

Food & Beverage

LITIGATION UPDATE

Issue 162 • March 15, 2006

Table of Contents

Legislation, Regulations and Standards

- [1] House Approves Contentious Bill That Would Preempt States' Food Safety Regulations1
- [2] Senate Lawmakers Urge HHS Secretary to Designate a Federal Agency to Monitor Food Marketing to Children1
- [3] FTC Seeks Data on Alcohol Manufacturers' Sales and Compliance with Advertising Codes2
- [4] Retail Consignees Would Be Made Public Under USDA Recall Proposal2
- [5] Labeling Rules to Be Discussed at April Meeting of U.S. Codex Delegates2

Litigation

- [6] United States Prevails in Beverage Tax Dispute with Mexico3

Other Developments

- [7] Prominent Nutrition Experts Issue Beverage Consumption Guidelines3

Scientific/Technical Items

- [8] Boston Researchers Claim Sugar-Sweetened Beverages Contribute to Adolescent Weight Problems4

Shook,
Hardy &
Bacon LLP

www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards U.S. Congress

[1] House Approves Contentious Bill That Would Preempt States' Food Safety Regulations

The U.S. House of Representatives last week approved [H.R. 4167](#), the National Uniformity for Food Act of 2005, by a margin of 283-139. The legislation amends the Federal Food, Drug and Cosmetic Act (FFDCA) by creating a single set of national standards governing food safety warning notifications.

States with food safety regulations that differ from federal standards could either petition the HHS secretary to adopt the state provision as a national standard or seek an exemption pursuant to an "important public interest." During any petition/exemption notice and comment period, the state standard would remain in place. In addition, the bill permits states to establish a provision that would otherwise conflict with the FFDCA in order to address an "imminent hazard to health that is likely to result in serious adverse health consequences or death."

Proponents of the bill argue that science-based, uniform standards would be more efficient for food manufacturers and less confusing to consumers

than the "hodgepodge that now exists." Some state officials and advocacy groups, however, reportedly contend that a uniform system would not sufficiently allow for state and local governments to require warnings and other information that may be important to a particular region. California Attorney General Bill Lockyer, for example, reportedly accused Congress of "trying to invalidate consumer environmental and public health laws" and deemed the legislation a "total disgrace." H.R. 4167 would preempt California's Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, which requires warnings to the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity."

The House bill has been referred to the U.S. Senate, where it now awaits action before the Committee on Health, Education, Labor, and Pensions. See *The New York Times*, February 28, 2006; *The Washington Post*, March 1, 2006; and *Associated Press*, March 9, 2006.

[2] Senate Lawmakers Urge HHS Secretary to Designate a Federal Agency to Monitor Food Marketing to Children

Senator Tom Harkin (D-Iowa) and 13 Senate colleagues have called on HHS Secretary Michael Leavitt to designate an agency responsible for monitoring food advertising and marketing to children. Their recommendation follows a December 2005 Institute of Medicine committee report that concluded that marketing strongly influences chil-



dren's dietary preferences. "With the risks to the diets and health of our children well-documented, concrete action toward the goals outlined by the Institute of Medicine is imperative," the senators wrote in their March 3, 2006, [letter](#). "Furthermore, information provided through the monitoring mechanism suggested by the Institute of Medicine is critical to Congress as it considers the need for additional legislative or regulatory action to promote child health."

Federal Trade Commission (FTC)

[3] **FTC Seeks Data on Alcohol Manufacturers' Sales and Compliance with Advertising Codes**

The FTC is seeking [public comments](#) on proposed information requests to beverage alcohol manufacturers with respect to (i) compliance with voluntary advertising placement provisions, (ii) sales and marketing expenditures, and (iii) the status of third-party review of complaints about voluntary advertising code compliance. FTC will consider the comments before requesting Office of Management and Budget review of the proposal under the Paperwork Reduction Act. Comments must be received by May 8, 2006. *See Federal Register*, March 8, 2006.

U.S. Department of Agriculture (USDA)

[4] **Retail Consignees Would Be Made Public Under USDA Recall Proposal**

[Proposed amendments](#) to federal meat and poultry inspection statutes would allow the agriculture department's Food Safety and Inspection Service (FSIS) to make public lists of the retail

consignees of meat and poultry products that have been voluntarily recalled if such products have been distributed to the retail level. FSIS reportedly proposed the action to improve the efficiency of the recall process and would post the lists of retail consignees on the agency's Web site. Comments on the proposal must be submitted by May 8, 2006. *See Federal Register*, March 7, 2006.

Codex Alimentarius Commission

[5] **Labeling Rules to Be Discussed at April Meeting of U.S. Codex Delegates**

The U.S. Department of Agriculture, Food and Drug Administration, and Department of Health and Human Services have scheduled an April 7, 2006, [meeting](#) to discuss draft positions to be presented at the 34th Session of the Codex Committee on Food Labeling in Ottawa, Canada, in early May. Issues to be discussed at the Ottawa meeting include (i) labeling provisions of draft commodity standards; (ii) guidelines for the production, processing, labeling, and marketing of organically produced foods; (iii) draft guidelines for the labeling of certain genetically modified foods; (iv) a proposed draft definition of *trans*-fatty acids; and (v) a discussion paper on advertising. *See Federal Register*, March 1, 2006.



Litigation

International Trade

[6] United States Prevails in Beverage Tax Dispute with Mexico

The World Trade Organization's (WTO's) Appellate Body last week [upheld](#) an October 2005 WTO panel ruling that Mexico's 20 percent sales tax and 20 percent distribution tax on sweetened beverages not containing cane sugar violated global trade rules. Imposed by the Mexican government in January 2002, the taxes have hindered trade negotiations between the two countries over how much sugar Mexico could export to the United States and how much high-fructose corn syrup (HFCS) the United States could send there. Sugar-sweetened beverages were exempt from the taxes. The Corn Refiners Association claimed the tax dispute resulted in losses of some \$944 million in HFCS sales annually. *See Press Releases of the Corn Refiners Association and Office of the U.S. Trade Representative*, March 6, 2006; *Associated Press*, March 7, 2006.

Other Developments

[7] Prominent Nutrition Experts Issue Beverage Consumption Guidelines

A group of leading nutrition experts have developed a ["Beverage Guidance System"](#) that advocates significant reductions in the intake of calorically sweetened beverages as a way to combat escalating rates of obesity in the United States. B. Popkin, et al., "A new proposed guidance system for beverage consumption in the United States," *American Journal of Clinical Nutrition* 83: 529-542,

2006. Funding for the research effort was provided by the Unilever Health Institute, which is reportedly using the nutritionists' suggestions in a new marketing campaign touting the benefits of drinking Lipton Tea.

University of North Carolina nutrition researcher, Barry Popkin, reportedly initiated the project out of "dissatisfaction" with federal dietary guidelines whose beverage recommendations address only the roles of milk and alcoholic beverages in healthy diets. Other members of the beverage panel included Benjamin Caballero, M.D., of The Johns Hopkins University; Balz Frei, Ph.D., of Oregon State University; Walter Willet, M.D., of Harvard University; George Bray, M.D., of Louisiana State University; and Lawrence Armstrong, Ph.D., of the University of Connecticut.

For most adults, the beverage guidance panel suggests consuming 32-48 ounces of water daily. Other beverages should be limited to the following: (i) no more than 40 ounces of unsweetened tea or coffee; (ii) no more than 32 ounces of diet soft drinks or other non-caloric sweetened beverages; (iii) no more than 8 ounces of 100 percent fruit or vegetable juices; (iv) no more than 16 ounces of low-fat or skim milk and soy beverages; (v) no more than one alcoholic beverage for women and two for men – one drink equals 12 ounces of beer, 5 ounces of wine, or 1.5 ounces of spirits; and (vi) no more than 8 ounces of sugar-sweetened beverages such as soft drinks.



The American Beverage Association reportedly took issue with the beverage intake advice, claiming it has “many factual shortcomings that are at odds with the USDA dietary guidelines, including the misguided suggestion that it’s healthier to drink more alcohol than sweetened beverages.” The trade group also criticized the “miniscule” role allotted to skim and low-fat milk in a healthy diet. See *Associated Press*, March 8, 2006.

Scientific/Technical Items

Soft Drinks

[8] **Boston Researchers Claim Sugar-Sweetened Beverages Contribute to Adolescent Weight Problems**

Researchers from Children’s Hospital in Boston reported last week that teenagers who consume non-caloric (diet) alternatives to sugar-sweetened beverages may experience weight loss, especially among the heaviest teens. C. Ebbeling, et al., “Effects of Decreasing Sugar-Sweetened Beverage Consumption on Body Weight in Adolescents: A Randomized, Controlled Pilot Study,” *Pediatrics* 117(3): 673-680, March 2006.

The six-month study compared two groups of adolescents ages 13 to 18. The intervention group of teens received home delivery of calorie-free beverages and were asked not to drink sugar-sweetened beverages, including soft drinks, juice drinks containing less than 100 percent juice, punches, lemonades, iced tea, and sports drinks. Teens in the control group were instructed to continue their usual eating and drinking patterns. At the study’s end, an 82 percent reduction in the consumption of sugar-sweetened drinks was observed for the intervention group, while intake in the control group remained unchanged. Weight losses equivalent to about one pound per month were observed among the heaviest teens in the intervention group, while the control group, as a whole, had a slight increase in weight.



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by
Mark Cowing and Mary Boyd in the Kansas City office of SHB.
If you have questions about the Update or would like to receive back-up materials,
please contact us by e-mail at mcowing@shb.com or mboyd@shb.com.
You can also reach us at 816-474-6550.
We welcome any leads on new developments in this emerging area of litigation.

Shook,
Hardy &
Bacon^{LLP}

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

Overland Park, Kansas

San Francisco, California

Tampa, Florida

Washington, D.C.

