By Eric F. Greenberg, Attorney-at-law

5 Bold Predictions

Columnists are expected to make predictions when there's a new President, so here are five observations about packaging-related developments we'll see from the new administration, and especially the U.S. Food and Drug Administration (FDA):

1. Who can tell? It's tough to tell exactly which of the new President's promises will be incorporated into actual changes in regulations or law because often they are contradictory.

The new President promises wholesale cuts in regulations (as if fewer is always better than more) but also suggests aggressive new steps relating to what's in Americans' food, which certainly sounds plenty regulation-y.

That's because Robert F. Kennedy, Jr. is Trump's nominee to run the Department of Health and Human Services, which includes FDA. If RFK, Jr. is Senate-confirmed, expect to hear the phrase "Make America Healthy Again," and imposition of a range of new requirements about microplastics, "chemicals" in food, "ultra-processed" foods, and vaccines, among other topics.

The inspiration for a lot of this appears to be a basic distrust of industry, something not ordinarily associated with the new President. In packaging, FDA's GRAS program is one that NGOs and others have for years wanted to see eliminated or changed. It allows individual companies to conclude that their uses of substances in or in contact with food are Generally Recognized As Safe. We might hear louder complaints about the program in coming years, but any big changes require Congress to change the law.

2. Speeding up. FDA has seemed to accelerate decisions in the weeks between the election and the start of the new administration, perhaps anticipating many of their activities being abandoned or changed. In the food-contact packaging area, almost three dozen approvals for use of PFAS chemicals are withdrawn. (More on this soon.) In the food labeling realm, it revised regulation about when it's OK to label a food as "healthy," and proposed a significant new front-of-pack nutrition information requirement for most foods. (More on these to follow, too.)

In early January, FDA released new documents on topics as varied as food allergens, low-moisture ready-to-eat foods, labeling of plant-based foods, and limits for lead in processed food for babies.

Even before the November election, FDA had reorganized its oversight of food and set up new and different offices and departments in what it's now calling its Human Foods Program. This was likely motivated by the infant formula contamination scandal in 2021-2022, which had led to lots of criticism of the agency's slow response.

3. PFAS action. Several of FDA's late-in-the-game actions affect packaging and labeling directly.

FDA withdrew approval for almost three dozen per- and polyfluoroalkyl substances (PFAS). It declared the clearances—all via Food Contact Notifications (FCNs) for their use as grease-proof coatings on paper-based food packaging—no longer effective because "the manufacturers or suppliers have ceased production, supply, or use" of them. This was a layup; the tough choices involve substances that are being used.

4. "Healthy" label claim and front-of-pack Nutrition Info. FDA's new rule for when foods can claim to be "healthy" as a nutrient-content label claim is a significant change from the longstanding rule.

FDA summarizes: "To qualify as 'healthy' under the updated definition, food products must contain a certain amount of a food from at least one of the food groups or subgroups outlined by the Dietary Guidelines for Americans including fruits, vegetables, protein foods, dairy, and grains. Foods that qualify for the 'healthy' claim must also meet certain limits on saturated fat, sodium, and added sugars. Under these changes, more foods that are key to healthy eating patterns will qualify for the 'healthy' claim, which could make them easier for consumers to identify when shopping. These foods include nuts and seeds, higher-fat fish such as salmon, olive oil, and water."

And at press time, after years of considering various ideas, FDA proposed a front-of-pack nutrition info program.

It would require significant new design changes for most packaged foods, though the effective date would be three or four years from the final rule's effectiveness date, depending on the size of businesses.

FDA proposes that the new label feature, called Nutrition Info, would appear on the front (principal display panel) and indicate if a serving of the food provides low, medium, or high levels of saturated fat, sodium, and added sugars. Companies could also voluntarily add a calorie statement.

This would complement the existing Nutrition Facts panel on food labels. Comments are due by May 16, 2025.

5. More effective objections to agency actions. If industry wants to squawk about radical or illogical agency actions to come, it needs to recognize that the landscape for legal challenges has changed. For decades, if you objected to agency regulations or orders or other actions, you could sue in court to have them blocked by showing they are arbitrary or capricious or not in line with the facts or law. The Administrative Procedure Act still gives you that right, and it might be easier to win those challenges. Early in 2024, the Supreme Court declared that federal courts would not have to defer to the reasonable judgments of agencies when the courts are asked to evaluate the agencies' interpretations of laws or regulations. That Supreme Court decision reversed the approach courts have taken for decades. One result of that decision is that agency regulations or orders or other actions might be struck down by courts more often in the future. **PW**

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