Shook, Hardy & Bacon L.L.P.

ISSUE 461 | NOVEMBER 9, 2012

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

USDA Adopts Final Rule for Residue Testing of Organic Agricultural Products

The Agricultural Marketing Service of the U.S. Department of Agriculture (USDA) has issued a final **rule** clarifying that the Organic Foods Production Act of 1990 and its implementing regulations require "periodic residue testing of organically produced agricultural products by accredited certifying agents." Effective January 1, 2013, the rule also "expands the amount of residue testing of organically produced agricultural products by clarifying that sampling and testing are required on a regular basis [and] requires that certifying agents, on an annual basis, sample and conduct residue testing from a minimum of five percent of the operations that they certify." *See Federal Register*, November 9, 2012.

FSIS Issues Notice on Written Recall Procedures

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has **issued** instructions for inspection program personnel (IPP) to follow "when verifying that large official establishments (with 500 or more employees) that produce meat and poultry products have prepared and are maintaining required written recall procedures." According to FSIS, the notice complies with a May 8, 2012, final rule outlining requirements for notifying the agency of adulterated or misbranded products and maintaining written recall procedures. It also calls on IPP to remind large establishments "of the availability of food defense plan guidance because food defense plans also facilitate the removal of adulterated products from commerce."

Although food defense plans are currently voluntary, FSIS has stressed that their purpose is to help meat and poultry companies "respond to intentional contamination of products" and may be used with other recall systems. Written recall procedures, however, must "specify how the official establishment will decide whether to conduct a product recall and the procedures it will follow should it decide that one is necessary." Establishments do not need to file these procedures with FSIS but must make them available to inspectors upon request.

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SHB 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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EFSA Releases Science Strategy for 2012-2016

The European Food Safety Authority (EFSA) has **published** a *Science Strategy 2012-2016* outlining the agency's plans to protect the food supply chain "in the coming years through up-to-date, science-based risk assessments." Intended to complement EFSA's corporate *Strategic Plan 2009-2013,* the new strategy reflects internal deliberations among its Scientific Committee, Advisory Forum, Management Board and staff, and various stakeholders. The document focuses on four objectives designed to (i) "further develop [the] excellence of EFSA's scientific advice"; (ii) "optimize the use of risk assessment capacity in the EU"; (iii) "develop and harmonize methodologies and approaches to assess risks associated with the food chain"; and (iv) "strengthen the scientific basis for risk assessment and risk monitoring."

To achieve these goals, the strategy proposes several key initiatives, including a bid to "enhance the contribution of EFSA staff to support the scientific work of the EFSA Scientific Committee and Scientific Panels." EFSA has also recommended making the scientific consensus process more transparent as well as revamping its communications with consumers and other parties "in order to understand and address their risk perceptions and information needs and preferences, particularly related to new or complex scientific issues." In addition, the agency has proposed streamlining regulatory submissions and reviews by facilitating electronic submissions and other IT-supported initiatives.

"As these activities are in large part related to regulatory review and post-authorization monitoring of regulated products, the level and origin of resources to fund these activities may impact the feasibility of these projects," concludes the strategy, which will remain an open document subject to further amendment. "Progress in implementing the strategy will be assessed annually against EFSA's corporate key performance indicators and any remedial actions will be included in the multi-annual work program and annual management plans of the Authority. The strategy itself will also be reviewed at regular intervals to adjust the strategic direction in line with changes in the operating environment."

DEFRA Requests Feedback on Food Labeling Legislation

The U.K. Department of Environment, Food and Rural Affairs (DEFRA) has **announced** a public consultation seeking feedback on proposed legislation that would implement the European Union's (EU's) regulation "on the provision of food information to consumers" (**Regulation (EU) No. 1169/2011**). According to DEFRA, the regulation known as FIC requires food business operators (FBOs) to provide specific information to consumers "so that they are able to make informed choices about the food they buy." These requirements address a number of technical issues, including (i) "country of origin/

place of provenance labeling"; (ii) "mandatory nutrition declaration and voluntary front of pack nutrition labeling"; (iii) "ingredients and nutrition labeling of alcoholic drinks"; (iv) "consumer information about non-prepacked foods"; (v) "food allergen labeling and information"; (vi) "clarity of food labels and minimum font size"; (vii) "labeling of vegetable oil including palm oil"; (viii) "labeling of engineered nano-materials"; and (ix) "quantity labeling."

The U.K. legislation enacting FIC would revoke existing food labeling regulations and replace them with EU-compliant ones as outlined in the consultation's **impact assessment**. To this end, the statutory instrument seeks to remove overlaps between domestic and EU-wide legislation, minimize regulatory burdens on FBOs, and implement "a proportionate, risk-based enforcement regime." DEFRA will accept comments on the assessment until January 30, 2013.

MPs Vote to Review UK Beer Tax

U.K. members of Parliament (MPs) have reportedly agreed to revisit a beer duty escalator tax that raises the price of a pint each year by 2 percent plus the rate of inflation. According to media reports, Conservative MP Andrew Griffiths argued in the House of Commons that the current beer tax has cost the country thousands of jobs as beer sales decline and pubs are forced out of business. The debate purportedly concluded with 100 MPs voting to review the tax despite Treasury Minister Sajid Javid's concern that the government would lose £105 million over the next two years if it were abolished.

"The reality is since the introduction of the beer duty escalator [in 2008], beer duty has increased by a crippling 42 per cent," said Griffiths, who chairs the All-Party Parliamentary Beer Group. "The point about an escalator is you stop when you get to the top. We have now reached the top and we are in danger of going off the edge of a cliff." *See Burton Mail,* November 2, 2012.

San Francisco Attorney Puts Pressure on Monster Beverage Corp.

San Francisco City Attorney Dennis Herrera has sent a **letter** to Monster Beverage CEO Rodney Sacks, asking the company to provide proof that the large dosages of caffeine contained in its popular Monster energy drinks are "completely safe" for consumption by adolescents and adults. Monster Beverage Corp. has come under increased scrutiny following reports last week to the Food and Drug Administration (FDA) that the product may be linked to as many as five deaths since 2009. Herrera issued the letter under provisions of California's Unfair Competition Law that empowers city attorneys to demand evidence for purportedly fact-based advertising claims.

"Although you claim that Monster Energy drinks are 'completely safe,'" Herrera writes, "there is increasing evidence that the high caffeine levels in your

products are dangerous, particularly for the youth whom you target with your advertising. As numerous scientific studies have concluded, consuming large amounts of caffeine can have serious health consequences, particularly for adolescents. Caffeine increases heart rate [and] blood pressure, and can cause seizures, heart arrhythmias, and, in some cases, death."

Herrrera references FDA guidelines that state that a healthy adult can consume up to 400 mg of caffeine daily. But for adolescents, the safe level is much lower—no more than 100 mg of caffeine per day, according to the American Academy of Pediatrics. Monster Beverage Corp. apparently does not disclose caffeine amounts on its products' labels, but according to a Monster press release, a 16-ounce can of Monster Energy contains 160 mg of caffeine and a 24-ounce can of Monster contains 240 mg of caffeine. "A single 16-ounce can of Monster thus exceeds the daily caffeine limit for teenagers set by the American Academy of Pediatrics. And a single 24-ounce can exceeds that limit by 2.5 times," writes Herrera. "Because energy drinks like Monster far exceed the safe caffeine levels for adolescents, the American Academy of Pediatrics has concluded that energy drinks 'should never be consumed' by adolescents."

Herrera contends that despite these exceedingly high caffeine levels, Monster Beverage Corp. encourages unsafe and irresponsible consumption of Monster Energy products. "Monster's labeling recommends that individuals consume no more than three 16-ounce cans or two 24-ounce cans per day, which amounts to a total of 48 ounces of Monster per day. But 48 ounces of Monster contains 480 mg of caffeine, nearly five times the caffeine that is safe for adolescents to consume in an entire day, and more than the 400 mg per day the FDA has indicated is safe for healthy adults."

Rather than warning consumers to exercise constraint or caution, Herrera says that Monster's marketing states that "bigger is always better" and "you can never get too much of a good thing." Further, "Monster urges consumers to 'chug it down,' or 'throw [it] back,' states that its product has a 'smooth flavor you can really pound down,' and [claims] that one of its products has 'the biggest chugger friendly wide mouth we could make.'" Additional information about the wrongful death lawsuit and the FDA investigation appears in Issue 459 and 460 of this *Update*.

California Voters Reject Soft Drink Tax

Voters in Richmond and El Monte, California, have rejected measures that would have taxed soda and other sugar-sweetened drinks at a penny-per-ounce rate. According to media sources, Richmond City Councilmember Jeff Ritterman initially proposed Measure N as a way to discourage residents from consuming sugary drinks, which he identified as a prime culprit behind the rise in diabetes, obesity, heart failure, and other related issues.

"I'm disappointed, but overall I think this has been a positive for Richmond," said Ritterman. "It's started a great conversation in this community. I think President Obama should (propose a soda tax). [Governor] Jerry Brown should. This is just the beginning of the wave." *See San Francisco Chronicle,* November 7, 2012.

While 67 percent of Richmond's electorate apparently voted against Measure N, 77 percent of voters in the Los Angeles suburb of El Monte also rejected a soft drink tax—an outcome that a November 7 *Huffington Post* article attributed to industry-sponsored campaigns against the measures. "The two cities were inundated with anti-soda tax campaign ads and occupied by paid canvassers throughout the fall," reported *HuffPo's* Joe Satran. "As of October 20, the last date for which records are available, the American Beverage Association (ABA) had spent $2.5 million fighting Richmond's Measure N and $1.3 million fighting El Monte's Measure H, dwarfing spending by those campaigning in favor of the taxes." Additional details about Richmond's proposal appear in Issue **453** of this *Update*.

Meanwhile, the American Public Health Association's (APHA's) Governing Council has reportedly adopted several new policies, including one that would impose taxes on sugar-sweetened beverages. According to "The Pump Handle" blog, APHA recently concluded its 140th Annual Meeting and Exposition, which addressed "Prevention and Wellness through the Lifespan" and attracted more than 12,500 public health professionals.

"Among other things, the APHA policy expresses support for taxes imposed at the federal, state, or local level on sugar-sweetened beverages," reports the blog. "The tax would raise the average price of sugar-sweetened beverages and reduce demand for them. It would also generate revenue for the taxing entity. A penny per ounce tax, for example, could raise nationwide over $13 billion annually." *See The Pump Handle,* November 5, 2012.

LITIGATION

CSPI Claims 7Up Antioxidant Beverages Mislead Consumers

The Center for Science in the Public Interest (CSPI) has filed a putative nationwide class action in a federal court in California against Dr. Pepper Snapple Group, Inc., alleging that the company misleads consumers, through marketing and product labeling, to believe that the antioxidants contained in its beverages are derived from fruits and that the company's use of antioxidants in soft drinks violates contrary Food and Drug Administration (FDA) regulations. *Green v. Dr. Pepper Snapple Group, Inc.*, No. n/a (U.S. Dist. Ct., C.D. Cal., filed November 8, 2012).

By using the term "antioxidant" in the names of some of its beverages, the company allegedly distinguishes its products "from similar soft drinks and, thereby, command[s] a premium price for the Products." According to the complaint, "Contrary to Defendant's claims and representations, the Products do not contain any real cherries, real berries, or even extracts from those fruits. Nor do the Products derive their antioxidant content from real, antioxidant-rich cherries; real, antioxidant-rich raspberries, blackberries, and cranberries; or real, anti-oxidant-rich pomegranates. Unbeknownst to the average consumer, the Products contain only one antioxidant—vitamin E."

The complaint also alleges that not only is the amount of vitamin E in the products minimal and thus unable to confer any health benefits, but the products also contain high-fructose corn syrup, artificial sweeteners and food coloring (Red 40) that carry their own purported health risks. The named plaintiff, a California resident, claims that he would not have purchased the products had he known the facts about their antioxidant content.

The complaint further alleges that "Defendant's fortification of the Products with chemical additives is in direct violation of the FDA's Fortification Policy. 21 C.F.R. § 104.20 (the 'Fortification Policy')." This policy states that FDA "does not encourage indiscriminate addition of nutrients to foods, nor does it consider it appropriate to fortify . . . snack foods such as . . . carbonated beverages." FDA purportedly maintains that is policy has the force of law although it is only a guideline. And, according to the complaint, a federal court in New York found that while the policy "is itself non-binding . . ., [it] is incorporated by reference into binding FDA regulations." The agency has apparently issued warning letters to the defendant and other companies "for similar violations of its Fortification Policy."

Alleging violations of the Consumers Legal Remedies Act, California Business and Professions Code (unlawful and fraudulent business acts and practices, misleading and deceptive advertising) and unjust enrichment, the plaintiff seeks restitution; disgorgement; injunctive relief; compensatory, incidental, consequential, statutory, and punitive damages; interest; attorney's fees; and costs.

CSPI Executive Director Michael Jacobson said, "Non-diet varieties of 7UP, like other sugary drinks, promote obesity, diabetes, tooth decay, and other serious health problems, and no amount of antioxidants could begin to reduce those risks. Adding an antioxidant to a soda is like adding menthol to a cigarette—neither does anything to make an unhealthy product healthy." CSPI claims to have communicated its concerns about antioxidants in the company's soft drinks in May 2012, "but the company has since refused to correct its labels." *See CSPI News Release*, November 8, 2012.

Investors Seek to Consolidate Claims Against Keurig Coffee Brewer Maker

Green Mountain Coffee Roasters Inc. investors have reportedly filed a consolidated securities action against the company, claiming that they were misled about demand for Keurig and K-Cup products. *La. Mun. Police Emp. Ret. Sys. v. Green Mountain Coffee Roasters, Inc.*, No. 11-00289 (U.S. Dist. Ct., D. Vt., filed October 29, 2012). The Louisiana Municipal Police Employees' Retirement System sued the company for U.S. securities law violations in November 2011 when Green Mountain's shares fell 34 percent in a single day, losing $3.1 billion in market value, after quarterly sales fell short of analysts' expectations.

A group of pension funds, seeking to represent all company investors, allege that "[u]nbeknownst to investors, and contrary to defendants' statements that they were barely able to ship orders as they came in, Green Mountain Coffee Roaster's warehouses were overflowing with unused and expiring coffee products that were not being sold to consumers." The company is facing increasing competition as a number of companies, including grocery stores, are making capsules that fit into Green Mountain's Keurig machines. Several securities fraud actions have been filed against it, including one in 2010 after Green Mountain announced a Securities and Exchange Commission investigation, and a number of other shareholder suits filed in both state and federal courts. *See Bloomberg*, October 30, 2012.

GMOs in Cheddar Goldfish Crackers Allegedly Belie "Natural" Label

A Colorado resident has filed a lawsuit on behalf of a putative nationwide class against Pepperidge Farm, Inc., alleging that the company misleads consumers by labeling its Cheddar Goldfish crackers "natural," because they contain genetically modified organisms (GMOs) "in the form of soy and/or soy derivatives." *Bolerjack v. Pepperidge Farm, Inc.*, No. 12-2918 (U.S. Dist. Ct., D. Colo., filed November 6, 2012).

Claiming damages in excess of $5 million, the plaintiff claims that she "purchased the Product believing it to be 'Natural' because he [sic] read and relied on Pepperidge Farm's material statement that the Product is 'Natural,' prominently displayed on the Product's front labeling/packaging. Plaintiff has been damaged by her purchase of the Product because the labeling and advertising for the Product was and is false and/or misleading under Colorado law; therefore, the Product is worth less than what Plaintiff paid for it and/or Plaintiff did not receive what he [sic] reasonably intended to receive when purchasing the Product."

Seeking to represent a nationwide class of consumers who purchased the product since November 2008, the plaintiff alleges violation of Colorado's Consumer Protection Act, breach of express warranty and negligent misrepresentation. She seeks equitable relief, restitution, disgorgement, actual damages, attorney's fees, costs, and interest.

Monster Energy Faces Lawsuit over Potentially Lethal Ingredient ECGC

A putative class action filed in a California state court claims that Monster Rehab®, a green tea and energy drink, contains unknown amounts of epigallocatechin-3-gallate (ECGC), "an extremely dangerous and potentially lethal ingredient," and that the company fails to warn consumers of its potential hepatotoxic side effects. *Wooding v. Monster Energy Co.*, No. 30-2012-00609716-CU-BT-CXC (Cal. Super. Ct., Orange Cnty., filed November 5, 2012). While the named plaintiff, a Huntington Beach, California, resident, has not apparently experienced any side effects, she claims to have "suffered injury in fact and has lost money and property as a result of the unfair, deceptive, untrue and misleading advertising described herein, including the purchase price for products that are of little or no value and are dangerous."

Among other matters, the plaintiff claims that those with compromised livers should not drink the product, nor should it be consumed with alcohol. Yet, she points to ads suggesting that the product be consumed as a pick-me-up after a long night of partying. While ECGC apparently has anti-oxidant properties in small doses, the plaintiff alleges that 20-year-old research recognized the ingredient's "liver-toxic effects . . . when used in the doses present in dietary supplements." The plaintiff also notes that the product cannot, as the company purportedly claims, function to re-hydrate because it contains caffeine, which is a diuretic.

The complaint cites a number of cases of liver injury in France and Spain between 1999 and 2003 allegedly linked to a supplement containing green tea extract. ECGC is evidently a tea catechin found in green tea. The complaint also includes information about liver toxicity reported to the U.S. Food and Drug Administration between 2002 and 2009 purportedly linked to Hydroxycut®, another product containing ECGC.

Seeking to represent a nationwide class of consumers, the plaintiff alleges violations of the Consumers Legal Remedies Act and California Business and Professions Code, breach of express and implied warranties, and unjust enrichment. She requests an order "directing Defendants to identify, with Court supervision, victims of their conduct and pay them restitution and disgorgement of all monies acquired by Defendants by means of any act or practice declared by this Court to be wrongful," a corrective advertising campaign, punitive and treble damages, attorney's fees, and costs.

EU Court Issues Ruling on Wine Origin Designation

The General Court of the European Union (EU) has dismissed an annulment action brought by Hungary, seeking to overturn a protected Slovakian designation of origin for wine produced in the Tokaj region which both countries share. *Hungary v. Commission*, Case T-194/10 (Gen. Ct., decided November

8, 2012). Hungary will have two months to bring an appeal to the Court of Justice, as to points of law only.

The European Commission registered the protected designation of origin 'Vinohradnicka oblast' Tokaj' on Slovakia's behalf in the 2006 and 2007 lists of quality wines produced in specified regions (QWPSR). On July 31, 2009, the day before the EU established the E-Bacchus database to publish the QWPSR lists, Slovakia requested a modified designation— 'Tokajská/Tokajské/Tokajsky vinohradnicka oblast'—which became the new protected designation on the electronic database. Several months later, Slovakia requested that the Commission revert to the original designation of origin, and the Commission amended the designation as requested.

Hungary then contested the amendment, claiming violations of applicable regulations and contending that the name 'Tokajská/Tokajské/Tokajsky vinohradnicka oblast' enjoyed Community protection on August 1, 2009, "the date of the entry into force of the new legislation of the Union on the market in the wine sector." The court found to the contrary that wine names protected in the EU before the E-Bacchus database was introduced "are automatically protected under the legislation in force since that database was introduced." Thus, the protection "did not depend on the registration of those names in the database." According to the court, the registration was simply the result of an automatic transition "from one regulatory regime to another, of protection that has already been granted and is not a condition for the grant of that protection."

Because Slovakian law in effect on August 1, 2009, the day the E-Bacchus database was introduced, protected the name 'Vinohradnicka oblast' Tokaj' "only that name was protected in the EU on that day." The incorrect change incorporated on Slovakia's behalf "does not change the fact that, pursuant to the Slovak legislation which alone is relevant, the name 'Vinohradnicka oblast' Tokaj' enjoyed protection on 1 August 2009. Nor is the fact that the new Slovak law on wine—adopted on 30 June 2009—included the name 'Tokajská vinohradnicka oblast' capable of calling into question the protection enjoyed by the name 'Vinohradnicka oblast' Tokaj' on 1 August 2009, because the new [Slovakian] law only entered into force on 1 September 2009." *See General Court of the European Union Press Release*, November 8, 2012.

LEGAL LITERATURE

State GE Labeling Requirements Could Be Legally Vulnerable

University of Arkansas School of Law LL.M. Candidate Lauren Handel has considered whether food-labeling provisions, such as those that would have been required under California's Proposition 37 (Prop. 37), which voters defeated this week, are vulnerable to constitutional or preemption challenges.

Had it been enacted, Prop. 37 would have required most food companies to label their products with a statement indicating that they contain genetically engineered (GE) ingredients and would have prohibited the use of the term "natural" on processed food products as inherently misleading to consumers.

In her article titled "Labeling of Genetically Engineered Foods: A Constitutional Analysis of California's Proposition 37," Handel explores the First Amendment standards applied to commercial speech and concludes that the state would not have been able to justify a ban on "natural" claims, and that whether consumers' "right to know" about GE ingredients trumps food companies' commercial speech rights is debatable. She also concludes that Prop. 37's GE-labeling component would likely have been preempted by federal law to the extent it reached meat and poultry product labels.

Meanwhile, Prop. 37 proponents have reportedly vowed to continue their efforts to require food companies to label products containing GE ingredients. The coalition of consumer advocacy organizations and organic interests is already apparently gathering signatures for a similar measure on Washington's 2013 ballot, and campaign leaders claim that the issue now has nationwide attention. They will continue to urge the Food and Drug Administration to require GE labeling, having backed a petition drive that garnered more than 1-million signatures. Just Label It Campaign Director David Bancroft was quoted as saying, "Federal GE foods labeling must now be the focus. The same powerful interests that funded the campaign against Prop. 37 have already had their lobbyists insert language in House versions of the Farm Bill, which, if passed, would strip federal agencies of their authority to regulate GE crops."

Critics of the proposal were equally sanguine, responding to the ballot initiative's defeat by claiming that it greatly reduces the odds such labels will be required anywhere in the United States. A supporter of biotech crops reportedly suggested that it will be more difficult to raise money to support labeling campaigns. According to L. Val Giddings, "What justification can they present to their funders to pour more money down this drain." Still, Prop. 37 proponents, citing President Barack Obama's (D) call for labeling during a campaign speech in 2007, do not appear to have lost their enthusiasm for seeking changes to food-labeling policy. *See Reuters, Huffington Post, The New York Times*, November 7, 2012.

OTHER DEVELOPMENTS

CSPI Wants Tougher Oversight of GE Foods in Farm Bill

The Center for Science in the Public Interest (CSPI) has asked members of the U.S. House of Representatives to exclude certain provisions in the Farm Bill that would limit the government's authority to conduct environmental analyses of genetically engineered (GE) crops. According to CSPI, "the bill

language at issue would specifically limit the U.S. Department of Agriculture's regulatory review to specific issues, such as whether the engineered crops could act as 'plant pests'—a scenario CSPI says is not supported by science. Instead, Congress should write stand-alone legislation that would give USDA specific regulatory authority over genetically engineered crops and consider the full range of actual potential problems with such crops, such as the development of weeds or insects that were resistant to the crops' technology, and the impact of gene flow to weedy relatives."

CSPI Biotechnology Director Greg Jaffe asks, "Why would Congress add to the public's skepticism of genetically engineered crops by letting new varieties go to market before a thorough analysis of their potential environmental impact? As written, these provisions would handcuff USDA and prevent it from eliminating or managing potential environmental harm that might be caused by these products."

In a **letter** to Agriculture Committee Chair Frank Lucas (R-Okla,) and Ranking Member Collin Peterson (D-Minn.), Jaffe wrote that the current regulatory process at USDA is not only too slow, but does not even focus on the most important risks of GE crops. CSPI has argued that foods made from currently marketed GE crops are safe to eat and that their environmental impact could be managed safety with effective oversight. But the group also supports legislation that would require mandatory pre-market approval of GE crops before they enter our food supply—authority that government regulators at the Food and Drug Administration still lack, according to CSPI. *See CSPI News Release,* November 2, 2012.

MEDIA COVERAGE

Cecilia Kang, "When is a kids' online game actually an ad?," *The Washington Post,* November 2, 2012

"If even the ad industry can't agree on the definition of an online ad, who can?," asks *The Washington Post's* Cecilia Kang in this November 2 article highlighting the "increasingly thorny debate on how to monitor advertising aimed at children when they are confronted with so many new forms of marketing online." Kang reports that both the Federal Trade Commission (FTC) and Federal Communications Commission regulate traditional media but have thus far failed to restrict online advertising to kids, leading consumer groups to question the supposedly "lax oversight of digital marketing."

"There is a great deal of research that shows children don't distinguish between content and advertising," American University Communications Professor Kathryn Montgomery was quoted as saying. "Now on digital, there is the opportunity of more blurring of those lines, and the industry is pushing to keep definitions of online advertising broad and unclear."

In particular, Kang notes that even the industry's Children's Advertising Review Unit (CARU) has sometimes struggled to distinguish among online entertainment, advertising and other forms of content. According to CARU, which refers unresolved disputes to the FTC, marketers still have "special responsibilities when advertising to children or collecting data from children online. They should take into account the limited knowledge, experience, sophistication and maturity of the audience to which the message is directed."

But industry efforts to educate children about online advertising have apparently done little to appease critics like Georgetown Law Professor Angela Campbell, who recently filed a complaint with FTC over McDonald's use of "tell-a-friend" features on its Websites. "They have the strategy of reaching lots of kids by constantly bombarding them with brands," she said. "They want children to develop positive emotions about their brands early on." Additional details about Campbell's complaint appear in Issue 451 of this *Update*.

CRA Uses *Mother Jones* Exposé in Its Fight Against Big Sugar

In a move that *Mother Jones* magazine calls "surreal," The Corn Refiners Association (CRA) has issued a press release using the magazine's recently published exposé "Big Sugar's Sweet Lies" as a "cudgel" in CRA's battle with the sugar industry. The exposé outlines the alleged decades-long efforts by the U.S. sugar industry to influence the debate about the health effects of sugar compared to high-fructose corn syrup (HFCS), and CRA apparently believes it helps its case.

In the article "Are High-Fructose Corn Syrup Makers in Denial?," *Mother Jones* author Michael Mechanic writes, "The corn refiners should be sending flowers, not subpoenas, to the Sugar Association. After all, the association's decades-long campaign to bury evidence suggesting that its product plays a role in the 'death-dealing diseases'—as revealed in our story—has benefited the makers of HFCS as well. If the corn refiners imagine that our exposé somehow left them looking good, well, I've got some evaporated cane juice to sell them."

SCIENTIFIC/TECHNICAL ITEMS

CDC Reports Energy Drinks Affected U.S. Service Members' Sleep in Afghanistan

Energy drink consumption by U.S. service members deployed for combat has been linked to sleep problems, according to the most recent Centers for Disease Control and Prevention's (CDC's) *Morbidity and Mortality Weekly Report*. Titled "Energy Drink Consumption and Its Association with Sleep Problems Among U.S. Service Members on a Combat Deployment—Afghanistan, 2010," the study found that "[s]ervice members drinking three or more energy

drinks a day were significantly more likely to report sleeping ≤4 hours a night on average than those consuming two drinks or fewer." The study also found that those consuming three or more of the beverages each day "were more likely to report sleep disruption related to stress and illness and were more likely to fall asleep during briefings or on guard duty."

The study involved 1,249 service members "using a cluster sample of randomly selected U.S. Army and Marine combat platoons deployed to Afghanistan." All were men, and, of those surveyed, 1,000 agreed to the use of their data for research with 988 answering the question, "How many energy drinks (e.g., Monster, Red Bull, 5-Hour Energy) do you use per day?" The researchers recommend educating service members about "the potential adverse effects of excessive energy drink consumption on sleep and mission performance and [encouraging them] to moderate their energy drink consumption in combat environments."

An editorial accompanying the study highlighted its limitations, including (i) "cause and effect cannot be determined because the data are cross-sectional"; (ii) "the survey did not allow for a true estimate of caffeine intake" and did not account for other caffeine intake; (iii) as asked, the questions about level of use could have "resulted in an underestimate of energy drink use"; (iv) "this study did not control for variables that might have confounded the relationship between energy drink consumption and sleep outcomes (e.g., mental health problems, physical injury, amount of time deployed, or peer group/unit effects)"; and (v) "analyses did not control for sleep medication use, which also can cause daytime sleepiness."

The editorial notes that military and civilian findings show that more than half of adolescents and young adults drink at least one energy drink per month, and approximately 6 percent consume these beverages every day. In this study, 45 percent of the respondents reported that they consumed one or more of the energy beverages daily. "No differences in energy drink consumption by age or rank were observed, demonstrating the ubiquitous nature of energy drink consumption during deployment." Because these beverages are "relatively new, generally unregulated, and lack warning labels," the editorial supports the researchers' recommendation to tell service members that long-term effects are unknown and high doses could affect their performance and sleep.

AHA Calls for Renewed Effort to Reduce Sodium Consumption

The American Heart Association (AHA) has **issued** a presidential advisory calling for renewed efforts to reduce sodium consumption among Americans. Published ahead of print in AHA's *Circulation,* the advisory summarizes the latest evidence backing its recommendation that consumers reduce their sodium intake to less than 1,500 milligrams per day.

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To this end, the new report builds on a 2011 presidential advisory that linked excess sodium consumption to high blood pressure, cardiovascular disease (CVD) and stroke. It also attempts to debunk what the advisory describes as "[r]eports of paradoxical inverse or J-shaped associations between sodium intake and CVD and stroke risk and a meta-analysis [that] have been widely misinterpreted as disproving the relationship between sodium and CVD and stroke risk and have received considerable media attention."

According to AHA, these publications "have stirred controversy and confusion in the popular press and the general population," leading some to question the need to curb salt intake. "People should not be swayed by calls for a change in sodium intake recommendations based on findings from recent studies reporting that a reduction in sodium consumption does not improve cardiovascular health," said the advisory's lead author in a November 2, 2012, AHA press release. "Our detailed review of these studies identified serious methodological weaknesses, which limit the value of these reports in setting or revising sodium intake policy. Our focus should be on finding effective ways to implement, not change, the existing American Heart Association policy on sodium intake." Additional details about AHA's first advisory appear in Issue 377 of this *Update*.

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