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LEGISLATION, REGULATIONS & STANDARDS

Draft Guidance on Food Recalls Issued

The U.S. Food and Drug Administration (FDA) has issued [draft guidance](#) on the release of retailer information during the food-recall process. The guidance indicates when the agency may find that identifying retailers is necessary during Class I recalls — “recalls where there is a reasonable probability that the use of, or exposure to, the food will cause serious adverse health consequences or death to humans or animals”—as well as a limited number of Class II recalls associated with foodborne illness outbreaks.

“Assisting food producers in having effective recall practices in place, as well as taking immediate action to address unsafe products, are high priorities of mine,” FDA Commissioner Scott Gottlieb said in a [statement](#). “Our recall authorities – and how we deploy them – are a cornerstone of our vital consumer protection mission.”

Think Tank Petitions FDA to Prohibit Use of “Non-GMO” on Labels

The [Information Technology & Innovation Foundation](#) (ITIF) has submitted a [citizen petition](#) to the U.S. Food and Drug

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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.

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Administration (FDA) challenging the use of labeling that asserts that products are free of genetically modified organisms (GMOs). “[T]he ‘Non-GMO’ Project’s butterfly logo and language on consumer foods and goods misleads and deceives consumers through false and misleading claims about foods, food ingredients and their characteristics related to health and safety,” the petition argues. ITIF urges FDA “to prohibit the use of the term ‘Non-GMO’ on consumer foods and goods” because it allegedly constitutes “misbranding under the law.”

ITIF objects to the Non-GMO Project’s distinction between “natural” foods and those made with GMOs. “The techniques used to bioengineer crops and livestock to produce foods were discovered as natural phenomena, and the enzymes and reagents involved are all extracted or derived from sources in nature. While *in vitro* bioengineering methods may produce ‘combinations of ... genes that do not occur in nature or through traditional crossbreeding methods,’ recombination as it takes place in nature is also constantly generating novel combinations of genes, and there is nothing intrinsic to such novel combinations from either source that allows any predictions with regard to their safety.”

Cornell Finds Brian Wansink Committed Academic Misconduct

Cornell University has announced that the university’s investigation into Brian Wansink’s research methods has concluded. “Professor Wansink committed academic misconduct in his research and scholarship, including misreporting of research data, problematic statistical techniques, failure to properly document and preserve research results, and inappropriate authorship,” the university’s provost stated. “Professor Wansink has tendered his resignation and will be retiring from Cornell at the end of this academic year. He has been removed from all teaching and research. Instead, he will be obligated to spend his time cooperating with the university in its ongoing review of his prior research.”

FDA Issues Update on Cyclospora

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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.

U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb has issued a statement on testing for *Cyclospora* as a foodborne pathogen. The statement noted that the testing methods allowed the agency to identify *Cyclospora* in cilantro, marking the first time it found the parasite in domestically grown produce.

“We must continue to put in place science-based measures to prevent microbial contamination from occurring, and work with our state and foreign partners to implement the Produce Safety Rule,” Gottlieb stated. “We’ve been working closely with the National Association of State Departments of Agriculture and our state partners to, among other things, train federal and state regulators who will conduct inspections slated to begin next spring, develop inventories of farms that are covered by the rule, put in place the Produce Safety Network to support the states and their farming communities regionally, conduct On Farm Readiness Reviews to help farmers assess their preparedness to implement the Produce Safety Rule, and continue training opportunities for the farming community.”

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.



Ad Board Recommends Changes To Meal-Kit Co.'s Organic Claims

The Electronic Retailing Self-Regulation Program (ERSP) has determined that Green Chef Inc. cannot support some of its claims about organic food in its meal-kit deliveries, which it marketed as containing 90 percent or more organic ingredients. ERSP found that the use of the U.S. Department of Agriculture's organic seal "inaccurately communicated that Green Chef meal kits were entirely organic, or contained almost all organic ingredients." The board also found that Green Chef could not corroborate its claim that it delivered the most organic ingredients when compared to other meal-kit companies. Green Chef indicated that it would change its marketing and work with its certified-organic supplier to establish appropriate language.

Brown Signs California Restaurant Straw Restriction

California Governor Jerry Brown has signed a law that will prohibit restaurants from giving patrons straws unless the patrons request them. Brown issued a signing statement indicating that the bill's purpose is to reduce plastic waste. "Ocean plastic is estimated to kill millions of marine animals each year," Brown states. "Nor are humans immune as microplastics were recently found in tap water around the world. Plastics, in all forms—straws, bottles, packaging, bags, etc.—are choking our planet. It is a very small step to make a customer who wants a plastic straw ask for it. And it might make them pause and think again about an alternative. But one thing is clear, we must find ways to reduce and eventually eliminate single-use plastic products."

CFBAI Announces Agreement to Strengthen Nutrition Criteria

The Council of Better Business Bureaus' Children's Food and Beverage Advertising Initiative (CFBAI) has announced an agreement among 18 companies to strengthen nutrition criteria for advertising to children under 12. Under the agreement, participating companies will not advertise food products to children unless the foods meet several updated standards, including reduced sodium levels. The standards will also limit "whole grain" labeling to those foods that "contribute a meaningful amount of whole grains" and limit nutrient-based qualifiers to "under-consumed" nutrients rather than "essential" nutrients. CFBAI also issued a white paper detailing the updated standards and the reasoning supporting each change. The implementation date is January 1, 2020, chosen to coincide with the U.S. Food and Drug Administration's updated food-labeling regulations.

LITIGATION

Dunkin' "Angus" Suit Dismissed

A New York federal court has dismissed a putative class action alleging that Dunkin' Brands Inc. misled consumers by marketing a sandwich and a wrap as containing "Angus steak." *Chen v. Dunkin' Brands, Inc.*, No. 17-3808 (E.D.N.Y., entered September

17, 2018). The court first dismissed the claims brought by a non-resident of New York, finding it did not have jurisdiction to consider them. The court also dismissed the resident plaintiff's breach-of-warranty allegation under the Magnuson-Moss Act, holding that the description "Angus beef" is "'at most' a 'product description,' not a written warranty."

Turning to the state-law claim of deceptive practices, the court disagreed with the plaintiff's argument that a reasonable consumer would interpret "Angus steak" as "an intact cut of meat," finding that the television commercials show "zoomed-in pictures of the sandwich and wrap, with ground-meat patties." The plaintiff also asserted that the beef patties contained additives and preservatives, which a reasonable consumer would allegedly not expect to find in an "Angus steak" product. "Without other qualifications, 'Angus Steak' guarantees just some Angus beef," the court held. "A review of Defendant's ingredient list—a document integral to the Second Amended Complaint—shows that the patties at issue here contain 'Angus Beef.'" The court dismissed the final allegation and directed the clerk to close the case.

Whole Foods Obtains Restraining Order Against Activists

Whole Foods Market Inc. has reportedly obtained a restraining order against Direct Action Everywhere, an activist group that was apparently planning a "week-long occupation" of a Whole Foods location in Berkeley, California. The group has previously targeted the company with protests challenging its "free-range" labels on chicken and alleging its vendors treat animals inhumanely on factory farms. The California Superior Court of Alameda County has reportedly restrained any member of Direct Action Everywhere from entering the Berkeley Whole Foods.

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