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Food supply chains under increasing scrutiny

By Sascha Matuszak

The United States Federal Trade Commission (FTC) issued a monetary penalty^[1] for “greenwashing” last month, the first such penalty imposed on a company for falsely claiming its products were organic. The company, Truly Organic Inc., was ordered to pay USD 1.76 million to settle the FTC complaint, is prohibited from making false or unsubstantiated claims regarding its products (e.g., that they’re organic, good for one’s health, good for the environment) unless backed by scientific evidence, and is also prohibited from providing anyone else with the means to make those claims.

In a statement,^[2] FTC Commissioner Rohit Chopra lamented the fact that several similar cases — including a case against Aromaflage^[3] and several “Made in USA” fraud cases — “were resolved for no money, no notice to victims or competitors, and no findings or admissions of liability.” Chopra called for a policy statement addressing fraudulent and dishonest claims and asserted that “no-money settlements are inadequate.”

The Truly Organic case and the first-of-its-kind monetary penalty for fraud represent a much larger trend that goes back some 30 years, when Western consumers started paying attention to where their products come from, who makes them, and the vast system that ensures we have organic strawberries in winter, cheap beef year round and all the cheap clothes and gadgets we could ever possibly need.

That vast global supply chain is under increasing scrutiny, driven by regulatory pressure, consumer choice and consumer rights associations, non-governmental associations trying to save a fragile ecosystem, and trillions of U.S. dollars in investment funds trying to stay ahead of the latest consumer surge and thereby turn a profit.

Food companies are particularly responsive to this scrutiny, because the food supply chain crosses several sectors and industries, and reaches across the entire globe. Actors in the supply chain include farmers and processors, factories and transport companies, and warehousing and storage; any one of these actors could be located in West Africa, Southeast Asia, South America, North America or China. Risks exist at every point in the chain, and many of those risks are regulated by very different laws and statutes.

Additionally, consumer attitudes can have an immediate effect on a company’s reputation and bottom line. If it emerges that a certain food company has, for example, forced labor or contaminants in its supply chain, or has a particularly negative effect on the environment, or has made fraudulent claims regarding how organic a product is, the effects can be immediate and devastating.

In this article we’ll touch on two major developments affecting the food supply chain: (1) the United States Federal Drug Administration’s (FDA) Food Safety Modernization Act (FSMA), and (2) mandatory disclosures that dig deep into the supply chain.

Moving a very big ship: FSMA and the US food supply chain

In a recent issue of RSCC, we gave an overview of the FSMA, including the seven key rules,^[4] and took a closer

look at the [“Intentional Adulteration rule.”](#)^[5]

Since then, the FDA has issued three guidance documents:

- The number of employees for purposes of [defining a small business](#).^[6]
- [Evaluating standards](#) for produce for human consumption.^[7]
- Recommendations for producing a [written recall plan](#),^[8] as required by [21 CFR § 117.139](#)

A recall is a food company’s worst nightmare. The FSMA requires companies to not only go to extraordinary lengths to prevent recalls (see Intentional Adulteration rule above), but also prepare for the possibility that it could happen. This is part of the regulatory pressure exerted on companies to do more than check a box and react to a crisis; they must actually put in place the processes and procedures that help assess and mitigate risks and vulnerabilities. The recommendations call for sample letters to authorities and partners, a list of employees who will be assigned to the team handling the recall procedure, and an effective monitoring process of the entire recall operation.

These processes are required by law. The workload has increased for companies; smaller businesses are trying to find ways to comply without consuming too many resources, hence the constant refinements of what constitutes a small business and what deadlines they face to comply with the many FSMA requirements.

Given the FDA’s very proactive stance toward food safety in the supply chain, and the willingness of the FTC to levy fines (as well as the commissioner’s call for fines to become standard policy), organizations are faced with a heavy responsibility.

Mandatory disclosures and supply chain transparency

Consumers have called for “farm to fork” disclosures from major food conglomerates like Mondelez International, Inc., Nestlé S.A., General Mills, Inc. and others. The result has been a wave of mapping processes and transparency disclosures — some voluntary and some mandated by regulations, such as the [U.K. Modern Slavery Act](#) (2015 c. 30),^[9] the [California Transparency in Supply Chains Act](#) (S.B. 657, Cal. 2010),^[10] or the more recently enacted [Australian Modern Slavery Act](#) (2018, No. 153).^[11]

We discussed supply chain mapping and transparency in the last issue of *RSCC*,^[12] as well as in this issue. Supply chain mapping has a wide range of benefits for companies that can allocate enough resources to do it properly. The data collected is useful to the entire organization, not just the compliance department. Mapping can lead to transparency, which in turn leads to a more streamlined organization; i.e., the type of organization that can not only have a written recall plan in place, but is also able to communicate the plan down through the supply chain, pinpoint exactly where the problem emerged in the chain, and shut the problem down before it causes any more damage.

An article in [The Wall Street Journal](#) describes the wave of supply chain mapping,^[13] primarily in the food industry, as a step forward for all stakeholders (e.g., consumers, non-governmental organizations, investors and private sector actors). Consumers place importance on the source of ingredients when purchasing food, and they will pay a premium for ethically sourced food.

The focus for everyone, really, is the attitude of the consumer. Supply chain compliance is a function of consumer demand, as is regulatory action and investor movement. One interesting point made by Adam Chilton, who is quoted in the story, is that mandatory disclosures are not as effective as they are thought to be, despite the

obvious business and compliance cases for supply chain mapping.

Chilton, Professor of Law and Walter Mander Research Scholar at the University of Chicago Law School, co-wrote a paper in 2016, ["The Limitations of Supply Chain Disclosure Regimes,"](#)^[14] which argued that consumers "consistently rated disclosures reporting low levels of due diligence almost as highly as disclosures that reported a high level of due diligence."

Regardless, the regulatory pressure is not easing up, and neither is the overall case for achieving supply chain transparency, and thereby, compliance with an increasingly strict global regulatory regime.

Takeaways

- Regulatory scrutiny of supply chains is increasing and may include more monetary penalties for noncompliance than before.
- Mandatory disclosures required by various regulations are also increasing and require sincere due diligence and effective supply chain mapping techniques.

1 Federal Trade Commission (FTC), "Truly Organic? The FTC Says No, Alleges Retailer Misled Consumers about Its Products," press release, September 19, 2019, <http://bit.ly/31hljRm>.

2 Statement of Commissioner Rohit Chopra, September 19, 2019, <http://bit.ly/2nPFRw6>.

3 FTC, "FTC Halts Deceptive Mosquito-Repellent Claims for Aromaflage Perfume and Candles," press release, May 3, 2018, <http://bit.ly/2IXgHt6>.

4 Sascha Matuszak, "US food industry moves to comply with sweeping food safety legislation," RSCC 2, no. 6, April 4, 2019, <http://bit.ly/2pxyOyU>.

5 Sascha Matuszak, "US Food and Drug Administration demands tough food defense plans for food processors," RSCC 2, no. 7, April 18, 2019, <http://bit.ly/32AQet6>.

6 Food and Drug Administration (FDA), *Guidance for the Industry: Determining the Number of Employees for Purposes of the "Small Business" Definition in Parts 117 and 507*, June 2019, <http://bit.ly/2P2hxbQ>.

7 FDA, "Draft Guidance for Industry: Evaluating Alternate Curricula for the Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption," June 2019, <http://bit.ly/2VRNIwo>.

8 FDA, *Hazard Analysis and Risk-Based Preventive Controls for Human Food: Draft Guidance for Industry*, "Chapter 14: Recall Plan," <http://bit.ly/2IVlc6j>.

9 Sascha Matuszak, "'Setting a higher bar' for modern slavery due diligence: A conversation with Kate Dunbar," RSCC 2, no. 7, April 18, 2019, <http://bit.ly/2oS3oF3>.

10 California Dept. of Justice, *The California Transparency in Supply Chains Act: A Resource Guide*, 2015, <https://bit.ly/1CBYoyT>.

11 Sascha Matuszak, "Australia passes Modern Slavery Act into law," RSCC 2, no. 1, January 11, 2019, <http://bit.ly/32n456k>.

12 Sascha Matuszak, "Supply chain mapping and the transparency wave of the future," RSCC 2, no. 19, October 10, 2019, <http://bit.ly/2BkUWiW>.

13 Micah Maidenbergl, "Food Companies Put Supply Chains Under a Microscope," *The Wall Street Journal*, October 9, 2019, <https://on.wsj.com/2OG4Rrk>.

14 Adam S. Chilton and Galit Sarfaty, "The Limitations of Supply Chain Disclosure Regimes," SSRN, June 29, 2016, <http://bit.ly/31mNAG4>.

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