

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards U.S. Congress

#### [1] Senator Enzi Urges FDA to Take Action on Soft Drink Labeling

Senator Mike Enzi (R-Wyo.), chair of the Senate Health, Education, Labor and Pensions Committee, yesterday [called on](#) FDA Acting Commissioner Lester Crawford to explain how the agency plans to deal with the issue of “confusing” ingredients disclosure on soft drink labeling, i.e., high-fructose corn syrup and/or sugar. Enzi reportedly believes the “and/or” sweeteners declaration leads consumers to believe non-diet soft drinks contain sugar when most contain high-fructose corn syrup. “Allowing this kind of ambiguity in labeling does not benefit consumers and may have a negative impact on some,” Enzi said. “There is a difference between corn sweetener and sugar. Health-conscious consumers need the right labeling information to make the most informed decisions.”

In response to a 1984 petition from the National Soft Drink Association, FDA issued a proposal in January 1993 that would have amended food ingredients labeling regulations to allow “and/or” labeling in the declaration of sweeteners in soft drinks. 58 *Federal Register* 2950 (1/6/93). FDA withdrew that proposed rulemaking in November 2004, stating the

agency was “considering its position on the use of ‘and/or’ labeling.” 69 *Federal Register* 68,831 at 68,833 (11/26/04). The agency undertook no enforcement actions against soft drink manufacturers using “and/or” labeling during the pending rulemaking. Given FDA’s withdrawal of the proposed rule, Enzi specifically requests that Commissioner Crawford advise him as to “what enforcement authority you intend to exercise to ensure proper labeling and your timeframe for commencing enforcement activities.” *See Press Release of Senator Mike Enzi*, May 24, 2005.

#### [2] Iowa Senator’s Proposed Wellness Initiative Calls for Nutrition Disclosure and Increased FTC Authority over Food Marketing Aimed at Children

Comprehensive legislation ([S. 1074](#)) sponsored by Senator Tom Harkin (D-Iowa) strives to provide “all sectors – child care centers, schools, workplaces, health care providers, and communities – with incentives and the tools they need to reach the goal of making America a healthier place.”

Title III of the voluminous Healthy Lifestyles and Prevention Act (HeLP America Act) would (i) require chain restaurants with more than 20 locations to provide nutritional information on menus and menu boards; (ii) require operators of more than 20 vending machines to post nutritional information on their machines; (iii) authorize the Federal Trade Commission (FTC) to restrict the marketing or advertising of foods and beverages to youth younger



than age 18 if FTC “determines that there is evidence that consumption of certain foods and beverages is detrimental to the health of children or it determines advertising to children to be unfair or deceptive”; and (iv) authorize the agriculture secretary to prohibit food and beverage advertising in schools that participate in the federal breakfast or lunch programs if the secretary determines that consumption of the advertised products “has a detrimental effect on the diets or health of children.”

Other provisions of Harkin’s proposal expand the fruit and vegetable program in schools, authorized the agriculture secretary to regulate the sale of snack foods in schools, provide tax incentives to employers that offer wellness programs, and augment federal funding for obesity research. The bill has been referred to the Committee on Finance.

## Government Accountability Office (GAO)

### [3] GAO Again Recommends Consolidation of Federal Food Safety Functions

GAO last week issued a [report](#) that evaluates the need to reduce overlap and better utilize resources among federal agencies charged with oversight of the U.S. food supply. Included in the report are (i) an overview of the agencies’ food safety responsibilities, (ii) examples of overlapping or duplicative inspection and training efforts, and (iii) a review of interagency agreements and their effectiveness. Absent restructuring the food safety system, GAO recommends cost-efficient measures such as having the Food and Drug Administration (FDA) commission agriculture department personnel conduct inspections of FDA-regulated foods at facilities under both agencies’ jurisdiction and establishing a joint training program for both agencies’ food inspectors.

## Food and Drug Administration (FDA)

### [4] FDA Seeks Public Input on CFSAN Priorities for 2006

FDA is requesting public comment on 2006 program priorities for the Center for Food Safety and Applied Nutrition (CFSAN). The FY 2006 work-plan will categorize activities under the following sections: (i) Ensuring Food Defense and Security; (ii) Improving Nutrition and Dietary Supplement Safety; (iii) Ensuring Food/Color Additives and Cosmetic Safety; (iv) Ensuring Food Safety: Crosscutting Areas; and (v) Priority Ongoing Activities. Comments are due by July 19, 2005. *See Federal Register*, May 20, 2005.

## U.S. Department of Agriculture (USDA)

### [5] USDA Extends Comment Period for Feedback on National Animal Identification System Proposals

USDA has extended the deadline for public comments about the agency’s Draft Strategic Plan and Draft Program Standards document for the National Animal Identification System (NAIS) to July 6, 2005. The draft plan describes the NAIS development process, while the draft program standards describe the agency’s current thinking on how NAIS will function when fully implemented. Particular issues about which USDA seeks feedback include (i) the necessity of a mandatory identification program to achieve successful animal disease surveillance and monitoring, (ii) compliance mechanisms, (iii) timelines for NAIS implementation, (iv) producers’ confidentiality concerns, and (v) recordkeeping requirements. *See Federal Register*, May 20, 2005.



## Litigation

### First Amendment

#### [6] U.S. Supreme Court Upholds Beef Checkoff Advertising Program

The U.S. Supreme Court on Monday [upheld](#) the Beef Promotion and Research Act of 1985 by ruling that a government program requiring beef producers to fund generic promotional campaigns does not violate First Amendment protections against coerced speech. *Johanns v. Livestock Marketing Association*, No. 03-1164, 544 U.S. \_\_\_\_ (5/23/05). The 6-3 decision overturned rulings from the 8th Circuit and the U.S. District Court for South Dakota that concluded the beef checkoff program unconstitutionally compelled producers who disagreed with the mandatory \$1 per head assessment to subsidize advertising messages with which they did not necessarily agree, e.g., the ads' failure to distinguish between grass-fed and grain-fed beef.

Writing for the majority, Justice Antonin Scalia said, "Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object." Joining Justice Scalia in the majority opinion were Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Clarence Thomas and Stephen Breyer. In a separate concurring opinion, Justice Ruth Ginsburg said the mandatory assessments in commodity checkoff programs "qualify as permissible economic regulation."

In dissent, Justice David Souter argued that the beef ads should not qualify for treatment as government speech because they appear to have been sponsored by the beef industry. "No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak? Given the circumstances, it is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so." In a footnote, Souter states that other "expressly governmental messages take a different view of how much beef Americans should be eating. Dietary Guidelines for Americans 2005...discusses beef in a chapter entitled 'Fats.' The message of that chapter is that most Americans need to reduce their consumption of fats, and should get most of the fats they do eat from sources other than beef, namely fish, nuts, and vegetable oils." Other dissenters were Justices John Paul Stevens and Anthony Kennedy.

## Other Developments

#### [7] Prominent Economists Advocate Higher Federal Taxes on Alcoholic Beverages

Some 59 economists, including four winners of the Nobel Memorial Prize in Economic Sciences, last week called on Congress to "eliminate or modify the differential tax treatment between beer, wine and liquor" and defeat proposals (S. 722 and H.R. 1791) that would reduce federal excise taxes on alcoholic beverages. "Through neglect, Congress has allowed effective rates of tax on a substance that does more harm than any illegal drug to fall dramatically, even as the federal budget has sunk far into the red," Henry Aaron, senior fellow in economic studies at



the Brookings Institution, was quoted as saying. The [\*Declaration on Federal Alcohol Excise Taxes\*](#) was initiated by the Coalition for the Prevention of Alcohol Problems, a project co-chaired by the Center for Science in the Public Interest and the National Council of Alcoholism and Drug Dependence. See *CSPI News Release*, May 16, 2005.

## Scientific/Technical Items

### Soft Drinks

#### [8] **Pediatricians Implicate Soft Drinks in Childhood Obesity Epidemic**

Soft drinks “may have a place in every day nutrition, albeit only in moderation, and in the opinion of the AAP COSH [American Academy of Pediatrics’ Committee on School Health], not in schools,” say the authors of an invited commentary in the May 2005 *Journal of Pediatrics*. (R. Murray, et al., “Are Soft Drinks a Scapegoat for Childhood Obesity?” *Journal of Pediatrics* 146: 586-90, 2005).

The authors urge the beverage, restaurant and snack food industries to cooperate in the public health community’s battle to prevent childhood obesity, cautioning that the industries should expect to be held accountable by pediatricians and parents “for marketing practices that worsen an already deleterious health situation for children.”

After reviewing studies, position statements and editorials from researchers and soft drink industry representatives, the commentary’s authors conclude that while no single factor can be identified as the sole cause of childhood obesity, soft drink consumption plays a prominent role. They note that while current dietary guidelines recommend limiting added sugars to less than 10 percent of total daily calories, soft drinks constitute nearly 20 percent of a child’s daily calories and nearly 40 percent of all added sugars in a child’s diet. The consequences of increased soft drink consumption among children, they say, are clear: nutritional deficiencies brought about by displacement of milk consumption and the increased risk for the development of early glucose intolerance, a precursor to type 2 diabetes.



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## LITIGATION UPDATE

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