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FOOD, BEVERAGE & AGRICULTURE ALERT | NIXON PEABODY LLP

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Food & Beverage Crystal Ball: Trends We're Following

Nixon Peabody has one of the leading [Food, Beverage and Agribusiness](#) (FBA) practices in the nation. In this edition of the quarterly Crystal Ball Newsletter, our FBA lawyers have prepared short summaries of the top trends we have seen in an industry in flux over the first six months of 2018. Facing challenges including new regulatory thresholds intended to drive healthier consumption and greater transparency, companies have aggressively pursued innovative opportunities and unique ventures to effectively navigate the changes in consumer eating habits and dietary preferences. And while these developments have helped some companies thrive, they have also led to uncertainty for others.

Struggling Restaurants Face Significant Challenges: How to best prepare for seismic changes

Restaurants experiencing significant market challenges reads like a who's who of restaurant chains: Applebee's, Bertucci's, Bob Evans, Cosi, IHOP, Joe's Crab Shack, Romano's Macaroni Grill, Ruby Tuesday, Outback, Subway. These and countless others have closed a significant number of locations in the past few months with many filing for bankruptcy protection. As consumers' dining habits have shifted toward restaurants perceived to offer healthier alternatives, traditional casual-dining restaurants in the U.S. have struggled. **To prepare for these challenges, it is important that involved parties—owners/operators, franchisors/franchisees and contract counterparties—know their rights and obligations under any contract.** Some key considerations include: owners/operators understanding loan documents and what assets are pledged as collateral; landlords knowing that leases are alternately valuable and a drain for struggling restaurants and that these rights can shape both a bankruptcy filing and pre-bankruptcy negotiations; recognizing the rights that are retained can significantly affect a reorganization or sale; and tensions in the franchise model can present challenges in a corporate restructuring or sale. [Lee Harrington](#)

Expect continued uncertainty with respect to the revised Nutrition Facts and Supplement Facts label

The recent backlash over FDA's proposed rule change that would make producers of honey and maple syrup label their products as containing "added sugars" may just be the beginning. **Similar uncertainty may result with regard to the "dietary fiber" requirement, as the FDA recently**

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approved eight non-digestible carbohydrates that manufacturers will be able to include when calculating the total amount of fiber per serving, as long as they provide health benefits. The relative advantages and/or disadvantages of synthetic fiber (e.g., a brownie with added fiber) versus natural fiber (e.g., fruits or vegetables) may prompt consumers to select the product with added fiber if that product shows a higher fiber level. The shifting public perception of food labels has prompted the introduction of other food labeling initiatives, the most recent of which—the Food Labeling Modernization Act of 2018 introduced by Rep. Frank Pallone, Jr. (D-NJ) in April 2018—attempts to further reform food labeling laws. [Tracey Scarpello](#)

Liabilities stemming from social media influencers who promote food and beverage

The prevalence and selling power of social media influencers has resulted in food and beverage companies using social media platforms and talent to market their products. These companies often compensate talent via affiliate programs based on the number of products or subscriptions purchased using the influencer’s personalized coupon code/link. This structure incentivizes influencers to post content that embellishes products or services, which may run afoul of various regulatory schemes, state and federal law. **The Federal Trade Commission Act, the primary consumer protection act, which regulates advertisements, requires advertising be truthful and non-deceptive. This means influencers must try the promoted product and endorse it truthfully from that experience. It also means influencers cannot make unsubstantiated claims about the product that the food or beverage company would be prohibited from making.** While companies often provide influencers with guidelines or even scripts, companies often attempt to shift all FTC and attendant liability to influencers via contractual representations and warranties and indemnities. As the FTC increasingly pursues influencers and companies, influencers need to be mindful of such promotions and messaging points. [Ellie Altshuler](#); [Christina Chang](#)

Considerations for early stage food, beverage and agribusiness companies in obtaining a strategic partner

Identifying a strategic partner is an effective means for securing much needed capital, obtaining key industry insights and establishing important business connections. For example, a minority investment from an industry leader not only raises capital, but it is also a resource that can help facilitate vendor and supply chain agreements and determine how to most effectively grow a company. Oftentimes minority investments are presented to early stage company owners with predefined exit strategies. However, a strategic partner may also require they remain involved in the company’s management and strategic decision making. This is a much different approach than receiving a “passive” investment from “friends and family.” **While we expect early stage FBA companies will continue to partner with industry leaders, we further anticipate the relationships between companies and partners with the strongest synergies will reap the biggest and most sustainable rewards.** [Tyler Savage](#); [Isaac Figueras](#)

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