



## LEGISLATION, REGULATIONS & STANDARDS

### USDA Releases Proposed Bioengineered Ingredients Standard

The Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA) has released the proposed National Bioengineered Food Disclosure Standard, which would establish “a mandatory uniform national standard for disclosure of information to consumers.” The proposal defines “bioengineered food” as food “that contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques” “for which the modification could not otherwise be obtained through conventional breeding or found in nature.” AMS seeks comments on “how to interpret the statutory definition of ‘bioengineering,’ and thus the scope of the regulatory definition of ‘bioengineered food,’” according to the announcement. “In particular, AMS is interested in any additional studies conducted on this issue, the cost of implementation under each policy, and whether certain policies describing the scope of foods subject to the disclosure standard would lower costs to affected entities.” Comments on the proposed rule must be received by July 3, 2018.

### FDA Extends Compliance Dates For Updated Nutrition Labels

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The U.S. Food and Drug Administration (FDA) has extended the compliance date for its changes to food nutrition labels. The extension applies to rules on (i) providing updated nutrition labeling on food; (ii) defining a single-serving container; (iii) requiring dual-column labeling for certain containers; (iv) updating, modifying and establishing certain reference amounts customarily consumed; and (v) amending the label serving size for breath mints. The compliance date for manufacturers with \$10 million or more in annual food sales is January 1, 2020, and the compliance date for manufacturers with less than \$10 million in annual food sales is January 1, 2021.

## Hawaii To Ban Chlorpyrifos, Restrict Pesticide Use Near Schools

The Hawaii Legislature has passed a bill banning the use of pesticides containing chlorpyrifos and prohibiting restricted-use pesticides near schools. The legislation would prohibit the use of chlorpyrifos beginning January 1, 2019, but allow for the grant of temporary extensions through 2022. Hawaii's Department of Agriculture will also be required to produce a summary of pesticide use by county. The bill has been forwarded to Governor David Ige for approval.

## NAD Finds Perdue "Free Range," "All-Veggie" Ads Misleading

The National Advertising Division (NAD) has recommended that Perdue Farms Inc. modify or discontinue broadcast and YouTube advertisements for the company's Harvestland Organic chicken, finding the ads could mislead consumers into believing all Perdue chicken is organically raised. NAD found that the company's "Free Range" and "All-Veggie Diet" ads featured "general brand references" to Perdue but only "momentary visual references to Harvestland Organic," potentially leading consumers to conflate the two. The ads, which asserted that Perdue's chickens are "happy," also "clearly stated the general claim, 'Perdue, raising more organic chickens than anyone in America,'" NAD noted. The board further cited a consumer-perception survey submitted by Perdue, finding that "the survey showed that substantially more

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### ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

respondents took away a message about the Perdue brand, generally.”

“NAD recommended that the advertiser discontinue the broadcast and YouTube commercials or modify them – including the YouTube description copy – to make clear that the advertising pertains to Perdue’s Harvestland Organic sub-brand, and not the Perdue brand as a whole,” according to a press release. “NAD also determined that if the commercials were appropriately modified, the advertiser’s use of ‘hashtag happy’ would not be misleading.”



## USDA Proposes Amendment to Allowed Organic Substances in Livestock

The U.S. Department of Agriculture (USDA) has proposed amending the National List of Allowed and Prohibited Substances to approve elemental sulfur for use in organic livestock production as a topical parasiticide for fleas, ticks and mites. The proposal would also reclassify potassium acid tartrate from a non-agricultural substance to an agricultural substance and require use of the ingredient’s organic form when commercially available. Public comment on the proposed rule must be received by June 29, 2018.

## FDA Changes Common Name for Crabmeat

The U.S. Food and Drug Administration (FDA) has announced a change to the common name “brown king crabmeat,” derived from *Lithodes aequispinus*. Effective May 3, 2018, the common and usual name for crabmeat previously described as “brown king crabmeat” has been changed to “golden king crabmeat.” The compliance date for the changes is January 1, 2020.

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### LITIGATION

## Advocacy Groups Seek to Compel FDA Ruling on Food Additive Petition

Eight advocacy groups have filed a joint petition for a writ of mandamus to compel the U.S. Food and Drug Administration (FDA) to rule on a 2016 citizen petition seeking rescission of approval for several artificial flavorings used in food that have been linked to cancer. *Breast Cancer Prevention v. FDA*, No. 18-71260 (9th Cir., filed May 2, 2018). The groups, including Center for Environmental Health, Center for Food Safety, Center for Science in the Public Interest, Environmental Working Group and Natural Resources Defense Council, allege that FDA failed to issue a decision by the deadline of August 8, 2016, and request an order mandating FDA to issue a decision within 30 days.

The groups allege that after FDA approved the seven chemicals at issue—including benzophenone, ethyl acrylate and styrene—multiple U.S. and international agencies established that each of the chemicals induces cancer in humans or animals. Under the Food, Drug and Cosmetic Act, the groups assert, carcinogenic chemicals cannot lawfully be used to flavor foods. “Congress clearly told FDA that known carcinogens cannot be used as food additives. What more does FDA need? It is time for FDA to take seriously its responsibility to keep cancer-causing chemicals out of food,” an attorney for the groups said in a [press release](#).

“Consumers cannot identify every ingredient in processed food and they shouldn’t have to; we need FDA to do its job and protect our health and welfare.”

## Challenge to Organic DHA Milk Preempted By OFPA

Ruling that the plaintiff’s claims are preempted by the Organic Foods Production Act (OFPA), a federal court in California has dismissed a putative class action alleging Danone North America’s Horizon Organic milk is not organic because it contains DHA. *Brown v. Danone N. Am. LLC*, No. 17-7325 (N.D. Cal., entered May 1, 2018). Noting that the Ninth Circuit has not considered whether the OFPA preempts state law challenges that “call into question whether organic products were properly certified as organic,” the court sided with decisions from the Eighth and Second Circuits holding that such challenges are preempted. “The labels clearly state that the milk is ‘organic’ and that the milk contains DHA, and the labels bear the United States Department of Agriculture (USDA) organic certification logo,” the court found.

“The USDA database publicly shows that Horizon Organic milk with DHA is currently certified organic by the USDA, and has been so since 2013.” Accordingly, the court held, the plaintiff’s claims challenged the certification process itself. “There is simply no way to rule in [the plaintiff’s] favor without contradicting the certification decision, and, through it, the certification scheme that Congress enacted in the OFPA,” the court concluded. The court also ruled that the plaintiff could not allege the reliance and economic injury required to establish standing under California law because the product labels “fully disclosed the facts giving rise to [her] claims.”

## Plaintiff Claims E. Coli Infection From Red Lobster’s Romaine

An Arizona woman has sued Red Lobster Hospitality alleging that she contracted *E. coli* from eating a salad at a Red Lobster in Phoenix. *Styles v. Red Lobster Hospitality, LLC*, No. 18-1361 (D. Ariz., filed May 1, 2018). The plaintiff alleged she ate the salad, which contained romaine lettuce, on March 23, 2018, and became ill around March 29, 2018. After she was hospitalized, she tested positive for *E. coli* O157:H7 bacteria, which has been linked to an outbreak of *E. coli* from romaine lettuce grown near Yuma, Arizona. Claiming breach of warranty, strict liability and negligence, the plaintiff seeks damages and attorney’s fees. A [similar lawsuit](#) was filed against Panera Bread Co. in April 2018.

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