

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulation and Standards

Federal Trade Commission (FTC)

[1] Commission Seeks Information on Alcohol and Food and Beverage Marketing

In two separate notices, the FTC is seeking marketing information from alcohol advertisers, food and beverage companies, and quick service restaurants. In an October 24, 2006, *Federal Register* [notice](#), FTC proposes “to issue compulsory process orders to corporate entities responsible for the majority of alcohol advertising in the United States, including their affiliated and subsidiary companies, seeking information concerning, among other things, compliance with voluntary advertising placement provisions, sales and marketing expenditures, and the status of third-party review of complaints regarding compliance with voluntary advertising codes.”

Comments on the proposal must be submitted on or before November 24. The information provided will allow FTC to update reports issued in 1999 and 2003 on voluntary advertising self-regulation by the alcohol industry. This is a second request for comments on this matter; the first, issued in March, generated nearly 1,300 comments, with most favoring the proposal. The notice recognizes that some of the information to be collected is

confidential and will be protected; the notice also warns that “any destruction, removal, mutilation, alteration, or falsification of documentary evidence that may be responsive to this information collection, within the possession or control of a person, partnership, or corporation subject to the FTC Act, may be subject to criminal prosecution.” *See Federal Register*, October 24, 2006.

The second FTC marketing [notice](#) had not yet been published when this Report went to press. It solicits comment on “proposed information requests to food and beverage companies and quick service restaurants . . . to obtain information from those companies concerning, among other things, their marketing activities and expenditures targeted toward children and adolescents.” Comments must be submitted on or before December 21.

The information will be used to prepare a report for Congress that is expected to include “an analysis of commercial advertising time on television, radio, and in print media; in-store marketing; direct payments for preferential shelf placement; events, promotions on packaging; all Internet activities; and product placements in television shows, movies, and video games.” This is the second notice issued on this initiative; comments have already been received from food trade groups, health advocacy organizations and others. The comments generated will be used to support FTC’s request for OMB approval and thus, should be directed toward whether the proposed collection is necessary for the proper performance of FTC’s functions; the



accuracy of the agency's estimate of the collection's burdens; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize collection burdens.

Fifty parent companies will be asked to provide youth marketing information; they include companies that sell quick service restaurant items, breakfast cereals, snack foods, candy and gum, carbonated and noncarbonated beverages, frozen and chilled desserts, prepared meals, and dairy products such as milk and yogurt. FTC is also proposing to query major fruit and vegetable marketers "to ensure that data are gathered regarding efforts to promote consumption of these foods among children and adolescents." Provisions about document-destruction prosecutions and protection of confidences also appear in the notice.

Food and Drug Administration (FDA)

[2] FDA Announces Public Hearing on "Functional Foods"

FDA has scheduled a December 5, 2006, public hearing "on the regulation of certain conventional foods that companies are marketing as 'functional foods.'" In its [notice](#) of public hearing, FDA stated that although the industry has no "formal definition" of functional foods, an Institute of Food Technologists report defined them as "foods and food components that provide a health benefit beyond basic nutrition." FDA acknowledged that while it does not regulate functional food as such, the agency oversees "conventional foods being marketed as 'functional foods' under the same regulatory framework as other conventional foods." Emphasizing that current standards ensure "safe and lawful" conventional foods, FDA nevertheless

believes that "it would be in the best interest of public health to begin a dialog with industry, consumers and other stakeholders." Parties interested in attending must submit a notice of participation by November 28. *See Federal Register*, October 25, 2006.

European Union (EU)

[3] European Commission Adopts Alcohol Strategy

The European Commission has adopted a [communication](#) setting forth a strategy to reduce alcohol-related harm that will be presented to EU health ministers in November 2006. While the communication identifies a number of priorities, including protecting young people, children and fetuses, it does not recommend any new legislative proposals. The commission's other priorities are to "reduce injuries and deaths from alcohol-related road traffic accidents"; "prevent alcohol-related harm among adults and reduce the negative impact on the workplace"; "inform, educate and raise awareness on the impact of harmful and hazardous alcohol consumption, and on appropriate consumption patterns"; and "develop, support and maintain a common evidence base."

Youth-related aims noted in the document: (i) "To curb under-age drinking, reduce hazardous and harmful drinking among young people, in cooperation with all stakeholders"; (ii) "To reduce the harm suffered by children in families with alcohol problems"; and (iii) "To reduce exposure to alcohol during pregnancy, thereby reducing the number of children born with Fetal Alcohol Disorders." The commission will establish an alcohol and health forum by June 2007, "which



will put together experts from different stakeholder organizations and representatives from Member States, other EU institutions and agencies. See *theparliament.com*, October 24, 2006.

Litigation

Criminal Conduct

[4] Seventh Circuit Upholds Criminal Convictions Against Meat Warehouse Company

The Seventh Circuit Court of Appeals has upheld corporate convictions for unsanitary conditions at a meat warehouse in Chicago. [*U.S. v. LaGrou Dist. Sys., Inc., No. 05-3361 \(7th Cir., decided Oct. 20, 2006\)*](#). Defendant LaGrou was convicted on three felony counts: the knowing improper storage of poultry products, the knowing improper storage of meat products and the knowing improper storage of food products. The company was sentenced to five years' probation and ordered to pay \$8.2 million restitution and a fine of \$2 million. Because part of the criminal fine was outside sentencing parameters, the company's sentence on one count was vacated and remanded for further proceedings.

The situation giving rise to the convictions apparently involved more than 20 million pounds of meat stored in conditions described by a USDA microbiologist as the "worst case" she had seen in 28 years. Warehouse employees had been trapping rats at the facility over a period of years, at one point some 50 rats a day were being captured, and product was frequently discarded because of rodent damage. Warehouse managers, who decided not to take measures to fix the problem for economic reasons, apparently lied to the meats' owners about the extent of the problem when complaints were

raised about damaged product. USDA inspectors found, after employees had spent a night attempting to clean the facility,

rat droppings and rat nesting material throughout the warehouse, including next to and on product; rodent-gnawed meat, poultry, and other food products; live rodent sightings; blood from meat product on the floor mixed with rodent droppings and rat tail marks; dirt and debris on meat product; potential rodent access points, including open sewer drains and openings under doors; holes in ceilings, walls, and floors; ice buildup on the ceilings directly above stored product and water dripping from ceilings onto the product; mold and filth on the walls and ceilings; several inoperable bathrooms, which forced warehouse workers to use broken toilets and "flush" them with buckets of water; and raw sewage and standing water on the floors.

Commenting on the conditions, the court observed that they "were enough to turn even the most enthusiastic meat-loving carnivore into a vegetarian."

Issues on appeal included whether the jury was properly instructed as to *mens rea*, or intent, and whether the civil remedy and criminal fines were appropriate. According to the court, the restitution sum was based on the wholesale price of the 8 million pounds of product that had to be destroyed and the cost of reconditioning 12 million pounds of meat that had not been visibly damaged by rats and could still be sold. While the court found that the restitution award was reasonable, it reversed the \$1 million criminal fine levied on one count because it was double the default statutory maximum.



Bovine Spongiform Encephalopathy (BSE)

[5] Canadian Cattle Farmer Seeks Class Certification in BSE Case

According to a news source, a Quebec farmer is seeking the certification of a class of all farmers in the province who were allegedly harmed by the Canadian government's failure to ban the use of ruminant meat and bone meal in cattle feed and a feed company's failure to stop selling such feed. Donald Berneche reportedly contends that continued use of the feed led to the development of mad cow disease in several Canadian cows which caused many of the country's trading partners, such as the United States and Japan, to close their borders to Canadian beef. The suit was filed in Quebec Superior Court; it joins similar class action applications pending against Ridley, Inc. and the federal government in Alberta, Saskatchewan and Ontario. Damage estimates range from a low of \$6 billion to a high of \$20 billion. Berneche reportedly contends that he lost \$100,000 more than the \$120,000 he received in emergency compensation from the government. His suit states, "The respondents are responsible for the present mad cow crisis due to their inaction and negligence." See *The Globe and Mail*, October 17, 2006.

Other Developments

[6] Genetically Engineered Crops Continue to Feed Global Debate

Mexico has reportedly prohibited the planting of bioengineered corn, fearing that genetically engineered seeds will threaten valuable native species. The decision moots requests by American companies seeking to grow experimental crops in

Mexico's northern states. Under Mexican law, areas designated as "centers of origin" for corn are not open to genetically modified plantings, but researchers are apparently still debating whether any states in Mexico can be declared a non-origin region. See *The State.com*, October 19, 2006.

Meanwhile, the European Union has voted to require testing on all U.S. imports of long-grain rice. Testing will reportedly target Liberty Link Rice 601, a genetically modified strain developed by Bayer CropScience that allegedly contaminated conventional crops and led to a Europe-wide ban on U.S. rice. U.S. and European health officials have since declared LLRICE 601 "not likely to pose an imminent safety concern to humans or animals." See *Greenwire*, October 24, 2006.

[7] Public Interest Groups Oppose Celebrity Participation in Bud.TV

The Center for Science in Public Interest (CSPI) is asking several celebrities to rethink their participation in Bud.TV, a purportedly youth-oriented Web site under development by Anheuser-Busch. Production companies associated with Ben Affleck, Matt Damon, Kevin Spacey, and Vince Vaughn have reportedly created programming for the site, which CSPI claims will attract underage visitors.

A [letter](#) initiated by CSPI and signed by more than 60 public interest groups, contends that Anheuser-Busch "plans to inaugurate Bud.TV without adequate age verification technology to deny access to young people who should not be targets of beer promotion." CSPI also asks the celebrities "to reconsider whether a beer site is an appropriate vehicle to distribute and highlight [their] creative works."



[8] Kid Power Food & Beverage Conference to Address FTC Oversight and Obesity Issues

The 8th Annual Kid Power Food & Beverage [Conference](#) is slated for December 4-6, 2006, in Del Mar, California. Mary Koelbel Engle, the associate director of advertising practices in the FTC's Bureau of Consumer Protection, will address industry guidelines in a presentation titled "Recognizing the Strengths and Limitations of Industry Self-Regulation in the Quest to Market Food and Beverage to Children." Other speakers will cover obesity issues and the effect of school wellness policies on the food and beverage industries.

[9] Becker-Posner Blog Discusses Merits of "Fat Tax"

Judge Richard Posner, who sits on the Seventh Circuit Court of Appeals, recently discussed the merits of a tax on foods high in saturated fat on a blog he shares with a colleague at the University of Chicago, Professor Gary Becker, who teaches in the Graduate School of Business. While both are skeptical that such a tax would make a dent in U.S. obesity rates due to other factors, like a lack of exercise, Judge Posner endorses either a tax on soft drinks or a ban on the sale of soft drinks to children. He also writes, "I suspect that many of the people who become obese as a result of what they eat do not understand how, for example, something so innocuous as a soft drink can produce obesity. I also suspect that producers of soft drinks and other fatty foods are ingenious in setting biological traps – designing foods that trigger intense pleasure reactions caused by brain structures formed in our ancestral environment, when a taste for fatty foods had significant survival value." See [becker-posner-blog.com](#), October 8, 2006.

Media Coverage

[10] Susan Dominus, "The Starbucks Aesthetic," *The New York Times*, October 22, 2006

"[T]he chain is increasingly positioning itself as a purveyor of premium-blend culture," writes *Times* reporter Susan Dominus about Starbucks and its latest expansion into CD sales, movie promotion and book recommendations. While discussing the store's preference for "blockbuster hits geared toward an older, educated audience," Dominus notes the availability of child-friendly merchandise, including CDs of Meryl Streep reading *The Velveteen Rabbit* and the film *Akeelah and the Bee*.

Scientific/Technical Items

[11] Consumers Think Unhealthy Food Tastes Better, Say Marketing Researchers

Consumers in four experiments reportedly inferred that food tastes better when an item is portrayed as unhealthy, regardless of whether a consumer believes there is a negative correlation between healthiness and taste. Rajagopal Raghunathan, et al., "The Unhealthy = Tasty Intuition and Its Effects on Taste Inferences, Enjoyment, and Choice of Food Products," *Journal of Marketing* 70 (October 2006). The authors found that "the less healthy an item is portrayed to be, the more it is enjoyed during actual consumption" and "the greater is the preference for it in choice tasks when a hedonic goal is more (versus less) salient."



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