



LEGISLATION, REGULATIONS & STANDARDS

Chicago SSB Tax May Cause State to Lose Federal Funding, USDA Warns

According to a warning letter from the U.S. Department of Agriculture (USDA), the sugar-sweetened beverage (SSB) tax that took effect in the Chicago metropolitan area on August 2, 2017, violates the federal Food and Nutrition Act, putting Illinois at risk of losing its food-stamp funds.

Some retailers could not update point-of-sale systems to exempt SSB purchases made with Supplemental Nutrition Assistance Program (SNAP) funds before the tax went into effect, so Cook County Department of Revenue officials told retailers they could refund the taxes at a customer service desk or other location on the premises. However, USDA told the Illinois Department of Human Services (IDHS) in an August 7 letter that retailers cannot charge tax to SNAP recipients at any time and that providing an immediate refund does not cure the violation of federal law. USDA also stated that it notified Cook County officials that the workaround was “unacceptable” as early as June 28, although a Cook County spokesperson reportedly said that the county board of commissioners did not know about the objection until it received a memo from IDHS about the August 7 warning letter. Additional details about the Cook County tax appear in Issues [640](#) and [642](#) of this *Update*. See [Chicago Tribune](#), August 10, 2017.

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Mexico Bans Imports of U.S. Potatoes

In response to a petition for a constitutional injunction from a group of Mexican potato growers, a federal district court in Los Mochis, Mexico, has banned the import of U.S. potatoes to “preserve food sovereignty and the health of Mexican crop fields.” The growers reportedly argued that imported potatoes create a risk of crop disease and that Mexican agricultural authorities had failed to take preventive action. *See New York Times*, August 4, 2017.



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Ad Board Recommends Against Gimmick-Exposing Campaign

The National Advertising Division (NAD) has recommended that Sanderson Farms change a campaign claiming that its competitors are tricking consumers with "raised without antibiotics" labels on poultry products. NAD found that the information in Sanderson's ads was accurate, including its claim that "none of the chicken you buy in the grocery store has antibiotics in it. By federal law, all chicken must be clear of antibiotics before they leave the farm." However, NAD recommended that the language Sanderson used to describe its competitors' "antibiotic-free" labels, including "marketing gimmick," "full of hot air," "just a trick to get you to pay more money" and "a phrase invented to make chicken sound safer," should be changed, noting that the scientific community lacks a consensus on the safety of consuming meat from animals raised using antibiotics.

Sanderson reportedly "respectfully disagrees" with the decision but will adjust the campaign to reflect NAD's concerns. "The crux of the advertising campaign was aimed at educating consumers and correcting widely held misunderstanding among consumers that chicken sold in stores contain antibiotics. Sanderson Farms believes the ads do just that and is hopeful that this recognition by NAD will further those educational efforts," the company told NAD. *See ASRC*, August 11, 2017.

Copper Mugs May Cause Illness, Health Officials Warn

Iowa health officials have warned that the copper mugs typically used to serve Moscow Mule cocktails may cause copper poisoning. The state's Alcoholic Beverage Division warns that according to U.S. Food and Drug Administration guidelines, copper should not come into contact with acidic foods with a pH below 6, and a traditional Moscow Mule is "well below" that, according to the

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.



agency. When copper or copper alloys come into contact with acidic foods, the metal can leach into the food; the agency recommends using copper containers lined with a different “nonreactive” material, such as nickel, stainless steel, enamel or ceramic. See *The Washington Post*, August 8, 2017.

LITIGATION

Dairy Group Challenges Wisconsin Water Law Enforcement

A dairy trade group has filed a lawsuit against Wisconsin’s Department of Natural Resources (DNR) alleging that the agency both exceeded its authority and failed to follow required public rulemaking processes when it set new water pollution control regulations affecting dairy and animal feeding operations. *Dairy Bus. Ass’n v. Wis. Dep’t of Nat. Res.*, No. 2017CV001014 (Wis. Cir. Ct., Brown Cty., filed July 31, 2017). The complaint involves recent administrative rules and guidance issued by DNR related to feed storage leachate runoff and calf hutches.

DNR is the state agency tasked with enforcement of the federal Clean Water Act and is responsible for issuing state Pollutant Discharge Elimination System permits (WPDES) to entities that discharge pollutants into state waters. The complaint asserts that the goal of the permit system is “parity” with the Clean Water Act (CWA) and state regulations “shall comply with and not exceed the requirements of the federal water pollution control act.”

Under the CWA, the plaintiffs assert, entities with concentrated animal feeding operations (CAFO) must obtain permits only if they have an actual discharge into U.S. navigable waters.

However, the plaintiffs claim that for years, DNR has exceeded its authority under state law by requiring anyone with a CAFO to “follow a complex and costly regulatory process” to obtain a permit regardless of whether they have a discharge or whether they intend to have one in the future.

The plaintiffs also claim that DNR failed to follow the public rulemaking process required by state law when it created a new rule governing feed storage leachate runoff and issued guidance setting new rainfall runoff calculations and requiring retrofitting of existing structures to bring them into compliance. The trade group is seeking declaratory judgments and injunctive relief.

TTAB Denies Trademark Status for “Coffee Flour”

The Trademark Trial and Appeal Board (TTAB) has affirmed a refusal to grant Empire Technology Development a trademark for “coffee flour,” finding “clear evidence of generic use” of the term. *In re Empire Tech. Dev. LLC*, Serial No. 85876688 (TTAB, entered August 3, 2017). The company, which created the flour from ground coffee cherry skins, pulp and pectin, claimed first use of the mark in 2012. TTAB found that Empire “failed to develop and promulgate a generic term other than ‘coffee flour’ and to educate the public to use some other name” and used coffee flour as a generic term in its advertising materials and in media coverage. To allow trademark protection for a generic term, even when identified with a first user, would grant the owner a monopoly because a competitor could not describe the product as what it is, the board said. Moreover, the board said Empire’s failure to police the usage “undercuts” its claim that the public would understand coffee flour to be anything other than a generic term.

SCIENTIFIC/TECHNICAL ITEMS

“Persistent” Use of Energy Drinks Linked to Alcohol Disorder and Cocaine Use

A study by University of Maryland researchers has purportedly found that adolescents and young adults whose consumption of energy drinks continued or increased after age 21 are at increased risk of alcohol use disorder, cocaine use or nonmedical stimulant use by age 25. Amelia M. Arria, et al., [“Trajectories of energy drink consumption and subsequent drug use during young adulthood,”](#) *Drug and Alcohol Dependence*, August 7, 2017. The study recruited subjects at age 18 and tracked their consumption of highly caffeinated energy drinks through age 25. Although overall consumption declined after age 21 and 20.6 percent of that age group did not consume the drinks at all, 51.4 percent of the subjects apparently demonstrated “persistent” use that predicted alcohol, cocaine or stimulant abuse.

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