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LEGISLATION, REGULATIONS AND STANDARDS

FDA Schedules Menu Labeling Workshops

The Food and Drug Administration (FDA) has scheduled two public workshops to help regulated industry comply with menu-labeling requirements under the Federal Food, Drug and Cosmetic Act. The first meeting will be held July 7-8, 2016, in College Park, Md., while the second is scheduled for September 27-28 in St. Louis, Mo. Each workshop will provide opportunities for two members of individual companies to consult with FDA staff about specific questions and concerns. *See Federal Register*, June 15, 2016.

CSPI Urges FDA to Act on Pure Caffeine Products

The Center for Science in the Public Interest (CSPI) has submitted a letter to U.S. Food and Drug Administration (FDA) Commissioner Robert Califf urging the agency to prohibit retail distribution of highly concentrated caffeine products, including powdered (PPC), liquid and inhaled caffeine.

The recently released letter supplements CSPI's 2014 citizen petition requesting the ban following the deaths caused by over-ingestion of caffeine powder. FDA sent warning letters to companies selling the substance, but "FDA's five letters appear to have ceased the sale of powdered caffeine at only the companies to which the agency addressed the letters," the CSPI document argues. "In the larger marketplace, sales of PPC remain commonplace, and the substance is still widely available. This compelling evidence demonstrates why a ban is the only step that will protect consumers from the hazards of PPC."

EC Issues Report on Sports Food Regulations

The European Commission (EC) has published a report finding that foods intended for sportspeople do not require special provisions under the regulation on food for specific groups (FSG Regulation), which will replace the framework on foodstuffs intended for particular nutritional uses (PARNUTs) on July 20, 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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Based on the results of an external study commissioned by the EC Directorate General for Health and Food Safety, the report explains that the FSG Regulation covers foods targeting vulnerable population groups—such as food for infants and young children, food for special medical purposes, and total diet replacement for weight control—but does not extend to sports foods intended for either (i) sportspeople who practice sport more than once a week, or (ii) lifestyle users who practice sport less than once a week or not at all.

“Thus, since a categorization as foodstuff intended for particular nutritional uses will no longer be available to sports food, this type of food will be exclusively governed by horizontal rules of food law,” states the report, which seeks to assess the outcome of this change. Noting that the retail value of this market exceeded €3.07 billion in 2014, the commission identifies three categories of sports foods: (i) “sports drinks”; (ii) “(protein-based) muscle strengthening, building and post exercise recovery products”; and (iii) “energy and performance boosting products and products for on-going supplementation of sportspeople.”

When classified as foods for normal consumption as opposed to PARNUTs, these products must comply with a number of horizontal food laws that govern, among other things, (i) nutrition and health claim labeling, (ii) the addition of vitamins, minerals and other substances to so-called “fortified food,” (iii) the provision of food information consumers, (iv) food supplements, and (v) novel foods. In particular, the report concludes that, under the new regime, sports foods formally classified as PARNUTs may need to adjust their labeling, composition or notification procedures to meet applicable horizontal food laws, which, in turn, may undergo further consideration by the EC. Some products will also be reclassified as food supplements or fortified foods under the new rules.

“The horizontal rules of food law provide the necessary safeguards for these products in terms of food safety, food composition, consumer information and legal certainty,” concludes the report. “As a result, not only all sports food products will be subject to the same legal requirements but they will have the same level of harmonization as other foods falling under the horizontal rules of food law. It is expected that, through the simplification and clarification of the legal framework applicable for sports food, legal certainty will be enhanced and the current fragmentation based on the different legal frameworks reduced.”

LITIGATION

UK Court Holds Chicken Company Liable for Slavery Claims

The High Court of England and Wales has reportedly held DJ Houghton Chicken Catching Services liable for claims brought by six Lithuanian men who allege they were victims of trafficking. The company lost its license after police raids in 2012 found what the Gangmasters Licensing Authority called “the worst UK gangmaster ever.” The men assert that during their employment catching chickens for the company, they were denied sleep and toilet breaks, charged illegal work-finding fees, abused and assaulted, denied minimum wages and provided dirty, overcrowded and unsafe living quarters. The owners of the company argued that a Lithuanian supervisor was at fault for the treatment, but the court reportedly found that the supervisor’s methods were integral to business operations, leaving the company liable for his actions.

The attorney representing the Lithuanian men told *The Guardian*, “This is the first time a British company has been found liable for victims of trafficking and it is going to make a world of difference to our clients. It should be seen as a warning shot to businesses that they need to make sure modern slavery is eradicated from their supply chains.” See *The Guardian* and *BBC*, June 10, 2016.

Lifeway Argues ECJ Case Unaffected by FDA Ruling

Following the release of U.S. Food and Drug Administration (FDA) final guidance finding that “evaporated cane juice” (ECJ) should be labeled as “sugar” on food products, Lifeway Foods has filed a motion arguing that the May 2016 rule should not affect the outcome of a consumer’s lawsuit against the company arguing it mislabeled its kefir smoothies. *Figy v. Lifeway Foods Inc.*, No. 13-4828 (N.D. Cal., San Francisco Div., motion filed June 13, 2016). The case is one of many stayed or dismissed without prejudice awaiting FDA guidance after the agency announced it would reconsider the issue in March 2014.

In its motion, Lifeway argues that the guidance is “intended to advise” and “does not establish any rights for any person and is not binding on the FDA or the public.” “The Guidance has no more bearing on Plaintiff’s claims under California’s consumer protection statutes than it has on his common law claims,” the motion argues. “While the Guidance offers the FDA’s ‘current thinking’ that use of the term ECJ ‘is not the common or usual name of any type of sweetener and that this ingredient should

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not be declared on food labels as ‘sugar,’ the Guidance offers no support for the plausibility of Plaintiff’s claim of reliance. In particular, while the Guidance concludes that products containing ECJ should be labeled with the term ‘sugar,’ the Guidance does not provide any basis by which to conclude that a health-conscious consumer, who admitted to reading Lifeway Foods’ labels to avoid added sugar, could plausibly read a label listing ECJ as an ingredient and fail to understand that the product contains added sugar, absent some allegation regarding what he believed ECJ to be if not sugar.”

OTHER DEVELOPMENTS

EWG Drops “BPA Bombshell” Product Database

The Environmental Working Group (EWG) has launched what it describes as “the first easily, searchable database of nearly 16,000 processed food and drinks packaged in materials that may contain the hormone-disrupting chemical bisphenol A, or BPA.” According to EWG, the new database organizes information obtained from a food industry website into a list of products that users can search from EWG’s Food Scores application.

“The industry website’s apparent main purpose is to help food companies supply warning signs to retailers,” states EWG in a June 17, 2016, press release. “It reveals that Americans are far more widely exposed than previously known to a hormone-disrupting industrial chemical that poses greatest risk to pregnant women, infants and children. But the website is a chaotic jumble—incomplete, inconsistent, poorly organized and hard to use.”

EWG claims that its BPA database features 926 brands linked to 16,000 products, “including more than 8,000 soup, vegetable, sauce and fruit products, nearly 1,600 tomato products, more than 1,400 beverages and more than 500 meat and seafood products.” As the consumer group concludes, “EWG urges the California Office of Health Hazard Assessment not to extend beyond October 2016 the temporary rule allowing warning signs to be placed at checkout. The agency should also move quickly to establish a ‘safe harbor’ limit for BPA in food packaging that takes into account risk from low doses, to allow customers to choose products that will not expose them to levels above the limit.”

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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.



France Restricts Alcohol Sales After Soccer Fans Riot

Following June 11, 2016, riots and arrests in Marseille related to a Euro 2016 match between England and Russia, France has reportedly restricted the sale of alcohol in cities hosting the next games in the soccer tournament. Under the measures, public areas and shops in Lille and Lens could not sell alcohol before or during the matches, while bars and cafes were told not to sell drinks in containers that could be used as missiles thrown from terraces. French Interior Minister Bernard Cazeneuve told reporters, "I have asked for all necessary measures to be taken to prohibit the sale, consumption and transport of alcoholic drinks in sensitive areas on match days and the day before, and on days when fan zones are open."

An executive from the Football Supporters Federation, which supports England and Wales teams and fans, told the BBC that the ban would not work, arguing that "the Russians and the locals here who have been attacking football fans have been stone cold sober. . . . They're not drunk, that's not what's caused the violence here." Despite the alcohol ban, French police arrested dozens of rioters in Lille on June 15. *See BBC and RT, June 13, 2016; BBC, June 16, 2016.*