

Comment Re: Docket No. FDA-2010-N-0210

The Attorneys General of the States listed below strongly support FDA's efforts to make Front-of-Package ("FOP") labeling and shelf labeling more meaningful to consumers. As our states' chief law enforcement officers responsible for consumer protection, we are acutely aware of the potential for abuse of such labeling and consumers' need for clear and unbiased nutritional information. A recent multistate investigation of the Smart Choices Program reinforces the need for FDA to promulgate a uniform FOP labeling program that the States can use as a touchstone for their own investigations of deceptive consumer advertising.

The "Smart Choices" Program was a voluntary FOP labeling program that employed two symbols. The first symbol was a green check-mark, which indicated that a product had met certain nutrition criteria. The second symbol stated the calories per serving and the number of servings in the package. The States' investigation found that certain products met the Smart Choices Program criteria for some important nutrients, but nevertheless contained other ingredients – such as sugar – in large, arguably unhealthful amounts. For example, certain cereals qualified for the symbol because they met Smart Choices Program criteria for fiber and vitamins, but contained 12 grams of sugar per one-cup serving, which amounted to approximately 40 percent of the serving by weight. In addition, sugar was the first ingredient listed in the "ingredient list" on at least one cereal's label panel; *i.e.*, sugar was the most predominant ingredient in that product by weight. *See* 21 CFR 101.4(a).

Although the nutritional criteria for inclusion in the Smart Choices Program were ostensibly based on guidelines from respected and widely recognized sources, the States found that the Smart Choices Program appeared to cherry-pick criteria from multiple guidelines in order to include as many products as possible. As a result, the States involved in investigating the Smart Choices Program were concerned that the designation of certain products as "Smart Choices" was misleading, confusing and ultimately deceptive under our consumer protection laws.

The incongruities in this industry-run program illustrate the need for a uniform labeling system that will provide consumers with a comprehensive nutrition picture of the products available to them. We thus applaud Commissioner Hamburg's remarks at the Nutrition Summit on April 28, 2010, where she stated that the FDA's proposed labeling program must be consistent with the Dietary Guidelines for Americans. We further believe that a meaningful labeling program must provide complete nutritional information – both good and bad – to empower consumers to make informed choices about the foods that they buy for themselves and their families. Only the full disclosure of nutrition information will provide clear, consistent

guidance to consumers. Full disclosure also will encourage food manufacturers to offer healthier alternatives by reformulating existing products and providing new ones.

Therefore, in formulating an FOP labeling program, we hope the FDA will be guided by the following principles:

- a. *Transparency of underlying standards.* Any national FOP labeling system should be based on publicly-available standards, including an updated version of the Dietary Guidelines for Americans 2005, containing the best available nutritional criteria (including criteria for added sugar and portion size that take account of different ages and body sizes).
- b. *Applicability.* FOP labels should apply to as wide a range of foods as possible and the authorization or approval of use of the applicable FOP labeling should not be dependent upon payment by food manufacturers, although a reasonable licensing fee may be proper.
- c. *Understandability.* FOP labels should be readily understandable by people of varying educational levels, based on the best consumer research.
- d. *Helpfulness.* FOP labels should be designed to actually affect buying decisions in favor of healthy foods, based on the best consumer research. Understandability is not enough, if the label does not change consumer behavior in a positive way.
- e. *Uniformity.* A national, uniform FOP label should be the sole nutritional label on the front of food packages. Competing graphics or messages may cause confusion and undermine the recognizability and credibility of the governmental label. The need for a single label should be documented by consumer response testing.
- f. *Consistency of health and nutrition claims.* An otherwise effective FOP label can be undercut by marginal health and nutritional FOP claims. An FOP labeling system should ensure that any such claims are confined to other parts of the product package.

Combating diet-related chronic diseases and obesity is one of the most important public health missions of our time. Providing consumers with concise and meaningful nutrition information about the foods they buy for themselves and their families is an important step in this mission. The States are encouraged that FDA has taken on this important task, and we hope that this process opens up a serious dialogue among food manufacturers, marketers, consumers and nutritionists about how this significant public health problem can be addressed.

Connecticut, Oregon, Arizona, Delaware, Maine, Maryland, Nevada, New Hampshire, New Jersey, Ohio, Tennessee, Vermont