

NOW +

NEXT

FOOD, BEVERAGE & AGRIBUSINESS ALERT | NIXON PEABODY LLP

APRIL 22, 2019



Food & Beverage Crystal Ball: Trends we're following

Nixon Peabody has one of the leading [Food, Beverage & Agribusiness](#) (FBA) practices in the United States. In this edition of our quarterly Crystal Ball Newsletter, our FBA lawyers discuss several influential industry trends, including those they observed at the 2019 Natural Products Expo West convention. In addition, the ongoing spike in organic product sales is having a profound impact throughout the marketplace and FBA companies continue to seek new and innovative ways to capture and retain customers. We will continue to watch closely as these issues and others unfold into the third quarter.

Can you trust an “organic” label?

As consumers' desire for organic products increases (*organic food sales doubled from \$15 billion in 2006 to more than \$30 billion in 2015*), the reliability of labels continues to decline. Despite the United States Department of Agriculture's (USDA) efforts to develop requirements like the National Organic Program, companies are deliberately mislabelling, falsifying records and substituting and altering “organic” goods. **To minimize or eliminate these frauds, one group—the Organic Trade Association—is voluntarily enrolling members in an organic fraud prevention program. Companies joining this program are developing plans using a risk-based process to ensure their products meet consumers' expectations.** These companies also have a clear path if they suspect another business of committing “organic” fraud. The Lundberg Family, J. M. Smucker Company, Stonyfield and Grain Millers are among the companies that have already joined. By increasing accountability within the industry, companies hope to strengthen the “source-to-sale” traceability and reliability of organic goods. [Ruth Silman](#)

Observations from 2019 Natural Products Expo West

Nixon Peabody's presence in and around the 2019 Natural Products Expo West Convention helped our attorneys reaffirm the industry trends we have been following. For instance, startup beverage brands are continuing to push the limits of including potentially problematic language and claims on their packaging as well as incorporating controversial ingredients into their products. Some established beverage brands are likewise, and more surprisingly, exposing themselves to increasing risks by mirroring such practices as they attempt to capture, or at least maintain, market share in certain fiercely competitive categories. For example, **a variety of brands are aggregating certain ingredients in their ingredient statements into what could be construed as a misrepresentation of the actual concentration of a “desired,” value-added ingredient from which the product's identity and marketing is derived.** In addition, while several mainstream

and conventional ingredients, like oats, appear to be gaining in market usage, numerous brands are experimenting with controversial ingredients with cannabidiol (CBD) the most popular. [Daniel Fabian](#)

Efforts to ban single-use plastics

Environmentally-conscious consumers and activists are focusing on reducing single-use plastics, including straws, beverage bottles, take-out containers and food and cleaning product containers. In California, Assembly Bill 1080, if passed, would phase out single-use plastics like polystyrene, polyvinyl chloride and polypropylene by 2030, while also encouraging recycled plastic materials such as polyethylene terephthalate (or PET) and high-density polyethylene (HDPE). Biodegradable and alternative material substitutes are gaining traction, like Loliware™, which produces hyper-compostable, edible straws and cups derived from seaweed. These products provide consumers environmentally friendly options, but at a higher price point. In addition, retailers, like Walmart, are trying to reduce plastic waste through commitments, including 100% recyclable, reusable or industrially compostable packaging for its private brand packaging by 2025; 20% post-consumer recycled content in private brand packaging by 2025; using the How2Recycle® label on 100% of its food and consumable private brand packaging by 2022; working with suppliers to eliminate non-recyclable packaging material in non-private brand packaging by 2020; and reducing private brand plastic packaging when possible. **In order to ensure enforceability and feasibility, companies must prepare to negotiate and respond to these plastic reduction directives within their contracts.** [Alison Torbitt](#)

Reducing our carbon “foodprint” creates unique land use challenges

Organic food sales have been hitting new records every year, and some reports put recent organic growth rates at six times the pace of the overall food market. **These efforts to reduce food’s carbon footprint, or “foodprint,” combined with other efforts to increase the supply of locally grown produce and introduce greater food safety for fruits and vegetables, are having a dramatic effect on how land is used for agriculture.** Typically, organic systems require more land than conventional agriculture, which can increase other environmental impacts. The movement toward locally grown produce often requires a major change in zoning and land-use planning in urban centers—and growing efforts to increase local yields in hostile microclimates relies on controlled indoor environments that actually require building permits. Put simply, the “nature” of agriculture is shifting, which may mean more state and local permits . . . and in some places, like California, the ability to analyze carbon foodprints. [Bryan LeRoy](#)

Experimentation with inventive partnerships continues in grocery sector¹

Leaders in the grocery sector continue to establish unique partnerships in an attempt to grow sales. Last summer, Albertsons created a venture fund with Greycroft focused on developing grocery-related tech innovators. More recently, Kroger’s established a partnership with e-commerce retailer Ocado, to help facilitate increased sales through Kroger’s recently established online grocery platform by building automated warehouse facilities. **In other instances, partnerships aim to compete with e-commerce by leveraging synergies between chains in different industries (but with overlapping customers) by establishing “shared space” brick-and-mortar locations.** For example, Aldi and Kohl’s announced they will test a “shared space” model in an effort to target customers who shop at both stores. Similarly, Kroger’s is exploring the placement of mini grocery

¹ The statements are based on publicly available information.

outlets within Walgreens stores. Each new venture poses unique legal challenges, including how to allocate profits, divide costs and structure exit strategies, among others, that must be addressed from the outset of these partnerships. [Isaac Figueras](#)

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Daniel Fabian, 716-848-8210, dfabian@nixonpeabody.com
- Isaac Figueras, 585-263-1038, ifigueras@nixonpeabody.com
- Bryan LeRoy, 213-629-6118 bleroy@nixonpeabody.com
- Ruth Silman, 617-345-6062, rsilman@nixonpeabody.com
- Alison Torbitt, 415-984-5008, atorbitt@nixonpeabody.com