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LEGISLATION, REGULATIONS AND STANDARDS

Congress Passes GMO Labeling Bill

The U.S Congress has passed legislation ([S.764](#)) requiring food and beverage manufacturers to disclose the use of ingredients made with genetically modified organisms (GMOs). Crafted by U.S. Sens. Pat Roberts (R-Kan.) and Debbie Stabenow (D-Mich.) and backed by the Organic Trade Association (OTA), the bill defines bioengineered foods as those intended for human consumption that contain genetic material “modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques” and “for which the modification could not otherwise be obtained through conventional breeding or found in nature.”

If signed by President Barack Obama (D) as expected, the legislation would direct the Secretary of Agriculture to establish within two years a mandatory standard for the disclosure of GMO ingredients in applicable products by “text, symbol, or electronic or digital link” such as a QR code, excluding URLs not embedded in the link. The new rules would also allow certified organic products bear “non-GMO” labels while reaffirming the U.S. Department of Agriculture’s (USDA’s) “certified organic as the gold standard for transparency and non-GMO status,” according to a July 14, 2016, OTA press release.

Meanwhile, the legislative compromise has garnered both praise and condemnation from consumer groups that originally backed the measure. In particular, the Environmental Working Group (EWG) has registered disappointment with the final provisions even as it lauded Stabenow’s work on the bill. “While the Roberts-Stabenow bill imposes a federal mandate to label genetically engineered food, it lacks many elements of the national GMO labeling system that EWG has fought for at the state and federal levels,” EWG said. “Many of our concerns center around the discretion the legislation gives the Department of Agriculture. In particular, the USDA may define – potentially too narrowly – the types of biotechnologies that will be subject to the labeling requirement. The USDA will also establish the threshold amount of GMO-derived ingredients that will mandate labeling. The department is also given

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discretion to determine how to hold companies accountable if they fail to label.” See *NPR*, July 14, 2015; *EWG Press Release*, July 8, 2016.

FDA Argues Time Frame for Perchlorate Decision is Reasonable

The U.S. Food and Drug Administration (FDA) has filed an opposition to a petition for a writ of mandamus seeking a response to several consumer groups’ petition to prohibit perchlorate, an additive currently approved for limited use in food packaging. *Breast Cancer Fund v. FDA*, No. 16-70878 (9th Cir., petition filed July 8, 2016). The groups’ petition urged the Ninth Circuit Court of Appeals to compel FDA to respond to their December 2014 food additive petition, arguing the agency was required to respond by June 2015. Details about the petition for a writ of mandamus filed by the groups—which include the Center for Environmental Health, Center for Food Safety, Center for Science in the Public Interest, Environmental Working Group and the Natural Resources Defense Council—appear in Issue [599](#) of this *Update*.

FDA’s response first challenges the group’s standing to sue. “Even if petitioners could demonstrate that perchlorate poses some risk to them, the issue with respect to standing is not whether there is a risk that petitioners may be harmed by perchlorate, but whether there is an actual, imminent injury caused by the claimed marginal increase in exposure resulting from the limited uses of perchlorate in food packaging—or, put differently, whether the alleged injury would be redressed if the FDA granted the requested administrative relief,” the opposition argues. The agency also asserts that it has devoted “substantial resources” to “considering the complex issues raised by the petition,” resulting in a time frame for response that is “entirely reasonable.”

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.

FTC Warns Companies on False APEC Participation Claims

The U.S. Federal Trade Commission (FTC) has issued warning letters to 28 unnamed companies that allegedly represent themselves as participants in the Asia-Pacific Economic Cooperative (APEC) Cross Border Privacy Rules system despite failing to meet the requirements underlying that claim. According to FTC, certification is granted based on the following data privacy principles: (i) preventing harm, (ii) notice, (iii) collection limitation, (iv) use choice, (v) integrity, (vi) security safeguards, (vii) access and correction, and (viii) accountability. The FTC warning letters instructed the companies to remove the APEC certification claims from their websites and notify the agency of completion or provide documentation supporting the claims. See *FTC Press Release*, July 14, 2016.

LITIGATION

Court Dismisses One of Nine Claims in Safeway Tuna Slack-Fill Case

A California federal court has dismissed a claim of negligent misrepresentation in a lawsuit alleging that Safeway Inc. underfilled its tuna cans by 10 to 20 percent, according to testing conducted by the U.S. National Oceanic and Atmospheric Administration. *In re Safeway Tuna Cases*, No. 15-5078 (N.D. Cal., order entered July 13, 2016). Details about the complaint appear in Issue [584](#) of this *Update*.

In a motion to dismiss, Safeway challenged the plaintiffs' claims of unjust enrichment and negligent misrepresentation. The court dismissed arguments that unjust enrichment is not a cause of action in California, finding that the claim could be construed as a quasi-contract claim. Safeway also argued that the negligent misrepresentation claim was barred by the economic loss rule, which "requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." Because the plaintiffs did not allege any damages beyond economic loss, the court dismissed the claim.

Taco Bell Drive-Thru Discriminates Against Hearing-Impaired, Lawsuit Alleges

A deaf consumer has filed a lawsuit against Taco Bell Corp. and two franchisees alleging the company discriminated against her by refusing to allow her to order from the drive-through window. *Cirrinzione v. Taco Bell Corp.*, No. 33-0001 (D.N.J., filed July 13, 2016). At one location, the plaintiff alleges she wrote her order on a piece of paper and handed it to a Taco Bell employee at the drive-through window, and a manager then "berated Plaintiff for utilizing the drive through and for placing her order at the 'pick-up' window" because it "interfered with the desired flow of business."

At another location, the plaintiff asserts she again wrote her order and handed it to an employee, then "the note was slipped back through the drive-through window," the window was shut and the order was not processed, "and no Taco Bell employee communicated with Plaintiff in any way, leaving Plaintiff humiliated, frustrated, and confused." She alleges she then entered the store and "attempted to get the attention of the employees therein, but each and every one of them simply ignored her. She left without being served." For alleged violations

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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.



of the Americans with Disabilities Act and New Jersey Law Against Discrimination, the plaintiff seeks an order compelling Taco Bell “to develop, implement, promulgate, and comply with a policy prohibiting future discrimination” and a training program as well as damages and attorney’s fees.

SCIENTIFIC/TECHNICAL ITEMS

Alcohol Price Increase Would Allegedly Reduce Violence-Related Injuries

A study examining data from 299,381 adults in England and Wales has concluded that a 1-percent increase in alcohol beverage prices would result in 6,000 fewer emergency department (ED) visits for violence-related injuries. Nicholas Page, et al., “Preventing violence-related injuries in England and Wales: a panel study examining the impact of on-trade and off-trade alcohol prices,” *Injury Prevention*, July 2016. After controlling for the effects of poverty, income inequality, youth spending capacity, and seasonality, researchers with Cardiff University’s Violence Research School report that an increase in alcohol beverage prices is negatively associated with violence-related injuries whether the beverages are sold on-trade (“venues where alcohol is sold and consumed”) or off-trade (“venues where alcohol is sold for household consumption”).

“There are important implications from these findings for public health and policy. In the long term, evidence from this study suggests that government policies that seek to reduce poverty and financial inequality in England and Wales could lead to substantial reductions in violence nationally, although such policies would have to be viewed as permanent to yield reductions in violence,” state the study authors. “However, one policy option that could have an immediate impact on violence would be to increase the real price of alcohol... Importantly, findings suggest that any pricing policy that intends to reduce alcohol-related violence must aim to increase the price of alcohol in both markets, especially the on-trade.”