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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

USDA Issues Interim Rule On Hemp Production

The U.S. Department of Agriculture (USDA) has issued an interim final rule "specifying the rules and regulations to produce hemp." The rule outlines provisions for USDA "to approve plans submitted by States and Indian Tribes for the domestic production of hemp" and "establishes a Federal plan for producers in States or territories of Indian Tribes that do not have their own USDA-approved plan." Under the rule, hemp producers must obtain licenses, maintain "information on the land on which hemp is produced," comply with procedures for testing tetrahydrocannabinol concentration levels and dispose of non-compliant plants.

The rule took effect October 31, 2019, and the agency will accept comments until December 30, 2019.

Bipartisan "Real MEAT Act" Would Define "Beef" Federally

Reps. Roger Marshall (R-Kan.) and Anthony Brindisi (D-N.Y.) have introduced the Real Marketing Edible Artificials Truthfully (MEAT) Act, which would "codify the definition of beef for

labeling purposes, reinforce existing misbranding provisions to eliminate consumer confusion, and enhance enforcement measures available to the [U.S. Department of Agriculture] if the [Food and Drug Administration] fails to take appropriate action," according to Marshall's press release.

"The lack of any Federal definition of 'beef' or 'beef products' for the purposes of meat food product labeling has led some to begin marketing imitation products as meat or beef, creating the opportunity for marketplace confusion and consumer fraud that Congress originally charged the various Federal food regulatory agencies with the duty to prevent," the bill's text states. "Imitation products labeled as beef or as beef products create confusion in the marketplace. These products are in direct violation of the 'Congressional Findings and Declaration of Policy' authorized under section 2 of the Beef Research and Information Act (7 U.S.C. 2901) and undermine the integrity of that Act."

New York Bans Sale Of Foie Gras

The New York City Council has reportedly voted to ban the sale of foie gras produced from force-fed animals within the city, citing cruelty concerns. The law, which will take effect in 2022, will impose a $2,000 fine per violation and applies only to force-fed foie gras. "[D]etermining whether foie gras was illegally produced may present an enforcement challenge," *The New York Times* notes; "documentary" evidence will be required to show that foie gras was produced without force-feeding.

FDA, FTC Warn CBD Company for Unsubstantiated Claims

The U.S. Food and Drug Administration (FDA) and Federal Trade Commission (FTC) have announced a joint warning letter sent to Rooted Apothecary LLC focused on the potential benefits that the company claimed its cannabidiol (CBD) products could provide. "The Agency continues to be concerned about the proliferation of products asserting to contain CBD that are marketed for therapeutic or medical uses without having been reviewed for safety and effectiveness by the FDA as is required by law and to protect the public health," the letter states. "There are many

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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.

unanswered questions about the science, safety, effectiveness and quality of unapproved products containing CBD. Without this information, we are unable to ensure that these products will not cause harm to people who use them."

The agencies warn that Rooted Apothecary is marketing unapproved drugs because it advertises its CBD-infused products as helping to diagnose, cure, mitigate, treat or prevent a number of conditions, including pain associated with teething in children. FTC also noted that the marketing likely lacks "rigorous scientific evidence sufficient to substantiate the claims" in violation of the FTC Act.

CFS Urges FDA to Have Impossible Burgers Pulled from Grocery Stores

The Center for Food Safety (CFS) has submitted a letter to the U.S. Food and Drug Administration's (FDA's) Office of Food Additive Safety arguing that the sale of "uncooked Impossible Burgers to consumers in grocery stores" is unlawful because FDA "received timely objections to the agency's approval of Impossible Foods' color additive petition." CFS argues that its six objections to FDA's ruling should have automatically stayed the effective date of the rule. The letter describes grocery stores' advertising promising the availability of Impossible Burgers, asserting that "such sales are unlawful until there is a valid color additive regulation in place." The advocacy group concludes by urging FDA to "issue a recall notice to these and other retailers that are currently selling uncooked Impossible Burgers in their grocery stores."

Rudd Center Releases Report on Marketing Beverages to Children

The University of Connecticut's Rudd Center for Food Policy & Obesity has released a report on the state of nutrition and marketing for beverages targeted to children. The researchers identified "common practices that may confuse parents about the ingredients and healthfulness of sweetened children's drinks," including the "widespread use of low-calorie sweeteners," the "sugar content and calories" and the serving sizes of "100% juice

products" that "contained more than the recommended maximum daily amount of juice for toddlers." The report recommends that "manufacturers should develop and market unsweetened plain waters for children," that media companies with children's programming "should implement nutrition standards that comply with expert recommendations that can be advertised to children in their media" and that retailers should "clearly label children's drinks that contain added sweeteners."

Updates to National List Published

The U.S. Department of Agriculture (USDA) has published a set of changes to the National List of Allowed and Prohibited Substances, which documents the synthetic materials allowed or banned in the production and handling of organic agriculture. The amendments include the addition of "elemental sulfur for use as a molluscicide," the addition of "polyoxin D zinc salt to control fungal diseases" and the reclassification of magnesium chloride "from an allowed synthetic to an allowed nonsynthetic ingredient in organic handling."

USDA also published a list of proposed changes and will accept comments on the proposal until December 17, 2019. The proposed rule would "add blood meal, made with sodium citrate, to the National List as a soil fertilizer," "add natamycin to the National List to prohibit its use" and "add tamarind seed gum as a non-organic agricultural substance for use in organic handling when organic forms of tamarind seed gum are not commercially available."

Sen. Schumer Calls for FDA Action on Heavy Metals in Baby Food

Sen. Chuck Schumer (D-N.Y.) has reportedly called for action from the U.S. Food and Drug Administration (FDA) in response to a study purportedly showing that 95% of baby foods contained at least some lead, arsenic, mercury or cadmium content. Schumer reportedly said that consumers "rightfully expect those foods to be undeniably safe, appropriately regulated and nutritiously sustaining" and called for regulators to examine the study and release a public statement on its results.

LITIGATION

Kellogg Settles "Healthy" Cereal Suit for $20 Million

The parties in a lawsuit alleging Kellogg Sales Co. misrepresented its cereals as healthy have reached an agreement that would require the company to pay $20 million in payments and make marketing changes valued at more than $11 million. *Hadley v. Kellogg Sales Co.*, No. 16-4955 (N.D. Cal., filed October 21, 2019). The lawsuit alleged that Kellogg's Smart Start, Raisin Bran, Krave, Crunchy Nut and Frosted Mini-Wheats cereals, along with its Nutri-Grain bars, were misleadingly marketed as healthy despite containing high levels of sugar. Under the settlement agreement, Kellogg will (i) remove or limit the use of "Heart Health" claims on Smart Start and Raisin Bran; (ii) use "healthy" as an implied nutrient content claim only; (iii) remove "lightly sweetened" from Frosted Mini-Wheats and Smart Start; (iv) refrain from using "No High Fructose Corn Syrup" or an equivalent phrase; and (v) use "wholesome," "nutritious" and "benefits" or equivalent words only in connection with a specific ingredient or nutrient. Each member of the class will be eligible to obtain vouchers for Kellogg products or a cash refund of half the vouchers' value.

Plaintiff Challenges Probiotic Content of Kombucha

A consumer has filed a putative class action alleging that Brew Dr. Kombucha LLC markets its products as containing "billions" of "live and active cultures" or "beneficial bacteria, yeasts and organic acids" despite containing "only 50,000" colony forming units. *Amos v. Brew Dr. Kombucha LLC*, No. 19-1663 (D. Ore., Portland Div., filed October 16, 2019). "Because consumers specifically purchase kombucha products because of their probiotic content, and rely on the amount of probiotics stated on the product labeling when choosing what type and brand of kombucha drink product to purchase, Defendant's product labels and advertisements were false, misleading, and reasonably likely to deceive the public," the plaintiff argues. For allegations of

breach of warranties and unjust enrichment, the plaintiff seeks class certification and damages.

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