

Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards White House

[1] Presidential Cancer Panel Criticizes U.S. Food Subsidies and Youth Food Marketing

A recent presidential cancer panel [report](#) calls on the federal government to “cease being a purveyor of unhealthy foods that lead to disease and increased health care costs,” recommending that agencies revamp a number of policies allegedly contributing to escalating rates of obesity. Members of the President’s Cancer Panel include LaSalle Leffall, professor of surgery at the Howard University College of Medicine; Margaret Kripke, executive vice president of the University of Texas M. D. Anderson Cancer Center; and Lance Armstrong, cancer survivor and founder of the Lance Armstrong Foundation.

The panelists specifically recommend that Congress and federal agencies revisit agricultural subsidies and health policies to ensure the public’s access to nutritious food. “For example, current agricultural and public health policy is not coordinated,” the report states. “[W]e heavily subsidize the growth of foods (e.g., corn, soy) that in their processed forms (e.g., high fructose corn syrup, hydrogenated corn and soybean oils, grain-fed cattle) are known contributors to obesity and associated chronic diseases, including cancer.”

The report identifies the Farm Security and Rural Investment Act of 2002 (the Farm Bill) as an opportunity to “support fruit and vegetable farmers, support the national food supply, and enhance the health of participants in the national school lunch, food stamp, and Women, Infant and Children food assistance programs.” In addition, the panel advocates the regulation of food advertising in children’s media, improvements in school nutrition and “healthy eating” education for all segments of the population. Further research would be needed to determine: (i) the influence of diet, weight loss and physical activity on cancer biomarkers, preneoplastic changes and incidence of specific cancers; (ii) the mechanisms of food addiction; (iii) the relationship between socioeconomic position and obesity; and (iv) the role of high-fructose corn syrup, food additives and chemicals in obesity. “Ineffective policies, in conjunction with limited regulation of sales and marketing in the food and beverage industry, have spawned a culture that struggles to make healthy choices – a culture in dire need of change,” concludes the report. *See Reuters*, August 16, 2007.

Alcohol and Tobacco Tax and Trade Bureau (TTB)

[2] State AGs Call for Crackdown on Alcohol/Caffeine Beverages

News sources report that attorneys general from 28 states, Guam and the District of Columbia have called on the TTB administrator to “expand its



efforts to prevent misleading health-related statements from being made in connection with” the marketing of alcoholic beverages with caffeine and other stimulants. In an August 20, 2007, letter, the attorneys general contend that marketers of alcoholic energy drinks are “unconscionably appealing to young drinkers” who are already major consumers of non-alcoholic energy drinks. They suggest that beverage company claims about the stimulating properties of their drinks can cause youths to believe they can continue to drink and function normally while intoxicated. Spokespersons for companies targeted in the letter reportedly contend that they do not market to youths, their beverages are clearly marked as containing alcohol, and their beverages contain less caffeine than a 12-ounce cup of coffee. *See The Wall Street Journal*, August 21 and 22, 2007; *Advertising Age*, August 21, 2007.

Food and Drug Administration (FDA)

[3] FDA Considers Outsourcing Jobs After Scrapping Lab Closure Plan

FDA last week scrapped plans to close 13 food-testing laboratories, but has since announced that it will consider outsourcing 300 administrative positions to meet the competitive sourcing initiatives set by the Office of Management and Budget and the Department of Health and Human Services. The agency has already excluded from the review lab technicians and field office workers at facilities responsible for food and medical product inspections. Nevertheless, the National Treasury Employees Union (NTEU), which represents more than one-half of FDA employees, has asked Congress to oppose the outsourcing plan. “It’s a disgrace given the recent crisis we have experienced with our

food supply and other imports,” said NTEU President Colleen Kelley. FDA is reportedly awaiting a presidential panel report before reorganizing its lab structure, a move that lawmakers have criticized as endangering food safety priorities. “If it had been implemented, the FDA’s plan could have put the American public health at an even greater risk,” U.S. Representative Bart Stupak (D-Mich.) was quoted as saying. *See Reuters*, August 17, 2007; *Associated Press*, August 23, 2007.

Codex Alimentarius Commission

[4] Codex Committee Seeks Additional Information on Food Additives

The 39th Session of the Codex Committee on Food Additives (CCFA) has issued a [Circular Letter](#) seeking comments on several draft and proposed draft food additive provisions of the General Standard for Food Additives (GSFA). CCFA has specifically requested justification for the use of additives in certain applications, for example the use of aspartame, sucralose and acesulfame potassium in fermented milk products, cheese analogues, bread, dried fruit, and vinegar. Other additives and colorings under consideration include neotame, saccharin, carmine, beta-carotene, polysorbates, sulphites, Brilliant Blue FCF, Caramel III, and Caramel IV. In addition, CCFA will accept proposals on the maximum levels and technological needs for annatto extracts, lycopene and food additives containing aluminum. CCFA has also established a U.S.-led electronic working group “to consider the outstanding recommendations, relevant decisions made at the session and new comments submitted in response to [the] Circular Letter.” If the required information is not received by September 15, 2007, CCFA will discontinue work on the food additive



provisions and remove them from the GSEA. *See FoodNavigator-USA.com*, August 16, 2007.

In a related development, the Department of Agriculture's Office of the Under Secretary for Food Safety and the Food and Drug Administration have [announced](#) a public meeting to discuss agenda items coming before the 7th Session of the Codex ad hoc Intergovernmental Task Force on Foods Derived from Biotechnology (FBT). The September 6, 2007, meeting will address U.S. draft positions on (i) a review of the work by intergovernmental organizations related to food derived from biotechnology; (ii) a summary of the FAO/WHO expert report on the safety assessment of food derived from recombinant-DNA animals; (iii) a proposed draft guideline for conducting a safety assessment of foods derived from recombinant-DNA animals; (iv) a proposed draft annex to the guideline for conducting a safety assessment of food derived from recombinant-DNA plants modified for nutritional or health benefits; and (v) a proposed draft annex to the guideline for conducting a food safety assessment of food derived from recombinant-DNA plants with a low-level presence of recombinant-DNA plant material. The next meeting of the FBT is scheduled for September 24-28, 2007, in Chiba, Japan.

Litigation

[5] **FTC Appeals Whole Foods Merger Decision; Sale Put on Hold**

The Federal Trade Commission (FTC) took an immediate appeal from a district court's decision allowing Whole Foods Market, Inc. to purchase rival Wild Oats Markets, Inc., and, on the FTC's application for emergency injunctive relief, the D.C. Circuit Court of Appeals [placed](#) the proposed merger on

hold. The companies were required to file responsive pleadings by August 22, 2007; and the FTC's reply was due the following day. While the court indicated in its order that the grant of injunctive relief was not to be construed as a ruling on the merits, at least one antitrust lawyer suggested that the court would not have held up the deal or sought briefs from the companies if it did not deem the agency's arguments significant. Counsel for the natural foods supermarkets reportedly expressed their hopes for a quick ruling so they can move ahead with the acquisition.

FTC argued in one of its circuit court [filings](#) that the district court ignored assertions in company e-mails and other electronic material that the reason Whole Foods sought to buy Wild Oats was to eliminate competition. According to a news source, the district court's opinion, which was placed under seal, made little mention of statements by a Whole Foods executive. The FTC contends that this constitutes a key error in the lower court's ruling. *See Associated Press*, August 17, 2007; *Reuters and The Wall Street Journal*, August 20, 2007; *The Wall Street Journal*, August 22, 2007.

Media Coverage

[6] **Marion Nestle, "Eating Made Simple: How do you cope with a mountain of conflicting advice?," *Scientific American*, September 2007**

"Without improved methods to ensure compliance with dietary regimens, research debates are likely to rage unabated," argues New York University Professor Marion Nestle in this article discussing the plethora of conflicting studies on diet and nutrition. Nestle contends that research sponsored by the food and beverage industries has contributed to the



confusion over what constitutes a healthy diet, leading to a population increasingly at risk of obesity, cardiovascular disease and diabetes. She specifically faults the meat, dairy and fish industries for allegedly criticizing independent studies that contradict their own research. "Food companies prefer studies of single nutrients because they can use the results to sell products," Nestle asserts. "Add vitamins to candies, and you can market them as health foods." She attributes increased obesity rates to market factors ranging from Reagan Administration policies that deregulated agricultural production to the "shareholder value movement," which purportedly encouraged food companies to endorse frequent snacking and larger portion sizes. At the same time, the Department of Agriculture has not committed to alternative food choices like organics because its "principle mandate is to promote conventional agriculture," according to Nestle. She ultimately recommends that, absent conclusive research, Americans follow a common-sense plan focused on eating less, moving more and consuming more fruits, vegetables and whole grains.

[7] Minimal Resources Devoted to Organics Oversight

A recent article in *The New York Times* reports that just nine employees and a \$1.5 million annual budget are responsible for administering the National Organic Program, which regulates a rapidly growing \$14 billion industry. Contending that consumers can never be certain their organic products actually meet government standards because certification is in the hands of third parties and greater volumes of purportedly organic foods are being imported from countries like China that provide questionable regulatory oversight, the

article suggests that additional resources would help.

Originally designed to regulate the labels on produce and dairy products, the program is constantly under pressure to adopt new standards for products such as frozen dinners, while companies push the Department of Agriculture to approve non-organic ingredients for use in organic products. "With just nine employees," writes Andrew Martin, "one of whom performs clerical duties, the National Organic Program would be lucky to effectively oversee the organic industry in Vermont, let alone the rest of the world." More funding may be on the way as the Bush administration has proposed increasing the program's budget in 2008 to \$2.7 million, and the House approved a version of the farm bill that would authorize \$60 million for various organic initiatives.

"Whether organic foods are healthier than conventional products is open to debate. But that doesn't mean Congress should give short shrift to research and regulation of organics. The growing popularity of organic products helps small farmers stay in business. They're also better for the environment and help ease farmers away from crops that require government subsidies," the article concludes. See *The New York Times*, August 19, 2007.

Scientific/Technical Items

[8] Study Suggests Common Cold Virus Link to Obesity

A recent U.S. study reportedly suggests that a common adenovirus known as Ad-36 causes adult stem cells to develop into fat cells. Researchers presented their findings this week at the American



Chemical Society conference in Boston, Mass., where they claimed that “Ad-36 stimulates human adult stem cells to become pre-fat cells and store more fat.” The study compared adult stem cells infected with Ad-36 to those without the virus, finding that most of the infected cells developed into “pre-fat” cells while the uninfected cells did not. Moreover, the study apparently concluded that increased fat growth corresponded to larger viral doses and that infected cells collected fat at a faster than normal rate. The research team had shown in an earlier study that 30 percent of obese people carry the adenovirus, as opposed to 11 percent of non-obese people. “We’re not saying that a virus is the only cause of obesity, but this study provides stronger evidence that some obesity cases may involve viral infections,” said Magdalena Pasarica, an obesity researcher with Louisiana State University’s Pennington Biomedical Research Center. “Not all infected people will develop obesity. We would ultimately like to identify the underlying factors that predispose some obese people to develop this virus and ultimately find a way to treat it.” See *Forbes.com* and *The London Times*, August 21, 2007.



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