

FOOD & BEVERAGE LITIGATION UPDATE



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LEGISLATION, REGULATIONS AND STANDARDS

FSIS Previews July 2014 Codex Alimentarius Commission Activities

In advance of the July 14-18, 2014, 37th Session of the Codex Alimentarius Commission in Geneva, Switzerland, the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) has published a [notice](#) soliciting public comments to inform U.S. positions on various proposed commission standard-setting actions. No deadline for submitting comments has been specified.

FSIS is responsible for keeping the public informed of the activities of international standard-setting organizations, including the Codex Alimentarius Commission, which was created in 1963 by two U.N. organizations—the Food and Agriculture Organization (FAO) and World Health Organization (WHO)—to establish food standards that are often adopted and implemented by governments around the world, including the United States.

Codex committees discussed in the FSIS notice include those focusing on residues of veterinary drugs in foods, contaminants in foods, food additives, pesticide residues, methods of analysis and sampling, food labeling, food hygiene, fresh fruits and vegetables, nutrition and foods for special dietary uses, fats and oils, and processed fruits and vegetables. The notice also provides information about upcoming meetings of FAO/WHO regional coordinating committees, as well as the list of U.S. Codex Alimentarius officials and alternates, all of whom are employed by the U.S. Food and Drug Administration, U.S. Department of Agriculture or U.S. Environmental Protection Agency. See *Federal Register*, June 13, 2014.

California Assembly Rejects Senate Bill on Sugary Drink Warning Labels

A California Assembly committee has voted 8-7 against a bill ([S.B. 1000](#)), passed in May 2014 by the Senate, to require warnings on sugar sweetened beverages (SSBs) alerting consumers that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." Those on the Assembly Health Committee opposing the measure were apparently concerned that it singled out a single industry and children would not necessarily read the label. Industry advocates reportedly called the proposal unfair, because it would have required warnings on SSBs containing 75 calories while allowing higher calorie foods to be sold without them. Bill sponsor Sen.

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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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Bill Monning (D-Carmel), who also introduced unsuccessful legislation that would have imposed a tax on soft drinks, was quoted as saying, "I remain committed to pursuing this issue and being part of a broad public health campaign to educate communities about the proven health risks of sugary drinks." See *Reuters*, June 17, 2014; *California Healthline*, June 18, 2014.

LITIGATION

Court Denies Black Farmers' Intervention in Female & Hispanic Discrimination Suits

A federal court in the District of Columbia has denied the request of the Black Farmers & Agriculturalists Association, Inc. to intervene in lawsuits brought by female and Hispanic farmers against the U.S. Department of Agriculture (USDA) alleging gender and race bias in the administration of farm loan and disaster benefit programs. *Love v. Vilsack*, No. 00-2502 (U.S. Dist. Ct., D.D.C., decided June 13, 2014). Additional information about the gender discrimination claims appears in Issue [374](#) of this *Update*.

The association was not a member of the settlement class established to resolve the claims of African-American farmers who failed to file claims for administrative adjudication before the deadline expired in *Pigford v. Glickman* (*Pigford I*). Those missing the deadline saw their claims revived under the 2008 Farm Bill and consolidated in litigation collectively known as *Pigford II*. Details about that litigation appear in Issue [395](#) of this *Update*. The association sought (i) a declaration that the Constitution mandates that its members who are eligible "*Pigford* claimants" under the 2008 Farm Bill, but did not timely file claims under the settlement agreement reached in that case, are entitled to file claims under the framework established for Hispanic and female farmers; and (ii) a permanent injunction against USDA to refrain from discrimination in processing black farmers' loan applications.

The court determined that the motion to intervene failed on a number of grounds, including that (i) the first claim is plainly barred by *Pigford II*, "which unequivocally extinguished the right of any *Pigford* claimant to receive a determination on the merits of a claim outside of the claims process created by *Pigford II*"; (ii) the association failed to demonstrate Article III standing; and (iii) the motion was untimely, given its filing nearly 13 years after the plaintiffs filed suit, almost three years after USDA announced its intention to create the administrative claims process to settle the claims asserted in the women and Hispanic farmer lawsuits and more than a year after USDA finalized the claims process. The court also found that the association did not need to intervene to pursue its second claim, because it can be brought in separate litigation and "the association will suffer no harm if intervention is denied," while intervention at this late date would disadvantage the existing parties.

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Peanut Corp. Owner Fails in Effort to Seal “Highly Prejudicial” Email

A federal court in Georgia presiding over the criminal case filed against the former owner of the Peanut Corp. of America, implicated in a nationwide *Salmonella* outbreak in 2009, has denied Steward Parnell’s motion to seal an exhibit that the government intends to introduce as Rule 404(b) evidence—that evidence pertaining to crimes, wrongs or other acts. *United States v. Parnell*, No. 13-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., order entered June 13, 2014). Details about the criminal charges appear in Issue [472](#) of this *Update*.

Parnell claimed that the evidence, an email, is “highly prejudicial” and would taint the jury pool. The government argued that “the exhibit is a judicial document subject to the common law right of access.” The court agreed with the government, because the document was discovery material that had been filed in connection with Parnell’s motion in limine, seeking to keep it from being introduced at trial. It also found that Parnell had “failed to show good cause for sealing it.” The email, dated June 30, 2008, contains Parnell’s response to a request from a Peanut Corp. employee as to how to handle company membership dues that are evidently based on sales. His response was “lie about the sales if it saves us money.”

OTHER DEVELOPMENTS

Consumer Reports Launches Campaign to Ban “Natural”

Monthly magazine *Consumer Reports* has started a campaign to rid food labels of the word “natural” following a survey that found significant confusion over the term’s meaning. The Consumer Reports National Research Center, which conducts the research published in the magazine, conducted a phone survey of 1,000 people and asked them about their understanding of the use of “natural” on a food label and what they think it should mean.

The center reportedly found that “[a]bout two-thirds believe [“natural”] means a processed food has no artificial ingredients, pesticides, or genetically modified organisms, and more than 80 percent believe that it should mean those things.” U.S. Food and Drug Administration guidelines suggest that manufacturers can use the term if nothing artificial or synthetic has been added to their products, but the definitions are vague and flexible, *Consumer Reports* argues. “We want to clean up the green noise in the food label marketplace so Americans can get what they want—truthful labels that represent important and better food production systems,” said *Consumer Reports* Food Safety and Sustainability Executive Director Urvashi Rangan. The organization has partnered with TakePart, a social media platform, to create a petition to push the government to prevent manufacturers from using “natural.” See *Consumer Reports*, June 16, 2014.

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SSB Playbook Calls for Multi-Pronged Public Health Approach

During the second National Soda Summit held in Washington, D.C., in early June 2014, ChangeLab Solutions, which has been active in tobacco control, [presented](#) a “Sugar-Sweetened Beverages [SSB] Playbook” calling for a public information campaign that would include telling consumers “you’re drinking 16 packs of sugar in that cola.” Other “playbook strategies” include a progression of activities: limiting SSBs on government property and in workplaces and schools, prohibiting SSBs in childcare and afterschool programs, restricting SSB marketing in schools, eliminating SSBs from children’s meals, licensing SSB retailers, taxing SSBs, and limiting SSB portion sizes. Each recommended action is accompanied by examples and model policies and ordinances.

New Report Claims Industry and Government Promote “Dairy Junk Foods”

Public Health attorney and author Michele Simon has [issued](#) a report titled “Whitewashed: How Industry and Government Promote Dairy Junk Foods.” According to Simon, dairy foods have gotten “a pass” as the public health community focuses on “obvious culprits such as soft drinks and fast food” to address the nation’s “public health epidemic due to poor diet.”

The report explains how plain liquid milk consumption has fallen in the United States and been replaced by its consumption as flavored milk, with cereal or in a drink. Simon claims that today half of the milk supply makes 9 billion pounds of cheese and 1.5 billion gallons of frozen desserts, such as ice cream, and 11 percent of all sugar is used in dairy product production. She refers to these products as “dairy junk foods” loaded with saturated fat, sugar and salt.

The report focuses on the government’s collection of industry fees for “checkoff programs” that are supposed to be used for “generic” marketing activities, but have apparently been used to ensure that fast-food restaurants increase their use of dairy products and promote the consumption of chocolate milk in schools, as well as in lobbying activity to promote U.S. dairy products overseas. Included in the report are statements by a registered dietitian countering health-related claims that have been made for dairy products, including that cheese can fit into almost any eating plan and contributes essential nutrients for good health to the U.S. diet. Simon contends that the International Dairy Foods Association “made sure that the USDA’s proposal to improve the nutrition of snack foods in schools included plenty of dairy-friendly language.” The result has apparently been that flavored milks, cheese, yogurt—with sugar allowed up to 35 percent by weight, and pizza are approved on school menus.

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The report recommends doing away with the dairy checkoff program entirely or not allowing checkoff funding to promote (i) “dairy junk foods that conflict with federal dietary guidelines or public health programs,” (ii) name brands, (iii) sugary milk in schools, and (iv) the “Fuel up to Play 60” program in schools. It also calls for the federal government to more closely review checkoff recipients’ marketing and education materials, and conduct better oversight to ensure these funds are not used for lobbying. The report further urges that the federal government not allow “dairy junk foods to be approved as ‘Smart Snacks’ in schools,” sugary milk in schools, and the Women’s Infants and Children’s Program to be “further exploited by the dairy industry to allow sugary yogurts.” It urges state governments like New York to “stop subsidizing yogurt companies such as Chobani.”

Five Guys’ “Kosher Style” Hot Dog May Violate Washington Law, Blogger Argues

The sale of hot dogs described as “Kosher Style” by Five Guys Enterprises LLC may violate a Washington state law that describes what food products may be labeled kosher, according to a blogger for George Washington Law Professor Jonathan Turley’s blog. Darren Smith, a former deputy sheriff in Washington, writes that Five Guys advertises one of its products as a “Kosher Style” hot dog because, according to the company’s Website, “the dogs are cooked on the same grill as our burgers,” even though “the way we cook them and serve them is not [kosher].”

This label may violate Washington’s RCW 69.90.020(1), which states, “No person may knowingly sell or offer for sale any food product represented as ‘kosher’ or ‘kosher style’ when that person knows that the food product is not kosher and when the representation is likely to cause a prospective purchaser to believe that it is kosher,” with kosher defined as “a food product which has been prepared, processed, manufactured, maintained, and sold in accordance with the requisites of traditional Jewish dietary law.” Any person, partnership, corporation, or association found in violation of the section is guilty of a gross misdemeanor.

Arguing that the law unduly criminalizes seemingly innocuous behavior, Smith points out the difficulties of abiding by state laws while operating a business in several states when “serving something as ordinary as a hot dog might possibly constitute a crime; it can make any business worry.” For more information on the constitutionality of such kosher labeling laws, see Issue [439](#) of this *Update*. See *Jonathan Turley*, June 14, 2014.

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Consumer Goods Forum Pledges Changes in Food Advertising to Children and Nutrition Labeling

A consortium of more than 400 food manufacturers and retailers, the Consumer Goods Forum, has built on a 2011 pledge to clarify nutrition labeling and to advertise only those products fulfilling specific nutritional criteria to children younger than 12. The new pledge further defined the goals by setting deadlines; both reforms are to be completed by 2018, and by 2016, each member company will make its internal policies on nutrition and product formulation available to the public. The forum's board of directors also established an independent scientific advisory council that will conduct a comprehensive survey of members' progress toward the forum's goals. *See Consumer Goods Forum*, June 18, 2014.

MEDIA COVERAGE

Bittman Cites Research on Corporate Involvement in Addressing Obesity

New York Times op-ed writer Mark Bittman, in a column titled "Parasites, Killing Their Host," considers how "Big Food" is unwittingly destroying its own market. Diet-related Type 2 diabetes and cardiovascular disease disable and kill people, and undoubtedly we'll be hearing more about nonalcoholic steatoph hepatitis, or NASH, an increasingly prevalent fatty liver disease that's brought on by diet and may lead to liver failure." He refers to recently published research by a George Washington University associate professor of sociology discussing how corporations have adopted a strategy to increase their legitimacy in the "community" effort to address the obesity epidemic and thus continue to sell products that promote ill health. Bittman concludes, "government's rightful role is not to form partnerships with industry so that the latter can voluntarily 'solve' the problem, but to oversee and regulate industry. Its mandate is to protect public health, and one good step toward fulfilling that right now would be to regulate the marketing of junk to children. Anything short of that is a failure."

Appearing in *Social Currents*, the [article](#) by Ivy Ken examines the activities of two corporate-affiliated organizations—the Partnership for a Healthier America (PHA) and Alliance for a Healthier Generation (AHG)—and posits that the food industry has adopted a strategy of seeking legitimacy and community good will by inserting itself into the public effort to address obesity. Ken contends that the effort involves framing the issue as a problem that corporations have nothing to do with but can solve by working together with stakeholders in a "community," becoming even more engaged with children through their schools, and selling more products.

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According to Ken, these organizations have turned “overweight and obese people into idiots” by claiming that kids and families must be inspired to make healthier choices and food companies will make it easier for them to do so. She asserts that “[b]y co-opting the language of community and the core framing tactics of [social movement organizations], the AHG and PHA have created powerful messages that have already been linked to increased sales and profits for their corporate partners.” Ken concludes that these coordinated framing efforts “reveal that they know what is really at stake: involvement in our actual communities,” and suggests that they also reveal corporate “desperation.”

She writes, “[T]hey reveal how desperately they need to maintain legitimacy in an environment in which actual community groups are demanding limits to their involvement in the chain that supplies food to children.” She calls for not letting corporations set the agenda or write the terms and for forcing them to earn a place at the table by “not producing fat-, sugar- and salt-laden products, not doing market research to find out how much unhealthy food eaters will buy, and not placing maximum profits ahead of the maximum health of communities.”

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

SHB attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.

SHB lawyers have served as general counsel for feed, grain, chemical, and fertilizer associations and have testified before state and federal legislative committees on agribusiness issues.

