



LEGISLATION, REGULATIONS & STANDARDS

CSPI Urges FDA to Establish Standardized Front-of-Package Labeling

The Center for Science in the Public Interest (CSPI) has filed a [regulatory petition](#) asking the U.S. Food and Drug Administration (FDA) “to require on the principal display panel of a food an easy-to-understand, standardized system that is 1) mandatory, 2) nutrient-specific, 3) includes calories, and is 4) interpretative with respect to the levels of added sugars, sodium, and saturated fat per serving.” The petition argues that current food labeling requirements and voluntary industry initiatives are “insufficient to promote healthy diets” because the Nutrition Facts label “has low utilization.”

“Dozens of countries have implemented [front-of-package nutrition labeling (FOPNL)], and over one hundred experimental and real-world studies have tested the effects of different FOPNL systems,” the petition asserts. “These studies find that well-designed interpretive FOPNL can significantly improve the healthfulness of foods selected by consumers and prompt product reformulation. The U.S. should learn from experiences abroad and follow the science to select a system with optimal potential to promote equitable access to information, improve diets, promote reformulation, and advance public health.”

USDA to Update Organic Regulations for Livestock, Poultry

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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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The U.S. Department of Agriculture is accepting comments on proposed changes to organic standards for livestock and poultry production. Issues addressed in the proposed changes include livestock health care practices, living conditions, transport and slaughter. The many proposed changes include a limit on the types of physical alterations permissible in organic livestock production, such as needle teeth clipping and tail docking in pigs, and the establishment of a distinction between requirements for mammalian living conditions and avian living conditions based on different physiological needs. Comments will be accepted until October 11, 2022.

GAO Issues Report on Promoting Healthy Eating Across Agencies

The U.S. Government Accountability Office (GAO) has issued a report suggesting that federal agencies can better coordinate guidance on healthy eating. The report found that GAO's previous recommendations had not been implemented, including a 2021 recommendation that Congress "consider identifying and directing a federal entity to lead a strategy on diet-related efforts." The agency also recommended in 2017 that the presidential administration develop a strategy for federal food oversight.

"We have long reported on the fragmented federal food safety oversight system. We added federal oversight of food safety to our high-risk list in 2007; federal government operations on this list either need broad reform or are vulnerable to fraud, waste, abuse, and mismanagement. We added this issue to the list because of inconsistent oversight, ineffective coordination, and inefficient use of resources. For example, the U.S. Department of Agriculture (USDA) had critical information on contaminated eggs that ultimately sickened more than 1,900 people in 2010. Because of the divided regulatory environment, USDA did not share this information with agencies that had the authority and ability to act on it. If the agencies had received this information, they could have limited the scope of the ensuing recall of more than 500 million eggs by targeting those that were more likely to be contaminated, according to USDA's Office of Inspector General."

LITIGATION

Court Dismisses Bagel Bites Labeling Lawsuit



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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

An Illinois federal court has granted Kraft Heinz Foods Co.’s motion to dismiss a lawsuit alleging the labeling noting the inclusion of mozzarella cheese and tomato sauce in Bagel Bites is misleading. *Jackson v. Kraft Heinz Foods Co.*, No. 21-5219 (N.D. Ill., E. Div., entered August 3, 2022). “Central to all of Plaintiff’s claims is the notion that the Product’s label misleads consumers by representing that the Product contains ‘mozzarella cheese. REAL cheese,’ and ‘tomato sauce,’ but omitting that it contains additives,” the court found. “However, a product that says it contains mozzarella cheese and tomato sauce when the Product does, in fact, contain mozzarella cheese and tomato sauce is not misleading to the reasonable consumer simply because its label does not list its additives.”

The court also noted that the standard of a “reasonable consumer” can vary according to the product at issue. “[W]hile Plaintiff contends reasonable consumers do not expect starch, whey, and nonfat milk when promised ‘mozzarella’ and ‘REAL’ cheese (or thickening agents when promised ‘tomato sauce’), Plaintiff alleges nothing of what reasonable consumers of the Product, *i.e.* Bagel Bites, expect. [] Expectations differ when one purchases mozzarella cheese or tomato sauce alone, from when one purchases a frozen bagel pizza snack. It seems that when purchasing ‘junk food’ (or ‘processed food,’ to use Defendant’s term) like frozen pizza, the reasonable consumer would expect at least some ‘junk’ (or ‘processed’) ingredients. At the very least, any consumer would at first glance of the Product know that it is not pure mozzarella cheese or tomato sauce, but a frozen pizza bagel containing various other ingredients. To suggest that a reasonable consumer expects pure (*i.e.* without additives) mozzarella or tomato sauce when buying a bite-size frozen bagel pizza ignores the true nature of the product as a sum of pizza ingredients, including but not limited to, mozzarella and tomato sauce. [] Such a suggestion is a fanciful interpretation of the Product’s label that obfuscates who the real consumers are and how they would understand and react to the label. [] Plaintiff has not plausibly pleaded the front label likely leads a significant portion of reasonable consumers to falsely believe something that the back label belies.”

Chicken Tenders Must Be Chicken Tenderloin, Plaintiff Argues

A consumer has filed a putative class action alleging Popeyes Louisiana Kitchen Inc. misled her into believing that the restaurant’s chicken tenders were composed of chicken

inspections, subject to FDA, USDA and FTC regulation.



tenderloins. *Sanders v. Popeyes Louisiana Kitchen Inc.*, No. 22-4477 (E.D.N.Y., filed July 29, 2022).

“Traditionally, chicken tenders are made from chicken tenderloins,” the complaint asserts. “Chicken tenderloins are the small strips of meat that are loosely attached to the underside of each breast, along the breastbone. As a result, chicken tenderloins are more tender than regular chicken breast, and hence, the name chicken *tender*. Chicken tenderloins are also juicier, making them more desirable for consumption. They are significantly smaller than the remainder of the chicken breast, also making them more expensive than the rest of the chicken breast.” The chicken tenders at Popeyes, the plaintiff argues, are instead made from the remainder of the chicken breast.

The plaintiff asserts that Popeyes’ competitors are accurate in their food names, such as “the world-famous fast food chicken restaurant chain, Kentucky Fried Chicken,” which “offers chicken ‘tenders’ that are actually made from chicken tenderloins.” For alleged violations of New York’s consumer-protection statute, the plaintiff seeks class certification, restitution, damages and attorney’s fees.

New England Hospitality Groups Challenge Massachusetts Animal Cruelty Law

The National Pork Producers Council and a group of organizations representing restaurants and hotels in New England have filed a lawsuit aiming to enjoin Massachusetts from enforcing a law set to take effect August 15, 2022, banning the sale of pork produced from animals “that the business owner or operator knows or should know is the meat of a covered animal that was confined in a cruel manner, or is the meat of the immediate offspring of a covered animal that was confined in a cruel manner.” *Mass. Restaurant Ass’n v. Healey*, No. 22-11245 (D. Mass., filed August 3, 2022). The complaint urges the court to prevent enforcement until after the U.S. Supreme Court has reviewed a Commerce Clause challenge to a “materially identical California statute.”

The Massachusetts Pork Rule and California’s Proposition 12 ban “the sale of pork born to a sow confined in a way that prevents her ‘from lying down, standing up, fully extending the animal’s limbs, or turning around freely.’” The Ninth Circuit refused to enjoin the law, finding that the requirements apply equally to in-state and out-of-state businesses and “merely impose a higher cost on production, rather than affect interstate commerce.” Arguments

in the appeal of that case are scheduled to be heard in October 2022.

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