

insights

TYPES NOT MAPPED YET August 13, 2018 | TTR not mapped yet | Kimberly (Kim) Bousquet

Can almonds lactate? Standards of identity and why the FDA may soon target makers of milk substitutes

“Standards of identity” are used by the FDA to establish the common or usual name of certain processed foods and define their basic nature. A standard of identity is usually based on what the food must contain and may also define how the food is processed. The standard may list optional ingredients as well.

For example, under 21 C.F.R. § 163.124 “white chocolate” is defined as: “the solid or semiplastic food prepared by intimately mixing and grinding cacao fat with one or more of the optional dairy ingredients specified... and one or more of the optional nutritive carbohydrate sweeteners and may contain one or more” other specified ingredients. Thus, this standard lists required ingredients (cacao fat), optional ingredients (certain dairy products), and denotes a processing method (mixing and grinding).

The FDA has established about 300 standards of identity for various food products ranging from macaroni to margarine; see for yourself at 21 C.F.R. § 131 to 169. Likewise, the USDA has established numerous standards of identity for meat and poultry products, located at 9 C.F.R. § 319 and 9 C.F.R. § 381.155-381.174.

Food companies need to pay attention to these standards because failing to follow them can render a product misbranded under the Federal Food Drug & Cosmetics Act, 21 U.S.C. § 340(g), the Federal Meat Inspection Act, 21 U.S.C. § 601(n)(7), or the Poultry Products Inspection Act, 21 U.S.C. § 453(h)(7), depending on the product. Violating a standard of identity could put your company on the FDA’s or the USDA’s enforcement radar, or even trigger a consumer fraud lawsuit.

So why ask if almonds can lactate? The standard of identity for milk says, among other things, it is “the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows.” See 21 C.F.R. § 131.110. The dairy industry has been complaining for years that the FDA has not enforced this standard with respect to products like “almondmilk,” “ricemilk,” or “soymilk,” a fact FDA commissioner Scott Gottlieb [recently recognized at a Politico Pro Summit](#). This issue prompted Gottlieb to quip that: “An almond doesn’t lactate, I will confess.”

But this non-enforcement may soon change; the FDA [is currently reviewing](#) the “wide variety of plant-based foods that are being positioned in the marketplace as substitutes for standardized dairy products” which are using “traditional dairy terms . . . in the name of the product.”

On July 26, 2018 the FDA held a “Public Meeting to Discuss the FDA’s Nutrition Innovation Strategy,” covering modernizing standards of identity and requested comments on the issue by August 27, 2018. The FDA is open to hearing comments on enforcement of standards as well as revisions to current standards.

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