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WLF Cautions FDA that Nutrition Label Rulemaking Ignores the First Amendment

(In re: Proposed Revisions of the Nutrition and Supplemental Facts Label)

“By FDA’s own admission, these policies lack sufficient scientific nexus to consumer health. As recent court decisions make clear, FDA can no longer get by with its ‘the-First-Amendment-does-not-apply-to-us’ approach to federal rulemaking.”
—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—In formal comments filed today with the Food and Drug Administration, the Washington Legal Foundation reminded the agency that its proposed revisions to nutrition and supplemental facts labeling requirements must comport with longstanding First Amendment precedents.

While many aspects of FDA’s proposed amendments to the nutrition labeling requirements implicate First Amendment concerns, WLF highlighted two proposed revisions that are particularly suspect under the First Amendment. First, FDA’s proposed addition of “added sugars” to the nutrition facts label raises serious First Amendment concerns in light of the agency’s longstanding acknowledgement that added sugars are not physiologically distinguishable from naturally occurring sugars. Second, FDA’s proposal to compel dual-column labeling—which would require nutrition facts information be provided on a per serving *and* per package basis for some products—also presents serious First Amendment concerns. WLF argued that FDA cannot constitutionally compel such speech because it is unclear what interests regulators are seeking to advance and whether and how the dual-column labeling requirement will further those interests.

As WLF highlighted in its comments, even though the agency’s proposed amendments to nutrition labeling regulations fundamentally impact free speech rights under the First Amendment—by compelling speech—FDA failed even to acknowledge the First Amendment in over 150 pages of proposed rulemaking. WLF pointedly reminded FDA that its similarly blatant disregard for constitutional rights in past rulemakings has exposed the agency to legal challenges and judicial reprimands.

Upon filing its comments, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: “By FDA’s own admission, these policies lack sufficient scientific nexus to consumer health. We are left to hypothesize as to why FDA believes it has authority to restrict free speech rights for reasons other than to alleviate consumer deception or confusion. As recent court decisions make clear, FDA can no longer get by with its ‘the-First-Amendment-does-not-apply-to-us’ approach to federal rulemaking.”

WLF is a public interest law firm and policy center that regularly litigates in support of the free speech rights of the business community.

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