

# Food & Beverage

## LITIGATION UPDATE

Issue 216 • May 25, 2007

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Department of Agriculture (USDA)

##### [1] USDA Questions Safety of Chinese Food Exports

Agriculture Secretary Mike Johanns reportedly questioned the safety of Chinese food exports during recent trade talks addressing the economic relationship between the countries. Johanns apparently said the issue “strikes at the heart of trust,” although China promised to improve regulations after U.S. investigators discovered the industrial plasticizer melamine in Chinese feed ingredients. The Food and Drug Administration (FDA) this week also blocked imports of Chinese toothpaste that allegedly contained diethylene glycol, a toxic solvent used as an inexpensive alternative to glycerin. Although most toothpaste sold in the United States is produced domestically, FDA has issued a “top-priority” import alert as a precaution likely to affect some “gray market” products. *See The New York Times*, May 22 and 23, 2007; *The Wall Street Journal*, May 24, 2007.

Meanwhile, Mission Foods Corp. and Tyson Foods Inc., have reportedly told their American suppliers to stop using ingredients imported from China. China, which exported \$2.5 billion worth of food ingredients in 2006, is the leading

manufacturer of vanilla flavoring, citric acid, thiamine, riboflavin, and folic acid, according to *Los Angeles Times* writer Don Lee. American- or European-made additives are often more expensive than their Chinese counterparts; for example, one Chinese company sells sorbic acid for \$1.30 per pound while the U.S. version fetches \$4 per pound. American food processors, however, have been alarmed by reports that Chinese manufacturers can avoid government oversight by registering their products as nonfood items. Chinese authorities have currently established standards for only 250 of the 1,750 approved food additives made and used in the country. “There is no clear food-classification system, no distinct definition for the range that the food includes, no related regulation about residues that additives leave on foods,” one industry consultant was quoted as saying. “All these bring loopholes for additives manufacturing and usage, give illegal traders opportunities and affect customers’ trust toward food additive safety.” *See The Los Angeles Times*, May 18, 2007; *Food Navigator USA.com*, May 21, 2007; *Pork Alert*, May 22, 2007.

##### [2] Poultry Farmers Object to “Natural” Label on Chicken Enhanced with Saltwater

A poultry producers coalition has reportedly launched a campaign to end “natural” labeling claims for chickens enhanced with water, salt or binding agents such as carrageenan. Sanderson Farms, Inc., Foster Farms and Gold’n Plump Poultry



have asked USDA, which is currently redrafting its rules on “natural” claims, to exclude chicken products that are mechanically injected or tumbled with a marinade solution to improve appearance and moisture retention. The current definition specifies only that products cannot contain artificial ingredients and must be “minimally processed.”

The Center for Science in the Public Interest (CSPI) contends that “some unscrupulous poultry producers add as much as 15 percent saltwater – and then have the gall to label such pumped-up poultry products ‘natural.’” U.S. Representatives Dennis Cardoza (D-Calif.) and Charles Pickering (R-Miss.) claimed in a recent press release that approximately 33 percent of fresh chicken sold to consumers was altered via injection or “vacuum tumbling.” They also argued that such products contain 800 percent more sodium than the plain version. USDA, however, reportedly asserts that the addition of saltwater and binding agents does not significantly differ from the tenderizing techniques that consumers use at home. *See The Wall Street Journal*, May 17, 2007; *CSPI Press Release and Truthful Labeling Coalition Press Release*, May 22, 2007.

### [3] National Organic Standards Board Seeks Nominations

The National Organic Standards Board (NOSB) is [requesting](#) nominations to fill one Environmentalist position on the 15-member board, which also includes organic producers, organic handlers, consumer representatives, a scientist, a certifying agent, and a retailer. The five-year term on the board would begin January 24, 2008.

NOSB is responsible for developing the National List of Allowed and Prohibit Substances and advising the agriculture department on matters

related to the National Organic Program. Written nominations and resumes must be postmarked on or before August 17, 2007.

## Codex Alimentarius Commission

### [4] UN Initiates Assessment of Chlorine Uses in Food Production and Processing

The United Nations’ Codex Alimentarius Commission has asked the World Health Organization (WHO) and Food and Agricultural Organization (FAO) to initiate a research project assessing active chlorine use in food production and processing. Active chlorine apparently refers to chlorine compounds such as hypochlorous acid and its base, hypochlorite ion and its base of chlorite ion, chlorine gas or chlorine dioxide. WHO and FAO will examine (i) the benefits of using active chlorine to reduce food pathogens; (ii) the human health risks associated with chemical residue; (iii) the potential loss of nutrients with specific treatments; and (iv) the chemical residue levels in or on treated foods. The two agencies have also issued an [information](#) request for published and unpublished materials that will be considered in a 2007 expert panel. *See Food Navigator USA.com*, May 4, 2007; *FPA/GMA Food Safety Update*, May 16, 2007.

## Other Developments

### [5] Menu Foods Offers to Pay Pet Owners Directly

Menu Foods, Inc. has reportedly posted claims information on its Web site, providing a way for pet owners whose pets died or were injured from a contaminated food outbreak to recover their expenses from the company. Pet owners who



choose to participate in the plan must release any and all claims for damages, including recoveries that could be obtained under any of the 50 putative class-action lawsuits that are pending against the company in the United States and Canada. Pet owners who wish to take advantage of the direct offer must provide receipts from the purchase of affected products, copies of product labels, and copies of records from a veterinarian, clinic or other facility. They are asked to save all opened and unopened cans and pouches of suspected cat and dog food and must fill out lengthy questionnaires. One attorney assessing the company's offer was quoted as saying, "[Pet owners will] be lucky to get a free can of dog food." See *ConsumerAffairs.com*, May 17, 2007.

#### **[6] British Companies Begin Labeling Foods with Carbon Footprint Information**

Several British food companies and retailers are apparently planning to add "carbon footprint" labels to their products, showing the quantity of carbon-dioxide emissions associated with manufacturing and shipping foods and other goods. In conjunction with the Carbon Trust, a private consultant the U.K. government is funding, these companies are working toward reducing their energy usage; the initiative is expected to help shoppers choose products with the smallest carbon footprint and allow them to compare locally produced and imported foods.

Walkers Cheese & Onion Crisps are the first foods for which a carbon footprint has been calculated. Taking into account the energy used in producing the raw materials (potatoes, sunflowers and seasoning), manufacturing, packaging, distribution, and disposal of empty packages, a standard package purportedly has a carbon footprint of 75 grams. *The Economist* points out that some carbon-dioxide

generators in the processing chain will be ignored, such as employees commuting to work; the energy needed for refrigeration, lighting and heating in shops; or product usage in the home. Nor can producers come up with more than an average shipping distance for products transported to different parts of the country for sale. Agricultural modeling is also reportedly causing some difficulties because some emissions sources can be readily calculated, while others, such as nitrous-oxide emissions from soils and methane emissions from animals, cannot.

The Carbon Trust is reportedly working with a number of interests to resolve these issues and come up with a common methodology for all participants to use. Companies that have committed to participation include Cadbury Schweppes; Tesco; Marks & Spencer; and Sainsbury's. Despite their pledges, some of these companies are already reportedly shipping products all over the globe from cultivation to shipping to packing to distribution. For example, coffee sold at Sainsbury's is made from beans cultivated in Tanzania, driven to Dar-es-Salaam, shipped to India for packing, then transported some 5,000 miles to Southampton, 330 miles to Gateshead and finally driven to Leeds for distribution. Tesco apparently sends its haddock, taken in the Atlantic Ocean off the coast of Scotland, to be processed in Poland before it is returned to Britain for sale. See *The Economist*, May 17, 2007; *The Sunday Times*, May 20, 2007.

#### **[7] Study Claims Functional Foods Require Additional Monitoring**

"We need to invest more in finding out what functional foods can contribute to individual and public health in relation to the promises made by manufacturers," conclude researchers from the Dutch National Institute for Public Health and the



Environment (RIVM) in a recent study focusing on phytosterols and stanols-enriched products. Nynke de Jong, et al., “Functional Foods: The Case for Closer Evaluation, *British Medical Journal*, May 19, 2007. The term “functional food,” a category not closely regulated in the United States, describes modified food products that claim to improve health or quality of life. Clinical trials have reported that daily consumption of products containing phytosterols/-stanols can decrease total cholesterol levels by 17 percent, but other studies have warned that increased plant sterol levels in the blood may cause adverse events. “Very little is known about exposure, long-term or otherwise, and safety under free condition of use, and whether and how functional foods interfere with drugs designed for the same target,” write the authors, in warning that patients who use functional foods may stop taking prescribed medication, such as cholesterol-lowering pharmaceuticals.

## Media Coverage

### [8] *NEJM* Gives the Low Down on New York City *Trans* Fat Ban

A perspective piece in the *New England Journal of Medicine* discusses the *trans* fat ban that will take effect in New York City eateries beginning July 1, 2007. Contributing editor Susan Okie, M.D., tells of the efforts that pastry chefs, french fry cooks and others have undertaken to make products that conform to a half-gram per serving limit; many will apparently be switching to saturated fats. Health commissioner Thomas Frieden opines that even switching to suet would be better in terms of health. Frieden estimates that eliminating artificial *trans* fats from city menus will save between 200 and 500 lives each year. According to Okie, the benefits of switching

away from *trans* fats could amount to a 12- to 22-percent reduction in the number of myocardial infarctions and deaths due to coronary disease.

Center for Science in the Public Interest Executive Director Michael Jacobson is quoted as saying, “New York is critical. What [the restaurant chains] do in New York, they’re going to do throughout the United States.” The article also discusses what food manufacturers have done with their products since the Food and Drug Administration required information about *trans*-fat content on labels. Okie acknowledges that “not everyone is equally optimistic about the likely effect on rates of illness and mortality,” and suggests that rules requiring calorie information to be posted may be more effective in getting Americans to follow a healthier diet. See *The New England Journal of Medicine*, May 17, 2007.

Meanwhile, Montgomery County, Maryland, has also adopted a ban on partially hydrogenated oils in restaurants, supermarket bakeries and delis. The new regulation, adopted May 15, 2007, will apply to restaurants and other establishments serving food beginning in January 2008; establishments offering baked goods, other than packaged goods made outside the county, will have to comply as of January 2009. Thus, Sara Lee cakes will be exempt, but local donut shops will be subject to the ban. According to a news source, the county’s public health officer has not yet determined how the measure will be enforced, although violators will have to pay fines of up to \$75, with a three-day license suspension for repeat offenders. Eatery managers and food inspectors will have to undergo training; the latter will learn how to analyze menus, recipes and ingredient labels during routine health inspections. Bakers are apparently concerned about



taste, texture and cost issues. Many will switch to butter. Those who sell ethnic foods question whether health will be improved by eliminating *trans* fats given the high-calorie content of the foods their patrons consume. See *The Washington Post*, May 16 and 17, 2007.

**[9] Jacob Sullum, "An Epidemic of Meddling,"**  
*Reason*, May 2007

*Reason's* senior editor Jacob Sullum, who has often disparaged anti-smoking crusaders, writes in this article that public health authorities have strayed again by attempting to intervene in the obesity epidemic. Referring to overeating, gambling, smoking, and playing violent video games as behavioral choices, Sullum distinguishes such behaviors from external threats, like communicable diseases, factory emissions and contaminated water, which, he believes, are the only public health problems government should address.

Sullum attempts to make the case for people choosing to "accept a shorter life span, or an increased risk of disease or injury, in exchange for more pleasure of less comfort." "With lifestyle choices that pose longer-term risks, such as smoking and overeating, the dangers may be easier to ignore, but it is still possible for someone with a certain set of tastes and preferences to say, 'Let me enjoy myself now; I'll take my chances.' The assumption that such tradeoffs are unacceptable is the unspoken moral premise of public health."

He contends, "There is little evidence that kids like candy and ice cream, or eat more of it, because of advertising; that they see more food advertising now than they did when they were thinner; or that bans on ads aimed at children, which have been imposed in Sweden and Quebec, make kids slimmer." He further suggests, "Restaurants can sell only what

people are willing to eat, and litigation will not change that. Establishing fast-food-free zones near schools would not prevent students from bringing their own fattening food to school, and it would not affect most of their meals in any case."

Sullum opines that a junk-food tax would be unfair, because both thin as well as fat people would have to pay it. To illustrate the purported absurdity of government regulation related to obesity, he recommends instead that people be taxed for every pound over their ideal weight or every citizen be forced to participate in calisthenics "in the town square every morning." As he has argued previously, smokers may raise the cost of treating certain illnesses, but it reduces some other costs, "since smokers tend to die sooner than nonsmokers and therefore do not use as much health care in old age, do not spend as much time in nursing homes, and do not draw as much on Social Security. Something similar might be true of obesity."

The article concludes with a quote from John Stuart Mill, "Over himself, over his own body and mind, the individual is sovereign." According to Sullum, "The mandate 'Health for All' replaces that principle with a legally enforceable duty to be well, a demand by the collective to keep one's body and mind in optimal condition. A government empowered to maximize health is not a government under which anyone who values liberty would want to live."

## Scientific/Technical Items

**[10] Researchers Link High-Salt Diet to  
Ulcer-Causing Bacteria**

A study recently presented at the American Society of Microbiology conference claimed that a



high-sodium diet may increase the potency of *Helicobacter pylori*, the bacteria responsible for up to 90 percent of duodenal ulcers and 80 percent of gastric ulcers. Lead researcher Hanan Gancz, of the Uniformed Services University of the Health Sciences in Bethesda, Md., reported that although high-salt concentrations decreased the growth rate of *H. pylori*, it caused the bacteria to change shape and form long chains. Gancz noted that two genes associated with *H. pylori*'s virulence also became more active in the presence of salt. "Epidemiological evidence has long implied that there is a connection between *H. pylori* and the composition of the human diet. This is especially true for diets rich in salt," Gancz was quoted as saying. "Apparently *H. pylori* closely monitors the diets of those people whom it infects." See *BBC News*, May 22, 2007.

#### [11] Dairy Consumption Allegedly Linked to Dementia

A U.S. study presented this month at the Experimental Biology conference in Washington, D.C., has reportedly identified a link between high dairy intake and dementia in older men and women. Researchers scanned the brains of 79 men and 153 women aged 60 to 86 for brain lesions, areas of tissue damage ranging from tiny flaws in healthy people to those causing cognitive impairment. When controlling for factors such as fat intake, age and high blood pressure, the study concluded that participants who consumed the most calcium and vitamin D had a higher total volume of brain lesions. "We do not know if high calcium and vitamin D intake are involved with the causation of brain lesions, but the study provides support to the growing number of researchers who are concerned about the effects of too much calcium, particularly among older adults, given the current emphasis on promoting high intakes of calcium and vitamin D," lead researcher Martha Payne, Ph.D., was quoted as saying. Scientists apparently speculate that excessive calcium may produce bone-like deposits in blood vessel walls, causing them to narrow and restrict blood-flow to neurons.



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