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LEGISLATION, REGULATIONS AND STANDARDS

White House to Lift Travel Restrictions on Alcohol from Cuba

The White House has issued a policy directive intended to promote “authorized engagements with Cuba to advance cooperation on areas of mutual interest, and increase travel to, commerce with, and the free flow of information to Cuba.” To this end, the Department of the Treasury’s Office of Foreign Assets Control (OFAC) and the Department of Commerce’s Bureau of Industry and Security have announced amendments to the Cuban Assets Control Regulations and Export Administration Regulations that will lift restrictions on travelers bringing Cuba-origin alcohol, cigars and other products back to the United States for personal use.

According to the announcement, OFAC considers “personal use” of imported merchandise “to include giving the item to another individual as a personal gift, but not the transfer of the item to another person for payment or other consideration.” In addition, the new rules permit a range of specific healthcare, humanitarian, trade, and commerce transactions, and authorize “exports of certain consumer goods that are sold online or through other means directly to eligible individuals in Cuba for their personal use.”

“The U.S. private sector, scientific and medical researchers, agriculture industry, foundations, and other groups have new avenues for collaboration that can provide opportunities for Cuban entrepreneurs, scientists, farmers, and other professionals,” states the policy directive. “At the same time, increased access to the internet is boosting Cubans’ connectivity to the wider world and expanding the ability of the Cuban people, especially youth, to exchange information and ideas.”

USDA Finds American Egg Board Engaged in “Inappropriate Conduct” Against Hampton Creek

The U.S. Department of Agriculture’s (USDA’s) Agricultural Marketing Service (AMS) has completed a report reviewing nine allegations of misconduct asserted by Josh Tetrick, head of Just Mayo producer

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Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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Hampton Creek, against the American Egg Board (AEB). The report concludes that AEB staff and board members engaged in inappropriate conduct, including failing to adhere to USDA guidelines, targeting a specific company and sending inappropriate emails.

The report found substantiation for five of Tetrick's nine allegations: (i) AEB employees exchanged inappropriate emails about Tetrick, including references such as, "Can we pool our money and put a hit on him?" and "old buddies from Brooklyn pay him a visit"; (ii) an AEB executive accepted a consultant's offer to contact Whole Foods Market Inc. in an effort to persuade the company to stop stocking Just Mayo, although the consultant never actually contacted the company; (iii) a public relations expert conducted market research on egg-replacement products, identifying Just Mayo specifically in violation of guidelines against targeting a specific company; (iv) AEB developed egg-positive pop-up ads to display when consumers searched for terms related to "Beyond Eggs," including "Hampton Creek, Inc.," "Josh Tetrick" and "Just Mayo"; and (v) AEB executives violated guidelines in creating internal budget and program documents specifically identifying Just Mayo. The report also notes that AEB staff will be required to complete additional training on appropriate activities and procedures.

Four of Tetrick's allegations were unfounded, the report concluded, because they constituted regular activities for a research and promotion board. That AEB paid bloggers to promote the benefits of consuming and cooking with eggs was a standard practice and not an effort to "discredit Hampton Creek, Inc., online," as Tetrick alleged. In addition, AEB's attempt to join The Association of Dressings & Sauces could not be construed as an attempt to manipulate standards, and AEB did not intervene in Unilever's litigation with Hampton Creek when an executive informed Unilever that AEB could not support the litigation nor make a statement. Finally, AMS could not find any evidence to support the allegation that AEB attempted to persuade the U.S. Food and Drug Administration to pursue action against Hampton Creek for labeling issues.

The AMS [memo](#) about the report specifies that at the time the agency initiated the review, "all of the inappropriate activities had stopped." Additional details on the allegations appear in Issue [578](#) of this *Update*.

European Parliament Adopts Resolution to Harmonize Food Contact Material Regulations

Members of the European Parliament have backed by a 559 to 31 vote, with 26 abstentions, a non-binding resolution asking the EU to “further harmonize the safety requirements for food contact materials [FCMs], which are largely used in everyday life in the form of food packaging, kitchen utensils and tableware.” According to a news release, “Only four out of listed 17 food contact materials are currently covered by specific safety measures foreseen in existing EU framework legislation: plastics, ceramics, regenerated cellulose and ‘active and intelligent’ materials.”

In particular, the report on the implementation of the Food Contact Materials Regulation ((EC) No 1935/2004) calls on the Commission to consider identifying bisphenol A (BPA) as one of the substances classified as a substance of very high concern (SVHC) under REACH regulations. It also asks the European Commission to prohibit the use of bisphenol S (BPS) in FCMs “as a substitute for Bisphenol A (BPA), as BPS may have a toxicological profile similar to BPA.”

“This is how we ensure that the materials that are in direct contact with our food are safe,” said rapporteur and Danish MEP Christel Schaldemose (S&D). “The lack of harmonized rules causes problems for consumers, for companies, and for the authorities. In reality, it means that the single market is not a single market: some countries have high standards, other low standards. We know from various studies that it is what is in the packaging that is causing health problems. The EU should therefore revise the current legislation. Food safety should mean the same thing across the EU.”

WHO Report Advocates Soda Tax to Reduce Obesity

The World Health Organization (WHO) has published an October 2016 report claiming that “taxing sugary drinks can lower consumption and reduce obesity, type 2 diabetes and tooth decay,” according to a concurrent press release. Titled *Fiscal Policies for Diet and Prevention of Noncommunicable Diseases (NCDs)*, the report collates information gathered during a May 2015 technical meeting of fiscal-policy experts who evidently concluded that “there is reasonable and increasing evidence that appropriately designed taxes on sugar-sweetened beverages would result in proportional reductions in consumption, especially if aimed at raising the retail price by 20% or more.”

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The report summarizes the effect of fiscal policies—including food and beverage taxes, nutrient-focused taxes and subsidies—on health outcomes in Denmark, Ecuador, Egypt, Finland, France, Hungary, Mauritius, Mexico, Philippines, Thailand and the United States. “Some of the challenges faced in implementation include a lack of appropriate capacity for tax administration, tax set at low levels that prove inefficient in influencing behavioral choices, and a lack of monitoring and evaluation of the health impact,” notes the report. “It was established from all presentations that countries attempting to progress fiscal policies face considerable political and industry opposition.”

Among other things, WHO recommends that countries considering the use of fiscal policies to affect diet first need to determine (i) the type and structure of the tax, (ii) what products to tax, and (iii) the implications for nutrition-related programming. The organization also draws parallels to tobacco taxation, arguing for “specific excise taxes” adjusted to inflation and income “to effectively reduce affordability and discourage consumption over time.” The report adds, “Similarly strong evidence shows that subsidies for fresh fruits and vegetables, that reduce prices by 10–30%, are effective in increasing fruit and vegetable consumption... Taxation of other target foods and beverages, particularly those high in saturated fats, trans fatty acids, free sugars and/or salt appears promising, with existing evidence clearly showing that increases in the prices of target options reduces their consumption.”

LITIGATION

Ninth Circuit Partially Reverses “All Natural” Summary Judgment in Dole Case

The Ninth Circuit Court of Appeals has reversed a grant of summary judgment to Dole Packaged Foods in a lawsuit alleging the company misleads consumers by labeling its packaged fruit products as “all natural” in violation of California consumer-protection statutes. *Brazil v. Dole Packaged Foods*, No. 12-1831 (9th Cir., order entered September 30, 2016).

The appeals court reviewed the evidence before it—including the plaintiff’s testimony that the “all natural” label deceived him, the label itself, Dole’s consumer surveys and U.S. Food and Drug Administration warning letters—and found that “this evidence could allow a trier of fact to conclude that Dole’s description of its products as ‘All Natural Fruit’ is misleading to a reasonable consumer.” Accordingly, the court

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reversed the grant of summary judgment and remanded the case to the district court.

The Ninth Circuit affirmed the district court's dismissal of claims alleging Dole sold "illegal products." The plaintiff "seems to be suggesting that Dole's website statements about certain fruit products subject him to risk of fine or prosecution if he is found in possession of that fruit product," the court noted. "We are unable to find support for this outlandish theory in the decisions of the California courts."

PCRM's Lawsuit Alleging Inappropriate Influence on Cholesterol Guidelines Dismissed for Jurisdictional Issues

A California federal court has dismissed a lawsuit alleging the U.S. Department of Agriculture (USDA) and Department of Health and Human Services (HHS) allowed the American Egg Board to unduly influence the government's nutrition advice on dietary cholesterol. *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-0069 (N.D. Cal., San Francisco Div., order entered October 12, 2016).

Physicians Committee for Responsible Medicine (PCRM) filed the lawsuit following a change to the 2015 Dietary Guidelines that removed the recommended limit of 300 milligrams per day of dietary cholesterol; instead, the guidelines recommended consuming "as little dietary cholesterol as possible while consuming a healthy eating pattern." PCRM alleged that the advisory body's analysis and recommendations were compromised by the presence of scientists who had received funding from the American Egg Board or Egg Nutrition Center.

The court assessed whether it had subject matter jurisdiction to consider PCRM's claim by examining the underlying statutes creating the process to formulate the Dietary Guidelines. The court could not find any "meaningful standard" from relevant law determining what may be inappropriate influence on the guidelines.

"This does not present the court with a merely 'difficult' question," the court held. "The operative problem instead is that the relevant law provides no meaningful standard by which the court can approach the question—difficult or otherwise. The issue is thus 'absolutely 'committed' to the agency's judgment.' [] If the court were to decide that question nonetheless, it would not be dutifully discharging its judicial responsibility, [] it would be wrongfully substituting its own judgment for that of a coordinate branch of government. Which is why the issue is at bottom jurisdictional."

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Snoop Dogg, Pabst Settle Endorsement Dispute

Rapper Snoop Dogg and Pabst Brewing Co. have reportedly reached an agreement to settle a lawsuit disputing a Colt 45[®] endorsement deal that the rapper argued entitled him to a portion of the proceeds when the brand was sold to Blue Ribbon Intermediate Holdings in 2014. Snoop Dogg's claims survived Pabst's motion to dismiss in February 2016 and motion for summary judgment in August 2016. Details about the motion to dismiss appear in Issue [595](#) of this *Update*. See *The Hollywood Reporter*, October 7, 2016.

Castle Cheese Executive to Pay \$5,000 over Adulterated Parmesan

Castle Cheese Inc. President Michelle Myrter has reportedly been sentenced to three years of probation, 200 hours of community service at a food bank and a \$5,000 fine for misdemeanor charges of food adulteration for selling "100% Parmesan" cheese containing high levels of substitutes, including cellulose. Following a federal investigation and a raid on company facilities, Myrter pleaded guilty to the charges in February 2016. Additional details appear in Issue [596](#) of this *Update*. See *Bloomberg*, October 11, 2016.

CSPI Alleges PepsiCo's Naked Juices Mislead Consumers

Representing a group of three consumers, the Center for Science in the Public Interest (CSPI) has [filed](#) a lawsuit against PepsiCo, Inc. alleging the company's Naked line misleads consumers by naming and labeling its juices with foods "perceived by consumers to be highly nutritious, like kale," but manufacturing the products without "the ingredient profile represented." *Lipkind v. PepsiCo, Inc.*, No. 16-5506 (E.D.N.Y., filed October 4, 2016).

"Consumers are paying higher prices for the healthful and expensive ingredients advertised on Naked labels, such as berries, cherries, kale and other greens, and mango," said CSPI Litigation Director Maia Kats in an October 4, 2016, press release. "But consumers are predominantly getting apple juice, or in the case of Kale Blazer, orange and apple juice. They're not getting what they paid for."

The complaint asserts Naked products "predominantly consist of cheaper and less nutritious ingredients like apple juice" and targets the label's "no sugar added" claim, arguing that consumers mistakenly perceive the phrase "to mean that the drinks are low in sugar—consisting primarily

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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.



of low-sugar vegetables and super ingredients heavily emphasized in juiced form.” The plaintiffs identify Naked’s Kale Blazer beverage as allegedly representative of the overall marketing strategy for Naked: although the product is “predominantly orange juice,” the label features “pictures of kale and other ‘dark leafy’ greens” while “[o]range juice and apple juice—of which the product largely consists—are not named or pictured anywhere on the front label.” PepsiCo also uses the Twitter handle “TweetsByKale” to promote the beverage and “authors promotional articles on sites like BuzzFeed, wherein PepsiCo extolls the various benefits of kale and exaggerates its presence in the drink.”

For alleged violations of New York and California consumer-protection statutes, the plaintiffs seek class certification, an injunction, statutory and punitive damages and attorney’s fees.

J.R. Simplot Alleges McCain Foods Infringes Patent for Sidewinders® Twisted Fries

J.R. Simplot Co. has filed a patent infringement suit against McCain Foods USA, Inc. alleging McCain copied Simplot’s twisted potato fries product, Sidewinders®. *J.R. Simplot Co. v. McCain Foods USA, Inc.*, No. 16-0449 (D. Idaho, filed October 7, 2016). Simplot asserts that its patent, “Spiral Potato Piece,” covers the ornamental features of Sidewinders®, including its “inherently distinctive and nonfunctional” shape, and that side-by-side comparisons indicate “McCain copied Simplot’s patented Sidewinders® design in developing its Twisted Potato products.” Simplot alleges patent and trade dress infringement and seeks damages, an injunction and attorney’s fees.