

MEMORANDUM

From: Martin J. Hahn
Veronica Colas
Mary B. Lancaster

Date: July 25, 2019

Re: **National Advertising Division Issues Decision on “0 g Added Sugars” Claim for Oatmilk**

Oatly, Inc. has chosen to discontinue its “no added sugars” advertising claims after the Campbell Soup Company brought a challenge before the National Advertising Division (NAD). ^{1/} Campbell argued that various claims found on Oatly oatmilk products, including “0 g added sugars” and “no added sugars,” were misleading because the products contain maltose, a sugar by-product of the hydrolysis process used to manufacture oatmilk. The company agreed to discontinue the “no added sugar” claim, and the NAD’s decision focused on the “0 g added sugars” claim. The case highlights key food industry advertising issues, including whether and when the NAD will defer to FDA regulations regarding claims based on mandatory labeling elements, as well as the complexities of calculating added sugars.

Background

The NAD is a voluntary industry dispute resolution body and is a division of the Better Business Bureau. The NAD has jurisdiction over national advertising, including labeling.

When a product or claim before the NAD is also the subject of federal regulation, as is the case here, the NAD seeks to generally harmonize its review with any applicable regulation so that advertisers are held to consistent standards. The NAD explains however, that such deference is neither automatic nor complete and that it still has an obligation to exercise its own discretion. In this case, the relevant FDA regulation is the new requirement to declare “added sugars” as part of the Nutrition Facts Panel (NFP), as well as FDA’s definition of the term “added sugars.” The compliance date for the new requirements is January 1, 2020 for larger manufacturers and FDA continues to release guidance on how to calculate and declare added sugars. ^{2/}

^{1/} Oatly, Inc. (Oatmilk Products), Report #6287, NAD/CARU Case Reports (June 2019).

^{2/} Guidance for Industry: The Declaration of Added Sugars on Honey, Maple Syrup, Other Single-Ingredient Sugars and Syrups, and Certain Cranberry Products,

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As an initial matter, the NAD concluded it had jurisdiction to review the “0 g added sugars” claim. The NAD did not evaluate whether the declaration of added sugars in the NFP complied with FDA regulations, but instead limited its review to the “0 g added sugars” claims appearing outside of the NFP. The NAD reasoned that the NFP is not used for the purpose of “inducing a sale,” but is instead used for the purpose of complying with FDA rules, so it is not advertising and is not subject to the NAD’s jurisdiction. In contrast, a claim that restates information in the NFP to induce a sale meets the definition of advertising.

Competitor Challenge

Oatly products bear several express claims about sugar content, including: “Includes 0g Added Sugars;” “No added sugar(s);” and “We don’t add sugar (We thought it was worth repeating).” The company website states the total sugar content is 7 grams per 1 cup serving. ^{3/} The challenger in this case argued that the hydrolysis process used to manufacture oatmilk creates a certain amount of sugar, specifically maltose, as a by-product, which should be considered “added sugars.” The challenger contended the “no added sugars” and “0 g added sugars” claims were false and misleading because FDA’s final rule treats sugars created during processing as added sugars.

The advertiser agreed to discontinue the “no added sugars” claim, so the NAD did not evaluate this claim as part of its decision. ^{4/} With respect to the “0 g added sugars” claim, the advertiser responded that the NAD should not take a position on an unsettled question of a pending FDA regulation – specifically, how to calculate added sugars created through a controlled hydrolysis process, a topic that has been the subject of much discussion in FDA guidance.

NAD Decision

In assessing the “0 g added sugar” claim, the NAD engaged in an extensive discussion of draft and final FDA guidance on added sugars. According to the NAD, while the January 2017 draft guidance from FDA focuses on the *amount* of sugar produced by a particular processing step (and specifically whether it exceeds 0.5 g sugars per serving), the November 2018 final guidance places greater weight on the *purpose* of the processing step that produces sugars.

The NAD concluded that while the technical FDA definition of added sugars may provide guidance on consumer takeaways from the claim “added sugar,” it is not conclusive. Instead, the NAD placed greater weight on the “ordinary meaning” of the phrase “added sugar” and found that according to

<https://www.fda.gov/media/127928/download> (June 2019); Guidance for Industry: Nutrition and Supplement Facts Labels: Questions and Answers Related to the Compliance Date, Added Sugars, and Declaration of Quantitative Amounts of Vitamins and Minerals, <https://www.fda.gov/media/117402/download> (November 2018); Draft Guidance for Industry: Questions and Answers on the Nutrition and Supplement Facts Labels Related to the Compliance Date, Added Sugars, and Declaration of Quantitative Amounts of Vitamins and Minerals, <https://www.fda.gov/media/102614/download> (January 2017) (Question 13 of the draft guidance addresses the declaration of hydrolysis-produced sugars).

^{3/} We are not opining on the decision to declare 0g added sugars in the Nutrition Facts Panel, as this concerns product details to which we do not have access. We note the company website has been revised to list 7 g added sugars per serving.

^{4/} The NAD noted, however, that it would treat the advertiser’s changes as though the NAD had recommended the changes and the advertiser agreed to comply.

this ordinary meaning, maltose, a sugar, has been added to the oatmilk via the hydrolysis processing step. The NAD therefore recommended the company not re-post or restate the “added sugars” line of the NFP in its advertising. The NAD noted that its decision does not affect Oatly’s use of the added sugars line as part of the NFP for purposes of complying with FDA regulations.

The Oatly decision suggests the NAD will continue to serve as an alternative dispute forum for food advertising disputes, including those related to labeling issues for which FDA has issued governing regulations. While the NAD recognizes some deference is due to FDA’s regulatory requirements, in cases where interpretation of the FDA regulation in question is somewhat of a gray area, the NAD may be more likely to place greater emphasis on the ordinary meaning of terms.

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We will continue to monitor NAD and FTC decisions that may impact the food industry. Please contact us with any questions regarding this or other matters.