

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

Food and Drug Administration (FDA)

[1] FDA Seeks Public Comments on Third-Party Food Safety Certification Program

The FDA has published a [request](#) for comments “on the use of third-party certification programs for foods and feeds, including pet foods.” According to the notice, a number of food and feed retailers and food service providers want to ensure that U.S. and foreign suppliers meet food safety and quality standards as a condition of doing business. These suppliers, in turn, are increasingly relying on third parties to certify their practices. Accordingly, the agency requests information “on the use of third-party certification programs.” Among the specific questions the FDA has posed are (i) “What domestic and foreign third-party certification programs for suppliers are currently in use by U.S. companies?”; (ii) “Do the current third-party certification programs ensure compliance with FDA requirements?”; (iii) “What are the obstacles to private sector participation in these third-party certification programs?”; and (iv) “What incentives would increase participation in these third-party certification programs?” Written or electronic comments must be submitted by May 19, 2008. See *Federal Register*, April 2, 2008.

[2] FDA Objects to Calling High-Fructose Corn Syrup “Natural”

An FDA administrator has reportedly told a media source that the agency “would object to the use of the term ‘natural’ on a product containing HFCS [high fructose corn syrup].” *Food Navigator-USA.com* revealed in an April 2, 2008, article that its reporters had inquired about HFCS using an FDA system designed to assist manufacturers with the labeling process. According to *Food Navigator*, FDA Supervisor Geraldine June of the Office of Nutrition, Labeling and Dietary Supplements replied in an e-mail that, “The use of synthetic fixing agents in the enzyme preparation, which is then used to produce HFCS, would not be consistent with our (...) policy regarding the use of the term ‘natural.’” “Moreover,” June added, “the corn starch hydrolysate, which is the substrate used in the production of HFCS, may be obtained through the use of safe and suitable acids or enzymes. Depending on the type of acid(s) used to obtain the corn starch hydrolysate, this substrate itself may not fit within the description of ‘natural’ and, therefore, [HFCS] produced from such corn starch hydrolysate would not qualify for a ‘natural’ labeling term.”

June further stated that despite petitions from the Sugar Association and Sara Lee asking to define the term “natural,” the agency has no immediate plans to take action due to limited resources and a lack of consumer interest. Nevertheless, FDA’s response “will at least prevent any future misinterpretations,” concluded *Food Navigator*, which noted that two



major beverage companies last year removed “natural” designations for beverages containing HFCS after consumer advocates threatened legal action.

State and Local Governments

[3] OEHHA Forming Stakeholder Workgroup on Warnings for Chemicals in Foods

California’s Office of Environmental Health Hazard Assessment (OEHHA) has [announced](#) that it will form a stakeholder workgroup to assist in its development of “regulatory language addressing the methods of delivery and content of warnings for exposures to listed chemicals in foods.” 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, will form the workgroup from volunteers representing food manufacturers, large and small grocery retailers, environmental groups, public prosecutors, and private Proposition 65 enforcement groups. The agency also expects to include representatives from the U.S. Food and Drug Administration and the California Departments of Public Health and Food and Agriculture. The workgroup will serve an advisory function, and, while the public will be provided with information about its progress, “workgroup meetings will not be publicly noticed.” The deadline to apply for a workgroup position is April 18, 2008.

[4] Ohio Revises “Free From Hormone” Labeling Rules for Dairy Products

The Ohio Department of Agriculture has reportedly decided to allow dairies to label their milk products as derived from hormone-free cows, but they must also include a Food and Drug

Administration disclaimer stating “no significant difference has been shown between milk derived from [the growth hormone] rbST-supplemented and non-rbST supplemented cows.” The disclaimer must be printed in type no smaller than half the size of the “free from growth hormone” claims, and processors will reportedly have 120 days to comply with the revised regulation. Stakeholders on each side of the issue are apparently concerned about the revision, with the Ohio Dairy Producers Association calling for a ban on any “free from” claims, and the International Dairy Foods Association contending that the rule remains more restrictive than federal guidelines and could affect products coming into and being shipped out of the state. According to a news source, the matter will be considered at an April 8, 2008, hearing before the state Department of Agriculture, and the Ohio Joint Committee on Agency Rule Review will provide additional review on April 21. *See FoodUSANavigator.com*, April 2, 2008.

Litigation

[5] Parties Reach Settlement in Principle in Tainted Pet Food Litigation

Canada-based Menu Foods Income Fund has announced that the parties to consolidated litigation against the company for pet illnesses and deaths allegedly caused by its contaminated pet food have reached a settlement agreement in principle. *In re: Pet Food Prods. Liab. Litig.*, No. MDL 1850 (U.S. Dist. Ct., D.N.J., transfer order filed February 20, 2008). The agreement must be approved by certain other parties as well as U.S. district and Canadian courts. The agreement and a motion for preliminary approval will be filed in the U.S. multidistrict litigation court on May 1, and a hearing will be held May



14. Menu Foods recalled 90 brands of pet food in 2007 after receiving complaints of pet illness and death. It was later learned that the company's pet food contained flour imported from China that contained melamine and aminopterin. Some 120 lawsuits were filed across the United States and Canada and ultimately involved product distributors and manufacturers in the United States and China. The recall cost the company nearly CAN\$55 million. The terms of the settlement have yet to be disclosed. *See Menu Foods Press Release* and *Mealey's Litigation Report: Food Liability*, April 1, 2008; *New Jersey Law Journal*, April 3, 2008.

[6] Pittsburgh Grocery Chain Sues Chocolate Cos. for Price-Fixing; DOJ Confirms Investigation

Pittsburgh, Pennsylvania, supermarket chain Giant Eagle, Inc. has added its price-fixing lawsuit to about 50 others that are now pending against chocolate makers around the world. *Giant Eagle, Inc. v. The Hershey Co.*, No. n/a (U.S. Dist. Ct., W.D. Pa., filed March 26, 2008). The company seeks treble damages and permanent injunctive relief under U.S. and state antitrust laws, contending the defendants engaged in "an international conspiracy . . . to fix, raise, maintain or stabilize prices" for chocolate confectionary products in Canada and the United States. The complaint, which details significant price hikes in the cost of defendants' chocolate products since 2004, alleges that Canadian, U.S. and European authorities are investigating suspected price-fixing by the companies. The German Federal Cartel Office reportedly raided the offices of seven chocolate manufacturers in February 2008, and the U.S. Department of Justice confirmed on April 1 that it has been conducting an investigation into "the possibility of anticompetitive practices in the choco-

late manufacturing industry." According to a news source, the companies have indicated that they are cooperating with the investigations. *See The Wall Street Journal*, April 1, 2008.

[7] Scheduling Conference Held in Consolidated Aurora Organic Dairy Cases

Attorneys representing clients in 17 class-action lawsuits filed against Aurora Dairy Corp., alleging that the company sold its milk as organic without following federal organic practice standards, met for a scheduling conference on March 28, 2008. *In re: Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, MDL No. 1907 (U.S. Dist. Ct., E.D. Mo., transfer order filed February 20, 2008). Related litigation filed against Target Corp. was apparently added to the multidistrict litigation shortly before the conference. According to a news source, defendants were expected to argue that the U.S. Department of Agriculture has primary and exclusive jurisdiction over the matter and were planning to ask the court to dismiss the lawsuits. They were also reportedly expected to contend that discovery would be inappropriate and unnecessary, thereby avoiding the disclosure of documents relating to their business operations.

According to a press report, the plaintiffs were planning to ask the court to require the parties to serve discovery requests by May 15 and to require the defendants to answer the complaint by June 16. *See Environmental News Network*, March 31, 2008.

[8] WTO Supports United States and Canada in Hormone Meat Dispute with EU

The European Union (EU) failed to justify its continuing ban on the import of beef treated with hormones from the United States and Canada before the World Trade Organization (WTO), which



has upheld the trade sanctions imposed by those countries on European imports. The WTO dispute apparently began in 1997 when Canada and the United States challenged a European ban on hormone-treated beef that dated back to the mid-1980s. The WTO ruled that the ban violated international trading rules and thereafter allowed the United States and Canada to impose duties, amounting to \$125 million annually, on European goods, including cheese, truffles and chocolates. While the EU changed its law in 2003, it maintained permanent and provisional prohibitions on a number of hormones. In 2005, the EU formally protested the continuing sanctions in light of its new law, and on March 31, 2008, the WTO upheld the sanctions. Its ruling apparently chastised the United States and Canada, however, for not following proper procedures after the EU amended its law. According to a news source, all of the parties have 60 days to file an appeal. *See Associated Press*, March 28, 2008; *Product Liability Law 360* and *Meatingplace.com*, March 31, 2008.

Other Developments

[9] CSPI Warns Parents About BPA-Lined Cans and Water Bottles

“Women who are pregnant or breast-feeding may want to consider reducing their exposure, and that of their infants and young children, to the controversial chemical bisphenol A (BPA) by avoiding most canned soups and drinks and many hard-plastic reusable bottles,” opines a recent press release issued by the Center for Science in the Public Interest, which published an article titled “Hard Questions About a Hard Plastic” in the April edition of its *Nutrition Action Newsletter*. CSPI has advised consumers to choose brands that use BPA-free liners

and plastics, specifically warning parents against “Nalgene-type polycarbonate water bottles,” including toddler “sippy” cups and infant formula bottles, and “metal cans lined with an epoxy resin made from BPA.” In addition, CSPI has urged the food industry to phase out BPA from all product packaging. “Why roll the dice and assume that all the studies finding problems with BPA are wrong?” CSPI Senior Nutritionist David Schardt was quoted as saying. The consumer interest group has also contested government-funded research into the alleged effects of BPA on humans. *See CSPI Press Release*, April 2, 2008.

Media Coverage

[10] Kim Severson, “Some Good News on Food Prices,” *The New York Times*, April 2, 2008

“The food-should-cost-more cadre wants to change an agricultural system that spends billions of dollars in government subsidies to grow commodities like grain, sugar, corn, and animal protein as cheaply as possible,” writes *New York Times* reporter Kim Severson in this article discussing the effects of rising food prices on the American marketplace. Severson points to a variety of factors controlling the cost of groceries on the shelf, including investors who “skew the volatile commodities market” and the money spent on “marketing, packaging, transportation, and multimillion dollar compensation for the biggest food companies’ executives.” Food activists like author Michael Pollan, however, are predicting that rising fuel and grain prices will translate into more expensive food staples, thus closing the price gap between “nutritionally-questionable, high-profile ingredients like high-fructose corn syrup” and local or organic foods. According to Severson, “locavores, small



growers and activist chefs” are hoping that “higher prices ... could push pasture-raised milk and meat past its boutique status, make organic food more accessible and spark a national conversation about why inexpensive food is not really such a bargain after all.” But other food industry analysts appear less certain about how higher prices will affect America’s eating habits. “The main thing is that you need a little evidence before you say everyone is clipping coupons and eating dirt,” one analyst was quoted as saying. “All we know for sure at this point is that people are going to supermarkets and noticing butter is \$4 a pound and not \$2.”



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