

# Food & Beverage

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture (USDA)

##### [1] Agency Seeks Public Comment on *Listeria* Risk Assessment

The USDA's Food Safety and Inspection Service (FSIS) has announced that it is requesting public comment on its draft *Listeria* risk assessment which was conducted (i) "to determine how the pathogen may contaminate meat and poultry products during production and packaging processes," (ii) "to examine the effectiveness of testing food contact surfaces and sanitation on product contamination and the subsequent risk of illness," and (iii) "to evaluate the effectiveness of other interventions." According to FSIS, "the frequency of testing food contact surfaces, as proposed in the proposed rule on Performance Standards for the Production of Processed Meat and Poultry Products, was specifically addressed." FSIS also notes that the "risk assessment will provide important additional data that the Agency will use in developing a final regulation concerning the reduction and control of *Listeria* in processing plants producing ready-to-eat products, and a new directive to replace Directive 10,240.3," on microbial sampling, "if appropriate."

The draft can be accessed at [www.fsis.usda.gov](http://www.fsis.usda.gov). Written comments are due February 21, 2003, and should be sent to FSIS Docket Room, Docket 03-005N, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 102 Cotton Annex, 300 12<sup>th</sup> Street, SW, Washington, D.C. 20250-3700.

A public meeting on the risk assessment has been scheduled for February 26 at the Washington Plaza Hotel. See *Federal Register*, February 6, 2003.

#### Codex Alimentarius Commission

##### [2] Public Meetings Scheduled to Prepare for Codex Committee Sessions

U.S. delegates to two Codex Alimentarius committees have announced public meetings in advance of their committee meetings to provide agenda information and proposed U.S. positions on the issues and to receive comments from interested parties. Co-sponsored by the U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA), a February 18, 2003, meeting will be held to discuss issues that will be raised during the 14<sup>th</sup> Session of the Codex Committee on Residues of Veterinary Drugs in Foods, scheduled for March 4-7 in Washington, D.C. Relevant documents can be obtained from [www.codexalimentarius.net/current.asp](http://www.codexalimentarius.net/current.asp). Topics expected to be discussed include consideration of draft maximum residue limits for veterinary drugs, a proposed draft appendix on the prevention and control of veterinary drug residues in milk and milk products, and a discussion paper on residue issues.

USDA and FDA will also co-sponsor a February 20 meeting to prepare for the 4<sup>th</sup> Session of the Codex Ad Hoc Intergovernmental Task Force on Foods Derived from Biotechnology, scheduled for March 11-14 in Yokohama, Japan. Relevant documents can be



obtained from [www.codexalimentarius.net/ccfbt4/bt03\\_01e.htm](http://www.codexalimentarius.net/ccfbt4/bt03_01e.htm). Among the topics to be addressed are matters referred by other Codex committees, matters relating to the evaluation of the safety and nutrition aspects of foods derived from biotechnology, a draft guideline for the conduct of food safety assessment of foods produced using recombinant-DNA microorganisms, and an open discussion of traceability. See *Federal Register*, January 31, 2003.

## Japan

### [3] Japanese Cabinet Endorses Food Safety Proposals

The Japanese cabinet has reportedly endorsed various food safety proposals aimed at regaining the public's trust in food. According to a news source, the legislation would (i) establish a government commission to evaluate the health effects of certain foods, (ii) further regulate the beef industry to allow better identification of meat infected with mad cow disease, (iii) prohibit misleading food product advertising, and (iv) increase fines for companies that have sold or imported food containing pesticide residues. See *The Japan Times*, February 8, 2003.

## New Zealand

### [4] Industry Challenges Proposed Restrictions on Fast-Food Advertising

According to a news source, the New Zealand government has proposed amending its 1956 Health Act by including a prohibition on all fast-food advertising during hours that children watch television. Thus, the ads could apparently be aired only after 8:30 p.m. Claiming such restrictions would cost business millions and result in job losses in manufacturing, retail, advertising, and media, representatives of a broad spectrum of interests have reportedly called

the proposal "idiotic and unworkable." Spending for fast-food ads apparently reached NZ\$57 million in 2002, or 3 percent of the total media advertising budget. Some have reportedly claimed that regulators will pull the proposal much as they did when an earlier attempt to prohibit all ads during children's programming failed on the realization that advertising pays for the programs people watch. See *The National Business Review*, February 10, 2003.

## Litigation

### Bio-Engineered Corn

#### [5] Preliminary Settlement Reached in StarLink Litigation

Corn farmers and the biotech companies that developed and marketed bio-engineered StarLink corn have reportedly reached a \$110 million settlement. According to a press report, if approved after further court review, the settlement fund will be shared by farmers whose crops were tainted by StarLink corn or who experienced a drop in corn prices due to the controversy. The corn, spliced with a gene deadly to the corn borer, was apparently planted in less than 10,000 acres in the United States in 1998 and expanded to 315,000 acres in 2000. Traces of StarLink corn were apparently found in U.S. taco shells and other food supplies in Japan, resulting in a sharp decline in that country's import of American corn supplies. Steep price drops for all U.S. corn reportedly followed. The lawsuit alleged that Aventis S.A. did not inform farmers that the Environmental Protection Agency had approved StarLink for use in animal feed only. StarLink farmers apparently allowed their crops to be mixed with regular corn supplies. See *Reuters*, February 6, 2003; *Greenwire* and *The Philadelphia Inquirer*, February 7, 2003.



## Legal Literature

- [6] **Note, "The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity,"** *Harvard Law Review*, February 2003

This article suggests that a first step toward the effective governmental regulation of nutrition and dietary habits would be "counteradvertising aimed at reducing risky behavior by negating the distortive influence of private-sector manipulation." To establish the framework for discussion, the article explores the causes of obesity, objections to paternalistic intervention in lifestyle choices, and regulatory options "for reducing risky eating behavior." The article argues that "private-sector advertising manipulates malleable consumer preferences, thereby reinforcing the biological pressures driving obesity." While the article acknowledges the ineffectiveness of government informational campaigns on diet and health to date, counteradvertising is viewed as an approach that has "produced encouraging results for a variety of risky behaviors," such as smoking. The article concludes that "in the coming war against unhealthy diets, the first battle will necessarily be for the mind of the consumer."

## Other Developments

- [7] ***NewScientist* Article Raises Questions About Addictive Qualities of Fast Food**

According to an article in *NewScientist*, "Some scientists are starting to believe that bingeing on foods that are excessively high in fat and sugar can cause changes in your brain and body that make it hard to say no. A few even believe that the foods can trigger changes that are similar to full-blown addiction." The article discusses research on leptins

and other hormones as well as high-fat and -sugar diets. Such research has reportedly shown that only a few high-fat meals can interfere with the leptin system and that withdrawal from a high-sugar diet can cause symptoms similar to those purportedly seen in people withdrawing from nicotine or morphine. The article suggests that litigants can soon be expected to make an addiction argument in obesity-related cases, and that the debate will then be out of scientists' hands. The National Restaurant Association responded to the article by stating "This so-called 'research' should be held up to the world as a perfect illustration of junk science," and that "satisfying basic human needs" "cannot be defined as an addiction." A Center for Science in the Public Interest spokesperson has also reportedly expressed skepticism about food-addiction claims. See *National Restaurant News Release*, January 30, 2003; *NewScientist*, February 1, 2003.

- [8] **Conservative Writer Blames Obesity on U.S. Food Aid for the Poor**

According to a paper published by a conservative think tank, federal food aid programs such as food stamps, free school meals and WIC (a supplemental nutrition program for women, infants and children), are putting the poor at risk of death and disease due to overeating. The paper, "We're Feeding the Poor as if They're Starving," speculates that (i) excess food stamps are being used to buy food the recipients do not need, (ii) school breakfasts and lunches are not only oversized, they are too high in fat and saturated fat, and (iii) WIC's emphasis on high-calorie, high-cholesterol foods only makes sense if this food assistance were a family's major source of nutrition. Critics of this American Enterprise Institute paper have reportedly cited a lack of research linking food aid with obesity, and claim, in fact, that recent studies have specifically found that food stamps do



not cause obesity. Some have apparently noted that a major factor influencing high rates of obesity in poor households is that unhealthy food is less expensive than fresh fruits and vegetables. According to a news source, some analysts agree that the issue is worth pursuing and that nutritional counseling for aid recipients could be beneficial. See *UPI*, January 29, 2003.

## Media Coverage

**[9] Richard Tompkins, "Out of the Tobacco Smoke and into the Frying Pan," *Financial Times*, February 6, 2003**

This commentary asserts that despite yearly revenues from the 1998 settlement agreement between tobacco companies and state attorneys general, many state governments face financial crises and are "desperate for another litigation windfall," making the prospect of lawsuits against the food industry "irresistible." According to Tompkins, "these food products carried no warning labels and were often portrayed as healthy when they were not. The companies employed neuroscience, psychology and anthropology to find new ways of triggering people's appetites and overcoming their natural resistance to gorging themselves. Even more damning, they aggressively marketed these products to children by advertising them in children's television programs and packaging them in ways that children would find appealing. He concludes that the only thing preventing such litigation is evidence "showing that the food companies knew the risks associated with their products but chose not to disclose them."

## Scientific/Technical Items

### Obesity

**[10] *Science Magazine* Focuses on Obesity**

Setting its sights on the causes of and treatments for obesity, the February 7, 2003, issue of *Science* contains a number of related articles and commentary. Marion Nestle, who has achieved renown writing about obesity and the food industry, writes in "The Ironic Politics of Obesity" that "improved prosperity" causes consumers to eat more nutritionally suspect, aggressively marketed foods and use products such as "cars, television sets and computers that promote sedentary behavior." While she suggests that a leadership vacuum in the United States has led to litigation "against the obesity-promoting practices of food companies," Nestle also proposes that scientists and public-interest groups take advantage of the vacuum by advocating better policies.

In "A War on Obesity, Not the Obese," Jeffrey Friedman asserts that obese individuals are at the mercy of their biology, indicating that such individuals may be fighting hormonal and evolutionary forces beyond their control. He suggests that obesity and deficiencies in weight-regulating hormones "appear to be the residue of genetic variants that were more adaptive in a previous environment" and that identification of these genetic variations may lead to new therapies to treat obesity. James Hill and colleagues, on the other hand, focus almost entirely on individual cognitive control over weight gain in "Obesity and the Environment: Where Do We Go from Here?" They propose that the key to arresting the obesity epidemic may be the implementation of specific behavioral targets such as decreasing caloric intake by 100 calories or burning an additional 100 calories per day through exercise.

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