Vermont Legislative Council

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## Memorandum

To: Representative Tom Stevens

From: Katie M. McLinn, Legislative Counsel

Date: January 7, 2015

Subject: Draft request 15-243; labeling sugar-sweetened beverages

Attached is the draft bill you requested that would require sugar-sweetened beverages to display a warning label about the health implications of excess sugar consumption. As I mentioned in an earlier e-mail, there are several potential legal challenges that opponents of the bill may articulate. First, opponents may argue that the federal Nutrition Labeling and Education Act (NLEA) preempts the State from regulating in this area. Second, there may be arguments that the bill violates the First Amendment of the U.S. Constitution on the grounds of impermissible compelled commercial speech. And lastly, opponents may challenge the bill under the Commerce Clause of the U.S. Constitution. Each of these potential challenges will be reviewed in turn below.

1. *Nutrition Labeling and Education Act*

NLEA authorizes the U.S. Food and Drug Administration (FDA) to require labels on food products for human consumption sold within the United States, including sugar-sweetened beverages.[1] It specifically preempts state regulations that differ from the Federal Food, Drug, and Cosmetic Act (FFDCA) as amended by NLEA, and that establish standards of identity, health or nutrient content claims, and other nutrition labeling standards.[2] In assessing whether a warning label on sugar-sweetened beverages would be preempted under NLEA, it must be determined: (a) whether a health warning constitutes "labeling"; (b) if so, whether imposing a health warning is within the scope of preempted state activities; and (c) whether there are any exceptions to preemption that apply to health warnings.

(a) *Does a health warning on sugar-sweetened beverages constitute "labeling"?*

Due to the fact that NLEA preemption only applies to "labeling," a threshold question is whether a health warning on a sugar-sweetened beverage meets the statutory definition of "label." A "label" is defined as "a display of written, printed, or graphic matter upon the immediate container of any article" and "labeling" is defined as "written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."[3] Therefore, a health warning directly adhered to the container of a sugar-sweetened beverage, on the

[1] Nutrition Labeling and Education Act of 1990, Pub. L. 101-535, 104 Stat. 2353.
[2] 21 U.S.C. § 343-1.
[3] 21 U.S.C. § 321(k), (m).

packaging for a sugar-sweetened beverage, or possibly even posted near a sugar-sweetened beverage display would constitute "labeling" under NLEA.

(b) *Is a health warning label within the scope of preempted state activities?*

Assuming a court was to find that a health warning on a sugar-sweetened beverage constitutes labeling, a state could be preempted from requiring such a label where, among other reasons, its content pertained to nutrition labeling of food, nutrient content claims, or health claims.[4] Although "nutrition labeling of food" is not a defined term, context suggests that it refers to quantitative nutritional information, such as calories, protein, carbohydrates, etc., and is unlikely to apply to the proposed health warning.[5]

With regard to nutrient content claims, NLEA's implementing regulations describe such a claim as one "that expressly or implicitly characterizes the level of a nutrient of the type required to be in nutrition labeling".[6] The examples provided in regulation, "low sodium" and "high in oat bran," describe either the level of a nutrient or of the fact that a nutrient is absent, present, or "useful in maintaining healthy dietary practices."[7] Interestingly, while the regulation specifically references a positive nutrient content claim, it is silent on use of a negative claim such as the proposed health warning label for sugar-sweetened beverages. Whether this distinction is significant enough to avoid state preemption would ultimately be for a court to decide.

Finally, NLEA's implementing regulations define a health claim as "any claim made on the label or in labeling of a food… that expressly or by implication …characterizes the relationship of any substance to a disease or health-related condition."[8] This ground for preemption is perhaps the strongest argument opponents have against a health warning linking sugar-sweetened beverages to obesity, diabetes, and tooth decay. Advocates for such a warning, however, will argue that because the only health claims listed in NLEA's regulations refer to positive health outcomes that the proposed warning falls outside the scope of this preemption.[9] As above, a court would be the final arbiter in determining whether this distinction is significant enough to avoid state preemption.

(c) *Are there any exceptions to preemption that apply to health warning labels?*

Even if a health warning on sugar-sweetened beverages is found to be preempted, the warning may fall into an exception that would allow a state to regulate in this area. Under NLEA, state preemption shall not "apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food."[10] While NLEA and its implementing regulations do not provide any guidance on the meaning of "safety of the food," the FFDCA does address the safety of specific components or contaminants of food. For example, FFDCA defines "food additive"—although subject to numerous

[4] 21 U.S.C. § 343-1(a)(4), (5).
[5] *See* 21 C.F.R. § 101.9.
[6] 21 C.F.R. § 101.13(b).
[7] *Id*.
[8] 21 C.F.R. § 101.14(a)(1).
[9] *See generally* 21 C.F.R. § 101.70 et seq.
[10] Nutrition Labeling and Education Act of 1990, Pub. L. 101-535, § 6(c)(2), 104 Stat. 2353.

exceptions—as a substance intended to become "a component or otherwise affecting the characteristics of any food."[11] FFDCA regulations state that a safe food additive "means that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use."[12] Substances such as sugar, corn syrup, and other sweeteners would all likely qualify as a "food additive" under FFDCA. Proponents of the proposed warning label will likely use the definition of "safe" as applied to food additives to argue that a reasonable certainty exists in the minds of competent scientists that sugar and other sweeteners may be harmful as they contribute to obesity, diabetes, and other health concerns. Conversely, opponents may argue that the FDA has determined that sugar and other sweeteners are safe or that they do not implicate safety concerns because the FDA has determined them to be safe even with the knowledge of potential health effects, in conformity with the two cases described below.

Two courts have assessed whether NLEA preempted certain types of safety warnings: *Mills v. Giant of Maryland* and *In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*.[13] The issue in *Mills* was whether a lack of warning about lactose in milk implicated safety concerns.[14] The court ruled that it did not.[15] The second case, *In re BPA*, involved safety concerns pertaining to the chemical BPA.[16] That court found that because the FDA had previously found BPA to be safe, grounds to invoke NLEA's safety exception to preemption did not exist.[17] Neither of these cases shed a great deal of light on how a court would decide the NLEA safety exception with regard to a health warning on sugar-sweetened beverages, nor would either case be binding in Vermont. Consequently, there is a great deal of uncertainty as to whether the proposed warning would withstand a challenge under NLEA.

2. *First Amendment Commercial Speech Issues*

The First Amendment of the U.S. Constitution prohibits the government from making laws abridging the freedom of speech.[18] It applies to commercial speech, which includes information on a product label.[19] The U.S. Supreme Court has ruled that the right not to speak is as paramount as the right to speak.[20] Under the First Amendment, commercial speech only receives protection if the speech at issue concerns a lawful activity and is not misleading.[21] Generally, for commercial speech that is not misleading and that addresses a lawful activity, the U.S. Supreme

[11] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321.
[12] 21 C.F.R. § 170.3.
[13] 441 F. Supp. 2d 104 (D.D.C. 2006); 2009 WL 3762965 (W.D. Mo. Nov. 9, 2009).
[14] 441 F. Supp. 2d 104 (D.D.C. 2006).
[15] *Id.*
[16] 2009 WL 3762965 (W.D. Mo. Nov. 9, 2009).
[17] *Id.*
[18] U.S. CONST. amend. I.
[19] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *See* Adolph Coors Co. v. Brady, 944 F.2d 1543, 1546 (10th Cir. 1991).
[20] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977).
[21] Central Hudson Gas and Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 563 (1980).

Court has established two tests to assess whether a regulation or statute violates the First Amendment: (a) the *Central Hudson* test and (b) the *Zauderer* test.[22]

(a) *The Central Hudson Test*

The *Central Hudson* test is primarily used when a regulation either prohibits or restrains commercial speech.[23] Under this test, a regulation is constitutional when: (1) the asserted governmental interest for the government regulation is substantial; (2) the regulation directly advances the governmental interest asserted; and (3) the regulation is not more extensive than necessary to serve the governmental interest.[24] A state has the burden of showing through convincing evidence versus speculation that a challenged regulation furthers the stated interest. In the recent past, the U.S. Court of Appeals for the Second Circuit has ruled that mere consumer concern about a product is not a substantial governmental interest.[25]

(b) *The Zauderer Test*

The *Zauderer* test is used when a government regulation compels commercial speech of "factual and uncontroversial information."[26] It is a less rigid standard of review than that found in *Central Hudson*. Under the *Zauderer* test, a regulation is constitutional if: (1) the state has a legitimate interest in the regulation; and (2) the disclosure requirements are reasonably related to the state's legitimate interest.[27] The distinction drawn by the *Zauderer* court was made because "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions of speech."[28] The Court also noted that because First Amendment protection for commercial speech is justified on the basis of the value the information has for consumers, the regulated entity's constitutionally protected interest in *not* providing any particular factual and accurate information is minimal. The legitimate state interest offered in *Zauderer* was "prevention of consumer deception," and it remains unsettled whether the holding in the case extends to other state interests.

(c) *Which test applies to a health warning on sugar-sweetened beverages?*

Interested parties disagree as to which First Amendment test applies to government imposed product labeling due in large part to two cases with roots in Vermont: *International Dairy Foods Ass'n v. Amestoy (IDFA)* and *National Elec. Mfrs. Ass'n v. Sorrell (NEMA)*.[29] Under *IDFA*, the Second Circuit applied the *Central Hudson* test and held that Vermont's law requiring milk to be labeled to disclose whether it contained rBST violated the Constitution. That court held that consumer curiosity regarding the composition of milk was not a substantial interest directly related to the labeling requirement. Conversely, in *NEMA*, the Second Circuit applied the *Zauderer* test to hold that Vermont's law requiring that light bulbs be labeled to disclose whether they contain mercury did not violate the Constitution. The *NEMA* court attempted to distinguish

[22] *Id.*; Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).
[23] *See supra* note 21.
[24] *Id.*
[25] International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2nd Cir. 1996).
[26] *See* Zauderer *supra* note 22 at 651.
[27] *Id.*
[28] *Id.*
[29] *See supra* note 25; National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2nd Cir. 2001).

the *IDFA* decision by providing that *IDFA* was expressly limited to cases where the state disclosure requirement is supported by no other interest than the gratification of consumer curiosity. In light of these two decisions, it remains unclear as to which First Amendment test a court would employ if a law on the labeling of sugar-sweetened beverages was challenged.

*3. Commerce Clause*

The Commerce Clause of the U.S. Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[30] This provision expressly enables Congress to regulate the flow of commerce among the states, and implicitly prohibits states from unreasonably regulating interstate commerce. The latter authority—the dormant Commerce Clause—restricts states from discriminating against out-of-state commerce in favor of in-state commerce and prohibits states from imposing regulations that excessively restrain interstate commerce. The proposed labeling of sugar-sweetened beverages would impact all beverage manufacturers evenly regardless of whether their product is produced in or outside of Vermont. Therefore, the more relevant question is whether such a requirement imposes excessive restraint on interstate commerce.

The U.S. Supreme Court in *Pike v. Bruce Church, Inc.* established the following standard for determining whether a state regulation improperly interferes with interstate commerce: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[31] In other words, the two-prong *Pike* balancing test seeks to weigh: (a) whether a challenged law is designed to "effectuate a legitimate local public interest;" and (b) the impact of the challenged law on interstate commerce.[32]

(a) *Legitimate Public Interest*

In general, courts have been hesitant to call into question those proffered local interests that are the basis of state regulation. As a result, the scope of those interests that have been upheld by the courts as legitimate public interests is fairly broad. This is particularly true with regard to traditional public health interests.[33] Consequently, the proposed labeling of sugar-sweetened beverages would likely stand a fair chance before a court of "effectuating a legitimate local public interest"—that is warning consumers about the potential health implications caused by these beverages—so long as the proffered interest is not suspected of cloaking a more protectionist motivation.

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[30] U.S. CONST. art. I, § 8, cl. 3.
[31] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[32] *Id.*
[33] *See* Fort Gradiot Sanitary Landfill v. Mich. Dep't of Natural Res., 504 U.S.353, 366 (1992) ("…we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other."); Lorilland Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (recognizing that a state's interest in preventing underage tobacco use "is substantial, and even compelling").

(b) *Impact on Interstate Commerce*

Under *Pike*, a court balances a state's proffered interest against the impact of the regulation on interstate commerce. If the impact is negligible, the law will likely stand.[34] However, where there is a more significant impact, the court must weigh the level of burden on interstate commerce against the benefits of the law.[35] Knowing that the court gives heavy weight to traditional public health interests is only partially helpful in determining the outcome of this balance, as jurisprudence has been somewhat inconsistent on this matter.

Opponents of a health warning on sugar-sweetened beverages will likely argue that the proposed law excessively burdens interstate commerce because it has an extraterritorial effect, may conflict with requirements imposed by other states, and may also lead some producers to terminate their business in the State. Proponents, however, will likely again refer to the *NEMA* case referenced above. In *NEMA*, the U.S. Court of Appeals for the Second Circuit held that the required labeling of light bulbs containing mercury did not constitute an excessive impact on interstate commerce in that it did not conflict with the laws of other states, because no other state had a similar requirement.[36] Additionally, the court found that the labeling law did not have an extraterritorial effect because producers were free to leave the market or free to market one product in Vermont and other products in other states.[37] Similarly, the U.S. Supreme Court found in *Minnesota v. Clover Leaf Creamery Co.* that a shift in industry from one producer to another or removal of some producers from the market as the result of a law was not in itself an excessive burden on commerce.[38]

In the case of a sugar-sweetened beverage label it remains challenging to predict how a court would rule. However, existing judicial precedent suggests that such a label may survive a challenge on interstate commerce grounds, particularly given that no other state has yet to pass a law creating a similar warning requirement.

[34] *See supra* note 31.
[35] *Id.*
[36] National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2nd Cir. 2001).
[37] *Id.*
[38] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).