

# Food & Beverage

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Issue 16 • February 5, 2003

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Congress

##### [1] New York Lawmaker Introduces Food-Labeling Legislation

Representative Nita Lowey (D-N.Y.) introduced two bills on January 29, 2003, that would amend the federal Food, Drug and Cosmetic Act (FDCA). The Food Ingredient Right to Know Act (H.R. 467) would require foods that contain spices, flavoring or coloring derived from meat, poultry or other animal products (including insects) to bear labels stating that fact; the proposal would require similar labels for foods containing known allergens (e.g., peanuts, shellfish, eggs, wheat). The Food Freshness Disclosure Act of 2003 (H.R. 468) would mandate conspicuously placed, easy-to-read dates stating the day, month and year after which a product would no longer be considered fresh. Both bills have been referred to the House Committee on Energy and Commerce.

#### U.S. Food and Drug Administration (FDA)

##### [2] FDA Outlines Food Reporting Requirements Under Bioterrorism Act

FDA has proposed a number of new regulations related to the food industry that will implement the agency's responsibilities under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. Comments on the proposals must be submitted to FDA on or before April 4, 2003.

Containing provisions requiring the registration of food facilities, prior notice of imported food, and the establishment and maintenance of records, the proposed rules would also authorize FDA to detain food when credible information indicates that it presents a threat of serious adverse health consequences or death to humans or animals. The proposals would apparently apply to all foods and animal feed products regulated by FDA, including dietary supplements, infant formulas, beverages, and food additives. Industry trade groups have already reportedly criticized the proposals claiming they exceed the statutory mandate and set forth impractical reporting requirements. FDA apparently expects some 20,000 prior notices regarding imported food to be submitted daily. *See GMA News Release, January 29, 2003; biz.yahoo.com, FDA News Release and just-food.com, January 30, 2003.*

##### [3] FDA Committee to Address Acrylamide Action Plan

FDA's Food Advisory Committee will reportedly convene February 24-25, 2003, in Beltsville, Maryland, to present the agency's revised draft action plan for acrylamide in foods. The revised plan will evidently incorporate findings and recommendations from the committee's Contaminants and Natural Toxicants Subcommittee. Written comments regarding the action plan must be submitted by February 10; those wishing to make oral presentations at the committee meeting must contact Sylvia Smith at (301) 436-2397 by the same date. The draft proposal is available at <http://www.cfsan.fda.gov/~dms/acryplan.html>. *See Federal Register, February 3, 2003.*



## European Union (EU)

### [4] GM Crops Still in EU Spotlight; Other Actions Affect Food Claims, Additives and Animal Feed

The Bush administration has reportedly decided to postpone bringing a case before the World Trade Organization challenging EU reluctance to import genetically modified (GM) crops. "There is no point in testing Europeans on food while they are being tested on Iraq," an unidentified White House official was quoted as saying. See *The New York Times*, February 5, 2003.

Meanwhile, efforts are underway in the EU to (i) ban food companies from making "misleading" claims about the health or mood effects of their products, (ii) permit one of four remaining antibiotics to be used in animal feed to promote growth, (iii) reduce the amount of a coloring additive commonly used in salmon and laying-hen feed following studies showing the additive is linked to the development of retina problems in humans, and (iv) adopt new food safety rules which will allow the EU to penalize member states that do not comply with food and animal feed controls by docking farm subsidies. The ban on "misleading" food claims has apparently drawn the attention of food manufacturers such as Danone, Nestle and Kellogg which use claims like "boost the immune system," "improve concentration" and "reinforce the body's resistance" in marketing and labeling. See *just-food.com*, January 27, 2003; *Food Ingredients First*, January 29, 2003; *Greenwire*, January 30, 2003; *Financial Times*, January 30 and 31, 2003; *Reuters*, February 2, 2003.

## State/Local Initiatives

### [5] California Proposals Would Regulate Bottled Water

Citing a "lack of consumer certainty as to the contents of bottled water products," two California state lawmakers have introduced legislation (A.B. 83, S.B. 50) that would impose standards for bottled water similar to those that apply to tap water under the California Safe Drinking Water Act. "People tout bottled water as this pure substance that's trickling from clear mountain springs when, in fact, that may not be the case," Assemblywoman Ellen Corbett (D-San Leandro), author of the Assembly bill, was quoted as saying. Corbett's proposal would require water bottlers, vendors, haulers, and retail water facilities to issue annual consumer confidence reports that identify (i) the source of the water; (ii) any regulated contaminants detected in the source of the water during the past year (iii) the level of the contaminants detected and the corresponding maximum contaminant levels; and (iv) any violations of the maximum contaminant levels in addition to providing a "plainly worded" explanation of health concerns resulting in regulation of the contaminants. Bottled water facilities, water vending machines and retail water facilities would also be subject to annual inspections by the California Department of Health Services. Companion legislation has been introduced by Senator Byron Sher (D-Palo Alto). According to a news source, sales of bottled water in California represent about 24 percent of the national market. See *San Francisco Chronicle*, January 27, 2003.

## Litigation

### Acrylamide

#### [6] California AG Criticizes Acrylamide Warnings in Settlement of Prop. 65 Case

Claiming that general warnings about acrylamide in food do not comply with the Safe Drinking Water and Toxic Enforcement Act (Prop. 65), California's attorney general (AG) has filed a supplemental memorandum opposing a proposed settlement in a Prop. 65 enforcement action involving environmental tobacco smoke and other chemicals present in hotels. To settle the case, which was brought by the Consumer Defense Group in 1999, hotel chains such as LaQuinta Inns, Hilton Corp. and the Wyndham Hotel Corp. had agreed to make a brochure available to guests at the registration desk that would provide warnings about tobacco smoke, chemicals in furnishings and electrical power cords, and acrylamide in foods fried or baked at high temperatures. According to the AG, the acrylamide warning is defective because warnings are only required by law when there is sufficient evidence that an exposure exists. The AG claims that plaintiff has not presented evidence of actual exposure or that "the exposure exceeds the warning level."

The proposed settlement is also challenged on the ground that the claims covered and the releases are far broader than those identified in the 60-day notice that preceded the lawsuit's filing. The AG's memorandum concludes by stating, "in seeking to incorporate every conceivable claim under Proposition 65 into this judgment, [defendants] have exceeded the bounds of law and of this Court's authority. The Court is not a permit bureau, and should not accept defendants' invitation to become one. There is no real controversy between the plaintiffs and

defendants here, there is simply an effort to preclude other Proposition 65 enforcement efforts. Consumer Defense Group does not enforce Proposition 65, it sells immunity." A hearing in the matter is scheduled for February 6, 2003.

## Other Developments

#### [7] U.K. Group Decries Salt Content of Processed Foods

Calling on the food industry to improve public health by reducing the amount of salt in processed foods, a non-profit organization in the United Kingdom has issued a survey comparing 1978 levels of sodium in certain foods to 2003 levels in equivalent products. According to the London-based Food Commission, the salt content in many brands of potato chips purchased in 2003 has more than doubled compared to chips manufactured in 1978, from an average of 540 mg. per 100 grams to 1,050 mg. per 100 grams. The group also contends that average salt levels in canned tomato soup, baked beans and white bread have shown "very little improvement, despite industry and government claims that salt has been reduced in these processed foods." With regard to popular children's foods, the Food Commission evidently found that one serving of a Burger King kids' meal (i.e., cheeseburger, small fries, small cola) or Heinz Teletubbies Pasta with Mini Sausages contains more than the Scientific Advisory Committee on Nutrition's recommended maximum daily intake of 2 grams of sodium for 1- to 6-year-olds. The Food and Drink Federation reportedly asserts that the group's claims are "out of date, out of touch and based on self-selecting surveys." See *Food Commission Press Release* and *just-food.com*, January 27, 2003.



## Media Coverage

### [8] Commentators Weigh In on McDonald's Lawsuit Dismissal

Following Judge Robert Sweet's dismissal of the obesity-related litigation against McDonald's Corp., a number of analysts have been considering whether the decision, which invited plaintiffs to refile their claims, marks the beginning of a new litigation trend. Tobacco-control advocate John Banzhaf, who apparently consulted on the case, has indicated that he will be meeting with other lawyers, legal experts and nutritionists to discuss amending the complaint. Banzhaf and fellow tobacco-control advocate Richard Daynard are also reportedly organizing a spring 2003 conference for lawyers and public-health officials interested in using litigation as a tool to counter rising obesity rates in the United States. According to news sources, some commentators believe that requiring fast-food restaurants to reduce portion sizes and post caloric information on their menus are reasonable demands. A *FindLaw* columnist, relying on Guido Calabresi's cost-benefit tort-law analyses, suggests that litigation could effectively force businesses to internalize costs they inflict on others. She believes higher prices for fast food could steer consumers to other, healthier food choices and might also lead to changes in factory farming of beef. See *Toronto Star* and *findlaw.com*, January 29, 2003; *Chicago Tribune*, *The Observer* and *The New York Times*, February 2, 2003.

## Scientific/Technical Items

### Obesity

### [9] Obesity Linked to Increased Health Care Costs

New research from the University of Michigan indicates that as people become increasingly overweight and obese, they face mounting health care costs ("The Relationship between National Heart, Lung, and Blood Institute Weight Guidelines and Concurrent Medical Costs in a Manufacturing Population," D.W. Edington, et al., *American Journal of Health Promotion* 17(3): 183-189, 2003). Dee Edington and colleagues from the University's Health Management Research Center examined approximately 178,000 adults enrolled in General Motors' health care plan, breaking down medical costs according to weight carried. Subjects were divided into six categories by body mass index, ranging from the underweight to the morbidly obese. Those subjects in the normal-weight group spent the least on health care costs, while both those in the underweight and overweight-obese groups spent more. The median annual health care cost of those of average weight was \$2,225. Those in the lowest category of overweight spent only slightly more, \$2,388, but costs rose sharply after that, reaching \$3,753 in the most obese category. Edington, et al. advise that given the current increases in obesity in western countries, "effective weight control programs would help avoid a substantial amount of medical costs associated with overweight/obesity and related diseases."

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Food & Beverage Litigation Update is distributed by Dale Walker and Mary Boyd in the Kansas City office of SHB. If you have questions about the Update or would like to receive back-up materials, please contact us by e-mail at [dwalker@shb.com](mailto:dwalker@shb.com) or [mboyd@shb.com](mailto:mboyd@shb.com). You can also reach us at 816-474-6550. We welcome any leads on new developments in this emerging area of litigation.

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