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FOOD, BEVERAGE & AGRIBUSINESS NEWSLETTER | NIXON PEABODY LLP

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Food & Beverage Crystal Ball: Trends we're following

In the 2019 fourth quarter edition of Nixon Peabody's Crystal Ball Newsletter, our [Food, Beverage & Agribusiness](#) (FBA) lawyers address important environmental issues, tax laws, and an increase in biotechnology agribusiness patents and how these developments are affecting food and beverage companies. We will continue to watch closely as these issues, and others, unfold in the months ahead and as we transition to 2020.

Biotechnology agribusiness patents show uneven adaptation to new examination guidelines

Inventions in the agribusiness industry are pivotal to the welfare of Americans and the U.S. economy. **Over the last decade, the United States Patent and Trademark Office (USPTO) has implemented significant changes in standards for how patent claims (1) comply with the written description requirement and (2) avoid improper claiming of natural products.** Our review of recently issued patents shows that many in the agribusiness industry have adapted well to these changes and have secured strong IP protections. Nevertheless, it is easy to run afoul of these changed standards, resulting in a patent with overly narrow claims that may be easy to design around. **A central tenet of a strong patent application that can successfully address both examination standards is a careful and thorough description of both the structural and functional properties of the invention.** We will continue to monitor these trends through our [Gut Check](#) and [Patent Plantings](#) alerts. [Nicole Kling](#), Ph.D.

The future of food products and packaging

Perfluoroalkyl or polyfluoroalkyl substances (PFAs) have become the subject of significant regulatory action, emerging research, litigation, and public debate. PFAs are a large family of chemicals that are oftentimes used in food packaging to provide water and grease resistance (e.g., popcorn bags, fast food containers, and pizza boxes). **Legislation has been introduced and, in some cases, passed, banning the use of PFAs in food packaging.** For instance, U.S. Representative Debbie Dingell (D-Mich) recently introduced a bill seeking to amend the Federal Food, Drug, and Cosmetic Act (FD&C), which deems any PFA substance used in food packaging to be unsafe, and, therefore, adulterated under the FD&C Act. Further, at least two states (Washington and Maine) have already banned the use of PFAs in certain food packaging, and California has added PFAs to its Proposition 65 list. Stay tuned for further developments in this emerging area of science and regulatory action. [Tracey Scarpello](#)

Single-use plastics: it's time to go

Consumer pressure is mounting to phase out single-use plastics, and replace these with more easily recyclable aluminum and glass, plant-based and compostable “hybrid” plastics, or re-use and re-fill containers. In response, the Coca-Cola Company recently began selling Dasani water in cans throughout the Northeast with plans to expand nationwide by 2020, as part of their “World Without Waste” campaign. Similarly, San Francisco International Airport banned all plastic water bottles and now requires travelers to fill reusable bottles at “hydration stations.” And, beginning in 2023, California will require all large hotels to stop using small plastic shampoo/conditioner bottles in their rooms. Simultaneously, new businesses are selling refills of consumer products, including hair and cleaning products, among other items, which consumers can buy to refill their own bottles. Even traditional businesses are joining the movement, replacing single-use coffee cups and plastic straws, with reusable mugs and metal straws. McDonalds, Starbucks, and Closed Loop Partners initiated a NextGen Cup Challenge, committing \$5 million to develop a recyclable and/or compostable cup. **All businesses should review their internal practices and consumer products to decide how they too can replace/reduce single-use plastics and make other environmentally friendly changes.** [Alison Torbitt](#)

Uncertainty looms for craft beverage industry

The beneficiaries of the Craft Beverage and Modernization Tax Reform Act of 2017 (“Act”)—craft alcoholic beverages, including beer and wine and distillers of whiskey, bourbon, vodka, gin, and rum (“Craft ABBs”)—are nearing the end of a two-year excise tax break that started in 2018. Although there is a proposal to make some benefits of the Act permanent (see, H.R. 1175, with 299 co-sponsors), no further Congressional action has been taken since this bill was introduced in February 2019. This uncertainty would be enough to upset a Craft ABB business planner, yet there is another layer which further complicates the situation. The current administration is using tariffs to level the international trade playing field. It has resulted in retaliatory measures by foreign governments and instances where the U.S. executive branch quickly implements and withdraws tariffs. Recently, a 25% tariff was placed on many European wines and liquors, among other items. Although one might think this would help U.S. Craft ABBs, the potential exists that such tariffs will not be permanent and/or foreign governments will retaliate. **Effective business planning, which requires understanding how one’s business will be taxed, along with sound legal counsel, will be paramount for Craft ABBs in the months ahead.** [Patrick “Rick” Cox](#)

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