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## LEGISLATION, REGULATIONS AND STANDARDS

### USDA and HHS Unveil 2015-2020 Dietary Guidelines for Americans

The U.S. Departments of Agriculture (USDA) and Health and Human Services (HHS) have published the *2015-2020 Dietary Guidelines for Americans*, which now emphasize overall dietary patterns as opposed to nutrient quotas. Explaining that “people do not eat food groups and nutrients in isolation but rather in combination,” the guidelines offer the following “overarching” recommendations: (i) “follow a healthy eating pattern across the lifespan”; (ii) “focus on variety, nutrient density, and amount”; (iii) “limit calories from added sugars and saturated fats and reduce sodium intake”; (iv) “shift to healthier foods and beverage choices”; and (v) “support healthy eating patterns for all.”

Among other things, the *Dietary Guidelines* specify that a healthy diet includes a variety of dark green, red, orange, and starchy vegetables as well as legumes; whole fruits; grains and whole grains; fat-free or low-fat dairy products and/or fortified soy beverages; a variety of proteins, such as seafood, lean meats, poultry, eggs, legumes, nuts, seeds, and soy; and oils. The guidance also advises individuals to limit their added sugar and saturated fat consumption to less than 10 percent of daily calories; consume less than 2,300 milligrams of sodium per day; and moderate their alcohol intake to less than one daily serving for women or two for men.

Meanwhile, consumer groups have met the new guidelines with mixed reviews. “The advice presented in the 2015 Dietary Guidelines for Americans is sound, sensible and science-based,” said Center for Science in the Public Interest (CSPI) Executive Director Michael Jacobson. “If Americans ate according to that advice, it would be a huge win for the public’s health. That said, the federal government’s basic nutrition advice has remained largely unchanged for the past 35 years. The problem is that the food industry has continued to pressure and tempt us to eat a diet of burgers, pizzas, burritos, cookies, doughnuts, sodas, shakes, and other foods loaded with white flour, red and processed meat, salt, saturated fat, and added sugars, and not enough vegetables, fruit, and whole grains.” See *CPSI Press Release*, January 7, 2016.

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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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New York University Professor Marion Nestle, however, deems the guidelines “a win for the meat, sugary drink, processed, and junk food industries,” criticizing the lack of guidance concerning calories, portion sizes and cholesterol. She has singled out the egg industry for allegedly lobbying to have cholesterol advice removed from the guidelines and takes issue with using “protein” as a catch-all for various products. “The Guidelines use [‘protein’] as yet another euphemism for meat,” she opined. “‘Protein’ lumps meat together with seafood, poultry, eggs, nuts, seeds, and soy. But grains and dairy also have protein, so using this term makes no nutritional sense and obfuscates the message to eat less meat.” *See Food Politics*, January 7, 2016.

### ASA Dismisses Complaint Against Baileys™ Christmas Ad

The U.K. Advertising Standards Authority (ASA) has dismissed a complaint alleging that Diageo Great Britain Ltd.’s holiday commercials for Baileys™ liqueur “implied that the success of a social occasion depended on the presence or consumption of alcohol.” Despite Alcohol Concern’s claim that the tagline “IT’S NOT CHRISTMAS WITHOUT YOU... BAILEYS” was “irresponsible,” the agency agreed with Diageo Great Britain and Clearcast that consumers were likely to understand “Christmas” as a reference to the entire holiday season as opposed to a specific social occasion.

“We considered that consumers would interpret the claim “IT’S NOT CHRISTMAS WITHOUT YOU” as a play on words referring to getting together with friends over the festive period, as well as referring to the fact that the drink had been traditionally associated with the Christmas period,” ASA said. “We noted that the ad showed the women enjoying one drink together, and there was no suggestion that the individual social occasions were dependent on Baileys in order to be successful. Rather, the women appeared to be laughing and enjoying each other’s company from the beginning of the ad before they had arrived at the bars or had been served any Baileys.”

### Public Health England Releases Free “Sugar Smart” App

With the launch of its Change4Life campaign, Public Health England (PHE) has issued a free barcode-scanning app that displays the sugar content of foods and beverages. Claiming that children ages 4 to 10 consume 22 kilograms of sugar per year—“the average weight of a 5-year-old”—the campaign also features TV, digital and outdoor advertising as well as educational packs to be distributed by schools.

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Among other things, PHE highlights tooth decay as “the most common reason” for hospital admissions among children ages 5 to 9. To this end, the “Smart Sugar” app allows users to scan product barcodes at supermarkets to display the sugar content in grams or cubes. According to PHE, which notes that a single serving of soda contains 9 cubes of sugar, the recommended daily maximum sugar intake is (i) “5 sugar cubes for children aged 4 to 6,” (ii) “6 sugar cubes for children aged 7 to 10,” and (iii) “7 sugar [for] children aged 11 or older.”

“Children aged 5 shouldn’t have more than 19 grams of sugar per day. That’s 5 cubes, but it’s very easy to have more,” PHE Chief Nutritional Alison Tedstone said in a January 4, 2016, press release. “That’s why we want parents to be ‘Sugar Smart’. Our easy to use app will help parents see exactly where the sugar in their children’s diet is coming from, so they can make informed choices about what to cut down on.”

### New French Law Requires Restaurants to Provide Take-Away Boxes

A law took effect in France on January 1, 2016, that requires restaurants to provide take-away boxes to diners who request them. The law reportedly targets the country’s rising food waste problem, but may have little impact—one government-commissioned report concluded that “the obstacle is mostly cultural” because “the majority of diners don’t dare to ask for the leftovers of their meal, while the restaurateurs see it as a ‘degradation’ of their dishes.” The French do not have a term for a take-away box; many reportedly call it “le doggy bag,” but a hotel and restaurant industry union is attempting to replace the term with “le gourmet bag.” *See France 24*, January 4, 2016.

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## LITIGATION

### D.C. Circuit Affirms Dismissal of Poultry Inspection System Challenge

The U.S. Court of Appeals for the D.C. Circuit has affirmed a lower court’s dismissal of Food & Water Watch’s challenge to the New Poultry Inspection System (NPIS). *Food & Water Watch, Inc. v. Vilsack*, No. 15-5037 (D.C., order entered December 22, 2015). The organization argued that the NPIS did not comply with the Poultry Products Inspection Act and would increase the risk of foodborne illnesses resulting from contaminated poultry. The lower court found that Food & Water Watch leaders did not have standing to sue because they could not show that the increased risk and probability of harm was substantial. The appeals court

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agreed, noting that the organization's arguments ignored some provisions of the NPIS requiring more "offline" inspections, which could lower the risk of foodborne illness. Additional information about the lower court's ruling appears in Issue [555](#) of this *Update*.

### Second Circuit Upholds Wine Fraud Conviction

The U.S. Court of Appeals for the Second Circuit had upheld the conviction of a man who sold \$20 million worth of counterfeit wine by mixing lower-priced wines and pouring them into the bottles of more expensive wines. *USA v. Kurniawan*, No. 14-2928 (2nd Cir., order entered December 22, 2015). The man challenged the search of his home on Fourth Amendment grounds, arguing that the evidence police found should have been inadmissible. The appeals court disagreed, finding that although the warrantless protective sweep had been illegal, the police affidavit provided enough additional evidence beyond what was found during the protective sweep to support issuing the warrant. Accordingly, the court affirmed a lower court's judgment that the man must serve 10 years in prison and pay \$28 million in restitution along with \$20 million in forfeiture.

### Certification Denied in Probiotic Yogurt Dispute

A California federal court has refused to certify the proposed class in a case alleging Yakult U.S.A., Inc. mislabels its probiotic yogurt drinks as providing nonexistent health benefits. *Torrent v. Yakult U.S.A., Inc.*, No. 15-0124 (C.D. Cal., S. Div., order entered January 5, 2016). The plaintiff argued that "Yakult fails to actually confer any health benefit and that there is no credible scientific evidence that the probiotics in the beverage do what Yakult claims," and he sought to enjoin Yakult from continuing to sell the product with its allegedly false labeling.

The court found that the plaintiff lacked standing to seek injunctive relief because he did not intend to buy Yakult's product again. "Owing to his lack of standing to pursue injunctive relief," the court said, "he has failed to provide a sound rationale for class certification under either [certification standard]." Further, "even if it were possible for [the plaintiff] to obtain injunctive relief in the instant case, the restitution he seeks in his complaint could not be recovered as part of a (b)(2) class, as it necessarily requires individual calculations of monetary relief related to the amount of Yakult purchased during the class period and the retail price paid by each consumer."



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### Stoli Trademark Suit to Continue After Second Circuit Revival

The U.S. Court of Appeals for the Second Circuit has ruled that a Russian state-owned company can sue U.S. distributors of Stolichnaya vodka in a dispute over which entity inherited the brand after the Soviet Union collapsed—the Russian Federation or private companies successive to the company that sold the product before the dissolution. *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Intl. BV*, No. 14-4721 (2nd Cir., order entered January 5, 2016).

A lower court previously held that the Russian Federation’s Federal Treasury Enterprise Sojuzplodoimport (FTE) did not have standing to sue, but the appeals court disagreed. “The declaration of a United States court that the executive branch of the Russian government violated its own law by transferring its own rights to its own quasi-governmental entity (FTE) would be an affront to the government of a foreign sovereign,” the appeals court held. “Even an inquiry into whether Russian law permitted the Assignment is a breach of comity.” Additional information about the lengthy dispute appears in Issue [536](#) of this *Update*.

### PCRM Sues Federal Agencies Seeking to Maintain Existing Federal Cholesterol Intake Guidelines

The nonprofit advocacy group Physicians Committee for Responsible Medicine (PCRM) has brought [suit](#) in the U.S. District Court for the Northern District of California seeking to prevent the U.S. Departments of Agriculture (USDA) and Health and Human Services (HHS) from adopting a recommendation of the 2015 Dietary Guidelines Advisory Committee (DGAC). The DGAC is a joint committee formed by USDA and HHS that recommended the agencies drop from the newly issued 2015-2020 *Dietary Guidelines for Americans* the advice that healthy individuals limit their daily dietary cholesterol consumption to 300 milligrams per day. PCRM seeks to permanently enjoin the agencies from incorporating the recommendation into the guidelines and to instead maintain current recommended daily limits.

The complaint alleges the data underlying the DGAC’s recommendation is not “fairly balanced” within the meaning of the Federal Advisory Committee Act because it omits evidence unfavorable to the egg industry. Rather, PCRM contends that the DGAC recommendation was “inappropriately influenced” by industry special interests because it is premised on studies funded by egg industry associations that omit evidence linking cholesterol intake to health risks. And, because there is a long-standing

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history of studies confirming such a link, the advisory recommendation is fundamentally misleading to members of the public.

### Chipotle Targeted in Federal Investigations, Shareholder Suit Filed in New York Federal Court

Chipotle Mexican Grill has reportedly been served with a grand jury subpoena as part of a U.S. Attorney's Office and Food and Drug Administration criminal investigation into a California norovirus outbreak in August 2015 that sickened more than 200 people. The company's fare was also linked to a norovirus outbreak in Massachusetts in December 2015. Chipotle's food safety practices face additional scrutiny over an ongoing E. coli outbreak that has resulted in the closure of 43 Chipotle locations in Washington and Oregon and reports of related illnesses in several other states. *See The New York Times*, January 6, 2016.

In a January 6 [Form 8-K filing](#) with the U.S. Securities and Exchange Commission, Chipotle reported a 14.6 percent drop in fourth quarter 2015 sales and non-recurring expenses related to its foodborne illness incidents of \$14 to \$16 million.

Meanwhile, Pomerantz LLP announced on January 8 that it has filed a purported class action against Chipotle and certain of its officers in a New York federal court on behalf of individuals and entities that purchased company securities between February 4, 2015, and January 5, 2016. According to a news release, the complaint asserts that the defendants "made false and/or misleading statements and/or failed to disclose that: (i) Chipotle's quality controls were not in compliance with applicable consumer and workplace safety regulations; (ii) Chipotle's quality controls were inadequate to safeguard consumer and employee health; and (iii) as a result of the foregoing, Chipotle's public statements were materially false and misleading at all relevant times." The suit seeks to recover damages under the Securities Exchange Act of 1934.

### New York Consumer Files Slack-Fill Lawsuit Against Trader Joe's

A consumer has filed a proposed class action against Trader Joe's Co. alleging the company sells 5-ounce cans of store-brand tuna filled with only 3 ounces of product. *Magier v. Trader Joe's Co.*, No. 16-0043 (S.D.N.Y., filed January 5, 2016). According to the complaint, "Independent testing by the U.S. National Oceanic and Atmospheric Administration (NOAA) determined that, over a sample of 24 cans, 5-ounce cans of Trader Joe's Albacore Tuna in Water Salt Added contain an average of only 2.61 ounces of pressed cake tuna when measured



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precisely according to the methods specified by [the federal statute].” The complaint further alleges similar NOAA test results for six other Trader Joe’s tuna products, amounting to breach of warranties, unjust enrichment, negligent misrepresentation, fraud and violations of New York’s consumer-protection statute. The plaintiff seeks class certification, declaratory judgment, compensatory and punitive damages, an injunction, attorney’s fees and a jury trial.

### “Made in USA” Lawsuits Filed Against Rockstar, Heinz

A plaintiff has filed two similar lawsuits against H.J. Heinz Co. and Rockstar, Inc. alleging the companies’ products wrongfully bear “Made in the USA” label claims because they contain “foreign ingredients.” *Alaei v. Rockstar, Inc.*, No. 15-2959 (S.D. Cal., filed December 31, 2015); *Alaei v. H.J. Heinz Co.*, No. 15-2961 (S.D. Cal., filed December 31, 2015).

Heinz 57<sup>®</sup> sauce, one complaint argues, is misrepresented as manufactured in the United States because some of its ingredients, including “turmeric, tamarind extract, and jalapenos, among other ingredients,” are “not from the United States.” Similarly, Rockstar’s Sugar Free beverage, described as “Made in the USA” on the label, contains “various amounts of taurine, guarana seed extract, and milk thistle extract, which, among other ingredients in Defendants’ products, are not from the United States.” These foreign ingredients, the complaint argues, are problematic because they are not subject to the same strict regulatory requirements and “are of inferior quality, potentially more dangerous and less reliable.” In both complaints, the plaintiff seeks class certification, declaratory judgment, an injunction and damages.

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## OTHER DEVELOPMENTS

### Nestle Pens Article Targeting Industry-Sponsored Food Studies

New York University Professor Marion Nestle has penned an opinion article in the January 2016 edition of *JAMA Internal Medicine* criticizing industry-backed food studies. Pointing to research reviews posted on her *Food Politics* blog, Nestle alleges that 70 out of 76 industry-funded studies published between March and October 2015 “reported results favorable to the sponsor’s interest.”

“In the studies I collected, companies or trade associations promoting soft drinks, dairy foods, eggs, breakfast cereals, pork, beef, soy products,

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dietary supplements, juices, cranberries, nuts, and chocolates supported the study itself, the investigators, or both,” she said in the commentary. “These studies all found significant health benefits or lack of harm from consuming the foods investigated, results that can be useful for deflecting criticism of a company or promoting its products.”

Based on her findings, Nestle urges journals to consider whether submitted work promotes public health or food marketing. “Journal editors should ensure that editors and members of editorial boards are free of industry conflicts, require peer reviewers to note food-industry funding in manuscript evaluations, and be wary of accepting industry-funded publications with evident commercial implications,” she said. “If food companies and trade associations want to fund research, they should consider pooling resources and setting up an independent foundation to administer the grants.”

### Alleged Links Between Cancer and Diet Target of Upcoming Harvard Webcast

“Cancer and Diet: The Latest on Processed Meats, Fats and More” is the title of a January 15, 2016, [live forum](#) hosted by the Harvard T.H. Chan School of Public Health. Webcast faculty, including Harvard Professors Walter Willett and Frank Hu, will discuss the World Health Organization’s classification of processed meat as a “Group 1” carcinogen and the 2015-2020 *Dietary Guidelines for Americans*, among other topics. Willett and Hu were quoted in a January 8 [Time](#) article about the role of food industry influence on the new guidelines.

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## SCIENTIFIC/TECHNICAL ITEMS

### Plain Food Packaging Might Encourage Consumption

Plain food packaging for snack foods decreases purchase intention and brand perception but increases actual consumption among some consumers, according to French and Belgian researchers. Carolina O.C. Werle, et al., “Is plain food packaging plain wrong? Plain packaging increases unhealthy snack intake among males,” *Food Quality and Preference*, December 2015.

Billed as the first to examine “the impact of plain packaging on consumers’ perceptions and actual consumption of unhealthy food items,” the study used brand- and plain-packaged M&M’s® to explore the effects of plain packaging on (i) product and brand attitudes as well

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as the intention to consume an unhealthy snack, (ii) food intake once consumers have sampled the product, and (iii) food intake when plain packaging is combined with low-fat claims.

The results evidently indicate plain food packaging “negatively impacts product and brand attitudes as well as intention to consume an unhealthy snack when consumers only evaluate the packaging.” The researchers, however, note the loss of this effect once consumers actually tasted the product. In this scenario, plain packaging not only increased consumption among male participants, but plain packaging combined with a low-fat label increased consumption among both men and women.

“What is effective for preventing smoking may not necessarily be as effective for reducing food consumption,” conclude the study authors. “Even worse, the present findings suggest that, although plain food packaging may adversely impact purchase intentions, it may actually increase actual food consumption once the product [is] bought or offered (at least among males). We deem it critical that future research advances our understanding of whether plain food packaging represents a viable health prevention strategy for fighting overweight and obesity.”

### Mammary Gland Tumors Allegedly Linked to Sucrose Consumption

An animal study examining the purported link between high sucrose intake and the development of mammary gland tumors has attributed the effect in part “to increased expression of 12-lipoxygenase (12-LOX) and its arachidonate metabolite 12-hydroxy-5Z,8Z,10E,14Z-eicosatetraenoic acid (12-HETE).” Yan Jiang, et al., “A Sucrose-Enriched Diet Promotes Tumorigenesis in Mammary Gland in Part through the 12-Lipoxygenase Pathway,” *Cancer Research*, January 2016.

University of Texas MD Anderson Cancer Center researchers used several mouse models--“including a mouse mammary gland tumor model that carries a MMTV/unactivated neu transgene, a human triple-negative breast cancer cell (MDA-MB-231) orthotopic mouse model, and a breast cancer lung metastasis mouse model (injected with 4T1 mouse breast cancer cells)”--to identify a potential mechanism by which a sucrose-enriched diet contributes to tumor genesis and metastasis. The study reports that 50 to 58 percent of mice on a sucrose-enriched diet developed mammary tumors, compared to 30 percent on a starch-control diet. It also suggests that those mice fed a diet high in sucrose and fructose showed a significantly higher numbers of lung metastases.

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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.



“We determined that it was specifically fructose, in table sugar and high-fructose corn syrup, ubiquitous within our food system, which was responsible for facilitating lung metastasis and 12-HETE production in breast tumors,” explained one of the authors in a December 31, 2015, press release. “This study suggests that dietary sucrose or fructose induced 12-LOX and 12-HETE production in breast tumor cells in vivo. This indicates a possible signaling pathway responsible for sugar-promoted tumor growth in mice. How dietary sucrose and fructose induces 12-HETE and whether it has a direct or indirect effect remains in question.”