

Congressional Outlook 2016: Food

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Law360's Expert Analysis congressional outlook series highlights key areas to watch during this election year, featuring commentary from law firm public policy practice leaders, academics and former members of Congress.



It is a difficult but often worthwhile exercise to forecast the legal consequences of transformative policy changes in the food sector. One such emerging food policy change, which is also politically charged, is the stated nexus between environment and public health in the food supply chain. This article briefly examines the development of this nexus, culminating most recently in the formation of the 2015 U.S. dietary guidelines, and the potential legal consequences of this linkage for practitioners and policymakers in 2016 and beyond.

Background

Beginning in the 1960s and 1970s, attention to nutrition accelerated as the relationship between diet and health became more evident to lawmakers and government officials. In recent years, rising rates of obesity and diabetes have prompted policymakers to consider the connection between diet and health. A number of legal tools, including marketing regulations (e.g., menu labeling), prohibitions (e.g., trans fat ban), social motivators (e.g., soda tax), and government programs (e.g., school meal programs) have been developed to stem the growth of obesity and to promote nutrition.

Environmental concerns in the production of food are often expressed by the descriptor, "sustainability."^[1] The notion of sustainable food systems emerged in popular usage in the late 1980s and has grown in popularity since then. Today, it is hard to escape discussion of sustainability in the food sector: One of the hottest topics of the day, it resonates particularly with millennials, and will likely play an even greater role for consumers in years to come. The scientific evidence of the environmental effects of food production, if previously only acknowledged at the margins, has now been mainstreamed and is well accepted, with current estimates that the global food system is responsible for up to one-third of total greenhouse gas emissions worldwide.^[2]

These two areas of concern over food — public health and sustainability — have historically generally been addressed separately; however, in 2015, an attempt was made to link environment/sustainability to public health/nutrition when, for the first time ever, the Dietary Guidelines Advisory Committee (DGAC) recommended that the sustainability of dietary choices be



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integrated into the U.S. dietary guidelines.

The DGAC is a panel of expert scientists appointed to advise the U.S. Department of Agriculture and the U.S. Department of Health and Human Services on the revision of the U.S. dietary guidelines every five years. The DGAC makes its recommendations based on the best available scientific evidence to date. The dietary guidelines fulfill the USDA's Center for Nutrition Policy and Promotion's public health mandate to develop and promote dietary guidelines that reflect scientific research. On a practical level, the guidelines aim to guide Americans' individual dietary behavior and directly impact over \$100 billion of food policy through large federal institutional purchasing, including public schools and the military, as well as millions of additional meals in private institutional food service environments.

The response to the DGAC's recommendation was a fierce political debate that resulted in the USDA and HHS declining to incorporate the DGAC's sustainability recommendations into the final 2015 guidelines. Notwithstanding the rejection of the nexus between sustainability and dietary public health in the 2015 dietary guidelines, it is likely that scientific, political and marketing pressures will escalate the appearance of sustainability in food policy in 2016 and beyond, including increased linkages between dietary public health and sustainability. The policy driver behind this linkage is recognition that food systems issues are best addressed holistically, by giving credence both to public health and sustainability. In addition, decisions about public health can implicate sustainability in the food system, sometimes in profound ways. For example, food safety concerns may lead to regulations that alter farming and conservation practices in ways that may or may not be consistent with sustainability objectives. Another example is how the promotion of locally sourced foods through government programs for public health reasons (freshness, nutrient content, etc.) may contribute to the vitality of small or local farms, an important objective in the sustainability movement.

Putting aside the political and policy debate over the relationship between public health and sustainability, the balance of this article explores a few of the potential legal consequences of this nexus and provides an outlook of this issue in the coming years, both inside and outside of Congress.

Policy Integration and the Farm Bill

The formal integration of sustainability policies into food policy may find traction in the closest thing in the United States to a national food policy: the U.S. Farm Bill. Such integration is precedented elsewhere in the world. For example, since 2000, European Union law has required that all new EU laws and policies take environmental impact into account.[3] Because food production deeply implicates sustainability, food and agriculture policies are ripe for integrating sustainability. Indeed, the EU Common Agricultural Policy was one of the policies to undergo major changes as a result of the 2000 law. It would not be surprising if some U.S. policymakers began attempting to account for environmental externalities in parallel U.S. laws and policies, including for example the U.S. Farm Bill.

The Farm Bill is a \$1 trillion piece of legislation which funds agricultural production and nutrition assistance in the U.S. It is due for reconsideration in the next two years. This means lawmakers may seriously begin to consider this year and next year how to integrate sustainability into the Farm Bill, particularly as it pertains to agricultural production, in preparation for the 2018 bill. Integrating sustainability could include, for example, increased funding for farmers engaged in sustainable agricultural practices, which could lower the cost of sustainably produced commodities.

Given the experience of the dietary guidelines, it seems likely that policymakers will only integrate sustainability, if at all, into areas of the next Farm Bill that relate directly to agricultural production. That said, it is entirely possible that in the next two years, or even down the road further, the needle of public opinion will have moved sufficiently to induce lawmakers to integrate sustainability into other areas of the Farm Bill currently considered more tangential to agricultural production, including nutrition and diet programs.

Food Marketing

There may be other areas outside of formal policy adoption where sustainability manifests itself in food policy in the near future. One example may be increases in voluntary sustainability labeling. As sustainability rises in importance to consumers, food companies may opt to affix seals, certifications or other similar labels to their packaging to proclaim the sustainability of their products in order to entice consumers or justify a higher price point. The ultimate success of such labeling depends in large part on the ability of these companies to market the value behind the labels. Some labels — for example, organic, gluten-free or kosher — have generated tremendous revenue, while others have simply faded into obscurity.

In addition to label marketing, linkage of public health and sustainability may foster corporate social responsibility statements and commitments by food companies which tout food products that are healthy or safe for humans and for the environment. This practice raises possible risk for food companies where purported practices do not meet the commitment as advertised.[4] This speech venue risk is illustrated by the case of *Kasky v. Nike*, in which the California Supreme Court addressed allegedly false statements and advertisements Nike had made about its labor practices and working conditions in factories in foreign countries.[5] Construing Nike's statements as commercial speech with an economic motivation to promote and protect product sales, the California Supreme Court held that Nike's statements were not protected political speech under the First Amendment.[6] The Nike case cautions that food companies that choose to make public statements or commitments about the sustainability of their products should take care that those statements are true.

Private Standards

Along the same lines, individual food companies may go one step further than individual voluntary labeling and decide to develop private standards in sustainability. In fact, much of the development of sustainable practices in the food supply chain to date is due to private standards issued by food companies. Private standards are voluntary standards promulgated by nongovernment entities, such as in this case, a for-profit industry. These private standards are imposed on the supply chain in the form of a contract, and oblige suppliers in the food chain to meet the specified standards. The market for foods certified to private standards has expanded substantially over recent years due to consumer demand and it is likely that increased focus on sustainability, and especially the linking of sustainability to public health, will result in further proliferation of private standards in the food supply chain via contracts and verifications.

Private food standards by way of supply contracts have been criticized for being vague, inconsistent and unscientific. Small farm advocates also point to the undue hardship that private standards impose on small producers in the form of compliance costs. Another dilemma is that linking public health and sustainability in food supply chains can be a complicated endeavor not necessarily best left to private stakeholders to achieve. Such criticism leads many to believe that uniform public sustainability standards promulgated by the government emerge as the best, or only, option both for long-term food company viability and the long-term public interest.

Congress

What can we expect to see from Congress in 2016 around sustainability and food policy? The fallout from the 2015 dietary guidelines will continue to play out this year. At the end of 2015, Congress inserted a \$1 million provision into the 2016 House agriculture spending bill to direct the National Academy of Medicine to conduct an independent review of the process of crafting the dietary guidelines. As of February 2016, this independent review process has begun, with the USDA now holding listening sessions on the matter. Proponents of the independent review cite the lack of clarity around the scientific evidence that informs the creation of the dietary guidelines and the need for accountability, while those skeptical of the process describe it as political theater and a waste of time and resources. Regardless of one's take, the point is that the discussion — or perhaps controversy — associated with the 2015 guidelines has spilled over into 2016 and will continue to occupy the public and congressional agenda this year.

Outside of the dietary guidelines, we can also expect to see the USDA continuing to enact policies around sustainability in 2016. Sustainability has recently become a much bigger focus at the USDA, which has begun harmonizing some of its policies in sustainability and agriculture, particularly in light of the Paris climate change talks in late 2015. These policy actions along with

informal discussions within the USDA suggest that the agency is likely to continue promulgating sustainability policies that integrate sustainability and agriculture in 2016.

This USDA momentum in sustainability begs the question: Will the sustainability movement ultimately bridge with public health in the years to come, or will it remain siloed within agriculture? The next couple of years will be key indicators in answering this question and determining how this movement will play out. Was the 2015 DGAC a one-time attempt at bridging sustainability and nutrition? Or did this effort instead herald a broader movement in which these two concepts will ultimately merge in food policy?

Conclusion

Connecting sustainability to dietary public health may have been nixed in the most recent U.S. dietary guidelines, but given the growing interest in holistic approaches to food systems, it is very likely that the linkage will continue to be pressed in government programs, marketing efforts and private standards in the years to come. This article has outlined a few of the legal implications of this nexus and of the overall increase of sustainability norms in food systems.

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[1] MICHAEL T. ROBERTS, FOOD LAW IN THE UNITED STATES 397-98 (2016) (addressing the conceptual and definitional challenges of sustainability as used in food production).

[2] <http://www.nature.com/news/one-third-of-our-greenhouse-gas-emissions-come-from-agriculture-1.11708>

[3] Article 6, Treaty of Amsterdam, 1999.

[4] ROBERTS at 429.

[5] 27 Cal. 4th 939, 964, 119 Cal. Rptr. 2d 296, 45 P.3d. 243 (2002).

[6] 27 Cal. 4th at 967.