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LEGISLATION, REGULATIONS & STANDARDS

USDA Releases GMO Labeling Standard

The U.S. Department of Agriculture’s (USDA’s) Agricultural Marketing Service has released the final National Bioengineered Food Disclosure Standard (NBFDS), which will require food manufacturers, importers and other entities to indicate on a product’s label whether it was made with genetically modified organisms (GMOs). The rule applies to food products in which the predominant ingredient is subject to the federal Food, Drug, and Cosmetic Act; “[a] multi-ingredient food product that contains broth, stock, water, or similar solution as the first ingredient, and a meat, poultry, or egg product as the second ingredient on the food label would also not be subject to the NBFDS,” according to the announcement. The rule takes effect February 19, 2019, and mandatory compliance with the rule begins on January 1, 2022.

Canadian Food Safety Law Takes Effect

The Safe Food for Canadians Regulations (SFCR), which consolidates 14 Canadian food safety laws into one set of rules, went into effect January 15, 2019. The final rules were published in June 2018 and aim to “provide clear and consistent rules for food commodities so consumers can be confident that food on grocery shelves is safer to eat, whether it is produced in Canada or

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Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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abroad.” The rules align with many U.S. rules to streamline importing and exporting of food products between the countries.

In addition, Health Canada has proposed rules for the sale of cannabis, including the proposed creation of “edible cannabis,” “cannabis extracts” and “cannabis topicals” classes of products. The agency also proposed “new regulatory controls to address the public health and public safety risks associated with these new classes of cannabis, including their appeal to youth and the risks of accidental consumption, overconsumption, and foodborne illness, among other risks.”

U.K. Public Consultation to Examine Ads for Foods High in Fat, Sugar and Salt

The United Kingdom has launched a public consultation on a proposal to restrict some types of advertising for foods high in fat, sugar and salt (HFSS). The consultation targets “volume-based price promotions of HFSS food and drink that encourage people to buy more than they need, for example, ‘buy one, get one free’ and free refills of sugary soft drinks” as well as ads placed at “main selling locations in stores, such as checkouts, aisle ends and store entrances.” The government further seeks input on “which businesses, products and types of promotions should be included in the restrictions,” “definitions for HFSS products, price promotions and locations in stores” and “how businesses can put this into practice and whether they will face any difficulties.”

FDA Issues Uniform Compliance Date, Technical Amendments to Nutrition Facts Panel

The U.S. Food and Drug Administration (FDA) has established January 1, 2022, as “the uniform compliance date for food labeling regulations that are published on or after January 1, 2019, and on or before December 31, 2020” to help “minimize the economic impact of label changes.” The agency also issued technical amendments to the Nutrition Facts Label Final Rule that correct errors in sample labels and inadvertent omissions of preexisting provisions.

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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.

LITIGATION

Brewery Sues Federal Government for Shutdown's Approval Delays

Washington, D.C., brewery Atlas Brew Works has filed a First Amendment lawsuit and motion for preliminary injunction alleging that the federal government's partial shutdown has violated its right to speak because the Alcohol and Tobacco Tax and Trade Bureau has stopped issuing label approvals, causing beer production to halt. *Atlas Brew Works v. Whitaker*, No. 19-0079 (D.D.C., filed January 15, 2019). The complaint asserts that Atlas "sits on 40 barrels of seasonal, perishable beer—an apricot-infused India pale ale known as The Precious One—that it cannot lawfully label for interstate sale in kegs, as scheduled, for lack of a [Certificate of Label Approval (COLA)]." The brewery alleges that its speech—through labels—is essential to its business because it "cannot sell, and no one will purchase, random unidentified liquids."

Atlas argues that its First Amendment rights have been violated because "it cannot be denied the right to speak for lack of meeting an impossible condition. The *right* to free speech is not a favor that the government affords Americans when political circumstances allow. Moreover, the COLA requirement, a content-based prior restraint on speech, is currently unconstitutional because the licensing authority withholds permission indefinitely." Atlas seeks an injunction stopping the federal government from enforcing the law that prohibits breweries from selling beer without prior label approvals.

"Metchup" Mark Owner Alleges Trademark Infringement by "Mayochup"

The owner of a trademark on "Metchup" has filed an infringement suit alleging that H.J. Heinz Co.'s "Mayochup" is "confusingly similar" to his protected trademark. *Perry v. H.J. Heinz Co. Brands*, No. 19-0280 (E.D. La., filed January 14, 2019). The plaintiff has purportedly used the "Metchup" mark to sell his ketchup-mayonnaise and mustard-mayonnaise combinations

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.



since 2010, and he asserts that Kraft Heinz Co. has infringed on his trademark by using a mark that “bears a particularly strong phonetic similarity to Plaintiff’s mark. Depending on pronunciation and/or regional dialect, the marks are virtually indistinguishable from one another.” The complaint further cites Google search results for “metchup,” which direct searchers to the Heinz website, as evidence that consumers are confusing the two marks. The plaintiff seeks an injunction, destruction of infringing materials, damages and attorney’s fees for allegations of counterfeiting, trademark infringement, false designation of origin and violations of Louisiana’s business codes.

Lawsuit Challenges Nutritional Benefits of Sprouted Grains

A plaintiff has alleged that Food for Life Baking Co. Inc. misled consumers by advertising its cereal product, Ezekiel 4:9, as nutritionally superior to comparable cereal products because it is made with sprouted grains. *Elliott v. Food for Life Baking Co. Inc.*, No. 19-0249 (E.D.N.Y., filed January 13, 2019). The complaint asserts that Ezekiel 4:9’s labeling makes nutrient claims comparing its sprouted grains to non-sprouted grains without including “any reference food upon which the relative claims are based, which is misleading because there is no way to accurately evaluate the statements regarding the higher nutritional values of sprouted grains compared to non-sprouted grains.” In addition, the complaint contests Ezekiel 4:9’s assertion that the grains are a “living food” because “by the time the sprouted grain is dried, grounded into flour and heated, any nutritional benefits which may have existed have been extinguished.”

For allegations of fraud, negligent misrepresentation, unjust enrichment, breach of warranties and a violation of New York consumer-protection law, the plaintiff seeks class certification, injunctive relief, attorney’s fees and damages.

Tootsie Rolls Contained PHO After Federal Ban, Plaintiff Alleges

A consumer has filed a putative class action alleging that Tootsie Roll Industries Inc. sold Tootsie Rolls and Tootsie Pops with partially hydrogenated oil (PHO) in 2016, after the U.S. Food and Drug Administration issued a rule declaring PHO unsafe for use in food. *Beasley v. Tootsie Roll Indus. Inc.*, No. 18-7724 (N.D. Cal., filed December 26, 2018). The complaint focuses on the harms of PHO consumption, including elevated risks of diabetes, cancer, organ damage and cognitive decline. The plaintiff asserts that she “suffered physical injury when she repeatedly consumed the Tootsie Products, because consuming artificial trans fat in any quantity, including the quantity she actually consumed, inflames and damages vital organs and increases the risk of heart disease, diabetes, cancer, and death.” For an alleged violation of California consumer-protection law and breach of implied warranty of merchantability, the plaintiff seeks class certification, restitution and attorney’s fees.

Canada Dry Settlement Receives Preliminary Approval

A California federal court has granted preliminary approval to the proposed settlement of a lawsuit alleging Keurig Dr Pepper Inc. and Canada Dry Mott’s Inc. misled consumers into believing that Canada Dry Ginger Ale was “Made from Real Ginger.” *Fitzhenry-Russell v. Keurig Dr Pepper Inc.*, No. 17-0564 (N.D. Cal., entered January 10, 2019). Under the settlement agreement, the company will pay \$0.40 per product unit to class members, with a maximum of \$40 for those with proof of purchase and \$5.20 for those without. The plaintiff’s attorneys may apply for up to \$2.25 million in attorney’s fees, and the class representative will receive \$5,000.

SCIENTIFIC / TECHNICAL ITEMS

GMO Opponents “Know the Least But Think They Know the Most,” Study Finds

A study in *Nature Human Behavior* has reportedly found that Americans who oppose the cultivation of genetically modified

organisms (GMOs) believe themselves to be highly informed on the subject but lack knowledge of it. Fernbach et al., “Extreme opponents of genetically modified foods know the least but think they know the most,” *Nature Human Behavior*, January 14, 2019. A survey of 501 Americans asked true/false questions about GMO technology and asked participants about their willingness to eat GMO foods, likelihood of participation in protests against them and belief in the necessity of GMO regulation. The researchers reportedly found that “as extremity of opposition to and concern about genetically modified foods increases, objective knowledge about science and genetics decreases, but perceived understanding of genetically modified foods increases.”

Meta-analysis Finds No Effects Associated with Artificial Sweeteners

A review of 56 observational studies and controlled trials has reportedly found “no compelling evidence” that non-sugar sweeteners (NSSs) cause positive or negative health effects. Toews et al., “Association between intake of non-sugar sweeteners and health outcomes: systematic review and meta-analyses of randomised and non-randomised controlled trials and observational studies,” *BMJ*, January 2, 2019. Some of the studies included in the review showed minor benefits to promoting weight loss, while others found minor increases in blood glucose levels for subjects who consumed artificial sweeteners; the researchers found the evidence on both contentions to be weak when compared to similar studies. “For most outcomes, there seemed to be no statistically or clinically relevant difference between NSS intake versus no intake, or between different doses of NSSs,” the researchers concluded. “No evidence was seen for health benefits from NSSs and potential harms could not be excluded.”

MEDIA COVERAGE

Publications Examine Effects of Farm Bill on Hemp, CBD

The December passage of the Agriculture Improvement Act of 2018, or the Farm Bill, has resulted in several publications speculating about the effects of the bill's legalization of industrial hemp on the cannabidiol (CBD) market. The law, which removed "hemp" from the definition of "marijuana" in the Controlled Substances Act, may "make CBD production legal and cheaper," according to *Forbes*, while *MarketWatch* explains that CBD "will remain largely off-limits" in the near future. *Rolling Stone* predicts that CBD is "poised for [a] boom," while *Vox* suggests that "CBD is bound to become even more visible," although "[i]ts legal status remains unclear." *Fortune* notes that cultivating hemp will be legal but heavily regulated, and the shutdown of the federal government has delayed cultivation approvals during the period when farmers are planning crop rotations and sourcing seeds for 2019, according to *PBS NewsHour*.

Meanwhile, California legislation banning the use of CBD in alcohol beverages took effect January 1, 2019. The law prohibits licensed alcohol distributors from selling, offering or providing "a cannabis product that is an alcoholic beverage, including, but not limited to, an infusion of cannabis or cannabinoids derived from industrial hemp into an alcoholic beverage."

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