



Office of the Secretary

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

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Re: Citizens' Petition to Change the Labeling Requirements for Eggs Sold in the United States

Dear Ms. Leahy, Ms. Kaplan, Mr. Dillard, Ms. Share, and Ms. Bock:

This letter is in response to your Citizens' Petition, filed on December 30, 2010 before the Federal Trade Commission ("Petition"), requesting that the Commission promulgate a regulation requiring all shell eggs sold at retail in the United States to be prominently and conspicuously labeled as "Free-Range Eggs," "Cage-Free Eggs," or "Eggs from Caged Hens" according to the particular conditions in which the egg-laying birds were kept during the production process. The Petition follows a similar petition you filed before the Commission on February 21, 2007, which Commission staff denied on May 29, 2007 on the grounds that your request was more appropriately directed to the Food and Drug Administration and the U.S. Department of Agriculture.¹ The Petition was supplemented by a letter you wrote to FTC Chairwoman Edith Ramirez on March 20, 2013.²

¹ See Letter from Mary K. Engle, Associate Director, Division of Advertising Practices (Feb. 21, 2007), available at <http://www.ftc.gov/os/closings/staff/070529egg.pdf>. The FTC, FDA, and the USDA share jurisdiction over claims made for food products pursuant to a regulatory scheme established by complementary statutes. Since 1954, the FTC and FDA have operated under a Working Agreement whereby the FTC takes primary responsibility for regulating food *advertising* (other than labeling) and the FDA takes primary responsibility for

Your Petition and associated materials argue that current labeling of shell eggs contains materially misleading claims, both express and implied, as well as material omissions of fact, which distort the market for such products. Your Petition sets forth certain labeling claims made on egg cartons,³ states that such claims are deceptive and are material to consumers,⁴ argues that recent studies establish that cage-produced eggs are nutritionally inferior to free-range eggs,⁵ and claims that there is a strong public policy justification to adopt the requested regulation.⁶

Decision Summary

For the reasons stated herein, the Commission has decided not to commence the rulemaking proceeding requested by your Petition. We do not have sufficient evidence to determine that the practices described in your Petition are deceptive or unfair under the Federal Trade Commission Act. Nor is it apparent that deceptive or unfair practices regarding the labeling of egg-production methods are prevalent. We are also mindful of the fact that the rulemaking that you propose would entail considerable costs and believe that, under these circumstances, case-by-case investigations are a more effective tool to address the practices identified by your Petition. Therefore, your request is denied.

Standard for Rulemaking

The Commission has authority under Section 18 of the FTC Act to commence a rulemaking to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”⁷ In determining whether to conduct such a rulemaking, the Commission considers not only the nature of the practices at issue (*i.e.*, whether they may be deceptive or unfair) and the prevalence of those practices,⁸ but also may consider

regulating food *labeling*. See Working Agreement Between Federal Trade Commission and Food and Drug Administration, 4 Trade Reg. Rep. (CCH) ¶ 9850.01 (June 9, 1954).

² The Petition is identical in material respects to petitions you filed before the Food and Drug Administration (“FDA”) and the U.S. Department of Agriculture’s Food Safety and Inspection Service (“FSIS”) and the Agricultural Marketing Service (“AMS”) in the fall of 2010 and the winter of 2011. The AMS denied your petition on March 21, 2011, and the FDA denied your Petition on August 28, 2013.

³ See Petition at 11-17, 38-41.

⁴ *Id.* at 17-19.

⁵ *Id.* at 19-25.

⁶ *Id.* at 25-34.

⁷ 15 U.S.C. § 57a(a)(1)(B). The FTC’s substantive rulemaking authority was codified in 1975 by the Magnuson-Moss Act, which added Section 18 to the FTC Act.

⁸ 15 U.S.C. § 57a(b)(3). The Commission may conclude that particular acts or practices are prevalent if one of two conditions is met: (1) if it has issued cease and desist orders regarding such acts or practices, or (2) there is other information available to the Commission that indicates a widespread pattern of unfair or deceptive acts or practices. *Id.*

the extent of the harm caused by those practices and the likely reduction of harm should the proposed rule be adopted. The Commission also may take into account the likely costs both of undertaking the rulemaking and of ultimately enforcing the proposed rule.⁹

FTC Approach to Evaluating Deceptive or Unfair Advertising

The Federal Trade Commission regulates food advertising under its statutory authority to prohibit unfair or deceptive acts or practices under Section 5 of the FTC Act,¹⁰ and under Sections 12 and 15 of the FTC Act, prohibiting “any false advertisement” for, among other things, food products.¹¹ The Commission has set forth its interpretations of this authority in its Deception Policy Statement,¹² Statement on Advertising Substantiation,¹³ and Policy Statement on Unfairness.¹⁴ The Commission has also taken action in a number of food advertising and labeling cases, which may provide additional guidance as to which practices the Commission finds unlawful.¹⁵

Applying the Deception Statement, the Commission will find a food advertisement or label to be deceptive, and therefore unlawful under Section 5, if it contains a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances,

⁹ Administrative agencies have broad discretion in determining whether to proceed by rulemaking or administrative adjudication. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (Chenery II), *reh'g denied*, 332 U.S. 783 (1947). The Commission has interpreted this discretion to apply equally to decisions to proceed by court action rather than by rulemaking.

¹⁰ 15 U.S.C. § 45.

¹¹ 15 U.S.C. §§ 45, 52, 55 (2012). Section 12 of the FTC Act only applies to food *advertising*, not to its *labeling*, so its applicability here would be limited.

¹² See *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (*Deception Statement*).

¹³ See *FTC Policy Statement on Advertising Substantiation*, 104 F.T.C. 839 (appended to *Thompson Medical Co.*, 104 F.T.C. 648 (1984)) (*Substantiation Statement*). Claims regarding egg production conditions would not fall within the Commission’s 1994 Enforcement Policy Statement on Food Advertising, which relates to nutrient content and health claims.

¹⁴ See *FTC Policy Statement on Unfairness*, 104 F.T.C. 1070-76 (1984) (appended to *International Harvester Co.*, 104 F.T.C. 949 (1984) and codified at 15 U.S.C. § 45(n)) (*Unfairness Statement*).

¹⁵ See, e.g., *POM Wonderful LLC*, 2013 FTC LEXIS 6 (Jan. 16, 2013); *Nestlé HealthCare Nutrition, Inc.*, FTC Docket No. C-4312 (Jan. 12, 2011), available at <http://www.ftc.gov/os/caselist/0923087/110118nestledo.pdf> (Decision and Order); *Dannon Co.*, 151 F.T.C. 62 (2010); *Kellogg Co.*, FTC Docket No. C-4262 (Jul. 27, 2009), available at <http://www.ftc.gov/os/caselist/0823145/090731kelloggdo.pdf> (Decision and Order); *Tropicana Prods., Inc.*, 140 F.T.C. 176 (2005); *KFC Corp.*, 138 F.T.C. 422 (2004); *Unither Pharma, Inc.*, FTC Docket No. C-4089 (Jul. 22, 2003), available at <http://www.ftc.gov/os/2003/07/unitherdo.pdf> (Decision and Order); *Interstate Bakeries Corp.*, 2002 F.T.C. LEXIS 20 (2002); *Abbott Labs., Inc.*, FTC Docket No. C-3745 (May 30, 1997), available at <http://www.ftc.gov/os/1997/06/c3745.do.pdf> (Decision and Order); *Pizzeria Uno Corp.*, 123 F.T.C. 1038 (1997); *Conopco, Inc.*, 123 F.T.C. 35 (1997); *Eggland’s Best, Inc.*, 118 F.T.C. 340 (1994).

and that representation is material.¹⁶ The first step in a deception analysis is to identify the representations, both express and implied, made in an advertisement; in the case of implied representations, the Commission will look to the representation itself and to the overall net impression of the ad, including the juxtaposition of phrases and images, and the nature of the claims.¹⁷ In addition, the Commission will consider whether the ad omits material information that would be necessary to prevent any affirmative representations from being misleading.¹⁸ The Commission conducts this analysis from the perspective of a reasonable consumer.¹⁹ Finally, the Commission will determine whether the claims are likely to affect a consumer's choice or use of the product or service, *i.e.*, whether they are material.²⁰

The Commission may consider acts or practices to be unfair under Section 5 of the FTC Act if they cause or are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and that is not outweighed by countervailing benefits to consumers or to competition.²¹

Analysis of Petition Requesting Rulemaking

Deception Analysis

Under the Commission's deception analysis, there must first be a representation, omission, or practice that is likely to mislead the consumer.²² The Petition argues that the terms "free-range" and "cage-free," currently unregulated with respect to shell eggs, imply to consumers a higher standard of care than is the case.²³ The Petition also identifies a set of representations and imagery used by egg manufacturers and marketers on their cartons that you claim are misleading. These include express representations that the eggs are "All Natural," "Animal Friendly," produced from "naturally raised hens," are "farm fresh," and come from "Sunny Meadows,"²⁴ as well as imagery on cartons, such as a chicken on a nest incubating her eggs, depictions of hens foraging in outdoor conditions, or hens roosting on a fence in the middle of an open field, that you claim imply that the eggs were produced under natural conditions.²⁵

¹⁶ *Deception Statement*, 103 F.T.C. 110.

¹⁷ *Deception Statement*, 103 F.T.C. at 176; *Pom Wonderful LLC* at 24.

¹⁸ *Deception Statement*, 103 F.T.C. at 176-77.

¹⁹ *Id.* at 177-81; *Thompson Med. Co.*, 104 F.T.C. at 788.

²⁰ *Deception Statement*, 103 F.T.C. at 182.

²¹ 15 U.S.C. § 45(n).

²² *Deception Statement*, 103 F.T.C. at 175.

²³ *See* Petition at 8-9, 38.

²⁴ *See* Petition at 11-14, 35-37.

²⁵ *Id.* at 15-17, 35-37.

Your Petition argues that, alone or in combination, these terms and images create the misleading impression that eggs laid by caged hens were instead derived from free-range or cage-free conditions.

Under the Commission’s analysis, a reasonable interpretation is one that would be shared by at least a significant minority of reasonable consumers.²⁶ Your Petition argues that the appropriate class of consumers includes those who are the least sophisticated,²⁷ but also states that even more sophisticated consumers of shell egg products are likely to be misled by depictions and statements of certain egg production conditions.²⁸

Your Petition also argues that claims about egg conditions are material to consumers’ egg purchasing decisions;²⁹ the Commission agrees they may be. The Commission considers some claims to be presumptively material, including “express claims, claims significantly involving health or safety, and claims pertaining to the central characteristic of the product.”³⁰ Other claims may also be important to consumers’ purchasing decisions. The Petition cites certain consumer polls indicating many U.S. consumers with concerns about animal welfare may desire products labeled as protective of animal welfare.³¹ In this case, the Commission would agree that claims regarding the manner in which shell eggs are produced may be material to some consumers’ egg purchasing decisions.

Your Petition calls for the Commission to adopt a rule that would require that eggs sold in retail sales be labeled “cage-free,” “free-range,” or “eggs from caged hens,” depending upon the conditions in which the hens were kept during the production process. Although your Petition asserts generally that the terms “cage-free” or “free-range” are deceptively being used to imply living conditions that differ from those actually provided, the Petition does not provide specific evidence of consumer interpretation of particular carton labels and whether the practices are contrary to how consumers interpret particular label claims.³² Absent such evidence, the

²⁶ *Kraft, Inc.*, 114 F.T.C. 40, 122 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992); *Telebrands Corp.*, 140 F.T.C. 278, 291 (2005) (“[a]n ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim”), *aff’d*, 457 F.3d 354 (4th Cir. 2006); *Deception Statement*, 103 F.T.C. at 177 n.20 (citing *Kirchner*, 63 F.T.C. 1282 (1963) (explaining a reasonable interpretation is one that would be shared by more than an insignificant and unrepresentative segment of the class of persons to whom the represented is addressed)).

²⁷ *See* Petition at 37.

²⁸ *Id.* at 37-38.

²⁹ A “material” misrepresentation is defined as one that is likely to affect a consumer’s conduct with respect to the product or service. *Deception Statement*, 103 F.T.C. at 182.

³⁰ *Pom Wonderful LLC* at 121; *Novartis Corp.*, 127 F.T.C. 580, 686 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000).

³¹ *See* Petition at 9-10, 38.

³² Your Petition states that a 2007 poll indicates that consumers interpret “natural” to indicate that animals had access to the outdoors, but the details of the poll are not provided and the poll does not appear to specifically address egg packaging. Petition at 42-43. Your Petition does not contain any other empirical evidence regarding how consumers interpret the terms or images that you argue warrant regulation by rulemaking.

Commission cannot conclude, without conducting its own investigations, that the current use of those terms is misleading consumers.

The Commission also is unable to conclude, based on the information in your petition, that terms such as “All Natural,” “Animal Friendly,” produced from “naturally raised hens,” “farm fresh,” and “Sunny Meadows,” along with certain imagery, create the misleading impression that such eggs are produced either in cage-free or free-range conditions. These marketing terms do not appear to be inherently deceptive; the Commission would have to conduct further factual investigation to determine what impression reasonable consumers would take away. Based on the limited information that you have provided, we are not persuaded that your Petition identifies a set of deceptive acts or practices under the Federal Trade Commission Act that warrant the initiation of a rulemaking mandating that all egg cartons be labeled with one of the three designations you propose.

Unfairness Analysis

While your Petition analyzes egg sellers’ claims under a deception analysis, the Commission also would consider whether the absence of designations regarding egg production conditions constitutes an unfair practice and, if so, whether initiation of a rulemaking is warranted. Absent an express or implied representation, an omission of information can be considered unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition. Thus, the failure to include either a “free-range,” “cage-free,” or “eggs from caged hens” designation on shell egg cartons would be analyzed under this standard.

Based on the information presented in your Petition, we are unable to determine that the absence of a statement regarding egg production methods on egg cartons causes consumers substantial and unavoidable injury. Your Petition claims that consumers disapprove of certain egg production methods³³ and are confused by the current application of vague terms about animal welfare conditions – terms such as “cage-free,” “free-range,” and “all natural.”³⁴ However, it is not evident any such potential customer confusion would cause substantial consumer injury. Many consumers who wish to purchase only eggs produced by free-range or cage-free hens may be able to purchase eggs labeled with more particularity and avoid unlabeled or vaguely labeled eggs. In addition, those consumers with strong concerns about animal welfare may choose to research particular marketers’ egg production standards.³⁵ As the Commission noted in its Unfairness Statement, “[w]e anticipate that consumers will survey the available

³³ *Id.* at 9 (e.g., densely crowded cages).

³⁴ *Id.* at 10. The Petition also argues that cage-produced eggs are of inferior nutritional quality than eggs from hens raised in a pastured setting. *Id.* at 19-25. The Commission defers to the analysis presented in the Food and Drug Administration’s letter of August 28, 2013 (finding the studies cited in the petition “insufficient to support a categorical determination regarding the relative nutritional properties of eggs based solely on the method of production”). See letter from FDA, at 5-8.

³⁵ The Petition cites several examples of marketers that offer additional information on company websites about the conditions under which their eggs are produced. See Petition at 12-14.

alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.”³⁶

Moreover, it is not clear that the benefits of requiring egg production methods to be included on all cartons outweigh the costs. While you argue that producers of cage-produced eggs would face no additional costs to comply, your Petition does identify certain, non-negligible costs to producers of free-range or cage-free eggs associated with complying with the proposed regulation.³⁷

Although interest in animal welfare may be strong for some consumers, the Commission has long held that not every item of information that consumers may find useful must be disclosed in advertising. Rather, to be actionable under the FTC Act, the omission of information must meet the unfairness test.³⁸ Here, given the insufficient information regarding whether consumer injury resulting from unlabeled eggs is substantial, the likelihood that consumers can avoid injury by purchasing specifically labeled eggs (or for those most highly concerned, inquiring further into particular companies’ methods), and the potential for costs associated with requiring all eggs to bear a label regarding production methods, the Commission cannot determine that the failure to designate egg production methods is an unfair practice under the FTC Act.

Additional Rulemaking Criteria

In deciding whether to initiate a rulemaking, it is also appropriate for the Commission to consider the prevalence of those practices, the extent of the harm caused by those practices, the likely reduction of harm should the proposed rule be adopted, and the costs both of undertaking the rulemaking and of ultimately enforcing the proposed rule.

The Commission may conclude that particular acts or practices are prevalent if it has issued cease and desist orders regarding such practices, or it has other information indicating a widespread pattern of unfair or deceptive practices. In this regard, the Commission has not issued any cease and desist orders regarding the practices your Petition seeks to regulate by rule. Furthermore, even assuming that the labeling representations on egg cartons described in your Petition are prevalent, it is not evident that consumer deception with regard to carton labeling is prevalent. Your Petition does not provide evidence that the terms “cage-free” or “free-range” are deceptively being used to imply a standard of care greater than is actually provided, and in order to determine whether the use of those terms is deceptive, the Commission would have to conduct extensive investigations and obtain extrinsic evidence on their meaning.

³⁶ 104 F.T.C. at 1074.

³⁷ See Petition at 54-57.

³⁸ See *International Harvester Co.*, 104 F.T.C. 949, 1062 (1984) (“There is also a need for principled limits on [the concept of mandatory disclosure], of course, since virtually any piece of information may be useful to some consumers. . . . In most cases it is appropriate to limit mandatory disclosure to those core aspects of a transaction that virtually all consumers would consider essential to an informed decision”).

The resource commitment necessary to adopt a rule requiring affirmative disclosure of egg production methods and defining the precise conditions under which particular eggs would qualify for certain designations would be considerable. The Commission would be required to publish an advance notice of proposed rulemaking prior to issuing a notice of proposed rulemaking.³⁹ In addition, the Commission must allow interested persons to submit written data, views, and arguments, and make all these submissions public, provide an opportunity for an informal hearing on the proposed rule during which interested parties can present their views either orally or through written submissions, and, to the extent there are disputed issues of material fact, present rebuttal evidence and cross examination.⁴⁰ This significantly time-consuming effort would redirect limited Commission resources away from law enforcement efforts that it has identified as priorities based on its experience with the practices and harm to consumers.

Moreover, the Commission has concluded that any potential deceptive practices identified by your Petition are more appropriately addressed through case-by-case investigations rather than by initiating a rulemaking. A regulation is not required for the Commission to find certain food labeling practices to violate Section 5 of the FTC Act. Bringing individual cases permits the Commission to adjust the forum for relief and the remedy sought to the facts of each case. It also enables the Commission to evaluate the claims conveyed to consumers by particular labeling representations in light of consumer understanding.

In the case of shell egg labeling, the Commission believes that individual law enforcement efforts may be better suited to addressing any particular deceptive practices identified by your Petition. The Commission or its staff has taken such action in the past. In September 2005, the Commission staff responded to a petition you filed regarding the United Egg Producers' ("UEP") *Animal Care Certified* seal on egg cartons that purported to communicate a heightened level of care for hens than actual conditions permitted. In its response, Commission staff noted changes UEP made to its seal following the Commission's inquiry, and, in connection with the U.S. Department of Agriculture's Agricultural Marketing Service, committed to monitoring use and advertising of the seal in the marketplace.⁴¹ The Commission could take similar action in the future should other cases present themselves. The Commission also has authority under Section 13(b) of the FTC Act to seek preliminary and permanent injunctive relief and related equitable remedies in instances in which it has reason to believe that an individual or entity is violating any law administered by the Commission.

³⁹ 15 U.S.C. § 57a(b)(2)(A).

⁴⁰ 15 U.S.C. § 57a(c)(2).

⁴¹ The Commission also has taken action against an egg manufacturer's advertising claims that consuming its eggs would not increase serum cholesterol, or that doing so would not increase such cholesterol as much as consuming ordinary eggs. See *U.S. v. Egglund's Best, Inc.*, No. 96 CV-1983 (E.D. Pa. Mar. 12, 1996) (stipulated permanent injunction and \$100,000 civil penalty for violation of previous order in *Egglund's Best, Inc.*, 118 F.T.C. 340 (1994)).

Conclusion

The Commission appreciates the concerns you raise; the information you have submitted significantly contributed to the Commission's consideration of the issues raised by your Petition. However, for all of the foregoing reasons, the Commission denies Petitioners' request for a rulemaking.

By direction of the Commission.

Donald S. Clark
Secretary