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## LEGISLATION, REGULATIONS & STANDARDS

### Bipartisan Bill Introduced to Standardize Food Date Labels

U.S. Reps. Chellie Pingree (D-Maine) and Dan Newhouse (R-Wash.) have introduced the [Food Date Labeling Act](#), which aims to “end consumer confusion around food date labeling and ensure Americans do not throw out perfectly good food,” according to a [press release](#). Sen. Richard Blumenthal (D-Conn.) has introduced a companion bill in the Senate. The proposed law would establish “Best if Used By” to communicate that the quality may decline following the listed date, while “Use By” would communicate that a product should not be consumed after the listed date.

“Food labeling is important for consumer education, but the current practice is confusing and outdated. This bill takes a step toward reducing food waste by helping consumers understand the meaning behind date labels,” Newhouse is quoted as saying. “The legislation also helps restaurants and grocery stores bridge the gap when it comes to donating food to shelters, food banks and other charitable organizations.”

### UK House of Lords Subcommittee Argues Against Meat Definition Laws

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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.

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**[Mark Anstoetter](#)**

The EU Energy and Environment Subcommittee of the U.K. House of Lords has submitted a [letter](#) to the country’s agriculture minister in response to a EU committee’s approval of a measure that would prohibit the use of meat-associated words and phrases—including “sausage,” “burger” and “steak”—to describe plant-derived products. “Veggie tubes proposal a mistake,” the subcommittee’s [press release headline](#) states.

“Our witnesses were unanimous in the view that current naming conventions around vegetarian burgers and sausages are clear and easy to understand,” the letter states. “[W]e are concerned that the amendment would in fact reduce consumer clarity, be a barrier to growth for a burgeoning sector of the food industry, and ultimately make it more challenging for people to reduce the amount of meat in their diet at a time when Government should be seeking to encourage the opposite.”

The letter also notes that the amendment is “unlikely to apply directly to the UK” because it would take effect after the country leaves the EU. “However, if it were implemented it would have implications for UK food businesses seeking to trade with the EU, and also speaks to the broader issue of ensuring that health and environmental objectives are properly integrated across the policy landscape,” the subcommittee concludes. “We would therefore like to know what your position on this amendment would be if it were to be discussed at Council; whether you are aware of any evidence that the problem is ostensibly designed to solve does in fact exist; and whether you would consider implementing a similar measure if it were to take effect after the UK leaves the EU.”

## Organic Producers Could Potentially Use GMOs, USDA Suggests

In [testimony](#) before the House Agriculture Subcommittee, Under Secretary of Agriculture Greg Ibach suggested that genetically modified organisms (GMOs) could potentially be used in the production of organic foods eventually. “As the National Organic Standards Board set the rules originally, right now GMO or transgenics are not eligible to be in the Organic Program, but we’ve seen new technology evolve that includes gene editing that accomplishes things in shorter periods of time that can be done

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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.

through a natural breeding process,” Ibach stated. “I think there is the opportunity to open the discussion to consider whether it is appropriate for some of these new technologies that include gene editing to be eligible to be used to enhance organic production and to have resistant varieties—drought-resistant, disease-resistant varieties as well as higher-yielding varieties—available.”

Meanwhile, the European Food Safety Authority (EFSA) released guidance on how human dietary exposure to newly expressed proteins in GMO foods should be estimated. The guidance aims to assist applicants aiming for approval of GMO products; EFSA asks applicants “to estimate, by appropriate methods, the concentrations of newly expressed proteins, other new constituents and endogenous food and feed constituents, of which the levels have been altered as a result of the genetic modification.”

## FDA Approves Soy Leghemoglobin as Color Additive

The U.S. Food and Drug Administration (FDA) has announced that soy leghemoglobin has been approved for use “as a color additive in ground beef analogue products” following a petition submitted by Impossible Foods. The announcement notes that the agency previously found soy leghemoglobin to be generally recognized as safe as a flavor additive. “FDA concurs with the petitioner that the genetic modifications made to generate the non-toxic and non-pathogenic production strain are well-characterized and the production process conforms to good manufacturing practice,” the announcement states. “In addition to specification limits for lead, arsenic, mercury, and cadmium, we are requiring a specification for the minimum purity of soy leghemoglobin protein as a percent of the total protein in the color additive.” The rule takes effect September 4, 2019, and objections can be filed until September 3.

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.



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### LITIGATION

## Crystal Farms Wins Dismissal of Butter Lawsuit

A New York federal court has granted Crystal Farms Refrigerated Distribution Co.’s motion to dismiss a putative class action alleging that the packaging of Diner’s Choice mashed potatoes misleads consumers by featuring “Made with Real Butter” on the front despite containing both butter and margarine. *Reyes v. Crystal Farms Refrigerated Distrib. Co.*, No. 18-2250 (E.D.N.Y., entered July 26, 2019). The court dismissed the allegations relying on the “butter” representation because the statement “is not misleading. Defendant’s mashed potatoes contain butter. [] To the extent that including a label on a mashed-potatoes package indicating that the product is ‘made with real butter’ may create confusion as to whether the mashed potatoes also contain margarine, such confusion is sufficiently dispelled by the ingredients label on the back of the package, which states twice—and once in bold font set apart from the rest of the items listed in the ingredients label—that the product contains margarine.”

The court also dismissed allegations relying on a representation that the mashed potatoes are “made with fresh whole potatoes,” finding that the phrase “does not suggest that the mashed potatoes are themselves ‘fresh.’ ... ‘[F]resh’ means unfrozen and uncooked. As Defendant notes [] and Plaintiff does not dispute, mashed potatoes cannot be ‘fresh’ because potatoes must be cooked before they are mashed.”

## Some Claims Dismissed in Pet Food Arsenic Case

An Illinois federal court has dismissed part of a putative class action alleging that Champion Petfoods USA Inc. sold foods for animals that contained elevated levels of several heavy metals—including arsenic, cadmium, mercury and lead—as well as bisphenol A (BPA), pentobarbital, “non-regional and non-fresh ingredients, or unnatural or other ingredients that do not conform to the dog foods’ packaging or advertising.” *Zarinebaf v. Champion Petfoods USA Inc.*, No. 18-6951 (N.D. Ill., E. Div., entered July 30, 2019). The court found that the plaintiffs were not alleging the dog foods to contain unsafe levels of the materials at issue; rather, the plaintiffs’ claims were plausible because they alleged that the marketing led them to believe the products to be “healthy, natural and high-quality” but that a reasonable

consumer would not have purchased the products knowing that they contained heavy metals and BPA.

The court dismissed claims relying on the presence of pentobarbital in Champion's dog food brands because although the plaintiffs could show that Champion sold a batch of dog food containing the sedative, they did not have evidence to prove that they actually purchased dog food from that batch. The parties also disputed the phrase "biologically appropriate," which Champion called "nonactionable puffery" and the plaintiffs asserted was a "misleading" "nutritional statement." The court sided with the plaintiffs, finding the phrase to be an assertion of fact.

The court also dismissed allegations relying on representations that the food was "delivered daily" and made with "fresh regional ingredients," finding that the plaintiffs failed to show how "delivered daily" was incorrect merely because Champion used frozen ingredients to produce the food. "Finally, the phrase 'Made with Fresh and Natural Ingredients' is not actionable because Plaintiffs do not allege how or where Defendants marketed its dog food using that phrase, nor do they include any pictures featuring the phrase on Defendants' packaging or advertisements or provide any details about how or where the phrase is used," the court held. Further, the allegations relying on a "Never Outsourced" representation were held to be insufficient because "[t]he allegation that Defendants 'outsource the production of their meals,' without more detail, is conclusory and speculative." The court allowed to continue the plaintiff's allegations relying on "Fresh Regional Ingredients"—finding that the plaintiffs successfully alleged "that the dog foods contain heavy metals and BPA, which are not 'fresh regional ingredient[s]'"—as well as "Delivering Nutrients Naturally," also based on the BPA content.

## Heinz Asserts Trademark on "Poppers" as Appetizers

H.J. Heinz Co. has filed a trademark infringement suit alleging Real Good Food Co. created and sold frozen appetizers described as "Poppers," which Heinz argues it owns the rights to for "frozen appetizers consisting primarily of vegetables, pork and/or cheese, not including shrimp." *H.J. Heinz Co. Brands LLC v. Real Good Food Co.*, No. 19-0915 (W.D. Penn., filed July 26, 2019). Heinz



further argues that Real Good Food Co. had actual knowledge of Heinz's rights to the Poppers mark because Real Good Food Co.'s website compares its products to Heinz's TGI Friday's-branded appetizers. Heinz alleges federal trademark counterfeiting, infringement, dilution and unfair competition and seeks injunctive relief, damages and destruction of infringing materials.

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## MEDIA COVERAGE

### New Yorker Deems Fish Selection “Last Robot-Proof Job”

*The New Yorker* has described a visit to the warehouse of Fulton Fish Market, a web start-up that aims to provide fresh fish across the United States using “an Amazon-esque warehousing-and-logistics system.” In “[The Last Robot-Proof Job in America?](#)” the author states, “There is one thing, however, that the sophisticated logistics system cannot do: pick out a fish.” Robert DiGregorio, the expert who selects fish for the company, *The New Yorker* explains, “possesses a blend of discernment and arcane fish knowledge that, so far, computers have yet to replicate.”

“What can a fishmonger see that a computer can't?” *The New Yorker* points to “a nice ‘film’—as in slime,” which purportedly protects the fish from bacteria and parasites, along with the smell—“when [skate] goes bad, it smells like ammonia,” DiGregorio told the magazine. Further, he said that he builds relationships with the fishmongers to “get the best stuff—not the stuff they think they can get by with. ... How's a robot supposed to do that?” The company's system can already predict which vendors can provide quality fish, and DiGregorio acknowledges that it has helped him—and the software is learning to improve as he uses it. “By the time they invent a computer that can do what I can do,” DiGregorio told *The New Yorker*, “I'll be dead.”

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