

Food & Beverage

LITIGATION UPDATE

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Legislation, Regulations and Standards

U.S. Department of Agriculture (USDA)

[1] Proposed GE Rule Corrected to Expressly Preempt State Laws and Regulations

The USDA's Animal and Plant Health Inspection Service has issued a [correction](#) to a proposed rule regarding the "importation, interstate movement and release into the environment of certain genetically engineered [GE] organisms." Where the October 9, 2008, notice indicated that the rule would preempt "no State or local laws or regulations," the correction substitutes "All State and local laws or regulations that are inconsistent with this rule will be preempted." Comments on the entire proposal must be submitted on or before November 24, 2008.

The original [proposal](#) represents the "first comprehensive review and revision of the regulations since they were established in 1987," bringing the rules "into alignment with provisions of the Plant Protection Act" and updating the rules "in response to advances in genetic science and technology." Among the changes proposed are provisions to revise the rules' scope "to make it clear that decisions regarding which organisms are regulated remain science-based and take both plant pest and noxious weed risks into account," and to clarify that "the responsible person for a GE organism could correctly

apply the criteria in [7 CFR] § 340.0 to determine whether the GE organism is subject to the regulations." See *Federal Register*, October 9 and November 10, 2008.

Food and Drug Administration (FDA)

[2] Nutrition Roundtable Discussion with Stakeholders Scheduled

FDA's Center for Food Safety and Applied Nutrition (CFSAN) will conduct a [roundtable discussion](#) with stakeholders on December 12, 2008, and is tentatively scheduled to "communicate FDA's nutrition activities" and provide status updates on functional foods, health claims, evidence-based review guides, Critical Path Project on Biomarkers for Use in Health Claims, front-of-pack labeling, and sodium status, among other matters. According to CFSAN, the format will consist of a panel of experts led by the agency's director, with remarks from David Acheson, FDA Associate Commissioner, and a question and answer session. See *CFSAN Constituent Update*, November 7, 2008.

Codex Alimentarius Commission

[3] Food & Water Watch Calls for Comments on Codex *Listeria* Rule

The consumer advocacy group Food & Water Watch is calling on supporters to submit comments to the Codex Alimentarius Commission before its



November 15, 2008, deadline on a proposal to allow an “acceptable” level of *Listeria monocytogenes* in food. According to the organization’s senior food organizer, “Those who are advocating this change argue that some *Listeria monocytogenes* in foods can be tolerated by most people and it is virtually impossible to guarantee the complete absence of *Listeria monocytogenes* in food. In Europe and Canada, where the weaker standard is already in place, there has been an increase in the incidence of consumers getting sick from foods contaminated with *Listeria monocytogenes* in recent years.”

Apparently, the Codex Committee on Food Hygiene will debate the standard in early December. Food & Water Watch [urges](#) commenters to “Tell the Codex Committee that you are opposed to lowering food safety standards for imported foods.” The United States actively participates in Codex standard-setting activities and often adopts its standards as law, as do other countries. Currently, the United State has a zero tolerance standard for *Listeria monocytogenes* in foods. See *Food & Water Watch Alert Online*, November 13, 2008.

European Union (EU)

[4] EU Relaxes Restrictions on Produce Marketing Standards

The European Commission this week abolished more than 100 pages of rules and regulations governing the size, shape and color of various vegetables and fruits sold in member countries. The rules reportedly included prescriptions dictating that green asparagus must be green for 80 percent of its length and a cauliflower head must exceed 11 centimeters in diameter. Although it retained the

marketing standards for apples, pears, citrus fruits, strawberries, and tomatoes, the commission repealed those pertaining to apricots, artichokes, asparagus, avocados, beans, Brussels sprouts, carrots, cauliflower, cherries, chicory, courgettes, cucumbers, cultivated mushrooms, eggplant, garlic, hazelnuts in shell, headed cabbages, leeks, melon, onions, peas, plums, rubbed celery, spinach, walnuts in shell, and watermelon.

Organic farmers have greeted the demise of the regulations as a boon to their niche market, which is “about inner quality, not outer appearance,” according to Soil Association Director Patrick Holden. Large retailers like Sainsbury’s, Tesco and Asda also backed the repeal because individual store managers faced prosecution for “illegal” vegetables under the old laws. Supermarkets can begin selling “ugly” produce in July 2009.

EU Agriculture Commissioner Mariann Fischer Boel moved to relax the restrictions on less-than-perfect produce despite opposition from France, Italy, Spain and Greece. She argued that eliminating these arcane standards, which citizens have long ridiculed, will reduce waste, encourage healthier eating and alleviate the impact of higher food prices. “This marks the new dawn for the curvy cucumber and the knobbly carrot,” Boel was quoted as saying. See *The London Times*, November 12, 2008; *The Associated Press*, November 13, 2008.

China

[5] China Arrests Feed Producer Implicated in Melamine Contamination

The Chinese government has reportedly arrested the owner of a poultry feed operation implicated in a nationwide scandal involving melamine-tainted



animal products. The manufacturer apparently confessed to using the industrial chemical in 212 tons of chicken feed sold to Dalian Hanovo Enterprise Group, which then distributed adulterated eggs to Chinese consumers. The government also destroyed an additional 75 tons of contaminated feed seized from the owner as part of its crackdown on the widespread practice of adding melamine to feed and dairy products to artificially boost protein counts. State media sources have indicated that inspectors have shuttered 238 illegal farms and 130 dairy farms since melamine-laden infant formula first sickened thousands of children. The scandal has closed approximately 20 percent of China's dairy industry. *See What Not To Eat: Marion Nestle*, November 12, 2008.

Meanwhile, the U.S. Food and Drug Administration (FDA) has apparently issued a detention order for milk-containing products imported from China. The agency will hold these products, which range from baby food to candies and pet foods, at ports of entry until independent testing confirms the absence of melamine compounds. In addition, FDA has kept in place an import alert issued on October 10 for specific items known to be tainted with melamine.

China currently exports \$3.8 million in annual food and beverage products to the United States, leading to concerns that the detention order will adversely affect trade relations. Ben England, a former FDA official now working with Chinese producers, estimated that some products could be held in port from six weeks to three months. "This is going to be very, very expensive," he was quoted as saying. *See The Associated Press*, November 13, 2008; *The Wall Street Journal*, November 14, 2008.

State and Local Governments

[6] Philadelphia Adopts Tough Menu Labeling Measures

The Philadelphia City Council this week adopted menu labeling laws that will require chain restaurants with more than 15 outlets to provide extensive nutritional information on printed menus and to list calories on menu boards. Starting January 1, 2010, national and local chains must disclose calories, saturated and *trans* fats, sodium, and carbohydrates on printed menus in the same typeface used for food descriptions and price. Opposed by the Pennsylvania Restaurant Association for its "one-size-fits-all" approach, the regulation also drew criticism from some council members who viewed the bill as an unnecessary burden on the restaurants. The Center for Science in the Public Interest, however, praised the new rules as a "useful incentive to the restaurant industry to expand the number and variety of healthy choices on their menus." *See CSPI Press Release*, November 6, 2008; *Philadelphia Inquirer*, November 7, 2008; *Meatingplace.com*, November 10, 2008.

In a related development, the *Seattle Post-Intelligencer* reported on the efforts of local King County businesses to adapt to menu labeling laws that take effect in January 2009. Some smaller operations have apparently found it difficult to estimate nutritional information for menu items prepared to order and by hand. They fear that inaccurate labeling will result in lawsuits like the one facing Applebee's after a consumer group sent meals to independent laboratories for nutritional testing. "This is seafood. It's not dehydrated potatoes where



you get the same portion sizes,” said Bob Donegan, the president of Seattle-based Ivar’s Seafood.

In addition, restaurateurs must “find that fine line” between appealing to customers who want healthier options and those seeking value, according to Robert Ott, chief executive officer of Claim Jumper Restaurants. “You might help the people saying, ‘I want to see smaller sizes,’ but there’s another group of people who don’t care about that, and you have to balance both,” Ott was quoted as saying. *See The Seattle Post-Intelligencer*, November 11, 2008.

Litigation

[7] **Class-Action Lawsuit to Be Filed in China Against Dairy Company for Melamine Contamination**

With more than 54,000 Chinese children sickened by the melamine contamination of milk and infant formula products in recent months and the government stalling over compensation of their families, some 15 lawyers have reportedly decided to file the claims of nearly 100 families in a single lawsuit against the Shijiazhuang Sanlu Group Co. The lawyers have not apparently set a date for its filing and intend to hold discussions with the dairy company at the heart of the alleged scandal. According to a news source, they are hoping to force a settlement by grouping a large number of claims. China’s government has ordered hospitals to order free treatment for the sick infants, but not all costs have been covered, and at least a dozen individual cases have already been filed. These suits are in a “legal limbo” because the courts have neither accepted nor refused them. *See Associated Press*, November 13, 2008.

Other Developments

[8] **James Andreasen & Christopher McDonald, “Agricultural Sustainability Standards Could Affect You,” *Pork Exec*, November 2008**

SHB Tort lawyers [James Andreasen](#) and [Christopher McDonald](#) have co-authored an [article](#) that discusses developments in the drafting of an agricultural sustainability standard under the auspices of the American National Standards Institute (ANSI). Noting that the initial draft, “if finalized, could have broad-reaching impact,” the authors observe that a number of stakeholders have already “expressed concerns about certain aspects of the draft,” which is intended to cover agricultural activities “from seed to store.”

Among the draft’s requirements for agricultural producers would be (i) the adoption of organic practices, (ii) limitations on and phase-out of “synthetic” pesticides and fertilizers, and (iii) employment practices in the areas of collective bargaining rights and union organizing activities “that may go beyond existing legal requirements.” The article notes that voluntary ANSI standards are often adopted by governments as legal requirements and indicates how interested parties can become involved in the standard’s development.

[9] **Food & Water Watch Urges Consumers to Oppose Organic Label for Fish**

The public interest group Food & Water Watch has urged consumers to contact the National Organic Standards Board (NOSB) to oppose the use of the “USDA Organic” label for farmed fish. Food & Water Watch has accused industrial fish farmers of attempting to “greenwash” aquaculture practices that, according to the group, disrupt ocean ecosys-



tems “by wiping out the fish on the bottom of the food chain” and increase “the amount of dangerous pollutants like mercury and PCBs” that wind up in farmed fish products. The organization warns consumers that feeding wild fish to farm-bred fish in deep-water open pens is not “consistent with [the] organic principles that you have come to trust and that require minimal impact on the environment, control of input and outputs, and animals to be raised on organically-raised feed.”

Food & Water Watch recently initiated several action calls to counteract the final directives of the Bush administration, which the group alleges has “blatantly decided to ignore consumer interest and have one last push at passing rules to further weaken our health, safety and environmental protections.” See *Food & Water Watch Blog*, November 9, 2008.

Scientific/Technical Items

[10] Scientist Calls for Toxicology Studies on Chemicals in Food and Beverage Containers

Researchers in Canada have published a [warning](#) in *Science* about the leaching of bioactive contaminants from disposable laboratory plastic ware such as test tubes, pipette tips and culture plates. They demonstrated that some lubricating, or slip, agents (“exemplified by oleamide”) and cationic biocides (DiHEMDA) used in manufacturing the plastics “leach from laboratory plasticware into a standard aqueous buffer, dimethyl sulfoxide, and methanol and can have profound effects on proteins and thus on results from bioassays of protein function.” These agents are apparently used in products from yogurt containers to clothing.

Biochemistry Professor Andrew Holt, who was apparently studying how an enzyme that plays a role in Parkinson’s disease is affected by different compounds, found widely and inexplicably varying results that were ultimately traced to the polypropylene tubes used to prepare the solutions. His team reportedly found a clear correlation between the particular test tubes used and their unusual results. According to a news source, Holt speculated that the same substances are also likely leaching out of food and beverage containers and, while he doubts they pose a health risk, he was unaware of any experiments that prove it. He said that toxicology studies are needed to determine if human exposures should be of concern. A senior scientist with the U.S.-based advocacy organization, Environmental Working Group, was quoted as saying “We simply don’t want these chemicals getting into our bodies.”

Scientists already studying the bisphenol A in plastics have apparently indicated that this research points to problems for researchers and scientific supply companies. Holt and his team have instituted measures to pre-wash their equipment, which evidently involves “two hours of washing prior to a three-hour experiment.” While the data are reportedly cleaner, the number of experiments that can be run in a day has been reduced by half. See *Montreal Gazette*, November 6, 2008; *Globe and Mail*, November 7, 2008.

[11] Child Obesity Researchers Report Early Signs of Heart Disease in Children

According to news sources, scientists attending the American Heart Association conference in New Orleans released the results of several studies including one showing that the artery walls of children who are obese or have high cholesterol are as



thick as those of adults who are 30 years older. Led by Geetha Raghuveer, a cardiologist and associate professor of pediatrics at the University of Missouri-Kansas City School of Medicine, this small study of 70 children used ultrasound to measure artery wall thickness. While no one apparently knows how thick a 10-year-old's blood vessels should be, the researchers reportedly used tables for 45-year-olds and found the thickness comparable.

Other research presented during the conference showed that 991 obese Australian children had a greater enlargement of their hearts and that 150 Australian children with a higher body-mass index had left ventricles that were slower to untwist in the heart pumping process, thus impairing the heart's ability to relax between beats. A Harvard pediatrics professor reportedly said that such findings "are potentially consistent with predictions that obesity and its complications would result in cardiovascular disease becoming a pediatric illness." Other medical specialists expressed concerns about "raising a generation of children that are going to have a significant increase in vascular disease as they get older." See *The New York Times*, *The Los Angeles Times* and *The Atlanta Journal-Constitution*, November 12, 2008.

[12] ICON Launches Web-Based Tool for Analyzing Nanotech Risk Research

The International Council on Nanotechnology (ICON) has announced the launch of a database analysis [tool](#) that enables nanotechnology research comparisons. The tool is used in conjunction with ICON's database of citations to peer-reviewed publications addressing the environmental, health and safety impacts of nanomaterials. According to ICON Director Kristen Kulinowski, "In addition to returning a list of abstracts that meet the criteria

chosen by the user, the database now allows the user to analyze research trends across time and by category." The comparisons are presented as pie charts and bar graphs.

Intended users are researchers at universities, non-governmental organizations, government, and industry worldwide. They will be able to (i) "Compare categories within a specific time range, e.g., selecting papers published between 2000-2007 and requesting the number that studied nanoscale carbons, oxides, metals and semiconductors"; (ii) "Track the progression of publications in a given category by month or year, e.g., plotting the number of publications studying nanoscale carbons and oxides by year or month between 2000 and 2007"; (iii) "Generate and export custom reports"; and (iv) "Click on a report result to generate a list of publications meeting user-defined criteria."

ICON, an international organization "dedicated to the safe, responsible and beneficial development of nanotechnology," established its research database in 2005 and claims that this "was the first effort to integrate the vast and diverse scientific literature on the impacts of nanoparticles."

[13] Study Alleges Evidence of Corn Agriculture Ubiquitous in Fast Food

Researchers at the University of Hawaii have tested 160 fast-food products purchased from outlets throughout the United States and reportedly found that "not 1 item could be traced back to a noncorn source." [A. Hope Jahren & Rebecca A. Kraft, "Carbon and Nitrogen Stable Isotopes in Fast Food: Signatures of Corn and Confinement," *Proceedings of the National Academy of Sciences*, November 18, 2008.](#)

According to the researchers, "Ingredients matter for many reasons: U.S. corn agriculture has been



criticized as environmentally unsustainable and conspicuously subsidized.”

Sampling the ratios of different isotopes of carbon and nitrogen in the meat and chicken samples tested, the researchers were able to determine what the animals were fed and the level of fertilizer used on the feed crops. They also found that higher levels of nitrogen isotope in the meat, from the ammonia emitted in their manure, could be linked to meat coming from animals raised in confined conditions.



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