

Division of Dockets Management (HFA-305)  
Food and Drug Administration  
5630 Fishers Lane, Rm. 1061  
Rockville, MD 20852

Re: Comments on “Food Labeling: Revision of the Nutrition and Supplement Facts Labels; Proposed Rule” (Docket No. FDA-2012-N-1210) and “Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed at One-Eating Occasion; Dual-Column Labeling; Updating, Modifying, and Establishing Certain Reference Amounts Customarily Consumed; Serving Size for Breath Mints; and Technical Amendments; Proposed Rule” (Docket No. FDA-2004-N-0258)

To Whom it May Concern:

The Behavioral Science and Regulation Group is a collection of students and fellows at Harvard’s Law, Kennedy, and Business Schools, committed to promoting the use of behavioral science in federal rulemaking. We (1) applaud the Food and Drug Administration’s (“FDA”) efforts to consider behavioral insights in designing the new nutrition facts label. We believe that the proposed nutrition label could be further improved by leveraging other behavioral findings to (2) better communicate the healthfulness of products and nutrients, and (3) avoid an implied endorsement of the listed “serving size” as one healthy portion.

**1. We endorse the FDA’s proposed use of visual cues to aid consumer understanding.**

We endorse the use of visual cues in the proposed rule. The Proposed Label utilizes design elements like whitespace, bold font, horizontal lines, and spacing to draw attention to important information. The regulation also leverages the concepts of primacy, proximity, saliency, and the fluency heuristic. The result is a nutrition label that behavioral science indicates will decrease the time consumers spend finding information, improve readability, focus attention on the most important information, and make information easier to process and remember. The revisions to serving sizes incorporate classic behavioral findings on the effect of portion size on amount consumed. The proposed label changes also make good use of technology to collect information about actual behavior: the FDA’s proposal to abbreviate “total carbohydrates” as “total carbs” is based on an analysis of Google searches. We also support the FDA’s efforts to rely on peer-reviewed scientific evidence and on a large range of rigorous and independent research, and the FDA’s proposal to conduct further research to validate and improve its changes over time.

**2. The FDA can better communicate product healthfulness by grouping nutrients into mutually-exclusive evaluative categories and using color to highlight healthful ingredients or particularly high or low nutrient levels.**

We are concerned that the FDA’s Proposed Label will not adequately communicate the healthfulness of a product. Below the serving size and calorie information, the Proposed Label includes an undifferentiated list of nutrients, followed by select vitamins and minerals.<sup>1</sup> The list of nutrients alternates between nutrients that are ordinary healthful (e.g., dietary fiber) and unhealthful (e.g., *trans* fat), without providing any indication to consumers of the healthfulness of the nutrient. Many consumers may not know without further education whether, for example, insoluble fiber is healthful.<sup>2</sup> In addition, the Proposed Label does not indicate whether the particular quantity of each nutrient represents a small, moderate, or large quantity in the context of a daily diet. Although the nutrition label—importantly—shows the percent daily value of most ingredients, it does not offer specific guidance as to whether a particular product’s percent daily value is high or low. Consumers must instead consult other sources of information, such as the FDA website, to learn whether an ingredient is healthful and whether a particular quantity is relatively large<sup>3</sup>; consumers would benefit from having this information directly on the label.

The Alternative Visual Format addresses some of these concerns by clearly indicating that consumers should “avoid too much” of some ingredients or “get enough” of other nutrients, but the “quick facts” category may create confusion.<sup>4</sup> The “avoid too much” and “get enough” category titles are particularly helpful, because by avoiding blanket “good/bad” delineations, they recognize that the healthfulness of a nutrient depends on the quantity consumed. However, the inclusion of a “quick facts” category alongside the categories “avoid too much” and “get enough” may confuse consumers. While the latter two categories are evaluative, “quick facts” is merely descriptive. Including an inconsistent item in a list produces more cognitive strain, and this can reduce comprehension, especially amongst consumers who are already mentally taxed.<sup>5</sup> Instead, we propose eliminating the “quick facts” category and relocating this information, as possible, into the two evaluative categories. We understand that the healthfulness of some nutrients may depend on factors specific to the individual, and that it therefore may not be appropriate to group these nutrients into the proposed evaluative categories. For these nutrients, we recommend that they be merged into the general information section, where calories and serving size are currently shown. In addition, the prevalence of obesity, a stated concern of the FDA, suggests that the information in “avoid too much” is more important to consumers; listing this information before “get enough” would draw consumer attention to those nutrients that it is important to avoid. The FDA could further accentuate the importance of avoiding unhealthful ingredients by coloring the entire “avoid too much” section red and the entire “get enough”

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<sup>1</sup> Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 79 Fed. Reg. 11,880, 11,882 (Mar. 3, 2014) (to be codified at 21 C.F.R. pt. 101).

<sup>2</sup> *See id.* at 11,911.

<sup>3</sup> *See id.* at 11,954.

<sup>4</sup> *See id.* at 11,955.

<sup>5</sup> *See* SENDIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY (2013).

section green. The colors green and red are easily understood, and have been used in “traffic light” designs to effectively encourage consumers to make healthier choices.<sup>6</sup>

The FDA could alternatively use color to communicate that a product contains a desirable or undesirable quantity of a particular nutrient by requiring manufacturers to highlight extraordinary nutrient levels in red or green. A product that contains a high level of a desirable nutrient or vitamin (or a low level of an undesirable nutrient) could highlight that line by using a green, instead of a white, background for the nutrient name, quantity, and percent daily value. Conversely, a high level of an undesirable nutrient could be highlighted in red. The FDA could define high or low levels for each nutrient and vitamin, or the agency could use the “5/20” rule that it advocates as a “rule of thumb” for consumers.<sup>7</sup>

### **3. “Serving size” should be replaced or defined to avoid implicitly endorsing large serving sizes.**

As the FDA acknowledges in its proposed rule, more than half of consumers perceive the term “serving size” to be a recommended serving size, not an amount customarily consumed.<sup>8</sup> For those people that would, in the absence of a serving size, have eaten a small portion, the inclusion of a perceived serving size recommendation could lead them to eat more than they otherwise would. This is because these consumers believe that the FDA has implicitly endorsed the serving size as healthy.<sup>9</sup> Consuming larger portion sizes is related to increased calorie consumption.<sup>10</sup> While the rule’s revision of the serving size volumes and increased use of “whole package” labeling is appropriate and important, it will also exacerbate this problem, because the perceived recommendations will typically be for even larger portions.<sup>11</sup> The FDA requested comment on this issue in the Notice of Proposed Rulemaking.<sup>12</sup> While the FDA rejected various alternative suggestions for the “serving size” label proposed by a previous commentator, the agency explained that this rejection was because those suggestions incorrectly characterized the FDA’s method for computing serving sizes.<sup>13</sup>

Near the top of the proposed new label are two lines referring to the number of servings per container and the serving size. We suggest that the word “serving” and the phrase “serving

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<sup>6</sup> See Anne N. Thorndike et al., *A 2-Phase Labeling and Choice Architecture Intervention to Improve Healthy Food and Beverage Choices*, 102 AM. J. PUB. HEALTH 527 (2012).

<sup>7</sup> 79 Fed. Reg. 11,880, at 11,954.

<sup>8</sup> Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed at One-Eating Occasion, 79 Fed. Reg. 11,990, 12,007 (Mar. 3, 2014) (to be codified at 21 C.F.R. pt. 101).

<sup>9</sup> See Craig R.M. McKenzie, Michael J. Liersch & Stacey R. Finkelstein, *Recommendations Implicit in Policy Defaults*, 17 PSYCH. SCI. 414, 418 (2006).

<sup>10</sup> See Food Labeling, 79 Fed. Reg. at 11,997.

<sup>11</sup> *Id.* at 12,001.

<sup>12</sup> *Id.* at 11,994, 12,007.

<sup>13</sup> See *id.* at 12,007.

size” be changed to avoid an implied endorsement. Changing “serving” to a word that does not suggest the context of a meal, like “unit” or “quantity,” may mitigate the endorsement effect. Alternatively, the FDA could consider removing the two lines that mention “serving” and adding, next to the words “Amount per \_\_,” the fraction of the container that the RACC represents (for example, “Amount per  $\frac{2}{3}$  cup ( $\frac{1}{8}$  of container)”). A third possibility could be to use the footnote text at the bottom of the nutrition label to explain that the RACC is not a suggestion, although the benefits of this change should be balanced against the risk of information overload and the alternate uses for the footnote text.<sup>14</sup> In addition to increasing the clarity of the label, any of these changes would draw media and consumer attention to the meaning of “serving size,” and this will advance FDA’s education efforts.

Thank you for your consideration.

Respectfully submitted,

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<sup>14</sup> Changing “serving size” to a phrase like “average serving size” or “typical serving size” would not resolve the implied endorsement effect, because people may think that the average amount consumed represents a healthy serving size. See Joseph Henrich, et al, *What Is the Role of Culture in Bounded Rationality?*, in *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* 343, 344 (Gerd Gigerenzer and Reinhard Selten, eds., 2001).