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Critical Legal Issues: WORKING PAPER SERIES

"FOP" FOOD LABELING: THE ENERGY STAR® MODEL RAISES FIRST AMENDMENT CONCERNS

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Key Points in this WORKING PAPER:

- Established First Amendment principles require the government to justify commercial speech restrictions under *Central Hudson*, regardless of whether the government restrictions can be said to restrict speech under a voluntary scheme.
- Disclosure requirements intended to elicit certain responses or symbolize a particular message are inherently suspect under the First Amendment and subject to more rigorous scrutiny than disclosure requirements that seek to provide objective information.
- Any front-of-package labeling program must grant food marketers sufficient freedom to convey truthful information and avoid placing unnecessary restrictions on how that information is conveyed in order to be consistent with the First Amendment.

I. THE FEDERAL FRONT-OF-PACKAGE NUTRITION LABELING INITIATIVE

On April 29, 2010, the Food and Drug Administration (FDA) published a notice in the Federal Register requesting that "interested parties" submit consumer research, design suggestion, and other information "to inform the development of a government sponsored nutrition symbol program to help consumers make informed dietary choices and to provide the food industry incentives to make more nutritious foods available."[1] The FDA notice also announced that FDA and the U.S. Department of Agriculture (USDA) are

[1] 75 Fed. Reg. 22,602, 22,605 (April 29, 2010).

working with public and private stakeholders to develop a "voluntary [front-of-package] FOP nutrition label" with the goal being to create an FOP label that will "increase the proportion of consumers who readily notice, understand, and use the available information to make more nutritious choices for themselves and their families, and thereby prevent or reduce obesity and other diet-related chronic disease." The FDA notice explained that, through the mechanisms of "improved consumer understanding and use of nutrition information and product reformulation," FDA believes that it is possible that a "well-designed and science-based [FOP] nutrition labeling program could bring about significant positive changes in Americans' diet and play a role in lowering the incidence and prevalence of diet-related disease in the United States."

II. THE INSTITUTE OF MEDICINE STUDY AND RECOMMENDATIONS

In conjunction with FDA's evaluation of FOP labeling and related policy options, the agency, together with USDA and the Centers for Disease Control and Prevention (CDC) and with support from Congress, sponsored an Institute of Medicine (IOM) study to evaluate existing FOP nutrition labeling systems and symbols used in the marketplace by food manufacturers and retailers, and the impact that a FOP labeling system could have on consumer food choices. The IOM study was conducted in two-phases. "Phase I," which was released on October 13, 2010, was directed to "[i]dentify front-of-package systems being used by manufacturers, supermarkets, health organizations, and governments in the United States and abroad" and "consider advantages and disadvantages

of various approaches for adults and children."[2] In developing the final "Phase II" report published a year later on October 20, 2011, the Committee was tasked with considering "[t]he potential benefits of a single, standardized front-label food guidance system regulated by the FDA" and developing "conclusions about the systems and icons that best promote health and how to maximize their use."[3]

The Phase I report concluded that the FOP nutrition labeling systems used in the marketplace by food companies and retailers could be classified into three basic groups, based on whether the system was designed to provide (1) nutrient specific information; (2) a summary indicator characterizing the nutritional value of the food; or (3) information concerning the contribution a food makes with respect to particular food groups. The Phase I report concluded that all FOP labeling systems the committee evaluated had limitations, but that nutrient specific and summary indicator systems each provided a more promising foundation for the development of a single uniform labeling system to promote diet-related public health objectives than food group systems, but further consumer research and evaluation would be needed.

The Phase II report evaluated evidence, including surveys and statistical studies, about "consumer use of nutrition information and product choices,

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[2] Institute of Medicine (IOM), *Examination of Front-of-Package Nutrition Rating Systems and Symbols: Phase I Report* (2010), at 2.

[3] Institute of Medicine (IOM), *Front-of-Package Nutrition Rating Systems and Symbols: Promoting Healthier Choices* (2011), at 1-2.

understanding of FOP labeling systems, and effects of food package information on consumer choices" and recommended that FDA and USDA consider a shift away from the "cognitive" orientation of current nutrition labeling requirements, which focuses on "informing" consumers about the nutritional value of foods through the disclosure of "nutrition facts." The report advised that FDA and USDA should consider a different approach focusing more directly on shaping consumer behavior by providing consumers with a simple FOP "symbol" that would function as a "signal or cue" to consumers concerning the nutritional benefits of a food. Under the model characterized in the Phase II report, "a single, standard FOP system" would "appear on all products" and consist of information concerning calories per serving, and for eligible foods, a nutritional point score ranging from 0 to 3 points. Those points would be assigned to a food based solely on its level of saturated fat, trans fat, sodium, and added sugars. Under this kind of system, the signal that would be conveyed by the FOP symbol would favor foods containing lower amounts of saturated fat, trans fat, sodium, and added sugars, but would not be calculated to account for any positive nutritional contribution a food may make to a healthy diet by virtue of its nutritional density, essential nutrients, or its contribution to the necessary food groups (e.g., dairy, fish, fruit, vegetable, etc.).

While the Phase II report recognized that any government-sponsored FOP labeling system would present significant First Amendment and other

legal issues that were beyond the scope of the IOM study, the report singled out the "*Energy Star®*" labeling program administered by the Environmental Protection Agency (EPA) and the Department of Energy (DOE) as an example of a "successful government labeling system" that would satisfy key criteria the IOM committee considered to be important for a successful FOP labeling program. Specifically, the report characterized the *Energy Star®* program as "a dynamic and evolving program . . . [with] multi-faceted promotions" and successful partnerships with key stakeholders and explained its success by noting that "[c]onsumer awareness of the label is high, and it appears to be effective in informing consumer purchases."[4]

The committee identified four attributes "common to most successful FOP systems: (1) simple (not requiring specific or sophisticated knowledge to understand meaning); (2) interpretive (providing guidance rather than specific facts); (3) ordinal (providing guidance using a scaled or ranked approach); and (4) supported by communication (conveying readily remembered names or symbols).

The committee concluded that each of these factors would be relevant in the design and implementation of an "effective and successful FOP nutrition rating system for food products." The press release that accompanied the publication of the Phase II study report capsulized the findings in a headline that read, "Calorie Count Plus Points Based on Added Sugars, Sodium, and

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[4] Institute of Medicine (IOM), *Front-of-Package Nutrition Rating Systems and Symbols: Promoting Healthier Choices* (2011), at S-4.

Saturated and Trans Fats Recommended as New Front-of-Package Nutrition Labeling System," and included the following statement from the IOM study committee chair, Ellen Wartella: "Our report offers a path to develop an *Energy Star*® equivalent for foods and beverages. . . . A successful front-of-package nutrition rating system would enable shoppers to instantly recognize healthier products by their number of points and calorie information. It would encourage food and beverage producers to develop healthier fare and consumers to purchase products that are lower in calories and food components that contribute to chronic disease."[5]

III. THE *ENERGY STAR*® LABELING PROGRAM

The *Energy Star*® program was created to encourage manufacturers to develop, and consumers to purchase and use, more energy efficient products through a voluntary product certification and labeling program. Under the program, manufacturers can seek an *Energy Star*® certification by testing their products in an EPA-recognized laboratory and having products reviewed at an EPA-recognized certification body. Once the certification body verifies results provided by the laboratory, it reports the data and product to EPA, which then re-reviews the data to determine whether the product meets the relevant standards.

[5] Press Release, News from the National Academies (Oct. 20, 2011).

Minimum energy efficiency standards may evolve over time, and EPA brings public recognition to products that qualify as the "Most Energy Efficient." Companies are authorized to market certified products using the *Energy Star*® label on a voluntary basis, but the label must be used in compliance with the content and design restrictions that are established by the Federal Trade Commission (FTC).[6] For instance, FTC regulations provide that the *Energy Star*® label should appear on the bottom-right hand of the label and be one-inch-by-one-inch in size. Companies that fail to abide by these content restrictions or that violate other rules or requirements of the *Energy Star*® program may face enforcement actions by the FTC or DOE and are subject to civil penalties of up to $100 per violation (e.g., per label).[7]

Additionally, private citizens may bring actions against companies which fail to comply with the requirements of the *Energy Star*® program. While strengths of the *Energy Star*® program are recognized in the IOM Phase II report, the challenges presented by fraudulent *Energy Star*® certifications and labeling suggest that government sponsorship of an FOP labeling system is unlikely to bring an end to consumer deception from false or misleading marketing claims of the kind that would violate both existing federal and state laws. In fact, the *Energy Star*® program has been criticized by the

[6] *See* 16 C.F.R. Part 305.

[7] 42 U.S.C. § 6303(a).

Government Accountability Office as "vulnerable to fraud and abuse"[8] and manufacturers successfully obtaining *Energy Star*® certification have been subjected to lawsuits alleging false advertising and consumer deception.[9]

There are a number of key differences between the *Energy Star*® labeling program and the FOP labeling system recommended in the IOM Phase II report, differences which raise serious questions concerning the extent to which *Energy Star*® can serve as a model for FOP nutrition labeling. First, while the *Energy Star*® program does not prohibit the use of other types of energy efficiency claims, the IOM report's emphasis on a simple, uniform FOP labeling scheme suggests that the committee's "ideal" program would discourage, if not prohibit, other FOP nutrition labeling systems. Second, the *Energy Star*® program relies on objective testing and certification of "energy efficiency," a product feature which is simpler and less controversial than the kind of FOP labeling system envisioned by the IOM report. The recommended FOP food labeling system would attempt to "signal" which foods could fit into a healthy diet based solely on calorie content and nutrients to avoid, and would convey a stigmatizing "signal" for some wholesome and nutritious foods. In addition, there are significant differences in the product marketing environment in which appliances and food products are marketed to consumers. For example, consumers confront food purchasing decisions with

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[8] Government Accountability Office, ENERGY STAR PROGRAM: Covert Testing Shows the Energy Star Program Certification Process is Vulnerable to Fraud and Abuse (Mar. 2010).

[9] *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2010 WL 3655954 (N.D. Ohio Sept. 15, 2010).

a variety of distinct nutritional needs and food preferences which may not be accounted for under a uniform FOP labeling scheme.

IV. FIRST AMENDMENT CONSIDERATIONS

The recommendation made by the IOM committee that the *Energy Star*® program serve as a model for the development of a government-sponsored FOP nutrition labeling system, if accepted, would have significant First Amendment implications. While the *Energy Star*® program has not yet been subjected to judicial review under the First Amendment, this does not mean that the program has succeeded in meeting these standards, or that the voluntary nature of the program removes *Energy Star*® labeling requirements from First Amendment scrutiny.

The First Amendment standards that the Supreme Court has articulated in *Central Hudson*[10] and subsequent commercial free speech cases recognize that the freedom of speech includes both the freedom to speak and the freedom to refrain from speaking, and that content restrictions may infringe both freedoms. From this vantage point, it is evident that a basic initial assumption in a First Amendment analysis is that exercising the freedom to speak, rather than remain silent, means that all "speaking" is essentially voluntary. In fact, it might be said that the vast majority of commercial speech is regulated under consumer protection laws that are consistent with this principle and merely require that when commercial speakers volunteer to

[10] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

speak, they ensure that the message they convey is truthful. In view of the essentially voluntary nature of all expressions, it is unsurprising that the First Amendment analysis under *Central Hudson* and its progeny assigns no importance to whether the content restrictions imposed by the government affect speech that can be characterized as having been conveyed on a voluntary basis.

The Supreme Court has made clear that the First Amendment places a demanding burden on the government to justify restrictions that are imposed on the content of commercial speech, regardless of whether the freedom of speech is restricted by means of a ban the government places on certain content, or mandatory content requirements that are prescribed by the government. In *Central Hudson* and later cases, the Supreme Court has crystallized the criteria that the government must satisfy in order to justify content restrictions on commercial speech. "Commercial speech that is not false, deceptive, or misleading can be restricted . . . only if the State shows that the restriction directly and materially advances a substantial State interest . . . ."[11] For a content restriction to "directly" and "materially" advance a substantial governmental interest, the government must demonstrate that there is an immediate connection between the content restriction and the government's purposes, and provide evidence that the content restriction satisfies minimum standards of effectiveness. A content restriction will not

[11] *Ibanez v. Fla. Bd. Of Accountancy*, 512 U.S. 136, 142 (1994).

withstand First Amendment scrutiny if the restriction "provides only ineffective or remote support for the government's purpose."[12] The government cannot satisfy the rigorous standards of the First Amendment through "mere speculation or conjecture," but must demonstrate from evidence that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[13]

FDA's interest in preventing consumer deception caused by false and misleading FOP labeling is clearly substantial. The government's substantial interest in "insuring that the stream of commercial information flows cleanly as well as freely" is firmly established,[14] and is intensified when public health protection is at stake.[15] Nonetheless, the Supreme Court has been unwilling to uphold content restrictions on public health grounds in cases in which there was no evidence of consumer deception resulting from the content the government sought to restrict. In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court invalidated a law that prohibited pharmacists from advertising prescription drug prices on First Amendment grounds, rejecting the state's public health policy arguments. More recently, in *Thompson v. Western States Medical Center*, the Supreme Court invalidated an FDA policy established under the Federal Food, Drug and

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[12] *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

[13] *Id.* at 770-71; *see also Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993).

[14] *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 (1976).

[15] *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 162 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

Cosmetic Act which prohibited advertising of compounded drugs, ruling that FDA's public health policy rationale was inadequate because "[s]everal non-speech related means" existed which similarly would advance the state's interest in preventing large-scale manufacturing of compounded drugs.[16]

A critical determinant of whether content restrictions meet First Amendment standards is whether the restrictions leave the commercial speaker with sufficient freedom to convey information that is truthful and avoid conveying information involuntarily that is objectionable. In the Supreme Court's unanimous decision in *In re R.M.J.*, the Court held that the government could not limit the content of lawyer advertising to specified categories of information or to prescribed language when it operated to ban truthful claims. While recognizing that the advertising presented special risks of consumer deception because of the "public's comparative lack of knowledge, the limited ability of [the commercial speakers] to police themselves, and the absence of any standardization" in the marketed product, the Court held that in the absence of proof that the particular speech at issue was in fact misleading, the restrictions could not be sustained under the First Amendment.[17] In *Zauderer*, the Supreme Court struck down a rule restricting the scope of information that could be included in advertisements on similar First Amendment grounds, finding that the government had failed to demonstrate that the risks of consumer deception presented by the prohibited

[16] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 372 (2002).

[17] *In re R.M.J.*, 455 U.S. 191, 205-206 (1982).

content "could not be combated by any means short of a blanket ban," and concluding that, "[g]iven the possibility of policing . . . the advertisements on a case-by-case basis, the prophylactic approach" reflected in the government's rule could not stand.[18] In *Ibanez*, the Court invalidated a compelled disclosure requirement that would have required the advertisements of a Certified Financial Planner (CFP) to be accompanied by the objectionable qualifying statement that the CFP credential "was not affiliated with or sanctioned by the state or federal government." The Court held that the state could not discipline the accountant for omitting the involuntary statement from her advertisements, since the state had no evidence that consumers were, in fact, misled by her advertisements omitting the statement.

In *Association of National Advertisers v. Lungren*, the Ninth Circuit upheld regulations establishing uniform terminology for use in communicating the environmental attributes of certain consumer products (e.g., "recyclable," "biodegradable,") under *Central Hudson*.[19] While the *Lungren* court concluded that the law would reasonably help guard against unfounded green marketing claims, the decision has been sharply questioned in the D.C. Circuit. In *Pearson v. Shalala*, the D.C. Circuit observed that the Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island* had "undermined" the *Lungren* decision, pointing out that in *44 Liquormart*, the Supreme Court had ruled that restrictions which suppress speech are impermissible "where there

[18] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985).

[19] *Ass'n of Nat'l Advertisers v. Lungren*, 44 F.3d 726 (9th Cir. 1994).

is no showing that disclosure would not suffice to cure misleadingness."[20] Notably, the more flexible alternative regulatory model used by the FTC for green marketing claims provides further grounds for calling into question the *Lungren* decision because the Supreme Court has made clear that "if the Government could achieve its interests in a manner that . . . restricts less speech, the Government must do so."[21]

The government's burden to justify restrictions on commercial speech under the First Amendment is substantial, including when restrictions involve compelled speech requirements such as disclosure statements. The government's burden is more readily carried when a disclosure requirement involves non-controversial factual information that equips the consumer to use a product in a safe and lawful manner[22] than when the restriction involves a disclosure designed to "elicit" a particular response or "convince" the consumer to make healthier decisions.[23] Such disclosure requirements designed to "symbolize" a particular government message, rather than simply provide objective information, are inherently suspect under the First Amendment.

In *IDFA v. Amestoy*, the Second Circuit invalidated a Vermont law that would have required dairy products to bear such labeling as: "rBST HAS BEEN

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[20] *Pearson v. Shalala*, 164 F.3d 650, 657-58 (D.C. Cir. 1999).

[21] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002).

[22] *Nat'l Elec. Mfr. Assoc. v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (upholding law requiring disclosure of mercury content in light bulbs).

[23] *RJ Reynolds Tobacco Co. v. FDA*, No. 11–1482, 2012 WL 653828, at *5 (Feb. 29, 2012).

OR MAY HAVE BEEN USED [in this product]."[24] The state had not sought to justify the labeling requirement on consumer protection or public health grounds, but rather as the state's response to consumer interest. The court ruled that "[c]onsumer curiosity is not a strong enough state interest to sustain compulsion of even an accurate, factual statement." The court went further in recognizing that the labeling amounted to "the functional equivalent of a warning about a production method that has no discernable impact on a final product" and therefore could not be justified "on the basis of 'real' harms."[25]

CONCLUSION

The Supreme Court's First Amendment case law makes clear that an FOP labeling system modeled after the *Energy Star*® program would pose substantial First Amendment issues. Any FOP labeling program must grant food marketers sufficient freedom to convey truthful information and avoid placing unnecessary restrictions on how that information is conveyed. Additionally, the FOP labeling program must avoid compelling speech which is not necessary to consumer use or safety. As envisioned by the IOM Phase II Report, the FOP labeling system has the potential to stigmatize wholesome and nutrient rich products that can be part of a healthy diet, based on a "signal" that highlights solely calories and nutrients that consumers would be

[24] *IDFA v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996).

[25] *Id.* at 73.; *see also Nat'l Comm'n on Egg Nutrition v. FTC*, 750 F.2d 157, 164 (7th Cir. 1977) (FTC order violated First Amendment by requiring egg producers "to argue the other side of the controversy, thus interfering unnecessarily with the effective presentation of the pro-egg position").

encouraged to avoid – added sugars, saturated and trans fats, and sodium. This stands in stark contrast to the simpler and less controversial *Energy Star*® program which offers product marketers an additional option for disseminating factual information by pursuing *Energy Star*® claims to highlight the attributes of a product with respect to energy efficiency. Ultimately, any FOP nutrition labeling program must respect a company's choice to participate in the government-sponsored labeling program or, alternatively, the choice to rely on FOP labeling systems designed by industry or other non-governmental organizations similarly conveying truthful non-misleading information protected by the First Amendment.