Shook, Hardy & Bacon L.L.P.

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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Senators Join Call for Surgeon General Report on Sugary Drinks

U.S. Senators Frank Lautenberg (D-N.J.), Ron Wyden (D-Ore.) and Richard Blumenthal (D-Conn.) have reportedly joined the American Cancer Society's Cancer Action Network and a coalition of federal, state and local public health organizations in urging U.S. Surgeon General Regina Benjamin to investigate the alleged association between sugar-sweetened drinks and rising obesity rates. According to a September 12, 2012, letter, the senators have asked Benjamin to conduct a study that would determine "the impact of sugary drinks on rates of American obesity and whether public health proposals that target sugary beverages will positively impact public health."

"As America's waistline has expanded, so too has our access to sugary drinks," states the letter. "Beverages like soda, sports drinks, lemonade, juice drinks, and sweetened teas are cheap and available everywhere. Doctors and public health experts recommend limiting and reducing the consumption of sugary drinks, especially in children, but kids and adults drink twice the amount of soda that they did three decades ago."

Additional details about previous requests for a Surgeon General report on sugary drinks appear in Issues 446 and 447 of this *Update*.

Senators Press FDA for More Answers on Energy Drinks

Senators Richard Durbin (D-Ill.) and Richard Blumethal (D-Conn.) have responded to the Food and Drug Administration's (FDA's) letter concerning actions the agency plans to take on energy drinks. While the senators "were pleased to learn that the FDA intends to release final guidance distinguishing liquid dietary supplements from beverages," they contend that FDA's response to their earlier request "did not address one of our greatest concerns, which include the potential interactions and cumulative effects of additives with stimulant properties in energy drinks with high levels of caffeine. While ginseng and other additives were not mentioned, your letter reviews taurine and guarana, which are generally regarded as safe (GRAS) food additives when used to add flavor."

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The senators seek an explanation about the use of these ingredients to provide a stimulating effect and their safety when used this way. They also seek information about the agency's consideration of "the unique health risks associated with consuming high levels of caffeine among young people." While FDA cited a report noting that most caffeine consumption in the United States comes from caffeine naturally present in coffee and tea, FDA did not provide an "assessment of the shifting consumption patterns among young people, who are major energy drink consumers." The letter concludes by urging FDA "to assert its authority to regulate the level of caffeine in energy drinks marketed as beverages."

FDA Issues Draft Compliance Guide for Marketing Pet Food Intended to Treat or Prevent Disease

The Food and Drug Administration (FDA) has **announced** a draft compliance policy guide (CPG) concerning the "Labeling and Marketing of Nutritional Products Intended for Use to Diagnose, Cure, Mitigate, Treat, or Prevent Disease in Dogs and Cats." According to the September 10, 2012, *Federal Register* notice, the draft CPG explains how FDA plans "to use its enforcement discretion with regard to the labeling and marketing of dog and cat food products that are labeled and/or marketed as intending to diagnose, cure, mitigate, treat, or prevent diseases and to provide nutrients in support of meeting the animal's total daily nutrient requirements."

Issued in response to new animal drug provisions of the Federal Food, Drug, and Cosmetic Act (FD&C Act), the draft CPG seeks to address an observed increase in the number of cat and dog food products "that make labeling or marketing claims" about disease diagnosis, treatment or prevention. It also sets forth the Center for Veterinary Medicine's "current thinking with respect to the factors it will consider before determining whether to take regulatory action" against these products.

Meanwhile, FDA has reiterated that it does not "generally intend to recommend or initiate regulatory actions" against dog or cat food products covered in the CPG provided that manufacturers (i) "make the products available to the public only through licensed veterinarians or through retail or Internet sales to individuals purchasing the product under the direction of a veterinarian"; (ii) "do not market such products as approved new animal drugs"; (iii) are registered under section 415 of the FD&C Act; (iv) "comply with all food labeling requirements for such products"; (v) "do not include indications for a disease claim (e.g., obesity, renal failure) on the label of such products"; (vi) "limit distribution of material with any disease claims for such products only to veterinary professionals"; (vii) "secure electronic resources for the dissemination of labeling information and promotional materials such that they are available only to veterinary professionals"; (viii) "include only ingredients that

are general[sic] regarded as safe (GRAS) ingredients, approved additives, or feed ingredients defined in the 2012 *Official Publication* of the Association of American Feed Control Officials (AAFCO) for the intended uses in such products"; and (iv) ensure that "the label and labeling for such products are not false and misleading in other respects." The agency has requested written comments by November 9, 2012.

New York City Approves Serving-Size Limits on Sugary Beverages

The New York City Board of Health has adopted Mayor Michael Bloomberg's recommendation to establish a maximum serving size of 16 ounces for sugar-sweetened, non-alcoholic drinks sold at local food establishments. Board members reportedly voted 8-0 with one abstention, one absence and one vacancy to amend Article 81 of the Health Code to place a size restriction on beverages containing more than 25 calories per eight ounces and all self-service cups offered by food vendors, with exemptions for products that are more than 50 percent milk or 100 percent fruit or vegetable juice. Effective March 13, 2013, the new regulations will apply to restaurants, mobile food carts, delis, theater and stadium concessions, and any other food-service business regulated by the city's Department of Health and Mental Hygiene, which will impose fines of $200 per violation.

"Today's vote is a historic and important step in fighting New York City's epidemics of obesity and diabetes," Health Commissioner Thomas Farley elaborated in a September 13, 2012, press release. "It continues the long tradition of this Board of Health leading the charge against major health problems of the day. It is my hope that in the future we will see today as a turning point in epidemics that each year claims [sic] the lives of thousands of New Yorkers."

Meanwhile, an industry group opposed to the measure has pointed to the ban's potentially negative impact on small business owners and other companies. "This is not the end," a New Yorkers for Beverage Choices spokesperson was quoted as saying. "We are exploring legal options, and all other avenues available to us. We will continue to voice our opposition to this ban and fight for the right of New Yorkers to make their own choices. And we will stand with the business owners who will be hurt by these arbitrary limitations." Additional details about the Board's decision appear in Issues 442 and 443 of this *Update*. *See New Yorkers for Beverage Choices Press Release,* September 13, 2012.

Air District Cites Kentucky Warehouse over Whiskey Fungus Vapors

The Louisville Metro Air Pollution Control District has reportedly issued violation notices concerning emissions from a whiskey warehouse owned by Diageo Americas Supply Inc., citing odor complaints and complaints about

a black, sooty substance on neighboring properties between May 2011 and May 2012. The violations apparently carry a potential penalty of $10,000 per violation per day. An air district spokesperson reportedly said, "This is not a dangerous mold. But it's a nuisance. These people's homes are affected by it." The company was given until November 3, 3012, to submit a plan on how it can comply with air-quality regulations. Information about the property-damage lawsuit filed by Louisville residents against the company is included in Issue 444 of this *Update*. *See Courier-Journal.com*, September 12, 2012.

LITIGATION

Ninth Circuit Withdraws Opinion Upending Settlement of False-Advertising Claims Against Kellogg

The Ninth Circuit Court of Appeals has withdrawn its previous opinion reversing an order that approved the settlement of class claims against Kellogg Co., although it has reached the same conclusion in its new opinion. ***Dennis v. Kellogg Co.*, Nos. 11-55674, -55706 (9th Cir., decided September 4, 2012)**. Information about the withdrawn opinion is included in Issue 447 of this *Update*. The plaintiffs claimed that Kellogg lacked supporting scientific evidence for marketing and promotional statements that some of its cereal products could improve children's cognitive functions.

Apparently, the court had failed to consider the plaintiffs' preliminary argument that it could not address the validity of the *cy pres* distribution of funds that remained in the settlement fund. They contended that the issue "will not be ripe until it is determined that available cash remains in that fund after the claims process has concluded." As the court observed in a footnote to the withdrawn opinion—and now includes in the body of the new ruling—the deadline for the submission of claims was more than one year ago, and the total of claims submitted amounted to some $800,000, leaving "almost $2 million in the settlement fund for *cy pres* distribution." Thus, the court concluded that the issue is ripe and addressed it as it had in the withdrawn opinion.

Federal Court Dismisses Most Claims in Cheerios MDL

A federal court in New Jersey has found that most of the named plaintiffs in putative class actions consolidated in a multidistrict litigation (MDL) proceeding lack standing to pursue claims that General Mills, Inc. violated consumer fraud laws by claiming that its Cheerios cereal products reduce cholesterol, the risk of heart disease and certain forms of cancer. *In re Cheerios Mktg. & Sales Practices Litig.*, No. 09-cv-2413 (U.S. Dist. Ct., D.N.J., decided September 10, 2012) (unpublished). Under a choice-of-laws analysis, the court found that California, New Jersey and New York law applied to the claims and

thus dismissed four counts alleging violations of Minnesota law. The court also found that most of the named plaintiffs consumed the cereal for reasons other than health benefits, did not know what the cereal cost or had not read the product labels. Accordingly, the court granted the company's motion for summary judgment as to five of the named plaintiffs. The New York plaintiff, who did purchase the cereal for its purported health benefits and did know what the product cost, remains in the case.

Court Stops City's Enforcement of Disclosure Law in Soft Drink Tax Fight

A federal court in San Francisco has issued a temporary injunction against the city of Richmond, California, to block enforcement of a law requiring campaign mailers to include information about "major funding from large out-of-city contributors." *Cmty. Coal. Against Beverage Taxes v. City of Richmond*, No. 3:2012cv04545 (U.S. Dist. Ct., N.D. Cal., order entered September 7, 2012). The ordinance calls for committees that spend at least $2,500 on a local ballot proposal campaign to list their top five contributors on each mailer.

According to news sources, the city adopted the ordinance in June in the midst of a heated political dispute over a November ballot measure that would, if approved by voters, require local businesses to pay a 1-cent-per-ounce tax on the sales of sugar-sweetened beverages. The Community Coalition Against Beverage Taxes, purportedly funded by the American Beverage Association, has apparently spent in excess of $350,000 to defeat the measure, outspending the proposal's supporters by at least 50-1, according to campaign disclosure statements. It sued the city in late August, challenging the finance disclosure law on First Amendment grounds

Adopting the temporary restraining order, the court stated, "This case directly involves Plaintiffs' fundamental rights of political speech during an election campaign. Defendants' unequivocal written assertion that the City will strictly enforce Richmond Municipal Code 2.42.075 against Plaintiffs has a chilling effect on Plaintiffs' exercise of rights protected by the First Amendment. Plaintiffs have established that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest." On September 11, the court extended the order until September 28, after the parties requested that the court delay by one week a hearing on the preliminary injunction.

In a written statement, the coalition applauded the court's action and claimed that the city had not wanted voters to know that it would not be using the revenue to address obesity, the measure would impose a general tax on businesses and raise grocery prices for all shoppers, and local business would suffer "when shoppers and diners go elsewhere to avoid higher prices." Commenting on the soda-tax dispute, New York University Nutrition Professor

Marion Nestle reported that "'Big Soda' is expected to spend more than a million dollars in Richmond to make its efforts look like a local campaign." *See Contra Costa Times*, September 6, 2012; *SFGate.com* and *Community Coalition Against Beverage Taxes Press Release*, September 7, 2012; *FoodPolitics.com*, September 10, 2012.

Iowa Egg Farm Manager Pleads Guilty in Effort to Bribe Federal Inspector

The manager of an Iowa egg farm that recalled 550 million eggs in a 2010 *Salmonella* outbreak that may have sickened 2,000 people has reportedly entered a guilty plea to a charge of conspiring to bribe a public official to allow the sale of eggs that failed to meet federal standards. *United States v. Wasmund*, No. 3:12-cr-03041 (U.S. Dist. Ct., N.D. Iowa, plea entered September 12, 2012).

According to Tony Wasmund's attorney, the former manager, who oversaw some of the enterprises owned by Jack DeCoster, is cooperating with government authorities. The indictment charged Wasmund with authorizing the use of $300 in petty cash to be used by a colleague to bribe a U.S. Department of Agriculture inspector assigned to DeCoster's Wright County egg farm. The bribe was purportedly intended to persuade the inspector to approve the sale of shell eggs that had been withheld for falling short of applicable USDA standards.

Prosecutors apparently refused to discuss the matter, saying that the plea was filed under seal, but that additional details will be made public in the future. A news source has indicated that documents made public earlier this year show that Wasmund knew about the presence of *Salmonella* in DeCoster's chicken houses in the months preceding the outbreak. He could face five years in prison, but has been freed on bond pending sentencing. Other DeCoster employees have reportedly retained counsel and several have testified before a grand jury on more than one occasion. One attorney familiar with the case was quoted as saying, "I sense it's kind of a roving investigation. I don't sense there's any real direction to it." *See Huffington Post*, September 9, 2012; *Law360*, September 12, 2012.

Meat Processor Sues ABC News for $1.2 Billion over "Pink Slime" Reports

Beef Products Inc. (BPI) has filed a defamation lawsuit against ABC News, Diane Sawyer and two former U.S. Department of Agriculture (USDA) employees, among others, claiming that they "knowingly and intentionally published nearly 200 false and disparaging statements regarding the company and its product, lean finely textured beef (LFTB)." ***Beef Prods. Inc. v. ABC, Inc.*, No. n/a (Cir. Ct., Union Cnty., S. Dak., filed September 13, 2012)**. The company is seeking $1.2 billion in damages.

At one time, LFTB was used in some 70 percent of ground beef; it is made from fatty scraps remaining after cattle carcasses are cut into steaks and roasts. Bits of lean meat are heated and separated from the fat in a centrifuge,

then treated with ammonium hydroxide gas to rid the product of *E. coli* or other pathogens. BPA claims that it sold more than 3.7 billion pounds of LFTB between 2003 and 2012 and its average weekly sales exceeded 5.5 million pounds with operating profits of $2.3 million per week. According to the company, the disinformation campaign about its product spread across national media outlets and on social media sites, leading fast food restaurants, large supermarket chains and most school lunch programs to stop using it. The company reportedly suspended operations in three of its four plants and eliminated more than 650 jobs.

According to the complaint, ABC aired celebrity chef Jamie Oliver's "Food Revolution" beginning in March 2010, and about a year later, Oliver "made multiple false statements regarding the process used by BPI to produce LFTB." While BPI apparently informed ABC that the statements about its product were false, "ABC did not issue an apology. ABC did not issue a retraction. ABC did not insist that Oliver correct the various false statements he presented during his show." The defendant then, according to the complaint, broadcast multiple stories about BPI and LFTB throughout March 2012 and published 14 different online reports during the same time period. Defendant Gerald Zimstein, a former USDA microbiologist, allegedly dubbed LFTB "pink slime" and "appeared on ABC broadcasts and was quoted in ABC's online reports."

Among other matters, BPI contends that "[c]onsistent with the use of the phrase 'pink slime' to describe LFTB, Defendants made false statements to convince consumers that LFTB is not beef, or even meat. . . . Defendants stated that selling ground beef with LFTB amounted to an 'economic fraud' because LFTB was a 'substitute' for beef. These statements were intentionally and knowingly false statements by Defendants. LFTB is 100% beef." *See Sioux City Journal,* September 12, 2012; *Huff Post Food*, September 13, 2012.

U.S. Cattle Ranchers Sue WTO over Ruling on Country of Origin Labeling Act

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers Association (R-CALF USA) has filed a complaint for declaratory and injunctive relief in a Colorado federal court against the World Trade Organization (WTO) and U.S. Department of Agriculture Secretary Tom Vilsack, alleging that WTO's determination that the U.S. Country of Origin Labeling Act (COOL) imposes discriminatory burdens on meat imported from Canada and Mexico is contrary to U.S. law and the Uruguay Round Agreements. *Made in the USA Foundation, Inc. v. WTO,* No. 1:2012cv02337 (U.S. Dist. Ct., D. Colo., filed September 1, 2012). Details about WTO's ruling appear in Issue **419** of this *Update.*

With some 5,400 members in 45 states, R-CALF USA apparently worked with Congress to pass the COOL legislation "that reserves the USA label for only cattle born, raised, and slaughtered in the U.S.A." The complaint alleges that the plaintiffs will lose income as a result of WTO's ruling and that its members

"are harmed by any dilution of the country of origin labeling law and do not want their domestic meat confused by the consumer with meat from Canada or Mexico." They seek a declaration that WTO has no authority to override U.S. law, and orders compelling Vilsack to "implement and enforce the Country of Origin Labeling Act as enacted by Congress" and requiring U.S. Trade Representative Ron Kirk to "cease and desist from negotiating away the sovereignty of the United States by attempting to amend and dilute the U.S. Country of Origin Labeling Act."

Putative Class Claims Nature Valley "100% Natural" Products Are Not All Natural

New York and New Jersey residents have filed a putative nationwide class action with two statewide subclasses against General Mills, Inc. in a Minnesota federal court, alleging that the company has violated federal and state consumer fraud laws by marketing its Nature Valley snack bars as "100% Natural" when they contain high-fructose corn syrup and other non-natural ingredients. *Chin v. General Mills, Inc.*, No. 0:2012cv02150 (U.S. Dist. Ct., D. Minn., filed August 31, 2012).

The plaintiffs also allege that the products contain highly processed high-maltose corn syrup and the texturizer maltodextrin. They allege that they relied on the company's marketing and advertising and purchased its products "believing them to be 100% natural," but sustained "injury in fact and lost money as a result of General Mills having misrepresented the Nature Valley Products." According to the complaint, General Mills incorporates the "100% Natural" claim into its primary branding of the Nature Valley products and "has gone so far as to have applied for and received a registered trademark for the phrase 'NATURE VALLEY 100% NATURAL'."

Seeking in excess of $5 million damages, the plaintiffs allege violation of the Magnuson-Moss Act; unjust enrichment; breaches of express warranty and implied warranty of merchantability; fraudulent misrepresentation; and violations of Minnesota, New York and New Jersey consumer fraud laws. They also seek an order declaring that the company violates these statutes; compensatory, treble and punitive damages; interest; restitution; attorney's fees; and costs.

Putative Class Claims Yogurt Maker Adds Unauthorized Ingredients to Products

A California resident has filed a putative nationwide class action with a statewide subclass against a yogurt maker that sells "Greek-Style Yogurt" which allegedly contains ingredients that the Food and Drug Administration (FDA) has banned from use in yogurt. *Smith v. Cabot Creamery Coop., Inc.*, No. 12-4591 (U.S. Dist. Ct., N.D. Cal., filed August 31, 2012). According to the named plaintiff, the company sells its product as "authentic Greek yogurt" thus allowing it to "charge a substantial price premium. . . . But the price

premium for Cabot Greek is even larger, because Cabot Greek has no value whatsoever. Because the product is adulterated, it cannot legally be sold at any price. It is worthless."

The plaintiff contends that by using whey protein concentrate and milk protein concentrate as filler materials to thicken the product, the company does not incur the time and expense required to produce real Greek yogurt. Among other matters, the plaintiff claims that adding these ingredients to the product violates the FDA's "standard of identity" for yogurt. The complaint cites a 2002 FDA warning letter indicating that "[T]he current standard makes no allowance for the use of whey protein concentrate as a basic ingredient in yogurt." The plaintiff also claims that these ingredients are not generally recognized as safe, thus making the yogurt adulterated. A second defendant is the company that purportedly supplies whey protein concentrate (WPC) with a disclaimer—"Purchaser is solely responsible for ensuring that product supplied is in conformity with all relevant food legislation and should determine whether suggested data, formulations or procedures are suitable for their own purposes"—which, the plaintiff alleges, shows that "it is aware that adding WPCs to dairy products is prohibited by FDA regulations and federal law."

The complaint includes counts for breaches of express warranty, implied warranty of merchantability and implied warranty of fitness for a particular purpose; unjust enrichment; violation of California's Consumers Legal Remedies Act, Unfair Competition Law and False Advertising Law; negligent misrepresentation; and fraud. The plaintiff seeks compensatory and punitive damages, restitution, interest, injunctive relief, attorney's fees, and costs.

Putative Class Claims Dannon Yogurt Is Not Yogurt

A New York resident has filed a putative class action against The Dannon Co., alleging that because the company adds "filler materials, such as water, corn starch, and Milk Protein Concentrate" to products that it sells as yogurt, the products contain "banned additives" and, as a matter of federal law, are not yogurt, are misbranded and "cannot legally be sold in the United States." *Conroy v. The Dannon Co., Inc.*, No. 12 CIV 6901 (U.S. Dist. Ct., S.D.N.Y., filed September 11, 2012). A number of allegations in the complaint, including a history of yogurt-making, are carbon copies of a complaint filed in a California federal court in August 2012 against Cabot Creamery Cooperative, alleging that its Greek-style yogurt cannot be sold in the United States for similar reasons. Filed by the same law firm, that case is discussed elsewhere in this *Update*.

Seeking to certify a nationwide class and New York subclass of product purchasers, the plaintiff alleges breaches of express warranty, implied warranty of merchantability and implied warranty of fitness for a particular purpose; unjust enrichment; violations of New York Deceptive Acts or Practices and False Advertising laws; negligent misrepresentation; and fraud.

The plaintiff asks for an order declaring that the company has violated the statutes, compensatory and punitive damages, interest, restitution, injunctive relief, attorney's fees, and costs.

Class Claims Dog Treats from China Allegedly Sickened Pets

A New York resident has filed a putative class action in a California federal court seeking to recover damages allegedly sustained by pet owners whose dogs became sick after eating "Chinese Chicken Jerky." *Langone v. Del Monte Corp.*, No. 12-4671 (U.S. Dist. Ct., N.D. Cal., San Francisco Div., filed September 6, 2012). The plaintiff cites and quotes a number of items published on the Internet purportedly showing that the Food and Drug Administration had been warning, at least since 2007, that chicken jerky products could pose a threat to dogs. "Notwithstanding these warnings," he claims, "Del Monte continued to market the product as being wholesome and Del Monte placed no warnings concerning their products on their packaging to date."

Seeking to represent a nationwide class of product purchasers, the plaintiff alleges violations of California's Unfair Competition Law and False Advertising Law and breach of express warranty and implied warranty of merchantability under the Magnuson-Moss Warranty Act. He seeks an order enjoining the marketing of these products as "wholesome" or "healthy," a corrective advertising campaign, disgorgement, destruction of all packaged "Chinese Chicken Jerky" products lacking warning labels, restitution, costs, veterinary charges, expenses, and reasonable attorney's fees.

European Court of Justice Decides Winemaker Cannot Label Product as "Wholesome"

A European Court of Justice panel has determined that a German winemaker may not, under European Union law, place labels on its bottles including the word bekömmlich (meaning digestible, wholesome or nourishing). *Deutsches Weintor eG v. Land Rehinland-Pfalz*, Case C-544/10 (E.C.J., decided September 6, 2012). According to the court, "[b]y highlighting only the easy digestion of the wine concerned, the claim at issue is likely to encourage its consumption and, ultimately, to increase the risks for consumers' health inherent in the immoderate consumption of any alcoholic beverage. Consequently, the prohibition of such claims is warranted in light of the requirement to ensure a high level of health protection for consumers." The matter returns to a German court for final ruling.

OTHER DEVELOPMENTS

Golden Rice Study Criticized on Ethical Grounds

A recently published study involving transgenic rice has reportedly drawn criticism from Greenpeace China, which has accused U.S. researchers of using Chinese children "as guinea pigs in [a] genetically engineered 'Golden Rice' trial." According to media sources, the advocacy group has cited a joint Chinese-U.S. study appearing in the August 2012 edition of the *American Journal of Clinical Nutrition* as evidence that scientists sidestepped authorities by allegedly feeding vitamin-enriched Golden Rice to 24 children without the required approvals. "It was actually back in 2008 that we first heard of this experiment and immediately informed the Chinese Ministry of Agriculture," opined a August 31, 2012, Greenpeace China blog post that has since sparked a government investigation into the trial. "The Ministry came back and assured us no Golden Rice had been imported and the trial had been stopped—something that unfortunately appears not to be the case."

The study in question apparently examined whether a new version of Golden Rice could help boost vitamin A levels in children who consumed one small bowl of the enriched staple per day. In light of the Greenpeace allegations, however, the Chinese Center for Disease Control and Prevention has publicly maintained that it did not approve the trial and has already suspended one scientist connected with the study. Tufts University has also purportedly agreed to investigate the case to "ensure that the strictest standards were adhered to," although a university statement reiterated that it continues to respect "the laws, regulations, and cultures of all countries in which our researchers work or collaborate."

Meanwhile, the flap has instigated a media debate about the use of transgenic crops to address malnutrition and other diseases worldwide. "The last thing Greenpeace wants is for Golden Rice to be effective," writes columnist Margaret Wente for *The Globe and Mail*. "Greenpeace is campaigning vigorously to block Golden Rice trials throughout Southeast Asia… GM opponents have been tragically successful in stalling the spread of modified crops to the people most in need of it. In China, where people are already terrified about food safety because of major scandals over tainted milk powder, GM crops are generally shunned." *See Science-AAAS, The Chronicle of Higher Education's Percolator Blog, The Wall Street Journal,* and *Xinhua,* September 11, 2012; *The Globe and Mail,* September 13, 2012.

CARU Recommends Changes to "Froot Loops" Website; Kellogg Agrees

The Kellogg Co. has reportedly agreed to modify its "Froot Loops" cereal Website following recommendations from the Children's Advertising Review Unit (CARU), which called for better disclosure that advertising is present

within the site's games and activities. An "investigative unit of the advertising industry's self-regulatory system . . . administered by of the Council of Better Business Bureaus," CARU noted in a press release that "none of the 12 different games—all of which featured Fruit Loops cereal and/or Toucan Sam—disclosed the advertising within the games' content." It was evidently concerned that "children would not understand that the games promote the sale of Froot Loops and, to comply with CARU's guidelines, should be clearly labeled as advertising." The disclosures will apparently state "This is advertising from Kellogg's." *See CARU News Release*, August 27, 2012.

UK Doctors Urge 9 p.m. Watershed for Food Advertising

The U.K. Royal College of Pediatrics and Child Health (RCPCH) has issued a **statement** urging regulators to prohibit all TV advertising for foods high in sugar, fat or salt before the 9 p.m. watershed. Citing a 2003 Food Standards Agency review that allegedly measured the impact of food promotion on children, RCPCH President Hilary Cass reportedly said that the current regulations are too weak to protect young viewers from "commercial exploitation."

"Although they are trying to avoid junk food advertising around specific children's program, you've still got it around soaps and other programs that children watch," Cass was quoted as saying. "So the only realistic way to do it is to have no junk food advertising before the watershed in any programs at all."

RCPCH has endorsed the International Obesity Taskforce's Sydney principles "for achieving a substantial level of protection for children against the commercial promotion of foods and beverages." These principles include, among other things, a recommendation for regulatory action as opposed to industry self-regulation. The U.K. Advertising Association, however, has since rebuffed the RCPCH's statement, claiming that it does not reflect the most current data on the issue. "This call for a watershed ignores the academic evidence and risks overlooking the real causes of childhood obesity," the association's director of public affairs told the press. "Advertising in the U.K. has exemplary record in complying with one of the strictest regulatory regimes in Europe, and is already playing its part with constructive changes to the volume, visibility and content of food ads."

SCIENTIFIC/TECHNICAL ITEMS

Study Allegedly Links Obesity to "Structural Brain Impairments" in Adolescence

A recent study has reportedly documented "lower cognitive performance and reductions in brain structural integrity" among adolescents with metabolic syndrome (MeTS), "thus suggesting that even relatively short-term impairments in metabolism, in the absence of clinically manifest vascular disease, may

give rise to brain complications." Po Lai Yau, et al., "Obesity and Metabolic Syndrome and Functional and Structural Brain Impairments in Adolescence," *Pediatrics,* October 2012. Researchers with the New York University School of Medicine and the Nathan Kline Institute for Psychiatric Research apparently conducted cognitive testing on 111 adolescents with and without MeTS, concluding that those with metabolic syndrome "showed significantly lower arithmetic, spelling, attention, and mental flexibility and a trend for lower overall intelligence." In addition, MRIs of the participants reportedly showed, "in a MeTS-dose—related fashion, smaller hippocampal volumes, increased brain cerebrospinal fluid, and reductions of microstructural integrity in major white matter tracts."

According to the report, these "alarming" findings imply that obesity-related metabolic disease "may be mechanistically linked to lower the academic and professional potential of adolescents." The study's authors have thus urged further research to determine whether the observed effects are reversible. "Although obesity may not be enough to stir clinicians or even parents into action, these results among youth with MeTS strongly argue for an early and comprehensive intervention," they concluded. "We propose that brain function be introduced among the parameters that need to be evaluated when considering early treatment of childhood obesity."

Research Suggests BPA Association with Anxiety in Adolescents

A new study in which Wistar rats were exposed to bisphenol A (BPA) through drinking water from gestation through puberty purportedly shows that "behavioral impacts of BPA can manifest during adolescence, but wane in adulthood, and may be mitigated by diet." **Heather Patisaul, et al., "Anxiogenic Effects of Developmental Bisphenol A Exposure Are Associated with Gene Expression Changes in the Juvenile Rat Amygdala and Mitigated by Soy", *PLoS One*, September 5, 2012**. The rats were reared on a soy-based or soy-free diet, and the changes observed were associated only among those on the soy-free diet. The animals, which were found on assessment to have internal BPA doses "within a human-relevant range," were assessed for anxiety-like and exploratory behavior after weaning but before puberty. According to the authors, "BPA induced anxiogenic behavior in juveniles and loss of sexual dimorphisms in adult exploratory behavior" in the soy-free animals.

Rudd Center Study Examines Obesity-Related Health Messaging

Researchers with Yale University's Rudd Center for Food Policy and Obesity have published a study purportedly assessing the effectiveness of "major obesity public health campaigns from the United States, the United Kingdom and Australia." R. Puhl, et al., "Fighting obesity or obese persons? Public perceptions of obesity-related health messages," *International Journal of Obesity,* September 2012. After showing a random selection of 10 obesity-

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related messages to "a nationally representative example of 1014 adults," the study's authors reported that participants responded most favorably "to messages involving themes of increased fruit and vegetable consumption, and general messages involving multiple health behaviors." In particular, those messages that made no mention "obesity" but instead focused on general behaviors and empowerment were rated as more motivating by surveyed adults, while campaigns that "implied personal responsibility and blame… received the more negative/less positive ratings among participants."

"This suggests that messages intended to motivate individuals to be healthier may be more effective if framed in ways that foster confidence and self-efficacy to engage in health behaviors rather than in ways that imply personal blame or solitary effort," concludes the study. "In contrast to messages that received positive ratings, participants responded most negatively to messages that were coded as stigmatizing… These messages were ascribed the most negative characteristics, the least positive characteristics, and were rated as the least motivating among all other messages."

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