Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Federal Trade Commission (FTC)

[1] FTC Set to Investigate Youth Marketing by Food Companies; Democratic Congressman Urges FCC to Take Action on TV Ads

FTC Chair Deborah Platt Majoras is apparently awaiting approval from the Office of Management and Budget for an agency initiative that will require food and beverage marketers to provide information about their youth promotions. FTC is "exploring not only traditional TV, print and radio advertising, but [also] the many other ways that the industry reaches children – through in-store promotions, events, packaging, the internet and product placement in video games, movies and television programs." *See Advertising Age*, April 16, 2007.

Meanwhile, Representative Ed Markey (D-Mass.) has **written** to the Federal Communications Commission (FCC) expressing his concerns about "the prevalence of television advertisements for fast food, junk food, sugared cereals, and other foods wholly lacking in nutritional value" and "an unhealthy trend toward poor nutrition and childhood obesity." Markey, who chairs the House Subcommittee on Telecommunications and the Internet, called on the agency to consider taking more aggressive action on the advertisement of foods and beverages to children. "There is no question that the Commission has both the affirmative obligation and the statutory authority to examine whether placing limitations on certain food advertising to children would further the public interest," he writes.

Markey specifically seeks, by May 4, 2007, answers to such questions as (i) "Have you examined the efforts of other countries to combat the problems of childhood obesity and poor nutrition by restricting, or banning altogether, junk food advertisements on television?"; (ii) "Do you believe the Commission should take steps to limit or eliminate the amount of food advertisements on television viewed by children? Does the commission have plans to initiate a rulemaking on this topic? Would you support such a step?"; and (iii) Do you support disqualifying, for purposes of complying with the Children's Television Act, any educational children's show that airs with junk food advertisements during its programming time frame?"

Markey was instrumental in amending the Children's Television Act to mandate that broadcasters air at least three hours of educational programming each week; he cites the Kaiser Foundation report that found children were exposed to thousands of ads each year for foods

and beverages of limited nutritional value. Markey contends, "if a 'core' educational program tells children to eat healthy foods and exercise, but the advertisements aired during the program encourage them to eat Twinkies and Fruit Loops, the ads have the potential to undercut the educational and informational value of the program. As such, the Commission should consider disqualifying any children's program during which junk food advertisements are aired from a broadcast licensee's weekly three-hour 'core' educational programming window."

Congressional Research Service (CRS)

[2] CRS Releases Report on Fraud and Deception in Seafood Marketing

CRS has issued a **report** to Congress about incidents of fraud and deception related to fraud and deception in the seafood industry. Titled *Seafood Marketing: Combating Fraud and Deception*, the report discusses investigations into (i) mislabeling or substituting species, (ii) low weights or undercounting, (iii) over-treating or added water weight, (iv) altered color, and (v) transshipments to avoid import or customs duties. The report concludes that such practices may not be increasing, but "media attention to this issue has raised its profile with the public." CRS suggests that Congress may face questions about whether current law is clear and enforceable, federal agency enforcement actions are adequate, and the penalties for offenses are a deterrent.

National Institutes of Health (NIH)

[3] Company Reviewing Bisphenol A Fired for Conflicts of Interest

NIH has reportedly fired the company that was operating the federal Center for the Evaluation of Risks to Human Reproduction, after finding it was on the payroll of chemical companies such as Dow Chemical, BASF and 3M while it was under contract with the federal government to review the safety of chemicals. Sciences International was in the process of reviewing 500 scientific studies on bisphenol A for NIH, which had asked the company to prepare a literature summary for a panel of experts responsible for determining whether the chemical can affect human fertility or development. Dow Chemical and BASF both manufacture bisphenol A.

The Environmental Working Group, a Washington, D.C.-based watchdog group had raised questions about Scientific International's clients and potential conflicts of interest. Further details about EWG's effort appear in issue 205 of this Report. EWG's executive director was quoted as saying, "Protecting the public health is one of those jobs that can't be farmed out to contractors who have huge conflicts of interest with polluters and chemical makers." Sciences International's president called the firing "unfair" and claimed no science was compromised by the firm's business ties. NIH apparently terminated its contract after interviewing company employees and reviewing the company's client records.

According to a news source, the agency plans to review the work the company has done to date on bisphenol A. The expert panel's chair, a Pfizer

employee, reportedly claimed that Sciences International "has presented nothing but balanced and scientifically rigorous summations. This is all just theatrics. This has to do with a campaign by outside interests to hijack the process. SI was doing a perfectly fine job." *See The Washington Post*, April 14 and 17, 2007.

National Institute of Environmental Health Sciences (NIEHS)

[4] NTP Announces Scientific Review Process for *12th Report on Carcinogens*

NIEHS Director David Schwartz has published a **notice** announcing the final review process for the analysis of substances under consideration for inclusion in the National Toxicology Program's (NTP's)*12th Report on Carcinogens*. The draft review process was published for public comment, and, after considering the comments, NTP prepared the final review process which includes (i) "the public peer review of draft background documents by *ad hoc* scientific expert panels," (ii) "the public peer review of draft substance profiles by the NTP Board of Scientific Counselors," and (iii) NTP's preparation, on a trial basis, of a response to public comments for the 12th Report. Substances listed in the Report are either known or reasonably anticipated to be a human carcinogen. Nominations, which can be submitted by interested individuals or parties, are considered in a multi-step scientific review process with an opportunity for public comment. Alcoholic beverage consumption is listed in the *11th Report on Carcinogens* as a known human carcinogen, while acrylamide is listed as a substance reasonably anticipated to be a human carcinogen. *See Federal Register*, April 16, 2007.

U.S. Department of Agriculture (USDA)

[5] Cornucopia Institute Urges USDA to Reopen Rulemaking on Almonds

A farm policy group dedicated to the interests of small and organic food producers is calling for USDA to reopen the proceeding that led it to adopt a **rule** requiring the sterilization of all almonds grown in California and sold in the United States, Canada and Mexico. The Cornucopia Institute contends that the rule was not effectively announced to the public and will harm family farmers who will be required to purchase expensive equipment to either chemically treat or expose the product to high temperatures. Some critics apparently argue that the chemical process involves a genotoxic agent listed as a possible carcinogen by the International Agency on Cancer Research. The rule exempts growers who sell almonds at roadside stands, limiting the market for raw almonds according to the institute, which also complains that industry will mislead the public by continuing to market "pasteurized" almonds as raw. The institute also complains that USDA only gave sufficient notice to large producers by notifying them directly about the rule, and that most of them supported it. The rule, which became effective March 31, 2007, was apparently adopted in response to two *Salmonella* outbreaks that occurred after 2001 and were traced to raw almonds from large almond handlers. *See Cornucopia Institute Press Release*, April 5, 2007; *FoodUSANavigator.com*, April 6, 2007; *msnbc.com*, April 10, 2007.

Food and Drug Administration (FDA)

[6] Company Petitions FDA to Etch Labels on Produce

A Georgia company has **petitioned** the FDA seeking an amendment to food-additive regulations that would allow a laser device to etch the skins of fruits and vegetables with information currently placed on such products with stickers. According to a news source, the petition was accompanied by the results of tests purportedly demonstrating the technology's safety. The laser apparently vaporizes the top layer of produce skin, leaving the lower layers untouched and allowing the laser etching to stand out. While it works on fruits such as peaches, pears and kiwis, the laser does not work as well on cantaloupes. A grower cooperative has reportedly experimented with Durand-Wayland's laser etcher and finds it cost-effective and useful from a food safety standpoint. Information that would be permanently etched onto the produce can include shipper, packer and field identification. Consumers are hesitant about using any radiation technology on food; one shopper was quoted as saying, "The less tampering with fruit, the better." *See The Chicago Tribune*, April 11, 2007.

World Health Organization (WHO)

[7] WHO Deems Yeast Fermentation Product a Likely Human Carcinogen

WHO has reportedly classified ethyl carbamate, a substance produced during yeast fermentation, a Group 2A carcinogen. This is the same classification WHO uses for acrylamide, arsenic, anabolic steroids, mustard gas, and diesel-engine exhaust. This naturally occurring substance apparently forms in spirits, wines, beer, bread, soy sauce, and yogurt during fermentation, distillation or storage. According to a news source, scientists are exploring ways to reduce ethyl carbamate contamination in a number of products. Early results from a yeast process developed at the University of British Columbia indicated that the substance could be reduced by up to 89 percent in red wine, but further analysis has shown no significant impact under commercial conditions, said a news source. *See FoodUSANavigator.com*, April 10, 2007.

Litigation

[8] Chinese Companies Respond to Sucralose Infringement Charges

Chinese-based companies, accused by Tate & Lyle of patent infringement regarding the artificial sweetener sucralose, have reportedly issued a statement contending that they have not infringed any patents. Further details about the complaint, filed before the International Trade Commission, appear in issue 210 of this Report. According to a news source, the original sucralose patent was filed in 1976 and recently expired. Most companies have apparently been reluctant to enter the market, however, fearing liability and fines for infringing a complex web of related patents. A spokesperson for the Chinese companies claimed, "We intend to vigorously defend against these allegations and are confident that we will be fully vindicated." *See FoodUSANavigator.com*, April 13, 2007.

Other Developments

[9] CSPI Describes Health-Warning Labels on Malt Beverage as "Unreadable"

The Center for Science in the Public Interest has asked the Alcohol and Tobacco Tax and Trade

Bureau (TTB) to review the required health warnings on an Anheuser-Busch malt beverage sold in 2-ounce bottles. In an April 16, 2007, **letter**, CSPI alleges that Spykes Spicy Lime labels violate TTB's Certificate of Label Approval (COLA) regulations, which specify that the health-warning font must (i) exceed 1 millimeter in height, (ii) be printed on a contrasting background, and (iii) contain no more than 40 characters, excluding spaces, per inch. "It is nearly impossible to read with the naked eye because it is barely distinguishable from the non-contrasting background, and the characters per inch significantly exceed the maximum allowable number (40)," charges CSPI, claiming the Spykes label has "41, 47, 45 and 46 characters" in the first inch of each line. The public-health watchdog, which has launched a campaign to remove Spykes from the market, is also seeking civil penalties against Anheuser-Busch of $10,000 per day, the maximum allowed under the Alcohol Beverage Labeling Act. TTB approved the Spykes labels, including the government warning, in 2005. *See CSPI Press Release*, April 16, 2007.

[10] Advocacy Group Calls New Wrigley Gum Flavor Reprehensible

According to a news source, The Marin Institute, a California-based alcohol-industry watchdog, has expressed concerns about a new Wrigley Co. gum product called Mint Mojito Orbit.® Referring to the company's decision to make and market an alcohol-flavored gum as "mildly reprehensible," an institute spokesperson suggested that the product will appeal to children and that other companies are likely to go even further. "It's sad they need to name it like an alcoholic beverage to sell it," he was quoted as saying. A spokesperson for Wrigley contended that the mojito flavor, like pina colada, is now used in a range of products and has transcended alcohol. The creative director for the agency responsible for the gum's marketing campaign responded to the criticism by claiming, "We're aiming for an audience in their early 20s. This was never a teen brand." *See Advertising Age*, April 11, 2007.

[11] Nutritionists Criticize "Qualified Health Claim" for Corn Oil

"It's hilarious. They get funnier and funnier. This one is at the far end of hilarity," Marion Nestle, Ph.D., reportedly said of FDA's decision to allow corn oil manufacturers to make qualified health claims about their products. The claim in question, which conveys the weakest level of scientific backing, reads:

> Very limited and preliminary evidence suggests that eating about 1 tablespoon (16 grams) of corn oil daily reduce the risk of heart disease due to the unsaturated fat content in corn oil. FDA concludes that there is little scientific evidence supporting this claim. To achieve this possible benefit, corn oil is to replace a similar amount of saturated fat and not increase the total number of calories you eat in a day. One serving of this product contains [x] grams of corn oil.

Proponents of the claim argue that it encourages consumers to replace saturated fats such as butter with healthier oils, but nutritionists and critics have called the statement misleading. "There's a tendency to put the good parts in big print and the bad parts in small print," Nestle was quoted as saying, despite FDA's position that qualified health claims can educate the public in the absence of hard-to-obtain evidence.

"It's almost disingenuous of a public health agency to authorize claims that are unlikely to be true," opined a spokesperson for the Center

for Science in the Public Interest, which recently dropped plans to sue The Quaker Oats Co. over allegedly deceptive health claims. Quaker has excised labeling language that touted its oatmeal as "unique" in its cholesterol-fighting capabilities, according to a CSPI press release that takes responsibility for Quaker's action. *See The Los Angeles Times*, April 16, 2007; *CSPI Press Release*, April 17, 2007.

[12] U.K. Advertisers Extend Food and Beverage Ad Bans to Non-Broadcast Media

U.K. advertisers this month agreed to ban food and beverage promotions aimed at children from all non-broadcast media, including the Internet, billboards and cinema. The Committee on Advertising Practice (CAP) will extend television "junk food" ad restrictions, which take effect July 1, 2007, to cover all foods and beverages except fresh produce. The CAP rules reportedly state that ads should not: (i) condone poor nutritional habits in children; (ii) encourage excessive food and drink consumption; or (iii) mislead consumers about a product's nutritional health benefits. "Rules go further than those for television commercials and sponsorship," an Institute of Practitioners in Advertising said. "As such, they ought to be welcomed by those critical of advertising as the alleged, albeit unsubstantiated, cause of obesity." *See Advertising Age*, April 11, 2007.

Media Coverage

[13] Food Safety Experts Claim FDA Lacks Resources to Inspect Imported Food

FDA allegedly lacks the resources to inspect more than 1.3 percent of U.S. food imports, according to an April 16, 2007, *Associated Press* (AP) report claiming that authorities detained approximately 850 shipments in March "for issues ranging from filth to unsafe food coloring to contamination with pesticides to *Salmonella.*" Food safety experts who AP interviewed argue that decreased funding and increased globalization hinder the agency's ability to monitor imports from "problematic" countries such as China, which apparently exported the melamine-tainted wheat gluten recently implicated in multiple animal deaths. FDA focuses on foods at high risk of contamination, but would not have tested the wheat gluten because grains are generally considered safe after cooking. "Whenever they say 'risk-based approach,' it often means they don't have enough staff to actually do the job. They're doing triage. They're trying to hit what's most important to inspect but they're missing a lot," a Center for Science in the Public Interest spokesperson said. The United States reportedly imports $2.1 billion in agricultural products and commodities from China, up from $644 million in 1997.

[14] Caffeinated Soft Drink Aimed at Gaming Generation

"Our goal is to go beyond traditional advertising by creating initiatives that make the brand an integral part of the gaming experience," a PepsiCo spokesperson was quoted as saying in this week's *Advertising Age*, which reported on a "limited-edition" Mountain Dew created for the popular video game "Halo 3," scheduled for release this summer. The 20-ounce bottle, which allegedly contains 120 milligrams of caffeine, will be advertised as "game fuel" for the college-aged market the "Halo" series targets. Critics of caffeinated soft drinks include the Center for Science in the Public Interest, which recently petitioned companies to list caffeine-contents on labels and also filed lawsuits against energy drink manufacturers. *See CSPI Press Release*, February 20, 2007; *Advertising Age*, April 16, 2007.

Scientific/Technical Items

[15] Researchers Identify Gene Linked to Obesity

U.K. researchers have identified a gene variant linked to body mass index that occurs in one-half of the European population. Timothy Frayling, et al., "A Common Variant in the *FTO* Gene Is Associated with Body Mass Index and Predisposes to Childhood and Adult Obesity," *Science*, April 12, 2007. The researchers, who were studying Type 2 diabetes in nearly 40,000 people, claim that those carrying one copy of an FTO gene variant – dubbed the "fat" FTO variant – had a 30 percent increased risk of being obese compared with people lacking the mutation. An estimated one in six people carry two copies of the "fat" FTO variant, which puts them at a 70 percent increased risk for obesity, according to the study. "The typical message has been that if you are overweight it is due to sloth and gluttony and it is your fault," one researcher was quoted as saying. "This work is suggesting that there is also a genetic component." *See BBC News*, April 12, 2007.

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