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Recent Developments from the Trump Administration and Capitol Hill Impacting Food, Beverage, and Dietary Supplements

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Regulatory and Public Policy

A few interesting developments took place in Washington DC last week that are relevant to the food, beverage, and dietary supplement sectors. Last Thursday, July 20, 2017, the Trump Administration published its Spring 2017 Unified Agenda with the aim to significantly limit agency activity. The same day, the Senate Appropriations Committee proposed a FY 2018 budget for USDA and FDA, and the following day, issued its FY 2018 report with a wish list of action items directed at the two agencies. While not exactly at odds with each other, the Unified Agenda pulls back hard on agency activity while the Senate report urges USDA and FDA to complete specific regulatory tasks.

The Trump Administration's 2017 Unified Agenda

Entitled "Current Unified Agenda of Regulatory and Deregulatory Actions," the Unified Agenda outlines the Administration's rulemaking plans for the near and long terms. This particular Agenda illustrates the Administration's emphasis on rolling back rulemaking. The Administration withdrew 469 actions that were proposed in the Fall 2016 Agenda and reclassified 282 actions as "long-term" and 109 action as "inactive." The Administration summarizes its Agenda as "the beginning of fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burden on the American people."[1]

The "2017 Inactive Actions List" attempts to take out of play some notable rulemaking activities directed at the food and beverage industry, including:

- USDA's National Bioengineered Food Disclosure Standard
- FDA's Revisions to Dietary Supplement CGMPs
- FDA's Laboratory Accreditation for Analyses of Foods
- FDA's Food Standards: General Principles and Food Standards Modernization
- FDA's Label Requirement for Food That Has Been Refused Admission Into the United States

[1] See our previous alerts on the Trump Administration's regulatory rollback Executive Orders (cited as drivers for the rollback in the Unified Agenda) here and here.

- USDA's Revisions of the Nutrition Facts Panels for Meat and Poultry Products and Updating Certain Reference Amounts Customarily Consumed
- Several rules impacting the National Organic Program (NOP) (including organic standards for pet food, aquaculture, and apiculture)
- A host of rules impacting the USDA's Food and Nutrition Services programs (e.g., NSLP, SBP, SMP, WIC, SNAP, FFVP)

Based on recent agency activities, it's not clear that an agency will stop working on key activities, even if the Administration has listed such activities as "inactive," particularly if the activities are mandated by Congress. For example, USDA's Agricultural Marketing Service (AMS) appears to be actively moving forward on promulgating its proposed rule on the National Bioengineered Food Disclosure Standard. On June 28, 2017, AMS made available 30 questions requesting input on specific issues necessary to promulgate and implement the Disclosure Standard (see our summary here). Just last week, AMS extended the comment period for these 30 questions from July 17 until August 25, 2017. Moreover, as part of this rulemaking process, AMS is anticipating receiving this week the results of a study that was mandated by Congress to understand challenges consumers face when relying on electronic and digital disclosures.

The Agenda identifies only a few relevant FDA activities on its list of "Long-Term Actions," including:

- Import Tolerances for Residues of Unapproved New Animal Drugs in Food
- New Animal Drugs: Updating Tolerances for Residues in New Animal Drugs in Food
- Updated Standards for Labeling of Pet Food

Out of the 13 "Active" 2017 FDA Agenda items, only two relate directly to food, beverages, and dietary supplements (none of the USDA "Active" Agenda items appear to significantly impact these sectors):

- Food Labeling: Gluten-Free Labeling of Fermented, Hydrolyzed, or Distilled Foods
- Food Labeling: Health Claims: Soy Protein and Coronary Heart Disease

The Senate Appropriations Committee FY 2018 Report

Somewhat in contrast to the Unified Agenda's regulatory rollback, the Senate report urges FDA and USDA to complete specific activities.

The report asks FDA to complete its work on the revised Nutrition Facts Label (NFL), including completing its review of fiber petitions seeking approval under the new definition of dietary fiber, issuing final guidance documents (including for dietary fiber), and providing sufficient time for food manufacturers to comply with the final requirements.

FDA previously announced on June 13 that it intends to extend the compliance date for the revisions to the NFL, but it has yet to release a new compliance date. In line with FDA's previous NFL announcements, it would make sense for FDA's Federal Register notice with the new compliance date to also include its review and conclusions on the pending fiber petitions and its final NFL-related guidance documents (including for dietary fiber, added sugars, quantitative declarations of vitamins and minerals, etc.).

The Senate report also requests FDA to address concerns related to the requirement that "added sugars" be declared on single-ingredient products like honey and maple sugar, where the sugar is not added.

Finally, the Senate report asks FDA to meet with interested stakeholders to address comments received on FDA's guidance, Dietary Supplements: New Dietary Ingredient (NDI) Notifications and Related Issues.

Covington & Burling's Food and Beverage Attorneys, in conjunction with its Public Policy and Government Affairs experts, are deeply engaged in tracking and providing strategic advice on federal legislative and administrative activities. We work directly with clients on FDA and USDA activities impacting foods, beverages, and dietary supplements. We will circulate additional details on USDA's GMO disclosure efforts as they are released and FDA's new NFL compliance date and related materials when they are published in the Federal Register.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Food, Beverage, and Dietary Supplements practice:

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