

September 13, 2021

Bruno Rodrigue
Executive Director
Office of Legislative and Regulatory Modernization
Policy, Planning and International Affairs Directorate
Health Products and Food Branch
Health Canada
11 Holland Avenue
Ottawa, Ontario
K1A 0K9

Re: Proposed Regulations for Caffeinated Energy Drinks and Supplemented Beverages

Dear Mr. Rodrigue,

The Ontario Chamber of Commerce (OCC) is pleased to provide a written submission with respect to Health Canada's proposed regulations for caffeinated energy drinks and supplemented foods and beverages, as published in Canada Gazette on June 26, 2021. The OCC supports Health Canada's desire to modernize regulations and protect the health and safety of Canadians. However, our concerns centre around eight broad areas.

To begin, the proposed regulations for caffeinated energy drinks and supplemented drinks could cause confusion among consumers regarding the safety of products that have been available for years and approved for sale through the issuance of Temporary Marketing Authorization Letters (TMALs).

Caffeinated energy drinks have been sold in the Canadian market since 2004, while supplemented drinks have been in the Canadian market for over a decade. Health Canada has recognized energy drinks and supplemented foods as safe by issuing TMALs since 2011.

TMALs permit the sale of these products as an interim measure while potential regulatory amendments are being considered. These products have been highly regulated and widely consumed by Canadians for many years. It is important to avoid conflicting messages that would confuse Canadians about the integrity of existing approval mechanisms.

Second, the proposed regulations would prevent supplemented beverages from making claims on products and require a warning label. This would limit the information available to consumers.

Health Canada intends to restrict claims for added ingredients that trigger cautionary statements. Further, these products would be required to have a supplemented food caution identifier on the front-of-pack. In other words, once the caution symbol is triggered, industry would be prohibited from making any claim(s) about the supplemental ingredient(s) within the beverage or what benefit(s) the product provides consumers.

Per the proposed regulation, the vast majority (or 88 percent) of the 611 supplemented beverages or energy drinks that are currently approved by Health Canada (through TMALs) would be required to have a black and

white visual Supplemented Food Caution Identifier (SFCI) on the label, which includes a large exclamation mark. Exclamation marks in labelling are typically used to denote “warning” and “danger” concerning potential for injury or death.

Claims explain the function and benefits of consuming a product that contains specific ingredient(s), allowing consumers to make informed purchasing decisions. Thus, the caution symbol runs counter to industry’s desire to ensure Canadians have factual, useful, and easy-to-understand nutritional information about the beverages they are choosing to consume.

For instance, apple juice fortified with added calcium would have a warning label on the front-of-pack; would not be permitted to declare it contains calcium and what benefit(s) are associated with the additional calcium; and would include a Supplemented Food Facts table (SFFt) instead of the typical Nutritional Facts table (NfT) that shows the percentage Daily Value (% DV) for the supplemental ingredient(s). Ultimately, this prevents consumers from having the information they need to understand why a product has been supplemented with additional ingredients and the potential benefits.

As the Canadian Chamber of Commerce (CCC) notes in its submission to your office, “balanced labelling requires that both benefits and risk be communicated to ensure consumers can compare products and make an informed decision on product choices.”

The marked departure for the labelling of energy drinks and supplemented beverages could cause consumers to believe the products they have been consuming for decades – and without warning labels – are not safe and limiting product information would result in greater unease about future purchases.

Third, the proposed changes to caffeinated energy drinks would impact Canadian industry competitiveness.

As another example, Health Canada has proposed to lower the maximum allowance for caffeine from 200 parts per million (ppm) of caffeine to 150 ppm. As such, anything above this 150 ppm threshold (which would impact certain colas and soft drinks) would have to be recategorized as caffeinated energy drinks; include a warning symbol on the front-of-pack; a “High caffeine content” statement on the front-of-pack; and a caution statement of “not recommended for those under 14-years old.”

If implemented, manufacturers would be required to reformulate these products to maintain their status as colas. This would lead to costly changes to product lines and introduce inconsistencies between Canadian formulations and those used in other jurisdictions like the United States.

Fourth, the proposed regulations would require labels to be changed from “not recommended for children” to “not recommended for those under 14-years old” for supplemented foods. This is inconsistent with established precedent by Health Canada.

Health Canada has a clear and well-established regulatory precedent that defines a child as younger than 12-years of age. Health Canada’s proposed regulation for caffeinated energy drinks and supplemented drinks departs from this established definition and norm.

As one example, natural health products classify a child as being under 12-years of age. Health Canada’s lack of consistency in terms of what age constitutes a child will result in consumer confusion. It also introduces unnecessary uncertainty for industry in terms of whether other product categories will be impacted in the future.

Fifth, the proposed framework runs counter to several provisions of the United States-Mexico-Canadian Agreement (USMCA).

The CCC and OCC have consistently advocated for regulatory frameworks that align with those of our international trading partners. This is critical to reducing regulatory burdens on Canadian businesses.

As the CCC notes, the USMCA is Canada’s most important trade agreement. The agreement notes that international standards should be employed as a basis for technical regulations. If international standards are not adopted, the failing Party must provide an explanation. There are additional obligations within the USMCA, including minimizing unnecessary regulatory differences to facilitate trade or investment.

As the CCC’s submission states, “as drafted, the current regulatory proposal runs counter to several aspects of USMCA and for that reason alone must be reworked in order to ensure that Canadian businesses remain internationally and globally competitive.”

Sixth, the proposed regulations are inconsistent with the regulations found in other nations, including some of Canada’s key trading partners. This could hinder trade and the sector’s growth.

When it comes to finalizing regulations for supplemented foods and caffeinated energy drinks, Health Canada should consider and adopt best practices from its international trading partners. Yet, the EU/UK approach to food fortification and regulating substances added to food is more comparable to that of the United States than Canada’s proposed framework. Beyond this, New Zealand does not classify energy drinks as supplemented foods nor require a cautionary logo on the front-of-pack; instead, the statement “Supplemented Food” is on the label.

Health Canada’s proposal – that industry adopt a SFFt instead of the NFt on the back-of-pack for products that fall under the proposed regulations – is inconsistent with how these products are labelled in other major jurisdictions, including Australia, Belgium, Britain, Ireland, New Zealand, and the United States.

If implemented, the framework could place undue burden on Canadian food and beverage producers who sell these beverage products in multiple jurisdictions as they would have to meet differing regulatory requirements in Canada and abroad. The proposed regulations could also make it harder for the beverage industry to do business in Canada.

Thus, rather than facilitating growth, trade, and innovation, the proposed regulations could pose a barrier to firms in this sector. The non-alcoholic refreshment beverages sector employs 60,000 Canadians, both directly and indirectly, contributing over \$892 million in annual tax revenue.

The sector supports independent businesses, the food service industry, and numerous adjacent industries like Canada’s agricultural sector. Effort must be made to bolster – rather than stifle – innovation and the sector’s growth.

Seventh, industry is concerned that Health Canada has not publicly released the scientific framework that guided the proposed regulations. This runs counter to a transparent consultation.

To support any new regulations, government should ensure a robust body of evidence to substantiate the proposed changes. Health Canada indicated it has collaborated with an academic institution to conduct food environment and consumer research on supplemented foods. Although the consultation period has already commenced and is nearing completion, the scientific framework guiding Health Canada’s proposed

regulations has not been made publicly available. Like any Canadian product, caffeinated energy drinks and supplemented beverages should be regulated based on evidence.

Industry supports evidenced-based decision-making. Industry also recognizes that regulations may need to be reviewed from time to time. However, by not releasing this research, analysis, and data, it is challenging for industry to understand what evidence informed the proposed regulatory framework, respond to the proposed regulations, and address Health Canada's concerns.

Not releasing the scientific framework results in a lack of openness and transparency – elements that should underpin government consultations and meaningful industry engagement and collaboration.

Finally, the three-year implementation period that Health Canada has proposed is insufficient for industry. This period should be increased to five years for Supplemented Food regulations.

Traditionally, industry has been given five years to come into compliance with major labelling changes. Under the proposed changes, industry would only have a three-year transition period.

A three-year transition period is an extremely short runway for domestic and international manufacturers. If the proposed regulations are implemented, industry will have to make costly changes, substantially modify packaging, and reconsider future investments and product innovations.

Since the proposed regulations are a significant departure from how caffeinated energy drinks and supplemented beverages have been previously regulated, industry requires a sufficient time to adjust and adapt. By providing a transition timeline of five years, the first compliance date would be January 1, 2028 (presuming the Supplemented Food regulations are finalized in 2022).

Given these concerns, we encourage Health Canada to consider the following recommendations:

- **Recognizing how the proposed regulations could cause confusion and limit the information available to consumers, remove the proposed requirements for the SFFt, the SFCl, and the proposed prohibition on claims;**
- **Reconsider the revised age definition and associated restriction given the inconsistencies this would introduce with established precedent;**
- **Address the trade and business implications associated with the proposed regulations;**
- **Publicly share the research and data underpinning the proposed regulations; and**
- **Extend the implementation transition period to a minimum of five years.**

In closing, we appreciate the opportunity to provide the Office of the Legislative and Regulatory Modernization with our feedback on the proposed regulations. We also appreciate Health Canada's decision to extend the regulatory proposal for supplemented foods by another 30 days and until September 24, 2021. This extension will allow industry to thoroughly review and assess the proposed regulations and accompanying documentation.

We would be happy to discuss these issues further and look forward to continuing to work with you on solutions that support industry, protect consumers, and grow the economy.

Sincerely,



Rocco Rossi
President and CEO
Ontario Chamber of Commerce