

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

U.S. Congress

[1] **Dorgan Amendment to Communications Reform Bill Would Require FCC to Assess Proposals for TV and Radio Broadcasts on School Buses**

The U.S. Senate Committee on Commerce, Science & Transportation this week reportedly approved an amendment to proposed communications reform legislation (S. 2686) that would require the Federal Communications Commission (FCC) to evaluate whether commercial proposals for TV and radio broadcasts on school buses are “in the public interest.” Offered by Senator Byron Dorgan ((D-N.D.), the amendment also directs the FCC to (i) determine if the material broadcast would be age-appropriate for bus passengers and (ii) examine the amount and content of commercial advertising. A company called [BusRadio](#) reportedly plans to launch radio broadcasts to more than 100,000 Massachusetts schoolchildren during fall 2006, with the hope of taking its programming nationwide by fall 2007. See *The Washington Post*, June 4, 2006; *Commercial Alert*, June 28, 2006.

U.S. Department of Agriculture (USDA)

[2] **USDA Seeks Nominations for Membership on National Advisory Committee**

USDA is seeking nominations for membership on the National Advisory Committee on Microbiological Criteria for Foods. Among other things, the committee offers advice and recommendations to the agriculture and HHS secretaries on developing criteria for microorganisms that indicate whether food processing facilities employ good manufacturing practices. USDA invites any stakeholder to nominate individuals with expertise in food technology, epidemiology, microbiology, risk assessment, and related sciences for membership on the committee. Nominations must be received by July 24, 2006. See *Federal Register*, June 23, 2006.

Germany

[3] **German Government Commissions Nanotech Study**

Germany’s Federal Institute of Risk Assessment has reportedly commissioned the University of Stuttgart to conduct a survey of the potential health risks of nanotechnological applications in food and cosmetics. According to a news source, the institute will debate the information gathered at two workshops before presenting government officials with a nanotechnology “risk barometer.” See *Food Production Daily.com*, June 26, 2006.



Litigation

Genetically Engineered Foods

[4] Non-Profit Sues FDA over Failure to Respond to GE Petition

The Center for Food Safety recently filed a lawsuit against the Food and Drug Administration (FDA) seeking declaratory judgment and mandamus relief for the agency's failure to respond to the center's rulemaking petition on genetically engineered (GE) foods. The complaint, which was filed in the U.S. District Court for the District of Columbia, alleges that the center's members are being harmed by FDA's "unreasonable delay" in regulating GE foods because such foods "contain novel allergens, new toxins, elevated levels of inherent toxins, degraded nutritional quality, and other harmful changes."

The center describes itself as a "non-profit public interest and environmental advocacy membership organization" created in 1997 for the purpose of challenging purported harmful food production technologies. In conjunction with dozens of other consumer and environmental groups, the center apparently filed a "Petition Seeking the Establishment of Mandatory Pre-Market Safety Testing, Pre-Market Environmental Review & Labeling for all Genetically Engineered Foods" in March 2000. The FDA has yet to respond to the petition, although the center notes that, since it was filed, the agency has participated in the development of GE foods assessment protocols at the Codex Alimentarius Commission, a United Nations food safety standard-setting organization. According to the center, "[t]he FDA's current policy does not follow the guidelines adopted at Codex."

The center seeks (i) a declaration that the FDA's delay in responding to its petition violates the Administrative Procedure Act, (ii) an order requiring a substantive answer to the petition within 60 days of the order's entry, (iii) the court's retention of jurisdiction to require compliance with its decree, and (iv) attorney's fees and expenses. The complaint and petition can be accessed [here](#).

Legal Literature

[5] Kathleen Meister, *Foods Are Not Cigarettes: Why Tobacco Lawsuits Are Not a Model for Obesity Lawsuits*, American Council on Science and Health, July 2006

The American Council on Science and Health (ACSH), apparently concerned that blaming obesity on the food industry will convince the overweight that they are not responsible for their food intake and activity levels, has published an [article](#) specifying in what ways food differs from cigarettes.

The article notes that "[t]he threat of litigation provides a powerful incentive for any manufacturer to reduce risks associated with use of its product or to warn people very specifically about those risks." Nevertheless, after briefly reviewing the history of tobacco litigation, the article comprehensively addresses the differences between tobacco and food and explains why obesity-related litigation is unlikely to succeed.

Those differences include (i) food fulfills a basic life need, whereas cigarettes do not; (ii) cigarette consumption is generally related to a single manufacturer, while the food industry is more diverse; (iii) smoking-related illnesses are more clearly linked to smoking, but health problems related to obesity, like coronary heart disease, can



have many causes; and (iv) the causes of obesity are not as well understood as the causes of lung cancer and, in fact, obesity is attributable to numerous factors. These factors, says the author, have legal significance in terms of pinpointing the source of liability.

The article further contends that people tend to erroneously describe their desires for certain foods as addictions. According to ACSH, “some attorneys for plaintiffs have invoked various versions of a concept called *reward deficiency theory* to support their arguments that their obese clients are victims of an addiction.” Claiming that this theory is no more than an unproven hypothesis, the article concludes that obesity litigation “could convince people that they are powerless to control their own behavior.”

[6] **Michelle Mello, David Studdert and Troyen Brennan, “Obesity – The New Frontier of Public Health,” *New England Journal of Medicine*, June 15, 2006**

Contending that government has a duty to regulate private behavior to promote public health, these authors address the ways that legal, legislative and regulatory strategies might be used to combat obesity in the United States. They propose, for example, bringing lawsuits against the manufacturers of “non-nutritious foods” for product defects and unfair business practices, although they recognize that such suits face significant hurdles in light of established legal standards and a spate of recent state laws that immunize fast-food companies from obesity-related tort claims.

The article further addresses federal regulatory mechanisms that could be used to implement changes in the food industry, including the Federal

Trade Commission’s authority over product advertising and the Food and Drug Administration’s authority over product labels. The authors believe that the most successful and acceptable strategies will focus on children and adolescents and suggest that research associating food advertising with children’s eating habits and obesity could justify new regulatory approaches. They also propose changes to agricultural subsidies as a means to “alter the food environment considerably.” The [article](#) cites the “lessons” learned from initiatives targeted at cigarette manufacturers such as “the development of a scientific base and social disapproval.”

Other Developments

[7] **International Research Team Touts Top 10 Reasons for Obesity**

Scientists from the United States, Canada and Italy, surveying more than 100 studies on obesity not related to diet and exercise, have reportedly identified 10 alternative explanations for obesity. The rationales include inadequate sleep, endocrine disruptors in some foods that alter body fats, comfortable indoor temperatures, decreased smoking incidence, the side effects of some medications, demographic changes (i.e., more middle-aged and Hispanic populations), older birth mothers, genetic influences *in utero*, natural selection, and the tendency of overweight individuals to procreate. Nutritionist Marion Nestle reportedly characterized the report as a “calorie distracter,” or “anything to get people to stop worrying about having to eat less and move more. And let’s not say a word to food companies about misleading and manipulative marketing practices, especially those directed toward children.” See *Associated Press*, June 27, 2006.



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