



## Consumer Federation of America

November 19, 2021

Acting Commissioner Janet Woodcock  
Food and Drug Administration  
Department of Health and Human Services  
5630 Fishers Lane, Room 1061  
Rockville, MD 20852

**Re: FDA-2021-N-0929-0001; Food and Drug Administration New Era of Smarter Food Safety Summit on E-Commerce; Public Meeting; Request for Comments**

Dear Commissioner Woodcock:

Consumer Federation of America appreciates the opportunity to submit these comments in response to FDA's virtual public meeting, "FDA New Era of Smarter Food Safety Summit on E-Commerce: Ensuring the Safety of Foods Ordered Online and Delivered Directly to Consumers." The increased popularity of online food sellers poses many challenges to FDA's ability to keep the food supply safe and to protect consumers from deceptive and misleading marketing tactics. Online platforms have reduced barriers to entry in many food sectors, and enabled consumers to purchase directly from a growing number of small food companies. As discussed at the public meeting, many of these companies have not adequately invested in controlling food safety risks, or fail to adequately disclose food safety, nutrition and other information to consumers. Even established food retailers sometimes omit critical information for consumers in their online platforms.

FDA should issue guidance, and where necessary new regulations, to define companies' responsibility for maintaining food safety to the point of delivery to the consumer. The agency should also clarify what information online retailers must present to consumers at the point of sale. Finally, FDA should also step up enforcement of food companies whose online operations misinform or endanger consumers.

E-commerce is creating new food safety challenges.

The food safety system can be seen as comprising three interacting and sometimes overlapping components: government regulation, civil litigation and consumer advocacy, and industry supply chain management.<sup>1</sup> The rise of e-commerce has disrupted each of these components, and will continue to do so. In particular, increased e-commerce has made possible the participation of a large number of smaller, upstart firms in the food system. It has expanded the role of shipping companies and third-party delivery services in consumers' engagement with the food system. And it has diminished the role of traditional "gatekeepers," such as brick and mortar retailers. FDA must take into account these disruptions as it decides how to marshal agency's limited resources.

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<sup>1</sup> See Timothy D. Lytton. *Outbreak: Foodborne Illness and the Struggle for Food Safety*, (2019).

The changes brought on by e-commerce, while in many aspects positive, will subject consumers to unacceptable risk without adaptations to FDA policy. During the public meeting, Professor William Hallman of Rutgers University presented the results of a joint study with Tennessee State University examining the condition of 684 meat, poultry and seafood products ordered from online vendors and delivered via Fedex, UPS, and the U.S. Postal Service. Nearly all of the companies in the study shipped their products “signature release,” meaning that packages are routinely left on doorsteps and front porches, sometimes in sweltering heat, until consumers arrive home to find them. The researchers found that nearly half of products arrived with a surface temperature above 40 degrees Fahrenheit.<sup>2</sup> However, the online retailers did little to warn consumers of the potential for pathogenic bacterial growth. Moreover, few of the companies offered any recourse to consumers dissatisfied with a product’s condition upon delivery, and some even purported to assign liability for defects to the shippers, who themselves disclaim responsibility in a blanket waivers.

FDA should issue guidance on how companies should pack seafood and other FDA-regulated perishable food products for delivery to consumers so as to minimize food safety risk. The guidance should also direct companies to disclose risks associated with temperature abuse, and invite consumers to give feedback. In particular, online vendors should inform consumers that perishable food items must be kept at a temperature below 40 degrees Fahrenheit, and they should invite consumers to report when the temperature of a package exceeds that threshold. The agency should encourage practices such as the use of adhesive, “thermometer strips” in packaging, which could alert consumers to food safety risks.

FDA should issue clear, prescriptive rules and standards for online vendors.

In addition to food safety risk, online food vendors often fail to provide critical nutrition, ingredient, and allergen information to consumers. As we documented in our joint letter with the Center for Science in the Public Interest, the Center for Digital Democracy, and Consumer Reports, online retailers and platforms—such as Walmart, Instacart, and Amazon—routinely omit Nutrition Facts, ingredients and allergen information at the online point of sale.<sup>3</sup> Similarly, third party ordering platforms like Grubhub, Doordash, and Uber Eats, often fail to disclose calorie counts on menus for chain restaurants, a practice we urged FDA to address in a letter submitted earlier this year with other consumer and public health groups.<sup>4</sup> FDA should issue guidance that makes clear the information that online vendors must provide to consumers.

Such clarifying guidance serves two important roles. First, and most directly, it will lead most food companies, especially the larger ones, to begin disclosing information that enables consumers to make informed choices online. But just as importantly, it will serve as a basis for taking enforcement action against companies that choose to ignore the law.

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<sup>2</sup> FDA recommends discarding any perishable food that has been above 40°F for two hours or more. See <https://www.fda.gov/consumers/consumer-updates/are-you-storing-food-safely>.

<sup>3</sup> See <https://consumerfed.org/wp-content/uploads/2021/11/Consumer-Groups-Ask-FDA-to-Ensure-Online-Consumers-Access-to-Nutrition-Information-11.10.21.pdf>

<sup>4</sup> See <https://consumerfed.org/testimonial/consumer-public-health-groups-ask-fda-to-hold-third-party-platforms-accountable-on-menu-labeling/>

This second role points to a more general need for so-called “bright line” rules that FDA can enforce with relatively little risk of litigation expense. As pointed out during the public meeting, the rise of e-commerce has reduced or eliminated barriers to entry that had limited the number of food companies and their scope of operations. Some of these barriers to entry were arbitrary and consumers are better off for their decline. Other barriers, such as a retailer’s requirement that a food manufacturer submit to third-party food safety audit, carried benefits for which public policy may now need to compensate. As more new food companies compete online, strategies to differentiate a product or otherwise seek advantage by skirting the law may increase in appeal. In this new food system ecology, FDA cannot afford to implement ambiguous rules, open to interpretations that leave consumers vulnerable to deceptive practices.

#### E-commerce increases the need for robust enforcement strategy.

Recent trends in alcoholic beverage marketing illustrate the dangers of regulatory ambiguity. Last year, CFA and the Center for Science in the Public Interest wrote to FDA to urge the agency to take enforcement action against companies making fortification and nutrient content claims on FDA-regulated alcoholic beverages.<sup>5</sup> The Department of Treasury’s Tax and Trade Bureau (“TTB”), which regulates most alcoholic beverages, prohibits such claims. However, for a narrow category of “hard seltzer” type drinks that fall under FDA’s jurisdiction, regulatory uncertainty has given rise to claims such as “with antioxidant vitamin C,”<sup>6</sup> and “excellent source of vitamins.”<sup>7</sup> These claims are blatantly misleading. Alcoholic beverages are not a good source of vitamins, in part because alcohol consumption actually impairs the body’s ability to digest and utilize nutrients.<sup>8</sup> Nevertheless, in internal documents that CFA obtained through Freedom of Information Act requests, FDA officials cited the absence of prescriptive standards on nutrient claims as cause for declining to enforce deceptive labeling laws against these companies.

In one case, FDA actually threatened enforcement action, only to have its tepid response to the company’s claims turned into a further deceptive marketing ploy. FDA appears to have asked one alcoholic beverage manufacturer, Coco Cocktail, to remove a “no hangover” claim from its product website. Sadly, any alcoholic beverage drunk to excess will cause a hangover, making any such claim patently false. However, Coco Cocktail continues to use an “excellent source of vitamins” claim and recently added to its website the claim that its product is “the only alcoholic beverage to achieve US FDA requirements to claim an Excellent Source of Vitamins in every can.” This seems to be a reference to the company’s successful defense of its meeting the nutrient content claim standards for foods generally when challenged by FDA regulators. And it is even more misleading for its implication that FDA in some way “approved” its product.

Unfortunately, such craven marketing tactics are not limited to alcoholic beverage manufacturers and clear rules on nutrient content claims, and on food and beverage companies’ responsibilities to consumers more generally, will be increasingly critical to FDA protecting public health. CFA looks forward to working with the agency to define the guidance and regulations needed to protect consumers. Clear rules and robust enforcement will establish a level-playing field for food

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<sup>5</sup> See <https://consumerfed.org/testimonial/cfa-cspi-ask-fda-to-enforce-rules-against-misleading-alcohol-ads/>.

<sup>6</sup> <https://www.vizzyhardseltzer.com/av?url=https://www.vizzyhardseltzer.com/>

<sup>7</sup> <https://cocococktail.com/>

<sup>8</sup> Lieber CS. Alcohol: its metabolism and interaction with nutrients. *Annu Rev Nutr.* 2000;20:395-430 *available at:* <https://pubmed.ncbi.nlm.nih.gov/10940340/>

and beverage companies, and help to ensure that e-commerce in food ushers in a new era of improved food safety and public health writ large.

Thank you for your consideration of these comments.

Sincerely,

Thomas Gremillion  
Director of Food Policy  
Consumer Federation of America