Time to End the Chaos: A Call for Regulatory Reform on the Online Food Labeling System

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INTRODUCTION

It is a sunny day. You wake up and pick up your phone, planning to do some grocery shopping in preparation for the holiday season. You open Instacart, a mobile app that offers same-day grocery delivery to your door. You click on Chips Ahoy! Cookies. Just as you would in-store, you look for the nutrition facts labels and ingredient lists. Here you have two choices: one is to swipe over seven pictures to reach the nutrition facts and then click to zoom in to see the tiny words; the other is to scroll down over advertisements such as "picked for you," "related items," and "often bought with" to reach the nutrition facts along with a long description full of marketing language.[1] You exit and then click on Clancy's Butter Microwave Corn. There is no option to swipe or scroll. All you have is a single picture of the front package and nothing else.[2] There is a tiny nutrition facts table in the lower-left corner, but it is too blurry to be seen clearly.[3] You try to use a filter to access low-sodium products only to find that there is no such thing available. You have to rely on your own knowledge to pick the right things for your family.

The COVID-19 pandemic changed Americans' way of living. Even before the pandemic, online purchases accounted for one-fifth of all expenditures on food, representing one dollar out of every five dollars spent.[4] The limiting of in-person shopping and the issuance of stay-at-home orders further facilitated the switch from in-person to online grocery shopping.[5] In August 2020, approximately twenty-nine percent of all US households were considered active users of online grocery shopping.[6] It has been estimated that even as the pandemic ends, fifty-five percent of US consumers will pick up online grocery shopping by the end of 2024, and if the pandemic persists, the number will likely climb to sixty-six

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* J.D., Georgetown University Law Center (May 2023); L.L.B. & B.A., Beijing Normal University (2017).

1. *See* Appendix Figure I.
2. *See* Appendix Figure II.
3. *Id.*
4. Kelly Lienhard, *FDA Eyes Food Labeling Updates Amid Rise in Online Food Purchases*, 13 INSIDE HEALTH REFORM No. 29 (2021).
5. Mary Ellen Shoup, *Online Grocery Sales Stabilize as Market Enters New Growth Cycle with 'Large Base of Committed Shoppers,'* FOOD NAVIGATOR-USA (Sep. 10, 2020, 3:54 PM), https://www.foodnavigator-usa.com/Article/2020/09/10/Online-grocery-sales-stabilize-as-market-enters-new-growth-cycle-with-large-base-of-committed-shoppers?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright [https://perma.cc/7L38-THML].
6. *Id.*

percent.[7] Even though some shoppers may go back to in-person shopping after the pandemic, online grocery shopping will likely continue to have a profound impact on people's lives.[8]

The pandemic has resulted in a shift in habits that will bring about lasting changes, and the increase in noncommunicable diseases (NCDs) is one of them.[9] Worse still, the neglect in NCD management may exacerbate the spread of COVID-19 and further increase the global health burden by creating a dual pandemic.[10] NCDs represent the primary cause of death worldwide and stand as "one of the major health challenges of the 21st century."[11] The annual death toll from NCDs is forty-one million people, comprising seventy-one percent of all deaths.[12] Unhealthy diets, along with tobacco use, alcohol consumption, and physical inactivity, remain some of the biggest risk factors for NCDs.[13] This is especially true in the United States, where over one-third of adults and over twenty percent of adolescents are obese, and these numbers are projected to grow.[14]

Full and consistent disclosure of nutrition information, along with easy and equal access to information, are necessary to encourage people to make healthy diet decisions.[15] The scenario mentioned above demonstrates the common hardship people encounter in online grocery shopping due to inadequate food labeling disclosure for nutrition, ingredient, and allergen information. The US Constitution authorizes the government to promote public welfare[16] but also limits this power by preserving individual liberties.[17] Although eating habits are personal and cannot be interfered with by the government, public authorities can

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7. Daniel Keyes, *The Online Grocery Report: Coronavirus is Accelerating US Online Grocery Shopping Adoption – Here are the Market Stats, Trends and Companies to Know*, INSIDER (Feb. 3, 2021, 11:41 AM), https://www.businessinsider.com/online-grocery-report-2020 [https://perma.cc/Q39K-HZXB].

8. *See id.*

9. The World Health Organization (WHO) defines the term NCD as "a group of conditions that are not mainly caused by an acute infection, result in long-term health consequences and often create a need for long-term treatment and care." World Health Org. [WHO], *Noncommunicable Diseases Fact Sheet* (Apr. 13, 2021) [hereinafter *WHO Fact Sheet*]; *see* Sarah Musa, Ismail Dergaa, Veronica Bachiller & Helmi Ben Saad, *Global Implications of COVID-19 Pandemic on Adults' Lifestyle Behavior: The Invisible Pandemic of Noncommunicable Disease*, INT'L J. OF PREVENTIVE MED. 2023;14:15, 6 (2023).

10. *See* Tea Collins, Juan Tello, Menno Van Hilten, Lina Mahy, Nicholas Banatvala, Guy Fones, Svetlana Akselrod, Fiona Bull, Alarcos Cieza, Jill Farrington, Jack Fisher, Cristina Gonzalez, Jaimie Guerra, Fahmy Hanna, Zsuzsanna Jakab, Alexey Kulikov, Khalid Saeed, Nisreen Abdel Latif, Bente Mikkelsen, Nasim Pourghazian, Giuseppe Troisi & Juana Willumsen, *Addressing the Double Burden of the COVID-19 and Noncommunicable Disease Pandemics: A New Global Governance Challenge*, INT'L J. HEALTH GOVERNANCE, vol. 26 no. 2, 199, 200 (2021).

11. World Health Org. [WHO], *Noncommunicable Diseases Country Profiles 2018*, at 10 [hereinafter *WHO Country Profiles*].

12. *WHO Fact Sheet*, *supra* note 9.

13. World Health Org. [WHO], *Time to Deliver: Report of the WHO Independent High-Level Commission on Noncommunicable Diseases*, at 7 (2018).

14. *See WHO Country Profiles*, *supra* note 11, at 213.

15. *See generally* Melissa Ahern, Cheryl Brown & Stephen Dukas, *A National Study of the Association Between Food Environments and County-Level Health Outcomes*, 27 J. OF RURAL HEALTH 367, 369 (2011).

16. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to . . . provide for . . . general welfare of the United States").

17. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 78 (2000).

and should promote public health by honoring people's choices to have a healthier life.[18]

This Note analyzes US food labeling requirements in the context of online grocery shopping. It begins by examining the problems of the current online food labeling conventions, highlighting their inadequacies and the disproportionate impact on certain ethnic groups and communities with lower incomes. It also assesses the regulatory power and the weaknesses within the enforcement system. This Note then puts forth a series of proposed solutions, such as creating new online food labeling regulations, strengthening the FDA's enforcement system, modifying the ABA *Model Rules* to enable lawyers to report public health risks, and establishing a multisectoral mechanism to raise public awareness on these issues. Ultimately, this Note concludes that it is crucial to create a comprehensive food labeling system that honors people's choices to live a healthier life, and collaboration between the FDA, the legal community, NGOs, and society is necessary to achieve this goal.

I. PROBLEMS WITH CURRENT ONLINE FOOD LABELING CONVENTIONS

Problems with online food labeling exist in two dimensions: regulation and enforcement. In-store packaged foods follow a universal standard for displaying certain information on their labels, including a statement of identity, a net quantity of contents, nutrition labeling, an ingredient declaration, and the name and place of business of the manufacturer, packer, or distributor.[19] However, there is no such standard for online food labeling.[20] This vacuum in regulation results in inadequacy and discrepancy in disclosure, which disparately affects people's ability to make healthy dietary choices.[21] The weak enforcement system of food labeling regulation also contributes to the problem.[22] In addition, technology companies play a key role in the creation of online food labels, and it is unclear whether they can be regulated under the current legal framework.

A. LACK OF A UNIVERSAL STANDARD

The United States has two layers of food labeling regulations: federal and state, and most state laws are patterned after federal law.[23] This Note will only examine food labeling regulations at the federal level. Generally, three agencies share the power of non-alcohol food labeling: the Food and Drug Administration ("FDA"), the United States Department of Agriculture ("USDA"), and the Federal Trade

18. *See id.*

19. 21 U.S.C. § 343(e), (i), (q); 15 U.S.C. §§ 1453, 1454, 1459.

20. NYU, *Food Labeling is Lacking in Online Grocery Retailers,* NYU NEWS (Jan. 20, 2022), https://www.nyu.edu/about/news-publications/news/2022/january/food-labeling-is-lacking-in-online-grocery-retailers.html [https://perma.cc/8EFT-TS6F].

21. *See id.*

22. *See generally* Michael Snow, *Seeing Through the Murky Vial: Does the Fda Have the Authority to Stop Compounding Pharmacies from Pirate Manufacturing?*, 66 VAND. L. REV. 1609, 1638 (2013).

23. Practical Law Commercial Transactions, *FDA Food Labeling: Overview*, WESTLAW, Note 4-572-8098, at 23.

Commission ("FTC").[24] Within these three agencies, the FTC plays a complementary role by coordinating with the other two to prevent unfair or deceptive acts in food labeling.[25] Meat, poultry, and processed eggs fall under the primary jurisdiction of the USDA, and the FDA has primary authority to regulate all other food products sold in the United States.[26]

The FDA acquires its authority on food labeling from the Federal Food, Drug, Cosmetic Act ("FDCA"), which "gives [the] FDA the responsibility to protect the public health by ensuring that. . . foods are safe, wholesome, sanitary, and properly labeled."[27] The FDCA defines the scope of food regulation, provides the basis of national nutrition labeling, and provides penalties in the case of noncompliance.[28] There are two other major laws governing food labeling: the Fair Packaging and Labeling Act ("FPLA") and the Nutrition Labeling and Education Act ("NLEA").[29] The NLEA, signed in 1990 as a reaction to the concern between diets and disease, introduced the requirement of uniform nutrition labeling.[30] The FPLA provides detailed regulations regarding the content labeling.[31] Over the years, the FDA also created supplemental regulations and guidelines to update and specify these laws, codified in the Federal Code of Regulations Title 21 Part 101.[32] Additionally, the FDA has issued guidance documents for industries as representations of the FDA's current thinking on certain topics.[33] For example, from 2020 to 2022, eighty-four guidelines were issued in response to the COVID-19 public health emergency.[34] They are viewed as the FDA's quick reactions to rising social concerns.[35] However, they are not legally binding, and industries are free to choose alternate approaches.[36]

The laws, regulations, and supplemental guidelines mentioned above created a comprehensive and uniform national standard on in-store food labeling. However, currently, there are no corresponding regulations in place for food sold

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24. BRANDON W. NEUSCHAFER, RECENT DEVELOPMENTS IN FOOD AND DRUG LAW 1–2 (2014).

25. *See id.* at 2.

26. *Id.*

27. Robin Kundis Craig, *Labeling Genetically-Engineered Foods: An Update from One of the Front Lines of Federalism*, 47 ENV'T L. 609, 619–20 (2017).

28. *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 333, 341, 343-1.

29. *Food Labeling in the United States,* AGQ LABS (June 10, 2020), https://www.agqlabs.us.com/food-labeling-in-united-states/ [https://perma.cc/QAD6-74CJ].

30. *See* Nutrition Labeling and Education Act, 21 U.S.C. § 343.

31. *See* Fair Packaging and Labeling Act, 15 U.S.C. § 1453.

32. 21 C.F.R. §§ 101.22 *et seq*.

33. *See, e.g.*, FDA, GUIDANCE FOR INDUSTRY: TEMPORARY PERMITS FOR INTERSTATE SHIPMENT OF EXPERIMENTAL PACKS OF FOOD VARYING FROM THE REQUIREMENTS OF DEFINITIONS AND STANDARDS OF IDENTITY, NOV. 2021, https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-temporary-permits-interstate-shipment-experimental-packs-food-varying-requirements [https://perma.cc/P36F-3WNX].

34. FDA, COVID-19-RELATED GUIDANCE DOCUMENTS FOR INDUSTRY, FDA STAFF, AND OTHER STAKEHOLDERS, MAR. 2023, https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-related-guidance-documents-industry-fda-staff-and-other-stakeholders [https://perma.cc/M5KK-LYUN].

35. K.M. Lewis, *Informal Guidance and the FDA*, 66 FOOD & DRUG L.J. 507, 539 (2011).

36. *Id.* at 508.

in online grocery stores.[37] In August 2021, the Food Labeling Modernization Act of 2021 ("FLMA") was introduced to Congress by Representative Frank Pallone, Jr.[38] As of April 2023, the bill is still pending review.[39] The FLMA aims to "amend the [FDCA] to strengthen requirements related to nutrient information on food labels . . . ."[40] Specifically, in section 16, the FLMA proposed extending the disclosure of information to the sale of food online.[41] Although this may represent a conscious effort to regulate food labeling in the online context, this bill is still primarily focused on front-of-package nutrition labeling, with only one section, consisting of three sentences, addressing online food labeling.[42] The format requirements for in-store labeling, such as proximity, font size, and font types, have not been modified to be readily applicable in the online context.[43] As a result, the proposed regulation about online food labeling appears to be nothing more than a cursory addition and is insufficient to establish a universal standard ready for implementation.[44]

Thus, with the expansion of the online market and the rapid increase of variety in online grocery stores, the disclosure regarding nutrition facts, ingredients, and allergens still remains largely unregulated and varies from site to site.[45] The inadequate disclosure resulting from the lack of regulation will discourage healthier food choices and ultimately harm public health.

1. HARMFUL CONSEQUENCES DUE TO LACK OF REGULATION

One consequence of the lack of regulation is that the information is either missing or is disclosed in inappropriate ways. Sometimes, as discussed in the example of Clancy's Butter Microwave Corn above, there is no disclosure available at all. Based on the author's observation, when there is accessible information, food labels are generally disclosed online in several ways: (1) disclosure by photos of the actual package, though sometimes the photo is too vague to be seen clearly, and other times accessing the photo requires at least five swipes; (2) disclosure by listing a nutrition facts table and the ingredients in the "product details" column, accompanied by intensive marketing languages of the same font and size, which makes it overwhelming and difficult for consumers to distinguish and understand; (3) disclosure by listing categorized labels under the product image, but it remains unknown whether the labels are retailer-specific or they come from an FDA-approved national standard. The lack of universal food labeling disclosure standards in online grocery stores—which allows inadequate or no disclosure—

37. NYU, *supra* note 20.

38. Food Labeling Modernization Act of 2021, H.R. 4917, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/4917 [https://perma.cc/97VH-WB34].

39. *Id.*

40. *Id.*

41. *See id.*

42. *Id.*

43. *Id.*

44. *See generally id.*

45. NYU, *supra* note 20.

significantly undermines consumers' right to access information and makes it hard for people to make informed choices.[46]

Although the retailers can use the technology to create quick access to healthier products, such as designing the platform in a way that highlights healthy tags or creating extra filters that lead to healthy food, they generally do not choose to do so.[47] Virtual aisles (and labels indicating healthier choices) are sometimes available, but they are far less effective compared to those in a physical store.[48] Research has shown that consumers tend to make quick decisions while doing grocery shopping online; it usually takes a consumer only about ten seconds to make the selection.[49] As online shopping reflects a desire for efficiency, the absent or improper disclosure of nutrition information not only fails to promote healthy diets but effectively discourages people from making healthy choices.

This vacuum in regulation also brings disparate impacts on minority groups and communities with lower income. First, the lack of disclosure makes it hard for people who have to rely on online grocery shopping to make healthy choices.[50] Research shows that non-white and lower-income neighborhoods are more likely to have limited access to grocery stores with affordable and nutritious food.[51] Also, lower-income groups are more likely to experience a lack of public or private transportation.[52] These barriers to accessing healthy food for lower-income groups are exacerbated by the pandemic. Due to the higher risk of disease transmission associated with public transportation during the pandemic, lower-income communities with limited car ownership have to rely more on online grocery shopping.[53] Consequently, the inadequate disclosure offered in online grocery stores will fall on these communities, leading to a disparate increase in NCDs in the long run. Second, the inadequate disclosure by certain ethnic online grocers has a disparate impact on certain minority groups. For example, on Weee! and FreshGoGo, which are both online grocers catering to Asian

46. International law and the US Constitution both recognize people's access to information. *See e.g.*, Universal Declaration of Human Rights art. 19; Jennifer D. Jones, *A New Paradigm for Protection: First Amendment Principles and the Environment*, 69 WASH. L. REV. 183, 188 (1994) (arguing that the government cannot restrict public access to information). Although the government does not have an affirmative duty to supply information to the public, here the government's inaction regarding online food labeling arguably serves as a *de facto* limit on people's access to information because in-store food labeling is otherwise available.

47. *See generally* Gina Acosta, *Physical Stores Shouldn't Take Backseat to Digital,* PROGRESSIVE GROCER (Apr. 12, 2022), https://www.progressivegrocer.com/physical-stores-shouldnt-take-backseat-digital [https://perma.cc/W4FW-UYT8].

48. *See generally id.*

49. *See* Zachary Anesbury, Magda Nenycz-Thiel, John Dawes & Rachel Kennedy, *How do Shoppers Behave Online? An Observational Study of Online Grocery Shopping*, J. CONSUMER BEHAV., 15: 261, 262 (2016).

50. *See* NYU, *supra* note 20.

51. *See* Annie Goyanes & Jeffrey Matthew Hoch, *Using Ecological Diversity Analyses to Characterize the Availability of Healthy Food and Socio-Economic Food Deserts*, INT. J. ENV'T RSCH. PUB. HEALTH 18 (19):10297, 8 (2021); *see also* Allison Karpyn, Candace Young & Stephanie Weiss, *Reestablishing Healthy Food Retail: Changing the Landscape of Food Deserts*, CHILDHOOD OBESITY, vol. 8, no. 1 28, 28 (2012).

52. *See* Goyanes & Hoch, *supra* note 51, at 1.

53. *See* Hannah Younes, Robert B. Noland & Wenwen Zhang, *Browsing for Food: Will Covid-induced Online Grocery Delivery Persist?*, REG'L SCI. POL'Y & PRAC., doi: 10.1111/rsp3.12542, 14 (2022).

American audiences, nutrition facts for many products are either missing or provided through photos of the actual packaging. This often requires extra swipes and clicks, and sometimes the information is too vague to be seen clearly.

B. DIFFICULTY IN REGULATION

It is not hard to imagine the huge impact on NCD prevention if there were comprehensive regulation and an enforcement mechanism on food labeling in online grocery stores. However, even though there is already a national standard of nutrition information disclosure in physical stores, it is not easy to put corresponding regulations in place for food sold online.[54] The difficulty in regulation exists in two parts: the power to regulate and the power to enforce.

1. POWER TO REGULATE: CONTROVERSY REGARDING TECHNOLOGY COMPANIES

It remains unclear whether the FDA has the power to regulate the technology companies involved in online food labeling. Under FDCA, the FDA possesses the authority to mandate any necessary labeling requirements "for the purpose of promoting honesty and fair dealing in the interest of consumers."[55] Therefore, the FDA can impose labeling requirements on food companies.[56] The Affordable Care Act ("ACA") extended the FDA's power to regulate "restaurant menus, grocery stores, and vending machines."[57] The FDA's power to regulate food labeling in physical stores is unquestionable, as the regulation only involves food manufacturers and retailers, both of which are explicitly within the FDA's regulating authority. Online label disclosure takes one further step that requires technology companies' involvement, and it is unclear from the statutes whether the FDA could regulate their behavior.

Nevertheless, although not explicitly granted, the FDA arguably has implied authority to regulate technology companies regarding online food labeling for two reasons. First, the FDA has been placed in a "policing" role, and there has been precedent of it seeking to expand its authority in labeling issues.[58] By requiring technology companies to provide support in compliance with label disclosure regulations, the FDA is arguably exercising its power within FDCA—namely, "promote honesty and fair dealing in the interest of consumers"—by promoting consumer interests through facilitating healthy choices.[59] The FDA is not regulating technology companies; these companies are still free to choose whether or not to collaborate with grocery stores and can continue to operate their other

54. *See generally* NYU, *supra* note 20.

55. Craig, *supra* note 27, at 620.

56. *See generally id.*

57. REED D. RUBINSTEIN, DEFENDING WHAT MATTERS: EFFECTIVELY HANDLING FOOD AND DRUG CLAIMS IN A DYNAMIC REGULATORY AND PUBLIC RELATIONS ENVIRONMENT 2 (2013).

58. INST. OF MED. (US) & NAT'L RSCH. COUNCIL (US) COMM., A FRAMEWORK FOR EVALUATING SAFETY (2005), https://www.ncbi.nlm.nih.gov/books/NBK216048/ ("Debate about what constituted 'labeling' ensued as FDA attempted to broaden labeling to include books and other materials.") [https://perma.cc/3TBG-2FLC].

59. *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 341.

programs without FDA oversight. Even within the ambit of online food labeling, the FDA's regulation on technology companies would be ancillary and minimal, which only requires them to provide the necessary support to make nutrition information available and accessible to consumers. Second, the FDA has recognized and made efforts to engage technology companies in other aspects.[60] In 2017, the FDA launched the emerging technology program, which invites pharmaceutical companies with proposed technologies to engage in early engagement and discussion with the FDA.[61] Companies participating in the program can meet with program members to discuss regulatory issues that a new manufacturing technology may face at an early stage.[62] It is notable that the "manufacturing technology" here is explicitly defined to include technology in packaging and labeling operations.[63] Although this program targets the drug industry and is nonbinding, it indicates the FDA's capacity to engage technology companies in the promotion of public health.[64] Even if the FDA cannot impose obligations directly on technology companies in the context of online food labeling, this practice shows the possibility of imposing softer regulation on retailers to encourage their coordination of the collaboration between the FDA and technology companies.

2. POWER TO ENFORCE: A WEAK ENFORCEMENT SYSTEM FOR LABELING VIOLATIONS

Even assuming that the FDA has the power to regulate both retailers and technology companies in online grocery shopping, the weak power to enforce its labeling regulations remains another difficulty. Enforcement actions of FDCA can be civil or criminal.[65] The FDA can use administrative tools to enforce the Act, including issuing warning letters to firms to request a written response to correct the violations, import alerts, recalls, and debarments.[66] The FDA can also seek judicial actions including civil money penalties, seizures, and injunctions.[67] For more serious violations, the FDA can also initiate criminal prosecutions.[68] Private actions are not available under the FDCA,[69] but food manufacturers using false or misleading labels can be sued by consumers and competitors based on tort liability, state consumer protection acts, and the Lanham Act.[70] Although the

60. *See generally* FDA, GUIDANCE FOR INDUSTRY: ADVANCEMENT OF EMERGING TECHNOLOGY APPLICATIONS FOR PHARMACEUTICAL INNOVATION AND MODERNIZATION, SEP. 2017, https://www.fda.gov/files/drugs/published/Advancement-of-Emerging-Technology-Applications-for-Pharmaceutical-Innovation-and-Modernization-Guidance-for-Industry.pdf [https://perma.cc/C5H7-GBXY].

61. *See id.* at 1.

62. *Id.*

63. *Id.* at 1 n.4.

64. *See generally id.*

65. Kathryn B. Armstrong & Jennifer A. Staman, *Enforcement of the Food, Drug, and Cosmetic Act: Select Legal Issues*, CONG. RSCH. SERV., 1 (2018).

66. *Id.* at 9–13.

67. *Id.* at 13–15.

68. *Id.* at 16.

69. *See* Jennifer L. Pomeranz, *A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labels*, 39 AM. J.L. & MED. 617, 619 (2013).

70. *Id.*

FDA has a variety of enforcement actions in place, they do not apply universally; different enforcement mechanisms apply to different products and issues.[71] Food safety remains the highest concern, which can lead to the most serious sanctions.[72] Mislabeling claims, which may cause NCDs and increase public health burden in the long term, rarely rise to the level of immediate safety threats.[73] Thus, the FDA can practically only resort to issuing warning letters to put companies on notice of food labeling violations, which essentially relies on companies' voluntary compliance.[74] Although non-compliance may theoretically bring further enforcement actions and non-complying companies may risk losing reputational capital, warning letters still represent a very weak mechanism, as many companies never "close out" the matter as procedurally required.[75] Therefore, even if there is an online food labeling regulation in place, the weak enforcement system on mislabeling claims is another obstacle that impedes the regulation's ability to effectively facilitate healthy diets and prevent NCDs.

II. PROPOSED SOLUTIONS

The correlation between unhealthy diets and NCDs urges the government to take actions to facilitate, or at least not restrict, access to healthier choices. The lack of regulation, together with the difficulty in regulation, calls for a revolution for a new and comprehensive system to regulate online food labeling. The problems exist in every stage: the design of the regulation, the enforcement of the regulation, and the creation of a social atmosphere that values public health promotion. And the proposed solutions should address each stage accordingly: there should be regulations in place for online labeling, an effective enforcement scheme, and a multistakeholder mechanism calling for positive public involvement.

A. CLOSE THE GAP: CREATE ONLINE FOOD LABELING REGULATION

1. A CALL FROM LEGISLATIVE HISTORY

The creation of online labeling regulation is supported by legislative history. While food regulations have always been closely related to public health promotion, the emphasis has not always been the same throughout history. Since the early 1900s, adulteration has been the main focus of food regulation. In 1901, twelve volunteers, named "The Poison Squad," agreed to participate in an experiment led by Dr. Harvey Wiley, where they would eat food with commonly used but untested additives.[76] This experiment drew public attention, for the first time,

71. *See* Nicole E. Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, BROOKS GOVERNANCE STUD., 3–4 (2014).

72. *See id.*

73. *Id.*

74. Pomeranz, *supra* note 69, at 619.

75. *See* Snow, *supra* note 22, at 1637–39.

76. Amy-Lee Goodman, *A "Natural" Stand Off Between the Food and Drug Administration and the Courts: The Rise in Food-labeling Litigation & the Need for Regulatory Reform*, 60 B.C. L. REV. 271, 276 (2019).

to food additives that may cause serious health consequences.[77] Upton Sinclair's book, *The Jungle*, exposing the meat packaging industry, as well as the findings from "The Poison Squad," were influential in further raising public outrage, which urged Congress to enact the Pure Food and Drug Act of 1906 ("PFDA"), the first law to prohibit the manufacture of "misbranded food."[78] In 1938, the FDCA further expanded the prohibition on "adulteration, misbranding, and false advertising."[79]

After World War II, the focus of food regulation gradually shifted to the protection of public health.[80] During the 1970s, the exposure to scientific research showing the correlation between food and diseases began to slowly structure American people in their dietary choices.[81] The government also reacted by shifting its focus from malnutrition to healthy eating in national conferences and educational programs.[82] In the 1980s, multiple dietary guidelines were issued by the government to help Americans make educated dietary choices.[83] The public consciousness among Americans regarding the causal link between unhealthy diet and NCDs, as well as the unverified health claims by manufacturers on food labels, called for a new push in legislation for a uniform national standard on food labeling.[84] In 1990, Congress created the NLEA to ensure that customers could access "scientifically valid, truthful, reliable, understandable, and non-misleading [information] in order to foster more healthy choices."[85] By enacting the NLEA, the FDA committed to making the food label "an important public health tool."[86] The uniform labeling standard, along with the education programs, equipped consumers with the knowledge and confidence to make healthy choices.

The confidence in food labels and the ability to rely on accurate and clear labels to make dietary choices should not be diminished in the new era of online grocery shopping. Just like before 1990, when the unregulated food labels created confusion to the public, the current unregulated online label disclosure is barring the public from access to valid and understandable nutrition information. Likewise, creating new regulations on online food labeling is necessary to close the gap. The regulation will create a uniform standard that treats retailers equally. Consumers will be granted equal access to nutrition information, regardless of their shopping choices. The regulation will also help create an innovative

77. Kevin A. Robinson, *Has the Government Failed to Protect Us? A Discussion of HFCs & Other Added Sugars*, 14 J. HEALTH & BIOMEDICAL L. 365, 371 (2018).

78. *See id.* at 372–73.

79. James Springer, *The Success of the Citizen Suit: Protecting Consumers from Inaccurate Food Labeling by Amending the Federal Food, Drug, and Cosmetic Act*, 68 FOOD & DRUG L.J. 401, 403 (2013).

80. *See* Goodman, *supra* note 76, at 279–80.

81. *Id.*

82. *See* Fred R. Shank, *the Nutrition Labeling and Education Act of 1990*, 47 FOOD & DRUG L.J. 247, 248 (1992).

83. *See id.*

84. Robinson, *supra* note 77, at 375–76.

85. *Id.*

86. *See* Shank, *supra* note 82, at 250.

environment that favors web pages designed for easy and quick access to healthy choices. People who care about their health should not be deprived of access to food labels simply because they choose to shop online, and new regulations are necessary to fill this gap.

2. ONLINE FOOD LABELING REGULATION IS COMPATIBLE WITH EXISTING LEGAL FRAMEWORKS

The creation of the online labeling regulation is also compatible with existing laws. The ACA, enacted in 2010, amended the FDCA and extended FDA's power to regulate "restaurant menus, grocery stores, and vending machines."[87] In compliance with the requirement, the FDA issued rules requiring that calorie information be listed on menus in chain restaurants, retail food establishments, and vending machines.[88] The rules are another example illustrating the broad power the FDA has in regulating food labeling, and they provide the legal basis to extend food labeling regulation to retailers online. Purchasing from vending machines resembles online grocery shopping in many aspects, and the vending machine labeling requirements can be effective in online food labeling in similar ways. Therefore, through parallel reasoning, the vending machine labeling requirements provide helpful insights into possible future online food labeling regulations.

Purchasing from a vending machine is similar to purchasing from an online grocery store. First, both can be viewed as extended forms of traditional in-store purchase as a result of the advancement of technology, and both are becoming increasingly common in people's life. Second, both forms aim at efficiency, at least in the grocery context.[89] Third, in both cases, consumers can only view the product as depicted and have no other way of accessing nutrition information before making the purchase. Lastly, retailers and operators can control whether and how to disclose nutrition information to consumers.

Given the similarities analyzed above, the vending machine labeling requirements are particularly instructive for online food labeling regulation by demonstrating how similar ends can be achieved in a similar form. Although there are still many differences between vending machine purchases and online grocery shopping, the vending machine requirements provided some common principles. The regulation mandates "clear and conspicuous" declarations to be "placed prominently" on the vending machine, and the "declaration must be displayed before the prospective purchaser makes his or her purchase."[90] This applies perfectly to online food labeling, since the entire idea of disclosure is to make the information clear, conspicuous, and easy to access before the prospective purchaser makes his or her choice. The regulation also requires the declaration be "placed

87. RUBINSTEIN, *supra* note 57, at 2.
88. 21 C.F.R. §§ 101.8, 101.11.
89. *See* Anesbury et al., *supra* note 49, at 261–62.
90. 21 C.F.R. § 101.8(c)(2)(ii).

in close proximity to the food or selection button," and "must be in a type size large enough to render it likely to be read and understood by the prospective purchaser."[91] The rule of proximity can be mirrored in online food labeling to eliminate the extra swipes and scrolls necessary to reach the nutrition information, and the "read-and-understood" rule can be effectively used to prohibit disclosure by unclear photos that are impossible to be read and understood by prospective purchasers. It is worth noting that although the requirements detailed some manners to be followed in vending machine labels, the manners are not rigid standards and still offer a considerable level of flexibility, which too can be applied in online food labeling regulation to preserve the uniqueness and diversity of different retailers.

Online grocery retailers should not be left without regulation. Given the similarities between vending machine purchase and online grocery shopping, creating online food labeling regulation is not really one step further but an action within the current legal framework to close a loophole that hinders people from making healthy life choices. If the vending machine labels could and should be regulated, then food labels in online grocery stores could and should be regulated, too.

3. FDA'S OPTIONS

There are several ways to create corresponding online food labeling regulations based on existing in-store labeling requirements. The FDA could use formal or informal rulemaking to close this gap, or it could issue non-binding industry guidance to help clarify the requirement. Congress delegates interpretive and regulatory authority to federal agencies.[92] The Administrative Procedure Act ("APA") sets forth the regulations for federal agency rulemaking.[93] The APA imposes certain procedural requirements in federal agency rulemaking.[94] Both formal and informal rulemaking require agencies to go through a "notice-and-comment" process, in which the agencies will provide notice and accept comments from the public to be incorporated into the final rule; formal rulemaking involves an additional trial-like hearing process.[95] The rulemaking process is generally long and costly, but it helps the FDA address public concerns, which promotes public acceptance of its directives.[96] Also, the procedural safeguards create binding rules.[97] On the other hand, the informal industry guidance lacks the procedural safeguards imposed on the rulemaking process by the APA and is

91. *Id.*

92. Lewis, *supra* note 35, at 507.

93. RUBINSTEIN, *supra* note 57, at 4.

94. *See id.*

95. *Id.*

96. *See* Brett M. Paben, *Lack of Interest in Consumer Interests: FDA's Narrow Perspective on Food Labeling and Label Statements Undermines a Century of Agency Leadership*, 13 RUTGERS J.L. & PUB. POL'Y 174, 175 (2015).

97. *See id.* at 195–96; *see also* Andrew Dietrick & Jonathan Stroud, *Rules to Bind You: Problems with the USPTO's PTAB Rulemaking Procedures*, 51 N.M. L. REV. 430, 435 (2021).

non-binding in nature.[98] As another option, the industry guidelines' relatively easy and fast implementation procedure enables the FDA to utilize them as a rapid response to emerging issues.[99] As technology advances quickly, a rule made through the rulemaking process might already be outdated by the time it becomes final.[100] And the guidelines offer great flexibility to cope with the ever-changing food industry.[101] The major drawback of the guidelines is that they are non-binding, but they generally would receive judicial deference post-*Chevron*.[102] The FDA has used the guidelines aggressively in the past and because they represent the FDA's current thoughts on select topics, they often have "rule-like effects on regulated entities."[103]

B. STRENGTHEN THE POWER OF FDA: A DETERRENCE-BASED ENFORCEMENT SYSTEM

As discussed above, the FDA has different enforcement mechanisms for different products and types of claims, and the enforcement of labeling violations is mainly done through the issuance of warning letters. Although the letters are sometimes cited as evidence of corporate misconduct in judicial proceedings, they still lack binding force and largely rely on voluntary compliance.[104]

Generally, there are two enforcement system models: the cooperative-compliance based system and the deterrence-based system.[105] In the cooperative-compliance based system, agencies partner with corporations to create an environment to support and facilitate their compliance.[106] In the deterrence-based system, agencies detect violations, correct them, and use penalties to deter future violators.[107] An example of the cooperative-compliance based system is that of the Environmental Protection Agency ("EPA"), which conducts on-site inspections to ensure compliance and withdraws any sanctions after compliance is achieved.[108] Nevertheless, unlike the EPA, the FDA's enforcement of food labeling violations should adopt a stronger enforcement system to ensure people's access to clear, accurate, and understandable information; facilitate healthful choices; and prevent NCDs at an early stage.

For food labeling violations, the FDA should strengthen the deterrence effect of its warning letters by imposing civil monetary penalties in the case of non-compliance by certain deadlines. In the case of overdue compliance, the FDA

98. *See generally* Paben, *supra* note 96, at 195–96.
99. Lewis, *supra* note 35, at 539.
100. *Id*.
101. *See id*.
102. *Id*. at 519.
103. *See id*. at 508.
104. *See* RUBINSTEIN, *supra* note 57, at 7.
105. *See* Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1186–88 (1998).
106. *Id*.
107. *Id*.
108. Pomeranz, *supra* note 69, at 638.

should resort to more serious sanctions.[109] There are a few reasons why a deterrence-based enforcement system is more desirable than the current system. First, the mission to protect public health requires the FDA to mandate compliance from the food industry and retailers rather than seek cooperation from them. Numerous research reports have shown the link between dietary choices and the prevention of NCDs.[110] A person's wish to live a healthier life is not only a personal choice that would benefit oneself but also an action beneficial to the family, the nation, and the world in the long run.[111] This choice should be respected. Corporations do not have the obligation to promote public health (although they may elect to do so) because their long-standing primary concern has been to "maximize profits at all costs."[112] As corporations do not have sufficient incentive to comply voluntarily, it is federal agencies' responsibility to close the gap between shareholder primacy and public health advancement through a stronger enforcement mechanism. Second, the unique feature of food labels makes it hard to mitigate existing harm when consumers have made the purchase based on inadequate or absent disclosure. It is impossible to overturn the potential harmful effect on health after consumers have made the purchase. Occasional inspections will not be as effective as civil monetary penalties in preventing mislabeling from happening. Therefore, a deterrence-based system would be better suited to be applied in online food labeling regulation. In addition, adding an extra layer of enforcement measures by imposing civil monetary penalties and deadlines of compliance incurs little cost to the FDA but can greatly increase the deterrence effect on companies by imposing pressure on them to react. The civil monetary penalties can also help cover the FDA's cost of enforcement and can support the FDA in fulfilling its scientific research tasks to further promote public health.[113]

C. ENGAGE THE OTHER SIDE: LAWYERS' ETHICAL DUTY IN PROMOTING PUBLIC HEALTH

1. THE NEED TO ENGAGE THE OTHER SIDE

Although the desire for a healthy life is shared by the majority of human beings, it does not mean every measure towards this end is easy to advance. Despite some recognition of the need for a comprehensive regulatory system in online food labeling,[114] a systemic approach to promote public health would require integrated actions across the society.[115] However, it is hard to build

109. *Id*. at 639.

110. *E.g*., *WHO Country Profiles*, *supra* note 11, at 10, 13.

111. *See generally id*.

112. David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html [https://perma.cc/K67Z-HHEX].

113. Pomeranz, *supra* note 69, at 646.

114. NYU, *supra* note 20.

115. *See* Cecile Knai, Mark Petticrew, Nicholas Mays, Simon Capewell, Rebecca Cassidy, Steven Cummins, Elizabeth Eastmure, Patrick Fafard, Benjamin Hawkins, Jorgen Dejgard Jensen, Srinivasa Vittal Katikireddi, Modi Mwatsama, Jim Orford & Heide Weishaar, *Systems Thinking as a Framework for Analyzing Commercial Determinants of Health*, THE MILBANK Q., vol. 96 no. 3, 472, 477 (2018).

interconnections between different stakeholders (e.g., researchers, NGOs, advocates, and social workers) because they use distinct methods from "a variety of sources and disciplines."[116] In addition, many of the efforts, including scientific research, administrative rulemaking, social campaigns, media exposure, and private litigation, are heavily resource dependent.[117] It is therefore more difficult to engage different stakeholders into a single and integrated power.

On the other side, the industries present a single voice against the implementation of new rules which would potentially harm their economic benefits.[118] Industries have been known to fund laboratories to provide scientific research that can weaken the link between unhealthy diets and NCDs or engage in lobbying to prevent or delay the implementation of certain regulations.[119] With wealth and resources in hand, the industry is able to interfere with administrative rulemaking to a significant extent.[120] There have been numerous critics of the lack of accountability in the process of federal agency rulemaking, which calls the federal agencies a "headless fourth branch of government."[121] This lack of accountability provides the ground for industry interference. The situation is made worse by the "revolving door" problem, where the change of employment between the government and private sector brings in additional power from the industry to the rulemaking process.[122]

Lawyers play a critical role in building a comprehensive online food labeling regulatory system since they comprise a profession that is present on both sides of this battle. Lawyers may work as consumer advocates in private litigation, seeking to obtain compensation for people who have been harmed and hold industries accountable for practices that endanger public health. On the other hand, lawyers may serve as legal counsel for the industries to help them navigate complex regulatory frameworks and ensure they comply with existing regulations while maximizing their economic benefits. Moreover, lawyers can be the key lobbyists that industries hire to directly influence the rulemaking process. Therefore, it will be particularly beneficial to engage lawyers from the other side by recognizing the ethical importance of reporting public health risks.

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116. *Id.*

117. *See generally* Joana Madureira Lima & Sandro Galea, *Corporate Practices and Health: A Framework and Mechanisms*, GLOBALIZATION AND HEALTH, vol. 14:21, 3 (2018).

118. *See generally* Knai et el., *supra* note 115, at 476 ("The adverse influence of corporate actors in public health policy—specifically in areas such as alcohol, tobacco, food and nutrition, and gambling—is well documented and there is a coherence of approaches across these industries.").

119. The funder sets the agenda, designs the research, owns the data, and reports the results selectively. Madureira Lima & Galea, *supra* note 117, at 7–8.

120. *See generally id.*

121. Norman L. Rave, Jr., *Interagency Conflict and Administrative Accountability: Regulating the Release of Recombinant Organisms*, 77 GEO. L.J. 1787, 1804–05 (1989).

122. Madureira Lima & Galea, *supra* note 117, at 3.

2. THE *MODEL RULES* AND THE PROBLEMATIC SILENCE

As a self-regulated profession, lawyers are held to higher ethical standards in both professional and personal lives.[123] This requires attorneys to comply with various ethical regulations that govern their professional conduct in the legal practice.[124] These regulations are typically outlined in their state's rules of professional conduct, which are often modeled after the American Bar Association ("ABA") *Model Rules of Professional Conduct* ("*Model Rules*").[125] The *Model Rules* address a wide range of matters concerning the relationship between clients and lawyers[126] and contain specific sections dedicated to other roles of a lawyer, such as serving as a third-party neutral or providing testimony as a witness.[127] Violation of the legal ethics rules results in disciplinary action, which could lead to sanctions such as "disbarment, suspension, probation, written reprimand, payment of costs or fees, and limitation of the nature of an attorney's future practice."[128]

In the context of food labeling regulation, the lawyers on the other side are likely counsels for the manufacturers and retailers. Counsels play a crucial role in assisting businesses with building and expanding their operations.[129] They provide legal guidance on a comprehensive list of matters, such as identifying and mitigating risks, structuring and negotiating transactions, and managing regulatory compliance.[130] Counsels need to stay up to date on changes to the regulatory system, help clients set expectations, and advise their clients on the potential impact of such changes. The *Model Rules* provide legal ethics guidelines as to whom counsels represent, what actions they can take during representation, and what steps to take when issues arise.[131] Model Rule 1.13 makes it clear that the organization is the lawyer's client.[132] This rule also explicitly requires that a lawyer for an organization "proceed as is reasonably necessary in the best interest of the organization,"[133] which aligns with the corporation management's fiduciary duty to maximize shareholder benefits.[134] Model Rule 1.2(d) sets the outer limit of the scope of representation, that "a lawyer shall not counsel a client to engage,

123. *See* MODEL RULES OF PROF'L CONDUCT pmbl. ¶¶ 5–7 (2018) [hereinafter MODEL RULES].

124. *See* Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 740–41 (2022).

125. *See id.*

126. *See* MODEL RULES.

127. MODEL RULES R. 2.4, 3.7.

128. Goldstein, *supra* note 124, at 741–42.

129. *See* Olga V. Mack, *Understanding (And Thriving In) The Role of An In-House Lawyer*, ABOVE THE LAW (Sept. 26, 2022, 3:02 PM), https://abovethelaw.com/2022/09/understanding-and-thriving-in-the-role-of-an-in-house-lawyer/ [https://perma.cc/M7F4-3JMA].

130. *See id.*

131. MODEL RULES R. 1.2, 1.13.

132. MODEL RULES R. 1.13(a).

133. MODEL RULES R. 1.13(b).

134. *See* Rutheford B Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 35–36 (2003).

or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[135] Model Rule 1.13 goes further and imposes a duty on the lawyer to bring a misconduct to the higher authority if the misconduct is likely to harm the organization.[136]

The corporate practices described in this article, including the intentional or unintentional exclusion of labeling information in the online context, do not violate any laws and are certainly not criminal. The corporate practices are also likely not "fraudulent" under the context of the *Model Rules*. "Fraudulent" is defined as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[137] The first prong cannot be satisfied, because there is no relevant law in place. Under the current *Model Rules*, Rule 1.13 remains the only other path. However, under Model Rule 1.13(b), the lawyer has a reporting duty only when the action is either related to "a violation of a legal obligation to the organization" or "a violation of law that reasonably might be imputed to the organization."[138] Essentially, this rule applies to managerial misconduct that is not in the best interest of the organization, not a collective, organizational, or industrial strategy that goes against the public interest.

The *Model Rules*' silence is problematic. Although the corporate practices do not fall into any categories where the *Model Rules* explicitly impose duties on lawyers to do or refrain from doing anything, it is important to recognize that this does not mean that these practices are acceptable or ethical, nor does it imply that they should be overlooked. It is possible that the law has just yet to catch up with new technological trends and address these practices explicitly. Actually, these practices could have negative consequences for consumers and potentially harm the reputation of the companies in the long run. The Preamble to the *Model Rules* acknowledges that a lawyer is "a public citizen having special responsibility for the quality of justice,"[139] "should seek improvement of the law,"[140] and that "the profession has a responsibility to assure that its regulations are conceived in the public interest."[141] It is a lawyer's duty "to serve society at large."[142] When lawyers engage in actions that impede public access to information, which will ultimately result in harm to public health, they are violating those fundamental principles.[143] By utilizing their specialized knowledge to support these harmful corporate practices, these lawyers are facilitating the obstruction of public

135. MODEL RULES R. 1.2(d).
136. *See* MODEL RULES R. 1.13(b).
137. MODEL RULES R. 1.0(d).
138. MODEL RULES R. 1.13(b).
139. MODEL RULES pmbl. ¶ 1.
140. MODEL RULES pmbl. ¶ 6.
141. MODEL RULES pmbl. ¶ 12.
142. Goldstein, *supra* note 124, at 745.
143. *See generally id.*

information by the organizations. The Preamble, while aspirational,[144] risks becoming empty words unless the *Model Rules* are amended to address the participation of lawyers in those corporate practices.

Making the change will also align with the current Rule 1.13(b), where lawyers are required to "proceed as is reasonably necessary in the best interest of the organization."[145] While the "best interest of the organization" may usually have been interpreted as maximizing shareholder return,[146] the statement declaring this old view, which had been in effect for 22 years, has been completely upended by 181 CEOs of major American corporations on August 19, 2019.[147] The Statement on the Purpose of a Corporation declared that "companies should serve not only their shareholders, but also deliver value to their customers, invest in employees, deal fairly with suppliers and support the communities in which they operate."[148] It demonstrates a broader movement in American business, where corporations are committed to "putting people before profits and generating positive societal impact."[149] It is imperative that the promotion of public health, or at the very least, refraining from actions that could endanger public health, becomes a crucial aspect of a corporation's purpose going forward. By doing so, the long-term creation of shareholder value can also be accelerated.[150] Lawyers, who play an integral role in corporate operations, can and should be part of this change.

3. PROPOSED AMENDMENT TO THE *MODEL RULES*

Agency action can lead to the addition of new ethical rules within the *Model Rules* framework. Congress enacted the Sarbanes-Oxley Act in response to widespread corporate scandals and failures, and Section 307 of the Act specifically required the SEC to promulgate rules restricting lawyers' participation in corporate misconduct and imposing affirmative obligation on lawyers to report the misconduct.[151] After much debate, the SEC released its final rule in 2003, requiring lawyers practicing before the agency to report evidence of managerial misconduct to the chief legal counsel ("CLO") or the chief executive officer ("CEO") of the company.[152] If the CLO or the CEO does not provide an "appropriate response" to the issue within a reasonable time, the attorney must "go 'up the ladder' to the audit committee or another appropriate committee of the board or to

144. *See id.* at 746.

145. MODEL RULES R. 1.13(b).

146. *See* Gelles & Yaffe-Bellany, *supra* note 112.

147. *One Year Later: Purpose of a Corporation,* BUSINESS ROUNDTABLE, https://purpose.businessroundtable.org/ [https://perma.cc/S4LQ-NGW4].

148. *Id.*

149. *Id.*

150. *See id.*

151. Clifton Barnes, *ABA, States, and SEC Hash Out Lawyers' Responsibility in Corporate Settings,* AM. BAR. ASS'N, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2802/corporate/ [https://perma.cc/9PYP-5SN7].

152. *Id.*

the board of directors itself."[153] The ABA modified Model Rule 1.13 following the SEC implementation of new regulations.[154] The revised rule imposes a similar reporting requirement, with a twist that the lawyer is allowed to refrain from reporting if the lawyer reasonably believes that disclosing the information would not serve the organization's best interest.[155]

This leaves us with several possible options to modify the *Model Rules* to address the requirement for lawyers to report public health concerns. The first possible amendment is to revise Rule 1.13(b) and add a parallel reporting duty to a matter that "presents public health risks" aside from the matters that violate the law or a legal obligation to the organization. This would be a powerful addition and a significant step towards ensuring the promotion of public health. However, the likelihood of this proposed addition being passed may be low due to concerns over its perceived aggressiveness. Arguably, public health concerns should take priority over securities law violations and breaches of fiduciary duty. However, this argument may face challenges, particularly in light of the SEC's need to give up most of its original, more expansive proposals due to widespread criticism.[156] The watered-down version dropped the controversial "noisy withdrawal"[157] requirement, and extensive record-keeping and investigation obligations.[158]

Another, more realistic path would be to create an option, which is permissive rather than mandatory, for lawyers to report public health concerns. This option should be explicitly outlined in the *Model Rules* to emphasize its importance. The proposed addition to Rule 1.13 reads as follows: a lawyer for an organization should serve the society at large. If a lawyer identifies a public health risk associated with a business decision, the lawyer may report this concern to higher authority in the organization.

Just like the interaction between the SEC and the ABA concerning the up-the-ladder reporting rule, the proposed addition related to public health concerns would be of limited value without involvement from the FDA. It is therefore essential that the FDA's regulation on online food labeling draws a clear connection between accurate online food labeling and public health, acknowledges the option, and encourages lawyers, as public citizens, to speak out and raise public health concerns to organizational decision-makers during the process.

153. *Id.*

154. *Id.*

155. *Id.*

156. Thomas E. Spahn, *Sarbanes-Oxley, the ABA Model Rules and State "Whistleblowing" Duties: The Untold Story,* MCGUIREWOODS LLP, at 1, https://www.fedbar.org/northern-virginia-chapter//wp-content/uploads/sites/74/2019/10/2006-10-31-pdf.pdf [https://perma.cc/RG85-PRT2].

157. "Noisy withdrawal" stands for the requirement that the lawyer must withdraw if his or her services are being used to further the wrongdoing. *Id.*

158. *Id.*

D. BUILD A MULTISECTORAL MECHANISM: RESEARCH, EDUCATION, AND CAMPAIGNS

In addition to legal measures, it is important to conduct research to study consumer behavior associated with their knowledge of food labeling. Consumer education programs and public outreach campaigns should also be implemented to raise public awareness and put pressure on companies to comply with the disclosure requirements. While setting a uniform standard for online food labeling is essential, its impact on NCD prevention would be minimal if the consumers are unable to make effective use of the information or if the companies do not feel compelled to comply. By researching consumer behaviors associated with their knowledge of food labeling, the FDA can measure the impact of the regulations and design its outreach programs accordingly. Through consumer education programs and public outreach campaigns, consumers can proactively participate in building a comprehensive regulatory system for online food labeling. This will enable consumers to make educated and informed dietary choices for themselves. Moreover, consumer pressure can incentivize companies to comply with the online food labeling requirements and even design webpages that provide easy and quick access to healthy choices.

The FDA has the ability to conduct research and launch consumer education programs and public outreach campaigns.[159] The FDCA gives the FDA responsibility to "protect the public health by ensuring that. . . foods are safe, wholesome, sanitary, and properly labeled," and the FDA is an agency of high regard that has both the reputation and the resources to conduct research and launch such programs.[160] Currently, there are videos and brochures available in both English and Spanish to educate the public on how to read and understand the nutrition facts label.[161] However, these are far from sufficient. Ideally, the FDA could partner with other federal agencies such as the USDA, the Centers for Disease Control and Prevention ("CDC"), and state health departments.[162] The FDA should also cooperate with other entities, including manufacturers, retailers, and non-governmental organizations to further extend its impact on public health advocacy. By collaborating with both governmental and non-governmental organizations, the FDA should aim to build a national network of public health promotion that is supported by local branches to adapt diversified needs in different places.

The networks should be wide, but the programs could be specific and targeted. Based on research on consumer behavior associated with their knowledge of food labeling, education programs could be designed to tackle specific problems and reach particular groups.[163] For example, in regions where obesity is a prevailing problem, education programs should mainly focus on helping people understand

159. *See* ¶ 40,674 Final Rule: Food Labeling; Revision of the Nutrition and Supplement Facts Labels, Food Drug Cosm. L. Rep. P 40674 [hereinafter ¶ 40,674 Final Rule].

160. Craig, *supra* note 27, at 620.

161. ¶ 40,674 Final Rule, *supra* note 159.

162. *See id.*

163. *Id.*

how to utilize information about calorie, fat, and added sugar content and how to manage their intakes in daily life. For certain groups where people are more used to a high-sodium diet, programs could be designed to focus on the causal link between high-sodium input and cardiovascular disease and to promote a low-sodium lifestyle. Also, to tackle the disparate impact of the NCD burden, programs should be designed to reach consumers who are more vulnerable to being exposed to the harmful consequences brought by the inadequate nutrition information disclosure, including groups with lower incomes and communities with diverse language and literacy levels. The programs should make use of multiple and culturally relevant channels to effectively reach those groups, and the information should be easily understandable, concise, and compelling.[164] This may include creating multilingual resources such as brochures, websites, and social media content that are designed to be accessible and easy to navigate for people with language barriers and lower education backgrounds. Ethnically diverse newspapers, radio, and television programs, as well as mobile apps, can also be effective in reaching specific ethnic audiences. Partnering with community organizations is another way to amplify the message and increase engagement.

Building on the efforts by the FDA, NGOs' advocacy efforts would also help strengthen the online food labeling regulatory system. There are already a number of consumer advocacy organizations, such as the Center for Science in the Public Interest ("CSPI"), that are actively engaging in creating a better food system.[165] While there is no solid legal basis for the FDA to regulate technology companies involved in online grocery stores, NGOs like CSPI are in a good place to exert influence on those companies by raising public awareness and concerns. They can put pressure on these companies directly by advocating for equal access to nutrition information. Alternatively, they can exert indirect pressure by raising public awareness on the importance of healthy diets. The pursuit of efficiency will naturally drive people away from online grocery stores that require extra swipes and scrolls to reach the nutrition information, which, in turn, will encourage designs that help facilitate healthy choices.

III. CONCLUSION

The COVID-19 pandemic has triggered a surge in online grocery shopping, which has helped reduce contact and curb the spread of the virus. However, the inadequate or even complete absence of disclosure of nutrition information is simultaneously harming public health by increasing the NCD burden in the long run. It is imperative to create online food labeling regulations and strengthen the FDA's enforcement system to build a strong regulatory framework for a universal online food labeling standard. Amending the *Model Rules* to allow lawyers to report public health risks would encourage participation from a wider range of

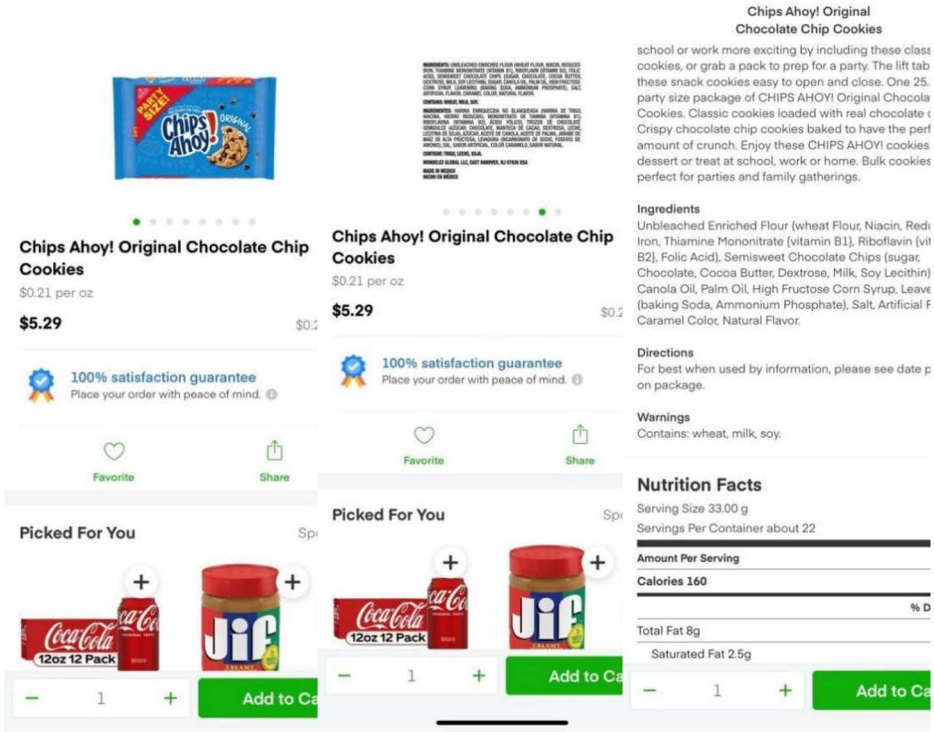
164. *See id.*

165. *See generally Food Labeling*, CTR. FOR SCI. IN THE PUB. INT., https://www.cspinet.org/advocacy/nutrition/food-labeling [https://perma.cc/P8DJ-JDFZ].

stakeholders and reinvigorate the legal profession's responsibility as "public citizens." Establishing a multisectoral mechanism would facilitate health education and enable people from diverse backgrounds to make informed choices.

Public health is at a crossroads. Providing adequate food labeling is essential to honor people's choices to live a healthier life. The FDA, the legal community, NGOs, and society should collaborate to create a comprehensive food labeling system to facilitate healthy choices for everyone.

APPENDIX FIGURE I



APPENDIX FIGURE II