

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

## Legislation, Regulations and Standards

### Department of the Treasury

#### [1] Alcohol Bureau Proposes New Beverage Labeling Rules

The Alcohol and Tobacco Tax and Trade Bureau (TTB) has issued a [notice](#) of proposed rulemaking that would require the makers of wine, distilled spirits and malt beverages to include serving sizes and nutritional information on their product packaging and advertisements. The rules would require “a statement of alcohol content, expressed as a percentage of alcohol by volume, on all alcohol beverage products” and a “Serving Facts” panel, including “a statement of calories, carbohydrates, fat, and protein,” that would appear on alcohol beverage labels. Commenters may request a public hearing before the comment closing date, which is October 29, 2007.

In its notice, TTB discusses the Center for Science in the Public Interest’s 2003 petition requesting such labeling and a previous notice issued on the subject that generated more than 19,000 comments. The bulk of this notice highlights the comments received and TTB’s responses to them. According to TTB, the comments “clearly indicate that consumers are very interested in having information about the calorie and nutrient content of the alcohol beverage products they

purchase.” While the proposed regulations would specify reference serving sizes for wine, distilled spirits and malt beverages “based on the amount of beverage customarily consumed as a single serving,” TTB decided not to define a “standard drink” at this time. TTB intends to make the requirements mandatory three years after the date the final rule is published. An industry spokesperson reportedly welcomed the proposal. *See Federal Register* and *Associated Press*, July 31, 2007.

### Food and Drug Administration (FDA)

#### [2] FDA Rolls Out Voluntary National Food-Safety Program for State Regulators

FDA has launched its Manufactured Food Regulatory Program Standards which, while voluntary, are intended to establish uniformity among state food-safety programs. A draft [version](#) of the standards, released for comment in 2006, appears to be the foundation for the agency’s initiative. According to FDA, the standards have been approved by the Office of Management and Budget and will be pilot-tested in Missouri, New York and Oregon before September 30, 2007. An FDA spokesperson called the program “a significant step in further integrating our food-safety system.” Program elements address training, inspection, inspection audits, food defense preparedness and response, compliance and enforcement, resources, and laboratory support. A news source said the new program “amounted to an acknowledgement, increasingly discussed within the FDA in recent months, that federal and state officials



need to combine forces to combat food-safety problems.” See *FDA News* and *The Wall Street Journal*, July 31, 2007.

### [3] FDA Task Force Issues Report Calling for Nanotechnology-Associated Guidance

The FDA’s Nanotechnology Task Force has issued a [report](#), *Nanotechnology*, which finds that “nanoscale materials present regulatory challenges similar to those posed by products using other emerging technologies.” The report makes both scientific and regulatory recommendations, including (i) “strengthening FDA’s promotion of, and participation in, research and other efforts to increase scientific understanding, to facilitate assessment of data needs for regulated products”; (ii) evaluating “the adequacy of current testing approaches to assess safety, effectiveness and quality of products that use nanoscale materials”; and (iii) “encouraging manufacturers to consult with the agency regarding the appropriateness of testing methodologies for evaluating products using nanoscale materials.” The task force further calls for the identification of particle size for food and color additives and the issuance of guidance related to dietary ingredients modified to include nanoscale materials. The report rejects wholesale labeling requirements for products containing nanoscale materials, but recommends that the agency address the issue on a case-by-case basis.

In a related development, the European Commission has issued a [consultation](#) on a voluntary code of conduct for researchers and companies developing nanotechnology products. The consultation recommends that the code of conduct highlight three basic principles, i.e., precaution, inclusiveness and integrity, as a means of promoting safe and responsible nanotechnology research. Comments can be submitted until September 21, 2007.

## 110th Congress

### [4] Kennedy Working on Precedent-Setting Tobacco Ad Legislation

According to a news source, Senator Edward Kennedy (D-Mass.) is planning to introduce legislation in fall 2007 that would significantly affect the way tobacco products are advertised. Food and alcohol interests are apparently watching the initiative closely, concerned that the requirements could set a precedent for their industries. The measure, which would give the Food and Drug Administration (FDA) regulatory authority over tobacco, would reportedly prohibit color or imagery in advertisements for tobacco where 15 percent of the ad audience is younger than age 18, prescribe type sizes for health warnings and limit what the companies can use in giveaways or sponsorships. While cigarette manufacturers have voluntarily instituted most of these proposed requirements, advertising executives believe such legislation constitutes “a de facto ban on advertising of a legal product” and would be subject to a First Amendment challenge.

Similar legislation (S. 625) has already been approved by a Senate subcommittee. While it gives the FDA regulatory authority over cigarettes and other tobacco products and prescribes new warnings and type sizes, it does not go as far as allowing 15 percent of the audience to determine whether or how a product can be advertised. See *Advertising Age*, July 30, 2007; *CQ Today*, August 1, 2007.

## Litigation

### [5] Grand Jury Looks into Chiquita’s Protection Payments in Colombia

In a front-page story, *The Wall Street Journal* has reported that a former Chiquita Brands International, Inc. executive is facing the possibility



of criminal charges as a grand jury considers the company's decision to continue making "security payments" to a violent paramilitary group in Colombia after self-reporting the illegal conduct to the U.S. Department of Justice. Roderick Hills, who headed Chiquita's audit committee and formerly chaired the Securities and Exchange Commission, reported the payments to authorities in April 2003. In past years, such admissions apparently earned a company lenient treatment, with many receiving "deferred prosecution," i.e., escaping criminal charges unless they committed additional crimes. The government is now taking a tougher approach; the company entered a guilty plea to charges of engaging in transactions with a terrorist group and agreed to \$25 million in fines in March 2007. Because Chiquita's payments continued for a year after the conduct was reported, Hills and other high company officials are apparently under investigation for their role in allowing that to happen.

Critics contend that the government's stance could make companies think twice about self-reporting, and Hills's supporters find his dilemma "absurd." U.S. prosecutors, however, defend the investigation, saying, "Even though Chiquita didn't murder anyone, that's what the money was used for – to buy weapons." A Justice Department spokesperson was quoted as saying, "If the only way for a company to conduct business in a particular location is to do so illegally, then the company probably shouldn't be doing business there." U.S. District Judge Royce Lambreth, who presided over the company's plea hearing, has reportedly asked prosecutors to notify him before October whether company officials will be indicted; he put the sentencing hearing on hold because of the company's cooperation in the matter. *See The Wall Street Journal*, August 2, 2007.

#### [6] Cadbury Pays Fines and Costs for *Salmonella*-Contaminated Chocolate

Apologizing to those sickened in 2006 by its *salmonella*-contaminated chocolates, Cadbury Schweppes reportedly said to a Birmingham Crown Court judge that it unreservedly accepted a £1 million (approximately \$2 million) fine following its plea to nine food-safety violations. The charges included a failure to notify authorities about the product contamination, putting contaminated chocolate on sale, and food-safety issues at a manufacturing plant. The company will also pay costs in excess of £152,000. While the court was apparently satisfied that Cadbury did not consciously place people's health at risk when it changed its testing system, it did question the company's failure to sufficiently evaluate the change.

The national *salmonella* outbreak gave 42 people food poisoning and sent three to the hospital. Industry watchers suggest that the case is unprecedented in the United Kingdom, which has apparently taken a tougher position on food-safety violations. They say that food companies in the United Kingdom and the European Union will have to balance risks of prosecution for failing to immediately report contamination with the possibility that the government could demand a recall over even minor issues. *See CNNMoney.com*, July 16, 2007; *The Scotsman* and *Guardian*, July 17, 2007; *Food Safety Update*, July 27, 2007.

#### [7] Government Misses Deadline to Appeal Court's "Dolphin-Safe" Label Ruling

According to a news source, the U.S. Department of Commerce has not appealed a Ninth Circuit Court of Appeals decision that rejected government attempts to change the qualifications for labeling canned tuna as dolphin safe. Thus, the standards



established by Congress in 1990, applying to fish caught without harming dolphins, stand. A spokesperson for Earth Island Institute, which has been litigating government attempts to broaden the standard for more than a decade, was quoted as saying, in regard to the government's decision not to file an appeal, "At long last, the dolphin-safe label for tuna is safe from the Bush administration's legal attack." Further details about the Ninth Circuit's ruling appear in issue 213 of this Update. *See San Francisco Chronicle*, August 2, 2007.

**[8] Court Hears Testimony on FTC Challenge to Whole Foods' Purchase of Wild Oats**

A U.S. district court judge reportedly began hearing argument and testimony on whether the plan of Whole Foods Market, Inc. to purchase Wild Oats Market, Inc. violates federal antitrust laws. The Federal Trade Commission (FTC) challenged the deal in June 2007, claiming that it will lead to less competition in the "premium and organic" grocery sector. Antitrust experts have already reportedly given conflicting testimony on the issue, and a key question in the two-day hearing is whether Whole Foods shoppers limit their organic grocery shopping to one retailer or visit multiple outlets. Company officials contend that organics are sold in numerous supermarkets and specialty grocery stores and that a merger will not raise prices. A Whole Foods lawyer was quoted as saying, "Whole Foods prices are lower than Wild Oats prices." The court is expected to issue a ruling by mid-August 2007. *See ABA Journal*, July 30, 2007; *Washington Post*, August 1, 2007; *The Wall Street Journal*, July 30 and August 1, 2007.

## Legal Literature

**[9] Alois Stutzer, "Limited Self-Control, Obesity and the Loss of Happiness," July 2007**

This [paper](#), authored by a business and economics professor at the University of Basel, discusses research on the relationship between people's body mass index and their reported subjective well-being; the obesity phenomenon, its causes and consequences; and strategies for testing and identifying limited self-control in observed body mass. The author concludes that, while further research is needed, Swiss adults with limited will power vis-à-vis a healthy diet have reduced well-being when they are obese. Accordingly, he suggests, "there is a need for institutional innovations that help people with self-control problems to protect themselves without incurring high costs on people who do not struggle with food consumption and without undermining self-control any further."

**[10] Laurel Harbour & Marc Shelley, "The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World," *The Practical Litigator*, July 2007**

Shook, Hardy & Bacon Partner [Laurel Harbour](#) and Associate [Marc Shelley](#) discuss the growing trend of European nations to allow multi-party litigation in their courts. While most European courts are concerned about the class-action abuses that have occurred in the U.S. system and are, accordingly, drafting their procedural rules with care, class plaintiffs nonetheless are changing Europe's litigation climate. The authors suggest that U.S. lawyers representing international corporations learn about European approaches to multi-claimant litigation because "litigation has been globalized." They also predict that some of the procedural



devices American courts have adopted to control their dockets may be exported as European judges face similar problems and issues dealing with thousands of actions arising out of a single dispute, involving hundreds of law firms and millions of pages of documents.

## Other Developments

### [11] Some Chinese Farmers Mislabeled Food Products

A special report in *Business Week* addresses whether organic food exports from China may not actually be organic. According to the article, “[w]hile falsely labeled organic foods are a problem all over the world, in China the situation is murkier than just about anywhere.” Apparently, multiple Chinese agencies claim the right to certify foods as organic. The issue has become critical given the rapid increase in China’s organic exports; totaling some 5 percent of the global organics trade in 2005, up from 1.2 percent the preceding year. Importers and U.S. retailers have reportedly found that vegetables and other produce from China that were supposedly organic had been treated with pesticides. See *Business Week*, July 30, 2007.

## Scientific/Technical Items

### [12] CDC Publishes Research Showing More Teens Consume Hard Liquor Than Beer

Reporting data from studies in Arkansas, Nebraska, New Mexico, and Wyoming, the Centers for Disease Control and Prevention has found that liquor, i.e., bourbon, rum, scotch, vodka, or whiskey, is “the most prevalent type of alcoholic beverage usually consumed among students in 9th-12th grades who reported current alcohol use or

binge drinking.” [CDC, “Type of Alcoholic Beverages Usually Consumed by Students in 9th-12th Grades – Four States, 2005,” \*MMWR Weekly\*, July 27, 2007.](#) The Center for Science in the Public Interest (CSPI) issued a statement when the report was released calling the findings “a huge victory for liquor marketers,” which promote liquors flavored with “kid-friendly flavors.” CSPI calls for federal and state regulators to take a fresh look at the industry before companies start “putting Hello Kitty or Barbie on gin and vodka.” See *CSPI Press Release*, July 27, 2007.

### [13] Study Finding Obesity Clusters Gets Widespread Publicity

An article appearing in *The New England Journal of Medicine* generated extensive media coverage in late July 2007, with headlines such as “Study Says Obesity Can be Contagious,” “Obesity Spreads in Social Circles as Trends do” and “Silly Study Says: Practice Safe Friendship.” [Nicholas Christakis & James Fowler, “The Spread of Obesity in a Large Social Network over 32 Years,” \*NEJM\*, July 26, 2007.](#) Based on data generated by an interconnected network of more than 12,000 people assessed as part of the Framingham Heart Study, the research showed that people are more likely to become obese when a friend became obese; the relationship apparently increased a person’s chances of becoming obese by 57 percent. Sibling influence increased the risk of obesity by 40 percent, and spousal obesity increased the risk by 37 percent. According to critics, the notion that people can “catch” obesity from friends and family will remove personal responsibility from strategies to deal with the problem, and public officials and activists may be given free reign to regulate in the name of preventing “second-hand obesity.” See *The New York Times*, July 25, 2007; *The Washington Post*, July 26, 2007; *consumerfreedom.com*, July 26 and 27, 2007.



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