

# Food & Beverage

## LITIGATION UPDATE

Issue 204 • March 2, 2007

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

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

##### [1] USDA Unveils Risk-Based Inspection Plan

USDA has [proposed](#) a timeline for a new risk-based inspection plan slated to begin in April 2007 at 30 locations and to cover 150 locations by year's end. Under the new system, the Food Safety and Inspection Service (FSIS) will continue daily inspections at all meat and poultry facilities, but will devote more resources to those plants "needing it the most." Each month processors presenting the greatest risk will be identified using "objective factors," such as previous noncompliance issues and microbial testing, so that FSIS can adjust accordingly. "Everyone agrees that not all plants and all processes pose an equal risk to public health and that FSIS should have the ability to shift resources as needed to more proactively protect the public from foodborne illness from meat, poultry and egg products," the USDA's top food safety official, Richard Raymond, said in a recent statement.

Developed with input from stakeholders, health experts and the public, the program will undergo frequent reviews as it expands. Nevertheless, some critics have reportedly called the policy "reckless."

"Moving too quickly, before they have fully analyzed the risk of different products, could start the program in the wrong direction," a Center for Science in the Public Interest spokesperson told the press. *See The Wall Street Journal*, February 22, 2007.

The change comes as consumer groups also fault the FDA for decreasing oversight in the last three years, with a reported 47 percent decline in inspections following a "spike" prompted by terrorism worries in 2003. "We have a food safety crisis on the horizon," opined one Center for Food Safety representative, while others argued that the FDA only has the resources to react to disease outbreaks, not prevent them. In a recent House Agriculture Appropriations Subcommittee hearing, Representative Rosa DeLauro (D-Conn.) challenged FDA's request for a \$10.7 million budget increase for fiscal year 2008, claiming the amount "is nowhere near enough to try to deal with the issues." Agency Commissioner Andrew von Eschenbach said the increase would go toward fresh produce safety, but that FDA also wants to "create enterprise efficiency" to supplement funding that has not kept pace with inflation. The subcommittee, however, concluded that although FDA oversees 80 percent of the food supply, it lacks both the financial support and planning necessary for "farm-to-fork" safety. *See Associated Press*, February 26, 2007; *CQ HealthBeat Update*, February 28, 2007.



## [2] FSIS Announces Food Additives Codex Meeting

USDA, FDA and the U.S. Department of Health and Human Services are sponsoring a public meeting on March 8, 2007, to discuss the U.S. positions that will be taken at the Thirty-Ninth Session of the Codex Committee on Food Additives, which will be held in Beijing, China, April 24-28. In its announcement, USDA's Food Safety and Inspection Service (FSIS) listed the topics to be addressed in China; they include (i) "Endorsement/Revision of Maximum Levels for Food Additives and Processing Aids in Codex Standards," (ii) "Consideration of the Codex General Standard for Food Additives," (iii) "Proposed Draft Guidelines for the Use of Flavorings," and (iv) "Specifications for the Identity and Purity of Food Additives." The agencies are soliciting public comments on the agenda items and draft U.S. positions. *See Federal Register*, February 16, 2006.

## Food and Drug Administration (FDA)

### [3] FDA Announces Public Hearings on Fresh Produce Safety

The FDA has published [notice](#) of two public hearings on fresh produce safety, the first slated for March 20, 2007, and the second for April 13, 2007. In addition to providing information about recent foodborne illness outbreaks, FDA will solicit feedback on (i) "current agricultural and manufacturing practices" for fresh produce; (ii) risk factors associated with these practices; and (iii) ways the agency can improve produce safety. The notice also asks attendees to consider a series of questions related to these issues, as well as the economic feasibility of their responses. Interested parties should register

by March 12, 2007, for the first hearing and by April 6, 2007, for the second. *See Federal Register*, February 27, 2007.

## National Institutes of Health (NIH)

### [4] CERHR to Convene Independent Panel on Bisphenol A

The Center for the Evaluation of Risks to Human Reproduction (CERHR) will convene an [independent panel](#) to review whether bisphenol A (BPA), a chemical used in polycarbonate plastic and resins, is harmful to human reproduction or development. Fifteen scientists will meet on March 5, 2007, in Washington, D.C., to review a [draft report](#) that considers the toxicity of the widely produced chemical, which in vitro and animal studies suggest "may mimic" the hormone estradiol. According to CERHR, humans come into frequent contact with BPA through food and drink packaging, electronic equipment, automobiles, and water supply pipes.

## State/Local Initiatives

### [5] New York City Councilman Introduces Bill to Amend Rule Requiring Calorie Contents on Menus

New York City Councilman Joel Rivera this week introduced a [bill](#) to amend a Board of Health rule requiring some restaurants to list calories on menu boards. "It's a compromise," Rivera said of the bill, which would allow establishments to meet the requirement with brochures and posters instead of menu displays. "It brings to the table the No. 1 goal of informing the customer, while not making it too expensive for the industry," he told the media.



Rivera claims that “more than a dozen council members” support the action, although the city’s health commissioner apparently expects lawmakers, including Council Speaker Nancy Quinn, to reject it. “What Rivera is proposing would totally gut what the Board of Health has already passed, and it goes against what the public wants,” said one critic from the Center for Science in the Public Interest. Meanwhile, the National Restaurant Association has welcomed the bill as a “reasonable” alternative to a “hasty, one-size-fits-all ruling.” See *The New York Times*, February 26 and 27, 2007; *PR Newswire*, February 28, 2007; *New York Post*, March 1, 2007.

## Litigation

### [6] UK High Court Upholds Food Agency Inaction on GM Rice

A British High Court judge has reportedly determined that the Food Standards Agency (FSA) did not act unlawfully by failing to take action when long-grain rice imports from the United States were found to be contaminated by a genetically modified (GM) strain. Environmental pressure group Friends of the Earth brought the legal challenge, seeking a declaration that FSA (i) failed to take action to implement emergency EU legislation to ensure that illegal GM rice was not sold in the UK, (ii) ignored early rice shipments that were potentially contaminated in favor of focusing on preventing further GM-contaminated rice from entering UK markets, (iii) failed to abide by the European Union’s GM precautionary principle, (iv) failed to order a product recall, and (v) failed to require local enforcement action, such as testing for contaminated rice in their regions.

While the court reportedly criticized the agency for a number of mistakes, including its decision not to issue a food alert and its late provision of advice to local authorities, its ruling, announced February 22, 2007, found that the agency fully complied with its obligations under EU law. FSA has apparently decided to launch an internal investigation to address the court’s concerns. FSA Chief Scientist Andrew Wedge stated, “As with all these sorts of incidents, there are lessons to be learned, and we’ll be studying the judgment to see how we can improve what we do in the future.”

A Friends of the Earth spokesperson indicated the group was disappointed with the judge’s decision, but “we are pleased that he recognized that [FSA] had made a number of mistakes in its handling of the GM rice contamination emergency. These mistakes meant that local authorities, the public and retailers were not given information about which rice products were found to be contaminated with illegal GM ingredients.” See *Friends of the Earth Press Release* and *FSA Blog*, February 23, 2007; *foodnavigator.com*, February 26, 2007.

### [7] New Jersey Court Rejects Challenge to Animal Care Rules

A New Jersey appeals court has upheld as reasonable Department of Agriculture regulations regarding the humane “raising, keeping, care, treatment, marketing and sale of domestic live-stock.” [\*N.J. SPCA v. Dept. of Agric., A-6319-03T1 \(N.J. Superior Ct., decided Feb. 16, 2007\)\*](#). A number of animal protection and environmental groups, individuals and farms challenged the regulations, alleging that they authorize industry practices that are not humane and thus violate the legislative mandate to adopt humane standards. Singled out were regulations addressing “forced molting” of egg-



laying hens, mutilating livestock without anesthesia, force feeding ducks and geese for foie gras, and allowing animals to be raised in confined conditions.

The court noted that it was required under the applicable standard of review to accord great deference to the actions of state agencies and could not substitute its judgment for agency expertise “so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.” Reviewing each challenged practice, the court pointed to the administrative record which was replete with instances in which the department, after careful review of the scientific evidence and faced with sometimes conflicting evidence, relied on its technical expertise to make its choices. The court repeatedly pronounced that it was obliged to defer to agency expertise and that any interference would be unwarranted.

Upholding the challenged regulations, the court stated, “Having carefully considered appellants’ arguments, we conclude that many of their contentions find support in the literature and in the veterinary community. So, too, do those of the Department. When the material in the record presents such divergence of opinion, the agency’s expertise and experience are entitled to our deference.”

## Other Developments

### [8] Attorneys General Continue to Apply Pressure over Bud.TV

Attorneys general for 21 states, the District of Columbia and Puerto Rico have written to Anheuser-Busch Cos. to complain that age-verification procedures for its online television network are

unlikely to prevent youth from accessing the site. They contend that simply asking for a name, zip code and birth date, without any verification procedures, will be inadequate to police the Web site that streams beer-themed shows, sports events and musical programming. A company spokesperson reportedly indicated that its age-verification software was turning away “tens of thousands of visitors,” but that the company remained committed to keep it in place “to show that we’re serious about wanting to prevent illegal underage drinking.” The company contends that additional procedures would invade people’s privacy.

The February 15, 2007, letter further contends that the file-sharing component of the Web site is of even greater concern because it “will make it impossible to measure the demographics of the ‘downstream’ audience.” The attorneys general ask, “What is to prevent a downloaded video from being immediately uploaded to video file sharing sites like YouTube?” The letter singles out the groundbreaking nature of the online network, stating “with Bud.TV, Anheuser-Busch is venturing into unknown, and more importantly unmeasured, territory. We feel strongly that, since you are creating the programming and controlling the Internet-based network, not just advertising on it, you have a higher responsibility to ensure that youth are not exposed to the marketing on your site.”

The Center for Science in the Public Interest asked celebrities involved with the project to rethink their participation. The group was also critical of the age-verification procedures planned for the Web site. Further details about CSPI’s initiative appear in issue 190 of this Report. See *Adweek.com*, February 18, 2007; *Advertising Age*, February 19, 2007.



### [9] Immigration Agents Go After Bosses in Sting Operation

While foreign workers are usually the target of immigration authorities and more than 1,000 were arrested in December 2006 after raids on Swift & Co. facilities, *The Wall Street Journal* reports that managers at a pallet-repair facility in New York were expected to plead guilty on February 27, 2007, to knowingly conspiring to transport, harbor, encourage, and induce illegal aliens to reside in the United States for commercial advantage or private gain. The arrests came after the Immigration and Customs Enforcement (ICE) bureau conducted a sting operation using an undercover immigrant informant. Details of ICE's investigation and the facts giving rise to the charges are set forth in the criminal [complaint](#) filed against the managers. The ICE apparently has tapes of conversations indicating that the managers were willing to overlook documentation problems when hiring employees, and a former bookkeeper allegedly told investigators that the company systematically underpaid workers for overtime.

The company and its top executives, who have reportedly denied any corporate strategy to hire undocumented workers or exploit employees, have not been charged, but the investigation is not closed, and immigration officials have stated that the objective is "to move up in the organization." Companies that rely on foreign labor are taking note. An immigration lawyer in Colorado who represents corporate clients was quoted as saying, "Everybody thinks these are show trials. And at the same time, we're scared to death about what's going on." According to the press report, the indicted

IFCO Systems North America managers could face prison terms of up to 20 years. See *The Wall Street Journal*, February 27, 2007.

### [10] CSPI Attacks Restaurant Offerings as "Hybrid Horribles"

"Burgers, pizzas, and quesadillas were never health foods to begin with, but many restaurants are transmogrifying these foods into ever-more harmful creations, and then keeping you in the dark about what they contain," charges Center for Science in the Public Interest Executive Director Michael Jacobson in a recent press release. CSPI alleges that chain restaurants encourage "extreme eating" with appetizers, entrees and desserts that top 2,000 calories. Describing the offerings as "designed to promote obesity, heart disease and stroke," the group recommends Menu Education and Labeling (MEAL) initiatives similar to the one recently adopted in New York City that requires restaurants to list calories on menus. According to CSPI, federal MEAL acts introduced in the 109th Congress are also expected to be revived this session by Representative Rosa DeLauro (D-Conn.), who claims that "nutrition labeling at chain restaurants would help Americans exercise personal responsibility and encourage the restaurant industry to exercise corporate responsibility." See *CSPI Press Release*, February 23, 2007; *Los Angeles Times*, February 27, 2007.

### [11] UK Regulator Reveals Timetable for Advertising Ban

British broadcasting regulator Ofcom has released a timetable for restricting food and drink advertisements aimed at children. As of April 1, 2007, ads for foods high in fat, sugar and salt (HFSS) will



be banned during programs created for 7- to 9-year-olds. By January 1, 2008, similar ads will be prohibited “in and around programs aimed at, or which appeal to, children aged 4 to 15,” and by December 2008, “dedicated children’s channels” must be free of all advertising for HFSS foods. Ofcom will also reassess the restrictions during fall 2008.

Meanwhile, U.S. health advocates are reportedly praising Ofcom’s measures. “If food companies and the advertising industry can survive under the new British standards, they could certainly survive under similarly tough standards in the United States,” the Center for Science in the Public Interest said of the rules, which are expected to cost U.K. broadcasters £39 million in revenue. *See BBC News*, February 22, 2007; *CSPI Press Release*, February 23, 2007; *Food Navigator USA.com*, February 26, 2007.

#### **[12] British Social Service Authorities Allow Obese Child to Remain with Mother**

According to news sources, social service authorities in North Tyneside, England, who were considering removing an obese 8-year-old boy from his mother’s custody, have reached an agreement with the family that will allow the boy to remain in his mother’s care. The boy weighed 218 pounds before an intensive diet and exercise program reduced his weight to 196 pounds. He reportedly has trouble dressing and bathing himself and misses school regularly due to poor health. Authorities have apparently been working with the family for some time, but indicated they had repeatedly failed to attend appointments with nurses, nutritionists

and social workers. The boy’s mother reportedly contends that she does not neglect the child, but press reports note that she refused to stop feeding him “junk food”; he apparently steals such food and hides it, frustrating any efforts to monitor his diet. Doctors and health officials have called the child’s lifestyle “extremely dangerous.” The case attracted national attention after the boy’s mother allowed a TV crew to film the child’s life over the course of a month. *See Associated Press*, February 26, 2007; *Guardian Unlimited and Reuters*, February 27, 2007.

## Media Coverage

#### **[13] Kate Macarthur, “Taco Hell: Rodent Video Signals New Era in PR Crises,” *Advertising Age*, February 26, 2007**

“Your brand disasters will now be broadcast. Widely and instantly,” pronounces *Advertising Age*’s Kate Macarthur in her coverage of Taco Bell’s most recent public relations crisis. The focus of an *E. coli* investigation last year, the chain restaurant now faces renewed censure after a news station recorded a rat infestation at a New York City franchise. By the time Taco Bell’s parent company, Yum Brands, Inc., addressed the issue, the footage was already circulating on the Internet. “There’s nothing more viral on the negative side than rats,” said one marketing expert. “In the world of fast food, hygiene is the No. 1 talk driver, and rats take it to the food-hygiene-on-steroids level.” *See The New York Times*, February 24, 2007.



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