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LEGISLATION, REGULATIONS & STANDARDS

Proposal Would Move Food Regulation to USDA

As part of a [proposal](#) to reorganize several federal agencies, the Trump administration has recommended that food-safety regulatory oversight be shifted to the U.S. Department of Agriculture (USDA), combining the agency’s Food Safety and Inspection Service (FSIS) with the current food purview of the Food and Drug Administration (FDA). According to the proposal, the Government Accountability Office found that the existing approach “has caused inconsistent oversight, ineffective coordination, and inefficient use of resources” and recommends “merging Federal food safety functions as a potential solution to this fragmentation.” For example, the administration suggests, “[W]hile FSIS has regulatory responsibility for the safety of liquid eggs, FDA has regulatory responsibility for the safety of eggs while they are inside of their shells; FDA regulates cheese pizza, but if there is pepperoni on top, it falls under the jurisdiction of FSIS; FDA regulates closed-faced meat sandwiches, while FSIS regulates open-faced meat sandwiches.”

The proposed USDA agency, the Federal Food Safety Agency, “would pursue a modern, science-based food safety regulatory regime” and “would reduce duplication of inspection at some food processing facilities, improve outreach to consumers and industry,

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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.

For additional information about Shook’s capabilities, please contact



Mark Anstoetter

and achieve savings over time while ensuring robust and coordinated food safety oversight.”

816.559.2497
manstoetter@shb.com



M. Katie Gates Calderon
816.559.2419
kgcalderson@shb.com



Lindsey Heinz
816.559.2681
lheinze@shb.com



James P. Muehlberger
816.559.2372
jmuehlberger@shb.com

FDA Releases Guidance on Protecting Against Food-Supply Attacks

The U.S. Food and Drug Administration (FDA) has released draft guidance on intentional adulteration of the food supply. The guidance aims to help manufacturers develop and implement plans to protect their products by providing details on the components of a food defense plan, including vulnerability assessments, mitigation strategies and training requirements. Large businesses must have a plan by July 26, 2019, with enforcement dates in 2020 and 2021 for small or very small businesses. FDA also indicated that it will issue two further installments of draft guidance on intentional adulteration focusing on vulnerability assessments and corrective actions.

“The likelihood of an incident at a particular facility is low, but the intentional adulteration of the U.S. food supply represents a very serious threat – one that could have devastating public health consequences,” FDA Commissioner Scott Gottlieb said in a statement. “The goal of this draft guidance, in its entirety, is to help provide greater clarity and predictability for manufacturers that need to take additional steps to come into compliance with the rule. We want to help ensure that the new requirements are cost-effective and not overly burdensome, while still being protective of the food system.”

OEHHA Determines Coffee Poses “No Significant Risk of Cancer”

California’s Office of Environmental Health Hazard Assessment (OEHHA) has determined that coffee will not be required to carry a label indicating that it contains chemicals known to cause cancer, birth defects or other reproductive harm pursuant to the state’s Safe Drinking Water and Toxic Enforcement Act (Proposition 65). According to the notice, “Coffee, a unique and complex chemical mixture made from the roasted seeds of the coffee plant, contains many different compounds, including carcinogens listed under Proposition 65, and anticarcinogens. The

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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.

International Agency for Research on Cancer (IARC)—the only Proposition 65 authoritative body to have evaluated coffee—concluded that coffee consumption is not classifiable as to its overall carcinogenicity and is associated with reduced risk of certain cancers in humans.” Written comments on the determination will be accepted until August 30, 2018.

Cornucopia Institute Issues Report on Organic Grain Fraud

The Cornucopia Institute has released “The Turkish Infiltration of the U.S. Organic Grain Market: How Failed Enforcement and Ineffective Regulations Made the U.S. Ripe for Fraud and Organized Crime,” a report arguing that the U.S. Department of Agriculture (USDA) has failed to “curb the infiltration of questionable organic grain imports” into the U.S. food supply. The report alleges that shipments of grain have arrived from Turkey, Russia, Moldova and Kazakhstan that were purportedly sourced from countries that do not have sufficient organic acreage to produce the amount of imported organic grains.

The report accompanies a Cornucopia letter urging Secretary of Agriculture Sonny Perdue to “implement protocols and procedures to require testing of any bulk shipment of ‘organic’ grain that meets minimum volume or monetary value thresholds and is presented for import at ports, docks, and border crossings of the United States.”

“We again urge the USDA to engage in emergency rulemaking to engender trust in the organic products for which consumers pay a premium. We strongly believe this is necessary to infuse confidence in the USDA organic label in light of the mounting evidence that significant quantities of conventional animal feed, represented as organic, have likely made their way into U.S. markets.”

Canada to Revise Beer Compositional Standards

The Canadian Food Inspection Agency has proposed changes to its compositional standards of beer, ale, stout, porter and malt

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.



liquor “to allow for innovation within the beer category while still preserving product integrity and to better reflect the tastes and needs of consumers.” The proposed amendments would update the definition of beer to allow the use of microorganisms beyond yeast in the fermentation starter culture and remove the requirement that the final product “possess the aroma, taste and character commonly attributed to beer.” In addition, herbs and spices would be permitted for use in product formulation, and beer would be limited to no more than 4 percent by weight of residual sugars to distinguish beer from malt-based beverages. Comments on the proposed changes will be accepted until September 14, 2018.

FDA to Hold Public Meeting on Cultured Meat

The U.S. Food and Drug Administration will host a public meeting on cultured meat, poultry and seafood on July 12, 2018. In a press release, FDA Commissioner Scott Gottlieb asserted that the agency governs “both substances used in the manufacture of these products of animal cell culture technology and the products themselves that will be used for food” and grouped cultured meats with other “rapidly evolving areas of technological innovation” such as genetically engineered foods and microbial, algal and fungal cells generated and used as direct food ingredients.

“The FDA remains committed to using our expertise in relevant scientific areas to evaluate the safety of emerging food technologies, such as foods generated by animal cell culture technology,” according to Gottlieb’s statement. “But as we mentioned, in addition to leveraging the existing expertise of our staff, we’re also investing in making sure we are considering all the unique attributes and challenges of this specific area.” Comments on the meeting will be accepted until September 25, 2018.

National Poultry Improvement Plan Changes Accepted

The U.S. Department of Agriculture has announced that April 2018 proposed changes to the National Poultry Improvement Plan

(NPIP) will be adopted. The amendments update several provisions, including “those concerning NPIP participation, voting requirements, testing procedures, and standards.”

LITIGATION

U.S. Seeks Injunction Against Meat Wholesaler For Mislabeling

Federal prosecutors in Chicago are seeking an injunction against Kingdom Farms Wholesale Meats Inc. for allegedly packaging, selling and transporting products without federal marks of inspection and required labeling. *U.S. v. Kingdom Farms Wholesale Meats Inc.*, No. 18-4155 (N.D. Ill., filed June 14, 2018). The complaint asserts that Kingdom Farms removed products from properly labeled shipping containers and repackaged and sold them without inspection marks and labeling, applied inspection labeling without authorization, and reused properly labeled shipping containers without authorization. The U.S. Attorney’s Office alleges the defendants’ actions violated the Poultry Products Inspection Act and the Federal Meat Inspection Act and seeks a permanent injunction restraining them from misbranding or mislabeling products and compelling their compliance with the laws.

Whole Foods Wins Partial Summary Judgment in Sugar Dispute

A federal court in Texas has granted partial summary judgment to WFM Private Label L.P., a subsidiary of Whole Foods Market Inc., in a contract dispute related to 365 Everyday Value Greek yogurt’s sugar content. *WFM Private Label, L.P., v. 1048547 Ontario Inc.*, No. 14-1013 (W.D. Tex., entered June 18, 2018). Whole Foods hired Skotidakis Goat Farm (SGF) to supply Greek yogurt products for the 365 Everyday Value brand, and SGF provided the company with nutritional information. SGF later received additional lab results indicating a higher sugar content than previous testing indicated, but it did not notify Whole Foods of the new results until a few days before *Consumer Reports* published an article alleging that the company’s plain yogurt contained five

times the sugar content listed on the product labeling. Eleven putative class actions were filed against Whole Foods; according to the vendor agreement, SGF had an obligation to indemnify Whole Foods in the lawsuits.

The court held that Whole Foods was entitled to summary judgment on its breach-of-contract claims related to SGF's obligation to indemnify and defend, failure to pay reasonable product withdrawal expenses, failure to provide accurate sugar content disclosures, duty to promptly notify Whole Foods of the product's failure to comply with product specifications, and counterclaim for termination of the contract without cause. The court denied Whole Foods summary judgment on three fraud claims and its request for exemplary damages.

Halo Top Underfills Pints, Lawsuit Alleges

Two consumers have filed a putative class action alleging that Eden Creamery “underfills its ‘pints’ of ice cream”—“[d]ramatically so at times, and as a course of business.” *Kamal v. Eden Creamery LLC*, No. 18-1298 (S.D. Cal., filed June 15, 2018). The complaint alleges, “Purchasers of the premium-priced ice cream simply have no idea how much ice cream they will get each and every time they buy a Halo Top ‘pint.’ And Halo Top has been doing this for years.” The “amount of underfilling appears to be random to consumers” and “appears to be unrelated to flavor of ice cream or the location of purchase,” the plaintiffs assert. The complaint also points to a form allegedly created by Halo Top that allows consumers to report underfilled containers to argue that Halo Top knows of its alleged underfilling practices. The plaintiffs allege violations of California’s consumer-protection statutes and seek class certification, damages, an injunction and attorney’s fees.

Plaintiff Drops “Real Ginger Ale” Suit Against Dr Pepper Snapple Group

A Missouri federal court has dismissed with prejudice a putative class action alleging Dr Pepper Snapple Group Inc. mislabels Canada Dry Ginger Ale because it does not contain ginger. *Webb*

v. Dr Pepper Snapple Grp. Inc., No. 17-0624 (W.D. Mo., entered June 21, 2018). The court approved a stipulated voluntary dismissal filed by the named plaintiff. In April 2018, the court denied the beverage maker's motion to dismiss, finding the plaintiff had adequately pleaded all of the seven counts alleged.

Putative Class Action Challenges RXBAR Ingredients

A consumer has filed a lawsuit alleging that the packaging for Chicago Bar Co.'s RXBAR misleads consumers about the ingredients of the product. *Pizzirusso v. Chicago Bar Co.*, No. 18-3529 (E.D.N.Y., filed June 15, 2018). RXBAR and RXBAR Kids products feature a list of ingredients on the front of the package—for example, the blueberry flavor's packaging reads, "3 Egg Whites, 6 Almonds, 4 Cashews, 2 Dates, No B.S."—with an additional ingredient list on the back of the package. According to the complaint, both lists obscure the actual ingredients; rather than egg whites, the plaintiff argues, RXBARs contain egg white protein powder, which a previous version of the packaging allegedly named. "[P]arents correctly wouldn't want to buy their young children foods which contained concentrated protein powders, for a variety of reasons related to normal adolescent and child development," the plaintiff argues. Further, the "fruit pieces incorporated into the Products are 'infused' (flavored) with sweetening agents such as apple juice concentrate, contrary to defendant's labels and messaging which emphasize 'real fruit' to provide flavor," the complaint alleges. The plaintiff seeks class certification, an injunction, damages and attorney's fees for allegations of negligent misrepresentation, breach of warranties, fraud and unjust enrichment.

Salmonella Outbreak Spurs Kellogg Lawsuit

A woman has filed a lawsuit alleging that she contracted *Salmonella* Mbandaka after consuming Kellogg Co.'s Honey Smacks cereal. *Lemieux v. Kellogg Co.*, No. 18-0682 (W.D. Mich., filed June 20, 2018). The infection is apparently part of an outbreak of *Salmonella* that began in March 2018 that has

infected 73 people in 31 states. The plaintiff alleges that after eating Honey Smacks every morning for two weeks, she “lost her appetite entirely,” experienced “agonizing abdominal craps” and had a fever of 104 degrees. For allegations of strict liability, negligence and breach of warranty, the plaintiff seeks damages of more than \$25,000 and attorney’s fees.

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