

# FOOD FOR THOUGHT

FOOD LABELING RISKS: WHY YOUR WORDS MATTER



Imagine that you produce a new snack-food that is surging in popularity. You're proud of the product — made with fruit and grains — it's low in fat, salt and sugar; there's nothing artificial. And you say just that in your advertisements and labeling. In fact, it is prominently displayed on the bag: *"All Natural" "No Added Sugar."*

But you're soon hit with a lawsuit by a consumer action group, challenging your claim that the snack is "all natural" because the fruit it is made with comes from a farm where pesticides are used. The lawsuit also alleges that what you call evaporated cane juice, should have been listed as sugar — its common name. And since sugar is an ingredient, that makes the "No Added Sugar" claim false and inconsistent with the FDA's nutrient claim regulation found in 21 CFR 101.60(c)(iii)(B)(2).

Cases like this are hard to defend. Although you believe that the ingredients you used were all natural, a plaintiff may argue that any chemical treatment of those ingredients renders the snack unnatural.

Technically the FDA has issued only informal guidance on this, saying that natural means "... that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in that food."

When it comes to labeling and marketing your product, consider that both the Food and Drug Administration (FDA) and Federal Trade Commission (FTC) regulate product claims. Essentially, the FDA regulates claims made on product packaging — the label and labeling material that may be distributed at the point of sale, and the FTC focuses on print advertisements and commercials on radio and television. The FDA and FTC generally share jurisdiction over claims made on company websites.

## TREND TO WATCH

From 2011 to 2012 the market saw its first wave of consumer lawsuits generally focused on labeling statements for being false or misleading. Plaintiffs use the FDA regulations to support the plausibility of their claims if the label was inconsistent with the regulation.

Plaintiffs argue that words like "organic," "all natural," or phrases like "no trans fats" could lead a consumer to believe they are making a healthy choice when in reality they're basing that decision on partial information. Most of the allegations have been shown to be implausible.

An example of a case tried recently involved a large snack-food company claiming on its packaging that its product was made "with all natural ingredients." To clarify what it meant, also printed on the packaging was a separate statement that read there were "no artificial flavors or preservatives, and no MSG." But the court ruled that wasn't enough of a disclaimer, and that the implication was that the entire product was completely natural, when in fact, it contained citric acid and maltodextrin — a food additive.

In the past five years, the number of similar lawsuits has increased. In an effort to protect consumers, the FDA and FTC monitors products' labeling and marketing for phrases that may be misleading, cause confusion, and possibly create a dangerous situation.

Consider that 2% of adults and up to 8% of children in the US are affected by food allergies. While labeling laws require that major food allergens (milk, eggs, fish, crustacean shellfish, tree nuts, wheat, peanuts, and soybeans) are shown on the label, it's often not a simple task — manufacturers can have thousands of products in which they track the ingredients and update food labels. It's an arduous process — the FDA reports that unlabeled allergens are the leading cause of food recalls.

## KNOW YOUR DEFINITIONS

While recently, the FDA requested public comment on how the agency should define or interpret the words “healthy” and “natural” — whether it ultimately issues updated regulations or guidance related to these terms will depend upon agency resources and priorities. And even if it does, it can take years before anything is issued in its final form.

Currently the FDA says this about the word “natural” on its website:

*Although the FDA has not engaged in rulemaking to establish a formal definition for the term “natural,” we do have a longstanding policy concerning the use of “natural” in human food labeling. The FDA has considered the term “natural” to mean that nothing artificial or synthetic (including all color\* additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in that food. However, this policy was not intended to address food production methods, such as the use of pesticides, nor did it explicitly address food processing or manufacturing methods, such as thermal technologies, pasteurization, or irradiation. The FDA also did not consider whether the term “natural” should describe any nutritional or other health benefit.*

\* A company could still run afoul of this guidance if it uses an additive. For example, a company that want to make its natural strawberry yogurt more pink, by adding beet juice, would be in violation — even if the beet juice is itself natural.

And this regarding the term natural flavor:

*The term natural flavor or natural flavoring means the essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, whose significant function in food is flavoring rather than nutritional. Natural flavors include the natural essence or extractives obtained from plants listed in subpart A of part 582 of this chapter, and the substances listed in 172.510 of this chapter.*

In addition to the words you use, the FDA and FTC are also focusing on the overall context in which claims are presented. What messages do they convey and does that represent complete information?

For example, under its nutrient content claim regulations, the FDA requires companies making a “low saturated fat” claim to also disclose, in immediate proximity to such claim, the level of total fat and cholesterol in the food if these nutrients are present in certain material amounts.

## KNOW YOUR SUPPLIERS AND HOW YOUR PRODUCT IS MADE

A key step in managing food labeling risks is understanding your supply chain, particularly when it comes to products imported from other countries that may not have similar regulatory requirements as the FDA. US food companies should consider the following about their suppliers:

1. Where does their product originate from and what location(s) is the product delivered to? For example, do imported food products identify the appropriate “country of origin” from a customs labeling perspective? The “country of origin” is not always the country from which the product was packaged and shipped.
2. Do the products come in contact with other ingredients or materials that may have an effect on the purity of the ingredients? An example would be if an ingredient supplier manufacturer used peanut containers to store process a product that is otherwise considered “nut-free,” or did not have robust practices in place for segregating

genetically modified ingredients from those that are not genetically modified.

3. Also pay attention to any process-driven comments you may be making. Examples include: artisanal, hand-made, and small batch. For large-scale commercial operations, such process-related statements may potentially be misleading.

## RISK VERSUS REWARD

For every description of your product that you consider using, weigh the benefit or reward against the risk. Companies are advised not only to clear marketing language with their legal team to ensure that it complies with applicable legal requirements, but also to think hard about why they're using certain words and quantify the value as much as possible.

Although using current healthy buzzwords may win you consumers in the short term, is it worth the possible fight in court? Attorneys warn that if you use words like pure, natural, organic, or artisanal, you are opening yourself up to scrutiny and potential challenge by plaintiffs' attorneys. Even if you're able to successfully defend the claim, you may find yourself spending a substantial amount of time and money doing so. Therefore, before you roll out that new packaging, ask yourself, how confident are you that the claim is substantiated, and is it worth the risk of inviting a claim challenging its accuracy.

*This briefing was prepared by Marsh's Food and Beverage Practice, in conjunction with Marsh Risk Consulting and King & Spalding, LLP.*

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