

Food & Beverage

LITIGATION UPDATE

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Table of Contents

Legislation, Regulations and Standards

- [1] “Downed Animal” Bill Introduced in Senate1
- [2] House Legislation Aims to Improve Product Recall Notification1
- [3] Senate Passes Resolution to Increase FDA Budget2
- [4] FDA Seeks to Expand Presence in Foreign Markets2
- [5] Opponents Use 2005 FDA Report to Question Cloning Approval3
- [6] EFSA Decides Against Banning Food Additives Linked to Children’s Hyperactivity ..3
- [7] California Seeks Input on Product Labeling for Vitamins and Minerals in Foods ...4

Litigation

- [8] French Court Postpones Final Ruling on Genetically Modified Corn Seed Ban4
- [9] California Court Orders Starbucks to Pay \$100 Million to Coffee Servers in
Tips Dispute5

Other Developments

- [10] Brewer to Cease Production of “Energy” Products5
- [11] CSPI Sponsors Conference on Transatlantic Public Policy Approaches
to Childhood Obesity5
- [12] Consumer Groups Take Youth Advertising Plan to World Health Assembly5
- [13] Supermarket Targeted in Credit Card Data Breach6

Scientific/Technical Items

- [14] Friends of the Earth Issues Report on Nanotechnology in Food and Agriculture ...6
- [15] “Natural” Products More Likely to Achieve Consumer Acceptance7
- [16] Study Links High Fat and HFCS Diet with Liver Damage in Mice7

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LITIGATION UPDATE

Legislation, Regulations and Standards 110th Congress

[1] “Downed Animal” Bill Introduced in Senate

In further fallout from the Humane Society’s release of video showing illegal slaughtering practices at a meatpacking facility, Senator Dianne Feinstein (D-Calif.) has introduced legislation (S. 2770) that would increase penalties on those slaughtering “nonambulatory livestock” and improve public disclosures about recalled meat or poultry. Titled the “Downed Animal Enforcement Act of 2008,” the proposed legislation would impose graduated penalties, starting with a fine based on a percentage of gross income and ending with a permanent shut-down for a third violation. Existing penalties include fines no greater than \$500,000 and up to 10 years’ imprisonment for third-time violators.

In introducing the bill, Feinstein reportedly said, “Companies responsible for this kind of activity shouldn’t just receive a slap on the wrist. Processing downed animals poses a health risk especially to vulnerable populations, those who have compromised immune systems and the very young and elderly who rely on our government food inspection system to protect them against food-borne illness.” The bill, which has three co-sponsors, has been referred to the Committee on Agriculture, Nutrition,

and Forestry. See *The Orange County Register*, March 13, 2008; *Planet Ark*, March 14, 2008; and *Product Liability Law 360*, March 17, 2008.

Meanwhile, the California Department of Public Health has identified 466 types of foods sold to markets, restaurants, grocery chains, caterers, workplace cafeterias, and other food services containing recalled meat from Westland/Hallmark Meat Co. The [list](#) includes jerky, meatloaf, salami, and frozen tacos. The department has also reportedly expanded its manufacturer list to 16 and its restaurant list to nearly 8,000. The state’s retail distribution [list](#) has grown to 137 pages. According to unnamed industry experts, the value of the affected products is likely to reach hundreds of millions of dollars, and it is unknown who will pay for the losses. See *The Press Enterprise*, March 19, 2008.

[2] House Legislation Aims to Improve Product Recall Notification

Representative John Lewis (D-Ga.) has introduced a bill (H.R. 5636) that would require the Consumer Product Safety Commission (CPSC) to adopt a number of product recall and product safety notification procedures. Titled the “Consumer Product and Food Safety Information Act of 2008,” the measure would require prompt notification of government entities, school districts and the public whenever a food or product is recalled. The term “product recall” includes (i) a corrective action related to a consumer product subject to a CPSC order, (ii) the designation of a product as a banned



hazardous substance, (iii) a voluntary corrective action undertaken by a product manufacturer, and (iv) a corrective action related to a motor vehicle or replacement part safety defect. The CPSC would also be required to establish a multi-lingual toll-free product safety telephone number and a product recall Web site. Enforcement agencies would be required to issue national public service announcements in various media outlets to inform the public about their roles, products regulated, sources for more information, contact information, and other relevant data. The proposed bill has been referred to the House Committee on Energy and Commerce.

[3] Senate Passes Resolution to Increase FDA Budget

The U.S. Senate has reportedly passed a resolution amending the 2009 budget to grant the Food and Drug Administration (FDA) an additional \$375 million in funds. In addition, the Senate approved a bipartisan initiative to create a “reserve fund to allow for legislation that enhances the protection and safety of the nation’s food supply,” according to a press release issued by Senators Robert Casey, Jr. (D-Pa.), Richard Durbin (D-Ill.), Sherrod Brown (D-Ohio), and Chuck Grassley (R-Iowa). The senators stated that the reserve fund is intended to support legislation that would (i) “expand both FDA and USDA [Department of Agriculture] food inspection field forces; (ii) “develop risk-based approaches to the inspection of the food supply;” (iii) “develop the necessary infrastructure – including information technology systems – to ensure a coordinated approach to enhancing the protection and safety of the food supply;” (iv) “improve scientific capacity by establishing science-based training programs and investing in improved surveillance and testing technologies;” (v) “enhance FDA’s recall authority;” and

(vi) “expand foodborne illness awareness and education programs.”

“FDA needs a serious infusion of resources and strong leadership dedicated to reforming the agency,” said Representative Henry Waxman (D-Calif.), who chairs the House Oversight Committee, in support of the measure. President George Bush, however, has apparently threatened to veto appropriations that exceed his demands, and critics have continued to question FDA’s ability to effectively regulate the nation’s food supply. “I don’t want to throw money at an agency that doesn’t have the infrastructure to carry out its mission,”

Representative Rosa DeLauro (D-Conn.) was quoted as saying. *See Press Release of Senator Robert Casey, Jr.*, March 14, 2008; *Marler Blog*, March 16, 2008; *The New York Times*, March 17, 2008.

Food and Drug Administration

[4] FDA Seeks to Expand Presence in Foreign Markets

FDA has reportedly received approval from the Chinese government to establish eight full-time positions at the U.S. Embassy in Beijing and the U.S. Consulates General in Shanghai and Guangzhou. This staff will partner with Chinese authorities to inspect food production facilities that export to the United States, fulfilling a key tenant included in a memorandum of understanding signed by Chinese and U.S. officials in December 2007. The food safety memorandum also emphasized a need for improved communication between the two countries, with China pledging to notify FDA when food producers failed inspections or lost their certification status. An FDA spokesperson told reporters that the new staff positions will carry out a range of activities,



such as “information sharing, joint industry training, and technical cooperation on U.S. standards and inspections.” See *Food Navigator USA.com* and *CQ HealthBeat News*, March 17, 2008.

In a related development, Department of Health and Human Services Secretary Michael Leavitt this week articulated intentions to establish similar posts in India. Speaking before the U.S. Chamber of Commerce, Leavitt stated that an increased foreign presence reflects a larger global strategy to safeguard the U.S. food and drug supply. He further stressed that the United States needs to exert more control over the certification of international goods and services. See *CQ HealthBeat News*, March 18, 2008.

[5] Opponents Use 2005 FDA Report to Question Cloning Approval

The Center for Food Safety (CFS) and other anti-cloning groups have reportedly seized on a 2005 internal report conducted by the FDA Center for Veterinary Medicine questioning public support for animal cloning. FDA apparently polled focus groups on the perceived health risks associated with animal clones, noting that “more than half of the participants across the board said that they would not want to eat food derived from clones.” In addition, the report stated that all participants with children “said that they would not give such food to their children.” Using these conclusions to attack FDA approval of animal cloning, the CFS and its allies have charged that the agency proceeded with its risk assessment “despite the results of this focus group report and other reputable surveys showing high consumer concerns and an unwillingness to buy food from cloned animals.” “[FDA] shows a complete disregard for public opinion,” a CFS spokesperson said of the report, which apparently

mirrors current European consumer attitudes toward genetically modified and cloned livestock. See *Food Navigator-USA.com*, March 19, 2008.

European Union (EU)

[6] EFSA Decides Against Banning Food Additives Linked to Children’s Hyperactivity

The European Food Safety Authority (EFSA) this week declined to change the acceptable daily intake (ADI) of sodium benzoate and certain food colorings that a 2007 U.K. study allegedly linked to hyperactivity in children. Although the study was funded and designed by Britain’s Food Standards Agency, EFSA reportedly faulted the research for failing to resolve “considerable uncertainties, such as the lack of consistency and the relative weakness of the effect and the absence of information on the clinical significance of the behavioral changes observed.” EFSA also noted that while individuals may exhibit a sensitivity to one or more food additives, it is “not possible to at present to assess how widespread such sensitivity may be in the general population.” In addition, the food agency has apparently engaged a scientific panel to evaluate all food additives, including those in the study, on a case-by-case basis. Nevertheless, the food and health group Sustain has criticized EFSA’s decision to refrain from action and urged British officials to remove the implicated additives from the country’s food supply. See *Reuters*, March 13, 2008; *Daily Mail*, March 16, 2008.



State and Local Governments

[7] California Seeks Input on Product Labeling for Vitamins and Minerals in Foods

California's Office of Environmental Health Hazard Assessment (OEHHA), which implements Proposition 65, the law that requires public warnings about substances known to the state to cause cancer or pose reproductive health risks, is [requesting](#) public input into its "beneficial nutrients regulatory concept." OEHHA recognizes that "[c]ertain chemicals or compounds such as vitamins and minerals are necessary to promote human health or to ensure the healthy growth of food crops." While excessive exposures can cause cancer or adverse reproductive effects, "OEHHA is seeking a way to balance the need for these nutrients with the necessity for providing Proposition 65 warnings for exposures to listed chemicals in foods." The agency has proposed regulatory language to address the issue and will hold a public workshop April 18, 2008, to gather input from stakeholders. Written comments must be submitted by May 2.

In a related development, representatives of business and environmental interests reportedly clashed during OEHHA's March 14 public workshop, at which a proposal to restructure a Proposition 65 regulation requiring warnings about toxins in foods was considered. Among the issues debated at the meetings were (i) whether OEHHA should maintain a Web site to provide information about possible chemical dangers in foods; and (ii) whether food manufacturers and grocers could provide general information at point of sale, directing consumers to the Web site for more information. Grocers suggested in-store signs that would also say "chemicals listed on Prop. 65 are in foods which are sold

pre-cooked, in raw ingredients prepared at home, and in products processed in a package." The message would also include information about chemicals in foods occurring naturally, being added or being a combination of the two. Representatives of the state and environmental organizations reportedly countered that such warnings would not comply with the law and would not be adequate. They contend that warning labels must appear on or accompany the product at issue. *See Inside Cal/EPA*, March 21, 2008.

Litigation

[8] French Court Postpones Final Ruling on Genetically Modified Corn Seed Ban

Refusing to lift a ban on a genetically modified (GM) corn variety in time for spring planting, the Conseil d'État has reportedly decided to maintain the status quo until it can rule on the ban's scientific justification. According to a news source, the court cited a January 2008 report calling for more product-safety studies. The French agriculture ministry apparently banned the product in February, calling for it to remain in place until European authorities complete a decennial product review. A spokesperson for the GM crop's U.S. manufacturer was quoted as saying, "We are disappointed [farmers] will not be able to benefit from the economic, agricultural and environmental advantages that this product offers." French farmers had hoped to plant 247,105 acres with the modified maize and reportedly contend that using non-modified seed will cost the industry 10 million euros for insecticides and pest-related losses. The GM product has been used for 10 years in the United States and will be planted in at least seven EU countries in 2008. *See The New York Times*, March 20, 2008.



[9] California Court Orders Starbucks to Pay \$100 Million to Coffee Servers in Tips Dispute

A San Diego Superior Court judge has reportedly ordered Starbucks to pay its “baristas,” or coffee servers, \$100 million to reimburse them with interest for the tips it forced them to share with managerial personnel. State law apparently prohibits gratuities intended for hourly workers to be taken by an employer or its “agents.” In February 2008, the court found that the company was liable for sharing tips with company managers, such as shift supervisors, i.e., “agents,” after plaintiffs asked the court to award restitution to a statewide class of some 120,000 employees. The court also granted plaintiffs’ request for injunctive relief, finding that Starbucks continues to use the tip-distribution system to compensate supervisors. A company spokesperson reportedly questioned the court’s ruling as “fundamentally unfair and beyond all common sense and reason.” An appeal is already planned. *See The Recorder*, March 21, 2008.

Other Developments

[10] Brewer to Cease Production of “Energy” Products

Foster’s has reportedly announced that it will no longer produce branded goods that contain “energy” ingredients like caffeine and taurine and will also cease making canned or bottled beverages with greater than 7 percent alcohol. The company apparently based its decision on stakeholder concerns about problem drinking. According to a spokesperson, “As the market leader, Foster’s has worked for many years to improve Australia’s underlying drinking culture as a whole. We believe

strongly that the real issue is not ‘bad’ products, but rather poor drinking behavior.” *See FoodUSANavigator.com*, March 20, 2008.

[11] CSPI Sponsors Conference on Transatlantic Public Policy Approaches to Childhood Obesity

The Center for Science in the Public Interest (CSPI) and European consumer organizations will [convene](#) April 8, 2008, in Washington, D.C., to address “transatlantic approaches to tackling obesity and diet-related disease, including restricting junk-food advertising aimed at children, phasing out artificial *trans* fats, improving nutrition labeling, and reducing salt content in processed foods.” The public is invited to attend at no cost, although space is apparently limited.

Featured speakers will include Marion Nestle, and Robert Madelin, Director General, Health and Consumer Protection, European Commission. Also on the agenda are Food and Drug Administration officials who will discuss nutrition labeling, *trans* fats and salt. City officials from New York and Seattle will address nutrition disclosure and calorie posting in restaurants. EU speakers will provide information about the European Commission’s proposed nutrition labeling requirements. The conference has been organized by the Trans Atlantic Consumer Dialogue, an advisory group established by the European Commission and the U.S. Department of State. Two previous related conferences were held in Europe. *See CSPI Press Release*, March 17, 2008.

[12] Consumer Groups Take Youth Advertising Plan to World Health Assembly

Consumers International and the International Obesity Task Force recently launched a marketing [code](#) that asks governments to institute radio and



television “watershed” bans on advertising foods and beverages high in fat, sugar and salt between 6 a.m. and 9 p.m. In addition, the groups have reportedly called for similar bans on social-networking Web sites, as well as a ban on promoting unhealthy foods with gifts, toys or images of celebrities or cartoon characters. The two groups intend to present the code in May at the World Health Assembly, where the World Health Organization (WHO) will consider whether to endorse the measures. “What we’re asking for is a global code so that consumers everywhere are protected from junk-food marketing. There’s a dispute about what constitutes child marketing. The food industry would say under 12, but at least under 16 is what we want,” a Consumers International spokesperson was quoted as saying. Several major food companies in 2006 adopted voluntary standards that restrict food marketing to children and ensure that the advertised foods meet strict nutritional requirements. *See The Wall Street Journal*, March 15, 2008.

[13] Supermarket Targeted in Credit Card Data Breach

A large supermarket chain has reportedly been implicated in a security breach involving more than 4 million credit cards and resulting in at least 1,800 fraud cases. Hannaford Brothers Co. this week announced that its computer network failed to prevent the theft of customer credit card numbers and expiration dates during the card authorization process. The breach extended from December 7 to March 10, when security experts managed to contain the security violations. Hannaford has since notified the affected banks and credit card companies, as well as law enforcement officials, to compensate fraud victims and to help identify the perpetrators. In addition to checking financial state-

ments, the consumer advocacy organization Private Rights Clearinghouse recommended that Hannaford customers using debit cards should close their bank accounts as a precautionary measure. Company executives have also warned consumers not to respond to e-mails from people posing as Hannaford employees and requesting personal information related to the security breach, which ranks among the largest in recent years. *See The Associated Press*, March 17, 2008.

Scientific/Technical Items

[14] Friends of the Earth Issues Report on Nanotechnology in Food and Agriculture

Friends of the Earth has released a [report](#) calling for a moratorium on the use and sale of nanotech materials in foods and food packaging citing potential risks to human health and the environment. The report, produced by the Australia, Europe and U.S.A. Friends of the Earth affiliates, provides a primer on nanotechnology and notes the ways it can be applied to agriculture, food processing, food packaging, and farm and food monitoring. It identifies 104 food products infused with nanomaterials or packaged in containers coated with nanoparticles and discusses specific kitchenware products incorporating the technology. It also names the food and beverage companies that are “engaged in nanotechnology research and development.”

The groups, which are dedicated to environmental causes and a “healthy and just world,” are urging a moratorium until regulators establish specific safety laws that define nanomaterials as new substances. In addition, the report asks for (i) extending the size-based definition of nanomaterials to include particles up to 300 nm; (ii) making safety



assessment and product labeling transparent; (iv) involving the public in the decision-making process; and, (v) supporting sustainable food and farming. Among the purported nanotechnology downsides explored in the report are its potential to make existing inequities in the global food system worse by concentrating agriculture, food distribution and retail sales in fewer hands; to “further erode our cultural knowledge of food and farming; and to introduce new privacy concerns as packaging nano-sensors will permit the collection of sensitive consumer information.

[15] “Natural” Products More Likely to Achieve Consumer Acceptance

A Swiss study of factors that consumers consider when deciding whether to accept or reject innovative food technologies suggests that nanotechnology would be more acceptable than genetic modification (GM). Michael Siegrist, “Factors Influencing Public Acceptance of Innovative Food Technologies and Products,” *Trends in Food Science and Technology* (forthcoming 2008). Reviewing the literature on the subject, researcher Michael Siegrist found that the processes used to make food are significant considerations for modern consumers. For example, chemical changes involving the addition of an ingredient are viewed as reducing a product’s naturalness, an “all-important” factor, while physical processes, such as grinding, are not. Thus, Siegrist reportedly concludes, “This reasoning suggests that consumers may be more willing to accept nanotechnology food than GM food. Since the former most likely will not be perceived as tampering with nature, few people will have a moral impetus to oppose this technology now.” While trust in the food industry may be a factor in the debate, some suggest that careful marketing of nanoparti-

cles in foods as natural in origin could enhance their acceptability. See *FoodUSANavigator.com*, March 14, 2008.

[16] Study Links High Fat and HFCS Diet with Liver Damage in Mice

According to a press report, Saint Louis University researchers will present a study during the May 2008 Digestive Diseases Week meeting showing an association between a high-fat and high-fructose-corn-syrup (HFCS) diet with beginning stages of Type 2 diabetes in mice. They reportedly fed mice a diet consisting of 40 percent fat and HFCS in amounts equivalent to eight cans of soft drinks per day in humans. Within four weeks, the mice, which were allowed to eat any quantity of food they wanted, but were not allowed to exercise, developed increased liver enzymes and glucose intolerance. Researcher Brent Tetri was quoted as saying, “A high-fat and sugar-sweetened diet compounded by a sedentary lifestyle will have severe repercussions for your liver and other vital organs.” See *naturalnews.com*, March 13, 2008.



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