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FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Legislation Seeks Data on Antimicrobial Use in Livestock

U.S. Reps. Henry Waxman (D-Calif.) and Louise Slaughter (D-N.Y.) recently introduced legislation (H.R. 820) that would require drug manufacturers "to provide better information on the amount and use of antibiotics and other antimicrobials given to animals raised for human consumption," according to a February 26, 2013, press release. The Delivering Antimicrobial Transparency in Animals (DATA) Act would also compel, "for the first time, large-scale producers of poultry, swine, and livestock to report data on the medicated feeds provided to their animals."

Under the DATA Act, drug manufacturers would report to the Food and Drug Administration (FDA) on how their products are used "by determining (or estimating) the amounts of their drugs used in each food-producing animal for which they are approved." In addition to general data about their antibiotic use, livestock producers administering medicated feed under a Veterinary Feed Directive would submit "detailed information" about "the quantities, dosages and duration of time the medicated feeds were provided to the animals." The DATA Act would also direct the (i) Department of Health and Human Services to collaborate with the U.S. Department of Agriculture to improve data collection activities; (ii) FDA to finalize "its guidance to drug sponsors wishing to comply with [the agency's] recommendations for judicious use of medically important antibiotics and other antimicrobials in animals"; and (iii) Government Accountability Office to evaluate FDA's data collection efforts as well as its success in reducing the "injudicious use of antimicrobials in animals."

"The widespread use of antibiotics in animals is a vital public health issue," said Waxman. "We need to learn more about how these drugs are being used. With this information, scientists will be able to better pinpoint the relationship between the routine use of antibiotics in animals and the development of dangerous resistant bugs that can harm humans. This knowledge will inform scientists and Congress and start us down the path to sensible regulation."

SHB offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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Meanwhile, the Institute for Agriculture and Trade Policy and 34 other groups have signed a February 26, 2013, **letter** asking the Senate Committee on Health, Education, Labor and Pensions to reauthorize and update the Animal Drug User Fee Act (ADUFA), which currently provides for data collection and reporting related to the use of antimicrobials in animals. In particular, the coalition has asked that the committee revise ADUFA to require (i) feed manufacturers to report medicated feed sales to FDA "by the antibiotic used, by animal species, and by indication (purpose of use) when available," and (ii) FDA to better summarize these data for the public, in part by reporting all available information on antibiotic sales in food-producing animals and by tracking "the response of drug manufacturers to FDA's voluntary plan so that Congress and the public can evaluate its effects on sales of antibiotics for use in food animal production."

"[FDA's] response to the threat has been to propose recommendations (Guidance for Industry #213) that encourage industry to voluntarily phase-out the marketing of antibiotics to speed up animal growth and to also voluntarily phase out the over-the-counter marketing of antibiotics," concludes the letter, which calls on Congress to help curb animal antibiotic use. "This guidance does not require action and has no mechanism to track the adoption of these recommendations or to evaluate their effects on antibiotic use and resistance, nor does it address the routine feeding of antibiotics to food animals to keep them from getting sick in overcrowded, unsanitary, and high-stress conditions."

FDA Publishes International Food Safety Plan

The Food and Drug Administration (FDA) has **released** its "International Food Safety Capacity-Building Plan," which aims to enhance "the food safety capacity of countries that export food to the United States." As directed by the Food Safety Modernization Act, the plan provides direction on how FDA can (i) "expand the technical, scientific, and regulatory capacity of foreign governments and their food industries," (ii) "prioritize its capacity-building efforts based on risks," and (iii) "work in partnership with counterpart authorities, industry, and other organizations in order to achieve lasting food safety results." To this end, the plan promotes efficiency across the Foods and Veterinary Medicine Program, evidence-based decision-making, the exchange of information between FDA and foreign government agencies, and enhanced technical support for foreign programs.

"This capacity-building plan recognizes the need for a change in agency strategy," states FDA's report. "Instead of focusing primarily on intercepting harmful products, FDA will attempt to prevent such goods from arriving at U.S. borders in the first place."

FDA Debars Importer After Guilty Plea for Seafood Mislabeling

The Food and Drug Administration has **debarred** seafood importer Richard Stowell from importing food into the United States for three years based on his felony conviction for instructing his company's employees to mislabel shrimp from Thailand and Malaysia as shrimp from Ecuador and Honduras and then selling it to a supermarket chain. Stowell pleaded guilty to three felony counts in July 2011 and failed to respond to the notice of proposed debarment. *See Federal Register*, February 26, 2013.

USDA to Revise Regulations on GE Organisms

The Department of Agriculture (USDA) has issued a **proposed rule** that would update regulations regarding genetically engineered (GE) organisms "by adding provisions for sharing certain business information with state and tribal government agencies." According to USDA, the proposed provisions would govern the sharing of certain information contained in permit applications and notifications for importations, interstate movements or releases into the environment of GE organisms. The agency also says that the provisions "would allow the Animal and Plant Health Inspection Service (APHIS) to share certain business information with state and tribal governments without impairing [USDA's] ability to protect confidential business information from disclosure." Apparently, APHIS currently withholds such information when it shares applications with non-federal government agencies. USDA says that the action would improve collaborative and cooperative efforts with state and tribal governments and improve effectiveness of its notification and permitting procedures as APHIS continues to regulate certain GE organisms. *See Federal Register,* February 27, 2013.

TTB Issues Final Rule Designating Cachaça as Type of Rum

The Alcohol and Tobacco Tax and Trade Bureau (TTB) has issued a **final rule** designating "Cachaça" as a type of rum and a distinctive product of Brazil. Effective April 11, 2013, the final rule recognizes Cachaça as a distinctive distilled spirit made from sugar cane "in compliance with the laws of Brazil regulating the manufacture of Cachaça for consumption in that country." In return, the Brazilian officials who petitioned TTB and the U.S. Office of the Trade Representative for the designation have reportedly agreed to recognize bourbon whiskey and Tennessee whiskey as distinctive products of the United States.

Under the final rule, products that meet the identity standards for Cachaça may be labeled as such and no longer need to include the term "rum" on the packaging. In addition, TTB has noted that distilled spirits containing corn or corn syrup will not be recognized as either rum or Cachaça and must continue to use "distinctive or fanciful names, as well as statements of composition,"

that do not reference this class or type of product. Additional details about the Cachaça designation appear in Issue 438 of this *Update*. *See Federal Register,* February 25, 2013

Codex Meeting to Target Food Contaminants

The U.S. Department of Agriculture and the Food and Drug Administration have **announced** a March 12, 2013, public meeting in College Park, Maryland, to provide information and receive public comments on agenda items and draft U.S. positions for discussion at the 7th Session of the Codex Committee on Contaminants in Foods in Moscow on April 8–12, 2013. Agenda items include (i) proposed draft maximum levels for Deoxynivalenol in cereals and cereal-based products; (ii) proposed draft revisions of maximum levels for lead in selected commodities in the general standard for contaminants and toxins in food and feed; (iii) a proposed draft code of practice for preventing and reducing Ochratoxin A contamination in cocoa; and (iv) a discussion paper on the development of a code of practice for preventing and reducing arsenic contamination in rice. *See Federal Register, February 27*, 2013.

EFSA Meeting to Target Endocrine Active Substances

The European Food Safety Authority (EFSA) will host a **meeting** on March 20, 2013, in Brussels to discuss the agency's work in the area of endocrine active substances (EAS) and endocrine disruptors (ED). The EFSA Scientific Committee will present its opinion on "Hazard assessment of endocrine disruptors: scientific criteria for identification of endocrine disruptors and appropriateness of existing testing methods for assessing effects mediated by these substances on human health and the environment," which was created in response to the European Commission's September 2012 mandate to define scientific criteria for identifying ED and to review whether existing toxicity methods are appropriate to identify and characterize potential endocrine activity (effect on endocrine system) and/or endocrine disruption (leading to an adverse effect) in humans and the ecosystem.

Sugar-Sweetened Beverage Tax Introduced in California

Proposed legislation (**S.B. 622**) in California would impose a 1-cent per fluid ounce tax on sugar-sweetened beverages to finance a Children's Health Promotion Fund. Introduced by Sen. Bill Monning (D-Carmel), the measure would apply to all sugar-sweetened beverage distributors whether their products are bottled or sold as concentrate.

Intended to "discourage the excessive consumption of sweetened beverages by increasing the price of these products," the proposal would also create a fund "allocated for the purposes of statewide childhood obesity prevention activities and programs." To this end, the Children's Health Promotion Fund

would support, among other things, state- and community-based efforts to reduce consumption of "calorie-dense, nutrient-poor foods" and improve access to "healthy, safe, and affordable foods and beverages."

"This bill will combat the obesity crisis and ensure that our children—and future generations of Californians—are not doomed to a shorter life expectancy and can instead live longer, healthier lives," Monning was quoted as saying. Details about Monning's previous attempt to pass a sugar-sweetened beverage tax appear in Issue **392** of this *Update*. *See Los Angeles Times,* February 26, 2013.

California Targets Sale of "Plumped" Poultry in State Buildings

California Assembly Member Ian Calderon (D-Whittier) has introduced a bill (**A.B. 682**) that "would prohibit chicken or turkey sold in any state-owned or state-leased building at food concessions and cafeterias from being 'plumped' in any way." The legislation defines "plumped" poultry as any such product injected with "saltwater, chicken stock, seaweed extract, or some combination thereof… to increase its weight and price."

"The practice of 'plumping' chicken or turkey can increase the sodium content by up to 500 percent," states the bill, which would take effect January 1, 2014, or upon the expiration of existing vending and concession contracts. "Fresh, natural chicken should have no more than 70 mg of sodium per four ounce serving, whereas plumped chicken can contain up to 400 mg sodium. The average household of four people, because of 'plumping' chicken or turkey, spends approximately $127 per year on saltwater."

OEHHA Extends Comment Period on Intent to Add BPA to Prop. 65 List as Reproductive Toxin

At the request of several stakeholders, including GMA and the California Chamber of Commerce, California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has extended the **comment period** on its notice of intent to add bisphenol A (BPA) to the list of substances known to the state to cause reproductive toxicity. Submissions must now be filed by March 27, 2013. Inclusion on the Proposition 65 (Prop. 65) list would mean that warnings about BPA, which is used in water bottles and is present in epoxy resins used to line food cans, would have to be provided to consumers. OEHHA planned to rely on the authoritative bodies listing mechanism to add BPA to the list.

In a related development, the agency has also extended the **comment period** for its proposal to establish a maximum allowable dose level (MADL) for BPA; submissions are requested by April 10. The proposed MADL would be 290 micrograms per day. *See OEHHA Press Release*, February 21, 2013.

Styrene Will Not Be Added to California's Prop. 65 List

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has **withdrawn** styrene as a potential addition to the list of substances known to the state to cause cancer by means of the Labor Code mechanism. In 2009, a state judge tentatively enjoined its listing after determining that no known evidence supported a finding that styrene is a carcinogen and that its designation as such would likely have a devastating effect on the industry. Widely used in food packaging, styrene plastics are apparently crucial to the transportation and sale of strawberries, raspberries and blueberries, state industries worth more than $1 billion. The court further ruled at the end of 2012 that OEHHA's reliance on the International Agency for Research on Cancer's conclusion that styrene is "possibly carcinogenic to human" was insufficient to justify its listing. OEHHA has not reportedly appealed the decision. *See InsideEPA.com*, February 21, 2013.

Colorado Rejects GE Food Labeling Bill

In a 7–2 vote, lawmakers in Colorado have rejected a **bill** (H.B.1192) that would have defined "genetically engineered" and required a person selling, distributing or offering food for sale in Colorado to identify genetically engineered (GE) food with the following label: "This product contains genetically engineered material or was produced with genetically engineered material."

The bill was sponsored by Rep. Jeanne Labuda (D-Denver), who, according to a news source, says that consumers deserve to know more about how their food is produced and argues that food producers already have to label foods containing certain additives or allergens.

Opponents of the bill, including many farmers and food retailers, reportedly claim that requiring labels for GE foods would significantly affect family farmers and increase the cost of food for all Colorado citizens. "Much of the dialogue surrounding this topic seems to be filled with fear and innuendo, as opposed to being well researched, thoughtful and fact based. The requirement to place what will be construed as a warning label on products that contain genetically modified material infers that the product is inferior or even dangerous…In fact, the USDA, the FDA and the AMA have all publicly stated that GE products are safe for human consumption," said a fifth generation peach grower in a Colorado Farm Bureau news release. *See SFGate.com,* February 21, 2013*; Farm Bureau Colorado Press Release,* February 21, 2013.

LITIGATION

Court Narrows Claims Against Tea Company over Antioxidant Source Labels

A federal court in California has dismissed some of the putative class claims filed against Twining North America, Inc., alleging that the company misled consumers by labeling its green tea products as a "natural source of antioxidants." *Lanovaz v. Twinings N. Am., Inc.*, No. 12-2646 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered February 25, 2013). Stricken with leave to amend are claims based on labels or products other than green tea because the named plaintiff alleged that she purchased green tea only.

The court disagreed with the defendant that the state law-based claims were preempted, finding that by stating its tea is a "natural source of antioxidants," the defendant made a nutrient content claim regulated by the Food and Drug Administration (FDA) and that the plaintiff was seeking to enforce state law identical to federal requirements. So ruling, the court cited an FDA warning letter sent to the company over its alleged "nutrient content claim." The court also ruled that the plaintiff had sufficiently stated an injury in fact to support Article III standing requirements and that her claims met the plausibility requirement.

Dismissed with prejudice were claims for breach of warranty under the Song-Beverly Consumer Warranty Act and Magnuson-Moss Warranty Act because the former applies to consumer products excluding consumables and the latter concerns warranties against product defect, which is not alleged here. The court further dismissed the plaintiff's restitution claim based on unjust enrichment, since she already has a restitution remedy under the Unfair Competition Law.

Putative Class Claims over Kraft, Cadbury & Back to Nature Food Labels Narrowed

A federal court in California has denied in part and granted in part the defendants' motion to dismiss putative class claims that many of their food products are sold with labels that are unlawful and/or mislead consumers. *Ivie v. Kraft Foods Global, Inc.*, No. 12-2554 (U.S. Dist. Ct., N.D. Cal., San Jose Div., order entered February 25, 2013). Among the products are chewing gum, crackers, granola, fruit punch, cheese, nut mix, lemonade, stuffing mix, Jell-O®, and Easy Mac®. The labels at issue include the following statements: "natural," "all natural," "no artificial" colors/sweeteners/flavors/preservatives/ingredients, nutrient content, health claims, "sugar free," "sugarless," certain serving sizes, and "evaporated cane juice." The allegations are also apparently based on products the named plaintiff did not purchase.

The court determined that (i) the plaintiff sufficiently alleged an injury in fact by claiming she would not have purchased the products but for the alleged unlawful or misleading labels; (ii) the plaintiff cannot bring claims relating to

products she did not purchase, but may amend her complaint on this point; (iii) the primary jurisdiction doctrine is inapplicable to most of the plaintiff's claims because the Food and Drug Administration (FDA) has established clear policy on the issues, and the alleged state law violations mirror or are identical to FDA provisions; (iv) because FDA is engaged in a rulemaking on amending serving-size regulations pertaining to small breath mints, plaintiff's claims as to Dentyne® breath mints were precluded under the primary jurisdiction doctrine; (v) most of the claims, including those based on use of the term "natural," survive a preemption challenge, and those that do not may be amended, although package statements that the products are a "good source" of vitamins or are "wholesome" included the required referral statements and were thus expressly preempted under federal law; and (vi) claims for restitution based on unjust enrichment and warranty claims under state and federal laws had to be dismissed with prejudice as superfluous or not within the laws' application.

Misbranded Yogurt Suit Dismissed with Prejudice

A California federal court has dismissed with prejudice claims filed against a yogurt maker and its parent company alleging that its Greek-style yogurt product was misbranded under federal food regulations. *Smith v. Cabot Creamery Coop., Inc.*, No. 12-4591 (U.S. Dist. Ct., N.D. Cal., decided February 25, 2013). The putative class plaintiffs alleged that the defendants used whey protein concentrate (WPC) and milk protein concentrate (MPC) as "filler material" to "thicken Cabot Greek and increase its protein content, instead of making Greek yogurt the 'authentic' way which involves filtering the liquid whey byproduct during the manufacturing process and keeping only the protein-rich solid portion." They also alleged that the Food and Drug Administration (FDA) forbids the use of WPC and MPC.

The defendants moved to dismiss the claims because they were premised on the alleged unlawful use of these ingredients, arguing that FDA allows WPC and MPC to be used lawfully "as optional ingredients to increase the nonfat solid content of the yogurt, as Cabot did." In support, the defendants cited an agency interpretation based on a question-and-answer session at a 2004 regional milk seminar. The court agreed that this session was formalized in an FDA Memorandum of Information directed to "All Regional Food and Drug Directors." According to the court, such interpretations are "entitled to deference, being statements from the FDA about its own regulations. The Court therefore finds that MPC and WPC are permissible optional ingredients in yogurt under FDA regulations."

Criminal Charges Follow Investigation into Illegal Importation of Honey

A U.S. attorney in Illinois has **announced** charges filed against two companies and five individuals in a five-year investigation of imports that allegedly circumvented $180 million in anti-dumping duties on honey from China

and involved purportedly "adulterated" honey containing the antibiotics Chloramphenicol and Tetracycline. Groeb Farms, Inc., described as the largest industrial honey supplier in the United States, knowingly avoided more than $78.8 million in anti-dumping duties by buying mislabeled honey imported from China and has agreed to pay a $2-million fine and "to dispose of any illegally-entered Chinese-origin honey in its possession." It will also institute a corporate compliance program to ensure supply chain integrity and conduct "reasonable inquiries to safeguard against any illegal activity."

Jun Yang, Urbain Tran and Hung Yi Lin were all charged with brokering or transporting illegal Chinese-origin honey in the United States. Yang will plead guilty and has agreed to a fine of $250,000 and restitution of $2.64 million. He also faces a 74-month prison sentence. Tran will plead guilty and has agreed to a fine of $500,000 and restitution of $204,403 and faces a maximum sentence of 20 years on each fraudulent sales and transportation count. Lin still faces arraignment; she was charged with one count of transporting 10 container loads of Chinese-origin honey through the Chicago area. The charge could result in a penalty of 20 years in prison and a $250,000 fine.

Douglas Murphy and Honey Holding I, Ltd., together doing business as Honey Solutions, allegedly purchased honey from Poland containing the broad spectrum antibiotic Chloramphenicol. Murphy has pleaded guilty and faces a $26,624 fine and six months in prison. Acknowledging its responsibility, Honey Holding agreed to pay a $1-million fine and will also establish a corporate compliance program. According to the U.S. attorney, the company avoided more than $33.4 million in antidumping duties by purchasing honey from "at least seven shell and front companies that were controlled by various Chinese honey producers and manufacturers."

Canadian resident Donald Couture has been indicted on four counts of violating the Food, Drug, and Cosmetic Act for delivering honey containing prohibited antibiotic Tetracycline. Each count carries a $250,000 fine and a maximum prison sentence of three years. *See U.S. Attorney's Office, Northern District of Illinois Press Release*, February 20, 2013.

Lawyer Silenced by Court in Halal Fraud Suit Claims Unlawful Prior Restraint

The Dearborn, Michigan-based attorney who was ordered to remove statements from his Facebook® page opposing a proposed class-action settlement in a case raising allegations that a McDonald's Corp. franchisee purported to sell halal chicken when some of the products were not prepared according to Islamic law has filed a motion to vacate the order and to extend the period for filing objections or opting-out. *Ahmed v. McDonald's Corp.*, No. 11-014559 (Wayne Cnty. Cir. Ct., Mich., motion filed February 22, 2013). Represented by advocacy group Public Citizen, Majed Moughni claims that the court's order

"was a prior restraint forbidden by the First Amendment." Additional information about the proposed settlement and Moughni's criticism of it appear in issues 468 and 471 of this *Update*.

According to the brief accompanying the motion, Moughni, his wife and children have eaten at McDonald's and are thus members of the class. The brief further contends, "Giving Moughni only a few days' notice, the Court convened an emergency hearing; then, without hearing from Moughni, issued a prior restraint of unparalleled breadth, barring Moughni from making **any** public statements about an entire subject matter, even statements that were entirely truthful and not at all misleading. It further compelled him to place speech with which he fervently disagreed on his own web page; and it forbade him from dissemination, circulation or publication of any opt-out form or objection during the crucial ten-day period before the deadline for members of the class to decide whether to opt out or object. On a literal reading of the injunction, Moughni was barred even from speaking to his own wife and children about the settlement, and even from submitting an objection to the settlement on his own behalf."

According to Moughni, the injunction not only constituted impermissible prior restraint, it also violated the strict rule against compelled speech. He argues that the plaintiff failed to show falsity or actual malice in what was posted on his Facebook® page. And he notes that no case law supports enjoining "a member of a class from urging other members of the class to oppose a settlement or a class action." He reminds the court that he "was not speaking as a lawyer representing clients, or representing the class, but as a member of the class appealing to fellow members of the class. In those circumstances, plaintiff must meet the ordinary standards for relief against core, noncommercial speech that enjoys the highest level of [protection] under the constitution."

Beer Maker Inundated with Product Dilution Claims

Putative class actions have been filed against the Anheuser-Busch Cos. (AB) in federal courts in California, New Jersey and Pennsylvania, alleging that "consumers receive watered down beer containing less alcohol than is stated on the labels of AB's products." *Giampaoli v. Anheuser-Busch Cos., LLC*, No. 13-0828 (U.S. Dist. Ct., N.D. Cal., filed February 22, 2013); *Wilson v. Anheuser-Busch Cos., LLC*, No. 13-1122 (U.S. Dist. Ct., D.N.J., filed February 25, 2013); *Greenberg v. Anheuser-Busch Cos., LLC*, No. 13-1016 (U.S. Dist. Ct., E.D. Pa., filed February 25, 2013).

Claiming that the company uses a technology enabling it to create precise alcohol levels in its beer products, each plaintiff seeks to certify a nationwide class of consumers who have purchased AB products such as Budweiser®, Bud Ice®, Bud Light Premium®, Michelob®, Michelob Ultra®, Hurricane High

Gravity Lager®, King Cobra®, Busch Ice®, Natural Ice®, Black Crown®, and Bud Light Lime®. Alleging violations of consumer fraud laws and breach of state and federal warranty laws, the plaintiffs seek injunctive relief, including a corrective advertising campaign; restitution; disgorgement; compensatory, exemplary and treble damages; attorney's fees; costs; and interest.

D.C. Circuit Dismisses Challenge to USDA Almond Rules

The D.C. Circuit Court of Appeals has dismissed a challenge to U.S. Department of Agriculture (USDA) rules requiring California almonds sold domestically to be treated with heat or chemicals to prevent the spread of *Salmonella*. ***Koretoff v. Vilsack*, No. 12-5075 (D.C. Cir., decided February 22, 2013)**. According to the court, the almond producers who mounted the challenge had waived their claims "by failing to raise them during the rulemaking process." They had contended that the USDA secretary exceeded his authority in requiring the treatment of all almonds "irrespective of whether they are contaminated" and that the secretary failed to determine that the treatment rule was "the only practical means of advancing the interests of the producers." Finding no error in the lower court's disposition, the court affirmed its grant of summary judgment for the secretary.

OTHER DEVELOPMENTS

New Report Critical of Digital Food Marketing to Children

Yale University's Rudd Center for Food Policy and Obesity and the Berkeley Media Studies Group have published a report criticizing top cereal manufacturers for allegedly targeting children with "sophisticated online marketing techniques." Andrew Cheyne, et al., "Marketing Sugary Cereals to Children in the Digital Age: A Content Analysis of 17 Child-Targeted Websites," *Journal of Health Communication,* February 2013. Focusing on 17 branded cereal Websites between October 2008 and March 2009, the study's authors reported that these sites employed a mix of techniques such as "advergames, videos, site registration, and viral marketing" to engage children in "lengthier and more sophisticated" interactions "than are possible with traditional, passive media such as television advertisements or product packaging."

In particular, the study relied on Internet traffic data to allegedly suggest that children spent more time on sites with higher levels of immersion, that is, "the most and most sophisticated techniques." These high-immersion sites reportedly brought children back for an average of three visits, with such visits on average including more than 100 Web pages per visitor and lasting longer than 20 minutes. Although the study's authors noted that these results were tentative insofar as they could only obtain traffic data for nine of the 17

sample sites, they nevertheless criticized cereal manufacturers for attempting to "exploit children's susceptibility to advertising by almost exclusively promoting high-sugar cereals using deeply engaging techniques."

"Future research should assess to what extent the engagement techniques on child-directed cereal websites affect children's brand awareness and preferences," concludes the report. "This work should evaluate children's knowledge of these techniques' promotional intent, and their food preferences and requests after exposure to digital food and beverage marketing… This is especially important given that the cereal industry touts compliance with its own voluntary nutrition guidelines regulating advertising to children." *See Rudd Center Press Release,* February 21, 2013.

One-Third of Seafood Allegedly Mislabeled, New Report Claims

According to a recent **study** conducted by the nonprofit ocean conservation group Oceana, as much as one-third of seafood sold in restaurants and grocery store is mislabeled. From 2010 to 2012, Oceana evidently collected more than 1,200 seafood samples from 674 retail outlets in 21 states to determine if they were correctly labeled. After conducting DNA tests, researchers allegedly found that one-third (33 percent) of the 1,215 samples analyzed nationwide were mislabeled under U.S. Food and Drug Administration (FDA) guidelines.

Oceana reports that, of the most commonly collected fish types, samples sold as snapper and tuna had the highest mislabeling rates (87 and 59 percent, respectively), with the majority of the samples identified by DNA analysis as something other than what was found on the label. Halibut, grouper, cod, and Chilean seabass were mislabeled between 19 and 38 percent of the time, while lower levels of mislabeling were noted among salmon (7 percent) and sole (9 percent). Apparently, only seven of the 120 samples of red snapper purchased nationwide were actually red snapper—the other 113 samples were another fish.

The testing results also reportedly showed strong national trends in seafood mislabeling among retail outlets, with sushi venues having the highest fraud levels (74 percent), followed by restaurants (38 percent) and then grocery stores (18 percent). Oceana indicated that some mislabeling may result from human error in identifying fish or their origin, but "more often, it is driven by economic gain, as when a cheaper or more readily available species is substituted for one that is more expensive, desirable or in limited supply." In addition, mislabeling can also provide cover and profit for illegal or unregulated seafood.

In a company news release, Oceana warned that seafood fraud can have "serious health consequences," concluding that its findings demonstrate the need for "a comprehensive and transparent traceability system—one that tracks fish from boat to plate—must be established at the national

level. At the same time, increased inspection and testing of our seafood, specifically for mislabeling, and stronger federal and state enforcement of existing laws combating fraud are needed." The nonprofit also said that the "government has a responsibility to provide more information about the fish sold in the U.S., as seafood fraud harms not only consumers' wallets, but also every honest vendor and fisherman cheated in the process," and affects the health of our oceans. Related information about efforts to address seafood labeling issues appears in Issue **458** of this *Update*. *See Oceana Press Release,* February 21, 2013.

IKEA Pulls Meatballs, Sausages in Wake of Horsemeat Scandal

IKEA Group has reportedly withdrawn its trademark meatballs and sausages from its European locations after testing revealed trace amounts of horsemeat in the products. According to a February 28, 2013, press release, the company identified horsemeat "in a few samples of our meatballs from a supplier in Sweden" and has thus suspended sales of "all products containing minced meat from pork and beef from that supplier."

IKEA Group has since reiterated, however, that the recall does not implicate products sold at its U.S. stores. "All meatballs sold in our IKEA US stores are sourced from a U.S. supplier," the company stated in a February 26 press release. "Based on the results of our mapping, we can confirm that the contents of the meatballs follow the IKEA recipe and contain only beef and pork from animals raised in the U.S. and Canada."

Meanwhile, the U.K. Food Standards Agency (FSA) has released the **second** and **third** rounds of DNA testing initiated by the food industry in the wake of the horsemeat scandal. According to these reports, 45 out of 5,430 tests have indicated horse DNA "at or above the 1% thresholds," resulting in the recall of 17 products to date. In addition, FSA has verified that no tests have thus far revealed the presence of the veterinary medicine phenylbutazone (bute) in any product.

"The FSA focus continues to be on gross contamination of beef products with horse meat, that is, where there is more than 1% horse DNA detected in a product," conclude the reports. "The Agency believes that such levels of horse DNA indicate either gross negligence or deliberate substitution of one meat for another."

German Farms Caught Up in Alleged Organic Egg Fraud

According to media sources, German officials have apparently launched an investigation into more than 160 farms accused of flouting the standards governing organic and free-range egg production. Lower Saxony and two other states have apparently announced an ongoing probe into poultry

establishments, including 40 organic farms, that allegedly marketed their eggs as organic or free-range while keeping their hens in overcrowded conditions. Those operators found in beach of EU regulations face both fines and up to six months in prison.

"If the accusations are found to be true, then we are talking of fraud on a grand scale: fraud against consumers but also fraud against the many organic farmers in Germany who work honestly," said German Food, Agriculture and Consumer Protection Minister Isle Aigner. "Consumers must be able to rely on the fact that what is written (on the produce) is also in there. Therefore it is important that this is checked." *See AFP* and *Reuters,* February 25, 2013; *The Telegraph,* February 26, 2013.

SCIENTIFIC/TECHNICAL ITEMS

Researchers Claim BPA Suppresses Gene Vital to Cortical Neurons

Duke University researchers have identified the mechanism by which bisphenol A (BPA) allegedly affects nervous system development by suppressing a gene "vital to nerve cell function," according to a February 25, 2013, press release. Michele Yeo, et al., "Bisphenol A delays the perinatal chloride shift in cortical neurons by epigenetic effects on the *Kcc2* promoter," *PNAS,* February 2013. The study focused on cortical neuron development, during which time a protein called *Kcc2* expels chloride ions that would otherwise "damage neural circuits and compromise the nerve cell's ability to migrate to its proper position in the brain."

Using cell cultures from rats and humans, researchers purportedly found that BPA suppresses the gene responsible for *Kcc2* production, raising concerns about whether BPA "could contribute to neurodevelopmental disorders such as Rett syndrome, a severe autism spectrum disorder found only in girls… [and] characterized by mutations in the gene that produces MECP2." When exposed to BPA, this latter protein evidently becomes "more abundant and binds to the *Kcc2* gene at a higher rate, which might help to shut it down."

"Overall, our results indicate that BPA can disrupt *Kcc2* gene expression through epigenetic mechanisms," concludes the study. "Beyond increase in basic understanding, our findings have relevance for identifying unique neurodevelopmental toxicity mechanisms of BPA, which could possibly play a role in pathogenesis of human neurodevelopmental disorders."

Population Study Examines Role of Sugar Availability in Diabetes Prevalence

A recent study has purportedly linked increased sugar availability to the prevalence of type 2 diabetes among overall populations. Sanjay Basu, et al., "The Relationship of Sugar to Population-Level Diabetes Prevalence: An

Shook, Hardy & Bacon L.L.P.

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Econometric Analysis of Repeated Cross-Sectional Data," *PLOS One,* February 2013. Researchers with Stanford University, the University of California, Berkeley, and University of California, San Francisco, apparently used nutritional and economic data provided by the U.N. Food and Agricultural Organization, International Diabetes Federation and World Bank to examine whether "alternations in sugar intake can account for difference in diabetes prevalence in overall populations" from 175 countries.

The findings evidently showed that "every 150 kcal/person/day increase in sugar availability (about one can of soda per/day) was associated with increased diabetes prevalence by 1.1% ($p < 0.001$)" after controlling for other food types, conditions such as obesity, and socioeconomic variables. In particular, the study's authors reported that "no other food types yielded significant individual associations with diabetes prevalence," and that the relationship between sugar and diabetes incidence in these populations appeared dose-dependent, with longer exposure to high sugar linked with higher prevalence of the disease. They also purportedly found that obesity "appeared to exacerbate, but not confound, the impact of sugar availability on diabetes prevalence, strengthening the argument for targeted public health approaches to excessive sugar consumption."

"In summary, population-level variations in diabetes prevalence that are unexplained by other common variables appear to be statistically explained by sugar," concluded the researchers, who noted that their work did not distinguish between sugar, high-fructose corn syrup and other sweeteners. "This finding lends credence to the notion that further investigations into sugar availability and/or consumption are warranted to further elucidate the pathogenesis of diabetes at an individual level and the drivers of diabetes at a population level." ■

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