

FOOD & BEVERAGE LITIGATION UPDATE



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FIRM NEWS

Shook Partner Discusses “Pros” and “Cons” of Self-Reporting Potential FCPA Violations in DRI Publication

Shook, Hardy & Bacon White Collar Defense & Government Investigations Practice Co-Chair [David Maria](#) provides a detailed [discussion](#) of typical issues that companies doing business internationally face in deciding whether to self-report to the U.S. government potential criminal conduct under the Foreign Corrupt Practices Act (FCPA) in the winter 2015 issue of DRI’s In-House Defense Quarterly.

According to Maria, a former prosecutor in the Criminal Division of the Department of Justice, a “corporate defendant starts with a significant strike against it if it seeks to cooperate *after* the government is informed of the conduct through independent means. Once the government learns of the conduct through a source other than the corporation (most likely a whistleblower), assuming that the corporation was aware of the conduct but opted not to disclose it (or had not yet disclosed it), even the most energetic cooperation may result in little credit given by the government.”

He explains various “pros” and “cons” of self-disclosure and concludes, among other things, that the financial incentive provided under the Dodd-Frank Act for individuals to report potential FCPA violations will continue to fuel the growing number of whistleblower complaints against companies. He also opines that “it’s only a matter of time before plaintiffs’ attorneys begin advertising their services and this whistleblower provision in foreign countries, especially in those countries that rank highest on the corruption index.”

LEGISLATION, REGULATIONS AND STANDARDS

Democratic Senators Issue Report Critical of Energy Drink Industry

Sens. Edward Markey (D-Mass.), Dick Durbin (D-Ill.) and Richard Blumenthal (D-Conn.) have [released](#) a report asserting that while 12 of 16 companies that responded to a series of questions from the lawmakers have made progress in reducing marketing and promotion activities targeting children younger than age 12 and children in K-12 school settings, they have failed to voluntarily eliminate such efforts geared toward teenagers (ages 13-18).

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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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"Despite energy drink makers' claims of not marketing their products to teenagers, a quick glance at social media or a drop by at a local concert shows that those claims just aren't based in fact," Senator Durbin was quoted as saying. "The truth is that in the absence of federal regulation, energy drink companies are using effective marketing tactics to reach young people—and sadly it's working. It is past time for this industry to heed the advice of public health experts across the country and take commonsense steps to protect young people from getting hooked on their product."

Among other things, the report calls on energy drink makers to stop marketing to youth ages 18 and younger and to "cease marketing caffeinated energy drinks as intended to be consumed for hydration or rehydration following rigorous physical activity." Recommendations for the Food and Drug Administration include developing (i) daily caffeine consumption limits for youth ages 18 and younger; (ii) labeling rules for all products containing added caffeine; (iii) guidance for industry on the voluntary reporting of adverse events associated with energy drink consumption; and (iv) definitions for "energy drink," "sports drink" and other "functional" beverages.

FTC Seeks Fair Packaging and Labeling Act Comments

The U.S. Federal Trade Commission (FTC) is [soliciting](#) comments on proposed amendments to the Fair Packaging and Labeling Act (FPLA). The 1967 law requires that certain products carry labels with identifying information such as the source, content and quantity and specifically excludes—among other categories—meat products, poultry and alcohol beverages.

FTC sought comments on the existing rules in March 2014 and used some of the suggested changes in the proposed amendments, which include (i) "modernizing the place-of-business listing requirement to incorporate online resources"; (ii) "eliminating obsolete references to commodities advertised using the terms 'cents off,' 'introductory offer,' and 'economy size'"; and (iii) incorporating "a more comprehensive metric chart." Comments must be received by March 30, 2015. See *FTC News Release*, January 22, 2015.

USDA Proposes New Pathogen-Reduction Methods for Poultry Products

The U.S. Department of Agriculture (USDA) has [proposed](#) new standards that aim to reduce *Salmonella* and *Campylobacter* in "the poultry items that Americans most often purchase," including ground chicken and turkey products as well as raw chicken breasts, legs and wings, according to Agriculture Secretary Tom Vilsack.

The proposed standards would require routine sampling throughout the year rather than infrequent sampling on consecutive days, and the allowed amounts of *Salmonella* in chicken parts, ground chicken and ground turkey would be lowered substantially. A USDA press release notes that the Food

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Safety and Inspection Service implemented standards for whole chickens in 1996, but “has since learned that Salmonella levels increase as chicken is further processed into parts.” *See USDA News Release, January 21, 2015.*

Food Contaminants, Veterinary Drug Residues Topics of Upcoming Codex Delegate Meetings

The U.S. Department of Agriculture’s Office of the Under Secretary for Food Safety, Food and Drug Administration, and Department of Health and Human Services have [announced](#) a February 23, 2015, public meeting in College Park, Maryland, to discuss draft positions for consideration at the 9th Session of the Codex Committee on Contaminants in Food in New Delhi, India on March 16-20.

The lengthy agenda for the February meeting includes (i) maximum levels for lead in ready-to-drink fruit juices and nectars as well as in canned fruits and vegetables; (ii) proposed draft maximum levels for inorganic arsenic in husked rice; (iii) a proposed draft Code of Practice for the Prevention and Reduction of Arsenic Contamination in Rice; (iv) proposed draft maximum levels for cadmium in chocolate and cocoa-derived products; (v) a discussion paper about the feasibility of developing a Code of Practice for mycotoxins in spices; and (vi) a priority list of contaminants and naturally occurring toxicants that the Joint FAO/WHO Expert Committee on Food Additives has proposed for evaluation. Those wishing to attend the meeting should register by February 19.

The same agencies have [scheduled](#) a March 19 public meeting to discuss draft positions for consideration at the 22nd Session of the Codex Committee on Residues of Veterinary Drugs in Foods slated for April 27-May 1 in San Jose, Costa Rica. Items on the agenda for the March 19 meeting include (i) a discussion paper outlining issues and concerns affecting the Committee’s ability to efficiently do its work; (ii) draft provisions on establishing maximum residue levels for honey; and (iii) a report detailing activities of the World Organization for Animal Health, including the harmonization of technical requirements, and the registration of veterinary medicinal products. Those wishing to attend the meeting should register by March 14. *See Federal Register, January 14, 2015.*

More State Lawmakers Want to Prohibit Powdered Alcohol

State legislators in Wisconsin and Illinois have proposed bills that would ban the sale and distribution of powdered alcohol, which may enter the market in spring 2015 under the brand name Palcohol. Sen. Tim Carpenter (D-Milwaukee), who proposed the Wisconsin legislation, reportedly compared the product to the synthetic hallucinogenic drug known as “bath salts,” which the state approved if they were labeled “not for human consumption” before banning them in 2011. He also apparently expressed concern that people could snort powdered alcohol, sneak it into classrooms and sporting events, or mistake it for another powder and ingest it accidentally.

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Illinois State Sen. Ira Silverstein (D-Chicago) proposed a similar measure as an amendment to the state's existing Liquor Control Act of 1934, noting that his "public safety bill" would combat "people spiking beverages." Similar legislation is also pending in Ohio, Colorado, Nebraska, Utah, and Indiana. Further details about powdered alcohol bans in New York, Alaska, South Carolina, and Vermont appear in Issue [526](#) of this *Update*, and information about U.S. Sen. Charles Schumer's call for a federal ban on the product appears in Issue [523](#).

EFSA Says "No Consumer Health Risk" from BPA

The European Food Safety Authority's (EFSA's) Panel on Food Contact Materials, Enzymes, Flavorings and Processing Aids (CEF) has [issued](#) a scientific opinion finding that bisphenol A (BPA) poses "no health concern for any age group from dietary exposure or aggregated exposure." Published January 21, 2015, the scientific opinion assessed exposure in three ways: (i) "external (by diet, drinking water, inhalation, and dermal contact to cosmetics and thermal paper"; (ii) "internal exposure to total BPA (absorbed dose of BPA, sum of conjugated and unconjugated BPA)"; and (iii) "aggregated (from diet, dust, cosmetics and thermal paper), expressed as oral human equivalent dose (HED) referring to unconjugated BPA only."

Using new data and methodologies, EFSA previously established a temporary tolerable daily intake (t-TDI) for BPA at 4 micrograms per kilogram of body weight per day, from 50 µg/kg bw/day. This latest scientific opinion confirms that the highest estimates for human exposure to BPA "are three to five times lower than the new TDI," with infants and toddlers having the highest estimated intake from dietary sources (up to 0.875 µg/kg bw/day) and adolescents the highest aggregated exposure (1.449 µg/kg bw/day). Estimated dietary exposures for women of childbearing age and men were the same (up to 0.388 µg/kg bw/day).

In addition to analyzing the potential health risks of BPA at current exposure levels, the CEP Panel used data from animal and human studies "to identify any health effects associated with exposure to BPA." It noted, however, that many uncertainties remain about dermal exposures from non-dietary sources.

"With significantly more and better data we have updated and more accurately estimated dietary exposure to BPA for all population groups," said the chair of the BPA working group, Trine Husoy. "As a result, we now know that dietary exposure is four to fifteen times lower than previously estimated by EFSA, depending on the age group." Additional details about the t-TDI appear in Issue [551](#) of this *Update*.

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LITIGATION

SCOTUS to Consider Whether Seizure of Raisins Is a Constitutional Taking

The U.S. Supreme Court has granted certiorari to a coalition of California raisin growers that challenged a federal rule requiring them to give a portion of their annual harvests to a crop-specific committee that in turn sells the reserves for export or donates them to school lunch programs or foreign governments. *Horne v. USDA*, No. 14-275 (U.S., certiorari granted January 16, 2015). The coalition contends that the portion of the harvest that its growers set aside constitutes a taking under the Fifth Amendment, which guarantees just compensation for such acts. They assert that for the 2002-2003 season, they were required to set aside 47 percent of their raisin crops, and the named plaintiffs were paid less than the cost of production; in the 2003-2004 season, they allegedly set aside 30 percent and were not paid at all. The coalition argues that, in a split from other circuits, the Ninth Circuit erred in holding that the takings clause of the Fifth Amendment does not apply to personal property.

Court Grants Conditional Class Certification in T.G.I. Friday's Wage Action

A New York federal court has granted conditional class certification to plaintiffs employed by T.G.I. Friday's who allege underpayment for side work and lack of payment for overtime work in violation of the Fair Labor Standards Act (FLSA). *Flood v. Carlson Restaurants Inc.*, No. 14-2740 (U.S. Dist. Ct., S.D.N.Y., filed April 17, 2014). The restaurant employs as many as 42,000 tipped workers throughout the United States who are eligible to join the nationwide class.

T.G.I. Friday's argued that the named plaintiffs were not similar enough to merit class certification, but the court disagreed, finding that the plaintiffs' "declarations and depositions—which cover eight T.G.I. Friday's locations in four states—contain common allegations of FLSA violations, including Defendants' denial of full minimum wage and overtime compensation for tipped workers." The court dismissed the restaurant's arguments on the merits of the case, noting that those issues could not be addressed at the class certification stage, and directed the parties to meet to determine the form and dissemination of notice. Additional information about the complaint appears in [Issue 521](#) of this *Update*.

Heinz "Dip & Squeeze" Suit Headed to Trial

A Pennsylvania federal court has denied H.J. Heinz Co.'s motion for summary judgment in a lawsuit alleging that the company stole the idea for the "Dip & Squeeze" ketchup packet. *Wawrzynski v. H.J. Heinz Co.*, No. 11-1098 (U.S. Dist. Ct., W.D. Penn., order entered January 7, 2015). The plaintiff asserts that he met with the company in 2008 and presented the idea for the dual-opening packet, but they never reached a deal; Heinz later released its Dip & Squeeze packet, which the plaintiff argues was too similar to his concept. The court

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noted that although Heinz presented evidence showing that it was actively developing a dual-function condiment container before meeting with the plaintiff, the plaintiff had also shown that Heinz had been unsuccessful in creating or marketing a feasible container. “Given the evidence presented by both parties to this lawsuit,” the court concluded, “whether either or both of Plaintiff’s ideas were novel and concrete are questions for the jury.” The court further found that the plaintiff’s claims of unjust enrichment and breach of contract hinged on the same issue. Additional details on the Third Circuit’s revival of the case appear in [Issue 531](#) of this *Update*.

California Prosecutors Target Chocolate Bunnies for Deceptive Advertising

District attorneys in California’s Yolo, Sacramento and San Joaquin counties have reportedly filed a lawsuit in state court alleging that R.F. Palmer Co. advertised its “Too Tall Bunny” product in violation of the unfair business practices, false advertising and unfair competition provisions of the California Business and Professions Code.

The chocolatier apparently packaged the chocolate bunny in a box similar in size to its competition but asserted that the bunny was “Too Tall” and displayed the ears in plastic popping out of the top of the box. The bunny sat on a cardboard insert at the bottom of the box, and without that insert, the bunny was the same size as other similar products, the prosecutors argued. The district attorneys reportedly reached an agreement with the Pennsylvania-based chocolatier bore filing the case to ensure compliance; the court issued a final judgment the same day—a civil penalty of \$2,500 for each act of false or misleading advertising as well as costs for a total judgment of \$46,919. *See Courthouse News Service*, January 16, 2015; *Sacramento Business Journal*, January 21, 2015.

OTHER DEVELOPMENTS

RWJF Report Targets Food Marketing Directed to Children

The Robert Wood Johnson Foundation’s (RWJF) Healthy Eating Research initiative has [published](#) a January 2015 report seeking to close alleged loopholes in industry efforts to regulate the marketing of foods and beverages to children. Focusing on children younger than age 14, *Recommendations for Responsible Food Marketing to Children* notes that although new advertising standards have led to improved nutritional profiles for many products, these guidelines often exclude product packaging, in-store promotions, toy incentives, and other strategies from their definitions of child-directed marketing.

To this end, the report offers model definitions that aim to cover diverse brand architectures as well as new media and venues for marketing activities. The authors recommend that companies restrict their advertising to products that meet nutritional criteria when (i) “children constitute 25 percent or more

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of the audience (e.g., viewers, listeners, readers, participants, or visitors) at the time of ad placement based on projected attendance;" (ii) "children are the target demographic based on the company's media or marketing plan, the developer's designation, or the description of the projected viewership, listeners, readers, participants or visitors;" or (iii) "an assessment of the marketing strategies, techniques, characteristics, and venue suggests that children are the target demographic for the advertising or marketing." Among other things, the report argues that guidelines should cover entire brands and not just individual products, claiming that "companies should not market products within brands that contain other products that do not meet nutrition criteria unless the product that meets nutrition criteria is the key focus and featured prominently in the marketing."

The authors also discuss several strategies, techniques and qualitative characteristics that would fall under their recommended child-directed marketing guidelines, including character licensing and cross-promotions, celebrity endorsements, product placements, sponsorships, merchandising, and animated or anthropomorphic objects or animals. In addition to addressing ads, logos and other brand-identifiers that appear in child-oriented and retail settings, these guidelines would apply to television, radio, print, digital platforms, movies, video games, email or text messages, games and apps, social media posts, and other media platforms, as well as viral or word-of-mouth marketing campaigns.

"These recommendations are intended to provide guidance to a broad range of stakeholders, including food and beverage manufacturers, retailers, restaurant companies, media and entertainment companies, industry trade associations, advertisers, marketers, government agencies, regulators and other policymakers, advocates, and researchers," states the report. "This guidance provides a comprehensive framework that, when paired with sound nutrition criteria, will assist stakeholders' efforts to continue to improve food marketing to children."

Meanwhile, the report has drawn criticism from New York University Professor of Nutrition, Food Studies and Public Health Marion Nestle, who writes in a January 20, 2015, *Food Politics* article that the recommendations stop short of requiring mandatory guidelines. "These are tweakings of voluntary guidelines," she opines. "If we really want the food industry to stop marketing unhealthy foods and drinks to kids, the guidelines can't be voluntary and tweakings are unlikely to help."

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MEDIA COVERAGE

NPR Explores “Non-GMO” Label

While laws mandating disclosure of the presence of genetically modified organisms (GMOs) on food labels are debated in statehouses, independent organizations such as the Non-GMO Project are offering certification for non-GMO products. *NPR* [tracked](#) how a food company earns the “Verified” label from the Non-GMO Project, beginning with an Iowa-based company called FoodChain ID that guides companies through the process of certification.

FoodChain ID first identifies all of the ingredients in the product—including those not actually listed on the label—such as “all the processing aids, the carriers and all the inputs that go into a product.” It then determines the source of each ingredient and input and individually verifies its seclusion from GMOs. “If there’s honey in cookies, for example,” *NPR* notes, “the company will have to show that the bees that make the honey aren’t feeding near genetically modified corn. When there’s even the smallest risk that an ingredient could contain a modified gene, DNA testing is in order.” If needed, FoodChain ID can extract and analyze DNA from ingredient samples in its laboratory to test for the presence of GMOs. *See NPR*, January 20, 2015.

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

