
NOTES

FEDERAL REGULATION OF THE “SMART CHOICES PROGRAM”: SUBJECTING FRONT-OF-PACKAGE NUTRITION LABELING SCHEMES TO CONCURRENT REGULATION BY THE FDA AND THE FTC

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INTRODUCTION	2403
I. THE CONFLICTING JURISDICTION OF THE FDA AND THE FTC	2405
A. <i>Jurisdiction of the FDA: Food Labeling</i>	2405
B. <i>Jurisdiction of the FTC: Food Advertising</i>	2408
C. <i>Cooperation Between the FDA and the FTC</i>	2412
II. THE SMART CHOICES PROGRAM	2414
A. <i>What is the Smart Choices Program?</i>	2414
B. <i>The Current State of the Smart Choices Program</i>	2416
1. Criticisms of the Program.....	2416
2. What Does the Future Hold?	2417
III. REGULATION OF THE SMART CHOICES PROGRAM.....	2419
A. <i>The Smart Choices Program Requires Federal Regulation</i>	2419
1. Present Government Regulation.....	2420
2. Future Regulatory Plans	2421
B. <i>How the Agencies Should Regulate the Program</i>	2423
CONCLUSION.....	2425

INTRODUCTION

If food marketing is any indication, American consumers are increasingly concerned about making healthy choices in the grocery store. Considering that sixty-eight percent of American adults are overweight, this is a well-founded concern.¹ However, with the many different campaigns featuring nutritional buzzwords like “organic” and “low-cal,” determining the true health benefits of any given food product is difficult. While some consumers may take a manufacturer’s advertising claims with a grain of salt, surveys show that

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¹ *FastStats: Obesity & Overweight*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/overwt.htm> (last visited Sept. 12, 2010).

Americans generally have confidence in the accuracy of labels on food products.² The food industry has recently taken advantage of this consumer confidence by combining both nutritional labeling and marketing materials on the front of food packaging to attract consumers.

These emerging “front-of-package” labeling/advertising schemes place helpful nutrition facts, such as the number of calories or grams of fat, side-by-side with a symbol or slogan suggesting that the product is a healthful choice. Most notably, the Smart Choices Program displays a green checkmark next to a food product’s relevant calorie and serving information on the front of the package. Other front-of-package nutrition labeling campaigns include Kraft Foods’ “Sensible Solution” – a green flag with a yellow sun and white lettering³ – and PepsiCo’s “Smart Spot” – a white checkmark inside a green circle with the phrase “Smart Choices Made Easy.”⁴ The Smart Choices Program and similar campaigns may reap the marketing benefits of making nutritional claims without the drawbacks of actually assuring compliance with any cumbersome regulations. This is because consumers purchase Smart Choices products in reliance on the products’ claims of healthfulness, but the food manufacturers using “healthy” logos are not currently required to meet any federal standards before claiming that their product is indeed a “smart choice.”

When marketing a food product, manufacturers must comply with regulations from two federal agencies: the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC). The Federal Food, Drug, and Cosmetic Act authorizes the FDA to regulate food labeling.⁵ Food advertising, on the other hand, falls under the jurisdiction of the FTC pursuant to the Federal Trade Commission Act, which authorizes the Commission to regulate deceptive and misleading advertising.⁶ In today’s world of mass marketing, however, labeling and advertising often overlap. This is the case with front-of-package nutrition labeling campaigns such as the Smart Choices Program. This campaign, and others like it, has the potential effect of deceiving consumers through misleading food product labeling *and*

² See *Food Safety: Survey Results for the U.S. Food and Drug Administration Remain Constant*, MEDICAL LETTER ON THE CDC & FDA (NewsRx.com, Atlanta, Ga.), Jan. 28, 2001 (discussing consumer satisfaction with the FDA’s performance in food labeling).

³ *Sensible Solution: Nutrition Criteria*, KRAFT FOODS, <http://www.kraftrecipes.com/kf/HealthyLiving/SensibleSolution/nutritioncriteria.aspx> (last visited Sept. 6, 2010) (“When the green Sensible Solution flag appears on a package label, it will highlight nutrition benefits about that product.”).

⁴ PEPSICO, OUR SUSTAINABILITY JOURNEY: 2007-2008 CORPORATE SUSTAINABILITY REPORT 21 (2008), http://www.pepsico.com/Download/PEPSICO_2007_Sustainability_Report.pdf (“Our Smart Spot symbol . . . is a simple labeling system that explains why each product is a smart choice.”).

⁵ 21 U.S.C. § 343 (2006).

⁶ 15 U.S.C. §§ 41-77 (2006).

advertising; therefore, both the FDA and the FTC should work together in their respective jurisdictions to develop uniform regulations for all front-of-package nutrition labeling schemes like the Smart Choices Program.

Part I of this Note outlines the history of the agencies' respective jurisdictions over food labeling and advertising, concluding with an explanation of how the FDA and the FTC have cooperated to regulate claims made by food manufacturers in the past. Part II introduces the front-of-package nutritional campaign called the Smart Choices Program. This discussion focuses on the parties that implement the campaign, the substance of the campaign, the effects that the campaign has had on the food industry, and the current state of the Smart Choices Program. Part III argues that campaigns like the Smart Choices Program require federal regulation. This section outlines the present regime used to regulate nutritional claims made in front-of-package marketing and describes how federal agencies plan to adapt their regulatory schemes to deal with front-of-package campaigns. Finally, this Note suggests regulatory roles for both the FDA and the FTC and argues that the two agencies should combine forces in order to create and implement a single federal standard by which all front-of-package nutrition campaigns must abide.

I. THE CONFLICTING JURISDICTION OF THE FDA AND THE FTC

A. *Jurisdiction of the FDA: Food Labeling*

There are four recognized purposes behind the regulation of food labeling: (1) ensuring fair competition between manufacturers; (2) informing consumers; (3) protecting consumer health and safety; and (4) influencing individual consumption choices to benefit the greater social good.⁷ Even before the creation of federal agencies like the FDA and the FTC, Congress recognized the need for a national uniform food labeling standard, as varying state standards caused consumer confusion and inhibited trade.⁸ Some states prohibited certain food products that other states considered acceptable. For example:

Michigan says "X" strawberry jam shall be labeled "imitation"; Wisconsin says it shall be labeled "glucose preserves"; Minnesota says it shall be labeled "imitation preserves, mixture adulterated." If any of the jam labeled in Minnesota got across the Duluth bridge into Wisconsin it

⁷ ELISE GOLAN, ET AL., ECONOMICS RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, ECONOMICS OF FOOD LABELING 1 (2001), available at <http://www.ers.usda.gov/publications/aer793/AER793.pdf>.

⁸ See Edward A. Ayers, *What the Food Law Saves Us From: Adulterations, Substitutions, Chemical Dyes, and Other Evils*, in 14 THE WORLD'S WORK: A HISTORY OF OUR TIME 9316, 9319 (1907) (discussing conflicting state food laws).

was outlawed; and if the Wisconsin jam slipped over into Duluth, it went legally bad.⁹

In response to this concern, Congress enacted the Pure Food and Drug Act of 1906 (1906 Act): “An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.”¹⁰ The 1906 Act prompted the creation of the FDA,¹¹ which then had narrow jurisdiction over food labels.¹²

Congress later gave the FDA much broader jurisdiction to regulate food, drugs, and cosmetics when it enacted the Federal Food, Drug, and Cosmetic Act (FDCA) in 1938.¹³ Under the FDCA, not only must the FDA ensure that certain foods in the market are generally safe for human consumption, but it must also ensure that food manufacturers properly label their products so as not to mislead consumers.¹⁴ The FDA regulates both the substantive and procedural aspects of food labeling: “it mandates what labels must disclose to consumers and how that disclosure takes place, [and it] prohibits certain disclosures or claims.”¹⁵ The FDCA defines the term “label” as “a display of written, printed, or graphic matter upon the immediate container of any article.”¹⁶ Courts have also interpreted the FDA’s labeling jurisdiction broadly, not merely restricting a product’s “label” to materials on or in its package, but also including “all literature used in the sale of food.”¹⁷ In support of the FDA’s broad jurisdiction, the Supreme Court in *Kordel v. United States*¹⁸ noted that restricting the FDA’s jurisdiction over food labeling would defeat the purpose of the FDCA to protect consumers.¹⁹

In exercising its broad grant of jurisdiction over food labeling, the FDA considers the claims made or suggested on the package, as well as any material omissions, to determine whether a product’s label is misleading.²⁰ The FDA

⁹ *Id.*

¹⁰ Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified at 21 U.S.C. §§ 1-15 (1934) (repealed 1938)).

¹¹ Peter Barton Hutt, *Government Regulation of Health Claims in Food Labeling and Advertising*, 41 FOOD DRUG COSM. L.J. 3, 4 n.1 (1986).

¹² *Id.* at 5 (“Because the 1906 Act applied only to the label itself, and not to the labeling or advertising, many food claims fell outside its jurisdiction.”).

¹³ 21 U.S.C. § 301 (2006).

¹⁴ *Id.* § 343(a).

¹⁵ Margaret Sova McCabe, *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, 17 J. L. & POL’Y 493, 496 (2009).

¹⁶ 21 U.S.C. § 321(k).

¹⁷ *V.E. Irons, Inc. v. United States*, 244 F.2d 34, 39 (1st Cir. 1957).

¹⁸ 335 U.S. 345 (1948).

¹⁹ *Id.* at 349.

²⁰ 21 U.S.C. § 321(n).

deems a food product “misbranded” if its label is “false or misleading.”²¹ The Administration recognizes four categories of claims that appear on food labels, the misuse of which could lead to a product’s “misbranding”: (1) health claims, (2) structure/function claims, (3) dietary guidance, and (4) nutrient content claims.²² Health claims suggest a link between consuming a food and a certain health condition.²³ The statement that “[d]iets low in sodium may reduce the risk of high blood pressure” is an example of a health claim.²⁴ Structure/function claims are similar to health claims, but instead of describing a relationship between consumption of a certain food and a health condition, they describe how consumption affects the normal structure or function of the human body.²⁵ For example, “calcium builds strong bones” is a structure/function claim because it cites a specific effect – bone strength – as the result of consuming a certain nutrient – calcium.²⁶ Dietary guidance statements, such as “carrots are good for your health,” typically make broad, general health recommendations.²⁷ Neither structure/function claims nor dietary guidance statements require FDA review or authorization before manufacturers may use them in a label, as long as the statements are true and not misleading.²⁸ This Note focuses on nutrient content claims, which may describe or compare the level of a nutrient in a food.²⁹ Examples of nutrient content claims include descriptive claims, such as “sugar free,” and comparative claims, such as “reduced fat.”³⁰

The FDA’s goal in regulating nutrient content claims is to ensure that they are meaningful, accurate, and consistent with respect to all food products.³¹ There are two types of nutrient content claims: expressed and implied.³² An expressed nutrient content claim makes a “direct statement about the level (or

²¹ *Id.* § 343(a).

²² Barbara O. Schneeman, Center for Food Safety and Applied Nutrition, Food and Drug Administration, Guidance for Industry and FDA: Dear Manufacturer Letter Regarding Food Labelling (Jan. 2007), <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm053425.htm>.

²³ *Id.* (citing 21 C.F.R. § 101.14 (2009)).

²⁴ *Id.*

²⁵ *Id.* (citing 21 C.F.R. § 101.93).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See id.*

²⁹ *Id.* (citing 21 C.F.R. § 101.13).

³⁰ *See id.*

³¹ Barbara O. Schneeman, Center for Food Safety and Applied Nutrition, Food and Drug Administration, Guidance for Industry: Dear Manufacturer Letter Regarding Front-of-Package Symbols (Dec. 2008), <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm120274.htm>.

³² *See* 21 C.F.R. § 101.13 (2010).

range) of a nutrient in a food,” such as “contains 100 calories.”³³ An implied nutrient content claim either “[d]escribes the food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a certain amount (e.g., ‘high in oat bran’);” or “[s]uggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient (e.g., ‘healthy, contains 3 grams (g) of fat’).”³⁴ The FDA cautioned food manufacturers that front-of-package symbols, such as those used in the Smart Choices Program, may constitute nutrient content claims subject to regulation.³⁵ Part II.B.2 of this Note discusses how the Smart Choices Program and participating companies have responded to this warning.

B. *Jurisdiction of the FTC: Food Advertising*

In 1914, Congress enacted the Federal Trade Commission Act (FTCA), creating the FTC, a federal agency with jurisdiction over economic competition and consumer protection.³⁶ The Commission may enforce the FTCA through either rulemaking, which affects an entire industry,³⁷ or adjudication, which issues a case-specific decision with respect to one advertiser’s practices.³⁸ When the FTC believes that an individual advertiser’s claim is false or misleading, the Commission typically orders the advertiser to cease and desist from making such claims.³⁹ In deciding whether to commence any action against an advertiser, the Commission considers several factors, including: (1) whether the Commission has jurisdiction over advertisements made about the product in question; (2) whether the advertising campaign is national in geographic scope; (3) whether the advertisement “represents a pattern of deception, rather than an individual dispute between a consumer and a business or a dispute between two competitors;” and (4) the extent to which the advertisement harmed consumer health, safety, or finances.⁴⁰ Individual

³³ *Id.* § 101.13(b)(1).

³⁴ *Id.* §§ 101.13(b)(2)(i)-(ii).

³⁵ Schneeman, *supra* note 31.

³⁶ *See* Federal Trade Commission Act, Pub. L. No. 63-203, § 1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (2006)) (creating the FTC); Deborah Platt Majoras, *Food for Thought: The FTC and Market Influences on Consumer Health*, 62 *FOOD DRUG L.J.* 433, 433 (2007) (“The FTC has jurisdiction to protect competition – which in turn protects consumers – and then to further protect consumers from unfair and deceptive practices in most economic sectors.”).

³⁷ *See* 15 U.S.C. § 57(a)(1)(B).

³⁸ *See id.* § 45(b).

³⁹ *Id.*

⁴⁰ FED. TRADE COMM’N, *ADVERTISING PRACTICES: FREQUENTLY ASKED QUESTIONS, ANSWERS FOR SMALL BUSINESS 7* (2001) (responding to the question: “How does the FTC decide what cases to bring?”).

businesses or consumers may contact the FTC if they believe a particular advertisement is deceptive.⁴¹

After the Commission issues a cease and desist order to an allegedly deceptive advertiser, it usually “proceeds with the customary administrative hearing and [FTC] determination, followed by the opportunity for court appeal.”⁴² The administrative hearing focuses on whether the advertiser’s claim is deceptive.⁴³ A deceptive claim is one that “is false and misleading in itself” or “lacks substantiation,” and therefore violates the FTCA.⁴⁴ The determination of whether a claim is deceptive involves three parts.⁴⁵ First, the advertiser must use “a representation, omission or practice that is likely to mislead the consumer.”⁴⁶ The advertiser’s challenged claim may constitute an express claim such as “contains real fruit,” an implied claim such as “eat real fruit; eat this product,” or an omission. In particular, with respect to implied claims, identifying the precise claim made by an advertiser is often difficult and controversial.⁴⁷ The Commission has the authority to “rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.”⁴⁸

Second, the FTC considers whether the representation, omission, or practice is likely to mislead the reasonable consumer.⁴⁹ The Commission will judge consumer reasonableness in light of the advertisement’s target audience.⁵⁰ Although it may not conduct a “fishing expedition” in order to make a tenuous case that an advertiser’s claim misleads consumers, “extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to makes [sic] its finding.”⁵¹ Third, the

⁴¹ *Id.* at 10 (responding to the question: “What can my company do if a competitor is running an ad that I think is deceptive?”).

⁴² Hutt, *supra* note 11, at 12.

⁴³ Dennis P. Stolle, Note, *The FTC’s Reliance on Extrinsic Evidence in Cases of Deceptive Advertising: A Proposal for Interpretive Rulemaking*, 74 NEB. L. REV. 352, 354 (1995).

⁴⁴ Douglas W. Hyman, *The Regulation of Health Claims in Food Advertising: Have the FTC and the FDA Finally Reached a Common Ground?*, 51 FOOD & DRUG L.J. 191, 196 (1996).

⁴⁵ Stolle, *supra* note 43, at 359.

⁴⁶ FTC Policy Statement on Deception (Oct. 14, 1983), *reprinted in* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 174 (1984).

⁴⁷ *See* Stolle, *supra* note 43, at 361.

⁴⁸ *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992).

⁴⁹ FTC Policy Statement on Deception, *supra* note 46, at 178 (“The test applied by the Commission is whether the interpretation is reasonable in light of the claim.” (quoting Nat’l Dynamics, 82 F.T.C. 488, 524, 548 (1973))).

⁵⁰ *Id.*

⁵¹ *Kraft*, 970 F.2d at 320.

representation, omission, or practice must be material – that is, “likely to affect a consumer’s conduct or decision with regard to a product.”⁵² Moreover, the FTC will presume materiality when the advertiser makes an express claim, intends to make an implied claim, omits information that it knew or should have known that a consumer requires, or makes claims involving health or safety.⁵³

In contrast, the FTC will not consider an advertiser’s claim deceptive under two circumstances. First, despite literally false claims, an advertisement is “not legally deceptive if consumers understand that the claims are not meant to be taken literally, and therefore are not misled into forming false beliefs.”⁵⁴ For example, “[t]he claim that ‘Exxon puts a tiger in your tank,’ though literally false, is not legally actionable.”⁵⁵ Second, an advertisement is not deceptive if the advertiser has adequate substantiation for any claims regarding its products.⁵⁶ “The FTC balances six factors in determining the appropriate level of substantiation required for an advertised product: (1) the nature of the product involved, (2) the type of claim, (3) the benefits of a truthful claim, (4) the cost of developing substantiation for the claim, (5) the consequences of a false claim, and (6) the amount of substantiation that reasonable experts in the field would agree on.”⁵⁷

When it comes to claims made about food products, the FTC’s evaluation of whether an advertiser has adequate substantiation for a claim may often turn on how the FDA views the claim. For example, in analyzing the sixth factor for determining adequate substantiation – the amount of substantiation on which experts would agree – the FTC may consider the FDA’s opinion as that of the relevant “reasonable experts in the field.” If the FDA considers a manufacturer’s claim relatively immaterial to a consumer’s perception of the product, it is likely that the manufacturer will not face a difficult burden of proving adequate substantiation for that claim before the FTC. Therefore, when it comes to food advertising, the FTC must often seek the opinion of outside parties such as the FDA to complete its deceptive advertising analysis.

Prior to 1938, any authority the FTC possessed to regulate such claims on food was strictly implied as the FTC did not have express statutory authority to regulate food advertising.⁵⁸ Originally, the FTC understood its jurisdiction over unfair competition to extend only to food manufacturers using misleading

⁵² FTC Policy Statement on Deception, *supra* note 46, at 174.

⁵³ *Id.*

⁵⁴ Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 669 (1985).

⁵⁵ *Id.*

⁵⁶ Hutt, *supra* note 12, at 13.

⁵⁷ Hyman, *supra* note 44, at 197 (citing *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986)).

⁵⁸ 15 U.S.C. §§ 41-77 (2006).

advertising in interstate commerce.⁵⁹ Congress later gave the FTC express jurisdiction over all food advertising in the Wheeler-Lea Amendments of 1938,⁶⁰ which outlawed “deceptive acts or practices in commerce” and empowered the FTC to prevent such acts or practices.⁶¹ The FTCA now prohibits “any false advertisement” which is intended or likely to induce consumers to purchase food,⁶² and declares that the dissemination of such a false advertisement “shall be an unfair or deceptive act or practice.”⁶³

Although the prohibition of false advertising only applies to food advertising, courts have interpreted other sections of the FTCA to apply to food labeling as well.⁶⁴ For example, in *Fresh Grown Preserve Corp. v. Federal Trade Commission*,⁶⁵ the court rejected the manufacturer’s argument that the FTC exceeded its jurisdiction under the FTCA because the definition of “false advertisement” in section 15(a) of that Act excludes labeling.⁶⁶ In *Fresh Grown Preserve*, the FTC ordered manufacturers to cease and desist from labeling or advertising their products as “preserves,” since they did not contain the appropriate fruit-to-sugar ratio.⁶⁷ The court upheld the FTC’s jurisdiction based on the Commission’s finding that the manufacturer’s conduct “amounted to unfair methods of competition in commerce in violation of § 5 of the [FTCA].”⁶⁸ Therefore, the jurisdiction of the FDA and the FTC overlaps when it comes to labeling.⁶⁹

⁵⁹ See, e.g., *FTC v. Good Grape Co.*, 45 F.2d 70, 71-72 (6th Cir. 1930) (upholding the FTC’s order to cease and desist from using advertising that was likely to mislead consumers into believing that a product was natural grape juice when in fact it was not); *Royal Baking Powder Co. v. FTC*, 281 F. 744, 753 (2d Cir. 1922) (affirming the FTC’s finding that the company engaged in methods of unfair competition by placing old baking powder labels on its new baking powder).

⁶⁰ Wheeler-Lea Amendments of 1938, Pub. L. 75-447, § 4, 52 Stat. 111, 114-17 (1938) (codified as amended at 15 U.S.C. § 45).

⁶¹ *Id.* § 3, 52 Stat. 111-12.

⁶² 15 U.S.C. § 52(a)(1)-(2).

⁶³ *Id.* § 52(b).

⁶⁴ Hutt, *supra* note 12, at 10 (“[A]lthough sections 15-18 of the FTC Act apply only to food advertising and not to food labeling, section 5 continues to apply fully to all food labeling.”). The FTC is authorized to prevent “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” § 15 U.S.C. § 45(a)(1).

⁶⁵ 125 F.2d 917 (2d Cir. 1942).

⁶⁶ *Id.* at 919 (referring to 15 U.S.C. § 55(a), which defines “false advertisement” as “an advertisement, other than labeling, which is misleading in a material respect”).

⁶⁷ *Id.* at 918 (“[The FTC] alleged that, as a direct result of such conduct by the petitioners, trade had been unfairly diverted to the petitioners from their competitors which injured competition in interstate commerce . . .”).

⁶⁸ *Id.* at 919 (citing 15 U.S.C.A. § 45 and explaining that the Wheeler-Lea Amendments of 1938 expanded the FTC’s jurisdiction over food labeling and advertising).

⁶⁹ See, e.g., *Kordel v. United States*, 335 U.S. 345, 351 (1948) (“Every labeling is in a

C. *Cooperation Between the FDA and the FTC*

The current understanding is that the FDA has jurisdiction over food labeling and the FTC has jurisdiction over food advertising. Nonetheless, to promote consistency when regulating the types of claims that food manufacturers may make about their products, the FDA and the FTC frequently work together. For example, the FTC often looks to FDA guidelines when evaluating whether a food product's advertising claim is false.⁷⁰ Before the Wheeler-Lea Amendments of 1938, however, the jurisdictional line was even less clear. Congressmen in office before the Amendments divided into those who supported FTC jurisdiction over food advertising and those who believed that advertising jurisdiction should belong to the FDA.⁷¹ "Those supporting extending the FDA's jurisdiction over advertising argued that . . . advertising regulation is a necessary corollary to labeling regulation."⁷² They argued that the FTC was not in the best position to protect consumer health when it came to food advertising because the Commission focused primarily on economic issues rather than consumer welfare.⁷³ Additionally, supporters of FDA jurisdiction believed that the cease and desist orders under the FTCA, which did not impose direct penalties for deceptive advertising, provided insufficient deterrence.⁷⁴

Those in opposition, including the food industry, argued that FTC jurisdiction was more appropriate because the FTC was more of "a quasi-judicial body" concerned with procedural fairness.⁷⁵ Unlike the FDA's preventative approach, which they argued was too harsh, the FTC's remedial procedure was "more appropriate to define the line between deception and puffery."⁷⁶ Those in favor of FTC jurisdiction feared that the FDA would draw an arbitrary line between deception and puffery, unnecessarily hindering the business community's commercial interests.⁷⁷ One FTC Commissioner, Erwin L. Davis, who pushed for jurisdiction, agreed that both agencies should work together, as they had done in the past.⁷⁸

While the jurisdictional line is still somewhat unclear, the Wheeler-Lea Amendments confirmed that the FTC deserves a role in the regulation of food advertising, and a 1954 Memorandum of Understanding (Memorandum) serves

sense an advertisement.").

⁷⁰ Hyman, *supra* note 44, at 192.

⁷¹ Nicole Gerhart, *The FDA & The FTC: An Alphabet Soup Regulating the Misbranding of Food* 10-11 (Apr. 30, 2002) (unpublished course paper, Food and Drug Law, Winter 2001), <http://leda.law.harvard.edu/leda/data/501/Gerhart.rtf>.

⁷² *Id.* at 9.

⁷³ *Id.*

⁷⁴ *Id.* at 10.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 11.

as the framework for the agencies' cooperation today.⁷⁹ The Memorandum cites "the common objective of preventing injury and deception of the consumer" as the motivation for the agreement.⁸⁰ In order to prevent duplication and promote efficiency, the Memorandum states that "[t]he initiation of proceedings involving the same parties by both agencies shall be restricted to those highly unusual situations where it is clear that the public interest requires two separate proceedings."⁸¹ Therefore, the Memorandum concedes that, despite the agreed-upon jurisdictional line where the FDA regulates labeling and the FTC regulates advertising, cases requiring the efforts of both agencies do arise.

To deal with cases involving conflicting jurisdiction between the FDA and the FTC over advertising, in 1976 Congress added section 707 to the FDCA, which is still in effect today.⁸² The Memorandum does not have the force of law, however, and either agency can withdraw from the agreement.⁸³ Thus, section 707 would continue to govern the agencies' respective jurisdictions in the event that either agency withdrew from the Memorandum. Under this provision, if the FDA wishes to take action regarding a food that it deems misbranded due to the product's advertising, the Administration must notify the FTC of its proposed action in writing.⁸⁴ If, within thirty days, the FTC replies to the FDA stating that the Commission has taken or plans to take action, the FDA must defer to the FTC.⁸⁵ If, however, the FTC fails to take such action within sixty days of the Commission's reply to the FDA, the FDA may then commence action.⁸⁶

The fact that the FDA must defer to the FTC in a situation of overlapping jurisdiction indicates that, "where the authority is unclear, [Congress] would prefer the FTC to pursue enforcement proceedings" with regard to food advertising.⁸⁷ Thus, the FTC arguably has broader authority to regulate food marketing claims because section 707 implies that the FTC can trump the FDA with respect to food advertising, because labeling often qualifies as a form of advertising,⁸⁸ and because the FTC may withdraw from the Memorandum to

⁷⁹ Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration, 36 Fed. Reg. 18,539, 18,539 (Sept. 16, 1971) (replacing and updating previous agreements between the FTC and FDA).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Gerhart, *supra* note 71, at 15 (citing Proxmire Amendments, Pub. L. No. 94-278, § 501(b), 90 Stat. 401, 412 (1976) (codified at 21 U.S.C. § 378 (2006))).

⁸³ Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration, 36 Fed. Reg. at 18,539.

⁸⁴ 21 U.S.C. § 378(a).

⁸⁵ *Id.* § 378(b)(1).

⁸⁶ *Id.* § 378(b)(2).

⁸⁷ Gerhart, *supra* note 71, at 15.

⁸⁸ See discussion *infra* Part II.B.

claim such jurisdiction. Although the FTC came out on top in the historical struggle over jurisdiction, today it is clear that Congress expects the FTC and the FDA to work together to regulate food labeling and advertising.

II. THE SMART CHOICES PROGRAM

A. *What is the Smart Choices Program?*

In January of 2007, the Keystone Center⁸⁹ convened a Food and Nutrition Roundtable in order to explore, among other things, ways to enhance nutrition labeling.⁹⁰ At this convention, attendants conceived of the Smart Choices Program during a discussion of the need for a clear, uniform front-of-package labeling system.⁹¹ A coalition of scientists, academics, health and research organizations, and food and beverage manufacturers and retailers developed the Smart Choices Program and released it to the public in the summer of 2009.⁹²

The Smart Choices Program is a self-described “front-of-pack nutrition labeling program” which displays a green check mark and the phrase “Smart Choices Program: Guiding Food Choices” on certain food products that are allegedly “smart choices” for shoppers.⁹³ The packages also display the relevant calorie and serving information for the product next to the check mark.⁹⁴ The founders intended that the Program be: (1) transparent in that the nutrition criteria are open to the public; (2) coalition-based; (3) comprehensive, by addressing the health needs of all consumers; (4) applied voluntarily; and (5) flexible to allow for periodic review and revision of the Smart Choice Program’s qualifying criteria.⁹⁵

⁸⁹ *About Us*, THE KEYSTONE CENTER, <http://keystone.org/about-us> (last visited Jan. 3, 2010) (“The Keystone Center seeks to solve our society’s most challenging environmental, energy, and public health problems.”).

⁹⁰ *Fact Sheet: Keystone Food and Nutrition Roundtable Creation of the Smart Choices Program*, THE KEYSTONE CENTER (Dec. 2009), http://keystone.org/files/file/SPP/health/Dec2009FactSheet_SmartChoices.pdf.

⁹¹ *Frequently Asked Questions*, SMART CHOICES PROGRAM, <http://www.smartchoicesprogram.com/faq.html> (last attempted visit Nov. 8, 2009; website no longer functional).

⁹² Press Release, Smart Choices Program, Smart Choices Program Helps Shoppers Identify Better Food and Beverage Choices, http://www.smartchoicesprogram.com/090805_choices.html (last attempted visit Sept. 6, 2009; website no longer functional), *discussed by* Ellen Ranta, *Smart Choices Program Helps Shoppers Identify Better Food and Beverage Choices*, GOURMET NEWS (Aug. 28, 2009), <http://www.gourmetnews.com/index.php?p=article&id=gn200908QFt6YZ>.

⁹³ *Helping Guide Smart Food and Beverage Choices*, SMART CHOICES PROGRAM, <http://www.smartchoicesprogram.com> (last visited Sept. 6, 2010).

⁹⁴ *Nutrition Criteria & Calorie Indicator*, SMART CHOICES PROGRAM, <http://www.smartchoicesprogram.com/nutrition.html> (last visited Sept. 6, 2010).

⁹⁵ *Helping Guide Smart Food and Beverage Choices*, *supra* note 93.

In order to adopt the Smart Choices Program, a company's products must meet certain nutritional criteria.⁹⁶ The Program based its nutrition criteria on the federal Dietary Guidelines for Americans⁹⁷ published every five years by the Department of Health & Human Services and the Department of Agriculture.⁹⁸ The criteria take into account the amount of total fat, trans fat, saturated fat, cholesterol, added sugars, and sodium that a product contains.⁹⁹ Additionally, products must contain at least ten percent of the Daily Value of one or more "nutrients to encourage" – namely, Calcium, Potassium, Fiber, Magnesium, and Vitamins A, C, and E.¹⁰⁰

Food manufacturers and retailers may voluntarily adopt the Smart Choices Program for a fee "based on the company's annual sales and number of products enrolled in the program."¹⁰¹ Any company that pays this fee may place the Smart Choices logo on its qualifying products. Sixteen companies, including major corporations like General Mills and Kraft Foods, adopted the Smart Choices Program.¹⁰² The Program recognizes nineteen categories of food products, such as dairy and cereals,¹⁰³ and the foods bearing the symbol range from deli meats to animal crackers.¹⁰⁴ The Program expected more than 1200 food products to feature the green checkmark symbol and calorie information by May 2010.¹⁰⁵

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Dietary Guidelines for Americans*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, <http://www.health.gov/DietaryGuidelines/> (last visited Nov. 8, 2009) ("The Guidelines provide authoritative advice for people two years and older about how good dietary habits can promote health and reduce risk for major chronic diseases.").

⁹⁹ *Nutrition Criteria & Calorie Indicator*, *supra* note 94.

¹⁰⁰ *Id.*

¹⁰¹ *Frequently Asked Questions*, *supra* note 91.

¹⁰² *Participating Companies*, SMART CHOICES PROGRAM, http://www.smartchoicesprogram.com/listings_results_company.asp?list_by= (last attempted visit Nov. 8, 2009; website no longer functional). The website also listed Carolina, ConAgra, Kellogg, La Choy, Mahatma, Minute, Oscar Mayer, Quaker, Riceland, River, Success, Sun-Maid, Unilever, and Wesson as participants. *Id.* The list did not take into account those companies that had started to phase out the program based on FDA concerns, discussed in Part II.B *infra* of this note. *Id.* See also William Neuman, *Food Label Program to Suspend Operations*, N.Y. TIMES, Oct. 23, 2009, available at <http://www.nytimes.com/2009/10/24/business/24food.html> (naming Kraft, Kellogg, and PepsiCo's Quaker division as participants).

¹⁰³ *For Health Professionals*, SMART CHOICES PROGRAM, <http://www.smartchoicesprogram.com/professionals.html> (last visited Sept. 6, 2010).

¹⁰⁴ Smart Choices Program Helps Shoppers Identify Better Food and Beverage Choices, *supra* note 92.

¹⁰⁵ Smart Choices Program Helps Shoppers Identify Better Food and Beverage Choices, *supra* note 92, discussed by Ellen Ranta, *Smart Choices Program Helps Shoppers Identify Better Food and Beverage Choices*, GOURMET NEWS (Aug. 28, 2009), <http://www.gourmetnews.com/index.php?p=article&id=gn200908QFt6YZ>.

B. *The Current State of the Smart Choices Program*

1. Criticisms of the Program

Recently, commentators have attacked the Smart Choices Program for marking products like Froot Loops cereal and Fudgsicles ice cream treats as “smart choices.”¹⁰⁶ One critic described the Program as a “thinly veiled food industry-backed labeling program that is designed to dupe lazy uninquisitive consumers into thinking that what they’re buying is healthy when in fact it is not.”¹⁰⁷ Aside from the list of questionable food products bearing the green check mark, another criticism stems from the possibility that participants in the Smart Choices Program may intend to draw consumers’ attention away from a product’s true contents.¹⁰⁸ Perhaps the most serious denigration of the Program is its allegedly lax nutritional criteria.¹⁰⁹ The Program bases the criteria on the Federal Guideline Daily Amounts, which one critic claimed was “just about the lowest bar you could find.”¹¹⁰ The commentator illustrated that the Guideline Daily Amounts “allow you to eat Froot Loops and M&Ms for breakfast, a cheeseburger for lunch and 3 slices of pepperoni pizza for dinner.”¹¹¹

Echoing this point, Walter C. Willet, Chairman of the Harvard School of Public Health’s Nutrition Department, characterized the Program as “not credible” because of its “seriously flawed” nutritional criteria.¹¹² Michael Jacobson, Executive Director of the Center for Science in the Public Interest and former Smart Choices Panel Member, agreed that the criteria deceive consumers into thinking that products are healthier than they really are by allowing products to bear the Smart Choices seal even if they only contain “added nutrients.”¹¹³ For example, “[d]espite federal guidelines favoring

¹⁰⁶ See, e.g., Marla, “*Smart Choices Program*” Really Not So Smart, FAMILY FRESH COOKING, <http://www.familyfreshcooking.com/blog/2009/10/16/smart-choices-program-really-not-so-smart/> (Oct. 16, 2009); Shereen Jegtvig, *How Smart is the Smart Choices Program?*, ABOUT.COM: NUTRITION (Sept. 7, 2009), <http://nutrition.about.com/b/2009/09/07/how-smart-is-the-smart-choices-program.htm>.

¹⁰⁷ *Smart Choices Food Labeling Program Assumes You’re Stupid*, SINCERELY SUSTAINABLE (Sept. 7, 2009), <http://www.sincerelysustainable.com/food/smart-choices-food-labeling-progr-am-assumes-youre-not>.

¹⁰⁸ See, e.g., Marion Nestle, *FDA to Research Food Labels*, FOOD POLITICS (Sept. 7, 2009), <http://www.foodpolitics.com/2009/09/fda-to-research-food-labels/>.

¹⁰⁹ See Tom Laskawy, *Big Food’s ‘Smart Choices’ Label Raises Eyebrows at the FDA*, GRIST (Sept. 8, 2009, 8:32 AM), <http://www.grist.org/article/2009-09-08-big-foods-smart-choices-label-raises-eyebrows-at-the-fda>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² William Neuman, *For Your Health, Froot Loops*, N.Y. TIMES, Sept. 5, 2009, at B1.

¹¹³ *Id.*

whole grains, the criteria allow breads made with no whole grains to get the seal if they have added nutrients.”¹¹⁴

Many nutritionists, including Jacobson, believe that the food industry exercised too much control over setting the nutrition criteria, causing skewed panel decisions and a loss of nutritional objectivity.¹¹⁵ For example, the food industry not only paid for the Program, but also dominated the nutritional criteria panel.¹¹⁶ The cereal industry, in particular, “put down its foot and said, ‘[the sugar allowance] has to be 12 grams or we’re not going to participate.’”¹¹⁷ Jacobson later resigned from the Smart Choices Nutritional Committee because of the Program’s insistence on what he believed was unsound nutritional criteria like the sugar allowance.¹¹⁸ Since the Smart Choices Program earns revenue from every product licensed to bear its logo, the Program’s willingness to relax its nutrition standards is not surprising. Thinking in terms of profits, more accommodating nutrition standards allow more food products to qualify for the Smart Choices seal, thereby increasing the revenue the Program earns.¹¹⁹ This interest in maximizing profits, accompanied by the Program’s lack of regulation and lax nutritional criteria, allows a seemingly beneficial campaign like the Smart Choices Program to actually harm consumers.

2. What Does the Future Hold?

The FDA responded to the concerns of nutritionists and consumers by writing a letter to Sarah Krol, the General Manager of the Smart Choices Program, in August 2009.¹²⁰ In that letter, the FDA cautioned the Program that

¹¹⁴ *Id.*

¹¹⁵ See Mary MacVean, *Healthy Eating or Rotten Labeling?: Smart Choices Says its Logo Helps People Pick Better Food. Not if Froot Loops Can Make the Cut, Critics Argue*, L.A. TIMES, Sept. 29, 2009, at A1 (“The public deserves sound nutrition advice, and this needs to be independent of industry.” (quoting dietitian Leslie Mikkelsen of the Prevention Institute in Oakland, CA)); Neuman, *supra* note 112 (“[Jacobson] said the panel was dominated by members of the food industry, which skewed its decisions.”).

¹¹⁶ Neuman, *supra* note 112 (“It was paid for by industry and when industry put down its foot and said this is what we’re doing, that was it, end of story.” (quoting Michael Jacobson, Executive Director of the Center for Science in the Public Interest)).

¹¹⁷ MacVean, *supra* note 115 (quoting Michael Jacobson).

¹¹⁸ *Id.*

¹¹⁹ See Kelly Dumke & Rachel Zavala, *The Controversy Surrounding Smart Choices*, THE FRIEDMAN SPROUT (Dec. 2, 2009), <http://friedmansprout.wordpress.com/2009/12/02/the-controversy-surrounding-smart-choices/> (“Kellogg’s and other participating companies pay up to \$100,000 for that seal. No wonder the [American Society of Nutrition] and everyone else involved in the program wanted to set the nutrition standards so loosely The more products that qualify for the Smart Choices logo, the more money the program gets. I’d call that a clear conflict of interest.” (quoting Dr. Marion Nestle, Senior Professor of Nutrition at New York University)).

¹²⁰ Letter from Michael R. Taylor, Senior Advisor for Food Safety, FDA & Jerold R.

the Administration planned to monitor the “effect on consumers’ food choices and perceptions,” expressing concern that the labeling system may not be “stringent enough to protect consumers against misleading claims” or would have “the effect of encouraging consumers to choose highly processed foods and refined grains instead of fruits, vegetables, and whole grains.”¹²¹ The FDA’s Senior Advisor for Food Safety, Michael R. Taylor, assured the public that the Administration was “taking a hard look” at the nutritional criteria for front-of-package labeling campaigns and how best to present that information to consumers.¹²² “What we don’t want to do,” Taylor said, “is have front-of-package information that in any way is based on cherry-picking the good and not disclosing adequately the components of a product that may be less good.”¹²³

Considering that front-of-package labels decrease the likelihood that consumers will inspect the Nutrition Facts panel,¹²⁴ which provides a better indication of a food product’s overall nutritional value, the FDA’s concerns are not unfounded. Fruits and vegetables “automatically qualify” for the Program;¹²⁵ however, a trip to the supermarket shows that produce does not display the Smart Choices seal and other Smart Choices products do not disclaim that fruits and vegetables are a better, or even equally sound, nutritional choice. This indicates that consumers who see the Smart Choices logo may erroneously believe – without inspecting the Nutrition Facts panel – that the product’s nutrients are comparable to those found in fresh fruits and vegetables. Nonetheless, the Program has defended its criteria – and its inclusion of Froot Loops as a “Smart Choice” – in the face of this criticism.¹²⁶ Dr. Eileen T. Kennedy, President of the Smart Choices Board and Dean of Tufts University’s Freidman School of Nutrition Science and Policy, stated that the sugary cereals are “better than other things parents could choose for their children,” and commended the program for thinking realistically about which foods consumers will actually want to eat.¹²⁷

Despite the creators’ continuing confidence in the Smart Choices Program, they announced in October 2009 that “it will voluntarily postpone active operations and not encourage wider use of the logo at this time.”¹²⁸ The

Mande, Deputy Undersecretary for Food Safety, U.S. Dep’t of Agric., to Sarah Krol, Gen. Manager, Smart Choices Program (Aug. 19, 2009), <http://www.fda.gov/Food/Labeling/Nutrition/LabelClaims/ucm180146.htm>.

¹²¹ *Id.*

¹²² Neuman, *supra* note 112.

¹²³ *Id.*

¹²⁴ Letter from Michael R. Taylor, *supra* note 120.

¹²⁵ MacVean, *supra* note 115.

¹²⁶ *See, e.g.*, Neuman, *supra* note 112.

¹²⁷ *Id.*

¹²⁸ Press Release, Smart Choices Program, Smart Choices Program Postpones Active Operations (Oct. 23, 2009), http://www.smartchoicesprogram.com/pr_091023_operations.

Program's pause came in response to the FDA's announcement earlier that month that the Administration "intends to develop standardized criteria on which future front-of-package nutrition or shelf labeling will be based."¹²⁹ While the FDA did not propose a government regulated front-of-package labeling system, the Administration did say that it plans to require manufacturers who voluntarily adopt such a system to meet the nutrition guidelines set by the FDA.¹³⁰ The FDA's announcement, however, does not mean the end for the Smart Choices Program. Mike Hughes, Chair of the Program, plans to work alongside the FDA to develop its criteria, and still believes that the Program is "an important step in the right direction."¹³¹

In light of the Program's change in direction, some participating companies have decided to phase out use of the Smart Choices logo on their products while the Program awaits guidance from the FDA.¹³² For example, Kraft Foods Spokeswoman Susan Davison announced that, although Kraft will not pull products with the Smart Choices label from stores, the company will discontinue use of the label in the future.¹³³ Nevertheless, a spokeswoman for the Smart Choices Program reported that most participants "will continue using the Smart Choices mark on products upon which it already appears"¹³⁴ despite cautionary warnings that the program needs firmer guidelines.

III. REGULATION OF THE SMART CHOICES PROGRAM

A. *The Smart Choices Program Requires Federal Regulation*

Consumers are willing to spend more money on food products if they carry detailed nutritional information.¹³⁵ Shoppers' willingness to pay for a food product is, therefore, likely to increase when the front of that product bears a

html.

¹²⁹ *Id.*

¹³⁰ Barbara O. Schneeman, Center for Food Safety and Applied Nutrition, Food and Drug Administration, Guidance for Industry and FDA: Letter Regarding Point of Purchase Food Labelling (Oct. 2009), <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm187208.htm>.

¹³¹ Smart Choices Program Postpones Active Operations, *supra* note 128.

¹³² Mike Hughlett, *Kraft to Uncheck Food Logo: 'Smart Choices' Fading as Labels Get Closer Look*, CHI. TRIB., Oct. 29, 2009, at C25 (reporting that Kraft Foods, General Mills, Kellogg, and Unilever "plan to phase out the Smart Choices label").

¹³³ *Id.*

¹³⁴ Mike Hughlett, *Food Label Program on Hiatus: Federal Review Prompts Decision on 'Smart Choices'*, CHI. TRIB., Oct. 24, 2009, at C10 (reporting that, despite the hiatus, the Smart Choices label "won't likely disappear any time soon").

¹³⁵ *Consumers Spend More on Products With Detailed Nutritional Information*, SCIENCE DAILY (Nov. 9, 2009), <http://www.sciencedaily.com/releases/2009/11/091106095634.htm> (describing the results of a study on how nutritional labeling affects consumer behavior) (adapted from FECYT – Spanish Foundation for Science and Technology).

symbol like that of the Smart Choices Program, even if that symbol divulges no more information than the requisite Nutrition Facts panel located on almost every pre-packaged food product. Additionally, nutritional labeling and advertising campaigns have the potential to mislead consumers as to the nutritional benefits of a product.¹³⁶ The Nutrition Facts panel already provides shoppers with accurate and detailed information about a product's contents. Supplementary claims, symbols, or even highlights from the panel itself may unfairly affect consumers' impressions of the product. This effect will not always be in the consumers' best interest, as front-of-package logos may deceive consumers into purchasing products that they would not have otherwise purchased.¹³⁷ A product's "front panel is prime real estate – the place to grab the consumer;"¹³⁸ therefore, it is important to ensure that front-of-package nutritional labeling campaigns like the Smart Choices Program, to the extent that the federal government allows them to exist, do not take advantage of consumers in this way.

1. Present Government Regulation

The FDA already has authority to regulate front-of-package labeling schemes like the Smart Choices Program.¹³⁹ As discussed in Part I, the FDA is responsible for regulating food labeling.¹⁴⁰ The FDA classifies these front-of-package labeling programs as either "summary" systems, which "use logos, numerical scores, or graphic schemes to communicate the overall nutritional quality of a food product," or "nutrient-specific" systems, which "provide quantitative, evaluative, or both kinds of information on selected nutrients in a product without comparing the product's overall nutritional quality to that of its counterparts."¹⁴¹ This Note discusses summary systems like the Smart Choices Program, Sensible Solutions, and Smart Spot.¹⁴² In contrast, an example of a nutrient-specific system is General Mills' Whole Grain Guarantee, which uses a white checkmark sprouting a stalk of wheat to

¹³⁶ Letter from Michael R. Taylor, *supra* note 120.

¹³⁷ Craswell, *supra* note 54, at 670.

¹³⁸ McCabe, *supra* note 15, at 501.

¹³⁹ 21 U.S.C. § 343 (2006).

¹⁴⁰ *See supra* notes 11-14 and accompanying text.

¹⁴¹ Schneeman, *supra* note 130.

¹⁴² All three programs use symbols on product labels to indicate healthfulness. Sensible Solutions, unlike the Smart Choices Program and Smart Spot, does not require that participating products meet certain nutritional criteria, but rather uses the logo to indicate one or more benefits of the product such as "low/no sodium" or "kid friendly." *See* Kraft Foods, *supra* note 3. The Smart Spot criteria fall between the specific requirements of the Smart Choices Program and the general guidelines of Sensible Solutions. To bear the Smart Spot label, products must "[meet] nutrition criteria based on authoritative statements from the [FDA] and the National Academy of Sciences." PEPSICO, *supra* note 4.

symbolize products that contain at least eight grams of whole grain per serving.¹⁴³

Both categories of nutritional labeling – summary systems and nutrient-specific systems – are subject to the FDCA’s prohibition on false or misleading claims.¹⁴⁴ The FDA will analyze any front-of-package schemes that appear to make explicit or implied nutrient content claims.¹⁴⁵ The Smart Choices Program, for example, appears to make both express and implied nutrient content claims about the products that display its logo. The part of the logo that includes the calorie and serving information on the package constitutes an express claim, while the checkmark and “Smart Choices” text constitute implied claims because it “[s]uggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient.”¹⁴⁶ The FDA and/or the FTC can ensure that such claims do not inappropriately describe the foods or mislead consumers.

Currently, this limited case-specific assessment of a front-of-package scheme is the only regulatory action taken by the federal government. Ensuring the accuracy and uniformity of front-of-package labeling requires more than case-by-case regulation of every individual food product bearing a Smart Choices or similar program logo. Presently, there are several different front-of-package programs in the food market and, “[a]lthough all symbol programs intend to indicate that the food products with their symbol are healthful choices, each symbol program has different nutritional criteria.”¹⁴⁷ Even if consumers clearly understood the claims made by the Smart Choices Program, the additional varying standards of other nutrition labeling programs will likely cause confusion. A comprehensive regulatory scheme uniformly applicable to all current and future front-of-package nutrition labeling systems is, therefore, essential to consumer protection.

2. Future Regulatory Plans

The federal government can and should effectively regulate nutritional labeling campaigns in order to maximize their benefit to consumers. One commentator has even suggested that the federal government adopt its own front-of-package labeling system for manufacturers to use.¹⁴⁸ While a government-sponsored front-of-package program seems unlikely, the FDA has responded to concerns about the Smart Choices Program and requests for regulation. One such request came from Congresswoman Rosa L. DeLauro of

¹⁴³ See *Whole Grain Nation*, GENERAL MILLS, <http://wholegrainnation.eatbetteramerica.com/> (last visited Aug. 28, 2010).

¹⁴⁴ Schneeman, *supra* note 130.

¹⁴⁵ *Id.*

¹⁴⁶ 21 C.F.R. § 101.13(b)(2)(ii) (2009).

¹⁴⁷ Schneeman, *supra* note 130.

¹⁴⁸ McCabe, *supra* note 15, at 495.

Connecticut's Third District, Chairwoman of the House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies.¹⁴⁹ In her letter to the FDA, DeLauro praised the Administration's efforts to monitor the Program and encouraged the FDA to identify, "through consumer-behavior research, the most effective front-of-pack nutrition labeling approach for empowering consumers to choose healthier foods."¹⁵⁰

The FDA has yet to take any definitive action regarding the status of front-of-package programs, but the Administration filed an administrative notice in the Federal Register requesting comments and information on the programs.¹⁵¹ In the December 1, 2009 notice, the FDA recognized that "there is a lack of publicly available quantitative consumer research on the relative effectiveness of existing and alternative labeling schemes in helping U.S. consumers make better dietary decisions."¹⁵² To address this lack of information, the Administration proposed to conduct experimental studies in order to quantify consumers' reactions to various front-of-package symbols and programs.¹⁵³ One study will examine consumers' reactions to the symbols used in five different front-of-package labeling schemes: (1) the Smart Choices Program, (2) the Guideline Daily Amounts scheme, (3) a format similar to the United Kingdom's "traffic light" scheme, (4) a control displaying only the Nutrition Facts panel, and (5) a control with no front-of-package information.¹⁵⁴ The second proposed study will focus on specific design features (such as the words, colors, and shapes used) of different front-of-package systems.¹⁵⁵ This Note suggests that the FDA and FTC combine forces and use the results of these studies to create a single set of regulations applicable to all front-of-package nutrition labeling programs.

¹⁴⁹ Letter from Rosa L. DeLauro, Chairwoman, House Appropriations Subcomm. on Agric., Rural Dev., Food & Drug Admin., & Related Agencies, to Margaret Hamburg, Commissioner, Food & Drug Admin. Dep't of Health & Human Servs. (Sept. 21, 2009), *reprinted in* Press Release, Congresswoman Rosa L. DeLauro, DeLauro Calls for FDA Investigation into "Smart Choices" Labeling: Urges Reclassification of Froot Loops, Other Sugary Cereals (Sept. 21, 2009), <http://delauro.house.gov/release.cfm?id=2653>; *see also* MacVean, *supra* note 115.

¹⁵⁰ Letter from Rosa L. DeLauro, *supra* note 149.

¹⁵¹ Experimental Studies of Nutrition Symbols on Food Packages, 229 Fed. Reg. 62,786, 62,786 (Dec. 1, 2009).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Experimental Studies of Nutrition Symbols on Food Packages, 229 Fed. Reg. at 62,787 (outlining the first proposed study). See Dietary Guidelines for Americans, *supra* note 98, for information on the Guideline Daily Amounts scheme, and see *Traffic Light Labeling*, FOOD STANDARDS AGENCY, <http://www.eatwell.gov.uk/foodlabels/trafficlighs/> (last visited Jan. 2, 2010), for information on the traffic light scheme.

¹⁵⁵ Experimental Studies of Nutrition Symbols on Food Packages, 229 Fed. Reg. at 62,790 (outlining the second proposed study).

B. *How the Agencies Should Regulate the Program*

The FDA's proposed studies on consumer responses to front-of-package nutrition labeling programs are an appropriate first step to understanding how best to regulate front-of-package nutritional labeling programs. While the current plan calls for the FDA to conduct the studies, the FTC's input in designing and conducting these studies would greatly enhance their effectiveness. The FTC's expertise in evaluating consumer perceptions, combined with the FDA's knowledge of sound nutritional criteria, will help to ensure that the results of these studies are accurate and meaningful. Not only should the FDA and the FTC cooperate in the development and implementation of the proposed studies, the two agencies should continue to cooperate when responding to the studies' results. The nature of front-of-package labeling programs requires an understanding of a product's nutritional benefits – the FDA's expertise – and of how promotions of those nutritional benefits affect consumer perceptions – the FTC's expertise. Armed with detailed information from the studies' results, the two agencies can work together to develop a uniform regulatory system applicable to all front-of-package nutrition labeling programs, rather than regulate the various programs on a case-by-case basis.

To assist consumers, the FDA should promulgate a regulation that would define the requisite nutritional criteria a food product must meet in order to qualify for a "Smart Choices" or similar front-of-package symbol. The FDA, as opposed to the FTC, is better suited to promulgate such a regulation because of its expertise in formulating nutrition-related definitions. An unsuccessful FTC attempt to promulgate a rule governing food advertisers' nutrition claims illustrates the two agencies' different capabilities. Beginning in 1974, the FTC spent nearly ten years debating a proposed regulation that would prohibit advertisers from using "the terms 'natural' and 'organic.'"¹⁵⁶ After some debate, the Commission decided to allow use of the term "natural," provided that the food "had not undergone more than 'minimal processing' after harvest or slaughter and contained no artificial flavor, color additive, chemical preservative, or other artificial or synthetic ingredient."¹⁵⁷ Finally, the Commission scrapped its efforts and abandoned the promulgation after realizing that its proposed "minimal processing" standard did not provide advertisers with sufficient certainty or guidance.¹⁵⁸ The delay and uncertainty involved in this proposed rule not only demonstrates that the FTC lacks the relevant expertise required to define the nutritional criteria for front-of-package symbols, but also the difficulties inherent in formulating such a definition. The

¹⁵⁶ PETER BARTON HUTT, RICHARD A. MERRILL & LEWIS A. GROSSMAN, *FOOD AND DRUG LAW* 116 (3d ed. 2007); see *Food Advertising*, 39 Fed. Reg. 39,842, 39842 (proposed Nov. 11, 1974) (to be codified at 16 C.F.R. pt. 437) (providing notice of the proposed rule).

¹⁵⁷ HUTT ET AL., *supra* note 156.

¹⁵⁸ *Id.* ("[T]he Commission announced in [48 Fed. Reg. 23,270 (May 24, 1983)] (to be codified at 16 C.F.R. 437)] that it was abandoning the entire proceeding.").

Federal Guideline Daily Amounts¹⁵⁹ and the FDA's Nutritional Quality Guidelines for Foods¹⁶⁰ may serve as the FDA's starting places for determining the proper nutritional criteria. Ultimately, however, the government must raise the bar beyond these standards for products bearing any front-of-package symbols which indicate that the food is a healthful choice. More rigorous regulation would reassure consumers that all front-of-package nutritional claims meet stringent FDA-approved nutritional guidelines.

In addition to FDA regulation, the FTC should be responsible for determining whether a product bearing a front-of-package nutrition logo unfairly deceives consumers. The determination would entail the FTC's usual tripartite deception framework: (1) identifying the precise representation or omission that is likely to mislead consumers; (2) considering whether such a representation or omission will, indeed, mislead consumers; and (3) determining the materiality of the representation or omission at issue.¹⁶¹ The FTC's process would also require the Commission to cooperate with the FDA, basing the determination not only on the consumer deception framework, but also on the FDA's opinion regarding the food product's compliance with its front-of-package nutritional regulations.

The FDA's opinion on the nutritional value of the food product at issue is likely to arise in two areas of the FTC's evaluation of deceptiveness. First, the FTC may often need to consult with the FDA to determine materiality – the third step of the deception framework. If the FDA believes that a front-of-package nutritional claim conforms to the FDA's nutritional regulations, this opinion may weigh against an FTC finding of materiality. Second, if the FTC does find that a claim made on a front-of-package advertisement is material, then the FDA's opinion about the product's compliance with nutritional regulations may be relevant in determining whether the manufacturer has adequate substantiation for that claim. If an advertiser has adequate substantiation for the claims that it makes, the FTC will not consider those claims deceptive.¹⁶² One of the six factors that the FTC would weigh in determining whether a food manufacturer has adequate substantiation for claims in a front-of-package advertisement is the amount of substantiation agreed upon by reasonable experts in the food industry.¹⁶³ The substantiation analysis is important to consumer protection because it provides the FTC with a framework to keep advertisers in check and ensure that consumers can rely upon the claims they make. Without the FDA's expertise, the FTC would not

¹⁵⁹ Dietary Guidelines for Americans, *supra* note 98.

¹⁶⁰ 21 C.F.R. § 104 (2009) (prescribing minimum criteria for certain classes of foods).

¹⁶¹ For a more detailed explanation of the FTC's deception framework, see discussion *supra* Part I.B.

¹⁶² Hutt, *supra* note 12, at 13.

¹⁶³ For a more detailed explanation of the FTC's substantiation factors, see discussion *supra* Part I.B.

be able to conduct a fully-informed substantiation analysis with respect to many food products.

Therefore, a full determination of whether a front-of-package nutrition labeling program unfairly misleads consumers requires the cooperative efforts of both the FDA and the FTC. This proposed regulatory scheme will ensure that food manufacturers that use front-of-package labels do so in a responsible manner so as not to confuse consumers. Moreover, regulating the nutritional standards by which front-of-package programs must abide ensures that those programs will not become obsolete from over-use. This not only protects consumers by assuring them that all products bearing a front-of-package label meet certain nutritional criteria, but also provides food manufacturers using such symbols with a competitive advantage over other manufacturers whose products do not conform to the federal front-of-package regulations.

CONCLUSION

Congress granted the FDA authority to regulate the safety of food, drugs, and cosmetics. The FTC has statutory authority to regulate practices in interstate commerce affecting economic competition and consumer protection. When it comes to regulating the marketing of food products, however, the FDA's authority over labeling and the FTC's authority over advertising become blurred and the jurisdictional line between the two agencies is not always clear. This is especially the case with the new trend of front-of-package nutrition labeling campaigns like the Smart Choices Program. The lack of any uniform federal regulatory standard for these campaigns jeopardizes consumer health because the various front-of-package programs – all of which conform to different nutritional standards – have the ability to confuse shoppers and deceive consumers into believing that they are purchasing a nutritious product. In fact, the healthfulness of many products bearing front-of-package seals like that of the Smart Choices Program is in great dispute. Nutrition experts have criticized the program for its lax nutritional criteria, which allegedly misleads consumers into purchasing products that are not healthful choices.

The federal government's present regulatory framework – case-by-case evaluation by the FDA of labels that may make misleading nutrient content claims – is insufficient to guard against consumer deception. The variety of front-of-package nutritional labels necessitates a single federal standard upon which shoppers can rely. Without the FTC's involvement in such regulation, consumers do not have complete protection from deception. The FDA's proposed studies of consumer reactions to front-of-package schemes are a step in the right direction toward a uniform standard of regulation. Involving the FTC in the process, however, is crucial to the effectiveness of a regulatory scheme. The FDA or the FTC alone does not possess the expertise and jurisdictional authority required to deal with the effects of multi-faceted nutritional marketing campaigns like the Smart Choices Program. For this reason, the FDA should promulgate regulations establishing a set of criteria

with which all front-of-package nutritional labeling programs must comply, and the FTC should work with the FDA to determine whether those front-of-package advertisements are deceptive.