



LEGISLATION, REGULATIONS & STANDARDS

WHO Announces Plan to Eliminate Trans Fat from Global Food Supply

The World Health Organization (WHO) has announced “a step-by-step guide for the elimination of industrially-produced *trans*-fatty acids from the global food supply.” The plan consists of six steps represented by the acronym REPLACE: (i) “review” sources of *trans* fat and the landscape for policy change; (ii) “promote” the replacement of *trans* fats; (iii) “legislate” regulatory actions to eliminate *trans* fats; (iv) “assess” *trans* fat content in the food supply; (v) “create” awareness; and (vi) “enforce” compliance.

“The world is now embarking on the UN Decade of Action on Nutrition, using it as a driver for improved access to healthy food and nutrition,” WHO Director-General Tedros Adhanom Ghebreyesus said in a press release. “WHO is also using this milestone to work with governments, the food industry, academia and civil society to make food systems healthier for future generations, including by eliminating industrially-produced *trans* fats.”

USDA Ends Discussion of Organic Checkoff Program

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The U.S. Department of Agriculture (USDA) has announced the termination of a rulemaking proceeding that “proposed to establish a national research and promotion program for certified organic products under authority of the Commodity Promotion, Research and Information Act of 1996.” The Organic Trade Association proposed the program in 2015, and USDA accepted comments on the proposal in 2017.

“In response to the proposed rule, USDA received almost 15,000 comments,” according to the announcement. “The comments revealed that there is a split within the industry in terms of support for the proposed program. While some comments voiced support for a collective industry program, other comments stated that industry was not aligned in backing the proposal. Opponents raised concerns about the proposed program, including how the de minimis level would eliminate a majority of organic farmers from the program; the disproportionate impact on high value commodities as assessments would be tied to sales value; whether organic promotion is possible without being disparaging to other agricultural commodities; voting methodology; financial burden on small entities to comply; and cited the challenges to tracing imported organic products.”

EFSA Releases Results of Glyphosate Review

The European Food Safety Authority (EFSA) has reviewed data on glyphosate residues on crops and determined that “current exposure levels are not expected to pose a risk to human health.” The review includes two reports examining crops grown for human consumption as well as crops used in animal feed. EFSA reportedly relied on comparisons between the diets of EU adults and children and the glyphosate intake values the agency recommended in 2015.

Senate Bill Would Allow Sales of Local Meat Across State Lines

U.S. Sens. Mike Rounds (R-S.D.) and Angus King (I-Maine) have introduced a bill that “would allow meat and poultry products inspected by state Meat and Poultry Inspection (MPI) programs to

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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.

be sold across state lines,” according to a [press release](#). The senators assert that although the inspection programs of 27 states meet or exceed federal inspection standards and the meat is processed through facilities approved by the Food Safety and Inspection Service, the products are not allowed to be sold across state lines. “Our bipartisan, commonsense bill will create new markets for producers and give consumers more choices at the grocery store, while continuing to maintain the high quality and safety standards necessary to keep consumers healthy,” Rounds was quoted as saying.



LITIGATION

Federal Court Dismisses Diet Pepsi Putative Class Action

A federal court in New York has dismissed with prejudice a putative class action alleging that Pepsi-Cola Co. falsely and deceptively used the term “diet” for its Diet Pepsi, leading consumers to believe that the beverage would help them lose weight or assist with “healthy weight management.” *Manuel v. Pepsi-Cola Co.*, No. 17-7955 (S.D.N.Y., entered May 17, 2018). Following three federal district court dismissals of nearly identical claims, the court found that “no reasonable consumer would understand a soft drink labeled as ‘diet’ to be a weight-loss product.”

“‘Diet’ immediately precedes ‘Pepsi,’ and thereby connotes a *relative* health claim—that Diet Pepsi assists in weight management *relative* to regular Pepsi,” the court held. Although “diet” is used to identify other weight-loss products, “in the context of soft drinks, the term unambiguously signals reduced calorie content relative to the non-diet version of the drink in question.” Ruling that a cause of action for false or misleading conduct cannot rest on an “unreasonable reading of label or advertising at issue,” the court held that the complaint did not adequately plead deception.

The court also rejected arguments that new studies indicate a correlation between the consumption of diet soft drinks and weight gain, noting, “In law, as in science, [c]orrelation is not

causation’ . . . Without evidence of causation, plaintiffs cannot establish actual deception.”

The court ruled that the plaintiffs’ state law claims were not preempted by the Food, Drug and Cosmetic Act (FDCA), finding that only claims challenging the use of the term “diet” based solely on nutrient content information available to the U.S. Food and Drug Administration and Congress before 1993 are preempted by FDCA. Diet Pepsi, which was grandfathered in as a “legacy soft drink,” is subject to Section 343(a) of the FDCA, which prohibits false and misleading advertising, the court held. Because the plaintiffs’ allegations were based on Pepsi’s current marketing campaigns and “the current state of scientific knowledge” acquired after 1993 and Section 343(a) has no preemptive force, the state law claims could not be preempted. The court also declined to invoke primary jurisdiction.

Plaintiff Alleges Halo Top Ice Cream Labeling is Deceptive

A New York plaintiff alleges Halo Top ice cream is falsely and deceptively labeled because it does not prominently display the term “light” on its labels, purportedly misleading consumers into believing it is regular full-fat ice cream. *Berger v. Eden Creamery, LLC*, No. 18-2745 (E.D.N.Y., filed May 9, 2018). Among other allegations, the plaintiff asserts that consumers associate the word “halo” with yellow, the color of butter and cream; that Eden Creamery fails to comply with federal laws requiring the identity statement “light ice cream” to be displayed prominently on the front label; and that the location where the phrase is displayed is “in an area of the container prone to ice or condensed water obstructing it.”

In addition, the complaint alleges that Eden Creamery’s statements that Halo Top is “All Natural” and contains “No Artificial Sweeteners” are false and misleading because the products contain a synthetic form of the sugar alcohol erythritol. Claiming violation of New York consumer-protection laws, negligent misrepresentation, fraud and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney’s fees.

Ferrara Candy Settles Slack Fill Putative Class Action

Ferrara Candy Co. has agreed to pay \$2.5 million to settle a putative class action alleging its candy boxes contained an unnecessary amount of slack fill. *Iglesias v. Ferrara Candy Co.*, No. 17-849 (N.D. Cal., motion filed May 10, 2018). Under the agreement, Ferrara will “modify its fill level quality control procedures and target fill levels to at least 75% for theater box Products, and at least 50% for bag-in-a-box Products.” In addition, the company will pay \$2.5 million into a common fund; class members may submit claims for an unlimited number of purchases, but recovery for claims without proof of purchase will be capped at \$7.50 per member. The named plaintiff will receive an incentive award of \$5,000, and attorney’s fees will be capped at 30 percent of the common fund, or about \$522,000.

Bumble Bee CEO Faces Felony Indictment For Alleged Tuna Price-Fixing

Christopher Lischewski, president and CEO of Bumble Bee Foods, has been indicted by a federal grand jury in California and charged with one count of felony price-fixing for his alleged role in a scheme to fix the price of canned and packaged seafood sold in the United States. *U.S. v. Lischewski*, No. 18-0203 (N.D. Cal., filed May 16, 2018). The felony charge alleges that Lischewski and co-conspirators engaged in “an unreasonable restraint of interstate commerce” in violation of the Sherman Act; the maximum penalties include up to 10 years’ imprisonment and a fine of \$1 million. Lischewski’s indictment follows guilty pleas on similar charges from Bumble Bee and its former senior vice president.

Man Sues Burger King After Being Jailed for \$10 Bill

Burger King Corp. faces a civil-rights lawsuit after an employee at a Boston location accused a man of trying to pay for food with an allegedly counterfeit \$10 bill, refused to return the bill and called the police when the man would not leave the restaurant. *Ellis v.*

Burger King Corp., No. 1884-CV-01489 (Mass. Super. Ct., Suffolk Cty., filed May 14, 2018). The plaintiff, who is homeless and black, alleges that when he was arraigned, he was charged with possession of counterfeit notes and a probation violation and was subsequently held without bail from November 12, 2015, until February 19, 2016. He was reportedly released when the U.S. Secret Service notified the prosecutor that the \$10 bill was authentic and not counterfeit. Burger King allegedly did not return the \$10 bill to the man. Claiming conversion, defamation, negligence and violation of the Massachusetts Civil Rights Act, the plaintiff seeks attorney's fees and \$950,000 in damages.

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