



LEGISLATION, REGULATIONS & STANDARDS

## FDA Releases Proposed “Healthy” Definition Update

The U.S. Food and Drug Administration (FDA) has announced a proposed update to guidance on how the term “healthy” can be used in marketing and labeling food products. The announcement notes that current limitations on usage of the term are out of step with the dietary guidelines—for example, salmon is excluded from permitted use due to fat levels despite being considered part of the “key elements of a healthy dietary pattern.” “The existing ‘healthy’ claim has become inconsistent with the longstanding purpose of this type of implied claim to indicate that the nutrient levels in a food may help consumers maintain healthy dietary practices,” the document notes.

“The proposed framework for the updated definition of ‘healthy’ uses a food group-based approach in addition to nutrients to limit (based on the understanding that each food group contributes an array of important nutrients to the diet). The proposed, updated ‘healthy’ criteria would emphasize healthy dietary patterns by requiring that food products contain a certain amount of food from at least one of the food groups or subgroups recommended by the *Dietary Guidelines, 2020-2025* in order to be labeled ‘healthy.’ The proposed regulation would also require a food product to be limited in certain nutrients, including saturated fat, sodium, and added sugars. The proposed rule would also add certain recordkeeping requirements for foods bearing the claim where compliance cannot be verified through information on the product label.”

SHARE WITH [TWITTER](#) | [LINKEDIN](#)

SUBSCRIBE

PDF ARCHIVES

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.

For additional information about Shook’s capabilities, please contact



**Mark Anstoetter**  
816.559.2497  
[manstoetter@shb.com](mailto:manstoetter@shb.com)

The agency also announced that it is researching a symbol for manufacturers to use to indicate that a product has met the “healthy” standard. “Having a standardized graphic to show that a food qualifies for the ‘healthy’ claim would further support the FDA’s goal of helping consumers more easily identify packaged food products that help them build healthy eating patterns,” according to the agency’s [constituent update](#).

Comments will be accepted until December 28, 2022.

## Biden Announces USDA Efforts to Increase Competition in Meat and Poultry Markets

The Biden administration has [announced](#) a new U.S. Department of Agriculture (USDA) rule it says will promote inclusive competition and market integrity in the livestock, meat and poultry markets.

At a September 26 meeting of the White House Competition Council, President Joe Biden announced the proposed Inclusive Competition and Market Integrity rules under the Packers and Stockyards (P&S) Act “to provide for clearer, more effective standards to govern the modern marketplace.”

The proposed rule would revise existing regulations under the P&S Act by prohibiting certain prejudices and disadvantages against covered producers in the livestock, meat and poultry markets and would prohibit retaliatory practices that interfere with lawful communications, assertion of rights and participation in associations, among other protected activities.

“Highly concentrated local markets in livestock and poultry have increasingly left farmers, ranchers, growers and producers vulnerable to a range of practices that unjustly exclude them from economic opportunities and undermine a transparent, competitive and open market—which harms producers’ ability to deliver the quality, affordable food working families depend upon,” Agriculture Secretary Tom Vilsack said in a statement. “USDA is focused on building new, fairer and more resilient markets, protecting producers, and reducing food costs, and we are proving again today that we will use all tools at our disposal to do so.”

Once the proposed rule is published, stakeholders and other interested parties have 60 days from the date of publication to submit comments.



**M. Katie Gates Calderon**

816.559.2419

[kgcalderon@shb.com](mailto:kgcalderon@shb.com)



**Lindsey Heinz**

816.559.2681

[lheinze@shb.com](mailto:lheinze@shb.com)



**James P. Muehlberger**

816.559.2372

[jmuehlberger@shb.com](mailto:jmuehlberger@shb.com)

### 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

# FDA Releases Activities Document Detailing Its Approach to Produce Imports

inspections, subject to FDA, USDA and FTC regulation.

The U.S. Food and Drug Administration (FDA) has released an activities document outlining how the agency is working to enhance the safety of fresh produce imported into the United States.



The Activities to Enhance the Safety of Imported Produce, announced September 27, builds on the FDA's Strategy for the Safety of Imported Food, which began in February 2019. The 2019 import strategy outlined the agency's comprehensive approach to ensuring the safety of food imported into the United States. The new activities document details how the strategy for safeguarding imported food applies specifically to produce.



“The success of FDA’s imported food safety efforts relies in large part on the safety of produce since fresh fruit and vegetables represent a significant volume of imported food,” the agency said in the activities document. “About 15% of the U.S. food supply is imported, including nearly 55% of fresh fruit and 32% of fresh vegetables.”

The activities document is structured on the 2019 import strategy’s four goals, which include:

- Goal 1: Food Offered for Import Meets U.S. Food Safety Requirements
- Goal 2: FDA Border Surveillance Prevents Entry of Unsafe Foods
- Goal 3: Rapid and Effective Responses to Unsafe Imported Food
- Goal 4: Improving the Effectiveness and Efficiency of our Food Import Program

## ASA bars Gordon Ramsay Gin Ad for Nutritional Claims

The U.K. Advertising Standards Authority (ASA) has barred Eden Mill Distillery from using a social media ad for Ramsay’s Gin featuring cofounder and celebrity chef Gordon Ramsay that the organization found to have made non-permitted nutrition claims about alcoholic drinks.

ASA received and investigated a complaint about a March 20 ad posted to Ramsay’s Gin’s Instagram and Facebook pages. The ad featured a bottle of Ramsay’s Gin with text that stated that the honeyberries used in the product “retain the rich flavours and

micro-nutrients that come from Scotland’s wonderful terroir.” The ad additionally claimed the honeyberries contain “more antioxidants than blueberries, more potassium than bananas, more vitamin C than oranges.”

After considering the ad’s claims, ASA concluded Eden Mill was not permitted to make claims regarding nutrient content in relation to alcohol. ASA upheld the complaint and barred the distillery from using the ad again in its same form. ASA also told the company not to make non-permitted nutrition claims about alcoholic drinks. In its response, Eden Mill told ASA it removed the ads.

“While we welcomed the action Ramsay’s Gin had taken to withdraw the ads, because the claims ‘retain [...] micro-nutrients’ and contained ‘more antioxidants than blueberries, more potassium than bananas, more vitamin C than oranges’ were nutrition claims that were not permitted for alcoholic drinks, we concluded the ads breached the Code,” ASA said.

## EPA Denies Petition Requesting Rulemaking on Insecticide-Coated Seeds

The U.S. Environmental Protection Agency (EPA) has denied a petition from the Center for Food Safety (CFS) and other groups calling on the agency to amend or formally interpret the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as not exempting seeds covered in insecticide and thus requiring compliance with registration and labeling under FIFRA. CFS filed the rulemaking petition in 2017; when EPA failed to respond to the petition by late 2021, the group filed suit.

In its September 27, 2022, response denying the petition, EPA stated it “will continue to review labeling instructions for pesticides registered for seed treatment use(s) in registration and registration review to verify the completeness of these instructions for both use of the treating pesticide and the distribution, sale, and use of the treated seed.”

EPA also said it intends to issue an advanced notice of proposed rulemaking “to seek additional information on pesticide seed treatment and to explore the option of issuing a rule pursuant to FIFRA section 3(a) to regulate the use of pesticide-treated seed, which may prove to be a more efficient and less resource intensive solution to some of the concerns raised in the petition.”

## Biden Administration Releases National

# Food Strategy

The White House has released the “[Biden-Harris National Strategy on Hunger, Nutrition and Health](#),” which lays out the Biden administration’s policy goals on a number of food-related subjects. The third pillar of the strategy includes the administration’s intention to (i) “develop a front-of-package (FOP) labeling system to quickly and easily communicate nutrition information”; (ii) “make sure that foods labeled as ‘healthy’ align with current nutrition science and the *Dietary Guidelines for Americans*”; (iii) “adequately fund [the U.S. Food and Drug Administration (FDA)]’s Center for Food Safety and Applied Nutrition (CFSAN) to prioritize its nutrition and labeling work”; and (iv) “facilitate making nutrition information easily available when grocery shopping online.”

The strategy also notes the policy goals of “lowering the sodium content of food” beyond FDA’s voluntary short-term reduction targets and “lowering added sugar consumption” by further researching strategies for reducing American’s sugar intake. The document further promises “regular updates to the *Dietary Guidelines for Americans*.”

In addition, the administration intends to “address the marketing of unhealthy foods,” including through law enforcement actions by the Federal Trade Commission “to prevent the deceptive advertising of foods and dietary supplements, including deceptive advertising that might be targeted to youth.”

The fifth pillar of the strategy focuses on additional research for further development of food policy. “The Biden-Harris Administration is committed to developing innovative, inclusive, impactful, and science-based policy solutions to address nutrition and food insecurity,” the strategy states. “The federal government spends approximately \$2 billion on nutrition research each year, primarily through HHS National Institutes of Health (NIH). However, there are still gaps in the scientific understanding of nutrition and health.” Accordingly, the administration’s goals include “bolstering funding to improve metrics, data collection, and research to inform nutrition and food security policy, particularly on issues of equity and access; and implementing a vision for advancing nutrition science.”

---

## LITIGATION

### Hydroponic Food May Be Labeled as

## ‘Organic,’ 9th Cir. Rules

A federal appeals court has ruled that the U.S. Department of Agriculture (USDA) is not clearly required by federal law to issue a regulation barring hydroponic growers from labeling their goods as organic. *Ctr. for Food Safety v. Vilsack*, No. 21-15883 (9th Cir., entered September 22, 2022).

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit unanimously held in an unsigned, unpublished opinion that the Organic Foods Production Act (OFPA) of 1990 does not clearly bar hydroponic production.

The ruling comes in an appeal brought by consumer and organic farming industry groups in their suit against USDA filed in 2020 after the agency rejected their 2019 petition to issue regulations prohibiting organic certification of hydroponic agricultural production. They argued that hydroponic operations fail to satisfy the tenets of organic farming and do not meet the statutory and regulatory requirements of OFPA.

The district court disagreed, granting the agency’s motion for summary judgment. The plaintiffs then appealed to the Ninth Circuit, which affirmed the lower court ruling.

“If the OFPA’s text clearly barred hydroponic production, we would be required to enforce it according to its terms and set aside USDA’s interpretation,” the panel said in the opinion. “But no part of the statute clearly precludes organic certification of crops grown hydroponically.”

Additionally, the panel disagreed with the plaintiffs’ assertion that hydroponic producers cannot comply with OFPA’s requirement that crop production farm plans “contain provisions designed to foster soil fertility.”

“USDA’s decision instead interpreted that provision to mean that if crops are grown in soil, their producers must take measures to preserve that soil’s ‘fertility’ and ‘organic content,’” the panel said. “That interpretation is consistent with the OFPA, which provides that ‘[if] a production or handling practice is not prohibited or otherwise restricted under this chapter, such practice shall be permitted unless it is determined that such practice would be inconsistent with the applicable organic certification program.’”

## Consumer Alleges Nonni’s ‘Limone’ Biscotti Misleads Consumers on Lemon Content

A Florida consumer has filed a proposed class action against biscotti maker Nonni's Foods LLC, alleging the company misleads consumers as to how much lemon the company's limone-flavored biscotti contains. *Goldstein v. Nonni's Foods LLC*, No. 22-81462 (S.D. Fla., filed September 21, 2022).

The plaintiff's suit specifically targets representations on the product's label including "Limone (Lemon) Biscotti," "Made with Real Sugar, Butter and Lemon Zest Oil," "Real Ingredients" and "No Artificial Flavors." She also notes images of lemon rind and peel on the product's packaging.

"The representations are false, deceptive, and misleading, because the Product contains a *de minimis* amount of lemon," the plaintiff alleges. She asserts the company was required to provide a designation on the product's packaging that the product's lemon taste is not from lemons, but from non-lemon sources, but failed to do so.

The plaintiff's claims include allegations of fraud, negligent misrepresentation, unjust enrichment, as well as violations of the Magnuson-Moss Warranty Act and the Florida Deceptive and Unfair Trade Practices Act and other state consumer-fraud acts. She is seeking class certification, injunctive relief, damages, and costs and expenses, including attorneys' fees.

## SHB.COM

ATLANTA | BOSTON | CHICAGO | DENVER | HARTFORD | HOUSTON | KANSAS CITY  
LONDON | LOS ANGELES | MIAMI | NEW YORK | ORANGE COUNTY | PHILADELPHIA  
SAN FRANCISCO | SEATTLE | ST. LOUIS | TAMPA | WASHINGTON, D.C.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

© Shook, Hardy & Bacon L.L.P. All rights reserved.

**[Unsubscribe](#) | [Forward to a Colleague](#) | [Privacy Notice](#)**