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LEGISLATION, REGULATIONS & STANDARDS

# California Lawmakers Introduce Legislation to Ban Five Food Additives

California lawmakers have introduced first-in-the-nation legislation seeking to ban five food additives—propylparaben, Red Dye No. 3, brominated vegetable oil, potassium bromate and titanium dioxide—from food products sold in the state. Assembly Bill 418, which would take ffect January 1, 2025, would prohibit people or entities in California from manufacturing, selling, delivering, distributing, holding or offering for sale in commerce a food containing any of the five additives.

The bill was cosponsored by Assemblymembers Jesse Gabriel and Buffy Wicks. In a news release, Gabriel said the included additives are currently banned in the European Union because of scientific studies finding demonstrated significant public health harms.

“Californians shouldn’t have to worry that the food they buy in their neighborhood grocery store might be full of dangerous additives or toxic chemicals,” Gabriel, chair of the Assembly Committee on Privacy and Consumer Protection, said in a statement. “This bill will correct for a concerning lack of federal oversight and help protect our kids, public health, and the safety of our food supply.”

Gabriel and Wicks introduced the bill on February 2 and has since been referred to assembly committees.



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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# FDA Calls on Infant Formula Industry to Improve Processes to Prevent Contamination

The U.S. Food and Drug Administration (FDA) is calling on companies in the infant formula industry to take quicker action to improve processes and programs so that infants are better protected against contaminated formula and product shortages.

In a letter dated March 8, the agency addressed infant formula manufacturers, packers, distributors, exporters, importers and retailers involved in the manufacturing and distribution of powdered infant formula, sharing information about how they can improve the microbiological safety of their products.

The letter followed a nationwide infant formula shortage in 2022, which was largely caused by a recall of a certain brand of powdered infant formula and shutdown of the brand's manufacturing facility after FDA noted in late 2021 and 2022 that a series of *Cronobacter* spp. illnesses among infants in the United States was associated with the product.

FDA said it has developed a strategy to prevent future *Cronobacter* spp. illnesses associated with powdered infant formula and asked companies to voluntarily notify the agency if a product sample is found to be positive for *Cronobacter* spp. or *Salmonella*, even if the affected lots have not been distributed.

"FDA calls on all members of the infant formula industry to use the information in this letter to take prompt action to improve processes and programs for the protection of our most vulnerable population," stated the letter, which was signed by FDA Commissioner Robert M. Califf and Susan T. Mayne, Director of the Center for Food Safety and Applied Nutrition. "FDA will continue conducting inspections and working with industry to ensure the safety of all infant formula in the U.S. market."

# FDA: Some Food-Industry COVID-19 Guidance Documents Expiring in May

The U.S. Food and Drug Administration (FDA) has issued a notice that some of the agency's COVID-19 guidance documents to help support the food supply chain during the pandemic will expire with the end of the Public Health Emergency (PHE) in May 2023.

In a March 10 Constituent Update, FDA said it issued a Federal Register notice to explain how the end of the PHE on May 11 will impact its COVID-19 guidance documents. The agency issued the documents during the PHE to help address the circumstances of

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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.

the PHE and the pandemic. Most of the guidance documents state that they are intended to only remain in effect for the duration of the declared PHE.

During the pandemic, the Center for Food Safety and Applied Nutrition issued 10 guidance documents to help provide temporary flexibility to the food industry to support the food supply chain and meet consumer demand during the pandemic. While some of the documents will expire along with the PHE, FDA is revising others to continue in effect through November.

The agency has provided a list of applicable guidance documents and their status.

LITIGATION

## Buffalo Wild Wings Deceives Consumers on its Boneless Wings, Man Alleges

An Illinois man has filed a lawsuit against Buffalo Wild Wings, accusing the restaurant chain of misleading consumers into believing its boneless wings are actually chicken wings.

In his complaint, he alleges the company's name and description of the products lead reasonable cosumers to believe they are actually chicken wings that have simply been deboned and are entirely comprised of chicken wing meat.

“Unbeknownst to Plaintiff and other consumers, the Products are not wings at all, but instead, slices of chicken breast meat deep-fried like wings. Indeed, the Products are more akin, in composition, to a chicken nugget rather than a chicken wing,” the plaintiff said in his complaint. “This clear-cut case of false advertising should not be permitted, as consumers should be able to rely on the plain meaning of a product’s name and receive what they are promised.”

The plaintiff noted in his complaint that other chains like Domino’s Pizza and Papa Johns do not call their similar products boneless wings, but rather chicken poppers.

The plaintiff is alleging the company violated the Illinois Consumer Fraud and Deceptive Business Practices Act. Other claims include breach of express warranty, common law fraud and unjust enrichment. He’s seeking class certification, declaratory judgment, restitution, damages, injunctive relief, attorney’s fees and pre- and post-judgment interest.

## Lack of Information About Laboratory Testing Sinks Wegmans Packaging Suit

A federal court in New York has thrown out a proposed class action against Wegmans Food Markets, Inc., alleging the company labeled its Gluten Free Vanilla Cake Mix in a way that misled consumers. *Santiful v. Wegmans Food Markets, Inc.*, No. 20-2933 (S.D.N.Y., entered March 10, 2023).

The plaintiffs took issue with labeling that the product is "Naturally Flavored," claiming that a laboratory analysis showed the product is instead flavored with an artificial flavoring, ethyl vanillin. The court granted dismissal of the suit after ruling that the plaintiffs failed to plausibly allege that ethyl vanillin is present in the product.

In its opinion, the court said the majority of the plaintiffs' second amended complaint discusses how ethyl vanillin is never a natural flavor, pointing to the laboratory analysis, but failed to include information substantiating the laboratory analysis.

"Because the presence of ethyl vanillin is supported solely by the results of an unsubstantiated laboratory analysis, this Court sees no 'non-conclusory, substantiated allegations' to suggest ethyl vanillin is present in the Product," the court said. "In the absence of any substantiated allegations that artificial flavors, like ethyl vanillin, are present in the Product, this Court concludes that the Product's labeling would not mislead a reasonable consumer."

## Woman Sues Mondelez, Lindt for Alleged Heavy Metals in Dark Chocolate

A New York consumer has filed a proposed class action against Mondelez and Lindt & Sprüngli, alleging they failed to disclose to consumers that their dark chocolate products contained high levels of heavy metals. *Newman v. Mondelez Global LLC*, No-23-1988 (S.D.N.Y., filed March 8, 2023); *Newman v. Lindt & Sprüngli (North America) Inc.*, No. 23-01972 (S.D.N.Y., filed March 8, 2023). The products at the heart of the Mondelez suit are the HU Organic Simple Dark Chocolate 70% Cacao and Green & Black's Organic Dark Chocolate 70% Cacao products. The products at issue in the Lindt suit are the Lindt Excellence Dark Chocolate 85% Cocoa and Lindt Excellence Dark Chocolate 70% products.

The plaintiff said a December report in *Consumer Reports* showed that many dark chocolate products, including the products at issue, contain high levels of cadmium and lead. The plaintiff asserted that high levels of lead and cadmium in food

products are material to reasonable consumers because they pose serious health risks to consumers, even in small doses.

"Additionally, the lead and cadmium levels in the Products could not be known before purchasing them, and may not be determined without extensive and expensive scientific testing," the plaintiff said in the complaint. "Accordingly, consumers rely on Defendant to be truthful regarding the ingredients, including the existence of lead and cadmium, in the Products."

The plaintiff has alleged violations of New York General Business Law Sections 349 and 350, breach of implied warranty and unjust enrichment. She is seeking class certification, damages including statutory damages of $50 per transaction under Section 349 and $500 per transaction under Section 350, and costs and expenses including attorney's fees.

## Consumer Argues 'French Dessert' Implies French Origin

A plaintiff has alleged that Petit Pot Inc. misleads consumers by describing its Pot de Crème products as a "French dessert" because it falsely implies that the products are made in France. *Faris v. Petit Pot Inc.*, No. 23-1955 (N.D. Cal., filed March 16, 2023). The consumer argues that the combination of the "French dessert" description, the depiction of a figure wearing a beret—the mascot, "Ambassador Louis"—and the use of French words on the label cause consumers to believe that the products are made in France. The allegations of fraud, unjust enrichment, breach of contract and California consumer protection statute violations were brought on behalf of putative nationwide and California classes, and the plaintiff seeks an injunction, costs, attorney's fees, damages and class certification.