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## LEGISLATION, REGULATIONS & STANDARDS

# USDA, FDA Announce Joint Regulation of Cell-Cultured Livestock and Poultry Products

The U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA) have announced after “several thoughtful discussions” that both agencies “should jointly oversee the production of cell-cultured food products derived from livestock and poultry.” The agencies’ statement announces a “joint regulatory framework wherein FDA oversees cell collection, cell banks, and cell growth and differentiation” that will transition “during the cell harvest stage” to USDA, which “will then oversee the production and labeling of food products derived from the cells of livestock and poultry.”

“This regulatory framework will leverage both the FDA’s experience regulating cell-culture technology and living biosystems and the USDA’s expertise in regulating livestock and poultry products for human consumption,” the announcement concludes. “USDA and FDA are confident that this regulatory framework can be successfully implemented and assure the safety of these products. Because our agencies have the statutory authority necessary to appropriately regulate cell-cultured food products derived from livestock and poultry the Administration does not believe that legislation on this topic is necessary.”

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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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## OEHHA Proposes Changes to Prop. 65 Exposure-Warning Requirements

California's Office of Environmental Health Hazard Assessment (OEHHA) has proposed changes that aim to clarify the exposure-warning requirements of the state's Safe Drinking Water and Toxic Enforcement Act (Prop. 65). The proposed changes amend the section of Prop. 65 requiring manufacturers to notify retailers or intermediaries about products that may cause exposure to a chemical listed under the act. Comments on the changes will be accepted until December 31, 2018.

## NOSB Announces Meeting on Organic Standards

The National Organic Standards Board (NOSB) has announced a meeting to be held April 24-26, 2019, that will include a discussion and vote on recommendations for updates to U.S. organic standards. The deadline to submit written comments is April 4, 2019, with the same deadline applying to those who intend to provide oral comments at the meeting in person or via webinar.

## EU Issues Report on Antimicrobial Resistance

The European Commission has issued a report on antibiotics and antimicrobial resistance that includes a section on Europeans' "attitudes towards the use of antibiotics on sick animals, and their awareness of the ban on using antibiotics to stimulate growth in farm animals." The report states that 56 percent of respondents believed that sick animals should be given antibiotics, while 35 percent told researchers that sick animals should not be treated with antibiotics. The majority of respondents—58 percent—did not know that the use of antibiotics to stimulate growth in farm animals is banned in the EU, which represents a drop by two percentage points since the same question was asked in a 2016 study.

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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.

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## LITIGATION

# Advocacy Group Sues USDA for Petition Inaction

The Animal Welfare Institute (AWI) has filed a [lawsuit](#) alleging that the U.S. Department of Agriculture (USDA) has failed to act on the organization's 2014 petition seeking certification for labeling claims about animal welfare and environmental stewardship during the meat and poultry production process. *Animal Welfare Inst. v. USDA*, No. 18-2621 (D.D.C., filed November 14, 2018). AWI's petition asserted that meat and poultry producers market food products as "humanely raised," made with "sustainable agricultural products," "raised in a stress free environment" and other similar claims despite allegedly exposing animals to "intensive confinement, barren and stressful housing conditions, and painful mutilations in order to increase production." AWI argues for the establishment of a certification program to verify marketing claims about animal welfare. According the complaint, USDA has not yet taken action on AWI's petition, allegedly resulting in an "unreasonable delay" in violation of the Administrative Procedures Act.

## Plaintiff Alleges Naan is Misrepresented as Tandoor-Baked

A woman has filed a putative class action alleging that FGF Brands (USA) Inc. misleads consumers by falsely marketing Stonefire Naan as baked in a tandoor oven. *Friend v. FGF Brands (USA) Inc.*, No. 18-7644 (N.D. Ill., E. Div., filed November 16, 2018). Naan requires a "labor-intensive cooking process," the complaint asserts, and the plaintiff "believed that the Mislabeled Naan was baked in a tandoor oven, in small batches by hand, and did not involve the conventional, automated, and commercial methods of baking bread." The complaint cites FGF's patents, which purportedly show that the naan "is mass produced on a conveyor belt in a gas-heated commercial oven designed by Defendants to overcome the impracticalities of using a tandoor oven to mass-produce products." The plaintiff alleges violations of Illinois consumer-protection law along with fraudulent

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.



concealment and unjust enrichment, and she seeks class certification, corrective advertising, restitution, attorney's fees and damages.

## Malic Acid Putative Class Actions Filed Against Utz, Talking Rain

Plaintiffs represented by the same plaintiff's firm have filed lawsuits alleging that companies mislead consumers by labeling their foods as flavored naturally despite containing malic acid. *Lepiane v. Utz Quality Foods LLC*, No. 18-2659 (S.D. Cal., filed November 20, 2018); *Augustine v. Talking Rain Beverage Co.*, No. 18-2576 (S.D. Cal., filed November 9, 2018).

The plaintiffs who filed against Utz Quality Foods allege that the company's Dirty Salt & Vinegar Potato Chips are labeled as containing "no artificial flavors" but list malic acid as an ingredient. "This type of 'malic acid' is not naturally-occurring but is in fact manufactured in petrochemical plants from benzene or butane—components of gasoline and lighter fluid, respectively—through a series of chemical reactions, some of which involve highly toxic chemical precursors and byproducts," the complaint argues.

The complaint against Talking Rain Beverage Co. makes identical allegations. Both complaints allege violations of California consumer-protection statutes and seek class certification, damages, injunctive relief and attorney's fees.

## Citric Acid Invalidates Soda's "Preservative-Free" Claim, Lawsuit Alleges

A consumer has filed a putative class action alleging that Reed's Inc. misleads consumers by labeling its Virgil's Sodas as made with "natural ingredients" and "no preservatives" despite containing citric acid. *Mason v. Reed's Inc.*, No. 18-10826 (S.D.N.Y., filed November 19, 2018). The complaint asserts that citric acid "is a synthetic compound" "usually produced from certain strains of the mold *Aspergillus niger*" and "the application of chemical solvents such as sulfuric acid." The plaintiff alleges

that the company’s “misrepresentations deceive consumers into thinking they are receiving healthier and ‘natural’ soda, when they are not.”

“Consumers cannot discover the true nature of the Products from reading the label,” the plaintiff argues. “Discovery of the true nature of the content of the Products requires knowledge of chemistry that is not available to the average reasonable consumer.” She seeks class certification, an injunction requiring “proper, complete, and accurate labeling of the products,” damages and attorney’s fees for allegations of fraud, unjust enrichment and violations of New York’s consumer-protection statutes.

## “Wizard of Oz” Owner Challenges Brewery’s Trademark Application for “Surrender Dorothy”

Turner Entertainment Co. has filed an opposition to Sligo Mill Brewing Co.’s application to trademark “Surrender Dorothy,” arguing that consumers will be misled into believing that the brewery is associated with “The Wizard of Oz.” *Turner Entm’t Co. v. Sligo Mill Brewing Co.*, Opp. No. 91244715 (U.S.P.T.O., filed November 13, 2018). Turner, which owns trademark rights on several iterations of “Dorothy,” asserts that “the well-known phrase ‘Surrender Dorothy’” was “written in the sky by the Wicked Witch of the West and is one of the most memorable scenes in *The Wizard of Oz*.” Turner alleges that Sligo Mill “attempted to mislead consumers into believing its mark is licensed, approved, or sponsored by or otherwise affiliated with” Turner and “The Wizard of Oz” by naming its beer after the movie scene and featuring an image of a yellow-brick road on its label. The entertainment company urges the U.S. Patent and Trademark Office to deny Sligo Mill’s trademark application.

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### SCIENTIFIC / TECHNICAL ITEMS

## Poll Finds Americans “Closely Divided” on Health Risks from Food Additives

A Pew Research Center poll has reportedly found that Americans are “of two minds about food additives” because about half “say the average person faces a serious health risk from food additives over their lifetime (51%) while the other half believes the average person is exposed to potentially threatening additives in such small amounts that there is no serious risk (48%).” The poll also found that 49 percent of respondents believed genetically modified (GM) foods to be “worse for one’s health than non-GM foods, while 44% say such foods are neither better nor worse and 5% say they are better for one’s health.”

Pew reports that it found “an inverse relationship between how much people know about science generally, based on a nine-item index of factual knowledge, and their beliefs about the health risk of foods with additives as well as GM foods. People with low science knowledge tend to express more concern about the health risk from these food groups compared with those high in science knowledge.”

## Spices and Herbal Remedies Can Expose Children to High Levels of Lead, Researchers Report

The North Carolina Childhood Lead Poisoning Prevention Program has reportedly found that children can be exposed to elevated levels of lead through consumption of spices and herbal remedies. Angelon-Gaetz et al., “Lead in Spices, Herbal Remedies, and Ceremonial Powders Sampled from Home Investigations for Children with Elevated Blood Lead Levels – North Carolina, 2011-2018,” Centers for Disease Control and Prevention *Morbidity and Mortality Weekly Report*. The researchers examined North Carolina counties that showed an increase of the number of children with blood lead levels “much higher than most children’s levels,” per Centers for Disease Control and Prevention standards. The researchers reportedly found that 28.8 percent of spice samples taken from 59 homes showed lead levels of more than one milligram per kilogram.

“Increasing testing of spices, herbal remedies, and ceremonial powders for heavy metals by food safety regulators at the port of entry when these substances are imported into the United States might reduce the occurrence of lead poisoning associated with

these substances,” the study concluded. “Because these products are sold nationwide, setting a national maximum allowable limit for lead in spices and herbal remedies might further reduce the risk for lead exposure from them.”

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## MEDIA COVERAGE

### Vox Compares SSB Taxes to Corner Store Initiatives

Vox Media’s podcast *The Impact* has examined New York City’s and Chicago’s approaches to combating obesity, including Chicago’s imposition of a tax on sugar-sweetened beverages (SSBs). A reporter first speaks to employees of an initiative in New York that encourages corner-store owners to stock more healthy foods, and she finds that the results have been middling. The podcast then turns to [Chicago’s tax on SSBs](#), which was enforced for two months before it was [repealed](#). “The Cook County soda tax became so toxic that nobody wants to talk about it anymore,” the reporter reveals. “This was by far the hardest episode of our season to report because people kept turning down my interview requests. I asked six different county commissioners to talk to me for this story. Five of them said no.”

“Right now, there isn’t great evidence that healthy corner store initiatives have a big impact on obesity. There’s better evidence that soda taxes could make a big difference. But healthy corner store initiatives are very palatable—they are a brand new benefit for constituents. Soda taxes are way harder to swallow; they draw a lot of political controversy,” the episode concludes.

### Associated Press Explores GE Livestock

The *Associated Press* has [detailed](#) the efforts of Recombinetics, a company that develops genetically engineered (GE) animals, to seek regulatory and public approval of its work. The company CEO reportedly told the news outlet that it aims to assuage fears about GE animals by focusing on how they can help ease animal pain, such as breeding cows without horns so that farmers can stop removing the horns to keep the cows from harming each

other. This approach has apparently led to some support among animal-welfare groups; the Humane Society of the United States supports GE pigs bred to no longer require castration, *AP* reports, although the organization does not give “blanket approval” for the technology. “If you edit for your chicken to be the size of an elephant, that’s not good,” the organization’s vice president of farm animal protection reportedly said.

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