



LEGISLATION, REGULATIONS & STANDARDS

## FDA Issues Guidance on Allulose, Seeks Comments on Non-Traditional Sugars

The U.S. Food and Drug Administration (FDA) has issued [final guidance](#) on the declaration of allulose in food. “The guidance describes FDA’s views on the declaration of allulose on Nutrition Facts and Supplement Facts labels and the caloric content of allulose,” according to the announcement. “The guidance also announces our intent to exercise enforcement discretion for the exclusion of allulose from the amount of Total Sugars and Added Sugars declared on the Nutrition Facts and Supplement Facts label and use of a general factor of 0.4 calories per gram (kcal/g) for allulose when calculating declarations on Nutrition and Supplement Facts labels.”

The agency also announced a [request for comments](#) on “the nutrition labeling of sugars that are metabolized differently than traditional sugars,” such as allulose, D-tagatose and isomaltulose. According to the announcement, “Some sugars (e.g., allulose, D-tagatose, isomaltulose) do not have all of the same effects in the body as traditional sugars. Because of that, we have received multiple requests from industry to treat these sugars that are metabolized differently than traditional sugars as distinct from traditional sugars for purposes of nutrition labeling.” Comments will be accepted until December 18, 2020.

## Meat, Cultured Meat Groups Jointly Send USDA Letter

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The National American Meat Institute and the Alliance for Meat, Poultry and Seafood Innovation have urged the U.S. Department of Agriculture (USDA) to seek more information on cultured or cell-based meat and poultry products. The organizations recommend that USDA's Food Safety and Inspection Service issue an Advanced Notice of Proposed Rulemaking to obtain information about the finished products. "For cell-based/cultured products, there are several approaches to producing these products and, depending on the approach, the characteristics of some products may vary from those of conventional products, as noted by the agencies," the letter notes. "The companies developing these products are committed to supporting and complying with principles that ensure labeling is truthful and not misleading, does not disparage cell-based/cultured or conventional products, enables consumers to distinguish between such products, and is consistent with the safety and nutritional qualities of the product."

## "Veggie Burgers" Approved But "Vegan Cheese" Banned in EU

The European Parliament has reportedly voted against a ban on the use of meat terms for plant-based alternatives to meat, allowing words such as "burger," "steak" and "sausage" to be used on the packaging for plant-based foods, while passing a measure to ban the use of dairy terms on alternatives to dairy foods, such as "yogurt-style" or "cream imitation." A ban was already in place for the use of "milk" and "butter" for plant-based foods, and the passage of the measure expands the limitations.

## FDA Announces Voluntary Pilot Program for FSMA Rules

The U.S. Food and Drug Administration (FDA) has announced a voluntary pilot program that will assess third-party food safety audit standards for the Preventive Controls for Human Food and Produce Safety requirements set forth under the Food Safety Modernization Act (FSMA). The agency also released a guidance document with further information about the program.

"We are launching this pilot program because we expect that FDA alignment determinations would create efficiencies for industry if they have confidence that the third-party standards used to audit their suppliers adequately consider the FDA's food safety requirements," the announcement states. "Similarly, we expect that it would be helpful for FDA investigators to know that the



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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

standards used to audit a supplier were aligned with FDA regulations. This could help investigators more efficiently determine whether importers and receiving facilities are in compliance with the FSMA supply-chain verification requirements for audits.”

inspections, subject to FDA, USDA and FTC regulation.



## LITIGATION

### Plaintiff Alleges Whole Foods Chocolate Is Mislabeled

A consumer has filed a putative class action alleging Whole Foods Market Group Inc. mislabels its chocolate-coated ice cream bars because the “purported chocolate contains vegetable oils.” *Mitchell v. Whole Foods Mkt. Grp. Inc.*, No. 20-8496 (S.D.N.Y., filed October 12, 2020). “Consumers want chocolate in chocolate products to come from a real source, i.e., from cacao beans,” the complaint asserts. “Chocolate provides greater satiety and a creamy and smooth mouthfeel compared to other ingredients which substitute for chocolate, like vegetable oils, which provide less satiety, a waxy and oily mouthfeel and leave an aftertaste.” The plaintiff argues that the product’s chocolate “contains ingredients not found in real chocolate,” such as organic expeller pressed palm kernel oil, and alleges the inclusion of the ingredients amounts to fraud, negligent misrepresentation and unjust enrichment as well as violations of the Magnuson-Moss Warranty Act and New York’s consumer-protection statutes.



### “Sour Cream” Chips Flavored with Diacetyl, Plaintiff Alleges

A consumer has alleged that Frito-Lay Inc.’s Baked Cheddar and Sour Cream chips use diacetyl to obtain the sour cream flavor without referring to diacetyl as a characterizing flavor. *Vado v. Frito-Lay Inc.*, No. 20-2055 (S.D. Cal., filed October 19, 2020). The complaint asserts that artificial diacetyl, which provides a butter flavor, is used to enrich the taste of sour cream that has been produced from cows raised on a feedlot rather than a pasture. The plaintiff argues that the diacetyl is thus a characterizing flavor of the chips and alleges the chips should be labeled “Cheddar and Artificial Sour Cream Flavored.” The complaint also distinguishes the baked variety of the chips from the brand’s conventional version, which “actually contains sour cream and unlike the Mislabeled Product, real sour cream is listed

as an ingredient on the back-label ingredient list.” The plaintiff alleges violations of California consumer-protection statutes as well as unjust enrichment.

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