

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Federal Trade Commission (FTC)

[1] FTC Schedules Forum on Youth Marketing Practices

FTC and the Department of Health and Human Services will hold a [forum](#) on July 18, 2007, to examine how the food industry markets its products to children and review actions taken to date to help address childhood obesity. Titled “Weighing In: A Check-Up on Marketing, Self-Regulation and Childhood Obesity,” the forum will bring together industry, media and self-regulatory representatives as well as consumer groups, advertising specialists and other experts. Participants will report on progress in implementing recommendations from a report issued in 2006.

[2] FTC Lawsuit Hinges on Statements Made by Whole Foods CEO

FTC this week released redacted portions of its June 6, 2007, lawsuit against Whole Foods Market, Inc., which has been seeking to purchase its rival Wild Oats Markets, Inc. The redactions included statements made by Whole Foods CEO John Mackay allegedly supporting FTC’s contention that a Wild Oats acquisition would violate the Clayton Act, which is intended to prevent the formation of monopolies. Mackay reportedly told fellow directors in internal documents that buying Wild Oats would

“avoid nasty price wars” that could “harm [Whole Foods’] gross margins and profitably.” He also said the \$565-million deal would prevent other major supermarket chains from launching their own organic or natural food stores. In addition, the documents discussed a plan to close many Wild Oats stores and operate others as Whole Foods outlets. FTC has claimed that such statements refute the argument that Whole Foods views conventional stores like Kroger Co. and Wal-Mart Stores, Inc. as legitimate competitors.

Meanwhile, Whole Foods has continued to assert that the FTC lawsuit overlooks the “robust competition in the supermarket industry,” with many conventional food stores now offering a large organic and natural selection. In his blog on the company Web site, Mackay blasted the FTC for its “bullying tactics,” arguing that antitrust officials “aren’t going to place ‘internal documents’ in their proper context.” He faulted the agency for failing to “bother to actually gather any pricing information from Whole Foods or Wild Oats,” instead relying on informal conversations to build its case. *See The Wall Street Journal*, June 20, 2007.

Department of Agriculture (USDA)

[3] Agriculture Secretary Addresses Farm Bill Legislation Advanced by House Subcommittees

Agriculture Secretary Mike Johanns has expressed disappointment in the Farm Bill legislation advanced this week by the House Subcommittee on General Farm Commodities and Risk Management.



“The bill fails to recognize the need for greater equity and predictability in farm policy, and does nothing to provide a more responsive safety net,” Johanns said, in criticizing the House draft for undercutting USDA proposals. Department administrators had recommended several key strategies to address (i) the inequitable distribution of Farm Bill funds, which currently omit 60 percent of farmers; (ii) the need for “predictable, non-trade distorting support” to protect agricultural exports; and (iii) conservation priorities, including renewable energy sources. The USDA plan also suggested that farmers among the wealthiest 2 percent of Americans should “graduate” from Farm Bill subsidies, thus allowing greater support for beginning or socially disadvantaged farmers. “The list goes on and in each instance the House draft either fails to identify these priorities or fails to fund them with mandatory dollars,” Johanns concluded. *See USDA Press Release*, June 19, 2007.

Meanwhile, several watchdog organizations have also voiced dissatisfaction with Farm Bill legislation. In a letter signed by 40 environmental and consumer groups, the Center for Food Safety (CFS) has called on Congress to delete section 123 of Title I, which would prohibit state or local governments from prohibiting the commercial use of USDA-approved products. Groups opposed to section 123 have argued that in addition to “subvert[ing] the principles of federalism and states’ rights,” the provision would preempt states from ruling on issues such as genetically engineered crops. “Section 123 takes us backwards by removing existing protections we have at the state and local level. We need increased, not decreased, food safety efforts,” the CFS legal director said. *See CFS Press Release*, June 19, 2007.

In a related development, the Environmental Working Group (EWG) recently launched a campaign to secure funding for organic and envi-

ronmentally sustainable farming. Contending that organic farmers receive less than 1 percent of Farm Bill funds, EWG has asked for donations to finance its lobbying efforts in Congress. The group, which blamed “big agribusiness and their allies in Congress” for under-funding organics, has claimed that 13,000 people have already signed its petition to “Grow Organics.” *See EWG Campaign Letter*, June 19, 2007.

[4] **USDA Seeks Comments on Interim COOL Rule for Fish and Shellfish**

USDA’s Agricultural Marketing Service is [seeking](#) general comments on an interim final rule requiring country-of-origin labeling (COOL) for fish and shellfish. The rule, which took effect in April 2005, compels retailers and suppliers to “notify their customers of the country of origin and the method of production (wild and/or farm raised) of specified fish and shellfish products.” It also entails record-keeping requirements for affected retailers and their suppliers. USDA will use the comments, which must be submitted on or before August 20, 2007, to craft a final rule for mandatory COOL for fish and shellfish.

Food and Drug Administration (FDA)

[5] **FDA Considers Risk-Based Inspection Plan for Food Imports**

FDA is reportedly considering a risk-based inspection program to identify the food imports most likely to present health hazards. Based on a 2002 Import Strategic Plan that the agency never implemented, the system would concentrate inspection resources on countries with sub-par safety records. It would also require FDA to gather more data from foreign businesses and create a “life-cycle” database to track food handling and production practices.



Under the risk-based approach, exports from countries with strong food standards, such as Britain, Canada and Mexico, would undergo little inspection, while products from loosely regulated countries like China would receive more attention. “The shift is to be more proactive, to put more focus on prevention,” said FDA Assistant Commissioner for Food Protection, David Acheson, who expects to unveil the new plan in the next few months.

Critics of the FDA’s current inspection process have apparently welcomed the move to a risk-based system. “It sounds like the strategic plan is what’s needed for the evolving situation that we see with the rapid increase in food imports,” the director of the University of Georgia’s Center for Food Safety was quoted as saying. The agency originally abandoned the 2002 plan because administrators believed the idea lacked the momentum to gain HHS approval. Acheson has also stressed that the current incarnation will not attempt to enforce equivalency requirements, which the USDA uses to ensure that all foreign meat, poultry and egg facilities meet the standards applied in the United States. “It is difficult to demonstrate what is equivalent for all the products FDA regulates,” Acheson said. “Often in foreign countries, products may be under different agencies, so we have to work with different agencies in any given country.” See *The Wall Street Journal*, June 14, 2007; *The Washington Post*, June 20, 2007.

European Union (EU)

[6] EU Votes in Favor of Vodka Definition Compromise

The EU Parliament this week voted 522 to 128 in favor of a proposed law that would strike a compromise between vodka purists and those looking to

capitalize on a growing vodka market. If ratified by the EU’s Council of Ministers later this year, the law would allow companies to continue using ingredients other than potatoes or cereals to distill vodka, provided the label includes such information. Members of the traditional “vodka belt,” including Poland, Sweden, Finland, Germany, and the Baltic states, supported a more limited definition that excluded other agricultural materials such as sugar beets, citrus fruit and grapes. Britain, Ireland and Spain, however, argued that these ingredients can produce vodka indistinguishable from the potato or cereal version. “The glass is half full,” said one Finnish legislator in regards to the compromise, which gives Europe its first labeling standards for vodka. The European Vodka Alliance has also called on the Council to approve the proposal as soon as possible. See *BBC News*, June 19, 2007; *Food Production Daily – Europe.com*, June 20, 2007.

Litigation

[7] Restaurant Association Challenges NYC Menu Board Labeling Regulation

A lawsuit filed in federal district court by the New York State Restaurant Association has put a hold on New York City’s health department regulation requiring that fast-food and chain restaurants prominently display calorie information on their menus. The regulation was apparently scheduled to take effect July 1, 2007, but under a deal negotiated by the parties, the health department agreed to a three-month delay before it starts issuing noncompliance notices. According to the association, the regulation violates free speech rights under the First Amendment and is otherwise preempted by federal law. A July 25 hearing has reportedly been scheduled in the case. The regulation was adopted when



New York City opted to prohibit all but trace amounts of *trans* fats in restaurant cooking oil. See *New York State Restaurant Association Press Release*, June 15, 2007; *The New York Times*, June 20, 2007.

[8] E-Mail Privacy Decision Favors Owner of Herbal Supplement Company

The Sixth Circuit Court of Appeals has upheld an injunction against the federal government which searched private e-mails without a warrant during a fraud investigation. [Warshak v. U.S., No. 06-4092 \(6th Cir., decided June 18, 2007\)](#). The case involves a man who owns Berkeley Premium Nutraceuticals, the herbal supplement company known for its “Smiling Bob” ads and “natural male enhancement” products. Steven Warshak has pleaded not guilty to charges that he and his business defrauded customers and banks by, among other matters, billing credit cards without authorization. The government twice obtained orders under the Stored Communications Act requiring Internet service providers (ISP) to disclose Warshak’s electronic communications and information related to them, but did so without obtaining a warrant. The ISPs were prohibited from telling Warshak about the orders, and while the Act requires the government to provide notification to the person subject to such searches within a year, it did so more than a year later.

Once notified, Warshak sought injunctive and declaratory relief, alleging that the compelled disclosure of his e-mails without a warrant violated the Fourth Amendment and the Act. He sought to prohibit future searches. After finding that Warshak had standing to bring his suit and the issues were ripe, the court “determined that e-mail users maintain a reasonable expectation of privacy in the

content of their e-mails.” It affirmed the preliminary injunction entered by the district court with one modification and prohibited the United States from seizing the contents of a personal e-mail account maintained by an ISP in the name of any resident of the Southern District of Ohio without either (i) providing the account holder prior notice and an opportunity to be heard, or (ii) making a fact-specific showing that the account holder had no expectation of privacy with respect to the ISP. See *Associated Press*, June 18, 2007.

[9] Cadbury Enters Plea to Violations of U.K. Food and Hygiene Regulations

Cadbury Schweppes has reportedly pleaded guilty in the Birmingham Crown Court to three charges of violating food and hygiene regulations stemming from its sale of *salmonella*-tainted chocolate in 2006. Thirty-seven people were apparently sickened from the contamination, and the company was forced to recall about one million chocolate bars. According to a news source, it has spent some £20 million to implement rigorous quality-control procedures. The company faces sentencing on July 13, 2007; each offense carries unlimited fines and up to two years’ imprisonment for managers who caused the problem. Hereford Council has reportedly brought similar charges over the incident, and a hearing in that matter has been set for July 24.

In a related development, contaminated Hershey’s chocolate is feared to be in consumer hands in Canada after recalled product was stolen from a recycling depot where it was being held for disposal. The company recalled the product in November 2006 after a routine inspection inside its Smiths Falls plant detected *salmonella*. A Toronto radio station reported that eight skids of the product are missing. See *FoodUSAnavigator.com*, June 15, 2007.



[10] Quebec Court Allows BSE Class Action to Proceed to Trial

According to a news source, a Quebec Superior Court Justice has authorized trial in a class action lawsuit alleging that the federal government's incompetence in addressing the bovine spongiform encephalopathy (BSE) crisis caused the cattle industry to suffer billions in losses. Suits were filed on behalf of cattle farmers in courts across Canada in 2005. Further details about the litigation appear in issues 122 and 190 of this Report. Lawyers representing the litigants in Quebec were quoted as saying, "Government officials jeopardized the safety of the Canadian food supply in failing to inform the public that they had allowed 80 British cattle that were supposed to be in a 'monitoring program,' to enter the human and animal food chain in Canada," despite the fact that there was a 95 percent chance that six or more of the animals had BSE. They recommend that "all potential members of the class retain their financial records going as far back as possible, as these records may be critical in determining the financial damages they are entitled to recover." Beef exports to the United States from Canada have never recovered from the BSE crisis and are still 20 percent below shipments before 2003. See *FoodUSAnavigator.com*, June 18, 2007.

Legal Literature

[11] Regina Austin, "Super Size Me and the Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker," *Loyola of Los Angeles Law Review* (2007)

University of Pennsylvania Law Professor Regina Austin analyzes Morgan Spurlock's documentary about a fast-food diet and its purported effects on

human health and draws attention to its failure to address gender, race and class issues. Austin notes that Spurlock was apparently inspired to create the film by the *Pelman* litigation filed by overweight African-American teenagers against McDonald's Corp. in New York. And while the film mentions the lawsuit, most of Spurlock's focus is either on himself, as guinea pig, or on other white, middle-class Americans.

According to Austin, "*Super Size Me* ignores the reality of the context and environment in which the *Pelman* plaintiffs lived their lives, with possible ill effects for the general enlightenment of the majority population and many of its minority viewers, regarding" such issues as (i) the greater incidence of obesity in minority communities; (ii) the association of poverty and food insecurity to obesity; (iii) the special nutritional significance fast-food restaurants have in communities lacking supermarkets; (iv) cultural issues related to food choices and body image; and (v) limited recreational outlets in poor minority urban communities. Austin suggests how an issue like body image could be used in the litigation context, contending that the *Pelman* defendants "might claim that the plaintiffs were merely following in-group aesthetic considerations when they gained weight while eating fast food and that their obesity was not harmful to their emotional well-being because it did not violate the norms of their racial reference group."

The article links the film's shortcomings to tort law, which "makes little allowance for the fact that risk varies with race/ethnicity, gender, and class." Austin is concerned that "the courts pay almost no heed to the lack of due regard for the damages and financial losses incurred by these same groups that results in the undervaluation and under-compensation of their injuries." Concluding that the film is a



funny and insightful documentary that brought needed attention to food issues, the author, nevertheless, argues that filmmakers “need to be conscious of their tendency to treat a part of the problem or conflict as if it were the whole.”

Other Developments

[12] U.S. Representative Calls on Food Companies to Follow Kellogg’s Lead

U.S. Representative Edward Markey (D-Mass.) this week urged major food and beverage companies to follow Kellogg Co.’s lead in adopting more stringent guidelines for youth marketing. Markey issued letters to companies such as Kraft Foods Inc., McDonald’s Corp. and PepsiCo, Inc., which he invited to adhere to similar standards and to propose new measures. Markey, who chairs the telecommunications panel of the House Energy and Commerce Committee, also announced that the panel’s June 22 meeting will cover food advertising aimed at children. “While parents and families have an undeniable responsibility to steer their children toward healthy choices, the Institute of Medicine has linked the current unhealthy trend toward poor nutrition and childhood obesity in our country to the prevalence of television advertisements for fast food, junk food, sugared cereals, and other foods wholly lacking in nutritional value,” Markey said. “These companies are some of the largest food and beverage marketers, and together they have the power to play a significant role in solving the childhood obesity problem through socially responsible advertising practices.” See *Advertising Age* and *Press Release of Representative Edward Markey*, June 19, 2007.

Meanwhile, analysts have anticipated that

Kellogg’s decision to limit youth marketing will “throw into play some \$1 billion or more in marketing dollars,” according to *Advertising Age*. Kellogg reportedly spent a total of \$765.1 million on marketing in 2006, and a reduction in youth marketing could affect approximately \$206 million spent on advertisements geared toward children, in addition to the \$200 million allocated to carry out the new plan. The move could also pressure 10 other marketers in the Children’s Food and Beverage Alliance to reconsider their marketing strategies, sending ripples throughout the industry. “The challenge now is: can we reformulate without too much a trade-off in taste?,” said Kellogg’s chief marketing officer for North America. “If we can, we will, and [continue] advertising to children in much the same way we do now. If we can’t reformulate our product and there is too much of a trade-off, we have to find a new target audience to make the brand relevant or, if we can’t, stop advertising it all together.” See *Advertising Age*, June 18, 2007.

[13] Starbucks Enters Licensing Agreement to Promote Ethiopian Coffees

Starbucks Corp. and the Ethiopian government have reportedly reached an agreement requiring the coffee chain to promote the country’s coffees in its stores and help farmers improve their beans. The company will not be required to pay a licensing fee to use Ethiopian regional names on its packages. Ethiopia has reportedly been trying to trademark the names of three coffees grown there – Sidamo, Harar and Yirgacheffe – to earn higher prices for the beans and has been asking coffee companies to sign royalty-free agreements to help build its brand and market. Starbucks had resisted signing such an agreement, because some brands had not earned U.S. trademarks, but when company chair Howard



Schultz became involved in the negotiations, the impasse was apparently resolved. *See The Wall Street Journal*, June 21, 2007.

[14] European Obesity Conference to Consider Strategies for Increasing Physical Activities

Stakeholders in the European obesity debate will gather at the 3rd Annual Obesity Europe Conference slated for June 26-27, 2007, in Brussels, Belgium, to discuss current and future approaches to fighting obesity and its related diseases. The 2007 agenda will specifically focus on strategies, including urban development, that encourage physical activity in schools, workplaces and communities. In addition, speakers will address several consumer protection issues, including nutritional labeling, health claims and regulatory measures affecting the food industry. Program segments will also cover social and environmental perspectives on obesity, scientific innovations, and the ways in which self-regulation can monitor the industry. Interested parties can register for the conference on the Obesity Europe [Web site](#).

[15] Trade Commissioner Warns EU to Accept Genetically Modified Foods and Crops

EU Trade Commissioner Peter Mandelson has reportedly said that the European Union must begin accepting more genetically modified foods and approving biotech crops or it will risk renewed complaints before the World Trade Commission. Legal challenges from exporters in the United States, Canada and Argentina led to a 2006 WTO ruling that the EU's ban on new genetically modified foods was illegal. Mandelson was quoted as saying, "If we fail to implement our own rules, or implement them inconsistently, we can, and probably will, be challenged." He also reportedly

contended that the EU could be undermining European industries by falling behind in endorsing biotech products. The European Commission is currently evaluating BASF's genetically modified potato for approval; if it is approved over the objections of member-state regulators, it will apparently be the first EU-authorized bioengineered crop in eight years. *See The International Herald Tribune*, June 14, 2007.



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