

# Food & Beverage

## LITIGATION UPDATE

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### Table of Contents

#### Legislation, Regulations and Standards

- [1] FDA Releases Draft Compliance Guide for Radionuclides in Domestic and Imported Foods.....1
- [2] Senate Committee in Colorado Approves Proposed Ban on Fast-Food Lawsuits .....1

#### Litigation

- [3] CSPI Director Predicts More Obesity-Related Litigation.....2

#### Other Developments

- [4] Citing Industry Influence, Critics Attack Bush Administration Stance on WHO Obesity Report .....2
- [5] New Policies Demand Soft Drink Bans in Schools, but Some Question Alternatives.....3

#### Media Coverage

- [6] "The Widening of America, or How Size 4 Became a Size 0," Jane Brody, *The New York Times*, January 20, 2004.....3

#### Scientific/Technical Items

- [7] Fast Food, Sugary Beverages Implicated in Weight Gain of U.S. Teens .....4
- [8] Eating Chicken Linked to Increased Arsenic Exposure .....4

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### Food and Drug Administration (FDA)

##### [1] FDA Releases Draft Compliance Guide for Radionuclides in Domestic and Imported Foods

FDA has issued a [draft compliance policy guide](#) (CPG) that expands agency coverage “from food accidentally contaminated with radionuclides to food accidentally and intentionally contaminated with radionuclides.” In the draft document, FDA sets forth new Derived Intervention Levels (DILs) for radionuclides to determine whether food in interstate commerce or food offered for import presents a safety concern. DILs adopted in the draft CPG are not binding on FDA or the regulated industry. Nevertheless, “FDA may decide to initiate an enforcement action against food with concentrations below the DILs or decide not to initiate an enforcement action against food with concentration that meet or exceed the DILs.” Written comments concerning the draft CPG and/or its supporting documents must be submitted by March 15, 2004. See *Federal Register*, January 14, 2004.

#### State/Local Initiatives

##### [2] Senate Committee in Colorado Approves Proposed Ban on Fast-Food Lawsuits

By a vote of 6-1, the Colorado Senate’s Judiciary Committee has approved a measure ([Senate Bill 20](#))

that would prohibit obese residents from seeking damages related to their condition from restaurants and food manufacturers. “We should just head this off at the pass and say these lawsuits will not be entertained in Colorado,” Senate Majority Leader Mark Hillman (R-Burlington) was quoted as saying.

The committee’s vote occurred January 13, 2004. The measure apparently has not been scheduled for vote on the Senate floor. See *The Denver Post* and *The Denver Channel.com*, January 13, 2004.

Louisiana enacted similar legislation in 2003. See [issue 37](#) of this Update, June 25, 2003. Like-minded bills titled the “Personal Responsibility in Food Consumption Act” ([H.R. 339](#)): and the “Commonsense Consumption Act” ([S. 1428](#)): are pending in the U.S. House of Representatives and U.S. Senate.

Meanwhile, the National Conference of State Legislatures included obesity legislation generally on its top-10 list of issues forecast for the 36 state legislatures that will be in session in early 2004. “Obesity is becoming an obsession,” according to the conference. “Increasing attention is focused on the high numbers of obese young people. Nutrition standards for foods served in schools will continue to dominate policies to prevent obesity.” See *NCSL News Release*, December 2003.



## Litigation

### Obesity

#### [3] CSPI Director Predicts More Obesity-Related Litigation

Claiming the U.S. government and food industry have made little “serious effort” to combat the nation’s obesity problem, Center for Science in the Public Interest Director Michael Jacobson was recently quoted as saying he expects “that many more lawsuits will be filed against food processors, broadcasters, fast-food restaurants, and school boards in the next few years.” Jacobson made the comments during a January 15-16, 2004, Food and Drug Law Institute [conference](#) targeting the scientific, legal and policy aspects of the overweight and obesity issue. According to Jacobson, the grounds for such lawsuits will vary “from deceptive advertising and labeling, to failure to disclose material facts on labels, to failure to protect children’s health in schools, to unfair advertising to young children.”

## Other Developments

#### [4] Citing Industry Influence, Critics Attack Bush Administration Stance on WHO Obesity Report

Public health experts around the world have accused the U.S. food and sugar industries of having undue influence with the Bush administration, given recent Department of Health and Human Services (HHS) criticism of the underlying World Health Organization (WHO)/Food and Agriculture (FAO) report that provided the basis for WHO’s [Draft Global Strategy on Diet, Physical Activity and Health](#). WHO’s executive board is expected

to approve the 17-page draft strategy this week in preparation for the World Health Assembly in May 2004. The strategy aims to provide a framework by which regional and national authorities can establish action plans to reduce the growing rates of chronic disease related to “unhealthy” diets and physical inactivity in collaboration with the private sector. With respect to food manufacturers, the draft strategy encourages “cooperative rather than adversarial relationships with industry” in making such specific recommendations as (i) limiting saturated fats, *trans*-fatty acids, sugar, and salt in existing products, (ii) following “responsible” marketing practices in regard to children, (iii) implementing consistent labeling practices and evidence-based health claims to help consumers make informed choices, and (iv) providing information on food composition to national authorities.

In a January 5 [letter](#) to WHO Director-General Lee Jong-wook, M.D., William Steiger, an international affairs special assistant to HHS Secretary Tommy Thompson, asserts that the April 2003 [WHO/FAO Expert Consultation on Diet, Nutrition and the Prevention of Chronic Diseases](#) is based largely on faulty science because its data and analysis “were not subject to formal, independent, external peer review, among other criteria.” According to Steiger, the WHO/FAO document has “an substantiated focus on ‘good’ and ‘bad’ foods, and a conclusion that specific foods are linked to non-communicable diseases and obesity (e.g., energy-dense foods, high/added-sugar foods, and drinks, meats, certain types of fats and oils, and higher fat dairy products). The USG [United States Government] favors dietary guidance that focuses on the total diet, promotes the view that all foods can be part of a healthy and balanced diet, and supports personal responsibility to choose a diet conducive to individual energy balance, weight control and health.” He also claims the

report “mixes policy recommendations not well-supported by evidence that address broad areas of trade, agricultural subsidies and advertising – areas which are outside the expertise of many of the experts who participated in the consultation and beyond the WHO and FAO’s mandates and competencies.”

The *Financial Times* quoted an International Obesity Task Force spokesperson as saying the U.S. government’s objections to WHO’s anti-obesity strategy put commercial interests before those of public health. “Effectively what we are seeing is an effort to sabotage the whole [WHO] process,” Neville Rigby said. Similarly, Center for Science in the Public Interest (CSPI) Legal Affairs Director Bruce Silverglade said “Secretary Thompson offers lip service about fighting obesity, but privately he’s flying to Geneva with a squad of lobbyists intent on undermining the WHO’s recommendations. These tactics are reminiscent of the tobacco industry’s sinister efforts to oppose global anti-smoking initiatives.” In an interview with *The Washington Post*, Steiger denied any industry influence on the administration’s position, saying “We have a whole series of potential changes we’d like to see. One overarching example is that any strategy that deals with this subject has to deal with individual responsibility. What’s lacking is the notion of personal responsibility as opposed to what the government can do.” See *The Washington Post* and *CSPI News Release*, January 16, 2004; *Financial Times*, January 17, 2004; *The Chicago Tribune*, January 20, 2004.

#### [5] **New Policies Demand Soft Drink Bans in Schools, but Some Question Alternatives**

School districts in Arizona, South Dakota and Philadelphia are reportedly imposing policies to limit or remove access to soft drinks in schools to combat rising rates of childhood obesity. The new policy in Philadelphia, for example, prohibits soft

drinks, iced teas and other sweetened beverages from vending machines and cafeterias; only water, milk and 100 percent fruit juices will be sold in district schools as of June 30, 2004. In Canada, soft drink manufacturers, including Coca-Cola and PepsiCo, have voluntarily offered to remove their carbonated products from elementary and middle schools before the next school year. A recent *Wall Street Journal* article reports that “Most experts agree while sports and juice-flavored drinks may sound healthier, they are simply noncarbonated versions of soda – often with water and high-fructose corn syrup as the first two ingredients. Even 100 percent juice drinks often are made with concentrates of pear, apple and grape and in the end are really just water and sugar.” See *The Atlanta Journal-Constitution*, January 6, 2004; *Associated Press*, January 7, 2004; *The Arizona Daily Star*, January 12, 2004; *The Wall Street Journal*, January 13, 2004; *The Philadelphia Inquirer*, January 15, 2004.

## Media Coverage

[6] **“The Widening of America, or How Size 4 Became a Size 0,” Jane Brody, *The New York Times*, January 20, 2004**

In this discussion of America’s burgeoning waistline, Brody commends and echoes the arguments of [Fat Land](#) author Greg Critser, who blames “the galloping epidemic of obesity” in part on the increased use of high-fructose corn syrup, supersizing, and food and beverage manufacturers’ marketing agreements with school districts. She exhorts readers to “start putting pressure on the big food companies and fast food chains” by writing to companies with their concerns about the nutritional content of particular products and portion sizes as well as voicing their support for snack food taxes and a ban on television advertising for “nutritionally questionable foods” during programs for children.



## Scientific/Technical Items

### Obesity

#### [7] Fast Food, Sugary Beverages Implicated in Weight Gain of U.S. Teens

New data in the journal *Archives of Pediatrics and Adolescent Medicine* indicate that adolescents in the United States have higher rates of overweight and obesity than those in 14 other industrialized countries, including France and Germany. I. Lissau, et al., "Body Mass Index and Overweight in Adolescents in 13 European Countries, Israel, and the United States," *Archives of Pediatrics & Adolescent Medicine* 158(1): 27-33, 2004. Using questionnaire data from 1997 and 1998, researchers calculated the body mass indices (BMIs) of nearly 30,000 youngsters ages 13 and 15. They found that those in Ireland, Greece and Portugal were among the heaviest, but American youth topped the list. Among American 15-year-olds, 15 percent of girls and nearly 14 percent of boys were obese, while another 31 percent of girls and 28 percent of boys were deemed modestly overweight. Co-author Mary Overpeck noted that U.S. teens are more likely than those in other countries to consume fast food, snacks and sugary beverages and more likely to be driven to school and other activities.

## Arsenic

#### [8] Eating Chicken Linked to Increased Arsenic Exposure

Arsenic levels in chicken are higher than previously realized and might necessitate adjustments to calculations of human dietary and overall exposure, according to U.S. Department of Agriculture (USDA) researchers. T. Lasky, et al., "Mean Total Arsenic Concentrations in Chicken 1989-2000 and Estimated Exposures for Consumers of Chicken," *Environmental Health Perspectives* 112(1): 18-21, 2004. The USDA research team reports arsenic levels three to four times higher in young chickens (broilers) than in other poultry and meat, levels they attribute to arsenic contained in the feed additives used to kill intestinal parasites in chicken. They suggest that while the arsenic levels fall within legal limits, the data raise questions about poultry's impact on total arsenic consumption. For example, they estimate that the average consumer of chicken (2 ounces daily) ingests 3.6 to 5.2 micrograms of inorganic arsenic and 5.6 to 8.1 micrograms of total arsenic per day. An avid consumer of chicken, however, (12 ounces daily) purportedly ingests 21 to 31 micrograms of inorganic arsenic and some 33 to 47 micrograms of total arsenic per day. See *The Atlanta Journal-Constitution*, January 19, 2004.



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## LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by Mark Cowing and Mary Boyd in the Kansas City office of SHB. If you have questions about the Update or would like to receive back-up materials, please contact us by e-mail at [mcowing@shb.com](mailto:mcowing@shb.com) or [mboyd@shb.com](mailto:mboyd@shb.com). You can also reach us at 816-474-6550. We welcome any leads on new developments in this emerging area of litigation.

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