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LEGISLATION, REGULATIONS AND STANDARDS

Senators Urge Action on GAO Bee Health Report

U.S. Sens. Barbara Boxer (D-Calif.), Dianne Feinstein (D-Calif.) and Kirsten Gillibrand (D-N.Y.) have written a March 14, 2016, letter requesting that the U.S. Department of Agriculture (USDA) and U.S. Environmental Protection Agency (EPA) act on recommendations contained in a Government Accountability Office (GAO) report on bee health.

Summarizing federal initiatives designed to improve bee health and protect pollinator populations, the report calls on USDA to “coordinate with other agencies to develop a plan to monitor wild, native bees, and evaluate gaps in staff expertise in conservation practices.” In particular, GAO recommends that USDA redouble its efforts with the White House Pollinator Health Task Force to “develop a mechanism, such as a federal monitoring plan, that would (1) establish roles and responsibilities of lead and support agencies, (2) establish shared outcomes and goals, and (3) obtain input from relevant stakeholders, such as states.” According to the report, USDA should also update the categories of bees in the Current Research Information System to reflect those in the Pollinator Health Task Force’s research action plan; institute measures to track conservation program acres; and evaluate the effectiveness of plans to restore bee habitats.

The GAO report also urges EPA to (i) determine whether the most common mixtures of pesticides used on crops “pose greater risks than the sum of the risks posed by the individual pesticides”; (ii) “develop a plan for obtaining data from pesticide registrants on the effects of pesticides on non-honey bee species”; and (iii) “provide Congress and the public with accurate information about the schedules for completing the registration reviews for existing pesticides.”

Meanwhile, Boxer, Feinstein and Gillibrand have voiced support for these actions, calling for the extension of the Pollinator Health Task Force beyond the current administration. They also ask EPA to extend the use of “bee advisory boxes” on pesticide labels “in order to increase consumer

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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.

For additional information about Shook's capabilities, please contact



Mark Anstoetter
816.474.6550
manstoetter@shb.com



Madeleine McDonough
816.474.6550
202.783.8400
mmcdonough@shb.com

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.

and user awareness of the proper, effective application for pesticides and best practices for their use, for both commercial and homeowner pesticide users.” As the letter concludes, “Protecting honeybees and other pollinators is a critical function, and the federal government must continue building upon the progress underway since the task force was created in 2014.”

CSPI Urges FDA to Mandate Warning Labels on Foods Containing Synthetic Food Coloring

The Center for Science in the Public Interest (CSPI) has called on the U.S. Food and Drug Administration (FDA) to require labeling on foods containing synthetic food dyes such as FD&C Green 3 and FD&C Blue 2. CSPI's latest move follows its January 2016 publication of a report critical of FDA's inattention to food dyes and pointing to studies allegedly linking food-dye consumption to behavioral issues in children, particularly those with Attention Deficit/Hyperactivity Disorder (ADHD). The health advocacy group's proposed labeling would state: “WARNING: This food contains synthetic food colorings that may impair the behavior of some children.”

“As long as dyes are permitted, only a warning label will provide consumers with the appropriate information to enable them to make the association between foods containing those dyes and their children's behavioral symptoms,” CSPI said in its March 15, 2016, letter to FDA. “The FDA has mandated such labeling in the past on several occasions. For the same reason, labeling is necessary in the context of food dyes.”

Previous examples of FDA-mandated warnings cited by CSPI include those required on unpasteurized juices and products containing olestra and aspartame.

“If the FDA is willing to place a label on products containing aspartame to protect (from a malady that we recognize may be far more severe than symptoms of ADHD) a vulnerable subpopulation of less than 10,000, the agency should also require a products containing food dyes that affect over half a million children.”

CSPI cites costs of \$3.5 billion to more than \$5 billion to treat children and adolescents with ADHD linked to ingestion of food dyes. *See CSPI News Release*, March 15, 2016.

U.S. Codex Delegates to Address Food Labeling Issues

The U.S. Department of Agriculture's Office of the Under Secretary for Food Safety and the U.S. Food and Drug Administration are holding an April 13, 2016, public meeting in College Park, Maryland, to discuss U.S. draft positions for consideration at the 43rd Session of the Codex Committee on Labeling in Foods (CCFL) in Ottawa, Canada, on May 9-13. CCFL is charged with drafting food labeling provisions and addressing issues related to the advertisement of food with particular claims or misleading descriptions.

Agenda items for the April 13 meeting include discussion papers focused on Internet food sales and the labeling of non-retail containers; proposed revisions to guidelines for use of the term "Halal"; and date marking. *See Federal Register*, February 26, 2016.

NOP Releases National List Petition Guidelines

The U.S. Department of Agriculture's National Organic Program (NOP) has published revised National List Petition Guidelines for requesting amendments to the National List of Allowed and Prohibited Substances (National List). According to NOP, the National List not only identifies "the synthetic substances that may be used and the non-synthetic (natural) substances that may not be used in organic crop and livestock production," but designates "a limited number of non-organic substances that may be used in or on processed organic products."

Clarifying the petition process as well as "the information to be submitted for all types of petitions requesting amendments to the National List," the guidelines address, among other things, (i) who can submit a petition, (ii) what types of substances can be petitioned, and (iii) the criteria by which the National Organic Standards Board (NOSB) evaluates petitions. These criteria include: (i) "the potential of the substance for detrimental chemical interactions with other materials used in organic farming systems"; (ii) "the toxicity and mode of action of the substance and of its breakdown products or any contaminants, and their persistence and areas of concentration in the environment"; (iii) "the probability of environmental contamination during manufacture, use, misuse or disposal of the substance"; (iv) "the effect of the substance on human health"; (v) "the effects of the substance on biological and chemical

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interactions in the agroecosystem, including the physiological effects of the substance on soil organisms (including the salt index and solubility of the soil), crops, and livestock”; (vi) “the alternatives to using the substance in terms of practices or other available materials”; and (vii) “[the substance’s] compatibility with a system of sustainable agriculture.” *See USDA Press Release and Federal Register*, March 10, 2016.

Meanwhile, NOP has announced an NOSB meeting slated for April 25-27, 2016, in Washington, D.C., as well as an April 19 webinar to receive public comments. The agency will accept written comments or registration to make oral comments by April 15, 2016.

Tasked with developing “standards for substances to be used in organic production,” NOSB will consider reports from its subcommittees on National List substances up for sunset review in 2018, including agar-agar, carrageenan, tartaric acid, cellulose, beta-carotene extract, copper sulfate, ozone gas, peracetic acid, and calcium chloride. The board will also hear recommendations on proposals and petitions related to the following substances: sodium and potassium lactate; oat beta-glucan; hypochlorous acid; sodium dodecylbenzene sulfonate; ancillary substances for microorganisms; ash from manure burning; squid and squid byproducts; and soy wax. *See Federal Register*, March 16, 2016.

UK Chancellor of the Exchequer Unveils Levy on Sugar-Sweetened Beverages

The U.K. Chancellor of the Exchequer George Osborne has announced a new levy on soft drink companies to be assessed “on the volume of sugar-sweetened drinks they produce or import.” In a budget presentation before Parliament, Osborne laid out a two-tiered tax scheme slated to take effect in April 2018, “to give companies plenty of space to change their product mix.”

Under the levy, which exempts milk-based drinks and fruit juices, sugar-sweetened beverages will fall into one band with “a total sugar content above 5 grams per 100 milliliters,” or “a second, higher band for the most sugary drinks with more than 8 grams per 100 milliliters.” The U.K. Office for Budget Responsibility apparently anticipates that the levy will raise an estimated £520 million for increased sport funding in primary schools.

“Many in the soft drinks industry recognize there’s a problem and have started to reformulate their products... So industry can act, and with the right incentives I’m sure it will,” said Osborne during his budget speech.

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“I am not prepared to look back at my time here in this Parliament, doing this job and say to my children’s generation: ‘I’m sorry. We knew there was a problem with sugary drinks. We knew it caused disease. But we ducked the difficult decisions and we did nothing.’”

OEHHA Takes Emergency Measure on Prop. 65 Warnings for BPA Exposure

The California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment (OEHHA) has proposed an emergency action to temporarily allow the use of standard point-of-sale warning messages for bisphenol A (BPA) exposures from canned and bottled foods and beverages. Under Proposition 65 (Prop. 65) regulations, consumer products that contain any chemical known to the state to cause reproductive toxicity or cancer must display a “clear and reasonable” warning on “labeling, shelf tags, shelf signs, menus or any combination thereof as long as the warning is prominent and conspicuous.”

Starting May 11, 2016, all foods and beverages that result in BPA exposure must display a similar warning “unless the person causing the exposure can show that the exposure is 1,000 times below the no observed effect level for the chemical.” To avoid consumer confusion and give manufacturers time to transition to BPA-free packaging, OEHHA proposes allowing the temporary use of point-of-sale warnings in lieu of product and menu labeling or shelf signs.

“Widespread Proposition 65 warnings for numerous canned food products may prompt such individuals to reduce, or to forego entirely, purchasing canned or bottled vegetables and fruits, to the detriment of their own health,” notes OEHHA. “Proposition 65 warnings typically help consumers make informed decisions about which products to purchase. But BPA warnings will be unusual in that they will apply to a wide range of nutritious canned food products where alternative choices are not always available.”

In addition, OEHHA has issued a notice of proposed rulemaking under Prop. 65 that would amend Section 25805(b) of Title 27 of the California Code of Regulations to set a maximum allowable dose level (MADL) of 3 micrograms per day for dermal BPA exposure from solid materials, such as paper receipts. To this end, OEHHA relied on a 2014 study that identified a subcutaneous lowest observable effect level of “0.05 milligrams BPA per kilogram body weight per day (mg/kg-day) for female reproductive toxicity.”

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“This proposed regulatory amendment would adopt a MADL that conforms with the Proposition 65 implementing regulations and reflects the currently available scientific knowledge about BPA,” states OEHHA. “The MADL provides assurance to the regulated community that exposures or discharges at or below it are considered not to pose a significant risk of developmental or reproductive harm. Exposures at or below the MADL are exempt from the warning and discharge requirements of Proposition 65.”

California Assembly Member Moves to Reinstitute Sales Tax on Candy and Snack Foods

California Assembly Member Cristina Garcia (D-Bell Gardens) has announced plans to introduce an Assembly Constitutional Amendment seeking to revoke a sales tax exemption for “candy, chips, snack cakes and other processed snack items.” According to Garcia, who aims to put the measure before voters in 2018, the passage of a ballot proposition in 1992 repealed the tax on these items and categorized them as “Essential Food Items.”

“Removing the snack food tax exemption will generate close to \$900 million per year, funding health services and programs to promote healthy eating [and] lifestyles, particularly for children and families living in poverty,” claims a March 11, 2016, press release, in which Garcia criticizes the food and beverage industry for allegedly backing the 1992 proposition. As she opines, “We’ve seen the results of the explosion of snack food consumption on our society and the negative health repercussions. Obesity, diabetes, hypertension, tooth decay, these and so many other conditions are a directly attributable to the poor modern diet made up of high calorie, ultra-processed foods.”

LITIGATION

Chipotle GMO False Ad Suits Filed, Refiled

A consumer has filed a lawsuit alleging that Chipotle Mexican Grill Inc. falsely advertised its food as free of genetically modified organisms (GMOs) despite serving meat products from animals fed GMOs and soft drinks that contain GMO corn syrup. *Pappas v. Chipotle Mexican Grill, Inc.*, No. 16-0612 (S.D. Cal., filed March 10, 2016). The plaintiff alleges violations of California's consumer-protection law and seeks class certification, damages, an injunction, and attorney's fees.

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The complaint echoes the arguments in a similar California case dismissed without prejudice in February 2016 finding that the plaintiff's definition of GMO was inconsistent. The plaintiff has filed an amended complaint arguing that consumers "reasonably understand today that such claims would mean that Chipotle's menu is 100% free of GMOs and that Chipotle does not serve food sourced from animals that have been raised on GMOs or genetically engineered food." *Gallagher v. Chipotle Mexican Grill, Inc.*, No. 15-3952 (N.D. Cal., amended complaint filed March 11, 2016). The plaintiff further argues that consumer organizations such as the Non-GMO Project and government authorities have aided in educating the public to associate "Non-GMO" with this cited definition. Additional information about the initial complaint appears in Issue [577](#) of this *Update*, and details about the dismissal appear in Issue [595](#).

Milano® Trademark Suit Dismissed

A Connecticut federal court has reportedly approved the dismissal of Pepperidge Farm's lawsuit against Trader Joe's Co. alleging the grocery infringed Pepperidge Farm's trademarked Milano® cookies. *Pepperidge Farm v. Trader Joe's Co.*, No. 15-1774 (D. Conn., order entered March 9, 2016). The lawsuit challenged Trader Joe's Crispy Cookies, which Pepperidge Farm asserted were the same shape and sold in similar packaging to Milano® cookies. The order is the first legal filing in the case since the lawsuit was filed in December 2015; an attorney for Pepperidge Farm told *Law360* that the parties had reached a "mutually satisfactory resolution." Additional information about the complaint appears in Issue [586](#) of this *Update*. See *Law360*, March 10, 2016.

European Court Finds EU Stance on Sugar Precludes Glucose Health Claims

The EU General Court has confirmed a European Commission decision finding that German company Dextro Energy's health claims for its glucose supplements are contrary to the messages of national and international authorities on the health risks associated with sugar consumption. The commission decided the issue in January 2015 despite advice from the European Food Safety Authority suggesting that the consumption of glucose could be linked to normal energy-yielding metabolism. "Even if those health claims were to be authorised only subject to specific conditions of use and/or were accompanied by additional messages or warnings, the Commission considered that the message nevertheless remained confusing for consumers, with the result that the claims in question should not be authorised," stated a March 16, 2016, press release from the General Court summarizing the opinion.

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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.



OTHER DEVELOPMENTS

Confectioners Join Advertising Initiative Modeled after CFBAI

The Council of Better Business Bureaus (CBBB) and the National Confectioners Association have announced the Children's Confection Advertising Initiative (CCAI), "a new self-regulatory initiative that promotes responsible advertising to children." Modeled after the Children's Food and Beverage Advertising Initiative (CFBAI), which includes six major confectioners, CCAI asks participating companies not to advertise to children younger than age 12 or in schools from pre-kindergarten through sixth grade. Six candy companies have already pledged to abide by CCAI advertising rules.

As Federal Trade Commission (FTC) Chair Edith Ramirez remarked, "This new initiative is a welcome addition to the CBBB's existing Children's Food and Beverage Advertising Initiative and represents the type of self-regulatory solution the FTC has long advocated. The commitment by six confectionery companies to refrain from advertising in elementary schools and in media targeted at children is a positive step. I also hope that this new partnership with the National Confectioners Association will encourage other smaller candy companies to participate." *See CBBB Press Release and FTC Press Release, March 16, 2016.*