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Food Cos. Likely To Embrace Wider Tracing, On One Condition

By Greg Ryan

Law360, New York (March 06, 2013, 9:12 PM ET) -- The U.S. Food and Drug Administration is considering a proposal to impose new tracking requirements on the production of all foods, not just high-risk ones — a mandate attorneys say companies are likely to accept as long as the agency does not dictate how they trace their products.

The FDA released a report Monday based on two pilot projects designed to examine companies' tracing of food across the supply chain. The projects, required by the Food Safety Modernization Act, were carried out by an organization of food scientists and other professionals known as the Institute of Food Technologists, with the participation of industry members and others.

To improve tracing, the group advised the agency to create a uniform set of record-keeping requirements for all foods. The mandate is more onerous than the FSMA, which calls for only high-risk products to be subjected to additional record-keeping requirements.

Despite the increase in regulation the recommendation entails, it appears likely to receive the support of much of the food industry, with the exception of some small companies, according to attorneys. The FDA is accepting public comments on the report over the next month.

"A lot of companies are doing this already," Faegre Baker Daniels partner Sarah Brew said. "And to a certain extent, [they're thinking] if we're doing this, we want everyone else to do it, too."

The industry's support comes with a caveat, however, attorneys say. If the agency provides goals without specifics on how to meet them, companies will want to maintain the tracing practices they have in place. Companies that have no systems in place may want to devise their own, on largely their own terms, according to attorneys.

"If you already have a system in place and you feel it's workable, and FDA comes in and says you have to change the system, you might feel, 'We have something that's already working. We shouldn't have to tinker with it,'" Brew said.

That preference was codified in one of the Institute of Food Technologists' other recommendations, that the FDA look to industry-led initiatives to create new tracing guidelines. The group said, "FDA should not prescribe the specific means that industry uses to meet FDA's objectives recommended by IFT."

Companies "will be pleased with that kind of flexibility," said Steptoe & Johnson LLP partner Ralph Simmons, a former policy analyst at the agency. "I think that flexibility reflects the variation of the types of companies involved in the food industry."

Though flexibility could assuage much of the industry's concern about additional record-keeping requirement, attorneys will still monitor whether making more data available to the public could lead to more product liability suits, they said.

Attorneys raised several reasons for companies' willingness to accept additional requirements. Companies may simply find it easier to trace all of their products, rather than targeting select ones, they said. The types of food considered "high-risk" can change over time, complicating the task of distinguishing between the products that have to be traced and those that don't.

Brew pointed to cantaloupe, a product that "a few years ago, I don't think anyone would have classified ... as a high-risk product for listeria," she said. In 2011, however, a listeria outbreak linked to cantaloupe from a Colorado farm led to at least 30 deaths and 146 infections. The next year, a salmonella outbreak tied to cantaloupe from an Indiana farm sickened at least 261.

"It's better to focus on the system, and not so much on which commodities are high-risk," said Brew, who represents food processors, distributors and retailers.

Companies have long expected the FDA to toughen tracing requirements, another factor that may predispose them toward accepting the Institute of Food Technologists' recommendation, attorneys said. Companies are already required to perform some tracing under the Bioterrorism Act of 2002.

"They'll be received as a necessary step forward, because traceability is simply something that needs to go in a forward direction," Simmons said.

The group noted there was a "rare showing of unanimity" among the pilot projects' advisers and the participating businesses regarding the recommendation for across-the-board tracing requirements. One group, the Produce Marketing Association, has already endorsed the group's recommendations, saying they align with an industry initiative that requires all produce handlers to keep records of their tracing information.

The group made 10 recommendations to the FDA in total, including a requirement that members of the food supply chain develop a product tracing plan, and the adoption of a technology platform for tracing data that other federal and state regulators can access. It also laid out the points along the supply chain at which product data should be collected.

--Editing by Kat Laskowski and Chris Yates.