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## LEGISLATION, REGULATIONS AND STANDARDS

### NTP Soliciting Information and Experts for Project Regarding Association Between PFOA and PFOS Exposures and Immunotoxicity in Humans

The National Toxicology Program's (NTP's) Office of Health Assessment and Translation is **inviting** information submissions about ongoing studies or upcoming publications targeting evidence of an association between exposures to perfluorooctanoic acid (PFOA) or perfluorooctane sulfonate (PFOS) and immunotoxicity to assist in the preparation of a monograph on the topic. PFOA and PFOS are chemical compounds that have been widely used in commercial and industrial applications, including food packaging and water-resistant coatings. NTP is also seeking scientists with expertise in areas such as epidemiology, immunotoxicology and biostatistics to serve on an ad hoc panel to peer review the draft monograph. Information submissions and nominations of scientific experts are due by September 30, 2015. *See Federal Register*, August 14, 2015.

### USDA Seeks Nominees to Fill NGRAC Vacancies

The U.S. Department of Agriculture (USDA) is **soliciting** nominations for five open slots on the National Genetic Resources Advisory Council (NRGAC), a subcommittee of the National Agricultural Research, Extension, Education, and Economics Advisory Board. NRGAC members are charged with recommending policies for collecting, maintaining and utilizing genetic resources as well as considering approaches for their conservation.

The agency is specifically looking for three candidates with scientific backgrounds (i.e., agricultural sciences, environmental sciences, natural resource sciences, health sciences, nutritional sciences) and two candidates representing the general public. The deadline for nominations is August 28, 2015. *See Federal Register*, August 10, 2015.

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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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If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd at [mboyd@shb.com](mailto:mboyd@shb.com).

### U.S. Delegates Schedule Fish and Fishery Products Meeting

The U.S. Department of Agriculture's Office of the Under Secretary for Food Safety, National Oceanic and Atmospheric Administration and the U.S. Food and Drug Administration have **announced** a September 24, 2015, public meeting in College Park, Maryland, to discuss draft U.S. positions for consideration at the 34<sup>th</sup> Session of the Codex Committee on Fish and Fishery Products (CCFFP) slated for October 19-24 in Alesund, Norway. The CCFFP develops global standards for fresh, frozen (including quick frozen) or otherwise processed fish, crustaceans and molluscs. Agenda items at the September gathering will include draft codes of practice for processing of fish sauce and processing of fresh and quick-frozen raw scallops as well as proposed food additive provisions in standards for fish and fishery products. *See Federal Register*, July 30, 2015.

## LITIGATION

### Kind "Healthy" Labeling Lawsuits Consolidated

The U.S. Judicial Panel on Multidistrict Litigation has consolidated 11 putative class actions against Kind LLC alleging that its snack bars are misleadingly marketed as "healthy" despite a high saturated fat content and low levels of nutrients. *Kind LLC "All Natural" Litigation*, MDL No. 2645 (S.D.N.Y., transfer order entered August 7, 2015). The court found that the actions involved common questions of fact, and all parties favored centralization except one plaintiff who did not oppose the motion. The lawsuits were filed after the U.S. Food and Drug Administration sent a letter to Kind warning against the use of "healthy" on several of its products. Details about the first of these lawsuits appear in Issue **562** of this *Update*.

### Plaintiff in Bigelow Class Action Cannot Obtain Profit Information

A California federal court has denied a plaintiff's attempt to obtain Bigelow's financial records in a putative class action alleging that the company mislabeled its tea. *Khasin v. R.C. Bigelow Inc.*, No. 12-2204 (N.D. Cal., order entered August 12, 2015). The plaintiff argued that the records would help him calculate what portion of the profits he would seek. The court sided with Bigelow, which argued that "its profits and costs are irrelevant because the proper measure of restitution in a food labeling case is the price premium attributable to the challenged

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label (the difference between the product as labeled and the product as received), not its profits.” The court then cited a similar decision in another food labeling lawsuit with the same plaintiff.

### As You Sow Threatens Prop. 65 Litigation Against SoyLent

Environmental group As You Sow has filed a **60-day notice of intent** to sue the manufacturer of SoyLent, a food substitute product, for alleged failure to warn that the powder contains lead and cadmium exceeding levels considered safe under California’s Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65).

The product at issue is SoyLent 1.5, which As You Sow alleges contains 12 to 25 times the safe-harbor level of lead and four times the safe-harbor level of cadmium, according to two samples reportedly tested by an independent laboratory. “These heavy metals accumulate in the body over time and, since SoyLent is marketed as a meal replacement, users may be chronically exposed to lead and cadmium concentrations that exceed California’s safe harbor level (for reproductive harm),” As You Sow CEO Andrew Behar said in an August 12, 2015, press release. “With stories about Silicon Valley coders sometimes eating three servings a day, this is of very high concern to the health of these tech workers.” Details about the media attention garnered by SoyLent upon its 2014 release appear in Issue [523](#) of this *Update*.

### Tito’s “Handmade” Vodka Label Targeted Again in Proposed Class Action

A consumer has filed a lawsuit against Fifth Generation, Inc. alleging that its Tito’s Handmade Vodka® is not “handmade” as claimed on the label because it is produced through a mechanized process. *Wilson v. Fifth Generation, Inc.*, No. 15-561 (M.D. Ala., E. Div., filed August 5, 2015). The complaint joins a number of other lawsuits alleging similar facts and claims against Tito’s Handmade Vodka®.

Fifth Generation has filed a motion to dismiss a similar lawsuit in Massachusetts federal court, arguing that the claims have “no basis in law or common sense” and no reasonable person could believe that a product sold nationally “was made exclusively in human hands in some backwoods, ad hoc operation, without any mechanical equipment.” *Emanuello v. Fifth Generation, Inc.*, No. 15-11513 (D. Mass., motion filed August 5, 2015). In May and July 2015, courts dismissed lawsuits targeting “handmade” claims made on Maker’s Mark® labels, finding

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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.



that the “handmade” claim “obviously cannot be used literally to describe bourbon” because some degree of machinery is necessary for production. Additional information about those decisions appears in Issues [564](#) and [573](#) of this *Update*.

### OTHER DEVELOPMENTS

#### Rudd Center Claims Food and Beverage Marketing Targets Black and Hispanic Youth

The University of Connecticut Rudd Center for Food Policy & Obesity has issued a [report](#) claiming that food companies “disproportionately target their TV advertising for fast food, candy, sugary drink and snack brands to black and Hispanic consumers.” Focusing on restaurant, food and beverage companies that spent at least \$100 million on advertising in 2013 as well as participants in the Children’s Food and Beverage Advertising Initiative, the report reviews the number of advertisements for fast food, sugar-sweetened beverages, snack foods, dairy products, 100-percent juice, water, fruits and vegetables that appeared on “Spanish-language TV and black-targeted TV programming.” The authors also used syndicated market research data from Nielsen to compile media spending by brand and product, in addition to estimating “exposure to TV advertising by black, Hispanic, and all children and adolescents in 2013.”

In particular, the report notes that 26 companies spent \$675 million in food-related advertising on Spanish-language TV and \$161 million on black-targeted TV. Of these companies, fast-food and other restaurants allegedly spent “the most on advertising in targeted media, totaling \$244 million in Spanish-language TV and \$61 million in black-targeted TV.” According to Rudd Center, the companies under review spent only \$10 million to market yogurt and 100-percent juice on Spanish-language TV and only \$2 million to market similar products on black-targeted TV.

“Our analysis of the largest food, beverage and restaurant corporations in the United States shows that these companies vary widely in their focus on advertising targeted to black and Hispanic youth. Unfortunately, the majority of brands targeted to youth of color are nutritionally poor products that can be harmful to their health,” said Rudd Center’s Director of Marketing Initiatives Jennifer Harris. *See Rudd Center Press Release*, August 14, 2015.