Food and Beverage News and Trends

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This regular publication by DLA Piper lawyers focuses on helping clients navigate the ever-changing business, legal and regulatory landscape.

- **Expansion of raw milk sales vetoed.** A measure tacked onto a Massachusetts flood relief bond bill – Section 22 of HB 4835 – would have allowed certain retail sales of raw milk in the Commonwealth. At present, Massachusetts limits raw milk sales only to direct purchases at dairy farms. On August 15, Governor Charlie Baker vetoed Section 22, instead proposing tougher regulation of raw milks. Baker said, "It is important that any expansion of the sale of raw milk in the commonwealth be in such a way that it protects those who choose to consume it." Under Baker's proposal, raw milk sales would fall under the regulatory ambit of the state Department of Agricultural Resources. The FDA made sales of raw milk across state lines illegal in 1987. But demand for raw milk has increased, and the 30 states that allow its retail sale all restrict how and where it can be sold. Meanwhile, some consumers are using devices like private buyer clubs to acquire it, even across significant distances. A 2016 Listeria outbreak traced to a dairy farm in Pennsylvania sickened consumers as far afield as California and Florida. One of them died.
- **FDA statement on its regulatory review of "milk."** In a July 26 statement, the FDA set forth thoughts on its review of the standard of identity for milk in view of the growth of vegetable "milks" that are not from dairy cows. FDA Commissioner Scott Gottlieb wrote, "We've seen a proliferation of products made from soy, almond

or rice calling themselves milk. However, these alternative products are not the food that has been standardized under the name 'milk' and which has been known to the American public as 'milk' long before the 1938 Federal Food, Drug, and Cosmetic Act was established. In addition, some of these products can vary widely in their nutritional content – for instance in relation to inherent protein or in added vitamin content – when compared to traditional milk." Michele Simon, executive director of the Plant Based Foods Association, replied, "As the FDA works to modernize its standards of identity, the agency should reject this attempt by the dairy industry to misuse the regulatory system to favor one industry sector over another."

- **Meat and poultry groups argue for USDA jurisdiction over lab-created meat.** In a July 26 letter to President Donald Trump, the National Cattlemen's Beef Association, the North American Beef Institute and other trade groups for traditional meat and poultry urged the President to ensure that the USDA, not the FDA, takes jurisdiction over laboratory-grown meat products. The FDA has vigorously asserted jurisdiction over this new type of meat, touching off a vigorous turf battle between the agencies. The groups argued for a "level playing field" that would require similar USDA regulatory inspections for both traditional and lab-grown meat products. "If cell-cultured protein companies want the privilege of marketing their products as meat and poultry products to the American public, in order to ensure a fair and competitive marketplace, they should be happy to follow the same rules as everyone else. Consumers expect and deserve nothing less," the groups wrote.
- **FDA points to cattle feedlot in massive E. coli outbreak.** The FDA says a cattle feedlot near an irrigation canal may be the source of the virulent E. coli in a 36-state outbreak linked to romaine lettuce from the Yuma, Arizona area. Months of investigation led the agency to the canal, and samples of its water have tested positive for the implicated strain. More than 200 people were confirmed to be infected in the outbreak; nearly half became so sick they had to be hospitalized, and five died. Federal officials declared the outbreak over on June 28. The agency says the feedlot in question "can hold in excess of 100,000 head of cattle at any one time and the FDA trace-back information showed a clustering of romaine lettuce farms nearby." *Food Safety News* reports the situation has prompted industry stakeholders to create the Leafy Greens Food Safety Task Force to review regional growing practices. Among its recommendations: tripling the buffer zone between feedlots and growing fields (from the present 400 feet to 1,200 feet). Members of the California and Arizona Leafy Greens Marketing Agreement are aiming to put new safety measures in place before the next planting season begins, in October. Most of the leafy greens grown in the US come from the Yuma region.
- **Was this recall a sign of the effectiveness of the food safety system?** On July 24, the FDA announced that several products containing whey powder from a factory in Wisconsin have been recalled because of possible Salmonella contamination. The FDA said that no illnesses have been reported and that the voluntary recall took place out of an abundance of caution. *Food Dive* magazine wrote that the recalls are actually a victory for the nation's system of food safety testing. However, the magazine said, "no one associated with the whey powder – from its production to the end products – should be resting on their laurels. Consumer trust hangs in the balance, so food makers must stay vigilant and make sure their products are as free from contamination as humanly possible."
- **FDA to provide more info on food packaging terms.** In the coming weeks, says FDA Commissioner Scott Gottlieb, the agency will "put out more detailed information about what different terms mean on food packaging, to help consumers best use claims like organic, antibiotic free-etc." Commissioner Gottlieb took to Twitter on August 7 to issue "a few initial thoughts" on such terms because, he said, the issue has been in the news. Gottlieb noted in another tweet that the FDA and USDA "have distinct roles when it comes to the oversight of organic foods" where USDA regulates the term organic and FDA oversees "general food labeling compliance and safety issues." Media speculation suggests that the trigger for Gottlieb's comments was a controversial *Wall Street Journal* op-ed by Henry I. Miller, founder of the FDA's Office of Biotechnology, who attacked what he called "blatantly false and deceptive advertising claims"in the organic food industry. Responding to that op-ed, Laura Batcha, CEO and executive director of the Organic Trade Association, said, "No other agricultural system operates under the comprehensive and rigorous set of federal regulations and standards by which organic farmers choose willingly to abide."
- **CSPI makes predictions about the final form of the GMO-disclosure rule.** On August 7, Gregory Jaffe, director of the Project on Biotechnology of the Center for Science in the Public Interest, wrote an article that tries to forecast the nature of the final rule coming from the USDA on the required disclosure of bioengineered products in foods. Jaffe predicted, among other things, that the USDA will most likely allow only the term "genetically engineered" to identify these products; that highly refined ingredients from an engineered crop like sugar or corn oil in a product will need to be disclosed, even though such ingredients don't contain any bioengineered content; and that gene-edited products that don't involve any foreign DNA (such as those created

through the CRISPR process) will not require disclosure. Jaffe also predicted that the USDA will delay the compliance date, probably until 24 months after the rule is promulgated. However, he added, "We're newcomers to the world of predictions, so don't bet the house on these."

- **Appeals court rejects claim based on consumption of partially hydrogenated oils.** On August 10, the US Court of Appeals for the Ninth Circuit rejected a case brought by a consumer who had eaten products containing partially hydrogenated oils (PHOs) before June 18, 2018. The court affirmed a US district court ruling that a finding by the FDA and subsequent action by Congress operated to exclude lawsuits such as this one. In a 2016 rider to an appropriations act, Congress declared that no PHOs would be considered unsafe until June 18, 2018. The circuit court, in a brief opinion, ruled that this meant the products the plaintiff ate were not "unlawful" under federal law and that her action under California state law thus could not proceed.

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