

Case #3408 (8/1/97)

NABISCO, INC.

Planters Deluxe Mixed Nuts

FCB New York/NY

● **Advertiser's making "no cholesterol" claims for high fat foods in broadcast commercials must clearly and conspicuously disclose the total fat content per serving**

Basis of Inquiry: Television advertising for Nabisco, Inc.'s Planters Deluxe Mixed Nuts, which features a "no cholesterol" claim, came to the attention of NAD through its routine monitoring program.

The commercial opens with a man and a chimpanzee stranded on a desert island when a crate filled with Planters Deluxe Mixed nuts washes ashore. Just before the man starts eating the nuts, he turns to the chimpanzee and says "Actually, Cootchie, we shouldn't. We have to watch what we eat." The chimpanzee then looks at the nutrition label on the Planters can and begins squealing. The man comes back, reads the nutrition label and says "All this good stuff and no cholesterol? Cootchie to the lounge chairs."

On the bottom of the screen a super appears stating: "A cholesterol free food. Sixteen grams of fat per serving" (Note: In alternate versions of the commercial the super reads: "Sixteen grams of fat total. Two grams of saturated fat per serving"). The commercial then cuts to a shot of the man and chimpanzee relaxing on lounge chairs on the beach eating the nuts, accompanied by a voice-over which states: "Planters Nuts. Fresh roasted taste. No cholesterol." The commercial ends with a shot of Planters Mixed Deluxe Peanuts, Honey Roasted Peanuts and Cocktail Peanuts, and a combination voice-over/super stating: "Planters. Relax. Go Nuts."

NAD was concerned with the potential overall message communicated by the commercial, particularly the possible interpretation that, although nuts are a high fat food, because they are cholesterol free, consumers need not be concerned about the nutritional or health consequences of eating them and should feel free to eat as many as they want, i.e., "Relax. Go Nuts."

Advertiser's Position: According to Nabisco, this advertisement was prepared, in part, to clear up a common misperception among consumers that nuts are high in cholesterol, when, in fact, nuts contain no cholesterol and are a "good source" of at least 4 vitamins and minerals (i.e., Vitamin E, magnesium, copper and phosphorus). Nabisco provided NAD with several articles, which detailed the nutritional benefits provided by nuts, and summarized clinical studies which purported to show that, if consumed in reasonable amounts, nuts can play a valuable role in a healthful diet.

While admitting that nuts do contain fat and may be of high caloric density, the advertiser emphasized that the fat contained in nuts is predominantly monounsaturated fat - the type of fat that is found in olive oil. In distinguishing the effects of saturated fats from unsaturated fats, Nabisco submitted various articles about the fat content in nuts, one in particular which noted that "all fats are not created equal". This article explained that, while most saturated fats "choke arteries with plaque; monos and polys seem to leave them alone."

It was Nabisco's position that its advertisement was in full compliance with the applicable FDA regulation, 21 CFR 101.62, which permits a "no cholesterol" claim if the total saturated fat per serving is less than 20% of the recommended daily value ("RDV") and that because the amount of saturated fat per serving in Planters nuts is only 11% of the RDV the claim is clearly permissible.

Nabisco also offered NAD a nutritional comparison of Planters nuts versus other snack foods, including potato chips, cheddar cheese crisps and popcorn and maintained that, per ounce, these other snack foods lack the nutritional benefits of nuts and are slightly higher in saturated fat. The advertiser pointed out that the positive nutritional value of nuts "... is close to items conventionally considered as foods other than snacks, such as cheese and peanut butter."

In response to NAD's concern that the "Relax, Go Nuts" tag line suggests that people trying to "watch what they eat" can eat nuts with abandon, Nabisco asserted that it is quite common for advertisers to suggest that consumers indulge in the advertised product. To illustrate its point, the advertiser referred to advertising campaigns for Baked Lays Potato Chips (i.e., "With low fat and two new flavors, some are really gonna want it (sic) to pig out"), Pringle's Right Crisps (i.e., "once you pop you can't stop") and Pepperidge Farms Goldfish crackers (i.e., "one snack that's okay to get hooked on"). Like the Planters' advertisement, most of these competitive advertisements use humor to convey the idea that that consumers will eat large quantities of the product.

Nabisco maintained that its commercial was not making any implied claims that consumers can feel free to eat as many nuts as they want but, instead, simply communicates that nuts are not as bad for consumers as they may think. The advertiser argued that its commercial is "clearly a light hearted fantasy" and shows a man, who refuses to eat nuts, then being educated about the nutritional value of the nuts by a chimp, who directs him to the nutrition label. When the man comments that the nuts contain no cholesterol, a super appears on the screen to disclose the fat content of the nuts. Further, as the man decides he can eat the product, he is shown consuming one nut. The "Relax. Go Nuts" tag line plays on the humor of the situation and, in its advertised context, is no more than a humorous way of suggesting that consumers choose nuts for their snack."

To support its argument, that consumers were not taking away an "eat as many nuts as you want without regard to health concerns" message, the advertiser presented a three-fold analysis. First, the advertiser stated that there was no express claim made in the commercial which stated that consumers need not be concerned with the health consequences of eating too many nuts. Second, the advertiser asked whether the "language and depictions are clear enough to permit [the reviewer] to conclude with confidence, after examining the interaction of all constituent elements, that they [the advertiser] convey a particular implied claim to consumers acting reasonably under the circumstance". Nabisco asserted that, based on this criteria, no implied claim could be inferred. Lastly, the advertiser asked if "extrinsic evidence allows one to conclude that the potential implication is a reasonable one. The advertiser contended that, based on its own test data, the answer is "no".

The advertiser submitted independent recall testing which, it argued, showed that the advertisement communicated a health message mostly with regard to "no cholesterol". The advertiser explained that consumers believe that nuts are bad for them, in part, because of their belief that nuts contain high levels of cholesterol and that the research "reinforces our position that the ad dispels this erroneous position since the main take away of the ad is the no cholesterol message." The advertiser conceded that consumers also think nuts are bad for them because they are high in fat. The advertiser maintained, however, that the advertisement did not communicate that nuts were low in fat. The test was conducted among 122 respondents who were asked in an open ended question what the main idea of the commercial was. According to Nabisco, in response to this question 60 % of the respondents answered "no cholesterol" or "low cholesterol". Conversely, the advertiser stated that "only a small percentage thought that the main idea was that nuts are healthy/good for you". The advertiser maintained that only one of the study verbatim reports indicated that the advertisement implied that you could eat all the nuts you want, and that had consumers understood the "Relax. Go Nuts" line to mean that they could consume massive quantities of the product, this interpretation would have been reflected in the verbatims.

The advertiser concluded that "it defies logic to suggest that reasonable consumers will believe that they can eat any food to their heart's content without health consequences. Consumers are intelligent enough to understand that foods should be eaten in the context of a diet, and consumers who are concerned about their overall fat intake are likely to check the labels. Even if they do not, the Planters ad clearly and conspicuously discloses the fat content of the product."

Decision: In 1990, in an effort to improve the public health, Congress passed The Nutrition Labeling and Education Act ("NLEA"), to substantially change the existing rules regarding food packaging and labeling, and to provide consumers with new and consistent information about the nutritional value and health benefits of the foods they purchase and eat. Pursuant to the NLEA, the Food and Drug Administration ("FDA"), the federal agency

responsible for regulating the labeling of food, promulgated regulations that, inter alia, define several terms, that relate to the nutritional value or health consequences of food including the claim “no cholesterol”. FDA undertook to define these terms so that they will have a consistent and uniform meaning when used on food packaging.

The FTC and FDA have overlapping jurisdiction over the advertising and labeling of food. Together, the two agencies have established a liaison agreement which provides that they will work cooperatively, and allocates responsibilities between them; with the FTC assuming primary responsibility for regulating food advertising and the FDA for food labeling.’ When FDA adopted its new food label regulations in 1992, the FTC reaffirmed its commitment to work cooperatively with FDA by issuing an Enforcement Policy Statement on Food Advertising which announced that as, a matter of policy, FTC would seek to harmonize its advertising enforcement program with the FDA’s new food labeling regulations “to the fullest extent possible” to ensure that the public receives uniform messages about the nutritional content and health consequences of the foods they eat.

NAD, as the advertising industry’s self-regulatory arm, believes that it is also important for national advertiser’s, and the advertising industry, to receive a uniform message about the standards by which their food advertising and labeling claims will be monitored and reviewed. Toward that end, NAD also seeks to harmonize its self-regulatory efforts, in the arena of food advertising and labeling, with the framework already developed by the FDA and the FTC. It is against this historical background, that NAD issued its decision in this case.

The advertisement at issue, makes “no cholesterol” health-related claims for a food [nuts], which is high in fat, i.e., 16 grams of fat per one ounce (1/4 cup) serving. The advertiser stated that its tagline (“Relax! Go Nuts.”) was intended to communicate that, in comparison with other snack foods, consumers should choose nuts. However, since the advertisement makes no reference to other snack foods, NAD determined that the tagline could also be reasonably interpreted by consumers to mean that they can consume nuts freely without concern for their health. This is clearly not the case because, a mere 2 ounce (1/2 cup) serving of nuts delivers 32 grams of fat — almost half of the total 65 grams of fat recommended for adults per day. While the “no cholesterol” claim was clearly communicated, NAD had concerns that the total fat content was not.

FDA has determined that, because a no cholesterol claim suggests that a product provides a health benefit, the level of fat in the food has a material bearing on the claim. Where, as here, the food making the claim is high in fat, the total amount of fat per serving must be disclosed. Specifically, 21 CFR 101.62 (d)(ii) provides that:

“The term “cholesterol free” may be used on the label or in the labeling of foods, which contain more than 13 grams of total fat per labeling serving provided that:

- (C) The food contains 2 g or less of saturated fatty acids per reference amount customarily consumed; and
- (D) The label or labeling discloses the level of total fat in a serving of the food. Such disclosure shall appear in immediate proximity to such claim preceding the referral statement [for which the nutrient content claim is made].”

The advertiser provided NAD with labeling information which disclosed that Planters Deluxe Mixed Nuts contain 16 grams of fat and 2 grams of saturated fat per one ounce serving. (Editors Note: Planters Honey Roasted Peanuts and Planters Cocktail Peanuts, the other two Planters’ Nuts products displayed at the end of advertisement contain 13g of fat/1.5g of saturated fat and 14g of fat/2g of saturated fat per serving, respectively). Thus, pursuant to the terms of 21 CFR 101. 62, Planter’s must disclose the total amount of fat per serving when making a “no cholesterol” claim.

The FDA’s disclosure requirements on this subject are quite detailed. If, Planters were to make a “no cholesterol” claim on its packaging for this product [which it currently does not do], it would have to disclose the total fat content in immediate proximity to the cholesterol claim, in type size no less than 1/2 the size used for the claim, on each panel where the claim appeared. NAD interprets these extraordinary disclosure requirements to mean that FDA has

concluded, that it is important to the public health, that high fat foods making “no cholesterol” claims, *clearly* communicate their total fat content to the public. Moreover, FTC has stated that if an advertisement, as a whole, conveys to consumers the net impression that the food makes only positive contributions to a diet (i.e., in this case, no cholesterol), or does not contain any nutrients at levels that raise the risk of diet related diseases, the failure to *clearly and adequately* disclose the presence of risk-related nutrients (i.e., in this case, high fat content) is likely to be deceptive.

Planters advertisement does include a super which provides the necessary fat content per serving disclosure required by the FDA regulation. However, the super appears in small white type, against an essentially off-white background at the very bottom of the screen, and states “A cholesterol free food. Sixteen grams of fat per serving.” in one advertisement, and “Sixteen grams total fat, two grams saturated fat per 1 oz. serving” in another. Despite the advertiser’s technical compliance with FDA’s provisions, NAD was concerned that the total fat message, in this format, was not being clearly or adequately communicated to the public.

To help in the analysis of this issue, NAD turned to Planters consumer research, which was designed to measure audience recall for various marketing purposes, but was not *specifically* designed or intended to test for consumer interpretation of the commercial. Despite this, NAD found the communication section of the testing (which included the verbatim responses to the “main idea of the commercial” question) to be somewhat instructive.

NAD agreed with the advertiser, that their data showed that a significant number of consumers took away the “no cholesterol” message as the main idea of the commercial. However, NAD disagreed with the advertiser on the extent to which an overall “low fat/health” message was communicated. After recasting the verbatims, NAD determined that as many as 28 out of the 108 people questioned took away the message that Planter’s nuts were a healthy and/or low-fat food. Only one respondent noted the fat content, stating the advertisement was about “a healthy, cholesterol-free food, with only 14 grams of fat”.

NAD’s Conclusion: NAD, having reviewed the advertiser’s nutrition evidence, agrees with the advertiser that, in comparison to many other snack foods, nuts have a higher nutritional value. However, nuts are also high in fat. Because of the significance that both the FDA and the FTC place on the *clear and adequate disclosure* of total fat content, when a “no cholesterol” claim” is made for a high fat food; because the disclosure in this advertisement appears in small white print, at the very bottom of the screen, on a non-contrasting background; and because the advertiser’s data indicates that the fat content message, although technically communicated, has not been clearly conveyed to consumers, NAD recommended that the advertiser make its “total fat content” disclosure more conspicuous. This can be accomplished in many ways—larger print, a contrasting background, substituting numbers for words, or, in the best of all worlds, a simultaneous audio and visual disclosure. Of course, the advertiser has complete discretion on how to achieve a clearer disclosure.

Advertiser’s Statement: “Nabisco is pleased that the concerns raised by NAD have been successfully addressed and that NAD agreed that the ad as a whole is in large measure substantiated. As NAD indicated, the ad also technically complies with FDA regulations (to the extent applicable through FTC harmonization) by disclosing the fat level in a super at the same time as the “no cholesterol” claim is made orally The fat disclosures meet or exceed all network standards for type size and duration of supers. Nabisco disagrees with NAD’s view of the fat disclosure based on its recasting of the verbatims. The number of consumers who perceived a low fat message was insignificant. This fact proves that the fat disclosures were adequate. While we believe the fat disclosures are adequate, in the spirit of cooperation, we will review the fat disclosures and comply with NAD’s recommendation to make them more conspicuous.” (#3408 PCM, closed 8/19/9 7)