Shook, Hardy & Bacon L.L.P.

ISSUE 483 | MAY 10, 2013

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

Senators Introduce Bill to Increase Information on Antibiotic Use

Sens. Kirsten Gillibrand (D-N.Y.), Dianne Feinstein (D-Calif.) and Susan Collins (R-Maine) have **introduced** bipartisan legislation to combat antimicrobial drug resistance by requiring the Food and Drug Administration (FDA) to report more information on the annual sales of antibiotics used among industrial farm animals. The "Antimicrobial Data Collection Act" would also reportedly give the agency a deadline to finalize policies proposed in 2012 that would eliminate the use of antibiotics for growth-promoting uses.

"Antimicrobial resistance is a public health concern that needs to be adequately addressed," Gillibrand said in a statement. "Increased data collection, transparency, and accountability are part of a comprehensive solution that will help protect American citizens from drug resistant microbes, saving lives and tax dollars."

"Our bill would not create any new reporting requirements for drug companies, feed mills, or farmers. It would only require the FDA to provide more transparency in reporting the antimicrobial data which is already being reported to it," said Senator Collins.

The legislation reportedly includes several provisions to require FDA to "report antibiotic sales publicly, comprehensively, and predictably," as well as to set an annual deadline for the publication of these data. As noted by The Pew Charitable Trusts, which publicly lauded the measure in a May 8, 2013, press release, "the agency's reports on these sales would be broken down by dosage form (in feed, in water, or by injection), marketing status (that is, whether they are available over the counter or by veterinary order), and indication of whether the drugs are important in human medicine." *See Reuters,* May 8, 2013.

House Lawmakers Seek Release of FDA Guidelines on Arsenic in Juice

U.S. Reps. Rosa DeLauro (D-Conn.) and Frank Pallone Jr. (D-N.J.), have written a **letter** to the Office of Management and Budget asking for the release of the Food and Drug Administration's (FDA's) voluntary industry guidelines for levels of arsenic in fruit juices currently under review by the Office of Information and Regulatory Affairs.

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Citing studies that have found "concerning" levels of arsenic in food and beverages, DeLauro and Pallone assert that FDA's guidance document will be "instrumental" to industry members and consumers in their efforts to address "this public health issue."

It is "inexcusable that the guidelines are stalled while consumers continue to be exposed to potentially dangerous levels of arsenic," the letter states. "Inorganic arsenic is a known carcinogen that can increase the risk of bladder, lung and skin cancers, [which is] particularly concerning because children consume large quantities of juice and may be at risk for more harmful effects from inorganic arsenic exposure."

During the last session of Congress, DeLauro and Pallone introduced the Arsenic Prevention and Protection from Lead Exposure in Juice Act of 2012, which would "require FDA to establish enforceable standards for arsenic and lead in fruit juices." The legislation was introduced following a *Consumer Reports* study that alleged high levels of arsenic and lead in apple and grape juice in New Jersey, New York and Connecticut. DeLauro and Pallone reportedly plan to introduce a similar bill in the coming months. *See News Release of Rep. Rosa DeLauro*, May 8, 2013.

CRS Releases Report on COOL Labeling and WTO Trade Dispute

The Congressional Research Service (CRS) recently issued a report to explore whether U.S. Department of Agriculture (USDA) proposed rules on labeling muscle cuts of meats will comply with World Trade Organization (WTO) findings that current country-of-origin labeling (COOL) requirements discriminate against livestock imports. Titled "Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling," the report reviews events that led to the WTO ruling which followed a challenge filed by Canada and Mexico to the 2008 farm bill amendments that adopted the disputed COOL provisions. A WTO arbitrator established May 23, 2013, as the deadline for the United States to comply.

Various stakeholders have apparently presented a number of options to bring the United States into compliance, and USDA issued a proposed rule in March. Canada and Mexico have evidently argued that the proposed rule does not fulfill U.S. WTO obligations, and the CRS report notes that this could lead to a request to retaliate. The report suggests that if the international COOL dispute reaches "the retaliation stage, the damage claims could fall between $1 billion and $2 billion." The CRS report concludes, "Some lawmakers agree with some industry groups' criticisms of mandatory COOL and could offer legislation to limit its scope and impacts. Others remain strongly supportive of COOL as enacted and oppose any rollback." With a new farm bill pending before the 113th Congress, some action on COOL is anticipated.

EC Overhauls Food and Feed Regulations

The European Commission (EC) has **introduced** a "landmark package to modernize, simplify and strengthen the agri-food chain in Europe" by reducing the number of food and feed regulations from 70 pieces to five. In addition to addressing regulatory enforcement and funding, the proposed package describes new procedures, preventative measures and risk-based controls related to plant and animal health, including plant reproductive materials. Among other things, the recommendations discuss (i) combining animal health regulations under a single piece of legislation focused on preventative efforts, livestock traceability and disease prioritization; (ii) upgrading the plant health regime to increase surveillance of both domestic and imported crops; and (iii) implementing "more simplified and flexible rules for the marketing of seeds and other plant reproductive material… to ensure productivity, adaptability and diversity of Europe's crop production."

To finance these goals and improve accountability, the new rules would change the way member states fund official controls by requiring governments to recoup the full cost of those activities and to use a risk-based approach when allocating their resources. Under the new framework, "the current system of fees to finance the effective implementation of these controls within a sustainable system along the whole chain will be extended to other sectors within the chain which are currently not charged." The new regulations would also compel member states to regularly conduct unscheduled "anti-fraud checks" as part of their national control plans and "to ensure that financial penalties in these cases are set at truly dissuasive amounts" and "offset the economic advantage sought by the perpetrator of the violation."

"Europe has the highest food safety standards in the world. However, the recent horsemeat scandal has shown that there is room for improvement, even if no health risk emerged," said Health and Consumer Commissioner Toni Borg in a May 6, 2013, EC press release. "Today's package of reforms comes at an opportune moment as it shows that the system can respond to challenges; it also takes on board some of the lessons learned. In a nutshell, the package aims to provide smarter rules for safer food." *See Reuters* and *The Wall Street Journal,* May 6, 2013; *U.K. FSA News Release,* May 8, 2013.

EFSA Delays Release of Aspartame Opinion

The European Food Safety Authority (EFSA) recently **announced** its decision to delay its final opinion on the safety of aspartame until November 2013 "to allow sufficient time to consider and address feedback, including new information, resulting from the public consultation on its draft opinion." According to the agency, the Scientific Panel on Food Additives and Nutrient Sources Added to Food (ANS Panel) received more than 200 comments on its January 9, 2013, draft opinion "on issues such as how EFSA's experts select studies for its risk

assessments, the safety of the metabolites of aspartame and how best to express uncertainties highlighted in the draft opinion."

Based on this feedback, ANS Panel experts have purportedly "identified aspects of their draft opinion and key steps in their scientific approach that they would like to clarify further, including the expression of uncertainties, before finalizing their conclusions." Finding that aspartame and its breakdown products "pose no toxicity concern for consumers at current levels of exposure," the draft opinion also reaffirmed the current acceptable daily intake for aspartame as safe for the general population. Additional details about the draft opinion and an April 9 meeting held to discuss the public consultation appear in Issues 466 and 474 of this *Update*. *See EFSA News Release,* May 8, 2013.

California Governor Proposes Prop. 65 Litigation Reforms

Working through California's Environmental Protection Agency, Gov. Jerry Brown (D) will collaborate with stakeholders and the legislature to advance Proposition 65 (Prop. 65) reforms that would end frivolous "shake-down" lawsuits, improve warnings about dangerous chemicals and strengthen the science that supports warning levels. The governor will have to convince environmental and consumer groups that the reforms are needed; any changes will apparently require the approval of at least two-thirds of both legislative houses, and supporters believe that the current law works well to force businesses to cease making products with chemicals known to the state to cause cancer or reproductive toxicity. Numerous lawsuits have been filed against food companies under the law since it was adopted in 1986 for various substances found in foods, including acrylamide, MEI-4 and lead.

According to a May 7, 2013, **press release**, the governor will seek to (i) cap or limit attorney's fees in Prop. 65 cases, (ii) require that plaintiffs demonstrate support for their claims before filing lawsuits, (iii) increase plaintiffs' disclosure requirements, (iv) limit how much money in an enforcement action "can go into settlement funds in lieu of penalties," (v) allow the state to adjust "the level at which Proposition 65 warnings are needed for chemicals that can cause reproductive harm," and (vi) require that warnings include useful information about what the public is exposed to and how they can protect themselves. *See Los Angeles Times*, May 8, 2013.

Maryland Bill Creates Workgroup to Examine Children's Online Privacy Issues

Lawmakers in Maryland have passed a bill (**S.B. 374**) requiring the Office of the Attorney General to assemble and direct a workgroup to explore issues relating to the protection of children's online privacy. The legislation requires that the workgroup include state government representatives, industry leaders, children's online privacy experts, and consumer and children's health advocates.

Among other things, the workgroup will examine (i) the nature and extent of data collected about children through Internet–based and mobile application–based advertising; (ii) "current and forthcoming federal and state regulation of children's online privacy and online advertising and associated data collection"; (iii) the effects on children of online advertising; and (iv) best practices to protect children's online privacy. The law takes effect on June 1, 2013, and requires that the Attorney General's Office report findings and recommendations to the Senate Finance Committee and House Economic Matters Committee by December 31.

LITIGATION

Preliminary Approval Granted for Settlement of Frosted Mini-Wheats® False Ad Claims

A federal court in California has rendered its reluctant approval of a preliminary settlement in class litigation against Kellogg Co., alleging that the company falsely advertised its cereal product as a food that could help improve children's attentiveness by 20 percent. *Dennis v. Kellogg Co.*, No. 09-1786 (U.S. Dist. Ct., S.D. Cal., order entered May 3, 2013). The matter had been remanded from the Ninth Circuit, which reversed an earlier settlement approval, finding that the *cy pres* distribution to organizations helping the indigent of funds remaining after the class claims were paid had not been properly assigned. Additional information about the Ninth Circuit's decision appears in Issues **447** and **453** of this *Update*.

The district court observes that the new designated *cy pres* recipients, the Consumers Union, Consumer Watchdog and Center for Science in the Public Interest, are appropriate as consumer-protection organizations, but expresses its dismay over the decrease in cash value to the class, while attorney's fees would remain constant. The original settlement had a cash value of some $10.5 million with $2 million set aside for attorney's fees and claims administration; the revised settlement has a cash value of $4 million with $1.5-2 million "still reserved for attorneys' fees and claims administration, leaving only $2-2.5 million in value to the class."

The court asks, "How did mere identification of proper *cy pres* recipients result in such a severe drop in the value of the class's claims? How is it that the value to the class dropped approximately 75% while requested attorneys' fees appear nearly constant?" Still, the court found that the proposed settlement fell "within the range of possible approval" and thus granted preliminary approval. The parties were ordered to "fully address these concerns in their final approval briefing and at the final approval hearing," which is scheduled for July 30, 2013.

Court Amends Order Against Oil Producer, Pomace Products to Be Recalled

A federal court in New York has amended the preliminary injunction entered against Kangadis Food Inc., doing business as The Gourmet Factory, originally requiring that the company send stickers to affix to all products sold as "100% Pure Olive Oil" and provided to wholesalers and retailers before March 1, 2013, because those products were actually made from Pomace, a processed oil made from olive pits, skins and pulp. *N. Am. Olive Oil Ass'n v. Kangadis Food Inc.*, No. 13-868 (U.S. Dist. Ct., S.D.N.Y., order entered May 7, 2013). Additional information about the earlier injunction appears in Issue 482 of this *Update.* The stickers were intended to inform consumers that the products were not "100% Pure Olive Oil."

The parties sought reconsideration after Kangadis indicated that it would prefer to recall its products from wholesalers and replace them with tins and bottles that do not contain Pomace. The plaintiff trade association agreed to allow this "voluntary" recall instead of a sticker program, but argued that the recall program must extend to retailers. The court allowed the recall, stating, "[B]y removing mislabeled tins and bottles from the marketplace altogether, a recall may actually achieve the Court's goal even more completely than the sticker program."

The court also determined that the recall must be extended to retailers. "Kangadis previously represented that 'very little' mislabeled product remained in its distribution chain," the court stated, "but now acknowledges that whole pallets of mislabeled product may still remain in distributors' warehouses. Moreover, whether mislabeled tins are in the possession of wholesalers or retailers, they are not less mislabeled, and will, when sold, cause no less irreparable harm to unwitting consumers and to [plaintiff]." The court also noted that "Kangadis has a written recall policy, and just a few weeks ago told the USDA that a recent mock recall required only '3.5 hours to account for all product.' Under these circumstances, Kangadis' speculation about the quantity of mislabeled product held by retailers cannot justify curtailing the scope of the Court's prior injunction."

Cereal Makers Targeted with Prop. 65 Acrylamide Claims

A number of companies that make cereals and other products containing acrylamide, a chemical believed to be a by-product of the Maillard reaction and found in baked or fried starchy foods, have been sued under California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) for failing to provide warnings to consumers. *RBC Four Co. LLC v. Post Foods, LLC*, No. BC507122 (Cal. Super. Ct., Los Angeles Cnty., filed April 30, 2013).

According to the plaintiff, the chemical was added to the Prop. 65 list as a substance known to the state to cause cancer in January 1990 and became subject to the law's warning requirements 20 months later. The complaint

also notes that the current safe-harbor acrylamide-intake level is .2 µg/day and that the defendants' products contain acrylamide levels that exceed maximum allowable dose levels "for chemicals causing reproductive toxicity with require warnings under Proposition 65."

Alleging that "from 1991 to the present Defendant's have knowingly and intentionally exposed persons who consume their products in California to acrylamide . . . without first giving a clear and reasonable warning of such to the persons exposed or the persons who purchased their products," the plaintiff seeks penalties, equitable relief, attorney's fees, and costs.

San Francisco City Attorney Sues Monster Beverage

San Francisco City Attorney Dennis Herrera has filed a consumer-fraud lawsuit on behalf of the people of the state of California against Monster Beverage just one week after the company sued Herrera to halt his investigation into company advertising practices and demands. ***People v. Monster Beverage Corp.*, No. CGC-13-531161 (Cal. Super. Ct., San Francisco Cnty., filed May 6, 2013)**. According to Herrera's press release, Monster Beverage's preemptive suit constituted "'forum shopping' and a bid to win the race to the court-house." Details about Monster Energy's lawsuit appear in Issue **482** of this *Update*.

The new lawsuit alleges that the company "aggressively markets" its energy drink products to children and teenagers, fails to adequately warn consumers about the purported risks of consuming such products, and illegally sold its beverages until earlier this year as a dietary supplement. According to the complaint, product labels claim that three 16-ounce cans can be safely consumed, but with 480 milligrams of caffeine, this "is *nearly five times the maximum* daily caffeine limit recognized for children and adolescents, and exceeds the 400 milligram daily caffeine limit recognized by the Food and Drug Administration as safe for healthy adults."

Herrera alleges that (i) Monster energy drinks labeled as dietary supplements remain on store shelves and are misbranded, (ii) its products sold as conventional beverages violate the state's Sherman Law because they contain additives that do not satisfy the generally recognized as safe standard, (iii) the company aggressively markets its products to children as young as age 6 without properly warning about the drinks' "dangerous side effects," (iv) its marketing to "underage persons using alcohol and drug references offend the legislative premises of multiple statutes and regulations aimed at preventing drinking and drug use among youth," and (v) labeling and promotions with unsubstantiated claims about boosting energy and enhancing physical performance are misleading. The complaint seeks a declaration that the company has engaged in unfair and unlawful business acts and practices in violation of the state's Unfair Competition Law, an injunction to stop the company from performing acts in violation of the law, restitution, costs, and

an order requiring the company "to pay $2,500 in civil penalties for each act of unfair and unlawful competition."

OTHER DEVELOPMENTS

Nutrition Professor Challenges Congressman's Defense of STOP Act

New York University Nutrition Professor Marion Nestle has co-authored a rebuttal to claims that U.S. Rep. Aaron Schock (R-Ill.) made about a bill (**H.R. 1572**) which would prohibit the use of federal money "for print, radio, television or any other media advertisement, campaign, or form of publicity against the use of a food or non-alcoholic beverage that is lawfully marketed under the Federal Food, Drug, and Cosmetic Act." Schock introduced the measure, titled the "Stopping Taxpayer Outlays for Propaganda Act" or "STOP Act," on April 15, 2013. In a *Politico* essay two days later, Schock claimed, "Using taxpayer dollars to attack the beverage and food industry might seem like a good idea to New York Mayor Michael Bloomberg, but it's this exact type of harmful government spending that we can ill afford and serves no purpose in the overall wellness debate—other than to be critical of domestic companies that employ thousands of hardworking Americans."

According to Schock, the Centers for Disease Control and Prevention—allocated funds under the American Recovery and Reinvestment Act to award grants for wellness initiatives—granted them to recipients that have used them "to run ads attacking and singling out legal American products and industries." Schock claims that these federal dollars have been used "to run advertisements against 'sugary products' or other food and beverages" that grant recipients "believe have an adverse impact on the health of American citizens, regardless of the quantity consumed. We are talking about hundreds of millions of tax dollars that are being used to discourage the consumption of lawfully marketed American-made products."

In her rejoinder, "Twinkie insanity hits the House," Nestle asserts, "This bill ignores some basic realities." She cites statistics purportedly demonstrating that sugar-sweetened beverages "are among the most significant contributors to diseases related to obesity," and observes that soda is sold to children using branded cartoon images and sports and entertainment celebrities. "It's difficult for us to believe that Schock seriously thinks that these billion-dollar companies and their Madison Ave. advertising agencies require protection from public health advocates who point out that Froot Loops and supersized sodas are bad for kids' health." The article also contends that Schock's job-killing point "is a specious argument. It assumes that jobs can't also result from creating healthy products instead of unhealthy ones."

The article concludes, "The real propaganda comes from companies that market sugar-sweetened breakfast cereals as healthful. The job of the Centers

for Disease Control is to assess the key threats to our health and assure that people have the best, most accurate information possible. That's not propaganda; it's public service." *See Politico.com*, April 17 and May 3, 2013.

NEJM Perspective Article Discusses Obesity Prevention at the Local Level

A perspective article published in the May 9, 2013, issue of the *New England Journal of Medicine* (*NEJM*) urges local governments to consider supplementing the federal Affordable Care Act's (ACA's) menu-labeling provisions with their own laws designed to improve consumer responsiveness to the calorie listings and increase overall compliance among businesses. Sara Bleich and Lainie Rutkow, "Improving Obesity Prevention at the Local Level—Emerging Opportunities," *NEJM*, May 2013. Noting that many local governments "have already begun engaging in innovative regulatory activity related to obesity prevention (e.g., pre-ACA local menu-labeling laws) and will continue to do so," the authors propose several strategies for influencing consumer behavior through more robust menu-labeling requirements, such as "presenting consumers with calorie information in the form of a physical-activity equivalent (e.g., minutes of running required to burn off a particular food)" instead of a straight calorie count; "replacing the default fries and soda in a child's meal with apple slices and low-fat milk"; or rearranging menus to list the lower-calorie items first. They also explain how local governments can work to close gaps in the ACA rules by requiring, for example, restaurants with fewer than 20 locations to comply with all menu-labeling provisions.

"Because it is estimated that the ACA provisions will affect less than half of U.S. restaurants—and restaurants with fewer than 20 locations will not necessarily volunteer to comply—state and local menu-labeling regulations remain important," write Bleich and Rutkow, who nevertheless warn that a handful of states have already enacted laws against such localized actions, in part to avoid burdening the restaurant industry with a patchwork of inconsistent laws. "As they anticipate such concerns, localities should be mindful of the costs associated with menu labeling and… perhaps provide financial support or technical assistance for restaurants' calculating of nutritional content and reprinting of menus and menu boards. State and local governments should also consider the scope of the first Amendment, which protects commercial speech and may limit the language that can be mandated in menu-labeling regulations."

MEDIA COVERAGE

HBR Article Examines Current Books About "Big Food"

Writing in the May 2013 edition of the *Harvard Business Review* (*HBR*), the editorial director of the HBR Press, Tim Sullivan, considers the questions raised by three new books that examine the evolution of the food industry and its rela-

tionship to consumer health. Turning to Michael Moss's *Salt Sugar Fat: How the Food Giants Hooked Us,* Melanie Warner's *Pandora's Lunchbox: How Processed Food Took Over the American Meal* and Jon Krampner's *Creamy and Crunchy: An Informal History of Peanut Butter, the All-American Food,* Sullivan notes that despite the blame leveled at food processors and marketers, "it's much harder to tell the public that they are partly culpable for the state of their personal and national health (food, after all, is not crack) than it is to point the finger at Big Business, Wall Street, or the government."

"When monoliths take over and aim to get us 'addicted' to their product—whether we're talking about processed food or something else—new makers can step in and serve up tastes that aren't mass but could become so," concludes Sullivan, who points to the independent peanut butter manufacturers that once used government standards to ensure the high quality of their product. "Instead of shaking a fist at Big Food and bad health, as Moss and Warner do, entrepreneurs can change the game. Want to compete with Big Food? Make something great."

Michael Moss Deconstructs the Potato Chip for *The Atlantic*

During a recent interview with *Atlantic* journalist Joe Fassler, author Michael Moss discussed "the language of junk-food addiction" and the role of salt, sugar, fat, and texture in snack foods allegedly engineered to promote "mindless eating—where were [sic] not really paying attention to what we're putting in our mouths." According to Moss, who spoke with Fassler about why consumers find processed foods like potato chips so appealing, the food industry has invested "a trillion dollars of money" in creating and marketing products that seek "to override the natural checks that keep us from overeating."

"And I've found that the language they use to describe their work and their products and their [sic] striving not just to make us like their products but to make us want more and more of them is absolutely revealing," opines Moss. "When they talk about the allure of food, they hate the word addiction: but they'll use the word 'craveability' and 'snackability' and one of my favorites, 'moreishness.' In this context, I think the argument that personal responsibility is [the] main culprit in overeating is to be kind of disingenuous."

In particular, Moss claims that the food industry as a whole—and not merely individual companies—has created a competitive food environment more attuned to profit than consumer health. "I tend not to see the processed food industry as an 'evil empire' that sets out to make us intentionally obese or otherwise ill," he concludes. "They can rightfully say that no single one of their products is responsible for the obesity—not even soda, not even potato chips. The problem lies in their collective zeal to do what companies do—which is to make as much money as possible by selling as much product as possible." *See The Atlantic,* April 30, 2013.

SCIENTIFIC/TECHNICAL ITEMS

Food Commercials Allegedly Linked to Increased Brain Activity in Teens

A recent study has allegedly concluded that food commercials increased brain activity in adolescent viewers regardless of body weight. Ashley Gearhardt, et al., "Relation of Obesity to Neural Activation in Response to Food Commercials," *Social Cognitive and Affective Neuroscience,* May 2013. Researchers with Yale University's Rudd Center for Policy & Obesity, the University of Michigan and the Oregon Research Institute apparently used functional magnetic resonance imaging (fMRI) to examine the brain activity of 30 adolescents described as either normal weight (10 participants), overweight (eight participants) or obese (12 participants), who viewed a TV show interspersed with 20 food and 20 non-food commercials. The study's authors then asked participants "to list five commercials that they had seen during the television program they just viewed to measure top-of-mind recall" and "to rate how much they liked the products/companies featured in the advertisements on a 5-point Likert scale" and "how familiar they were with the advertisements on a 5-point Likert scale."

In addition to the self-reported measure, which suggested that study participants had greater recall for food commercials compared to non-food commercials, the fMRI results evidently showed that "adolescents generally exhibited greater activation in regions implicated in visual processing (e.g., middle occipital gyrus), attention (e.g., parietal lobes), cognitive processing (e.g., inferior temporal gyrus, posterior cerebellar lobe), movement (e.g., anterior cerebellar lobe), somatosensory response (postcentral gyrus), and reward (i.e., OFC, ACC) during food commercials relative to non-food commercials and the television show." Moreover, the study's authors noted, "lean relative to obese adolescents exhibited greater neural response to food commercials in regions related to greater difficulty with weight loss/maintenance," suggesting that "even adolescents [who] are not currently exhibiting signs of pathology (e.g., normal-weight) may be impacted by commercials in a manner that might shape future eating tendencies."

"It appears that food advertising is better at getting into the mind and memory of kids," lead author Ashley Gearhardt was quoted as saying. "This makes sense because our brains are hard-wired to get excited in response to delicious foods." Additional details about Gearhardt's recent work appear in Issues **458** and **481** of this *Update*.

Engineered Avian and Swine Flu Hybrids Raise Concerns About Mammal-to-Mammal Transmission

Chinese scientists investigating the spread of airborne influenzas have reportedly combined genetic material from avian (H5N1) and swine (H1N1) flu strains to create more than 100 different hybrid viruses, five of which

proved contagious among mammals. Ying Zhang, et al., "H5N1 Hybrid Viruses Bearing 2009/H1N1 Virus Genes Transmit in Guinea Pigs by Respiratory Droplet," *Science,* May 2013. According to the study, researchers engineered 127 reassortant viruses using "a duck isolate of H5N1, specifically retaining its hemagglutinin (HA) gene throughout, and a highly transmissible, human-infective H1N1 virus," then tested the reassortants in mice "as a correlate for virulence in humans" and in guinea pigs, "which have both avian and mammalian types of airway receptor," as a test of transmissibility.

The results evidently showed that in addition to H5 HA gene mutations, which "improve affinity for human-like airway receptors," specific H1N1 genes enhanced mammal-to-mammal transmission, including "the polymerase PA gene and nonstructural protein NS gene"—which made the virus airborne—as well as nucleoprotein, neuraminidase and matrix genes. This outcome suggests that even low-pathogenic strains of avian flu can combine with other viruses "in current agricultural scenarios" to increase both virulence and transmissibility.

"It's remarkable work and clearly shows how the continued circulation of H5N1 strains in Asia and Egypt continues to pose a very real threat for human and animal health," Oxford University Clinical Research Director Jeremy Farrar was quoted as saying in a May 3, 2013, *Nature* article about the findings. At the same time, however, he noted concerns about the creation of such hybrid viruses in laboratory settings, pointing to last year's controversial decision by the World Health Organization to permit the publication of two studies involving H5N1 strains that were engineered to spread more easily among mammals. "I do believe such research is critical to our understanding of influenza. But such work, anywhere in the world, needs to be tightly regulated and conducted in the most secure facilities, which are registered and certified to a common international standard," Farrar said. Additional details about the controversy surrounding H5N1 research appear in Issue **428** of this *Update*.

Food Marketing in U.S. Spanish-Language TV Target of New Study

A recent study has reportedly concluded that while fewer food advertisements overall are shown during U.S. Spanish-language children's TV programs than during similar English-language programs, "the nutritional quality of food products on Spanish-language channels was substantially poorer than on English channels." Dale Kunkel, et al., "Food Marketing to Children on U.S. Spanish-Language Television," *Journal of Health Communications,* May 2013. Funded by the Robert Wood Johnson Foundation (RWJF), the study analyzed 158 Spanish-language children's programs "for [their] advertising content and compared them with an equivalent sample of English-language advertising." Researchers also evaluated the nutritional quality of the advertised products using a rating system developed by the U.S. Department of Health and Human Services (DHHS) that divides foods into three categories: *Go* (foods

that are "rich in nutrients and relatively low in calories"), *Slow* (foods that are "higher in fat, added sugar and calories than *Go* foods") and *Whoa* (foods that are "high in calories and low in nutrients").

According to a May 2, 2013, RWJF press release, the results indicated that approximately 84 percent of child-direct ads aired during Spanish shows and approximately 72 percent aired during English shows "promoted *Whoa* products, such as candy, sugary cereals, fries, and sodas, which fall into the poorest nutritional category as defined by DHHS." In addition, the study asserts that even among companies adhering to self-regulatory marketing pledges, "78 percent of ads for children on Spanish-language television and 69 percent of ads for children on English-language television were for unhealthy foods or drinks."

"The large majority of added were in this whoa category," said Kunkel. "It's still outrageously high on English channels, but we concede that food marketing on Spanish channels is especially problematic." *See NBC Latino,* May 6, 2013.

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