

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### 110th Congress

##### [1] 2007 Farm Bill Expected to Draw New Participants

During a Webinar co-sponsored by the Food Institute, former government officials, members of Congress and congressional staffers discussed what the new Democratic congress would mean for food and agriculture. The specific focus of the January 16, 2007, discussion was the U.S. farm bill which is up for renewal in 2007. Former Representative Charles Stenholm (D-Texas) observed that “Blue Dog” Democrats, those more moderate in their views, now hold a clear majority on agricultural oversight committees; he also noted that more than half of them have never authored a farm bill. Thus, education will likely be the key to putting together a successful legislative package. Senator Tom Harkin (D-Iowa), who will be chairing the Senate Committee on Agriculture, Nutrition and Forestry, is particularly interested in conservation, renewable fuels and children’s nutrition, according to conference participants.

Former U.S. Department of Agriculture Secretary John Block indicated that it was unclear whether the current administration would actually draft legislation or would just submit recommendations to

Congress. Block also said that current USDA Secretary Mike Johanns will likely have less influence over negotiations because the political control of Congress had changed during the interim elections. Block observed that this year’s farm bill, which will probably contain crop subsidies as in the past, should cost less relative to previous years because prices for basic commodities such as corn are high; he also suggested that different policy objectives, such as the promotion of increased production to help feed the world’s hungry and develop alternative fuel sources, will come into play in the next farm bill.

Marshall Matz, former special counsel to the Senate agriculture committee, discussed nutrition issues and speculated that the food stamp program, which must be reauthorized, will not be used to fight obesity by means of food restrictions. He opined that school lunch programs and food in schools will get increased attention, with industry interests looking for national standards. Given that states have been developing their own standards, Matz expects this to be a particularly contentious issue.

Conference participants noted that extensive lobbying efforts are already underway as new interest groups are hoping to advance their causes by means of the farm bill. Reference was made to a recent *Congressional Quarterly* article that provides a comprehensive list of the new groups that will be attempting to influence the legislation, including fruit, nut, vegetable, and wine producers; the American Heart Association; Oxfam America; the Humane Society; and drug companies.



Other issues expected to be debated within the farm-bill context include food safety, dietary supplements and obesity. Democrats have introduced bills in the past that would (i) create a single food agency with authority over food safety issues, such as bacterial contamination of fruits and vegetables, (ii) impose nutrition labeling requirements on chain restaurants, and (iii) restore Federal Trade Commission authority over food marketing to children. A recent article explores the FTC issue, noting that it is of particular importance to Senator Harkin. See *theledger.com*, January 11, 2007.

Conference participants agreed that the farm bill, as a comprehensive legislative initiative, will attract all manner of attachments and could be a vehicle for “mischief.” They also agreed that World Trade Organization actions will have an impact on U.S. food policy. Stenholm expressed the hope that a new Doha agreement would be in place by March so that Congress would be able to work with it in drafting a farm bill. Tensions over governmental crop subsidies are a frequent subject of dispute before the WTO.

Meanwhile, public interest organizations have already launched campaigns to convince Congress to amend country-of-origin labeling requirements. Groups such as Food & Water Watch are [urging](#) consumers to get involved. Op-ed commentators are also joining the chorus. Chef Dan Barber recently discussed how farm subsidies and the policies advanced by the U.S. farm bill have been responsible for putting “bland” foods on our tables. He argues, “if we’re spending \$20 billion or so a year on farm subsidies, we ought to invest in foods we eat. And I mean eat, not process into something that resembles food. That means fewer subsidies for grains like corn and soy, and more help for growers of broccoli and tomatoes.” Barber concludes by

calling for Congress to “allow the best examples of gastronomy to be their guide” as they debate the farm bill’s details. See *The New York Times*, January 14, 2007.

## Food and Drug Administration (FDA)

### [2] BSE, “Functional Foods” and Calcium on FDA Agenda

FDA has issued a final [rule](#), effective January 9, 2007, that requires human food and cosmetics manufacturers to establish and maintain records regarding products that contain material from cattle. The purpose of the rule is to ensure that human foods and cosmetics are not processed with or contain prohibited cattle materials, which include parts such as the brain and small intestines that could allegedly harbor bovine spongiform encephalopathy (BSE). The rule has been codified at 21 C.F.R. Parts 189 and 700. See *Federal Register*, October 11, 2006.

The agency has also [announced](#) that it will extend until March 5, 2007, the comment period on how the FDA should regulate conventional foods marketed as “functional foods.” The comments will not be accepted by e-mail, but should be submitted through the Federal eRulemaking Portal or the agency’s Web site. Further details about the initiative appear in issue 190 of this Report. The FDA extended the comment period in response to requests from commenters who asked for more time. See *Federal Register*, January 8, 2007.

In other action, the FDA has issued a [press release](#) announcing that it is considering allowing food and dietary supplement manufacturers to claim, when their products contain calcium and vitamin D, that they have the potential to reduce the risk of osteoporosis.



The proposed rule would amend one of the first health claims authorized under the Nutrition Labeling and Education Act of 1990 by eliminating certain requirements and adding a health claim “for calcium and vitamin D together and a reduced risk of osteoporosis.” The claim language would be shortened by dropping references to sex, race and age and the need to identify the mechanism by which calcium reduces osteoporosis risk. The agency is seeking public comments on the proposal. See *FDA News*, January 5, 2007.

### [3] FDA Extends “Lean” Labeling Rule to Cover Portable Products

FDA has issued a [final rule](#), effective January 12, 2007, that permits “mixed dishes not measurable with a cup” to carry the health claim “lean” provided the food meets certain nutritional standards. The change was prompted by a 2004 petition from Nestlé, which asked FDA to reconsider some portable products, such as burritos, pizza and sandwiches, not eligible for a “lean” label under the old rule because they weighed less than 6 ounces.

To qualify as “lean,” these foods must contain less than 8 grams total fat, 3.5 grams or less saturated fat, and less than 80 milligrams cholesterol per reference amount customarily consumed (140 grams). See *Federal Register*, January 12, 2007; *Food Navigator USA.com*, January 16, 2007.

### [4] FDA Focuses on California Dairy Farms in *E. Coli* Lettuce Investigation

FDA reportedly announced this week that samples taken from dairy farms in California’s Central Valley have DNA-matched the *E. coli* strain responsible for allegedly sickening 81 people last December. The investigation identified iceberg lettuce served at Taco John’s restaurants in Iowa and

Minnesota as the alleged source of contamination, although FDA still has not determined how the bacteria spread from dairy farms in the lettuce-growing regions to produce fields. “In the wake of recent outbreaks of consumer illness connected with fresh produce, FDA will accelerate its efforts to address produce safety, including consideration of new regulations, if appropriate, to reduce risk of contamination by pathogens,” stated an FDA [press release](#), which also announced forthcoming public meetings on the issue.

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

### [5] USDA Agencies Provide Notice on BSE and Codex Fats and Oils Activities

USDA’s Animal and Plant Health Inspection Service (APHIS) has published a [notice](#) seeking public comment on BSE-related amendments to animal-import regulations. The proposed amendments, which would affect 9 C.F.R. Parts 93, 95 and 96, would establish conditions for the importation of live bovines from regions posing a minimal risk of introducing bovine spongiform encephalopathy (BSE) into the United States. Comments must be submitted on or before March 12, 2007. See *Federal Register*, January 9, 2007.

Meanwhile, the Food Safety and Inspection Service (FSIS) has [announced](#) that it will be conducting a public meeting, January 23, 2007, to discuss draft U.S. positions on issues coming before the Codex Alimentarius Commission Committee on Fats and Oils, which is meeting in London, February 19-23. Agenda items include (i) a section on food additives in the draft standard for fat spreads and blended spreads, (ii) a code of practice for storage and transport of edible fats and oils in bulk, and



(iii) criteria to revise the standard for named vegetable oils. According to a news source, the European Commission (EC) is in agreement with most of the drafts coming before the Codex committee, but has reservations about the food additives section. Apparently, the draft includes the term “nature-identical flavoring substances,” which is not defined in the Codex system. The EC reportedly contends that such flavorings would constitute “artificial flavorings.” See *Federal Register*, December 18, 2006; *FoodUSA*, January 3, 2007.

## European Union (EU)

### [6] Experts Urge EU to Ban Use of Mercury

A pan-European group of health and environmental experts has reportedly called on EU lawmakers to prohibit the use of mercury. The Health and Environment Alliance (HEA) and Health Care Without Harm Europe joined forces to produce a [report](#) that discusses the purported health effects of mercury exposure and shows how mercury enters the ecosystem and contaminates most fish and shellfish. The HEA's director reportedly presented the report to the European Parliament, contending that even halting all mercury production, spills and emissions today would not stop contamination of the world's food supply for many years. The report also calls for an education program to show how to minimize infants' and children's exposures and the promotion of alternative technology transfer and financial assistance to developing countries to enable them to implement measures similar to those being considered by industrial nations. See *The International Herald Tribune*, January 10, 2007.

## State/Local Initiatives

### [7] New Jersey Law Will Prohibit Sale of Sugary Foods in Schools

The New Jersey Assembly has reportedly passed a bill prohibiting the sale of alleged junk food in schools that participate in federal child-nutrition programs. The prohibited foods and beverages include (i) items of “minimal nutritional value,” as defined by the U.S. Department of Agriculture; (ii) items listing any form of sugar as the first ingredient; and (iii) all forms of candy. Products that are sold or served in schools must also contain less than 8 grams of total fat and 2 grams of saturated fat per serving, and beverages must meet portion size guidelines for elementary, middle and high school students. If approved by Governor Jon Corzine (D), the bill will take effect in September 2007. See *The New York Times*, January 14, 2007.

## Other Developments

### [8] RAND Scientist Calls for Radical Environmental Changes to Tackle Obesity

A physician and scientist affiliated with the RAND Corp. has published an [article](#) that echoes themes presented during the Public Health Advocacy Institute's fourth annual obesity conference, i.e., that environmental factors over which we exercise no control are more to blame for obesity than individual choices. Further details about the PHAI conference appear in issue 192 of this Report. Deborah Cohen, M.D. writes, “Most people don't understand the strength and scope of the external influences that prompt them to eat more than they need to and can't keep track of the calories that keep them overweight or obese.” Cohen notes how





easy it is to gain 2 pounds in a year by eating just 20 extra calories per day, which is equivalent to a quarter-slice of wheat toast, less than a teaspoon of ranch salad dressing or two breath mints. She blames the media, schools, workplaces, all types of stores, and food and beverage companies for creating the environmental “cues” that keep many Americans overweight.

Cohen contends that exhorting people to eat more fruits and vegetables and substitute low-calorie snacks for high-calorie ones will not provide the environmental cues that people need to change their behavior. Using tobacco-control campaigns, which include “smoke-free” zones and harsh criticisms of the tobacco industry as an example of environmental cues that work, Cohen suggests (i) requiring outlets selling prepared foods to provide no more than 400- or 500-calorie meals, (ii) removing food from settings like bookstores, car washes and gas stations, “where eating is not necessary,” (iii) taking candy, snack and sugar-sweetened beverage vending machines out of schools and office buildings, (iv) launching a massive media campaign against sugar-sweetened beverages, and (v) labeling products that the agriculture department characterizes as “discretionary calories” with a red light. The article concludes, “We have become fat in an environment with easy availability of calories and ubiquitous cues to eat. If we change the environment, we will adapt and lose weight.”

#### [9] Food Studies Funded by Industry Are Biased, Survey Alleges

A recent [article](#) in *PLoS Medicine*, a Public Library of Science journal, claims that industry-backed nutrition studies are more likely to present conclusions that are favorable or neutral toward sponsors. The survey reported that 21 of 24 beverage studies financed by industry had favorable

or neutral results, whereas 32 of 52 non-industry sponsored studies were favorable or neutral and 20 were unfavorable.

“These conflicts could produce a very large bias in the scientific literature, influence the government’s dietary guidelines which are science based,” said lead researcher David Ludwig, M.D., also calling the alleged bias “a top-order threat to public health.” The American Beverage Association countered that the survey failed to address “the merits of the science” behind the studies that appeared in peer-reviewed scientific journals. See *American Beverage Association Press Release*, January 8, 2007; *The New York Times* and *Time*, January 9, 2007.

#### [10] CFNAP Conducts Survey of Consumer Attitudes Toward Cloned Livestock

The Center for Food, Nutrition and Agriculture Policy (CFNAP) at the University of Maryland last month published [survey results](#) from 1,000 adult Americans (weighted total) asked about their attitudes toward food from cloned animals. The report found that more than six of 10 participants, the majority of whom consumed meat at least once a week, “would continue to buy – or at least consider continuing to buy” milk or meat products from cloned livestock “if FDA determined it was safe.” CFNAP also found that, “There was no single reason for some Americans to be uncomfortable with animal cloning as an assisted reproductive technique.” Of the 664 people (weighted total) who said they were uncomfortable, 32 percent raised moral objections, 26 percent had safety concerns, and 23 percent “worried that animal cloning would lead to human cloning.” Only 26 percent of those surveyed, however, knew about the recent FDA risk assessment, which determined food from cloned animals was safe to consume.



## Media Coverage

### [11] Lawyers Predict Action on Children's Advertising at National Conference

During panel discussions about children's advertising at the Association of National Advertisers' Advertising Law & Business Affairs Conference in New York City this week, several speakers reportedly warned that 2007 will bring increasing scrutiny of food marketers' ads that could result in litigation. At least one speaker, however, advised attendees to ignore the critics to a certain extent. He was quoted as saying, "If you're in the business of selling candy, sell candy; if you're in the business of selling burgers, sell burgers." He did caution, nevertheless, that marketers should not characterize products as healthy if they are not. Counsel for a major cigarette manufacturer apparently warned that the food industry could become as unpopular as tobacco, which he called "the No. 1 commercial pariah in America." Other lawyers reportedly suggested that care be taken in drafting documents related to youth marketing, because documents can be taken out of context and will be discoverable for a long time. *See Advertising Age*, January 17, 2007.



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