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LEGISLATION, REGULATIONS AND STANDARDS

Freight Policy and Regulatory Developments Among Agenda Topics at Supply Chain Competitiveness Advisory Committee Meeting

The International Trade Administration’s Advisory Committee on Supply Chain Competitiveness will hold a **public meeting** on June 23-24, 2015, at the U.S. Department of Commerce in Washington, D.C. The 45-member group is charged with providing the Commerce secretary with recommendations for a comprehensive national freight infrastructure and freight policy to support U.S. supply chain and export competitiveness. Stakeholders are invited to submit written comments about the work of the committee no later than 5 p.m. EST on June 15. *See Federal Register*, June 2, 2015.

Food Standards Agency Publishes Five-Year Plan

The U.K. Food Standards Agency (FSA) has **issued** its Strategic Plan 2015-20 outlining a number of initiatives it plans to undertake with industry and other stakeholders over the next five years.

Key activities include (i) implementing campaigns to reduce the incidence of food-borne illness caused by *Campylobacter* and *Listeria* infections; (ii) expanding capabilities of the agency’s newly established Food Crime Unit; (iii) expanding the agency’s horizon scanning and emerging risks analytical capabilities; (iv) establishing new platforms for consumer engagement; and (v) continuing robust engagement with the European Union on revisions to the regulation on official food and feed controls. *See FSA News Release*, June 3, 2015.

EFSA Confirms Scientific Opinion on Acrylamide

The European Food Safety Authority’s (EFSA’s) Panel on Contaminants in the Food Chain (CONTAM) has **released** its final scientific opinion on acrylamide, concluding that dietary exposure to the substance “potentially increases the risk of developing cancer for consumers in all

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age groups.” Naturally formed in starchy food products during high-temperature cooking, acrylamide is digested and distributed throughout the body, where one of its metabolites is said to cause “the gene mutations and tumors seen in animal studies.”

“Evidence from animal studies shows that acrylamide and its metabolite glycidamide are genotoxic and carcinogenic: they damage DNA and cause cancer,” states the CONTAM Panel, which reviewed 43,419 analytical results from food commodities as well as the latest scientific literature. “Evidence from human studies that dietary exposure to acrylamide causes cancer is currently limited and inconclusive.”

In particular, the agency singles out fried potato products, coffee, biscuits, crackers, crisp bread, and soft bread as the main contributors to acrylamide exposure, warning that children are “the most exposed age group on a body weight basis.” It also notes that ingredient and home-cooking choices can affect dietary exposure levels in consumers. The scientific opinion will inform the policymakers responsible for reducing exposure to this substance in food. *See EFSA Press Release*, June 4, 2015.

New Hampshire Governor Blocks “Babies on Beer Bottles” Bill

New Hampshire Governor Maggie Hassan (D) has reportedly vetoed a bill seeking to allow alcohol beverage labels to depict minors as long as the advertising is not intended to promote underage alcohol consumption. Introduced by Rep. Keith Murphy (R-Hillsborough), the measure (**H.B. 122**) would have struck language from the state’s rules on alcohol beverage advertising that prohibits “any reference to minors, pictorial or otherwise.”

Although Murphy pointed to several labeling designs that use images of children or babies but do not promote underage consumption, New Hampshire Liquor Commission Director of Enforcement and Licensing James Wilson opposed the revision on the grounds that it obscures the agency’s “bright line standard” for labeling. As Hassan argued, “Substance misuse, including alcohol misuse, continues to be one of the major public health and safety challenges facing us as a state. Moreover, statistics suggest that New Hampshire has among the highest rates of underage drinking in the country.” *See Associated Press*, June 3, 2015.

Shook 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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LITIGATION

Peanut Corp. Convictions Upheld

A Georgia federal court has upheld the convictions of Stewart Parnell, Michael Parnell and Mary Wilkerson, former Peanut Corp. of America (PCA) executives, after an investigation into the defendants' claims of jury misconduct. *United States v. Parnell*, 13-cr-12 (U.S. Dist. Ct., M.D. Ga., Albany Div., order entered May 28, 2015).

The three were convicted on charges related to a 2008-2009 *Salmonella* outbreak that sickened hundreds of people nationwide and was linked to nine deaths. After a jury convicted them, the defendants argued that some jury members had conducted outside research, based on allegations made to them by Juror 34. The court rejected their argument, noting, "Throughout the sealed proceedings held on alleged juror misconduct, the court only uncovered one juror who could be termed biased: Juror 34." Further, "the evidence against the Defendants was overwhelming," the court said. The defendants' attorney told media that it planned to appeal the ruling. Additional details about the motion for a new trial appears in Issue [540](#) of this *Update*. See *Associated Press*, May 30, 2015.

Court Refuses to Block Oregon County's GMO Ban

A ban on growing genetically modified organisms (GMOs) in Jackson County, Oregon, took effect on June 5, 2015, after a federal court refused to block the voter-approved statute at the request of alfalfa farmers who have grown GMO crops. *Schultz Family Farms LLC v. Jackson Cnty.*, No. 14-1975 (D. Ore., Medford Div., order entered May 29, 2015). The court noted that the issue of GMO farming encompasses several broad questions about the American food supply that it would not attempt to answer; its decision "is simply about the statutory construction of the Right to Farm Act, Jackson County Ordinance 635, and Oregon Senate Bill 863."

The court first describes Oregon's Right to Farm Act, finding that "in the conflicts that arise between active, functioning farms and new, neighboring suburbanites, who inevitably find the farming practices loud, smelly, invasive, or simply irritating, the Oregon legislature has decided, as have many states, to tip the scales in favor of the farms." The GMO ordinance is valid on its face under the law because it "intends to protect against damage to commercial agriculture products," and thus falls into one of the Act's exceptions that allows such statutes.

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The ordinance is further validated by the uncodified portion of Oregon's Seed Bill, the court said. That legislation expressly forbade local governments from enforcing measures that inhibit or prevent agricultural production but created a specific exception for local measures "[a]pproved by the electors of the county at an election held on May 20, 2014," the date on which voters approved the Jackson County GMO ban. Accordingly, the court refused to grant the plaintiffs' attempt to block the ban and dismissed the case.

Putative Class Action Challenges Gerber's Infant Formula Immunity Benefits Claims

Two plaintiffs have filed a lawsuit against Gerber Products Co. alleging that the company misrepresented its Gerber® Good Start® infant formula by advertising it as the "first and only formula whose consumption reduces the risk of infants developing allergies." *Hasemann v. Gerber Prods. Co.*, No. 15-2995 (E.D.N.Y., filed May 21, 2015). The complaint echoes a similar lawsuit against Gerber pending in New Jersey federal court.

The plaintiffs assert that Gerber advertises its product as providing health benefits through partially hydrolyzed whey protein despite an alleged U.S. Food and Drug Administration denial in 2005 that Gerber's formula aids against allergy development. The plaintiffs seek class certification and damages of more than \$5 million. Additional details about Gerber's successful motion to receive medical records in the analogous case appear in Issue [562](#) of this *Update*. See *Legal Newslines*, June 2, 2015.

Kahlua® Makers Pursue "Kahfua" Makers in Court

Absolut Co. has filed a complaint and a motion for an injunction against Happy Hearts Wine LLC, a New York City importer of Israeli wine, after Absolut noticed a Certificate of Label Approval filed with the Alcohol and Tobacco Tax and Trade Bureau for "Kahfua," which it alleges is too close to Kahlua®. *Absolut Co. Aktiebolag v. Happy Hearts Wine, LLC.*, No. 15-3224 (E.D.N.Y., motion filed June 3, 2015).

Happy Hearts' Kahfua, a "coffee espresso [sic] liqueur," is packaged in a similar brown bottle with a similar yellow and red label written in a similar script to Kahlua®, Absolut argues in its motion. It further alleges that Happy Hearts has acted with bad faith by infringing Absolut's trade-

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marks. “Simply stated, there can be no ‘innocent explanation’ for such a blatant knockoff,” the motion asserts. In addition to trademark infringement, Absolut alleges that Happy Hearts is engaging in trademark counterfeiting, which requires a showing that the mark is “spurious” and “identical” or “substantially indistinguishable” from the existing mark. Absolut seeks a preliminary injunction to prevent Happy Hearts from using the mark during litigation.

KFC Sues Chinese Media Companies for Spreading Eight-Legged Chicken Rumors

Yum! Brands Inc.’s KFC has announced on its Chinese-language website that it has filed lawsuits against three Chinese media companies for allegedly spreading rumors that the company has bred its chickens to have eight legs and six wings. The complaint, filed in Shanghai Xuhui District People’s Court, reportedly alleges that the media companies disseminated false information on social media about KFC’s food quality, including digitally altered photos of deformed chickens and rumors of maggots in a delivery order.

KFC has more than 4,600 restaurants in China, accounting for about one-half of its revenue. The company reportedly alleges that 4,000 defamatory messages were viewed more than 100,000 times and seeks 1.5 million yuan, or about US\$242,000, from each media company as well as an apology. *See The Wall Street Journal* and *Reuters*, June 1, 2015.

OTHER DEVELOPMENTS

GMO-Free Baby Formula Focus of As You Sow Campaign

The shareholder advocacy group As You Sow has announced the success of a three-year campaign targeting baby formula purportedly made with ingredients derived from genetically modified organisms (GMOs). According to a May 27, 2015, press release, the group drafted a **shareholder resolution** asking Abbott Laboratories to remove GMOs from its Similac® Advance® baby formula. In response to the resolution, which apparently garnered support from \$2.7 billion in Abbott shares (6 percent of voting shares) at the company’s annual meeting, Abbott has reportedly agreed to offer a GMO-free version of its popular formula.



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Among other things, As You Sow claims that GMO crops “are contributing to several environmental concerns in the United States,” including the allegedly excessive use of pesticides and herbicides. “Polls show that 93% of Americans want GMOs to be labeled or taken out of their foods. Concerned parents are driving the decisions to have safer food products—they are creating demand for sustainable agriculture,” said As You Sow CEO Andrew Behar.

EWG Launches New Assault Against BPA in Cans

The Environmental Working Group (EWG), a “non-profit, non-partisan organization dedicated to protecting human health and the environment,” has **issued** an analysis of more than 250 foods that identifies which of the products’ cans are lined with bisphenol A (BPA) as well as an online **petition** imploring consumers to encourage companies to stop using BPA-based epoxy resins in can linings.

“The biggest problem is that people have no reliable way of knowing whether they are buying food that is laced with this toxic chemical,” an EWG representative was quoted as saying. “Federal regulations do not require manufacturers to label their products to identify cans with BPA-based linings. ... We hope to arm people with the critical information they need to avoid BPA and make smarter shopping decisions.”

EWG classifies the food companies mentioned in the survey into four categories of “players,” claiming that 78 brands (“worst” players) use BPA-lined cans for all products; 31 brands (“best” players) use BPA-free cans for all products; and 34 brands (“better” players) use BPA-free cans for one or more products. A total of 109 brands were deemed “uncertain” players because inadequate information about their products was available for EWG to make a determination.

BPA has allegedly been linked to a variety of health issues, including brain and behavioral disorders, cancer, diabetes, heart disease and obesity. *See EWG News Release, June 3, 2015.*

BMA Scotland Supports Measure to Ban Alcohol Ads at Sporting Events

The British Medical Association in Scotland (BMA Scotland) has reportedly backed legislation under consideration by the Scottish Parliament’s Health and Sport Committee that seeks to ban alcohol advertising at



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all events geared toward children younger than age 18. According to media reports, the proposed measure would also prohibit the marketing of alcoholic beverages near schools in addition to limiting ads on retail premises.

“The alcohol industry’s sponsorship of entertainment or sporting events can see children become walking billboards for alcohol products, exposing them to alcohol brands while they are at an impressionable age,” BMA Scotland Peter Bennie told reporters. “It should not be acceptable for the alcohol industry to sponsor and brand events that are aimed at under-18s and MSPs should use this opportunity to take action on alcohol advertising.” *See BBC News*, June 4, 2015.

MEDIA COVERAGE

New York Times Explores English Monks’ Caffeinated Wine

Buckfast Abbey, an English monastery approaching its millennial anniversary, has drawn criticism for its production of a sweet caffeinated wine, *The New York Times* reports. The beverage, which the abbey sells in 750-milliliter bottles through a distributor, is 15 percent alcohol and contains more than 300 milligrams of caffeine. The fortified wine was originally sold as a tonic, intended for medicinal purposes, but in recent years has gained popularity in Scotland among young people. Critics cite a 2009 report for the Scottish prison service that purportedly found that four in 10 young offenders ranked Buckfast tonic wine as their favorite drink, and 43.3 percent of respondents said they consumed the beverage before committing a crime.

“There is no doubt that caffeine-alcohol mixers make wide-awake drunks,” a physician and member of Scottish Parliament, Richard Simpson, told the *Times*. “If you drink enough alcohol you eventually become comatose, but if you combine it with caffeine you can go through a fairly aggressive phase before you become comatose.” Simpson has proposed legislation limiting the caffeine content in alcohol beverages to 150 milligrams per liter, and similar provisions have been debated in Scottish Parliament for several years. “It is a perfectly good drink if consumed modestly as a tonic wine,” Simpson reportedly said. “It is a pity it has become what it has become.”

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ABOUT SHOOK

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.

Shook 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.



NHS England Chief Executive Dubs Obesity "The New Smoking"

During a May 31, 2015, interview with BBC One's "The Andrew Marr Show," National Health Service (NHS) England Chief Executive Simon Stevens called on industry stakeholders to reduce the amount of sugar in food and beverage products. In particular, he claimed that "one in three of our teenagers are drinking high-energy, sugary drinks," urging "responsible retailers [and] food producers" to reformulate their products as they once did to reduce salt content.

"We've done very well in terms of cutting smoking and teenage pregnancy and drink driving," Stevens was quoted as saying. "But the new smoking is obesity. One in five cancer deaths is now caused by obesity." *See Press Association, May 31, 2015.*

CSPI Executive Director Pens Article Linking "Big Food" and "Big Tobacco"

"Food is not tobacco... But the public health community is concerned about both diet and tobacco use for a very good reason," writes Center for Science in the Public Interest (CSPI) Executive Director Michael Jacobson in a June 2, 2015, *Huffington Post* blog post claiming that both industries "share some common bloodlines."

Jacobson claims that both industries not only market to children, but purportedly "blame their customers for the harm caused by their products." In addition, he argues that these companies emphasize personal responsibility while overlooking "the extent to which companies persuade, lure, and manipulate customers—including children—into making the very decisions that companies say should be up to them."

"Like Big Tobacco, Big Food goes to great lengths to muddy the waters and obscure the connections between soda and disease," the article concludes. "Big Tobacco and Big Food are now separate industries, but the playbook is much the same. How the game ends is up to us."