

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

[1] Senator Harkin Continues Assault on Food Industry Marketing Practices; Calls on USDA Inspector General to Investigate Oversight of Livestock and Poultry Markets

“Corporate America spends \$12 billion [on advertising aimed at kids] because that advertising works brilliantly because it persuades children to demand – to the point of throwing temper tantrums, if necessary – a regular diet of candy, cookies, sugary cereal, sodas, and all manner of junk food,” Senator Tom Harkin (D-Iowa) charged yesterday in a speech delivered to a joint conference of the American Advertising Federation, the American Association of Advertising Agencies and the Association of National Advertisers. “Not even schools are safe havens anymore,” Harkin added. “There is Channel One, with ads for candy bars and sugary sodas. There are giant Coke machines that double as billboards, right in the school hallway or cafeteria.” Harkin reportedly encouraged the advertising professionals to collaborate with food and broadcasting companies to establish (i) age-appropriate standards for marketing “junk food” to youth and (ii) an enforcement mechanism for such standards that has “independence and teeth.” The Iowa senator plans to reintroduce separate legislation that would authorize the Federal Trade Commission to restrict food advertising to youth under age 18 and authorize the agriculture department to restrict junk food advertising in schools.

On Monday, Harkin [called on](#) USDA Inspector General Phyllis Wong to determine how “aggressively and accurately” USDA’s Grain Inspection and Packers and Stockyards Administration is reporting anti-competitive and unfair market practices in the increasingly concentrated livestock and poultry markets. “In Iowa and across the country, many of our family-sized livestock producers are disappearing as large, corporate, vertically integrated operations grow,” Harkin said. “This trend is very disturbing, and the lack of attention given to this issue by USDA is unacceptable.” *See Press Releases of Senator Tom Harkin*, April 4, 2005; *Food Production Daily*, April 6, 2005.

Food and Drug Administration (FDA)

[2] FDA Seeks Public Comment on Food Labeling Changes

FDA this week issued two Advanced Notices of Proposed Rulemaking (ANPRMs) in response to the FDA Obesity Working Group’s recommendation that improvements in food labeling could help consumers prevent weight gain. The [first ANPRM](#), “Food Labeling; Prominence of Calories,” requests public input on various questions related to ways that calorie content is stated on food package labeling, how consumers use that information to make dietary choices, and the impact of calorie labeling changes on product reformulation or packaging redesign.



The [second ANPRM](#), “Food Labeling: Serving Sizes of Products That Can Reasonably Be Consumed at One Eating Occasion; Updating of Reference Amounts Customarily Consumed; Approaches for Recommending Smaller Portion Sizes,” addresses ways that serving size information could be less confusing to consumers. With respect to individually packaged foods that appear to be single-serving containers but declare two or more servings on the label (e.g., some 20-ounce soft drinks), FDA is requesting comments on the criteria the agency should use in requiring nutrition information for the entire package. *See Federal Register*, April 4, 2005.

U.S. Department of Agriculture (USDA)

[3] United States, Canada and Mexico Agree on North American BSE Strategy

USDA announced last Friday that mid-March 2005 meetings held in Mexico City among USDA, Canadian and Mexican animal health officials, resulted in establishment of [harmonized risk management measures](#) for bovine spongiform encephalopathy (BSE). The minimum standards reflect World Organization for Animal Health guidelines and will not be codified until each country reviews them through the appropriate regulatory process.

Under provisions of the strategy, live cattle and beef product exports would be permitted among the nations as long as (i) specified risk materials were removed at slaughter and (ii) “adequate” animal identification systems were in place. The agreement has no effect on the United States’ ongoing ban on certain Canadian beef exports. *See MeatingPlace.com*, March 31, 2005; *USDA Press Release*, April 1, 2005.

State/Local Initiatives

[4] Massachusetts House Bill Takes Aim at Buzz Marketers

Citing a desire to protect kids from Internet marketers, Massachusetts State Representatives Michael Festa (D-Melrose) and Vincent Pedone (D-Worcester) have introduced [legislation](#) that requires youth ages 16 and younger to obtain parental consent before taking part in Internet marketing campaigns for any commercial products or services. “In an era when an unprecedented number of children are being recruited by marketers to participate in online advertising campaigns, we need to protect our youth from unwanted solicitations and ensure that marketing messages are age-appropriate,” Festa was quoted as saying. *See Campaign for a Commercial-Free Childhood.com*.

Litigation

Atkins Diet

[5] Florida Judge Orders Atkins Nutritionals to Produce Business Records

Pursuant to plaintiff’s [motion to compel](#), Palm Beach County Judge Susan Lubitz last week reportedly ordered Atkins Nutritionals, Inc. to produce financial documents in a Florida businessman’s lawsuit that alleges the high-protein diet resulted in his “life-threatening” heart disease. *Gorran v. Atkins Nutritionals, Inc.*, No. 502004-CC-006591-MB (County Court for Palm Beach County, Florida) (filed 5/27/04). *See Physicians Committee for Responsible Medicine News Release*, March 29, 2005; *Palm Beach Sun-Sentinel*, March 30, 2005.



Delray Beach resident Jody Gorran alleges that he followed the Atkins diet from May 2001 through October 2003 and relied on defendants' assurances that "you can eat all you want, lose weight and stay healthy, so long as you restrict carbohydrates." Gorran further claims that after just two months on the Atkins plan, his total cholesterol had risen from a safe level "to the danger range, well over 200 mg/dl." Eventually, he alleges, he developed severe chest pain and required angioplasty and a stent.

Gorran seeks damages "of less than \$15,000" under Florida's Deceptive and Unfair Trade Practices Act. He also requests "a permanent injunction preventing [defendants] from promoting and marketing their diet and products unless each such product and all marketing materials used have warnings deemed adequate by the Court to advise consumers of the risks of the Atkins diet."

Other Developments

[6] Obesity-Related Trends and Their Financial Impact on the Food Industry to Be Focus of June 2005 Conference

Food industry representatives, public health advocates, and financial and insurance analysts are some of the stakeholders who will gather in Arlington, Virginia, on June 29-30, 2005, for a [conference](#) titled "Obesity & the Bottom Line: Strategies for the Food Industry and Its Advisors." Sessions at the two-day event will include those targeting (i) the costs associated with product reformulation, new marketing plans and potential litigation; (ii) the risk and opportunity created by the "relentless focus on the health effects of obesity"; (iii) proactive public relations strategies; (iv) legislative initiatives to counter the threat of obesity-related lawsuits; and (v) youth marketing. Speakers will include Mark Berlind, executive vice

president of global corporate affairs for Kraft Foods; Leonard Teitelbaum, global coordinator of food and agribusiness for Merrill Lynch; Margo Wootan, nutrition policy director for the Center for Science in the Public Interest; and Marion Nestle, a professor of nutrition and public health at New York University. The conference is sponsored by Agra Forma, Inc., a Washington, D.C.-based publisher of agriculture- and food-related publications.

Scientific Technical Items

Cancer

[7] High Dietary Intake of Iron Linked to Cancer Risk

Individuals who tend to store iron in the body and who ingest high amounts of dietary iron are at an increased risk of cancer, say researchers in the latest issue of *Annals of Family Medicine* (A. Mainous, et al., "Transferrin Saturation, Dietary Iron Intake, and Risk of Cancer," *Ann Fam Med* 3(2): 131-137, March/April, 2005).

The research team analyzed data from the U.S. National Health and Nutrition Examination Survey (NHANES) database that followed adults from 1971 to 1992. Their analysis apparently found a doubling of cancer risk in individuals with increased body iron stores (indicated by a high percentage of transferrin saturation) and high dietary iron intake compared with individuals who exhibited normal serum transferrin saturation and low dietary iron intake. No increased risk was reported for people with high transferrin saturation rates and normal dietary iron intake. The authors suggest that their data "call into question the strategy of the addition of iron to food by manufacturers."



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