



LEGISLATION, REGULATIONS & STANDARDS

## FDA Warns Plant Manufacturers, Developers of Risk of Transferred Allergens

The U.S. Food and Drug Administration (FDA) has written a [letter](#) to the manufacturers and developers of new plant varieties, urging them to fully consider the potential ramifications of transferring the genes of allergens to new plant varieties used for food.

In a letter dated April 13, Kristi Muldoon-Jacobs, Acting Director of the Office of Food Additive Safety, said the agency is aware that some companies are exploring the transfer of genes for proteins that are food allergens—including major food allergens—into new plant varieties used for foods.

For example, she said a developer could add the gene for an allergenic animal protein to a new plant variety to provide a non-animal source of protein for use as an ingredient in another food. Muldoon-Jacobs said this could result in the presence of an unexpected allergen in the food and other consequences for food producers, such as the need to recall affected products. FDA is not aware of any foods currently in the U.S. market from these types of new plant varieties, she said.

The agency warned that stewardship practices for such plant varieties are likely to be more challenging and complicated than with other crops, and said that when developing risk management plans, they will likely have to significantly bolster standard mitigation strategies and practices to prevent inadvertent mixing of foods containing a transferred allergen with other foods.

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**M. Katie Gates Calderon**

816.559.2419

[kgcalderon@shb.com](mailto:kgcalderon@shb.com)

“We urge developers of products involving transfer of a gene for an allergen to a new plant variety used for food to fully consider the potential allergenicity issues related to these products,” Muldoon-Jacobs said. “We believe it is critically important to consider whether you and your partners throughout the supply chain can reliably establish and maintain conditions, from farm to processing to consumption, under which such new plant varieties, and protein-containing materials from such varieties, do not inadvertently enter the food supply, and are properly labeled when they are intentionally part of the food supply.”

## USDA Calls on Meat, Poultry Industry to Guard Against Use of Illegal Child Labor

The U.S. Department of Agriculture (USDA) has sent a letter to members of the meat and poultry industry calling on companies to take steps to ensure their supply chains are free of illegal child labor. In the April 12 letter, USDA Secretary Tom Vilsack said the department stands with the Biden-Harris Administration in its commitment to combatting illegal child labor. Vilsack said that since 2018, the U.S. Department of Labor (DOL) has seen a 69% increase in children being employed illegally by companies.

“The use of illegal child labor—particularly requiring that children undertake dangerous tasks—is inexcusable, and companies must consider both their legal and moral responsibilities to ensure they and their suppliers, subcontractors, and vendors fully comply with child labor laws,” Vilsack said. “Companies in food manufacturing—particularly those with significant market power—need to be vigilant about the standards of their suppliers to help reduce systemic violations and abuses.”

USDA is calling on industry members to determine whether illegal child labor is being used in their supply chains; include strong language in contracts to prohibit the use of illegal child labor; and adopt standards for suppliers, subcontractors and vendors to better guard against the use of illegal child labor.

The letter follows the formation of an Interagency Taskforce to Combat Child Labor Exploitation, and comes amidst a Congressional probe into migrant child labor in the United States. The House Committee on Oversight and Accountability held a hearing on the issue April 18.

## Comment Period on Plant-Based Milk Alternatives Reopened



**Lindsey Heinz**

816.559.2681

[lheinze@shb.com](mailto:lheinze@shb.com)



**James P. Muehlberger**

816.559.2372

[jmuehlberger@shb.com](mailto: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 inspections, subject to FDA, USDA and FTC regulation.



The U.S. Food and Drug Administration (FDA) will reopen the comment period for draft guidance titled “Labeling of Plant-Based Milk Alternatives and Voluntary Nutrient Statements; Draft Guidance for Industry.” The deadline for submitting comments will be July 31, 2023.



## EFSA Lowers BPA Tolerable Daily Intake, Citing Health Concerns

The European Food Safety Authority (EFSA) has significantly reduced the tolerable daily intake (TDI) of Bisphenol A (BPA) after publishing a new assessment of the chemical’s potential health effects. On April 19, EFSA published a reevaluation of BPA’s safety, significantly reducing the TDI it set in its previous assessment in 2015 of four micrograms per kilogram of body weight per day. TDI is the amount that can be ingested daily over a lifetime without presenting an appreciable health risk. Based on the new scientific evidence, EFSA’s experts established a TDI of 0.2 nanograms per kilogram of body weight per day.

Comparing the new TDI with estimates of dietary exposure to BPA, experts concluded that consumers with both average and high exposure to BPA in all age groups exceeded the new TDI, indicating health concerns.

Dr. Claude Lambré, chair of EFSA’s Panel on Food Contact Materials, Enzymes and Processing Aids, said the new assessment has allowed scientists to address important uncertainties about BPA’s toxicity. “In the studies, we observed an increase in the percentage of a type of white blood cell, called T helper, in the spleen,” he said in a statement. “They play a key role in our cellular immune mechanisms and an increase of this kind could lead to the development of allergic lung inflammation and autoimmune disorders.”

## FDA Amends Yogurt Standard of Identity

The U.S. Food and Drug Administration (FDA) has issued a final order to modify the yogurt standard of identity final rule published on June 9, 2021.

The International Dairy Foods Association (IDFA) objected to a provision of the final rule requiring yogurt to have either a titratable acidity of not less than 0.7 percent, expressed as lactic acid, or a pH of 4.6 or lower before the addition of bulky flavoring ingredients. FDA rejected the group’s request for a public hearing on the matter, issuing a final order to modify the final rule’s provision with respect to both pH and titratable acidity.

FDA says the rule will ensure the safety of yogurt while maintaining its basic nature and essential characteristics. The final rule took effect April 14, and the compliance date is January 1, 2024.

## FDA Requests Online Grocery Shopping Information

The U.S. Food and Drug Administration (FDA) is seeking information on the online grocery shopping experience, focusing especially on what consumers see when they order a product. The agency is focused on the nutrition, ingredient and major food allergens labeling shown to consumers on grocery store, manufacturer and third-party websites that offer food on an e-commerce platform. FDA will accept feedback until July 24, 2023.

“We are aware that many grocery retailers, manufacturers, and third-party online grocery providers present some label information online, such as nutrition and ingredient information,” the announcement states. “However, there may be inconsistencies in how and where this information is being displayed between the different types of online platforms (e.g., website, mobile application, etc.) and online grocery businesses []. For example, the Nutrition Facts label and ingredient information may not be consistently available for the same food packaged and sold through the different online grocery providers []. In some cases, there may be differences between the label on the food package and the information that is being made available online. This may include inconsistent nutrient values and differences in the format of the nutrition information presented online compared to the nutrition information that is declared on the package label.”

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### LITIGATION

## Fifth Circuit Vacates Injunction of Louisiana ‘Truth in Labeling’ Law

The U.S. Court of Appeals for the Fifth Circuit has reversed a lower court ruling that Louisiana’s 2019 Truth in Labeling of Food Products Act infringes on food companies’ free speech rights and vacated an injunction of the law. *Turtle Island Foods, S.P.C. v. Strain*, No. 22-30236 (5th Cir., entered April 12, 2023).

The ruling came in a suit that food manufacturer Turtle Island Foods, S.P.C., doing business as Tofurky Co., brought against the state’s commissioner of agriculture and forestry. Tofurky sells and

markets 100% plant-based foods with labeling including the phrases “chick’n,” deli slices, burgers, sausages, tempeh and roasts.

Tofurky brought the suit preemptively, arguing it believed it was under the threat of enforcement of the new law, which bars intentional misbranding or misrepresenting any food products as meat or a meat product when the food product is not derived from various animals. A lower court sided with Tofurky, finding that the statute was an unconstitutional restriction of Tofurky’s free speech rights, and granted injunctive relief.

On appeal, the state argued that the law only applies to actually misleading speech, falling outside the First Amendment’s protection of commercial speech. A three-judge panel of the Fifth Circuit agreed. “The district court did not lend any weight to the State’s interpretation of the statute and instead chose to apply *Central Hudson’s* analysis to its own interpretation of the Act,” the panel said. “In doing so, the district court concluded that the Act covered more speech than was necessary to support the State’s interest and found the law unconstitutional. But by failing to accept the State’s narrower construction of the Act’s text, the district court erred.”

The panel concluded that the law, when construed narrowly, does not violate the First Amendment’s protection of commercial free speech.

## Man Alleges Whole Foods Misleads Consumers on Tilapia Weight

An Illinois man has filed a proposed class action against Whole Foods Market Group, alleging the company is intentionally short-weighting their tilapia filet products. *Daly v. Whole Foods Mkt. Grp., Inc.*, No. 23-2427 (N.D. Ill., filed April 18, 2023). The case was initially filed in state court in Cook County, Illinois, in March. In April, it was removed to federal court. The products at issue are the 365 by Whole Foods Market tilapia fillets.

The plaintiff alleged that fish filet products are glazed with a thin layer of ice to protect the freshness of the fish, but sometimes fraudulently short-weighted fish filets are overglazed in order to sell the fish at a weight higher than the fish actually delivered. The plaintiff alleged that, based on its attorneys’ investigation, approximately 80% of the products tested were short weighted due to fraudulent overglazing.

“Plaintiff, like any reasonable consumer, understands that products sold by weight should actually be the correct weight for

the price paid,” he alleged in the complaint. “By making false and misleading claims about the Products, Defendant overcharged the Plaintiff and the class members.” The plaintiff is alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, common law fraud and unjust enrichment. He seeks class certification, declaratory judgment, injunctive relief and attorney’s fees.

## Data Breach Prompts Three Proposed Class Actions Against Yum! Brands

Former and current employees, as well as prospective employees, have filed three separate proposed class actions in Kentucky against Yum! Brands after a January 2023 data breach, alleging the company failed to keep their personally identifiable information secure. *Stinson v. Yum! Brands, Inc.*, No. 23-183 (W.D.K.Y., filed April 14, 2023); *Gravitt v. Yum! Brands, Inc.*, No. 22-201 (W.D.K.Y., filed April 21, 2023); *Beasley v. Yum! Brands, Inc.*, No. 23-206 (W.D.K.Y., filed April 24, 2023).

The suits stem from a 2023 ransomware attack that plaintiffs allege resulted in the breach of documents and information stored on Yum! Brands’ computer network. The plaintiffs allege the company failed to adequately protect their private information, enforce its security policies, promptly notify affected individuals, and mitigate the effects of the breach. In one suit, the plaintiff alleges the company sent data breach letters in April 2023.

“In its notice letters, sent to Plaintiff and Class Members, YUM! failed to explain why it took the company nearly three months to alert Class Members that their sensitive PII had been exposed,” the plaintiff said in the complaint. “As a result of this delayed response, Plaintiff and Class Members were unaware that their PII had been compromised, and that they were, and continue to be, at significant and present risk to identity theft and various other forms of personal, social, and financial harm.”

The suits include claims of negligence, breach of implied contract, unjust enrichment and invasion of privacy, and seek declaratory judgment and injunctive relief. In two of the suits, plaintiffs are seeking an order requiring the company to implement a comprehensive information security program and prohibiting the company from maintaining its personal information on a cloud-based database.

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