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FIRM NEWS

## Shook Attorneys Present Part I of Webinar Series on Navigating Prop. 65

Shook Partners [Frank Rothrock](#), [Naoki Kaneko](#) and [Chris Johnson](#), with Associate [Emily Weissenberger](#), have presented a webinar on California's Safe Drinking Water and Toxic Enforcement Act (Prop. 65). [Available on demand](#), the webinar covers an overview of Prop. 65 and strategies for managing its regulatory scheme.

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LEGISLATION, REGULATIONS & STANDARDS

## FDA Announces Modernization for Dairy Product Identities

Following his [related statements](#) at a conference, U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb has [announced](#) that the agency will review the standardized identities of dairy products and products marketed as their substitutes, including beverages made from almonds, rice or soy. The announcement suggests that allowing the plant-based substitutes to be labeled as "milk" has caused confusion among consumers and led to detrimental effects on children.

"We're going to have an active public process for reviewing our standard and how consumers understand the use of terms like milk on both animal-derived and plant-based products," Gottlieb

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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.

For additional information about Shook's capabilities, please contact



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said in the announcement. “We want to see if the nutritional characteristics and other differences between these products are well-understood by consumers when making dietary choices for themselves and their families. We must better understand if consumers are being misled as a result of the way the term milk is being applied and making less informed choices as a result.”

Gottlieb further noted that, “as a regulatory agency, it’s not appropriate to unilaterally change our regulatory approach if we have a history of non-enforcement. We also need to closely consider the potential First Amendment issues related to the different uses of these terms.”

## Foodborne Disease Report Released

The Centers for Disease Control and Prevention (CDC) has released a report on foodborne illnesses in the United States from 2009 to 2015. The agency’s Foodborne Disease Outbreak Surveillance System received reports of 5,760 outbreaks, resulting in 100,939 illnesses, 5,699 hospitalizations and 145 deaths. The data reportedly revealed that norovirus was the most common outbreak cause, while *Listeria*, *Salmonella* and *E. coli* caused 82 percent of hospitalizations and deaths.

## FSIS Proposes to Loosen “U.S. Inspected and Passed” Livestock Requirement

The U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) has proposed an amendment to a rule requiring that livestock carcasses be “marked with the official inspection legend at the time of inspection in a slaughter establishment” if the carcasses will be processed further at the same location. According to FSIS, the rule was established when slaughterhouses would ship carcasses to different locations for further processing; under “contemporary practices,” “a slaughter establishment typically moves [a carcass], under control, to another department in the same establishment for further processing.” As a result, “marking the carcass on the slaughter floor is often unnecessary,” FSIS asserts. Comments on the proposed rule will be accepted until October 1, 2018.

## EFSA Releases Report on Improving Risk Assessments



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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

The European Food Safety Authority (EFSA) has released a scientific report identifying potential areas of improvement in the agency’s emerging risks identification procedure. The report highlights “weaknesses with respect to data collection, analysis and integration” and suggests that broader analyses would improve the system. Recommendations include (i) integrating social sciences “to improve understanding of interactions and dynamics,” (ii) improving data processing pipelines and (iii) enhancing transparency and improving communication.

inspections, subject to FDA, USDA and FTC regulation.



## ASA Bans Heinz Ad After Revision Fails to Correct Complaint



The U.K. Advertising Standards Authority (ASA) has again barred HJ Heinz Foods UK from airing a television commercial suggesting that the nutritional benefits of beans and a protein supplement are comparable. After ASA found that the ad made an unpermitted nutrition claim, Heinz changed a line in the commercial to reduce an implied comparison between the levels of protein, fiber and fat in a protein shake and a serving of beans. ASA found that the updated version of the ad continued to create the “overall impression” that the two products were comparable and banned the ad from running on television.

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### LITIGATION

## CRISPR-Edited Organisms Are GMOs, European Court Holds

The Court of Justice for the European Union has held that techniques to edit an organism’s genes without inserting foreign DNA—such as CRISPR/Cas9—result in the creation of genetically modified organisms (GMOs) subject to the EU GMO Directive. *Confédération paysanne v. Premier ministre*, No. C-528/16 (CJEU, entered July 25, 2018).

The plaintiff, a French agricultural union, argued that French legislation exempting organisms produced with mutagenesis techniques such as CRISPR from GMO regulation conflicts with EU legislation governing GMOs. The court found that the mutagenesis techniques “alter the genetic material of an organism in a way that does not occur naturally, within the meaning of that provision. It follows that organisms obtained by means of techniques/methods of mutagenesis must be considered to be GMOs within the meaning of [the GMO Directive].”

## Court Approves Preliminary Ban on Imports from Mexican Fisheries Using Gillnetting

The U.S. Court of International Trade has approved a preliminary injunction preventing the importation of fish from Mexican commercial fisheries that use gillnets near where vaquitas are found. *NRDC v. Ross*, No. 18-0055 (Ct. Intl. Trade, entered July 26, 2018).

The Natural Resources Defense Council (NRDC) filed the lawsuit to protect the remaining population—about 15—of the vaquita, a type of small porpoise. “It is undisputed that the cause of the vaquita’s precipitous decline is its inadvertent tangling, strangulation, and drowning in gillnets, which are fishing nets hung in the water to entangle fish and shrimp,” the court noted. “The Government of Mexico, which regulates fishing practices in the Gulf of California, has banned the usage of gillnets in certain fisheries within the vaquita’s range, though illegal gillnet fishing continues. In other fisheries, gillnet fishing remains legal. If current levels of gillnet fishing in the vaquita’s habitat continue, the species will likely be extinct by 2021.”

The court found that NRDC is likely to succeed on the merits of its arguments, including that “the Mexican government has failed to effectively manage its northern Gulf fisheries that deploy gillnets.” The court noted, “The text of the Imports Provision imposes on the [U.S.] Government an immediate and continuous duty to ban fish caught with fishing gear that kills marine mammals, such as the vaquita, in excess of United States standards.” Further finding that a preliminary injunction is in the public interest, the court approved NRDC’s motion.

## Pucker Vodka Can Use Lipstick Mark, Court Holds

A Nevada federal court has dismissed JL Beverage Co.’s trademark-infringement allegations against Beam Inc.’s Pucker Vodka. *JL Beverage Co. v. Beam Inc.*, No. 11-0417 (D. Nev., entered July 23, 2018). The 2011 complaint, which alleged that Beam Inc.’s mark featuring a drawing of lips infringed on JL Beverage’s lip-imprint mark, was revived by the Ninth Circuit in 2016. In addition to arguing against the alleged infringement, Beam Inc. filed a counterclaim asserting that JL Beverage’s trademark should be canceled.

The court was unpersuaded by JL Beverage’s arguments about consumer associations with the lip illustration. “Consumers do not refer to Johnny Love Vodka as ‘the lip vodka,’” the court noted. “JL Beverage offered evidence at trial that consumers refer to Johnny Love Vodka as ‘the lip vodka,’ but the Court did not find this evidence credible.” Further, “Consumers exposed to JL Beverage’s logo and marketing materials during the sponsorship events probably would not remember it. While Mr. Diab (the manager of JL Beverage) testified that consumers who saw the JLV Mark on the media wall at the Miss USA pageant or on a race car in 2008 would remember it six to nine years later [], the Court finds that this testimony is not credible.” The court also observed that 40 existing trademarks registered for use on alcohol beverages feature lips as an element.

The court held that consumers were unlikely to confuse the brands because of the differences in trade dress and the lack of evidence that Beam Inc. sought to capitalize on consumers’ goodwill toward Johnny Love Vodka; using the same reasoning, the court refused to grant Beam Inc.’s motion to cancel JL Beverage’s mark registration.

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