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Agribusiness and Food Issues to Watch for 2017

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As 2017 begins, the agribusiness and food industries are facing a shifting legal and regulatory landscape. Armstrong Teasdale's Agribusiness and Food industry group has compiled its annual overview of key issues that may impact related industries throughout the year.

Pending Administration Changes

As of Jan. 20, 2017, changes in the U.S. administration are anticipated to significantly influence governmental agencies important to the agribusiness and food industries. To date, President-elect Trump has identified a number of nominees and appointees to Cabinet and key regulatory posts, including:

Tom Price, secretary of the U.S. Department of Health and Human Services (HHS)
Jim O'Neill, commissioner of the Food and Drug Administration (FDA)
Scott Pruitt, administrator of the Environmental Protection Agency (EPA)
President-elect Trump has not yet formally identified a potential U.S. Department of Agriculture (USDA) secretary. Sonny Perdue, former governor of Georgia (R), has been discussed as a top contender.

Genetic Engineering (GE) Food Labeling and S. 764

Throughout 2015 and early 2016, there was substantial litigation activity associated with efforts to prevent the implementation of Vermont Act 120, passed on May 8, 2014, with an effective date of July 1, 2016. Act 120 represented the most serious effort at the state level to establish new labeling requirements for manufacturers and other food processors to label food that is "produced with genetic engineering," "partially produced with genetic engineering," or "may be produced with genetic engineering." Act 120 threatened to create a patchwork of similar state regulations around the country and a severe compliance challenge for food manufacturers.

Litigation was ultimately unsuccessful in stopping the implementation of Act 120 (on the eve of Act

120's effective date, the Second Circuit declined to reverse the District of Vermont's denial of a preliminary injunction sought by the Grocery Manufacturers Association and other industry plaintiffs). However, a compromise bill, S. 764, passed by Congress on July 14, 2016, and signed by President Obama on July 29, 2016, preempts Act 120 and represents the first federal law to require labeling of GE ingredients.

S. 764 is an amendment to the Agricultural Marketing Act of 1946 and reflects an effort to streamline laws regarding GE food labeling through a compromise between legislators supporting the food industry's interests, as well as pro-labeling concerns. The federal law requires the USDA to develop a national mandatory bioengineered food disclosure standard throughout the next two years. S. 764 expressly preempts state laws like Act 120 by prohibiting individual states from establishing "as to any food or seed in interstate commerce any requirement relating to the labeling of whether a food…or seed is genetically engineered." Notably, S. 764 provides for a flexible labeling approach that would allow food and beverage companies the option to print a toll-free phone number or potentially a "SmartLabel" or "QR code" on product packaging to allow consumers to determine whether the product contains genetically engineered components.

Vermont's attorney general announced that it will no longer enforce Act 120. Nevertheless, the food manufacturing industry will be looking to 2017 and 2018 for greater certainty regarding GE labeling laws.

"All Natural" and Slack-fill Litigation

In follow-up to our July 2016 News Alert, class actions featuring "all natural," slack-fill and similar consumer deception claims will likely continue to persist and increase in volume throughout 2017, echoed in a recent post on the WSJ Law Blog. These cases share the common characteristic of exploiting FDA definitions (e.g., "slack-fill" as the difference between the actual capacity of a container and the volume of the product contained in the packaging/container) or the lack of an FDA position (e.g., the absence of a comprehensive definition of "natural") in order to claim that consumers have been deceived or otherwise damaged by food, beverage, supplement or pet food manufacturers. Broad state consumer protection laws will continue to make this a target area for plaintiffs.

FDA Menu Labeling Requirements – Compliance Date Changes

Section 4205 of the Affordable Care Act charges the FDA with establishing labeling requirements for certain retail food establishments and vending machines. On Dec. 1, 2014, the FDA issued two rules requiring calorie information to be listed on menus and menu boards at retail food establishments if they are a part of a chain of 20 or more locations operating under the same name and offering for sale substantially the same restaurant-type food items.

In December 2016, the FDA announced that it would be issuing a new rule to move the menu labeling compliance date to May 5, 2017. Covered establishments (e.g., restaurants, grocery stores and gas station convenience stores) previously had until Dec. 1, 2016 to identify calorie count and other information on their menus and menu boards. These establishments will no longer be in jeopardy of private lawsuits for failure to comply prior to May 5, 2017.

Clean Water Act Issues

WOTUS Challenges: In late 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the so-called "Waters of the United States" (WOTUS) rule. The stay halted implementation of the WOTUS rule nationwide, pending resolution of the lawsuit and, more immediately, resolution of certain jurisdictional issues. On Feb. 22, 2016, a three-judge panel in In re: Environmental Protection Agency and Department of Defense Final Rule: Clean Water Rule found that the Sixth Circuit had jurisdiction to review the WOTUS rule, meaning the stay would remain in place. On April 21, 2016, the Sixth Circuit denied six petitions for rehearing en banc, which requested that the court reconsider its decision on the jurisdictional issue. Since that time, the lawsuit has proceeded. During the latter months of 2016, a number of amicus briefs were filed, including one filed on Nov. 8, 2016, by 21 senators and 67 representatives urging the Sixth Circuit to vacate WOTUS. Briefing is scheduled to be complete by the end of March 2017.

In light of the pending Sixth Circuit case, district courts across the country continue to dismiss challenges to the rule on jurisdictional grounds. On Aug. 16, 2016, the Eleventh Circuit affirmed the ongoing stay of a separate challenge to WOTUS observing that it would be a “colossal waste of judicial resources” to get involved before a decision is issued in the Sixth Circuit case.

Industrial Pollutant Initiative: While the future of WOTUS is unclear, in February 2016, the EPA announced a new National Enforcement Initiative under the Clean Water Act, “Keeping Industrial Pollutants Out of the Nation’s Waters,” anticipated to impact fiscal years 2017-19. Starting on Oct. 1, 2016, under this initiative, the EPA began to direct enforcement resources toward certain industrial sectors such as chemical and metal manufacturing, mining and food processing.

Food Safety Modernization Act Roll Out

The Food Safety Modernization Act (FSMA) was signed into law on Jan. 4, 2011, and represents the most comprehensive overhaul of the U.S. food safety regulatory scheme since the passage of the Food, Drug and Cosmetic Act in 1938. For nearly five years, the FDA has been developing the seven final rules to implement FSMA. Each final rule impacts a different fundamental area of the U.S. food system.

The seven final FSMA rules include: (1) Preventive Controls for Human Food; (2) Preventive Controls for Animal Food; (3) Foreign Supplier Verification Program; (4) Standards for Produce Safety; (5) Accredited Third-Party Certification; (6) Sanitary Transportation; and (7) Intentional Adulteration. Certain compliance deadlines associated with the foregoing rules have already passed, while others have been extended into 2017. During 2017, covered entities may see a ramp up in inspections associated with FSMA. Given the immense scope and reach of FSMA, it is crucial for impacted companies to evaluate the applicability of the final rules and keep a close watch on compliance expectations to manage risk.

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