Shook, Hardy & Bacon L.L.P.

ISSUE 530 | JULY 18, 2014

FOOD & BEVERAGE LITIGATION UPDATE

CONTENTS

LEGISLATION, REGULATIONS AND STANDARDS

USDA Final Rule Amends Nondiscrimination Regulations

The U.S. Department of Agriculture (USDA) has issued a final rule clarifying "the roles and responsibilities of USDA's Office of the Assistant Secretary for Civil Rights (OASCR) and USDA agencies in enforcing nondiscrimination in programs or activities conducted by USDA." Intended to "strengthen the agency's civil rights compliance and complaint processing activities to better protect the rights of USDA customers," the final rule requires OASCR and other USDA agencies to "collect, maintain and annually compile data on the race, ethnicity and gender (REG) of all conducted program applicants and participants by county and State." To facilitate early resolution of complaints, the agency also stipulates that "OASCR shall offer Alternative Dispute Resolution (ADR) services to complainants where appropriate."

In addition, the final rule establishes two new protected bases: political beliefs and gender identity. "This amendment is meant to make explicit protections against discrimination based on USDA program customers' political beliefs or gender identity," states the agency. "Gender identity includes USDA program customers' gender expression, including how USDA customers act, dress, perceive themselves, or otherwise express their gender." *See Federal Register,* July 16, 2014.

FSIS Proposes Rule Requiring Ground Beef Records

The U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) has proposed a rule requiring that "all makers of raw ground beef products keep records" that would allow FSIS to conduct timelier recalls of potentially contaminated meat. The proposed rule would require retailers that mix meats from multiple sources to keep more detailed records identifying the source. According to a July 16, 2014, press release, previous FSIS efforts to encourage raw ground beef retailers' maintenance of clear records have been insufficient in aiding the service in tracing the source of contaminated meat. "The improved traceback capabilities that would result from this proposal will prevent foodborne illness by allowing FSIS to conduct recalls of potentially contaminated raw ground products in a timelier manner," said USDA Deputy Under Secretary for Food Safety Brian Ronholm. FSIS will accept comments on its proposed rule for 60 days following publication in the *Federal Register*.

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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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EFSA Seeks Feedback on Transparency Initiative

The European Food Safety Authority (EFSA) has **launched** an open consultation on a discussion paper titled "**Transformation to an Open EFSA**," which sets forth "a conceptual framework, a step-by-step methodology and a plan for the transformation of the [agency] into an Open Science organization over the next five years." Launched in January 2013 after the Corporate European Observatory (CEO) raised concerns about the agency's ties to industry, the Open EFSA initiative seeks to ensure that citizens can participate in a decision-making process that is "clear, obvious and understandable without doubt or ambiguity." Additional details about the CEO report and its aftermath appear in Issues **399** and **439** of this *Update*.

More specifically, notes the discussion paper, the advent of societal trends such as crowd sourcing and open innovation—coupled with technological advances that foster the growth of global information networks—have presented new opportunities and challenges for civic engagement within EFSA's current legal framework. In service of sound public policy, the agency thus aims to improve "the overall quality of available information and data used for EFSA's outputs" while "complying with normative and societal expectations." Adopting a proactive disclosure policy, Open EFSA plans to maximize its use of internal and external resources in addition to engaging citizen scientists through the innovative use of information technology tools.

To this end, the agency seeks feedback on the following questions, among others: (i) "Are you satisfied that EFSA has identified the societal and normative expectations it has to comply with or would you suggest additional ones that the paper does not capture?"; (ii) "How can EFSA increase its openness to meaningful contributions from individuals and organizations beyond its Panels and Committee?"; (iii) "How can EFSA ensure that commercially sensitive information and data are protected while providing access to key information, data and documents necessary to make its assessments reproducible?"; (iv) "How can EFSA foster even further an environment of creative debate amongst its experts while striking the appropriate balance between availability and quality of information?"; and (v) "Would you identify any other strategic drivers, contextual elements or policy options for the Authority to consider when implementing its vision of becoming an Open EFSA?." The agency will accept comments on the paper until September 15, 2014.

EFSA Sets ADI for Sunset Yellow

After revisiting a prior safety assessment, the European Food Safety Authority (EFSA) has **established** an acceptable daily intake (ADI) of 4 mg/kg bw/day for the food coloring known as Sunset Yellow. EFSA's Panel on Food Additives and Nutrient Sources Added to Food (ANS) recommended raising the ADI—previously set at 1 mg/kg bw/day—in light of a 28-day study report, a

2011 evaluation conducted by the Joint FAO/WHO Expert Committee on Food Additives and additional toxicological information made available since the 2009 assessment.

"Exposure estimates for Sunset Yellow FCF based both on the currently authorized MPLs [Maximum Permitted Levels] and reported use levels are well below the new ADI of 4 mg/kg bw/day for all population groups," noted the ANS Panel. "Overall, the Panel concluded that, using data provided by the food industry and Member States, the reported uses and use levels of Sunset Yellow FCF (E 110) would not be of safety concern." *See EFSA News Brief,* July 14, 2014.

Mexico Implements Food and Beverage Ad Restrictions

The Mexican Ministry of Health has reportedly announced new restrictions on food and beverage advertisements aired during TV programs and movies viewed by children. Part of its National Strategy for the Prevention and Control of Overweight, Obesity and Diabetes, the new rules will prohibit the marketing of sugar-sweetened beverages, snacks, confectionary, and chocolate on both terrestrial and cable television from 2:30 to 7:30 p.m. during the week and from 7:00 a.m. to 7:30 p.m. on weekends. Eliminating 40 percent of ads across these four product categories, the strategy will also ban these promotions in movies rated A or AA, which covers those targeted at all ages. *See Ministry of Health Press Release* and *BBC News,* July 15, 2014.

Nutrition Standards to Be Implemented for Food, Beverages Sold on D.C. Government Property

The District of Columbia City Council this week overrode Mayor Vincent Gray's veto of the 2015 budget, which includes a **directive** for the issuance of "healthy food and beverage standards" for vending machine and other concession offerings sold or served on District government property.

Encouraging fare that includes fruits, vegetables and other offerings low in calories and sodium, the Workplace Wellness Emergency Act of 2014 standards will "apply to foods and beverages purchased or served by District agencies, including at meetings, events, in vending machines, and through on-site vendors, with the exception of food served by the Department of Corrections and the Department of Behavioral Health to persons who reside at their institutions or are in their direct custody."

The council also reportedly approved a proposal to prohibit polystyrene foam food and beverage containers beginning in 2016; meat trays will be exempt from the ban. *See The Washington Post*, July 14, 2014.

LITIGATION

Calif. Foie Gras Ban Headed to SCOTUS Conference

Briefing has been completed before the U.S. Supreme Court (SCOTUS) on a petition seeking review of the Ninth Circuit Court of Appeals ruling upholding California's prohibition on the sale of food produced by force feeding birds to enlarge the liver beyond normal size. *Association des Éleveur de Canards des d'Oies du Québec v. Harris*, No. 13-1313 (U.S., distributed for Sept. 29, 2014, conference on July 16). Additional details about the Ninth Circuit's ruling appear in Issue 497 of this *Update*.

Joining the Canadian and New York foie gras producers that filed the certiorari petition are the attorneys general (AGs) of 13 states. Their *amici curiae* brief claims that the petition presents an issue of "exceptional importance to the preservation of state sovereignty," namely, that the lower court's decision "allows the states to engage in economic isolationism, set themselves against one another, and balkanize the nation, thus giving rise to trade wars and undoing the protections of the Court's dormant Commerce Clause jurisprudence and the structural limitations on extraterritorial regulation inherent in the Constitution." They contend that the disputed law goes beyond regulating the feeding of ducks in California and "regulates activity occurring wholly out of state, i.e., the methods farmers use in other states to produce their poultry products."

The petitioners also invoke the Commerce Clause, claiming that their ducks, raised in Canada and New York, are "in full compliance with both federal and local law. But, under the ruling below, they are now prohibited from selling their foie gras products in California if they feed their animals 'more food' than whatever California arbitrarily dictates as the limit for its own ducks." California Attorney General Kamala Harris argues that the proceedings—denial of a motion for preliminary injunction—are at an interlocutory stage and that the Court has no sound basis to review the matter. Harris also contends that the statute neutrally regulates in-state transactions and thus does not violate the dormant Commerce Claus "simply because [it] may have some effect on the practices of out-of-state firms that wish to serve the in-state market."

News sources have noted that *amici* do not include New York's AG and suggest that some of the involved states—Alabama, Georgia, Iowa, Kansas, Missouri, Montana, Oklahoma, and South Carolina—are among the nation's top pork, beef and poultry producers, who may be concerned about other local efforts to dictate farming methods, such as the space provided for individual animals and other feeding practices, matters of concern to animal rights advocates. *See McClatchy DC*, July 14, 2014; *The Los Angeles Times*, July 16, 2014.

Meanwhile, a New York appellate court has upheld a lower court ruling that the Animal Legal Defense Fund, Inc. and an individual who occasionally consumes foie gras lacked standing to bring an action against the state's commissioner of Agriculture and Markets, Department of Agriculture and Markets and corporations that produce foie gras, seeking "a declaration that force-fed fois gras is an adulterated food product and an order prohibiting the state respondents from allowing foie gras into the human food supply." *In re Animal Legal Defense Fund, Inc. v. Aubertine*, 2014 NY Slip Op 05395 (N.Y. App. Div., decided July 17, 2014).

The court ruled that the individual who based his standing on an alleged increased risk of developing secondary amyloidosis "has, at best, occasional exposure to a product that has not yet been connected by any actual case to the purported risk of harm alleged by petitioners." According to the court, such allegations of injury are "speculative and rest upon conjecture." The court also rejected his assertion of standing as a taxpayer. As to the organization, the court disagreed that using resources to investigate and litigate the alleged conduct conferred standing, noting that "[f]inding standing under the situation presented here would essentially eliminate the standing requirement any time an advocacy organization used its resources to challenge government action or inaction."

Ninth Circuit Rejects Objections to Nutella Settlement

The Ninth Circuit Court of Appeals has upheld the settlement of class actions alleging consumer fraud in ads portraying Nutella as a healthy breakfast food. ***In re Ferrero Litigation*, No. 12-56469 (9th Cir., decided July 16, 2014) (unpublished)**. Three members of the certified statewide class objected to the settlement, which provided $550,000 to reimburse class members, required ad-campaign and product-labeling revisions and awarded $985,920 in attorney's fees. The objectors claimed inadequate notice of the attorney's fee request, lack of justification or explanation for the fee award and the district court's failure to consider whether class counsel adequately represented the class. The court found no basis for the objections, noting in part that the district court properly applied the lodestar method to the attorney's fee calculation and that no indicia of collusion were present.

Court Dismisses Suit Accusing LSU of Fraudulent Sweetener Patent

A California federal court has dismissed on jurisdictional grounds Quest Nutrition LLC's lawsuit against Louisiana State University Agricultural Center accusing the school of filing a patent for a sweetener using Quest's confidential information. *Quest Nutrition LLC v. Bd. of Supervisors of LSU Agric. & Mech. Coll.*, No. 14-2005 (U.S. Dist. Ct., C.D. Cal., order entered July 8, 2014). The court ruled that the majority of Quest's claims—including those for unfair competition and breach of contract—arose under state law so the court

lacked subject matter jurisdiction, and the court held that state courts and the U.S. Patent and Trademark Office have subject matter jurisdiction over Quest's patent claims.

Quest hired LSU Agricultural Center in 2013 to test a potentially new sweetener and bound the information by a confidentiality agreement. The company alleged that the university succeeded in identifying the formula for the sweetener and filed a patent application with the information that did not list Quest as an inventor. The court dismissed the patent claim without leave to amend and dismissed the competition and contract claims with leave to amend.

ECJ Claims Against Snack Maker Not Plausible

A federal court in Illinois has dismissed without prejudice a putative class action alleging consumer fraud against a company that makes snacks which list evaporated cane juice (ECJ) as an ingredient. *Ibarrola v. Kind, LLC*, No. 13-50377 (U.S. Dist. Ct., N.D. Ill., E. Div., order entered July 14, 2014). The court declined to address whether the plaintiff had standing to assert claims as to products she had not purchased because class issues such as adequacy and typicality had not yet been briefed and further declined to consider dismissing the complaint under the primary jurisdiction doctrine, noting that the U.S. Supreme Court may have called this rationale into question in *POM Wonderful LLC v. Coca-Cola Co.*, No. 12-761, 2014 WL 2608859 (June 12, 2014).

The court dismissed the entire complaint, however, because it failed "to plausibly and adequately alleged that [the plaintiff] was deceived by Kind's representations." She did not apparently "explain how she was deceived, or what she believed evaporated cane juice to be, if not a form of sugar." She also did not explain "why the inclusion of molasses in the list of ingredients did not cause her to forego buying Vanilla Blueberry Clusters, but the inclusion of cane syrup would have. The Complaint reveals that molasses is also a sweetener derived from sugar cane. [The plaintiff] points out in her response that she did not think that Vanilla Blueberry Clusters were sugar free, but she does not make clear what, if anything, she actually thought with regard to the sugar content of, or the sweeteners used in, Vanilla Blueberry Clusters such that the Court can infer that she was actually deceived." In the absence of deception, the court was also constrained to dismiss her unjust enrichment claim.

State AGs Sue 5-Hour ENERGY® Makers for Deceptive Advertising

The state attorneys general (AGs) of Oregon, Vermont and Washington have reportedly filed separate lawsuits against Living Essentials and its parent Innovation Ventures seeking a permanent injunction to stop allegedly misleading and deceptive advertising for 5-hour ENERGY®. According to news

sources, other state AGs are expected to bring similar action; some 30 have been investigating the accuracy of company ads for the product.

Washington AG Bob Ferguson has alleged that the defendants violated the state consumer protection statute by (i) airing TV commercials with "survey results" from doctors who "recommend" the product "while misrepresenting survey results and failing to disclose key facts"; (ii) using a misleading "no sugar crash" product tagline given studies demonstrating a caffeine crash; (iii) implying that the product can be consumed by teens with the label statement, "Do not take if you are pregnant or nursing, or under 12 years of age"; and (iv) claiming that the "energy blend" in 5-hour ENERGY® and the vitamins and amino acids in Decaf 5-hour ENERGY® are responsible for the products' energy effects when the energy is actually derived solely from caffeine.

Oregon AG Ellen Rosenblum said, "This lawsuit is about requiring truth in advertising. Plainly and simply, in Oregon you cannot promote a product as being effective if you don't have sufficient evidence to back up your advertising claims." A company spokesperson reportedly characterized the Oregon lawsuit's allegations as "grasping at straws" as well as "civil intimidation" and indicated that the companies intend to mount an aggressive defense. *See Oregon Department of Justice Media Release* and *Courier-Herald*, July 17, 2014; *Reuters*, July 18, 2014.

Estate of John Wayne Files Lawsuit Against Duke University Over "Duke" Trademark

John Wayne Enterprises (JWE) has filed a complaint in California federal court seeking declaratory judgments determining that its usage of the "Duke" trademark is not likely to cause confusion with the trademarks owned by Duke University, which has challenged several JWE trademark applications over the last decade. *John Wayne Enterprises, LLC v. Duke Univ.*, No. 14-1020 (U.S. Dist. Ct., C.D. Cal., filed July 3, 2014). JWE intends to sell bourbon under the name Duke, a nickname John Wayne used since his childhood and which fans still use to affectionately refer to him. Duke University has repeatedly challenged JWE's past trademark applications by filing notices of opposition and a petition for cancellation of JWE's owned "Duke" trademarks, alleging that the marks suggest a false connection to the university, would likely confuse consumers and dilute the university's trademarks. JWE seeks two declaratory judgments to determine that its "Duke" mark does not create any likelihood of confusion and does not dilute the university's marks.

Scientist Sues Journal for Plan to Retract Golden Rice Study

Tufts University Senior Research Scientist Guangwen Tang has reportedly accused the American Society for Nutrition (ASN) of defaming her with its plan to retract her 2012 article—"β-carotene in Golden Rice is as good as p-carotene in oil at providing vitamin A to children"—for allegedly prob-

lematic research protocols. Filing in Middlesex County Court, Tang has also accused Tufts of interference in business relations because, she argues, the university barred her from doing human research for two years and told her she would be subject to disciplinary actions regarding future research and would be required to undergo human subject training—actions that Tufts disclosed to ASN and led to the organization's decision to retract her article, she claims.

Tang's studies examined the effects of golden rice, genetically engineered rice enriched with β-carotene, in China through a 2008 field trial that involved feeding the rice to Chinese children. Chinese media reports and Greenpeace China later accused Tang's research team of failing to properly inform parents of what they fed their children during the study, which led to an investigation by the Chinese Center for Disease Control and Prevention. Tufts also began inquiries into the study's research protocol, which Tang says found no health or safety problems and no evidence of research misconduct, but resulted in Tufts warning Tang about disciplinary action for future research and ASN's decision to pull her article. Tang argues that the planned retraction will harm her professional reputation and seeks damages for defamation and breach of contract as well as an injunction to prevent ASN's retraction. *See Courthouse News*, July 16, 2014.

Court Withholds Approval from $50 Million Milk Monopoly Settlement

While the Dairy Farmers of America (DFA) and affiliated Dairy Marketing Services have agreed to pay $50 million to settle class claims that they conspired to monopolize the market for raw milk in the Northeast, a federal court in Vermont has denied preliminary approval of the proposed settlement without prejudice. *Allen v. DFA, Inc.*, No. 09-0230 (U.S. Dist. Ct., D. Vt., order entered July 9, 2014). Details about the litigation appear in Issue **323** of this *Update*.

The court pointed to a number of flaws in the draft class notice, including that it released the defendants and a number of related entities and extended beyond the legal claims in the lawsuit without making this clear to class members. The basis for its ruling, however, was that some class members apparently plan to object to the settlement, but no information about their objections was provided in the expedited motion for preliminary approval filed by their counsel. The court determined that it could not preliminarily approve the settlement without "information regarding the basis for the Class Representatives' objections."

Dairy farmers alleged that DFA and its co-defendants tied up access to milk bottling plants in the Northeast by means of unlawful exclusive supply agreements that forced independent farmers in the region to join DFA or market their raw milk through Dairy Marketing Services. The farmers claimed that this

allowed DFA to reduce the raw milk prices paid to farmers resulting in windfalls to the defendants and their non-defendant co-conspirators. Discussing the proposed settlement, a DFA spokesperson reportedly said that while the cooperative admitted no wrongdoing, "the cost to defend ourselves has become too great." *See Law360*, July 15, 2014.

Trader Joe's Settles "All Natural" Labeling Class Action

A California federal court has approved a settlement in a class action alleging that Trader Joe's labels items with synthetic ingredients as "All Natural." *Larsen v. Trader Joe's Co.*, No. 11-5188 (U.S. Dist. Ct., N.D. Cal., order entered July 11, 2014). Trader Joe's will pay $3.375 million to a settlement fund to compensate class members with a proof of purchase for all products and members without a proof of purchase for up to 10 items, with leftover funds to be distributed as products to class members at retail locations throughout the United States. Plaintiffs' counsel will receive $950,000 of the fund.

In 2011, plaintiffs accused Trader Joe's of labeling several of its food products as "All Natural" or "100% Natural" despite containing one or more synthetic ingredients, which they alleged constituted fraud and unlawful business practices under federal and California law. The parties attended three mediation sessions supervised by a retired judge, but they failed to reach an agreement in any of them; the judge then submitted his own settlement proposal, to which both parties agreed. Additional information on the case appears in Issue **415** of this *Update*.

Trial Delayed for Former Peanut Corp. Officials

A federal court in Georgia has delayed until July 28, 2014, the criminal proceedings against Stewart Parnell, former owner of the Peanut Corp. of America, which was implicated in a 2008-2009 nationwide *Salmonella* outbreak that sickened hundreds and led to at least nine deaths. *United States v. Parnell*, No. 13-cr-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., order entered July 11, 2014). The defendants, including former vice president of sales Michael Parnell and former quality assurance manager Mary Wilkerson, had argued that they did not have time to review some 100,000 documents produced by the prosecution just days before the original July 14 trial date. The court refused to dismiss the 76-count felony indictment as an alternative remedy.

Meanwhile, the court is also considering whether a Centers for Disease Control and Prevention (CDC) official should be allowed to testify during the trial, indicating that it would conduct a *Daubert* hearing to determine whether the testimony of CDC Outbreak Response and Prevention Branch Chief Ian Williams is sufficiently reliable to be admitted. Parnell has reportedly requested that *Daubert* hearings be conducted as to all eight of the government's experts, but the court will allow just one, stating, "There are several

problems with Parnell's request. First, '[a] district court should conduct a *Daubert* inquiry when the opposing party's motion for a hearing is supported by 'conflicting medical literature and expert testimony.' Parnell ignores this requirement and excuses the absence of detail in his motion by explaining that the government provided insufficient expert disclosures. But if the government violated its discovery obligations, the remedy is a discovery sanction, not a *Daubert* hearing." *See Law360*, July 14 and 17, 2014; *Manufacturing Business Technology*, July 15, 2014.

EU Court Advisor Issues Opinion on Obesity as Protected Disability

Advocate General Niilo Jääskinen of the EU Court of Justice has **issued** an opinion in the case of a morbidly obese child-minder in Denmark who lost his job, allegedly due to unlawful discrimination, finding that "if obesity has reached such a degree that it plainly hinders participation in professional life, then this can be a disability" under the Equal Treatment in Employment Directive.

Karsten Kaltoft, who never weighed less than 352 pounds (with a BMI of 54) during his 15-year tenure with the Municipality of Billund taking care of other people's children in his home until he was terminated, claimed that his dismissal was based on his weight and sought damages for discrimination. The Court of Kolding in Denmark referred the case to the EU Court of Justice, seeking an opinion on whether the EU Treaty and Charter included a "self-standing prohibition on discrimination on the grounds of obesity," or alternatively, whether "obesity can be classified as a disability and therefore fall within the scope of the Equal Treatment in Employment Directive."

According to the advocate general, "there is no general, stand-alone prohibition on discrimination on grounds of obesity in EU law"—that is, the Treaty or Charter articles—but the Equal Treatment in Employment Directive prohibits discrimination on the basis of "limitations which result from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person in professional life on an equal basis with other workers." Because "extreme, severe or morbid obesity, that is to say a BMI of over 40, could suffice to create limitations, such as problems of mobility, endurance and mood," this degree of obesity could amount to a "disability" under the Directive. The advocate general's opinion is not binding on the Court of Justice, which is now considering the matter.

The advocate general concluded the opinion by noting that "the origin of the disability is irrelevant. The notion of disability is objective and does not depend on whether the applicant has contributed causally to the acquisition of his disability through 'self-inflicted' excessive energy intake. Otherwise physical disability resulting from reckless risk-taking in traffic or sports would be excluded from the meaning of disability."

OTHER DEVELOPMENTS

Food Marketing Workgroup Targets Lunchables

The Food Marketing Workgroup (FMW) has sent a July 16, 2014, letter to Kraft Foods Group, Inc., questioning how the company purportedly markets its Lunchables product line to children. Signed by Rudd Center for Food Policy and Obesity Director of Marketing Initiatives Jennifer Harris and Center for Science in the Public Interest Director of Nutrition Policy Margo Wootan, the letter cites a recent Rudd Center report alleging that just five out of 42 Lunchables meet nutrition standards under the Children's Food and Beverage Advertising Initiative (CFBAI). In particular, FMW claims that even though Kraft restricts its child-directed advertising to only those products that comply with CFBAI, the use of sweepstakes offers, in-store displays and other tactics could still contravene industry guidelines.

"In the supermarket, less nutritious versions of Lunchables outnumber the healthier ones by six to one, and the healthier varieties are most likely to be stocked on the top shelf, above eye level for both children and adults," states the letter. "Further, the advertised varieties appear on the top shelf while the products that contain candy, cookies, and sugary drinks are placed directly at children's eye level."

Arguing that this practice violates CFBAI, FMW urges Kraft to adopt a comprehensive policy that covers all marketing techniques, including shelf placement, in-store displays and on-package advertising. The group also recommends that this policy align with guidance set forth by the Federal Trade Commission (FTC), which "considers in-store and on-package marketing that prominently features child-oriented characters, themes, activities or celebrities or athletes popular with children to be child-directed marketing." In addition, the letter calls on Kraft to extend its marketing policy to cover children ages 12 to 14, opining that this age group "is heavily targeted with newer forms of social and mobile media marketing that is often disguised as messages from peers, making it difficult for children ages 12 to 14 to recognize and taking advantage of this age group's susceptibility to peer pressure." *See Rudd Center Press Release,* July 16, 2014.

Former FDA Commissioner: Food Label Revisions Not Enough

Former U.S. Food and Drug Administration Commissioner David Kessler has authored a perspective article in the July 17, 2014, issue of *The New England Journal of Medicine*, arguing that the agency's proposed revisions to the Nutrition Facts panel "don't go far enough." While praising the first amendments to the panel since its launch in 1997, the article claims that the proposed changes not only stop short of specifying a Daily Value for added sugar but fail to consider a product's overall nutritional value. Additional details about FDA's proposed labeling revisions appear in Issue **515** of this *Update*.

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"There is nothing in the new framework that actively encourages consumers to purchase food rich in the fruits, vegetables, and whole grains that are rightfully considered 'real food,'" explains Kessler. "Instead, the focus is on specific nutrients—an emphasis that gives food companies an incentive to fortify their products so they can make claims such as 'added fiber' or to produce sugar-laden foods that can be labeled 'low fat.'"

To address these concerns, the article urges FDA to overhaul the ingredient list to discourage "tiny type, complex names and confusing formats" and force manufacturers to aggregate related ingredients as opposed to listing them separately. Kessler also recommends a front-of-package labeling scheme that would require labels to prominently display the top three ingredients, the total calorie count and the number of additional ingredients included in the product. "A revised Nutrition Facts label combined with a streamlined, comprehensible ingredient list and trustworthy front-of-package labeling can have a powerful impact not only on consumer behavior, but perhaps more important, on the decisions manufacturers make about foods they create for the marketplace," he concludes.

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