

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Initiatives

[1] Organic Certification and Labeling Standards to Take Effect

Organic certification and labeling standards adopted by the U.S. Department of Agriculture (USDA) will take effect October 21, 2002. The USDA's new "organic" seal can only be used on products whose content is at least 95 percent organic, i.e., grown and produced without toxic synthetic pesticides, herbicides, fungicides, fertilizers, hormones, antibiotics, genetically modified ingredients, or irradiation.

Product descriptors permitted under the regulations include (i) "100 percent organic"; (ii) "organic," for those products containing at least 95 percent organically produced raw or processed agricultural products; and (iii) "made with organic (specified ingredients or food groups)," for those products containing at least 70 percent organically produced ingredients. Products with less than 70 percent organically produced ingredients may only identify organic content by identifying individual organic components or displaying the product's percentage of organic contents. The rules will apply to goods ranging from produce, beer and processed foods to livestock and animal feed.

According to a news source, a number of large food companies, including General Mills, Kraft, Kellogg, Dean Foods, Heinz, and Groupe Danone,

are starting to carry organic lines as the popularity of organic goods increases. Supermarket chains are also apparently hoping to take advantage of the trend. In 2001, \$9.4 billion of the \$460 billion American grocery budget was spent on organics, which often carry a 75 percent premium over their non-organic counterparts. Commenting on the growing interest in organic products, a dietitian and spokesperson for the American Dietetic Association was quoted as saying, "Quite often, people are under the assumption that organic food may be more nutritious. There really isn't any data out there that supports that." See *Business Week Online*, October 9, 2002.

[2] Congress Considers Effect of Animal Antibiotics on Human Health

Proposed legislation sponsored by Representative Sherrod Brown (D-Ohio) would amend the Food, Drug and Cosmetic Act by ensuring that the use of particular antibiotic drugs in animal agriculture does not compromise human health by contributing to the development of antibiotic resistance. More specifically, the Preservation of Antibiotics for Human Treatment Act of 2002 (H.R. 3804) would eliminate the nontherapeutic use – i.e., routine feeding to healthy farm animals to promote growth or prevent disease – of eight classes of antibiotics used in human medicine. The eight classes of antibiotics are penicillins, tetracyclines, macrolides (including but not limited to erythromycin and tylosin), lincomycin, bacitracin, virginiamycin, aminoglycosides, and sulfonamides. The bill also presumptively prohibits the use of fluoroquinolones – i.e., Cipro-like drugs – in poultry. Fast food chains, including McDonald's



and Wendy's, have already reportedly directed their chicken suppliers to stop using fluoroquinolones in treating illness, given the Food and Drug Administration's proposed ban on their use in 2000. Chicken producers Tyson, Perdue and Foster Farms have also evidently reduced their use of medically important antibiotics in healthy poultry. H.R. 3804 has been referred to the House Subcommittee on Health.

Senator Edward Kennedy (D-Mass.) introduced a companion bill to H.R. 3804 in May 2002. S. 2508 has been referred to the Senate Committee on Health, Education, Labor, and Pensions. See *Keep Antibiotics Working.com*.

State/Local Initiatives

[3] Oregon Voters to Decide Genetically Modified Food Labeling Proposal

An Oregon ballot initiative slated for November 5, 2002, will allow voters to decide whether genetically engineered foods sold or distributed in or from the state should be labeled as such. Many food manufacturers and biotechnology companies reportedly oppose Measure 27, claiming that such labeling would "stigmatize their products and create a logistical headache for farmers, food makers and grocery stores," while advocates of the measure claim it would allow consumers to make informed choices. If the measure passes, observers reportedly opine that other states will undertake similar ballot initiatives.

The Food and Drug Administration (FDA) opposes the proposal. In a recent letter to Oregon Governor John Kitzhaber, FDA Deputy Commissioner Lester Crawford reportedly states that the labeling measure "would impermissibly interfere with manufacturers' ability to market their products on a nationwide basis." Evidently, the letter also states that FDA has found "no significant difference"

between bioengineered foods and their conventional counterparts. As much as 80 percent of foods available in U.S. supermarkets evidently contain at least one ingredient created from genetically engineered crops. See *Greenwire*, October 2, 2002; *USA Today*, October 9, 2002.

Other Developments

Beverages

[4] Advocacy Group Targets Two Starbucks' Drinks

Center for Science in the Public Interest (CSPI) presented two Starbucks' beverages with the Food Porn of the Month award in the October 2002 issue of the group's Nutrition Action Newsletter. According to CSPI, 20-ounce Coconut Crème or Vanilla Crème Frappuccinos contain some 870 calories and no coffee. "These drinks are more like milk shakes than coffee," a CSPI nutritionist was quoted as saying. "Still, I doubt that many people expect that a drink from Starbucks can be as bad for your arteries as a three-quarter-pound New York strip steak. If ever there were a poster beverage for requiring calorie information on menu boards, this is it," she said.

CSPI's Web site indicates that the group is "a nonprofit education and advocacy organization that focuses on improving the safety and nutritional quality of our food supply and on reducing the carnage caused by alcoholic beverages. CSPI seeks to promote health through educating the public about nutrition and alcohol; it represents citizens' interests before legislative, regulatory, and judicial bodies; and it works to ensure advances in science are used for the public good." The group is based in Washington, D.C. See *CSPI Newsroom*, October 7, 2002.

Scientific/Technical Items

Acrylamide

- [5] "Acrylamide Is Formed in the Maillard Reaction," D.S. Mottram, et al.; "Acrylamide from Maillard Reaction Products," R. J. Stadler, et al., *Nature* 419: 448-450, 2002.

Two reports in the October 3, 2002, issue of *Nature*, discuss the Maillard reaction that occurs between the amino acid, asparagine, and sugar during the high-temperature cooking processes of many high-carbohydrate foods and results in the formation of acrylamide. Foods in which acrylamide develops when cooked at temperatures higher than 120 degrees Celsius include potato chips, french fries, processed cereals, and bread.

A recent press report indicates that acrylamide in concentrations 1,000 times higher than those in the average diet promotes carcinogenesis in rats and fruit flies, though "there is no direct evidence for acrylamide having a similar impact on humans." The International Agency for Research on Cancer evidently classified the chemical as "probably carcinogenic" in 1994. See *Nature.com*, October 1, 2002.

Obesity

- [6] "Prevalence and Trends in Obesity Among US Adults, 1999-2000, K.M. Flegal, et al.; "Prevalence and Trends in Overweight Among US Children and Adolescents," 1999-2000, C.L. Ogden, et al.; "Trends and Correlates of Class 3 Obesity in the United States From 1990 Through 2000," D.S. Freedman, et al.; and "Obesity Research: A Call for Papers," P. B. Fontanarosa, in *Journal of the American Medical Association*, Volume 288, No. 14, October 9, 2002.

Three articles on prevalence and trends in obesity in the United States are featured in the current issue of *The Journal of the American Medical Association* (JAMA). Two reports from the National Center for Health Statistics update information on the prevalence of overweight and obesity using data from the 1999-2000 National Health and Nutrition Examination Survey (NHANES). Flegal and colleagues report that among adults the prevalence of obesity was up to 30.5 percent in 1999-2000, compared with a rate of 22.9 percent found in the 1988-1994 survey. Similarly, the prevalence of overweight increased from 55.9 percent to 64.5 percent during this same period. Examining children and adolescents, Ogden, et al. report overweight is approximately 10 percent among 2- through 5- year-olds, 15 percent among 6- through 11-year-olds and 15 percent among 12- through 19-year-olds. These prevalence rates illustrate a general increase when compared to survey data from 1988- 1994. The authors note particularly evident increases among non-Hispanic black and Mexican-American adolescents. In the final article, Freedman and colleagues purport to use data from the Behavioral Risk Factor Surveillance System (BRFSS) to examine the rate of morbid or extreme obesity among U.S. adults. They claim that



the rate of such obesity is rapidly increasing and estimate prevalence at 2.2 percent, demonstrating an almost threefold increase from 1990 to 2000.

An editorial comment authored by *JAMA's* executive deputy editor indicates that the journal will publish a theme issue devoted to obesity research in spring 2003 "to focus research attention on this major clinical and public health problem, and to provide physicians and other health care professionals with clinically useful information on weight control, nutrition, and physical activity."

Upcoming Meetings

[7] Food Safety Groups to Discuss Acrylamide Issues at Workshop

The Joint Institute for Food Safety and Applied Nutrition (JIFSAN) and National Center for Food Safety and Technology (NCFST) are convening a workshop titled "Acrylamide in Food: What Do We Need to Know? What Are the Responses?" in Chicago, Illinois, on October 28-30, 2002. We will report on the proceedings of this invitation-only meeting when such information becomes available.

JIFSAN was established in 1996 as a jointly administered program between the Food and Drug Administration (FDA) and the University of Maryland. According to FDA's Draft Action Plan for Acrylamide in Food, JIFSAN will serve as a clearinghouse for international coordination and information sharing on acrylamide. NCFST is located in Chicago and is funded through a cooperative agreement with FDA, membership fees, state funds, and research grants. See *FDA Draft Action Plan for Acrylamide in Food*, September 20, 2002.

[8] USA to Participate in Codex Alimentarius Regional Coordinating Committee Meeting

The Coordinating Committee for North America and the South-West Pacific of the Codex Alimentarius Commission will meet in Vancouver, Canada, October 29 - November 1, 2002. The Codex Alimentarius Commission was created in 1962 by two United Nations' organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). The commission serves as "an international mechanism for promoting the health and economic interests of consumers while encouraging fair international trade in food." It accomplishes its goals by developing food standards, codes of practice and other guidelines. The U.S. Code of Federal Regulations requires the Food and Drug Administration to review all food standards adopted by the commission and accept or reject them for application in the United States. The Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture has the responsibility for keeping the public informed of international sanitary and phytosanitary standard-setting activities, and FSIS periodically solicits public comment on such activities through *Federal Register* notices.

Regional coordinating committees define regional problems and needs concerning food standards and food control, promote regional contacts for the mutual exchange of information, and recommend needed standards to the commission, among other matters. U.S. regional coordinating committee delegates and other interested parties met on October 1 to discuss meeting agenda items, including (i) policy-related issues in the areas of biotechnology and anti-microbial resistance, and (ii) public health and trade vulnerability issues resulting from the lengthy codex standard-setting process. See *Federal Register*, May 30, 2002.

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Food & Beverage Litigation Update is distributed by Dale Walker and Mary Boyd in the Kansas City office of SHB. If you have questions about the Update or would like to receive back-up materials, please contact us by e-mail at dwalker@shb.com or mboyd@shb.com. You can also reach us at 816-474-6550. We welcome any leads on new developments in this emerging area of litigation.

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