



LEGISLATION, REGULATIONS & STANDARDS

EU Changing Rules on Ethylene Oxide as Food Additive

A [notice](#) in the *Official Journal of the European Union* has announced a tightening of restrictions on the allowable amount of ethylene oxide, “an important chemical substance having multiple uses, including the use as a sterilising agent and as a raw material in the manufacture of various products,” that is “a substance of concern classified as carcinogenic, mutagenic and toxic for reproduction.”

The current regulation dictates that ethylene oxide may not be used for sterilizing purposes in food additives, but it did not set a quantified limit on the allowable amount for all food additives. Under the amended regulation, which is set to take effect in September 2022, ethylene oxide will not be authorized for food additives, and a residue of the substance above 0.1 mg/kg will be in violation of the rule.

USDA Issues Final Rule Rolling Back Dual Labeling Regulations

The U.S. Department of Agriculture has released its [final rule](#) amending its labeling provisions requiring dual labeling for meat or poultry products, which will take effect Oct. 17, 2022.

The proposed rule sought to amend the Food Safety and Inspection Service’s (FSIS) labeling regulations to remove provisions that require packages of meat or poultry products that

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contain at least one pound or pint, but less than four pounds or one gallon, to express the net weight or net content in two different units of measurement on the product label.

FSIS revisited the regulations in response to a petition submitted by a small meat processing establishment. After conducting a review of the regulatory provisions and comments on the proposed rule, FSIS determined the provisions were unnecessary.

The final rule adopts the requirements of the proposed rule, with some non-substantive changes to the proposed regulatory language. Under the final rule, all FSIS meat and poultry products will only need to include one unit of measurement in the net weight or content statement.

LITIGATION

Court Dismisses Part of Gorton’s “Sustainably Sourced” Lawsuit

A Massachusetts federal court has granted a motion to dismiss a request for injunctive relief but allowed to continue other claims alleging that Gorton’s Inc. misleads consumers by marketing its tilapia products as “sustainably sourced.” *Spindel v. Gorton’s Inc.*, No. 22-10599 (D. Mass., entered August 24, 2022). The court noted that in a hearing, Gorton’s acknowledged “that some of its tilapia comes from fish farms in China but contended that it follows industry best practices in its sourcing from China.”

“To the extent plaintiffs are casting a wider net in arguing that only tilapia raised in the wild are sustainable, they will come up empty,” the court found. “However, Plaintiffs do assert a plausible (albeit hotly disputed) claim that Gorton’s tilapia are sourced, in part, from unsustainable Chinese fish farms with ‘environmentally destructive and inhumane’ practices.” Accordingly, the court denied the motion to dismiss these claims.

Whole Foods’ “No Antibiotics, Ever” Campaign Misled Consumers, Plaintiffs Allege

A group of California consumers and an animal welfare nonprofit have filed a putative class action against Whole Foods, alleging the grocer misled consumers about whether its beef products were



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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

truly antibiotic-free. *Safari v. Whole Foods Market, Inc.*, No. 22-01562 (C.D. Cal., filed Aug. 23, 2022).

The plaintiffs alleged that Whole Foods’ “No Antibiotics, Ever” slogan and marketing used to tout its beef products as antibiotic-free misrepresented what consumers were actually getting in their beef purchases.

“The reality is starkly different: Whole Foods sold Beef Products without taking effective measures to ensure that they came from cattle raised without antibiotics,” the plaintiffs asserted, pointing to independent testing which they say shows evidence of antibiotic residue in Whole Foods’ beef products.

The plaintiffs noted in the complaint that consumer demand has risen in recent years for antibiotic-free meat. Consumers are also increasingly willing to pay a premium for it, the plaintiffs asserted, noting that the cost of antibiotic-free beef can be as much as 20% more than conventional beef.

For alleged violations of California’s consumer-protection, unfair competition and false advertising laws, the plaintiffs are seeking class certification, restitution, damages, injunctive relief and attorneys’ fees.

Packaging of US-Made Feta Prompts Suit Alleging Consumer Fraud

A Florida consumer has sued cheesemaker Lactalis American Group, Inc., alleging the company misrepresented the authenticity of its President-branded feta cheese. *Gallagher v. Lactalis American Group, Inc.*, No. 22-00614 (W.D.N.Y., filed Aug. 14, 2022).

The plaintiff alleges that Lactalis misrepresented its feta cheese as made in Europe under the President brand, when it is made in the United States. In the complaint, the plaintiff highlighted the company’s feta cheese packaging, which includes language that the brand is “Europe’s Leading Cheese Expert,” a gold olive branch wreath and the word “feta” “stylized in ancient-Greek font.” The plaintiff asserts that the labeling “gives consumers the impression the Product was made in Greece, or at the very least in another European country,”

“Consumers are faced with increasing commercialization of products and seek brands that are genuine – feta cheese from Greece, sake from Japan, and tomatoes from Italy,” the plaintiff asserts in the complaint. “Consumers pay a price premium ‘for what they perceive to be authentic products, particularly those

inspections, subject to FDA, USDA and FTC regulation.



perceived to be authentically associated with a specific place,' such as Greece for feta cheese.”

For alleged violations of consumer fraud laws in multiple states, the plaintiff is seeking damages, class certification for cheese purchasers in five states and attorneys' fees.

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