



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.

- **FDA continues some crucial food surveillance tasks during shutdown.** As the partial federal government shutdown enters its second month, Scott Gottlieb, commissioner of the Food and Drug Administration, wrote on Twitter on January 22 that the FDA's employees, working without pay, are continuing to conduct several crucial food-related missions: high-risk domestic food surveillance inspections, foodborne illness surveillance and outbreak investigations, execution of high-risk food recalls, inspection of foreign food facilities and sampling of imported food samples. Gottlieb was attempting to reassure the public that food safety would not go by the wayside during the shutdown. Numerous industry stakeholders are expressing concern about the shutdown and calling for more FDA action. Lettuce industry leaders told the *Washington Post* January 15 that they want the agency back on the job to inspect the product. The watchdog group Alliance for A Stronger FDA has warned that the shutdown may harm the agency's effectiveness in the long run. On January 17, Commissioner Gottlieb tweeted photos of "unpaid" inspectors at work in the agency's Philadelphia lab, talked about the many hardships our people are overcoming right now" and concluded: "I highly value each and every one of you, the institution depends on all of you. See his January 17 tweet thread here.
- **Government shutdown hamstrings craft brewers' expansion plans.** The closure of the Alcohol and Tobacco

Tax and Trade Bureau in the government shutdown means that craft brewers have been unable to introduce new beers because there is no way to obtain federal approval for new labels. "We release new beers every other week," Laura Dierks, CEO and founder of Interboro Spirits and Ales of Brooklyn, told *Business Insider*. "Right now, we're looking at not being to sell certain beer in February because of this." This problem will affect any possible sales that her company or other craft brewers may wish to make out of state involving products whose labels have not been approved by the TTB.

- **FDA says major companies have reneged on promises regarding youth and e-cigarettes.** On January 4, *The New York Times* reported that FDA Commissioner Scott Gottlieb plans to accuse Juul, the e-cigarette maker, and Altria, a leading cigarette company that has bought a stake in Juul, of reneging on their promises to take steps to keep e-cigarettes away from minors. Gottlieb is drafting letters to the companies that will criticize them for publicly pledging to remove nicotine flavor pods from store shelves, while at the same time negotiating the financial partnership between the two companies that seems to do the opposite. Under the agreement between Juul and Altria, Juul will have access to 230,000 retail outlets where Marlboro cigarettes and other Altria products are sold. Gottlieb said he will summon top executives of the companies to FDA headquarters to discuss this issue. Last year, the FDA threatened to take e-cigarettes off the market if manufacturers did not act to keep them away from minors. See some of our earlier reporting on this story.
- **Impossible Foods reformulates burger, says FDA petition will not delay retail launch.** On January 8, *Food Navigator* magazine reported that Impossible Foods, which makes the vegan Impossible Burger, has reformulated the product to include soy protein concentrate rather than wheat protein and thus has become a gluten-free product. The company has filed a petition with the FDA to permit the use of leghemoglobin, a key ingredient in the burger, as a color additive. A spokeswoman for the company said the FDA petition is not expected to delay the launch of the product in retail stores, which is set for later this year. The Impossible Burger is already sold at about 5,000 restaurants across the country.
- **Will meat-substitute companies pull their products out of Missouri?** On New Year's Day, the Missouri Meat Advertising Law went into effect, prohibiting manufacturers of plant-based meat-like products from using the term "meat" on food labels or advertising in the state. The law already faces a federal court challenge on constitutional grounds from the company that makes Tofurky, joined by the Animal Legal Defense Fund, the ACLU and the Good Food Institute. As the suit moves ahead, the question is whether those products will continue to be sold in Missouri at this time. Jaime Athos, CEO of Oregon-based Tofurky, is considering withdrawing Tofurky products from Missouri stores. In contrast, Ethan Brown, CEO of Beyond Meat – which in July tripled its production capabilities when it opened a new plant in Columbia, Missouri – has said the company will continue selling its plant-based products in Missouri despite the criminal statute.
- **E. coli outbreak comes to an end – investigation continues.** On January 9, the CDC declared that the outbreak of E. coli in romaine lettuce from California appears to be at an end. The outbreak sickened 62 people in 16 states and the District of Columbia late last year. No one died, but 25 people needed to be hospitalized. Investigators concluded that romaine lettuce grown in central and northern California was the likely source. "Our teams have collected environmental samples and are working with growers in an effort to pinpoint when and how the romaine lettuce became contaminated. Our ongoing investigation into this matter will soon come to a close and we believe that its findings will help to prevent future outbreaks in leafy greens," said FDA Commissioner Scott Gottlieb.
- **California winemakers' permission to use social media is expanded.** Effective January 1, winemakers in California are now permitted to promote an upcoming wine tasting at a hotel, bar, restaurant, wine shop or other licensed retailer in the state by posting a photo on social media of that venue before the event. Previously, this was prohibited under so-called tied-house rules that forbid California alcohol producers from posting photos of a venue hosting a wine-tasting event. The theory was that this was prohibited advertising – an illegal gift of "something of value" from the winemaker to the retailer. A state legislator explained that it is important to change the law: "In today's world of technology, social media, and fast-paced communication, prohibiting a winery or brewery from utilizing the full scope of social media is a competitive disadvantage. By allowing the limited use of photographs and sharing of website information, [this bill] brings the law into the 21st century."
- **Supreme Court hears argument on case testing Tennessee's alcohol retail law.** On January 16, the US Supreme Court heard oral arguments in *Tennessee Wine and Spirits Association v. Blair*, a case testing whether Tennessee's strict residency requirements for retailers of beer, wine and liquor in that state are constitutional. The outcome could set a major precedent for alcohol industry regulation and could have broader implications for protectionism at the state level. At argument, some of the justices appear to suggest that the restriction unconstitutionally discriminates against out-of-state economic interests, despite the strong state interest,

embodied in the 21st Amendment, in regulating liquor sales in each state. Justice Samuel Alito asked if Tennessee could pass a law that says, "You can't get a liquor license in Tennessee unless your grandparents were Tennessee residents." Justices Elena Kagan and Brett Kavanaugh both expressed concerns about interstate commerce – Justice Kagan commented that "the sky is the limit" if states are allowed to "promote economic protectionism." Other justices, such as Neil Gorsuch, however, expressed reluctance to vote against protectionism. The Court's decision in the case is expected by June.

- **Here comes quinoa-based whiskey.** On January 14, National Public Radio reported on a regulatory development that occurred in December: the Treasury Department's Alcohol and Tobacco Tax and Trade Bureau decided to formally propose that alcoholic beverages made in part out of quinoa and similar cereals can qualify to be called "whiskey." by definition, whiskey is made from grain, and in the past, it has only been made from four grains – corn, wheat, rye and barley. A number of distilleries and breweries have been using quinoa in some products for years, but the regulatory change arose when the Corsair Distillery in Nashville, Tennessee sought approval for its quinoa whiskey. NPR reports, "In early December, the TTB took a step to officially include quinoa as a whiskey grain. On December 3, the TTB outlined a new definition for what crops count as grains as part of a 132-page list of updated recommendations for the labeling of wine, beer and spirits. Also on the list are buckwheat and amaranth. The public comment period for the proposal closes in March, although it may be affected by the government shutdown.
- **Dairy industry publishes new study on plant-based milk.** On January 22, the dairy industry published poll results that it said point to significant consumer confusion over the nutritional value of plant-based milk. The survey, the industry's third such release since August, again highlights the industry's argument that labeling nondairy products with dairy terms is misleading to shoppers. The survey of more than 2,000 adults found that about 40 percent of US grocery shoppers aren't sure whether more proteins are found in plant-based milk or in dairy milk. Also, more than half of consumers mistakenly believe that the main ingredient in plant-based beverages like almond milk or soy yogurt is the plant itself; it's usually flavored water. The FDA has been soliciting public comment on the issue since September 2018.

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