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FOOD, BEVERAGE & AGRIBUSINESS 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 & Agribusiness](#) (FBA) practices in the United States. In this edition of our quarterly Crystal Ball Newsletter, our FBA lawyers discuss several industry trends expected to have a significant impact throughout 2019. The marketplace will continue to evolve as established food and beverage companies invest and/or acquire innovative startups and the Food and Drug Administration (FDA) addresses a number of significant issues that impact not only food and beverage companies, but also consumers. We will continue to watch closely as these issues and others unfold over the next twelve months.

Cell-based proteins: a game changer

No matter the name, cell-based, lab-grown or cell-cultured meat and poultry will drastically impact sustainability. While there remain numerous hurdles (e.g., educating the public, etc.), we expect the U.S. Department of Agriculture (USDA) and the FDA to jointly devise a regulatory structure in 2019, which will bring these products one step closer to reaching consumers. Last month, the two agencies agreed to split regulatory jurisdiction between different phases of production. This decision leverages FDA knowledge of cell-culture technology and living biosystems and USDA knowledge of meat and poultry product regulation. **Questions remain, however, including how labelling such products will ensure transparency.** For instance, citing potential consumer confusion regarding the source of cell-based meat, the U.S. Cattlemen's Association has advocated limiting the term "meat" in advertising and labelling to only the meat of traditionally raised animals. [Tracey Scarpello](#)

Unions between consumer packaged goods companies and new brands

In 2019, large consumer packaged goods (CPG) companies will continue investing in food and beverage startups. **No longer are large CPG companies only looking to acquire proven food and beverage brands. Instead they are exploring investments in early-stage food and beverage companies—often pre-revenue.** We further expect CPG companies will continue creating incubators to develop innovative products and foster the growth of new brands. In particular, they will focus on high growth product areas—including healthy, organic, ketogenic and plant-based items. Large CPG companies will also continue paying premiums to acquire nimble food and beverage companies with products and service offerings that align with their brands and growth plans, especially those which appeal to millennial consumers. This path is often preferable to developing brands from scratch, which requires internal research and development teams. A large

CPG company can instead acquire a small growth-minded brand and use its supply chain to scale up its own brand. [Janet Garetto](#)

Maybe “salt of the earth” is more than a casual compliment

Court filings for false advertising—such as “slack fill” and “natural” or “healthy” food claims—accelerated in the last quarter of 2018. **A possible new area for such filings in 2019 concerns microplastics (tiny plastic waste particles) in salt.** *Environmental Science & Technology, Q4 2018, reported that 36 of 39 food grade salt brands tested contained microplastics.* The study was picked up in the popular press and likely noticed by plaintiff class action lawyers. Because microplastic “contamination” varied by source, plaintiffs might argue that manufacturers are negligent if they do not choose “cleaner” sources of salt, even though there are no accepted standards for what is or is not allowable or a health concern. Because sea salt (particularly from certain areas, like Indonesia) is likelier to contain more microplastics than “mined” salt, advertising a product as “made with sea salt”—which might imply a “healthier” or “more natural” source—could become the focus of a deceptive advertising claim on the theory that “salt of the earth” is actually less likely to contain microplastics. We can think of numerous defenses to such claims, but there is often no end to the imagination of a good plaintiff class action lawyer. [Christopher M. Mason](#)

Gut friendlier foods on the rise

Many consumers are already familiar with probiotics—microbes that provide a health benefit to humans or pets. The increase in foods and beverages prominently featuring probiotics will continue. With the wider acceptance of probiotics, the trend is toward developing nontraditional, often shelf-stable, products supplemented with probiotic organisms. Those selling probiotic-supplemented cereals and granola—among other types of products (think snack foods)—can benefit from new microbe-stabilizing technology. For instance, producers who own or license patents covering these products and their methods of production can gain a competitive advantage as the market grows. **In addition to probiotics, more products will use prebiotics—substances nondigestible by humans but fermentable by human commensal microbes which promote a healthy commensal population—as well as postbiotics—compounds produced by probiotic or commensal microbes that mediate the health benefits of probiotics.** For all of these, food and beverage companies will need to carefully consider health claims on packaging and in advertising so as not to run afoul of regulatory and labelling laws. [Mark FitzGerald, Ph.D.](#)

Dairy farms in financial peril

Smaller and family-owned dairy farms will continue to struggle. The most common causes include persistent milk overproduction, low wholesale prices, high grain costs, lower domestic demand for milk and other dairy products, fierce competition from mega-dairies and reduced export opportunities. **Throughout the U.S. (but particularly in the Midwest), family dairy farmers are facing a daunting economic truth: their businesses are at risk because their farms are no longer financially viable—their cost of producing a gallon of raw milk is markedly higher than what a processor will pay for that gallon of milk.** Some farmers are leaving the business, while others are filing Chapter 12 bankruptcy and formally reorganizing. Others are seeking informal workouts with their lenders to reach acceptable credit terms going forward. In 2019, the dairy industry will undergo significant transitions and financial restructuring. [Louis Cisz](#)

The FDA will address high-profile issues affecting the food industry

In 2019, the FDA's regulatory agenda will include several important items impacting the food industry. The FDA has already announced that in March 2019 it will issue a proposed rule to redefine the term "healthy" and how the term may be used on food labels. **By proposing to redefine "healthy," the FDA is attempting to make the term more consistent with current public health recommendations, dietary patterns and recent changes to the Nutrition Facts panel.** Later in the year, **the FDA is expected to release a rule extending its ban on trans fats across the entire food supply.** Commissioner Gottlieb commented that the rule is intended "to further reduce deaths from coronary heart disease." In addition, **the FDA is expected to revoke "outdated standards of identity" for certain foods in order to encourage innovation in the food industry.** A statement of identity is a formal regulatory definition which mandates the ingredients a product must contain as well as other manufacturing requirements. The FDA will start this process with frozen cherry pie and French salad dressing. [Tracey Scarpello](#)

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