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**LEGISLATION, REGULATIONS AND STANDARDS**

**Humane Society Files FTC Complaint on Chicken Welfare in Egg Production**

The Humane Society of the United States (HSUS) has reportedly filed a complaint with the U.S. Federal Trade Commission (FTC) urging the agency to investigate Natural Pasteurized Eggs, producer of Davidson’s eggs, because the company allegedly keeps its “birds permanently locked in cages so tightly they can’t even spread their wings.”

HSUS argues the packaging of Davidson’s eggs misleads consumers by featuring “lush open pastures, a red barn and free-roaming hens” even though those hens “never feel sunlight nor touch a blade of grass.” Further, HSUS asserts that the company “claims its process ‘eliminates the risk of Salmonella’ from eggs even though caged hens are more likely to spread infection and disease.” According to the *Chicago Tribune*, FTC has not taken action on a complaint related to egg marketing since 1996. See *HSUS Press Release* and *Chicago Tribune*, October 14, 2016.

**FSIS Clarifies Guidelines on Substantiating Animal Raising Claims**

The U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) has updated its guidelines on the documentation needed to support animal-raising labeling claims, which include “Raised Without Antibiotics,” “Organic,” “Grass-Fed,” “Free-Range” and “Raised with the use of hormones.”

Among other things, the agency requires the following information to support such claims: (i) “a detailed written description explaining the controls used for ensuring that the raising claim is valid from birth to harvest or the period of raising being referenced by the claim”; (ii) “a signed and dated document describing how the animals are raised (e.g., vegetarian-fed, raised without antibiotics, grass-fed), to support that the specific claim made is truthful and not misleading”; (iii) “a written description of the product-tracing and segregation mechanism from time of slaughter or further processing through packaging and wholesale or retail distribution”; (iv) “a written description for the identification, control, and segregation of non-conforming animals or products”; and (v) “if a third party certifies a claim, a current copy of the certificate.”

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The agency will accept comments on the new guidelines until December 5, 2016. *See Federal Register*, October 5, 2016.

### U.S. and Mexico Announce Organic Trade Partnership

The U.S. Department of Agriculture's Agricultural Marketing Service (AMS) and the National Service for Animal and Plant Health, Food Safety and Quality of Mexico (SENASICA) have announced a joint Organic Compliance Committee to "ensure the integrity of organic products trade between the United States and Mexico." With implementation of Mexico's organic regulations slated for 2017, the two countries agreed to form a committee to achieve "equivalency in organic production and trade," as well as enhance enforcement controls on organic products.

According to an October 19, 2016, press release, the committee will "establish requirements for the use of import certificates in both countries within six months to provide verification of each shipment of organic products between the United States and Mexico." Under the new arrangement, the committee will sample organic products for chemical residues, share the results with AMS and SENASICA, and "engage with certifiers operating in Mexico by conducting listening sessions to determine any additional training, oversight, or policy guidance needs."

"We deeply value our relationship with Mexico as we work towards organic equivalency," stated AMS Administrator Elanor Starmer. "The committee's work will strengthen monitoring and enforcement controls, and improve traceability of organic products traded between the U.S. and Mexico."

Shook 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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If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd at [mboyd@shb.com](mailto:mboyd@shb.com).

### Malaysia to Require Food Sellers to Remove "Dog" from Hot Dogs

The Malaysian Islamic Development Department (MIDD) has reportedly ruled that hot dogs cannot be granted halal certification unless they are renamed to remove "dog" from the name. "In Islam, dogs are considered unclean and the name cannot be related to halal certification," MIDD Director Sirajuddin Suhaimie told the BBC.

Pretzel franchise Auntie Anne's was reportedly refused halal certification until it renames its "Pretzel Dog," which Suhaimie said would more appropriately be called a "Pretzel Sausage." Apparently determined following confusion from tourists, the ruling has been widely criticized, including by Malaysian Tourism and Culture Minister Nazri Aziz. "Even in Malay it's called hot dog—it's been around for so many years. I'm a Muslim and I'm not offended," he told reporters. *See BBC*, October 19, 2016.

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**LITIGATION**

**McCormick Black-Pepper Slack-Fill Suit to Continue**

A D.C. federal court has denied McCormick & Co.’s motion to dismiss a competitor’s lawsuit alleging the company’s black-pepper packaging contains too much slack fill. *In re McCormick & Co., Inc., Pepper Prods. Mktg. & Sales Practices Litig.*, No. 15-1825 (D.D.C., order entered October 17, 2016). The lawsuit is part of multidistrict litigation joining several consumer class actions with similar allegations.

McCormick challenged Watkins Inc.’s standing to sue and asserted that the company failed to state a claim under the Lanham Act, arguing that its packaging does not constitute advertising. The court disagreed, noting, “McCormick argues that size of its pepper tins is not commercial speech, but it is difficult to understand how the size of a package or container could possibly not be considered a form of ‘advertising or promotion.’ [] The size of a package signals to the consumer vital information about a product and is as influential in affecting a customer’s choices as an explicit message on its surface.”

The court also found support for Watkins’ standing to sue under the Lanham Act and Minnesota law, but it granted McCormick’s motion to dismiss the claim of common law unfair competition because Watkins did not contest McCormick’s argument. Details on Watkins’ complaint appear in Issue [568](#) of this *Update*, and additional information on a subsequent consumer putative class action appears in Issue [569](#).

**Too Much Sugar in Dole Fruit Products, Plaintiff Alleges**

A consumer has filed a putative class action against Dole Packaged Foods, LLC alleging the company’s products contain too much added sugar to be labeled as “rich in nutrients” or “healthy.” *Amaya v. Dole Packaged Foods, LLC*, No. 15-7734 (C.D. Cal., filed October 18, 2016). The complaint first details research connecting added sugar intake to detrimental health effects, including type 2 diabetes, cardiovascular disease and metabolic syndrome, then asserts that Dole’s products containing added sugar are misleadingly labeled. “Dole’s representations that Dole Fruit & Oatmeal contains ‘real fruit!’ and ‘No Trans Fat or Cholesterol,’ and is ‘a healthy . . . Breakfast’ are false, or even if literally true at least highly misleading, in light of the substantial added sugar in the Dole Fruit & Oatmeal products,” the plaintiff argues.

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### ABOUT SHOOK

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.

Shook 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.



The complaint also alleges the labeling claims are unlawful because (i) a statement indicating that the product is free of *trans* fat is “an unauthorized nutrient content claim that may not be made under any circumstances” and (ii) “the statement ‘No [ ] Cholesterol’ is unlawful because Dole Fruit & Oatmeal is naturally cholesterol free, but in violation of [the federal statute], Dole failed to disclose that cholesterol is not usually present in the food.” The plaintiff seeks class certification, injunctions, a corrective advertising campaign, damages and attorney’s fees for alleged violations of California’s consumer-protection statutes.

### Putative Class Action Targets Hormel’s “100% Natural,” “No Preservatives” Meat

A consumer has filed a proposed class action against Hormel Foods Corp. alleging the company misrepresents its meat products as natural and free of preservatives despite containing synthetic or genetically modified ingredients, including cultured celery powder, baking powder and maltodextrin. *Phelps v. Hormel Foods Corp.*, No. 16-62411 (S.D. Fla., Ft. Lauderdale Div., filed October 11, 2016). The lawsuit, focused on Hormel’s Natural Choice® line of products, echoes similar claims in a complaint filed by the Animal Legal Defense Fund in June 2016. Details on that complaint appear in Issue [610](#) of this *Update*.

“The U.S. Department of Agriculture (‘USDA’) takes into account the level of processing in its policy on natural claims on food labeling,” the consumer complaint asserts. “The USDA allows such products to be labeled ‘natural’ when ‘(1) The product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative [ ], or any other artificial or synthetic ingredient; and (2) the product and its ingredients are not more than minimally processed.’” Arguing that Hormel induced the proposed class to pay a premium with its alleged mislabeling, the plaintiff seeks class certification, a corrective advertising campaign, damages and attorney’s fees for alleged violations of Florida consumer-protection statutes, negligent misrepresentation and unjust enrichment.