Food & Beverage

LITIGATION UPDATE

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Table of Contents

Legislation, Regulations and Standards

[1] Senate Appropriations Subcommittee Approves Harkin Amendment Calling for FTC to Produce Report on Food Advertising That Targets Children; Stakeholders File Comments in Preparation for Upcoming FTC/HHS Workshop 1

[2] House Legislation Would Offer Grants to Offset Losses from Discontinued Pouring Rights Contracts 2

[3] USDA Rejects Request for Enforcement of Competitive Foods Rule 2

[4] FDA Issues Draft Report on Thresholds for Food Allergens and Gluten 3

[5] Connecticut Governor Vetoes School Nutrition Bill . . .3

Litigation

[6] PCRM Seeks Lactose-Intolerant Plaintiffs for Purported Class Action Against the Dairy Industry 4

[7] California Environmental Group Seeks Prop. 65 Enforcement Action over Lack of Acrylamide Warnings on Potato Chips 4

[8] Kellogg Canada Faces Purported Class Action over Low-Sugar Cereals 5

Scientific/Technical Items

[9] IARC Study Links High Intake of Red and Processed Meat to Increased Risk of Colorectal Cancer 5

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Legislation, Regulations and Standards

U.S. Congress

[1] Senate Appropriations Subcommittee Approves Harkin Amendment Calling for FTC to Produce Report on Food Advertising That Targets Children; Stakeholders File Comments in Preparation for Upcoming FTC/HHS Workshop

Yesterday, the Senate Commerce, Justice, Science and Related Agencies Appropriations Subcommittee reportedly approved an amendment to the FY 2006 spending bill that directs the Federal Trade Commission (FTC) to produce a report on food advertising to children by July 1, 2006. Offered by Senator Tom Harkin (D-Iowa), the amendment requires the FTC report to include "an analysis of commercial advertising time on television, radio, and in print media; in-store marketing; direct payments for preferential shelf placement; events; promotions on packaging; all Internet activities; and product placement in television shows, movies, and video games." *See Press Release of Senator Tom Harkin,* June 21, 2005.

Meanwhile, industry stakeholders and public health advocates have filed **comments** addressing issues that will be discussed at the FTC/HHS July 14-15 workshop titled "Marketing, Self-Regulation and Childhood Obesity." Mark Berlind, executive vice president of Kraft Foods, acknowledged the importance of media messages that encourage healthy eating habits and said the company "has adopted advertising practices that we hope will help children and their parents make better food choices …" Other comments submitted by food and advertising interests similarly promoted the effectiveness of manufacturers' self-regulatory efforts and the work of the Council of Better Business Bureau's Children's Advertising Review Unit (CARU).

Industry critics, however, such as the Boston-based Public Health Advocacy Institute, deemed CARU ineffective because it "lacks clear and measurable guidelines … transparency in its process and is supported by the very organizations that it purports to regulate." A California tobacco-control advocate echoed PHAI's stance on food industry self-regulation by comparing it to that of tobacco and alcohol manufacturers. "It is imperative," said Elva Yanez, "that the federal government looks to the relevant empirical evidence from the tobacco and alcohol policy arenas when considering regulation of food industry marketing to children in response to concerns about childhood obesity. As the FTC and DHHS are fully aware, self-regulation of marketing by the tobacco and alcohol beverage industries has done nothing to prevent underage smoking or drinking … In fact, there is ample evidence – including industry documents – that the tobacco and alcohol beverage industries have spent millions of dollars to undermine the most effective disease

prevention strategies available: local, state and federal policies to regulate these legal products. There is too much profit at stake for the food industry to be able to objectively self-regulate its marketing practices to children."

FTC is expected to post the agenda for the workshop **here** on June 23 and will accept public comments on the marketing and childhood obesity issue until July 29.

[2] House Legislation Would Offer Grants to Offset Losses from Discontinued Pouring Rights Contracts

Representative Lois Capps (D-Calif.) recently introduced legislation (**H.R. 2763**) that would authorize the Centers for Disease Control and Prevention to provide grants to local educational agencies for the purchase or lease of school vending machines stocked with "healthy" foods and beverages. Provisions of the Student Nutrition and Health Act would require elementary and secondary schools applying for the grants to remove other vending machines that offer foods and beverages of minimal nutritional value – e.g., those providing less than 5 percent of the Reference Daily Intake for protein and various vitamins and minerals – and ensure that items offered in the qualified vending machines be limited to prescribed portion sizes. The bill has been referred to the Committee on Education and the Workforce and the Committee on Energy and Commerce.

U.S. Department of Agriculture (USDA)

[3] USDA Rejects Request for Enforcement of Competitive Foods Rule

USDA has **rejected** an April 2005 petition from the nonprofit group Commercial Alert requesting that the agency promulgate new reporting and enforcement regulations to bolster child nutrition program rules prohibiting the sale of "foods of minimal nutritional value" in public schools during mealtimes. As defined by federal statute, such foods include soft drinks, chewing gum and most hard candies. "It is outrageous that the USDA is refusing to enforce its own rules against selling junk food in public schools," Gary Ruskin, the director of Commercial Alert, was quoted as saying. "They have turned their back [sic] on American children who are suffering from an epidemic of obesity," he said.

The impetus for Commercial Alert's petition reportedly came from a March 2005 USDA report that stated, "it is unclear to what extent federal and state regulations [against the sale of foods of minimal nutritional value] are enforced at the local level." The group therefore urged USDA to (i) require schools that participate in the national school breakfast and lunch programs to certify compliance with the competitive foods rule on a monthly basis; (ii) require state agencies to conduct annual surprise visits; and (iii) make compliance with the rule part of Food and Nutrition Service reviews of state agencies.

In rejecting the petition, a USDA spokesperson reportedly contended the agency has only the authority to prohibit school programs from selling

items of minimal nutritional value, not the authority to dictate the contents of vending machines. According to a press report, a representative of the National Soft Drink Association agreed with USDA's decision and said Commercial Alert had failed to make a convincing argument for federal action. "They didn't provide any proof that a problem exists," Drew Davis was quoted as saying. "Where's there proof of a problem?" *See Commercial Alert News Release,* June 14, 2005; *Scripps Howard News Service,* June 16, 2005.

Food and Drug Administration (FDA)

[4] FDA Issues Draft Report on Thresholds for Food Allergens and Gluten

FDA has issued a draft report titled *Approaches to Establish Thresholds for Major Food* Allergens and for Gluten in Food to inform the agency's response to provisions of the Food Allergen Labeling and Consumer Protection Act of 2004 (FALCPA). Among other things, FALCPA provides petition and notification processes by which ingredients can be exempted from FALCPA labeling requirements and directs FDA to develop a definition of "gluten-free." The **draft document** was prepared by an interdisciplinary working group charged with (i) evaluating current scientific knowledge about food allergies and celiac disease, (ii) evaluating approaches for setting thresholds for food allergens and gluten, and (iii) identifying the biological concepts and data needed to evaluate the scientific soundness of each approach. Comments on the draft report are due by August 16, 2005. *See Federal Register,* June 17, 2005.

State/Local Initiatives

[5] Connecticut Governor Vetoes School Nutrition Bill

Asserting that the General Assembly had "engaged in the unnecessary practice of usurping the long-standing authority of our local school districts," Connecticut Governor Jodi Rell (R) last week vetoed comprehensive legislation (S.B. 1309) that would have prohibited the sale of soft drinks and most snack foods in public school cafeterias, vending machines and school stores. In addition to normal physical education requirements, the measure would also have required another 20 minutes of physical activity for kindergartners and students in grades one through five. "The task of determining and meeting the health and dietary needs of children should, first and foremost, be undertaken by parents," Rell said in her veto message. Supporters of the legislation reportedly decried Rell's veto by claiming the governor was "out of touch" for rejecting a law advocated by parents and pediatricians and had succumbed to soft drink company arguments that nutrition policy mandates should be determined by local school boards. *See Press Release of Governor M. Jodi Rell,* June 14, 2005; *The New York Times,* June 15, 2005.

Litigation

Warnings

[6] PCRM Seeks Lactose-Intolerant Plaintiffs for Purported Class Action Against the Dairy Industry

The Physicians Committee for Responsible Medicine (PCRM) is reportedly planning to file a putative class action against dairy producers on behalf of District of Columbia residents who are lactose intolerant. "Given the high rates of lactose intolerance, especially among people of color, it is clear that dairy products should carry warning labels," Dan Kinburn, associate general counsel for PCRM, said. "Dairy manufacturers are well aware that many consumers are sickened by these products."

Evidently, the organization will soon launch advertisements in D.C. public transportation venues that read, "Got lactose intolerance? 75 percent of people do, particularly people of color. If you're lactose intolerant, you may have grounds for a lawsuit." PCRM has also established a new Web site titled MilkMakesMeSick.org where potential plaintiffs can read about lactose intolerance and access studies that allegedly link milk consumption to the development of prostate and ovarian cancer. *See PCRM News Release,* June 16, 2005.

[7] California Environmental Group Seeks Prop. 65 Enforcement Action over Lack of Acrylamide Warnings on Potato Chips

Acting under California's Proposition 65 (Prop. 65), the Safe Drinking Water and Toxic Enforcement Act of 1986, the Oakland-based Environmental Law Foundation (ELF) has served notice of its intent to sue four food companies for failure to warn consumers of potentially dangerous levels of acrylamide in the companies' potato chip products. "Our test results show that single servings of popular potato chips have acrylamide levels hundreds of times what Prop. 65 allows and what the World Health Organization consider safe in a single glass of water," ELF President James Wheaton was quoted as saying. "These corporations are violating California law and the will of California voters by not warning the public about cancer risks from their products. Every parent deserves the right to know whether the food their children are eating will put them at risk for cancer." Companies that received the notices include PepsiCo. for Lay's chips, Proctor & Gamble for Pringle's, Kettle Foods, Inc. for Kettle Chips, and Lance Inc. for Cape Cod chips. *See ELF Press Release,* June 16, 2005; *Los Angeles Times,* June 17, 2005.

Prop. 65 requires warnings to the public about exposure to chemicals "known to the state to cause cancer or reproductive toxicity" and provides 60 days for the attorney general to decide whether to join or take over the lawsuit. The law does not apply to chemicals that occur naturally in food. Acrylamide forms as a byproduct of high-temperature cooking processes in many high-carbohydrate foods and is reported to cause cancer in laboratory animals. The chemical has been listed as a carcinogen under Prop. 65 since 1990, and the current no-significant-risk level (NSRL) of 0.2 micrograms per day was based on occupational exposures unrelated to food consumption.

Cal/EPA is currently evaluating whether to (i) exempt acrylamide in foods from Prop. 65 warning requirements, (ii) establish a new NSRL for acrylamide of 1.0 microgram per day, (ii) set an NSRL for acrylamide in breads and cereals of

10.0 micrograms per day, or (iv) establish new warning requirements for stores and restaurants if products sold by those establishments exceed any new NSRLs for acrylamide. Such warnings would be required only at the point of sale or point of display of the affected food products, not on individual package labeling.

Deceptive Trade Practices

[8] Kellogg Canada Faces Purported Class Action over Low-Sugar Cereals

A Montreal-area mother of four has reportedly filed a putative class action against Kellogg Canada, alleging the cereal maker's reduced-sugar varieties of Frosted Flakes and Froot Loops mislead consumers into believing the products are healthier than their full-sugar counterparts. Plaintiff Janie Bedard of Deux-Montagne apparently contends that other carbohydrates have replaced the sugar, thereby making the reduced-sugar cereals higher in calories than the full-sugar varieties. She reportedly seeks reimbursement for the costs of the low-sugar cereals and asks that company profits from their sales be donated to children's health organizations. *See The* (Montreal) *Gazette,* June 21, 2005.

A San Diego, California, woman filed a similar lawsuit against cereal manufacturers and a grocery retailer in March 2005. *Hardee v. Del Mission Liquor,* et al., No. GIC844745 (Superior Court of San Diego County) (filed 3/24/05).

Scientific/Technical Items

Colorectal Cancer

[9] IARC Study Links High Intake of Red and Processed Meat to Increased Risk of Colorectal Cancer

High intake of red and processed meat is associated with an increased risk of colorectal cancer, according to researchers from the World Health Organization's International Agency for Research on Cancer (IARC). (T. Norat, et al., "Meat, Fish, and Colorectal Cancer Risk: The European Prospective Investigation Into Cancer and Nutrition," *Journal of the National Cancer Institute* 97(12): 906-16, June 15, 2005.) The study covered nearly a half-million Western Europeans who were followed over a five-year period. Individuals in the study population who consumed the highest quantities of red and processed meat exhibited a 35 percent increased risk of developing colorectal cancer compared to individuals with the lowest red and processed meat consumption. Colorectal cancer risk was 31 percent lower among individuals with the highest fish consumption compared to those in the lowest category of fish consumption. No association was observed between poultry consumption and colorectal cancer risk.

The American Meat Association Foundation reportedly dismissed the study's findings, asserting that a larger body of evidence has shown that processed meats are a healthy part of a balanced diet. *See Food Production Daily.com,* June 15, 2005.

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