




NewsFeedSM

Quarterly Food & Beverage Industry Web Conference Series

Thursday, January 31, 2013

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Antitrust Update

Presented by: Holden Brooks

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Enforcement: DOJ Report

- May 2012 DOJ Ag Workshop Report
 - “The Division remains committed to taking all appropriate investigatory and enforcement action against conduct threatening harm to competition in agricultural markets.”
 - But no major litigation or enforcement actions
 - Five public workshops in 2010
 - Seeds
 - Dairy
 - Livestock
 - Poultry
 - Supply Chain

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Enforcement, Cont.: Monsanto Investigation

- November 2012: DOJ Drops Seed Investigation
 - Began in January 2010 to investigate industry practices
 - Licensing of patented Roundup Ready soybean traits at least one target
 - Allegations were monopolization, price increases
 - Attempts to switch customers prior to patent expiration
 - No explanation for closing investigation
 - Cited unspecified “market developments”

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Enforcement, cont.: JBS

- December 2012: Call for investigation into potential JBS acquisition
 - JBS acquisition of National Beef Packing blocked by DOJ in 2008
 - Deal would have made JBS largest beef producer
 - In late 2012, JBS poised to acquire XL Four Star Beef
 - Deal would allegedly make JBS largest beef producer
 - Observers looking at regulatory reaction as indication of DOJ's enforcement priorities

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M&A Enforcement

- Ralcorp, ConAgra merger HSR waiting period expired in January 2013
 - Two entities had several areas of horizontal overlap and merged entity largest private label food producer
 - Opponents urged deeper review by FTC
 - Product markets, e.g. peanut butter instead of grocery generally
 - Systemic approach, looking at ways that private label competes other than price
 - Goal would be to prevent management of competition

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M&A Enforcement, Cont.

- A-B InBev-Modelo merger review pending
 - Made HSR filing in June 2012
 - Merged entity would have 52% US market share
 - Reports say that divestiture of production facility (not just distribution) or brands will be condition of DOJ approval

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Private Litigation

- Much of current antitrust action in food, agriculture sector is private litigation alleging price fixing conspiracies
 - Mushrooms
 - Potash
 - Milk (settled on eve of trial)
 - Chocolate
- Private plaintiff bar seen as stepping into gap left by federal enforcers.

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International Enforcement


- May 2012 European Commission Report re competition in food markets
 - Demonstrated that regulatory focus on competition lowered prices
 - Focus on processing, manufacturing
 - Cartel enforcement, merger enforcement, scrutiny of exclusionary practices key




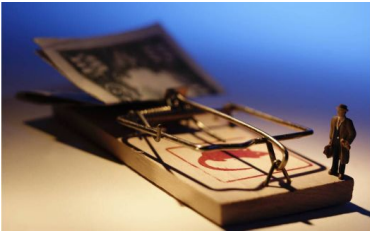
To Market, To Market:

Legal Issues Raised By the Sale of Food
Products Through
Independent Distributors,
Licensees, and Franchisees

Presented By: Mike Lockerby




Structuring the Relationship

- Alternative Food Distribution Models
 - Broker/sales agent
 - Distributor/dealer
 - License
 - “Franchise”
- The “f” word: hidden franchises in agency, distributor/dealer, and other licenses

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The “f” Word: Hidden Franchises

- FTC Franchise Disclosure Rule
 - Cease and desist orders, injunctions to prohibit sales
 - Rescission, reformation, refunds, damages
 - Civil penalties
 - State “little FTC Act” claims for treble damages
- State disclosure and registration laws
 - Rescission
 - Damages
 - Costs and attys' fees
 - Criminal penalties
- Franchise and dealer “relationship” laws
 - May apply even if not subject to disclosure or registration laws

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What is a "franchise" anyway?



- Trademark element
 - License or association
 - "Mere possibility" of trademark use
- Assistance or control
 - FTC: "substantial"
 - "Marketing plan"
 - "Community of interest"
- Franchise fee

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Franchise Compliance Options



- "Voluntary" compliance
 - Avoid uncertainty
 - Can collect upfront fees
 - Increased ability to control quality and uniformity
 - Disclosures inconsistent with later claims of oral contracts and fraud
- Available exemptions and exclusions
- Franchise law avoidance


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Franchise Law Avoidance?

- Trademark element
 - Probably unavoidable where trademarked goods and services are involved
- "Assistance or control"
 - Federal trademark law permits and indeed requires exercise of quality control
 - Manufacturers need to ensure that products sold properly and meet standards
- "Franchise fee" element
 - Difficult because of payments that may establish indirect franchise fee
 - Foregoing such payments may not be a sound business decision
 - May still be subject to "relationship" laws even without a "franchise fee"

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Maintaining the Relationship

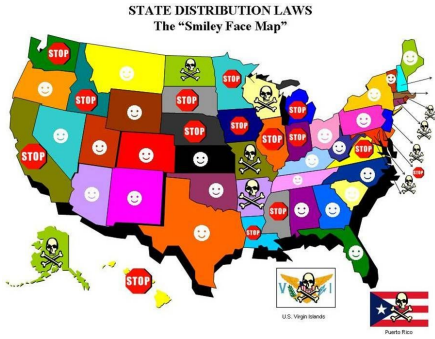


- Exclusivity, Pricing, and "Best Efforts"
 - Vertical non-price restraints
 - "Best efforts" clauses
 - Statutory prohibitions against "coercion"
 - Resale price maintenance
 - Price discrimination

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 **Ending the Relationship**

STATE DISTRIBUTION LAWS
The "Smiley Face Map"



- **State Franchise and Dealership Laws**
 - Terminations and non-renewals
 - Amendment
 - Notice and opportunity to cure
 - Inventory repurchase

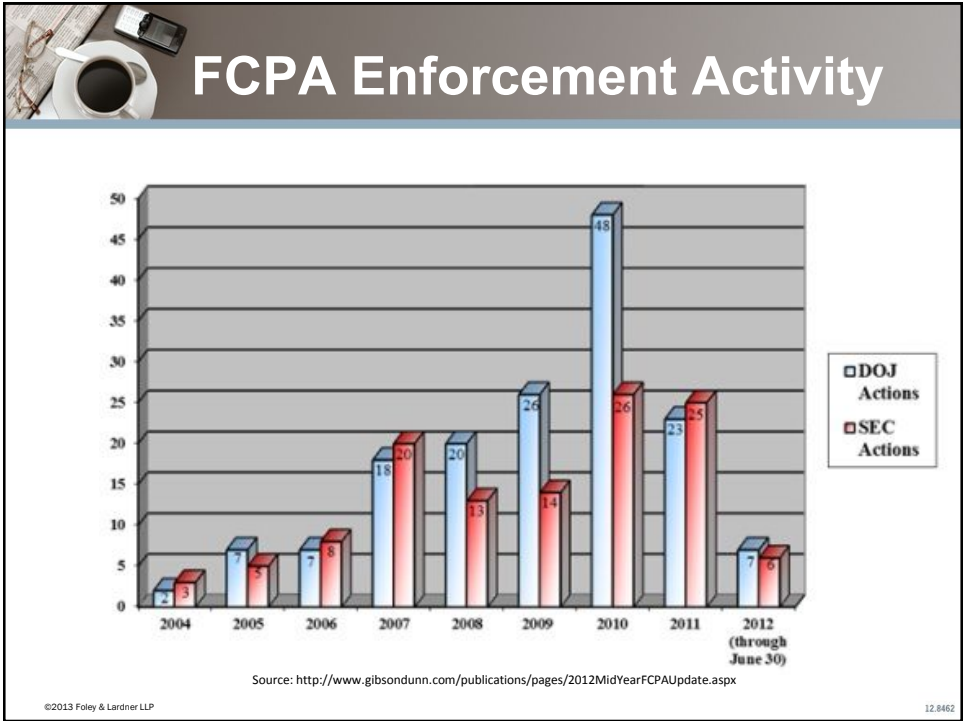
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FCPA Risk Update



Presented By: Lisa Noller

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Two Main Components

- Anti-Bribery Provisions
- Books and Records and Internal Control Provisions


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Anti-Bribery Provisions

- Apply to:
 - Domestic concerns (“private” companies, LLC’s, etc., and U.S. citizens);
 - Issuers (basically, “public” companies); and
 - Any person who, while in the U.S., commits an improper act
 - **Including non-U.S. citizens**
- Covers payments made by third parties with “knowledge” that the payment would be used to fund FCPA-illegal activity
- Extra-territorial jurisdiction

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What is Prohibited?

- Paying or offering to pay **“anything of value”**
- Directly or indirectly
- To a **“foreign official,”** or to any other person “while knowing” that all or part of the thing of value will be paid or offered to a foreign official
- Corruptly
- For the purpose of influencing the official in some official act or to secure any improper advantage
- In order to **“obtain or retain business”**

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“Anything of Value”

Examples:

- Cash or a cash equivalent
- Gifts
- Travel expenses and/or payment of personal expense
- Services
- Golf outings or other entertainment
- Charitable donations
- Medical treatment
- Loans
- Jobs for relatives




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“Foreign Official”

- Any officer or employee of a foreign government ***or any department, agency, or instrumentality thereof***
 - DOJ interprets instrumentality to include employees of state owned or controlled enterprises (“SOEs”)
 - No distinction made as to rank or title


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“Obtain or Retain Business”

- **“Business Purpose” Test**
 - Includes payments related to the renewal of contracts, the execution or performance of contracts, or the retention of existing business
- **Examples from DOJ/SEC:**
 - Winning a contact
 - Influencing procurement process
 - Circumventing import rules
 - Gaining access to non-public bid tender
 - Evading taxes or penalties
 - Influencing enforcement actions or litigation
 - Obtaining exceptions to regulations
 - Avoiding contract termination


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Exceptions & Affirmative Defenses

- **DOJ/SEC List of Safeguards:**
 - Do not select officials who will participate (or use pre-determined criteria)
 - Pay costs directly to vendors
 - Do not advance funds to participants or pay cash per diems
 - Limit expenditures to those necessary and reasonable
 - Ensure expenditures are transparent on both sides
 - Do not condition payment of expenses on actions by officials
 - Obtain written confirmation that payment is not prohibited by local law
 - Accurately record expenses

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Customer Visits

Questions to Ask:

- Are any of the visitors “foreign officials” under the FCPA’s broad definition of that term?
- Is the **entire** trip for the purpose of promoting the company’s products or services or in connection with the execution or performance of a contract?
- Are the proposed expenses proportionate and reasonable in relation to the company’s business purpose for inviting the foreign officials?
- How are the foreign official’s expenses being paid?
- Who within the company is approving the trip? Is that person sensitive to FCPA issues?
- Are the expenses accurately described and recorded on the company’s books and records?


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Gifts, Meals and Entertainment

- Companies may provide meals and entertainment, if in good faith, without corrupt intent, and with no expectation of a favor
- Must be directly related to legitimate business purpose
- Must be reasonable in value
- Best practices:
 - Should be in accordance with generally accepted business standards
 - No cash or equivalents
 - Company personnel should be in attendance
 - Should be properly documented


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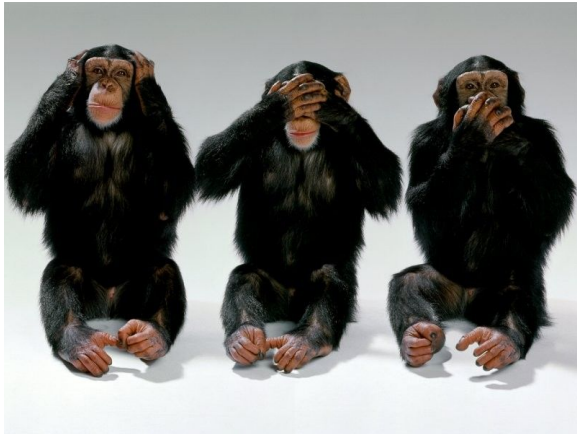
Third-Party Intermediaries

- FCPA expressly prohibits improper payments made through third parties
- The majority of recent enforcement actions have involved improper payments made through third-parties
- Regulators do not need to prove that the third-party acted on the company's direct orders or even that a company actually knew the intermediary engaged in prohibited conduct
 - Most enforcement actions have involved allegations of actual knowledge, however
 - Willful blindness constitutes knowledge


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Willful Blindness = Knowledge




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The Food Safety Modernization Act Proposed Rulemaking Update

Presented By: Nate Beaver

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FSMA Proposed Rules

- On Jan. 4th FDA released pre-publication copies of two new proposed rules.
 - 1) *Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food*
 - 2) *Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption*
 - Available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-01-16/pdf/2013-00125.pdf> and <http://www.gpo.gov/fdsys/pkg/FR-2013-01-16/pdf/2013-00123.pdf>.

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cGMP Proposed Rule

- Require food manufacturers to develop a written plan for preventing foodborne illness.
- The rule would apply whether food is produced at a foreign- or domestic-based facility, and also would require companies to have plans for monitoring and correcting any problems that arise.

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cGMP Rule – When?

- FDA is proposing that many food manufacturers be in compliance with the new preventive controls rules within one year after the final rules are published in the Federal Register.
- But small and very small businesses would be given additional time, though what constitutes small and very small businesses has not yet been defined.

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cGMP Rule – Who?

- Rule would apply to all facilities that “manufacture, process, pack or hold food” unless exempt.
 - 1) Low risk on farm activities (not yet defined)
 - 2) Seafood HACCP
 - 3) Juice HACCP
 - 4) Low acid canned food (Part 113)
 - 5) Dietary supplements (Part 111)
 - 6) Produce (subject to other rules)
 - 7) Alcoholic beverages (subject to BATF)
 - 8) Storage of raw agricultural commodities (other than fruits and vegetables intended for further distribution)
 - 9) Facility engaged solely in storage of packaged food that is not exposed to the environment

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Farm Proposed Rule

- Rule contemplates enforceable safety standards for the production and harvesting of produce on farms.
- This rule proposes science- and risk-based standards for the safe production and harvesting of fruits and vegetables.

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Farm Rule – When?

- FDA is proposing that larger farms be in compliance with most of the produce safety requirements 26 months after the final rule is published in the Federal Register.
- Small and very small farms would have additional time to comply, and all farms would have additional time to comply with certain requirements related to water quality.

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Farm Rule – Who?

- Covers domestic and imported produce.
- Exemptions for:
 - Certain produce rarely consumed raw.
 - Produce for personal or on-farm consumption.
 - Produce that receives commercial processing with “kill step”.
 - Farms of 3 year annual value of less than \$25,000
 - Qualified exemption for small farms (less than \$500,000 over 3 year average plus primarily sales to end users).

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Implementation Timeline

- The rules were issued nearly a year later than anticipated.
- The proposed rules are quite lengthy, 179 pages (cGMP Standards) and 144 pages (Produce Standards), as published in the Federal Register, which may partly explain the delay in their issuance.
- Comments may be submitted either written or electronically until May 16, 2013.
- Given the length of the rules and likely public comments, we expect final publication of the rule may not occur until 2014.
- Public meeting scheduled for February 28th

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What's Next?

- More proposed rules on the horizon.
- Including importer foreign supplier verification and accreditation of third party auditors.
- Overall, 2013 will be a busy year for FSMA activities.

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