

**PET FOOD INSTITUTE**

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Rockville, Maryland 20852

**Docket No. 02N-0209 Request for Comment on First Amendment Issues. 67 Fed. Reg. 34942, May 16, 2002**

The Pet Food Institute, the trade association that represents the manufacturers of over 97% of the dog and cat food produced commercially in the United States (a \$12.5 billion industry) appreciates the opportunity to again provide comments to FDA's request for input on commercial free speech under the First Amendment.

The pet food industry needs development of guidance that is consistent with First Amendment rights to allow the use of truthful and non-misleading claims on pet food labels. This guidance can be developed based on the principles recognized to support truthful and non-misleading labeling. Since the FDA is considered to be the final word on pet food labeling, an absence of clear, official guidance from the FDA forces individual states to enact their own guidance. This patchwork of regulation results in confusion for federal and state regulators, manufacturers and, most importantly, consumers. The restriction of First Amendment rights or the lack of clear guidance on truthful, non-misleading labeling serves none of the stakeholders under the current process. It is important to note that these products are designed to feed pets, not animals raised for human consumption.

FDA permits pet food companies to include on their product labels and labeling only a very limited number of truthful and non-misleading statements that describe a relationship between a food substance and the nutritional impact it has on a disease or health-related condition. Currently, for products sold in unrestricted commercial outlets, this class of claims, which can be referred to as "health-related statements," is limited to claims about urinary tract health, low magnesium and hairball prevention for feline diets. In deciding to allow these three claims, FDA addressed each on an ad hoc basis without any reference to a guidance for permitting other such health-related statements in the future.

The FDA's failure to provide guidance that would reliably allow pet food companies to efficiently include truthful and non-misleading health-

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related statements on their product labels and labeling operates as a de facto suppression of truthful and non-misleading commercial speech in violation of the First Amendment rights of those companies. To rectify this situation, PFI urges FDA to provide a mechanism that would allow pet food companies to include additional truthful and non-misleading health-related statements on their product labels and labeling in a prompt and efficient manner.

In addition, PFI supports the comments submitted by Grocery Manufacturers of America (GMA) in their September 10, 2002 submission (Comment # C 21). [This comment highlights several key points that PFI believes should also apply to foods manufactured specifically for dogs and cats.]

1) *The FDA standard for judging "misleading" food labeling under Section 403(a) of the FD&C Act must be changed from protecting the "ignorant, unthinking, and credulous" to protecting the reasonable person.* By adopting the FTC policy, in which determination of whether an advertisement is misleading "must be considered from the perspective of the reasonable consumer" (103 F.T.C. 174, 177 [1984]), it would allow for food labeling commercial speech that is currently permitted in food advertising. Pet foods should receive the same consideration.

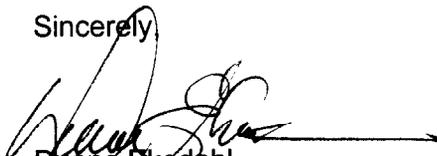
2) *The severe limitations on structure/function claims for both conventional food and dietary supplements must be substantially reduced, and there must be a parity of structure/function claims between conventional food and dietary supplements.* FDA's failure to provide guidance that would reliably allow pet food manufacturers to use structure/function claims on their product labels and labeling operates as a de facto suppression of commercial free speech in violation of the First Amendment rights of those manufacturers. As recent controlling case law has unequivocally held, such suppression is unlawful. The inability of the pet food industry to market food with truthful, non-misleading structure/function claims for pets is unreasonable, unnecessary and also inconsistent with the First Amendment. It also unduly restricts the ability of pet owners to obtain valuable health related information for their pets.

3) *FDA must revise its regulations and policies with respect to disease (health) claims for food, to broaden the narrow scope of permitted disease claims under the current regulations, to recognize that such claims can in appropriate situations cover both treatment and prevention of disease, and to establish a parity of claims between conventional food and dietary supplements.* In the case of health claims for pet food, the agency should develop guidance for making such claims e.g., reduced risk of specific diseases, but should not require approval of specific health claims.

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In summary, the manufacturers of pet food should be allowed the same ability to make truthful, non-misleading claims as the manufacturer of any other product under the First Amendment right to commercial free speech. Once again, The Pet Food Institute appreciates the opportunity to comment and looks forward to participating in further discussions on this issue with the Agency.

Sincerely,



Duane Ekedahl,  
Executive Director