Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Federal Trade Commission

[1] Commercial Alert Urges FTC to Investigate Buzz Marketing Practices

An Oregon-based nonprofit group that strives "to reduce the incidence of marketing-related diseases" this week asked FTC Secretary Donald Clark to scrutinize the practice of buzz marketing, claiming the technique constitutes deceptive advertising. In an October 18, 2005, letter to the FTC secretary, Commercial Alert asserts that some "companies are perpetrating large-scale deception upon consumers by deploying buzz marketers who fail to disclose that they have been enlisted to promote products. This failure to disclose is fundamentally fraudulent and misleading; and it might violate federal prohibitions against unfair or deceptive acts and practices affecting commerce."

The consumer group specifically encourages FTC to evaluate Procter & Gamble's use of an estimated 250,000 teens in its "buzz marketing sales force." The company's Tremor division evidently sends the teenagers free products and asks them to discuss them with their friends. A marketing expert quoted in *USA Today* estimates that 85 percent of the top 1,000 marketers in the United States utilize some form of buzz marketing. *See Commercial Alert News Release,* October 18, 2005; *USA Today,* October 19, 2005.

Food and Drug Administration (FDA)

[2] FDA Schedules Public Meeting to Present Research on Consumers' Reactions to Health Claims

FDA is hosting a **public meeting** on November 17, 2005, to discuss research findings pertaining to consumers' perceptions of health claims on conventional human foods and dietary supplements, i.e., labeling statements that describe a relationship between a product or component of a product and reduction in the risk of a disease or health-related condition. The agency is particularly interested in stakeholders' "views regarding schemes or signals, other than those already studied, that may, consistent with the First Amendment, effectively communicate to consumers the level of scientific support for health claims, without leading consumers to make erroneous inferences about the claimed substance-disease relationship and/or other product characteristics." According to the *Federal Register* notice announcing the meeting, FDA plans to consider all relevant information presented at the event in any potential rulemaking related to alternatives for regulating qualified health claims. Those individuals wishing to attend the meeting must register by November

10; written or electronic comments about the effect of health claims on consumer perceptions and behavior will be accepted until January 17, 2006. *See Federal Register,* October 19, 2005.

U.S. Department of Agriculture (USDA)

[3] USDA Seeks Nominations for Individuals to Serve on Biotechnology Committee

The Agricultural Research Service is **soliciting nominations** for membership on the Advisory Committee on Biotechnology and 21st Century Agriculture. The 19-member advisory group is charged with evaluating the long-term impacts of biotechnology on the U.S. food and agriculture system and providing USDA with attendant recommendations. Issues that USDA expects the panel to address over the next two years include transgenic animals and uses for certain biotech crops. The agency is interested in nominees with expertise in such areas as international trade, intellectual property rights systems and plant pathology. Nominations must be received by November 14, 2005. *See Federal Register,* October 13, 2005.

Litigation

Beef Imports

[4] Ninth Circuit Rejects Request to Reconsider Temporary Ban on Canadian Beef Imports

Late last week, the Ninth Circuit Court of Appeals let stand its decision overturning a district court's preliminary injunction that halted certain Canadian beef imports. The district court had entered the injunction pending the outcome of a lawsuit brought by the Ranchers-Cattlemen Action Legal Fund (R-CALF) against the U.S. Department of Agriculture (USDA). *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture,* No. 05-35264, (9th Cir. 7/14/05).

The United States prohibited imports of Canadian cattle in May 2003 after tests revealed that a North Alberta downer cow was infected with bovine spongiform encephalopathy (BSE). In March 2005, USDA planned to resume imports of live cattle younger than age 30 months and beef products derived from cattle of the same age until R-CALF, a nonprofit group representing cattle producers, filed a lawsuit in federal court in Montana seeking a permanent injunction against the beef imports.

News reports indicate that R-CALF now intends to ask U.S. District Court Judge Richard Cebull to schedule another hearing before issuing his final ruling in the case. Among other things, R-CALF claims that relaxing import restrictions will expose U.S. consumers to "an increased risk of an invariably fatal disease associated with consumption of BSE-contaminated meat, will increase the risk of invariably fatal BSE infection in cattle in the United States, and will expose U.S. cattle producers to severe economic hardship." *See Canadian Cattlemen's Association News Release,* October 14, 2005; *R-CALF News Release* and *Meatingplace.com,* October 17, 2005.

Other Developments

[5] Pew Policy Dialogue to Target Implications of GM Imports

The Pew Initiative on Food Biotechnology is sponsoring a November 2, 2005, policy dialogue titled "GM Imports: Implications for U.S.

Biotechnology Policy" at the National Press Club in Washington, D.C. Representatives of the International Food Policy Research Institute, Center for Science in the Public Interest and the USA Rice Federation will discuss what measures different industry sectors are taking to address the issue, relevant government policies and consumer perceptions of GM products. More information about the event is available **here**.

Media Coverage

[6] "Junk Food and Junk Science," Bill Lockyer, *The San Francisco Chronicle*, October 17, 2005

In this editorial, California Attorney General Bill Lockyer defends his decision to file a Proposition 65 lawsuit against nine companies for failure to warn consumers of allegedly dangerous levels of acrylamide in the companies' potato products. *People of the State of California v. Frito-Lay, Inc., et al.*, No. BC338956 (Superior Court of Los Angeles County) (filed 8/26/05).

According to Lockyer, the U.S. Environmental Protection Agency prohibits more than 0.5 micrograms of acrylamide per liter of water, and a Cal/EPA office has determined that a typical serving of french fries or potato chips contains 40 micrograms of the chemical byproduct of high-temperature cooking processes. "For consumers," Lockyer says, "those are bad odds. Since the discovery, some food manufacturers started exploring better cooking methods, but some manufacturers instead have launched a major disinformation campaign about California law. They are even twisting the FDA's glacial pace on addressing this health crisis into an endorsement for the status quo. They're doing what they always do when called upon to stop concealing facts: The junk-food industry is peddling junk science. … The question to ask is: Why doesn't the food industry want to tell you the truth about what you're eating?"

Named defendants in the lawsuit include Frito-Lay, Inc./PepsiCo.; Burger King Corp.; Lance, Inc.; H.J. Heinz, Inc.; Kettle Foods, Inc.; KFC Corp.; McDonald's Corp.; Procter & Gamble; and Wendy's International, Inc.

Scientific/Technical Items

Obesity

[7] Swedish Researchers Allege Link Between Midlife Obesity and Risk of Dementia

Individuals who are obese at middle age (BMIs higher than 30) have an increased risk of developing dementia and Alzheimer's disease in later life, according to a new Swedish study. (M. Kivipelto, et al., "Obesity and Vascular Risk Factors at Midlife and the Risk of Dementia and Alzheimer Disease," *Archives of Neurology* 62: 1556-1560, 2005.) The researchers assert that obesity, high cholesterol levels and high blood pressure tend to increase dementia risk in an additive manner; individuals in their study cohort with all three of those risk factors had approximately six times the risk of developing dementia than individuals with no risk factors. *See HealthDay News*, October 11, 2005.

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