



THE CHAIRMAN

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

December 5, 2011

The Honorable Edward J. Markey
U.S. House of Representatives
Washington, DC 20515

The Honorable Barney Frank
U.S. House of Representatives
Washington, DC 20515

Dear Representatives Markey and Frank:

Thank you for your letter regarding the recent findings by the Boston Globe and Consumer Reports following their separate investigations into the mislabeling of seafood sold in grocery stores, restaurants, and seafood markets. In your letter, you express concern that the mislabeling of seafood products, as set forth in the recent press reports, can harm consumers economically when they pay more for a less expensive and desirable fish, and also can create health risks to consumers who may be allergic to or otherwise intolerable of certain species of seafood. In light of these issues, you have asked whether such advertising and mislabeling of seafood can be deemed unfair and deceptive acts or practices under Section 5 of the FTC Act. More specifically, your letter lists four questions to which you have requested that the FTC respond. Our response to the questions is set forth below.

- 1. Does the FTC believe that selling one species of fish that is labeled as another constitutes a violation of Section 5 of the FTCA, which outlaws unfair or deceptive trade acts or practices? If not, why not?*

Response

The selling of one species of fish labeled as another species is likely to be a deceptive practice under Section 5 of the FTC Act. In fact, as discussed below in response to Question Two, the FTC has taken action in recent years to halt the deceptive marketing of certain seafood products. As you know, under the Federal Trade Commission Act, an act or practice is deceptive if (1) it is likely to mislead consumers acting reasonably under the circumstances, and (2) it is material; that is, likely to affect a consumer's purchase decision. In determining whether a particular act or practice warrants enforcement or other action, the Commission may consider a number of factors -- including the type of violation alleged; the nature and amount of consumer injury at issue and the number of consumers affected; and the likelihood of preventing future unlawful conduct.

The Honorable Edward J. Markey
The Honorable Barney Frank
December 5, 2011
Page 2

2. *If the Commission does believe that such acts or practices may constitute potential violations of the FTCA, what actions, if any, is the FTC taking in response to this matter? If no actions are underway or planned, why not? Has FTC ever investigated this issue in the past? If so, please provide me with copies of any reports that detail such efforts, as well as a list of each such act or practice that was investigated by the FTC in the past ten years, along with the outcome (including any enforcement measures, as applicable) of each such investigation.*

Response

The task of combating seafood fraud due to mislabeling poses various challenges for an agency such as the FTC due to the type of resources (such as trained inspectors and laboratory facilities) that are necessary in detecting the fraud. Accordingly, the FTC's activities in this field are likely to depend on others first uncovering the existence of the fraud. During the past ten years, the FTC has investigated marketers of seafood products when we became aware of misleading advertising claims about the products, pursuant to our statutory authority under Section 5 of the FTC Act.

For example, in June 2009, the FTC investigated advertising by Long John Silver, Inc. for making misleading representations about the type of lobster used in the advertiser's "Lobster Bites" product. In that matter, television and other advertisements disseminated by the advertiser made representations that could mislead consumers into believing that the "Lobster Bites" products were made from the commonly consumed traditional American Lobster species, when, in fact, the product was made from a different species known as langostino lobster. Pursuant to the FTC's inquiry, the company agreed to stop running the TV ad and to revise its marketing materials to include the term "langostino" adjacent to the term "lobster" so that consumers understand that it is part of the product name. A copy of the closing letter in that matter is attached as Attachment 1.

In 2002, the FTC investigated the Pick'n Save Grocery Store for making misleading representations about whether the salmon sold in its stores was "wild" Alaskan salmon or Atlantic farm-raised salmon. In that matter, which stemmed from an inquiry from the office of the late Senator Ted Stevens, certain recipe card advertisements by Pick'n Save that were used to promote the store's Atlantic salmon contained representations that the salmon was "wild" Alaska salmon. As a result of the efforts by the FTC staff, the retailer promptly removed the deceptive representations.

- 3. If any violation of Section 5 of the FTCA did occur in connection with such sales, what penalties would be applicable to the sellers of the mislabeled food product? What powers does the FTC have to halt such practices and ensure that consumers were protected from such frauds?*

Response

In cases where the FTC determines that there has been a violation of Section 5 and the public interest would be served by a formal action, the Commission can seek to impose a cease and desist order enjoining the marketer from engaging in similar conduct. The FTC does not have authority to seek civil penalties for violations of the FTC Act. However, any violation of a Commission cease and desist order can lead to the imposition of civil penalties. In appropriate cases, the FTC may also request a Federal District Court to order consumer redress or disgorgement of profits. In some instances, such as those described in the answer to Question Two, the Commission may obtain quick voluntary changes to advertising practices without the need for formal action.

- 4. Please describe the manner in which the FTC coordinates its efforts with other Federal and State Agencies that may share jurisdiction or responsibilities in this area. To the extent that such coordination efforts are formalized, please also provide copies of any relevant memoranda of understanding or other similar documents.*

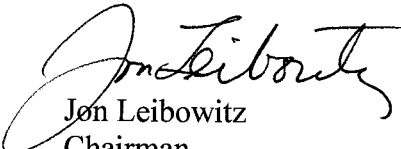
Response

The FTC has a long-established relationship with the FDA on issues of mutual interest in the area of labeling and advertising. On issues related to labeling generally, including the labeling of seafood, the FTC and FDA have a Memorandum of Understanding regarding overlapping jurisdiction. Under the Memorandum of Understanding, the FTC and the FDA have divided responsibilities for the regulation of product claims for foods, drugs, devices, and cosmetics so that, in general, the FDA has primary responsibility over all matters regulating the labeling of these products, and the FTC has primary responsibility over all matters regulating the truth or falsity of advertising for foods, drugs (with the exception of prescription drugs), devices, and cosmetics. For example, during the investigation of the Long John's Silver matter discussed above, the FTC staff worked closely with the staff at the FDA to ascertain that, under FDA's labeling requirements, langostino lobster cannot be marketed as "lobster" without the qualification of "langostino" to denote the species of lobster. A copy of the FTC-FDA Memorandum of Understanding is attached as Attachment 2.

The Honorable Edward J. Markey
The Honorable Barney Frank
December 5, 2011
Page 4

I hope that these responses provide the information you are seeking. If you or your staff have any additional questions or comments or wish to provide additional information, or if you have any information about specific companies or false advertising, please contact me or have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Very truly yours,



Jon Leibowitz
Chairman

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