



LEGISLATION, REGULATIONS & STANDARDS

Genetically Engineered Pigs Approved for Food Use

The U.S. Food and Drug Administration (FDA) has announced the approval of GalSafe pigs, which have a “first-of-its-kind intentional genomic alteration (IGA),” for use in food. “This is the first IGA in an animal that the FDA has approved for both human food consumption and as a source for potential therapeutic uses,” the announcement states. “The IGA in GalSafe pigs is intended to eliminate alpha-gal sugar on the surface of the pigs’ cells. People with Alpha-gal syndrome (AGS) may have mild to severe allergic reactions to alpha-gal sugar found in red meat (e.g., beef, pork, and lamb).” FDA reportedly found that “food from Galsafe pigs is safe for the general population to eat” and that the potential impact of the pigs is no greater than from conventional pigs.

FDA Proposes Revocation of Standards for Cherry Pie, French Dressing

In an effort to remove regulations no longer “necessary to ensure that these products meet consumer expectations,” the U.S. Food and Drug Administration (FDA) has proposed to revoke the standards of identity and quality for frozen cherry pie and French dressing. “The proposal is part of the FDA’s Nutrition Innovation Strategy,” constituent updates on the proposed revocations state. “One of the goals of the NIS is to modernize food standards to maintain the basic nature and nutritional integrity of products while allowing industry flexibility for innovation to produce more

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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
816.559.2497
manstoetter@shb.com

healthful foods. The FDA believes it is important to take a fresh look at existing standards of identity in light of marketing trends and the latest nutritional science.”

The agency’s Fall 2020 agenda also indicated an intention to amend the standard of identity for yogurt and revoke the standards of identity for lowfat and nonfat yogurt, but that final rule has not yet been issued.

FSIS Partially Grants CSPI Petition on Nitrites

The U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) has partially granted a petition filed by the Center for Science in the Public Interest (CSPI) about the use of “No Nitrate or Nitrite Added” and “Uncured” on labels for “products that have been processed using any source of nitrates or nitrites.” FSIS indicated in its response letter to CSPI that it will issue a rulemaking proposing the regulation of such phrases but noted, “However, rather than requiring disclosure statements about the use of nitrate or nitrites on labels of meat and poultry products, as requested in the petition, FSIS intends to propose to amend and clarify its meat and poultry labeling regulations to establish new definitions for ‘Cured’ and ‘Uncured.’ The basis for these proposed changes would be discussed in detail in the proposed rule, which is listed in the Fall 2020 Semiannual Regulatory Agenda, with a tentative publication date of May 2021.”

FDA Issues Final Guidance on Potassium Chloride Labeling

The U.S. Food and Drug Administration (FDA) has issued final guidance on the use of potassium chloride on food labels. The guidance advises “food manufacturers of its intent to exercise enforcement discretion for the name ‘potassium salt’ in the ingredient statement on food labels as an alternative to ‘potassium chloride’ to better inform consumers that it is a salt substitute.”

“Potassium chloride, in some instances, can be used as a partial substitute for sodium chloride (referred to as ‘salt’) in food processing and manufacturing,” the constituent update notes. “Providing this enforcement discretion may help facilitate consumers’ choices to decrease their sodium consumption, if manufacturers use potassium chloride as a substitute ingredient for some sodium chloride.”



M. Katie Gates Calderon

816.559.2419

kgcalderon@shb.com



Lindsey Heinz

816.559.2681

lheinze@shb.com



James P. Muehlberger

816.559.2372

jmuehlberger@shb.com

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

LITIGATION

Smithfield Foods “Safe Pork” Lawsuit to Continue

A D.C. Superior Court has denied Smithfield Foods’ motion to dismiss a lawsuit alleging it misleads consumers by marketing its products as “safer pork.” *Organic Consumers Assn. v. Smithfield Foods Inc.*, No. 2020 CA 2566 B (D.C. Super. Ct., entered December 14, 2020). The lawsuit, filed by the Organic Consumers Association (OCA), alleged that Smithfield “employs production practices that result in less-safe conditions, effects, and Products, including the routine preventative use of medically important antibiotics, crowded conditions, the use of potentially carcinogenic drugs, and rapid slaughter methods.”

The court disagreed with Smithfield’s argument that the marketing statements were puffery or “too general to be actionable,” finding that the statements Smithfield made about its safety were specific. Further, OCA’s “allegations about consumer understanding are plausible,” the court held, because the complaint cited sources “stating that food safety is an issue of significant concern to consumers” and studies showing “that a ‘reasonable consumer’ would expect ‘that products marketed with Smithfield’s Food Safety Representations are produced in conformance with international guidelines regarding antibiotics use, produced without the use of potentially carcinogenic drugs, have lower-than-average rates of *Salmonella* contamination, and are not contaminated with particularly dangerous disease strains.”

The court also refused to strike as immaterial an allegation that Smithfield “failed to take adequate steps to protect its workers from COVID-19” because it found that the allegations were related to the unsafe practices at issue in the case.

“Smoked” Cheese’s Flavor Obtained Without Smoking, Plaintiff Argues

A plaintiff has filed a putative class action alleging Dietz & Watson Inc. misleads consumers by naming its product “Smoked Provolone Cheese” when the cheese’s smoky flavor comes from “smoke flavor” rather than “slow cooking over a fire of wood chips.” *Jones v. Dietz & Watson Inc.*, No. 20-6018 (E.D.N.Y., filed December 9, 2020). The plaintiff alleges the cheese should be



labeled “Natural Smoke Flavored Provolone Cheese” under U.S. Food and Drug Administration regulations on characterizing flavors. “Even if consumers were to view the ingredient list, a reasonable consumer would have no reason to know that listing ‘smoke flavor’ forecloses the possibility the Product was also subject to some smoking,” the complaint asserts. “However, the Product has not undergone any real smoking, which is deceptive and misleading to consumers.” The plaintiff alleges violations of New York’s consumer-protection statutes, the Magnuson-Moss Warranty Act, fraud and negligent misrepresentation.

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