

# Food & Beverage

## LITIGATION UPDATE

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# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture

##### [1] USDA Asks Pork Producers for Input on Pork Checkoff Program

USDA is [asking](#) the pork industry to decide whether to hold a referendum on the Pork Checkoff Program, a mandatory promotion fund overseen by the National Pork Board and the USDA Agricultural Marketing Service. The agency's request for referendum gives pork producers and importers between December 8 and January 2, 2009, to vote in favor of a referendum on the program. "If 15 percent of the total number of eligible producers and importers want a referendum on the Pork Checkoff Program, the referendum will be conducted within one year after the results for the Request for Referendum are announced," stated USDA, which issued the request in accordance with the settlement agreement stemming from a 2001 lawsuit initiated by the Michigan Pork Producers Association.

Meanwhile, the U.S. Food Policy Blog has urged the pork industry to back the referendum, in part because the checkoff program is "an ineffective way of increasing consumer demand for pork." Noting that USDA dismissed a 2000 referendum on the Pork Checkoff Program as "non-binding," the blog further argues that a "well-designed voluntary program"

could still raise significant funds toward product promotion. *See U.S. Food Policy Blog*, November 30, 2008.

#### Food and Drug Administration (FDA)

##### [2] FDA Issues One-Year Progress Report on Food Protection Plan

FDA this week released a progress [report](#) on the Food Protection Plan launched in November 2007 to address "both food safety and food defense for domestic and imported products." The report states that federal regulators are "working collaboratively across the agency to implement the three-core elements of protection: prevention, intervention and response." It particularly notes that FDA has (i) established offices in China and India, with the intention of expanding its presence in Europe, Latin America and the Middle East; (ii) developed melamine and cyanuric acid testing for animal feed; (iii) developed rapid detection methods for *E. coli* and *Salmonella*; (iv) enhanced its ability to track foodborne illness outbreaks; (v) signed cooperative agreements with six states to form rapid response teams to handle emergencies; and (vi) approved the use of irradiation for iceberg lettuce and spinach. FDA also inspected 5,930 high-risk domestic food establishments in fiscal year 2008 and plans to hire 130 additional employees to carry out further safety assessments. "The goal is to radically redesign the process," said FDA Associate Commissioner for Foods David Acheson. "We cannot simply rely on



picking the ball up at the point of entry.” See *The New York Times*, December 1, 2008; *Meatingplace.com*, December 2, 2008.

Meanwhile, FDA has drawn criticism from the Government Accountability Office and some public interest groups for its slowness in enacting the Food Protection Plan. According to Consumers Union, the recent sale of melamine-tainted infant formula in the United States is evidence that the agency “needs a complete overhaul” to address systemic problems. U.S. Representative Rosa DeLauro (D-Conn.) has also called for a single federal agency to oversee the entire food and agricultural supply. “It’s got to be totally redone,” she was quoted as saying. “It needs resources; it needs better management; it needs less influence from the industry and more influence on the science.” See *Food Navigator USA.com*, December 2, 2008.

## Environmental Protection Agency (EPA)

### [3] Rumors of “Cow Tax” on Methane Emissions Prompt Opposition to EPA Plan

Farmers have reportedly reacted unfavorably to an EPA proposal that would regulate greenhouse gases from “stationary sources,” including cows and other livestock, as well as cars. The “advanced notice of proposed rulemaking” suggested that farms exceeding a 100-tons-per-year emission limit – those with more than 25 dairy cows, 50 beef cattle or 200 hogs – would need to obtain an annual air-pollution permit, which respondents estimated would cost upwards of \$175 per cow, \$87.50 per head of beef cattle and \$20 per hog. The U.S. Department of Agriculture joined with several state farm bureaus in pointing out that “[It] is neither efficient nor practical to require permitting and

reporting of [greenhouse] emissions from farms of this size ... These operations simply could not bear the regulatory compliance costs that would be involved.” Although some officials have described the overwhelming response as “almost a panic,” media sources have noted that strong opposition recently killed off similar proposals in New Zealand and Estonia. See *The New York Times*, December 1, 2008; *The Associated Press*, December 5, 2008.

## Government Accountability Office

### [4] GAO Launches New Web Page to Highlight Food Safety Priorities

GAO has launched a new “Urgent Issues” [Web page](#) that outlines food safety priorities and possible government actions to secure the national food supply. According to GAO, “the fragmented nature of the federal food oversight system undermines the government’s ability to (i) plan more strategically to inspect food product process, (ii) identify and react more quickly to outbreaks of foodborne illnesses, and (iii) focus on promoting the safety and integrity of the nation’s food supply.” The government watchdog also urges the executive branch to “reconvene the President’s Council on Food Safety” and “develop a government-wide performance plan that is results-oriented and provides a cross-agency perspective to help ensure agencies’ goals are complementary.” In addition, GAO calls on Congress to “commission the National Academy of Sciences or a blue ribbon panel to conduct a detailed analysis of alternative organizational food safety structures” and “enact comprehensive, uniform, and risk-based food safety legislation.”



## China

### [5] China Estimates 300,000 Infants Sickened by Melamine-Tainted Formula

China has reportedly estimated that nearly 300,000 infants were sickened and six died after ingesting melamine-tainted formula linked to kidney stones and renal failure. The government has increased the number of illnesses six-fold from its first calculations and doubled the death toll as the Health Ministry investigated fatalities purportedly involving infant formula. “The new figures are more realistic and objective than previous figures,” said one Beijing lawyer who represents several families seeking compensation and is considering the creation of a public fund for victims. “I assume the government is worried about the situation of the dairies and is afraid the companies may fall if they have to pay compensation amid the current financial crisis. The government may be worrying about the interests of the companies first.” *See Associated Press*, December 2, 2008.

In a related development, the U.S. Food and Drug Administration (FDA) recently [updated](#) its safety assessment for melamine and cyanuric acid to include infant formula. The agency had previously concluded that “levels of melamine and its analogues below 2.5 [parts per million] in foods other than infant formula do not raise public health concerns,” but declined to set a safety threshold for infant formula because regulators lacked adequate information. At the time, FDA noted, this decision “was based on several factors specific to infant formula contaminated with more than one melamine analogue, such as the product represents the totality of caloric exposure for most infants, exposure is chronic over months, and the persons ingesting the products are infants and toddlers

whose renal systems may not be fully developed.” Many infant formula manufacturers, however, interpreted this announcement to mean that FDA would not allow any detectable level of melamine in their products.

Once it discovered “extremely low levels” of melamine and cyanuric acid in U.S.-manufactured infant formula, FDA revised its interim assessment to set a safety level that takes into account “a worst case exposure scenario in which all of an infant’s total daily dietary intake (typically 0.15 kg powdered infant formula) is contaminated with melamine.” Based on this assumption, the agency has determined that “levels of melamine or one of its analogues alone below 1.0 ppm in infant formula do not raise public health concerns.” *See Associated Press*, November 26, 2008.

## Canada

### [6] Toronto Bans Sale of Bottled Water on City Property

Toronto’s city council has approved a ban on the sale and distribution of bottled water at city facilities, making it the largest city in the world to impose such a ban. The council also approved a measure requiring shoppers to pay five Canadian cents for plastic bags and business owners to offer reusable bags and carry-out containers. Environmental concerns have apparently spurred the initiatives, which come on the heels of a complaint filed by environmental interests in Canada against Nestlé accusing it of misleading the public by claiming that its bottled water is “the most environmentally responsible consumer product in the world.” A company spokesperson reportedly stood by the claim, saying that most water bottles



are recycled and that bottled water takes less water to produce than soft drinks, sliced bread or a can of vegetables. *See Globe and Mail*, December 1, 2008. *Wikinews Shorts*, December 4, 2008.

## State and Local Government

### [7] Kansas Agriculture Department Holds Final Hearing on “Hormone-Free” Milk

The Kansas Department of Agriculture this week held its final hearing on a regulation that would ban labels advertising a dairy product as “rBGH free,” “rBST free” or “artificial growth hormone free.” As of January 2010, the measure would also require products marketed as “derived from cows not supplemented with growth hormones” to carry disclaimer language stating, “the FDA has determined that no significant difference has been shown between milk derived from rBST-supplemented and non-rBST-supplemented cows.”

The department proposed the rules to reduce consumer confusion on the issue, but organic and environmental groups have since formed a coalition to lobby against the regulation. According to the Center for Food Safety, “94 dairy farmers; consumer, farm and agricultural groups; public health, animal protection and environmental organizations; food processors; and retailers” signed a letter to Kansas Governor Kathleen Sebelius (D), claiming that the “proposed rule puts unnecessary obstacles in the way of consumers getting the information they want, restricts free speech rights of dairies and processors, interferes with the smooth functioning of free markets and could lead to increased costs for the state.” *See Reuters*, December 2, 2008.

## Litigation

### [8] Appeals Court Refuses to Reconsider Whole Foods Decision

According to a press report, the D.C. Circuit Court of Appeals has refused the request of Whole Foods Market, Inc. that the court reconsider, en banc, a July 2008 decision by a three-judge appellate court panel reviving the Federal Trade Commission’s antitrust challenge to the company’s merger with Wild Oats Markets, Inc. More information about the panel’s divided ruling appears in issue 269 of this Update. The commission will conduct administrative hearings on the merger in February 2009. While the merger was completed in August 2007, the commission could apparently try to stop further integration of the companies’ operations or require Whole Foods to sell some properties. In a statement, Whole Foods reportedly indicated its intent to vigorously defend the administrative proceedings, “even though we believe it is an unfair process and a violation of the company’s due process rights.” *See Dow Jones Newswires*, November 21, 2008.

Meanwhile, a *Chicago Tribune* reporter focused on Whole Foods in an article appearing before Thanksgiving that discussed how the company’s product labels may not fully protect consumers with certain food allergies. According to reporter Sam Roe, hundreds of products in Whole Foods’ brand lines contain “good manufacturing practices” labels, which are supposed to mean that tree nuts, soy, milk or other potential allergens were strictly segregated in the manufacturing process. A *Tribune* investigation apparently found that the foods were not, in fact, manufactured in a way that would pose no risks to those with allergies. A company official



reportedly insisted that its allergen-control practices are effective, stating “We sell millions of individual products each year, and the number of substantial allergen related-incidents that we see are in the single digits.” See *Chicago Tribune*, November 23, 2008.

#### [9] U.S. Sues Organic Dairy Seeking to Stop Interstate Sale of Raw Milk

The federal government has sued a California dairy that ships raw milk to other states, claiming that the company falsely labels its products as “pet food” to exploit a purported loophole in the law about raw milk distributed in interstate commerce and makes claims that its products can treat or prevent a host of diseases without Food and Drug Administration (FDA) approval. *U.S. v. Organic Pastures Dairy Co. LLC*, No. 08-00692 (U.S. Dist. Ct., E.D. Cal., filed November 20, 2008).

The complaint requests that the dairy be permanently enjoined from shipping (i) products across state lines whether labeled as “for human consumption or pet food” and (ii) “products with labeling that makes them drugs” under federal law. According to the complaint, the FDA issued the defendants a warning letter in February 2005, stating that distribution of raw milk in interstate commerce violates the law and that failure to comply could lead to product seizure, injunction or prosecution. “Despite FDA’s warning, the most recent evidence confirms that Defendants continue to distribute raw milk and raw milk products in final form for human consumption.”

The complaint provides specific allegations about the defendants’ sale of raw milk and claims about the products since 2004, as well as information that the dairy provided to undercover investigators.

#### [10] Canada Challenges U.S. COOL Law Before World Trade Organization

The Canadian government has reportedly filed a complaint with the World Trade Organization (WTO), challenging the U.S. country-of-origin-labeling (COOL) law. According to a news source, Canada alleges that COOL will impose unnecessary costs on meatpackers that use Canadian livestock and could lead to additional and more stringent labeling requirements in other countries. Canadian Trade Minister Stockwell Day was quoted as saying, “We believe that the country-of-origin legislation is creating undue trade restrictions to the detriment of Canadian exporters.” The complaint initiates a consultation period, which, if unsuccessful, could lead to resolution by a WTO dispute settlement panel. Canadian beef and pork producers recently called on the government to institute such action; further details about their concerns appear in issue 281 of this Update. See *Meatingplace.com*, December 2, 2008.

## Other Developments

#### [11] CSPI and Consumer Reports Focus on Sodium

The Center for Science in the Public Interest (CSPI) has published new [data](#) on the levels of sodium in processed foods. CSPI apparently found that of the more than 500 products tested in 2005 and retested for this report, “[t]he average sodium content of 528 has remained essentially constant, *increasing* by a slight 0.6 percent. About as many products (109) *increased* by more than five percent as decreased (114) by that percentage. And there were almost twice as many (29) products that increased by 30 percent or more as decreased by



that percentage (18).” CSPI calls on restaurateurs and food processors to “lower the sodium content of their foods for the sake of their customers’ health and to avoid unflattering publicity.” The advocacy group also calls on the federal government to set sodium limits for processed foods and for the Food and Drug Administration to change salt’s regulatory status from “Generally Recognized as Safe” (GRAS) to a “food additive.”

*Consumer Reports* has also [analyzed](#) the salt content in foods such as breakfast cereal, candy and bagels and found that they contain relatively high levels per serving. For example, four strands of black licorice twists were found to contain 200 mg of salt and a chocolate-flavored instant pudding and pie filling mix had 420 mg of salt per serving. According to the magazine, “You might be getting sodium, even if you don’t see ‘sodium chloride’ listed as an ingredient, in the form of disodium guanylate, disodium inosinate, sodium caseinate, sodium benzoate, sodium bicarbonate, sodium nitrite, and other combinations.” Americans generally consume more sodium than the recommended daily limit, according to *Consumer Reports*, which notes that the limit is 2,300 mg per day and 1,500 mg or less for those trying to control high blood pressure. The article warns, “The bad news is that sodium lurks in foods that you’d never think to check.”

#### **[12] CSPI Annual Report Claims Seafood Causes More Cases of Illness Per Bite**

The Center for Science in the Public Interest (CSPI) has issued its annual [Outbreak Alert!](#) report, which claims that “a pound of fish and shellfish is 29 times more likely to cause illness than the safest food category, a pound of dairy foods.” According to CSPI, their database has tracked 1,140

foodborne illness outbreaks linked to fin fish, mollusks, and shrimp and lobsters. The group has attributed “a plurality of seafood outbreaks” to naturally occurring toxins such as scombrototoxin and ciguatoxin, but noted the impact of *Vibrio* bacteria and noroviruses. “Because foodborne illness is drastically underreported, because much foodborne illness does not occur in outbreaks, and because it is so difficult to prove which food caused an outbreak, CSPI’s data represents [sic] just the tip of the iceberg,” stated the watchdog in a November 25, 2008, press release. See *FoodNavigator-USA.com*, November 26, 2008.

#### **[13] CUNY Campaign Against Diabetes Publishes Obesity Policy Report**

The City University of New York Campaign Against Diabetes and the Public Health Association of New York City (PHANYC) have published a [report](#), titled *Reversing Obesity in New York City: An Action Plan for Reducing the Promotion and Accessibility of Unhealthy Food*, that aims to educate policy makers, advocates and health professionals about food policy issues. Focused on lowering obesity rates in New York City, the report asks local government to: (i) “create local healthy food zones” in schools, churches, health centers, and other public institutions; (ii) “use zoning laws to reduce density of unhealthy food outlets”; (iii) “strengthen oversight of deceptive health claims in food advertising”; (iv) “discourage racial/ethnic targeting of unhealthy food advertisements”; (v) “tax unhealthy food such as sweetened soda and other beverages”; (vi) “support counter-advertising campaigns against unhealthy foods”; and (vii) “restrict advertising and promotion of unhealthy food.” In addition, CUNY Campaign Against Diabetes and PHANYC have called on consumer



advocates and legislators to “challenge the food industry’s right to pursue profit at the expense of public health.” “One way the food industry protects its prerogatives is to make arguments that discourage public action,” opines the report, which contends that the “undesirable characteristics of unhealthy food are the direct consequence of food industry marketing, product design, and pricing practices.”

## Media Coverage

**[14] Tom Avril, “Influence of Corporate Money on Study of Nutrition Questioned,” *Philadelphia Inquirer*, November 25, 2008**

*Inquirer* staff writer Tom Avril opens his piece by focusing on a nutritionist who advised consumers to drink orange juice as a boost to the immune system when *Forbes.com* wrote an article in 2007 about preventing colds and the flu and turned to her for a quote. Apparently, nutritionist Lisa Hark was being paid by the Florida orange industry to promote its product when she gave the advice. According to Avril, such corporate ties are not unusual, and he notes how the federal government formed a new 13-member panel this year to review dietary guidelines, including six members who “have received funding from the food or pharmaceutical industries.”

Most of the article details Hark’s ties to other corporations and questions whether she was qualified to make some nutrition recommendations she provided on their behalf. Kelly Brownell, director of the Rudd Center for Food Policy and Obesity at Yale University, is quoted as saying, “For professionals to take money and believe they remain unbiased is contrary to both scientific evidence and common sense. Otherwise, why would industry pay all that

money.” Hark claimed that it was “ridiculous” to suggest that her opinion would be influenced by money.

**[15] John Tierney, “Health Halo Can Hide the Calories,” *The New York Times*, December 2, 2008**

This article addresses one possible explanation for a phenomenon that *New York Times* journalist John Tierney refers to as “the American obesity paradox,” which he describes as the failure of America’s health food obsession to curb obesity rates. Tierney and Pierre Chandon, an assistant marketing professor with the Institut Européen d’Administration des Affaires (INSEAD), asked separate groups of New York City residents and tourists to estimate the calories of two nearly identical meals from Applebee’s. The first meal contained a salad and a soft drink; the second meal was identical, but added a 100-calorie package of crackers labeled “*Trans* Fat Free.” The U.S. residents overestimated the calories in the first meal, but underestimated them in the second one. “Just as Dr. Chandon predicted, the *trans*-fat-free label on the crackers seemed to imbue them with a health halo that magically subtracted calories from the rest of the meal,” writes Tierney, who also found that foreign-born tourists “correctly estimated that the meal with the crackers had more calories than the meal without crackers.”

Tierney points to recent research claiming that “putting a ‘low fat’ label on food caused everyone, especially overweight people, to underestimate its calories, to eat bigger helpings and indulge in other foods.” In addition, the article questions whether the city’s recent ban on *trans* fat might backfire if “people start eating French fries – hey, they’re *trans*-fat free now! – and rewarding themselves with





dessert.” Chandon has further recommended that menus and packages clearly display calorie information to help consumers eliminate the health halo effect. “The health halo raises some interesting problems for consumers, as well as for companies and public health officials like those in New York City, who last year banned *trans* fats from restaurants,” Tierney notes on his *Times*-sponsored blog. “It may seem helpful to point out supposedly virtuous food with labels like ‘*trans* fat-free’ or ‘low-fat’ or organic, but do these labels just lead to more obesity?” See *Tierney Lab: Putting Ideas in Science to the Test*, December 2, 2008.

## Scientific/Technical Items

### [16] Swedish Doctoral Thesis Links Fast Food Diet to Brain Abnormalities

A researcher at a Swedish medical university, Karolinska Institutet, has studied the effect of a high fat, sugar and cholesterol diet on the brains of mice. Susanne Akterin’s [doctoral thesis](#), “From Cholesterol to Oxidative Stress in Alzheimer’s Disease: A Wide Perspective on a Multifactorial Disease,” shows that mice fed a diet equivalent to the nutritional content of most fast food developed brain abnormalities similar to those seen in the brains of Alzheimer’s patients. While she finds the results promising by suggesting how Alzheimer’s could be prevented, Akterin also noted that “more research in this field needs to be done before proper advice can be passed on to the general public.” Epidemiological studies have apparently shown that high cholesterol levels and lack of antioxidants may render people more susceptible to the development of the disease, so Akterin designed her research to find a mechanism that could explain these findings.



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# Food & Beverage

## LITIGATION UPDATE

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