THE GOOD FOOD INSTITUTE

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July 23, 2018

Scott Gottlieb, M.D.
Commissioner
Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993
CommissionerFDA@fda.hhs.gov

Submitted electronically via email

**RE: Enforcing dairy standards of identity and plant-based foods**

Dear Commissioner Gottlieb:

The Good Food Institute is a 501(c)(3) nonprofit organization dedicated to using market forces to create a healthy, humane, and sustainable food supply. As you may be aware, last year we petitioned the Food and Drug Administration (FDA-2017-P-1298) for a regulation to explicitly allow compound names like "almond milk."

At the Politico Pro Summit last week, you indicated that you plan to revisit the agency's approach to labeling almond and other plant-based milks. You framed this in terms of a shift in the FDA's enforcement policy; however, the standard of identity for milk does not apply to plant-based milks that use qualifiers on their labels. Indeed, the FDA has long recognized that the standard of identity for "milk" applies only to the use of the *unqualified term*, and not to qualified uses. In issuing its regulation establishing the identity standard for "milk," the FDA stated that this identity standard would not prevent the use of the term "milk" for "flavored milk products," concluding that "[s]ince flavored milks, such as chocolate milk, *do not purport to be and are not represented as milk,* their distribution as nonstandardized foods could be continued after the establishment of an identity standard for milk."[1] It is equally clear that almond milk, other plant-based milks, and even milks from other animals (such as goat milk) do not purport to be "milk." Without a labeling violation, the FDA's enforcement discretion is not at issue.

[1] 38 Fed. Reg. 27924, 27925 (Oct. 10, 1973) (emphasis added).

Compound names are commonly used on labels throughout the food supply. These often take the form of a standardized term plus a qualifier that clearly indicates what the food is—e.g., "rye bread" and "rice noodles." We assume that FDA will not be cracking down on these clearly labeled products, and for the same reason, it would make no sense for FDA to censor almond milk, soy milk, and similar plant-based dairy alternatives. Foods are not misbranded where the standardized term is appropriately qualified or if the label otherwise clearly and accurately discloses the nature of the product, even where the product does not follow the recipe set forth in the standard of identity for the unqualified term.

We hope that you will further consider that there is a constitutional issue which would cause a court to err on the side of free speech rather than defer to FDA's regulatory interpretation. According to clear Supreme Court precedent, the FDA may only restrict commercial speech on labels to directly advance a substantial interest. Qualifiers like "soy" and "almond" are clear, common, and widely understood, and prohibiting terms like soy milk would not serve any substantial interest. The U.S. Court of Appeals for the Eleventh Circuit held last year that a state regulation prohibiting a creamery from using the words "skim milk" on the label of its fat-free milk, because it did not contain added Vitamin A, was an unlawful constraint on commercial speech.[2] Here, a sensible approach to ensuring consumer clarity would be to grant GFI's March 2, 2017 petition for rulemaking that covers these issues rather than adopt a policy that censors the use of common words on food labels.

In your remarks at the Summit, you pointed out how absurd it is for the FDA to delineate how many cherries must be in a cherry pie. It is equally absurd to require that a product contain the lacteal secretions of a cow to be called almond milk or soy milk.

Please do not hesitate to contact me at (202) 670-1686 or jessicaa@gfi.org if I may be helpful on this issue.

Sincerely yours,

Jessica Almy, Esq.
Director of Policy

[2] *Ocheesee Creamery v. Putnam*, 851 F.3d 1228 (11th Cir. 2017).