Food & Beverage

LITIGATION UPDATE

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LITIGATION UPDATE

Legislation, Regulations and Standards

110th Congress

[1] Missouri Senator Introduces "Poison Pill" Amendment to Farm Bill

The advocacy group Public Citizen has launched an action **campaign** urging opposition to a Farm Bill amendment (S.AMDT. 3771) introduced by Senator Christopher (Kit) Bond (R-Mo.). Characterized as a "poison pill anti-regulatory amendment," the measure would require federal agencies to conduct an agricultural regulatory flexibility analysis for every proposed rule that will have a "significant economic impact on a substantial number of agricultural entities." The analysis, which would require agencies to consider a number of criteria, such as recordkeeping and compliance burdens and regulatory alternatives, would also require notification of affected entities, public comment, open conferences or hearings, and modification of procedural rules "to reduce the cost or complexity of participation in the rulemaking by agricultural entities." According to Public Citizen, the proposal would "create new ways for industry to delay or weaken needed protections for food safety, clean air, worker health and safety, animal welfare, and much, much more."

The amendment contains provisions that would further require federal agencies to review all rules adopted within the previous 10 years "to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objective of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such agricultural entities." Senator Bond's proposed amendment, introduced December 10, 2007, would also create a Chief Counsel for Advocacy of the Department of Agriculture who would report on compliance with the law and would be authorized to (i) appear as *amicus curiae* in any action brought to review a rule, (ii) measure the costs of government regulation on agricultural entities, (iii) make legislative and nonlegislative proposals to eliminate excessive or unnecessary regulation of agricultural interests, and (iv) serve as a focal point for receipt of complaints about federal policies affecting agricultural entities.

Department of Health and Human Services (HHS)

[2] Agreements Entered with China to Enhance Imported Food and Feed Safety

HHS Secretary Mike Leavitt has **announced** that agreements to ensure the safety of food, feed, drug, and medical device imports have been entered with the General Administration of Quality Supervision,

Inspection and Quarantine (AQSIQ) of the People's Republic of China.

The food and feed agreement applies to low-acid and acidified canned foods, pet foods/treats, food and feed ingredients such as wheat gluten and rice protein, and aquaculture farming products. Under the agreement, Chinese producers must meet Food and Drug Administration (FDA) requirements and register with AQSIQ, which must provide lists of registrants to FDA and conduct annual inspections of their establishments. AQSIQ will certify exports to the United States if they meet FDA requirements and must conduct a testing program to assure product quality. FDA inspectors will be allowed to participate in AQSIQ inspections. The Chinese have also agreed to notify U.S. regulators when a facility fails inspection or a certification is revoked.

Responding to Leavitt's statement that FDA officials will eventually be embedded in China's food safety bureaucracy, plaintiff's lawyer Bill Marler wrote on his blog, "So, let me get this right – last week we heard that the FDA did not have enough inspectors to deal with manufacturers in this country, but we can loan inspectors to China to lower their standards to ours – that's brilliant." *See The New York Times* and *marlerblog.com*, December 12, 2007.

National Institute for Occupational Safety and Health (NIOSH)

[3] Medical Screening for Nanoparticle Exposure Proposed

NIOSH and the Centers for Disease Control and Prevention are seeking **comment** on a draft current intelligence bulletin, "Interim Guidance on Medical Screening of Workers Potentially Exposed to Engineered Nanoparticles." The bulletin will be available online, but, as of this writing, could not be accessed. Because the agencies have indicated that medical screening is not warranted now, it is likely that the bulletin does not call for such measures. According the agencies, "insufficient medical evidence exists to recommend the medical screening of workers potentially exposed to engineered nanoparticles," despite "increasing evidence" indicating that exposure to some particles "can cause adverse health effects in laboratory animals." A public meeting on the draft has been scheduled for January 30, 2008, and comments must be submitted by February 15.

The agencies specifically seek comment on whether (i) the data support the document's conclusions, (ii) medical surveillance is appropriate, (iii) medical screening has potential benefits, adverse impacts or limitations, and (iv) establishing an exposure registry for workers is warranted. According to the notice, those wishing to attend the public meeting must register no later than January 18. *See Federal Register*, December 12, 2007.

European Union (EU)

[4] International Food Companies Agree to Youth Advertising Moratorium

According to a news source, major global food companies have announced they will cease advertising foods and beverages high in sugars and fats to children younger than 12 in Europe by the end of 2008. Among those agreeing to the voluntary initiative were Burger King, Danone, General Mills, Kellogg, Kraft, Mars, and Nestle. The EU's health and consumer affairs commissioner apparently warned the industry that a failure to take such steps

would result in legislative mandates. While each company will apparently establish its own guidelines as to what foods can and cannot be advertised to children, each will take national and international nutrition standards into account when deciding what to market to children in television and print and on the Internet. The press further reports that the EU is drafting minimum food and beverage labeling standards which will be published and considered for adoption in the new year. *See Financial Times*, December 11, 1007.

State and Local Governments

[5] California Advisory Board Seeks Caffeine and Bisphenol A Studies

The Science Advisory Board Developmental and Reproductive Toxicant Identification Committee of California's Office of Environmental Health Hazard Assessment (OEHHA) has reportedly called for research on whether beverages containing caffeine constitute a health hazard for pregnant women. The OEHHA board's 4-3 vote on the caffeine study is apparently part of a two-year review of nearly 300 chemicals that state officials believe might warrant expeditious review under Proposition 65. The board also recommended that bisphenol A be among the chemicals selected for further review. An OEHHA spokesperson noted that the recommendations are not binding, but will be given weight "because this is a panel of scientific experts." If the agency agrees to study caffeine and bisphenol A, public hearings and a literature review will be undertaken in 2008, and the agency would then consider whether to require manufacturers to place labels on products containing the substances warning of their purported reproductive toxicant effects. *See Associated Press*, December 10, 2007.

Litigation

[6] Class Claims Filed Against Aurora Dairy and Retailers in Colorado

A putative class action has been filed in a Colorado federal district court against Aurora Dairy Corp., and retailers Wild Oats Market, Inc., Costco Wholesale Corp., and Safeway, Inc., alleging that they deceptively sold milk or milk products as organic. *Snell v. Aurora Dairy Corp.*, No. n/a (U.S. Dist. Ct., D. Colo., filed November 20, 2007). While the complaint is similar to others recently filed in courts across the country, it differs by adding retailers as defendants. Additional information about other pending organic milk cases appears in issue 236 of this Update. The named plaintiffs in this lawsuit are residents of Arkansas, California, Connecticut, New Jersey, New York, Tennessee, and Washington, and they seek to certify individual state classes for consumers in these states. They outline the investigation undertaken by the U.S. Department of Agriculture that resulted in a consent decree whereby the USDA found that the dairy failed to comply with federal organic food regulations. Alleging a number of causes of action including unjust enrichment, negligence and consumer fraud, plaintiffs are seeking injunctive relief, disgorgement, corrective advertising, refunds, treble damages, punitive damages, costs, and attorney's fees.

[7] Misleading Marketing Suit Against Artificial Sweetener Company to Proceed

A federal court in California has reportedly denied a motion for summary judgment filed by the parent company of the firm that markets and distributes the artificial sweetener Splenda®. Johnson &

Johnson argued in support of its motion that plaintiffs failed to promptly take legal action because suit was not filed until four years after the ad campaign was launched. Brought by the Sugar Association, the lawsuit contends that the product's marketing slogan, "Made from sugar so it states like sugar," deliberately misleads consumers. According to a news source, trial is now scheduled to begin January 29, 2008. *See FoodUSAnavigator.com*, December 11, 2007.

Other Developments

[8] PHAI/CSPI Survey Finds Little Financial Benefit from School Beverage Contracts

The Public Health Advocacy Institute (PHAI) and the Center for Science in the Public Interest (CSPI) have reviewed 120 contracts between school districts in 16 states and soft drink companies and concluded that they average a net benefit of $18 per student per year. In "**Raw Deal: School Beverage Contracts Less Lucrative Than They Seem**," researchers conclude that students and their parents must spend $1 buying soft drinks to raise 33 cents; a return that compares unfavorably with the typical 45 percent profit margin from the sale of gift wrap or candy.

Most of the contracts are apparently exclusive to a single company and, in some instances, netted the school districts only 60 cents per student per year. While the report recommends that school districts stop selling low-nutrition beverages, PHAI Associate Director Jason Smith suggests that it also "highlights the need for legal tools to assist school districts in negotiating relationships that put the health and welfare of children first." According to the report, which includes some negotiating strategies, schools can make money even when they sell only water, milk and fruit juices. PHAI, located at Northeastern University's School of Law, has been a vocal anti-industry participant in the national debate over obesity; among its major players is Richard Daynard, who achieved some renown as an anti-tobacco activist. *See PHAI Press Release*, December 6, 2007.

Scientific/Technical items

[9] Researchers Link Red Meat Consumption to Higher Cancer Risks

National Cancer Institute researchers, studying 500,000 people who were part of an AARP diet and health study, have allegedly linked increased red and processed meat consumption to an increased risk of several types of cancer, including lung cancer. **Amanda Cross, et al., "Prospective Study of Red and Processed Meat Intake in Relation to Cancer Risk," *PLOS Medicine*, December 2007**. The study found that those who consumed the most red meat, defined as beef, pork and lamb, tended to be less well educated, less physically active and less likely to consume fruits and vegetables, and were more likely to be current smokers and have a higher body mass index. Those in the highest quintile had a statistically significant elevated risk of esophageal, colorectal, liver, and lung cancer. Null findings were made for gastric or bladder cancer, leukemia, lymphoma, melanoma, and cancers of the breast, ovaries, cervix, and prostate. Red meat intake was inversely associated with endometrial cancer. The researchers suggest that reducing red and processed meat intake would avoid one in 10 colorectal and lung cancer cases, but acknowledge that some effects "might be caused by other lifestyle factors."

[10] Sugar-Fed Mice More Likely to Develop Signs of Alzheimer's, Alabama Researchers Claim

According to a study by University of Alabama researchers, mice that consumed sugar-sweetened water, which constituted 43 percent of total caloric intake, not only gained more weight, but also developed learning and memory deficits as well as amyloid deposition in the brain, independent of dietary fat intake. **Dongfeng Cao, et al., "Intake of Sucrose-sweetened Water Induces Insulin Resistance and Exacerbates Memory Deficits and Amyloidosis in a Transgenic Mouse Model of Alzheimer Disease," Journal of Biological Chemistry, December 14, 2007**.

Because such cerebral deposits are an anatomical marker of Alzheimer's disease (AD), the study concludes that "[c]ontrolling consumption of sugar-sweetened beverages may be an effective way to curtail the risk of developing AD." The amount of sucrose the mice consumed was comparable to five cans of 12-ounce sugar-sweetened beverages per day.

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LITIGATION UPDATE

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