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FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

Advocacy Groups File Petition on Nanomaterials in Infant Formula

The Center for Food Safety and International Center for Technology Assessment have filed a rulemaking petition urging the U.S. Food and Drug Administration to regulate the use of nanotechnology in infant formula. "These new materials can have fundamentally different properties from their bulk material counterparts—properties that also create unique human health and environmental risks—which create new oversight challenges for the regulatory agencies charged with protecting public health and the environment," the petition states. "Of unique concern is the use of engineered nanomaterials in infant formulas sold throughout the United States."

The actions the groups request include "rigorous screening or safety testing" of infant formula for "nanomaterials or other potentially toxic synthetic ingredients," a required delineation of all nanoparticle ingredients on the label of an infant formula product, and a declaration that any infant formula currently available that contains nanomaterials is adulterated and misbranded.

Guidance Issued on Food Commodities with Chlorpyrifos Residues

Following the Environmental Protection Agency's 2021 final rule revoking tolerances for residues of the pesticide chlorpyrifos in food, the U.S. Food and Drug Administration's (FDA's) Center for

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Food Safety and Applied Nutrition has issued guidance for industry on how the agency will enforce the rule, which sets the expiration date for the tolerances as February 28, 2022. The guidance document is issued in the form of questions and answers; questions include "After the tolerances expire, is food containing residues of chlorpyrifos considered adulterated under the [federal Food, Drug and Cosmetic Act]?," "As an example, how would FDA respond to rutabagas with chlorpyrifos residues before and after the showing date?" and "As an example, how would FDA respond to canned rutabagas with chlorpyrifos residues before and after the showing date?"

"There are two stages to our enforcement approach after February 27, 2022: (1) in Stage 1, we generally intend to exercise enforcement discretion by not requesting showing documentation for a time period ranging from approximately 6 to 24 months, depending on the specific commodity," states the guidance, which provides a table listing the timelines for various foods. "[I]n Stage 2, we will accept showing documentation to demonstrate that lawful application occurred before February 28, 2022."

ASA Rules on Oatly Environmental Ads

The U.K. Advertising Standards Authority (ASA) has upheld several complaints against Oatly UK Ltd. arguing that the company's advertisements misled consumers into believing the product is more environmentally friendly than the production processes actually are. The ads cited several statistics on the greenhouse gases generated by the dairy and livestock industries and asserted Oatly's production generated fewer emissions. ASA found that the statistics were presented in ways that consumers would be likely to misunderstand, such as the assertion that "Oatly generates 73% less CO2e vs. milk," which applied specifically to whole milk and not the broader milk category.

The one complaint that was not upheld was the assertion that "If everyone in the world adopted a vegan diet, it would reduce food's annual greenhouse emissions by 6.6bn metric tons (a 49% reduction)" because ASA found sufficient evidence to support the statement.

FDA Releases Food Guidance Priorities List

The U.S. Food and Drug Administration (FDA) has released a list of the draft and final guidance topics that the agency is prioritizing for 2022. The list includes guidance on allergens, cell-

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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

cultured foods, heavy metals in juice and labeling of plant-based alternatives to milk and animal-derived foods. According to a caveat in the constituent update, "Although the FDA's intent is to publish all draft and final guidance topics on the list, modifications in plans may be needed to support emerging issues and Administration priorities."

inspections, subject to FDA, USDA and FTC regulation.

AMS Proposes Amendments to Organic National List

The U.S. Department of Agriculture's Agricultural Marketing Service (AMS) has proposed its regular update to the National List of Allowed and Prohibited Substances, which lists the synthetic substances allowed in the cultivation of organic products. The proposed additions are (i) low-acyl gellan gum, which is used as a thickener, and (ii) paper-based crop planting aids, which can transplant closely spaced crops. The proposal also includes a spelling change from "wood resin" to "wood rosin" because the latter term is more specific. Comments on the proposed changes will be accepted until April 4, 2022.

LITIGATION

Consumer Challenges Cocoa Content in 70% Cacao Bars

A consumer has filed a projected class action alleging Mondelez International Inc.'s Green & Black's chocolate packaging misleads as to the product's cacao content. *Lee v. Mondelez Int'l Inc.*, No. 22-1127 (S.D.N.Y., filed February 9, 2022). The labels indicate that the products are 60%, 70% or 85% cacao, but "the back labels uniformly reveal that the principal chocolate ingredient is not cacao but cocoa, which [] is an inferior, highly processed derivative of the cacao bean that has been stripped of the nutritional qualities that make dark chocolate appealing to its consumers." The complaint explains that the ingredient list —"organic bittersweet chocolate (organic chocolate liquor, organic cane sugar, organic cocoa butter, organic vanilla extract)—makes no "mention of cacao butter, but only of cocoa butter." Further, the front labeling also states that the product is "made from 'the finest Trinitario cacao beans,'" the plaintiff argues, which allegedly implies that the products "retain the nutritional qualities found in cacao beans, when in fact those qualities were lost when the cacao beans were processed into cocoa." The plaintiff seeks

class certification, restitution, damages, a corrective advertising campaign and attorney's fees.

Consumer Alleges "Milk-Based" Infant Formula Misleads

A plaintiff has filed a putative class action alleging that Mead Johnson & Co. markets its Enfamil infant formula products as "milk-based" despite containing corn-syrup solids as the primary ingredient. *Martinez v. Mead Johnson & Co. LLC*, No. 22-0213 (C.D. Cal., E. Div., filed February 2, 2022). The front-label packaging indicates that the product is a "milk-based powder," the complaint asserts, but "corn syrup solids" is listed as first on the ingredient list on the back of the packaging. The plaintiff argues that added sugars are banned in infant formulas sold in Europe in favor of carbohydrates that come from lactose. "[C]onsumers are being deceived into believing they are receiving a milk-based, healthier formula for their infant when, in reality, they are feeding their baby a product where the primary ingredient is unhealthy corn syrup." The plaintiff seeks damages, restitution, class certification, injunctive relief and attorney's fees for alleged violations of California's consumer-protection statutes.