

Agribusiness and Food Issues to Watch for 2018

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This year, the agribusiness and food industries will face ongoing legal and regulatory changes. Many of these changes take the form of walking back or revising the previous administration's regulatory reforms. Our Agribusiness and Food industry team has compiled its annual overview of key issues that may impact related industries throughout the year.

2018 Farm Bill

The anticipated reauthorization this year of the Agricultural Act of 2014 (aka the Farm Bill) will update laws and spending authority for significant food, nutrition, and farm programs. The Farm Bill addresses major commodities, conservation, rural development, marketing, and safety net programs like SNAP (food stamps). Congressional agriculture leaders have been quietly assembling the 2018 Farm Bill to present on the floor potentially early this year. There likely have been requests for a doubling of agriculture research spending, restoration of cuts in conservation programs, improvements to commodity support (such as for cotton and dairy industries), realignment of county yields used to set Agriculture Risk Coverage, and higher Price Loss Coverage reference prices. Secretary of Agriculture Sonny Perdue has emphasized the need to create a farm bill that strikes a balance for producers across the country and addresses different protocols needed for various farming activities.

Food and Drug Administration (FDA) Menu Labeling Requirements – Compliance Date Changes (Again)

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 2017, the compliance deadline was, once again, extended. Covered establishments (e.g., restaurants, grocery stores and gas station convenience stores) have until May 7, 2018, to identify calorie count and other information on their menus and menu boards.

Consumer Fraud Claims

General trends: Class actions featuring “all natural,” slack-fill and similar consumer deception claims continue to be both frequent and notorious, but they may receive increasing judicial scrutiny in 2018. These types of cases exploit broad state consumer protection laws, as well as existing 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.

Defining “natural”: In a July 17, 2017 report, Congress attempted to push the FDA to engage in rulemaking on “natural” claims on food packaging. The Committee on Appropriations directed the FDA to report, within 60 days of the passage of an appropriations bill impacting the FDA for fiscal year 2018, “on the actions and time frame for defining ‘natural’ so that there is a uniform national standard for the labeling claims and consumers and food producers have certainty about the meaning of the term.” It is unclear whether the FDA has made any progress in developing a working definition. At a minimum, Congress appears to implicitly agree with a regulatory resolution to the issue rather than case-by-case litigation.

Pet food formulation: Enhanced consumer protections have been felt not only in what is commonly characterized as the “human food” industry, but also in the pet food industry. Both increased regulation and pet humanization has placed the pet food industry in a position of balancing consumer preferences and the needs of pets. Notably, the same—sometimes problematic—marketing buzzwords trending for human food producers such as natural, sustainable and homemade have also become popular in the pet food industry.

Food Safety Modernization Act (FSMA) Deadlines

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. The FDA was charged with developing the seven final rules to implement FSMA; they 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 stretch as far out as 2024. The FDA continues to issue substantial guidance for compliance including a summary of key compliance dates. In light of the immense scope 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.

Genetic Engineering (GE) Food Labeling and Implementation of S. 764

The nation’s first GE labeling law, Vermont Act 120, spurred substantial litigation throughout 2015 and early 2016. Stemming the creation of a patchwork of state GE regulations, a compromise bill, S. 764, was passed by Congress on July 14, 2016, and signed by President Obama on July 29, 2016. As enacted, S. 764, i.e. the National Bioengineered Food Disclosure Standard Law, preempts Vermont Act 120 and any other similar state laws by mandating GE labels for all food products nationwide. The Agricultural Marketing Service (AMS) under the United States Department of Agriculture has until July 29, 2018, to establish a national standard and the procedures necessary for implementation of the law. The comment period for 30 questions put forward by AMS to be

considered by interested stakeholders ended on Aug. 25, 2017. It is unclear what form the final labeling standard will take, but it may require companies to print a QR code or a toll-free phone number on product packaging to provide consumers with a way to determine whether a particular product contains GE components.

Waters of the United States (WOTUS)

WOTUS was enacted in 2015 and aimed to give the Environmental Protection Agency (EPA) broad authority over regulating the pollution of wetlands and tributaries. The rule was widely attacked as representing regulatory overreach that negatively impacted industry and agriculture. WOTUS also faced significant judicial challenges—most notably in the Sixth Circuit—throughout the last several years, which delayed implementation of the rule. In February 2017, President Trump issued an executive order calling on the EPA and the Army Corps of Engineers (Corps) to revisit and revise the rule. In June 2017, EPA administrator Scott Pruitt and Douglas Lamont, the senior official performing the duties of the Assistant Secretary for Civil Works, signed a proposed, revised definition of WOTUS. However, in November 2017, the EPA and the Corps proposed extending the implementation date of the revised WOTUS until 2019 to allow for more time to work through the rulemaking process to repeal and replace the original version of the rule. As a result, it is unlikely 2018 will see much activity with respect to WOTUS.

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