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Food Drug Cosmetic Law JOURNAL

Papers Presented at the Briefing Conference on the Fair Packaging and Labeling Act of 1966

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THE EDITORIAL POLICY of this JOURNAL is to record the progress of the law in the field of food, drugs and cosmetics, and to provide a constructive discussion of it, according to the highest professional standards. The FOOD DRUG COSMETIC LAW JOURNAL is the only forum for current discussion of such law and it renders an important public service, for it is an invaluable means (1) to create a better knowledge and understanding of food, drug and cosmetic law, (2) to promote its due operation and development and thus (3) to effectuate its great remedial purposes. In short: While this law receives normal legal, administrative and judicial consideration, there remains a basic need for its appropriate study as a fundamental law of the land; the JOURNAL is designed to satisfy that need. The editorial policy also is to allow frank discussion of food-drug-cosmetic issues. The views stated are those of the contributors and not necessarily those of the publishers. On this basis, contributions and comments are invited.

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FOOD DRUG COSMETIC LAW JOURNAL

Editorial Advisory Board

REPORTS

TO THE READER

Briefing Conference on the Fair Packaging and Labeling Act of 1966. —The papers presented at the Briefing Conference on the Fair Packaging and Labeling Act of 1966 are featured in this issue of the JOURNAL. The Conference, sponsored by the Federal Bar Association and the Foundation of the Federal Bar Association in cooperation with the Bureau of National Affairs, Inc., was held in Washington, D. C., on May 25-26, 1967.

Beginning on page 314, *Frederick M. Rowe* introduces the theme of the Briefing Conference in his article, "The Fair Packaging and Labeling Act of 1966: An Introductory Appraisal."

Beginning on page 317, in his "Truth-In-Packaging Revisited," *Senator Philip A. Hart* of Michigan calls for strong determination and good sense on the part of the administrative agencies involved in formulating regulations for the Truth-in-Packaging law, and industry cooperation.

Congressman Paul G. Rogers of Florida, author of "The Philosophy Behind the Fair Packaging and Labeling Act of 1966," explains that the law was based on the principle that the interests of consumer and industry alike are best served by a free economy, and that Congress is intent on preserving the freedom of both. The article begins on page 322.

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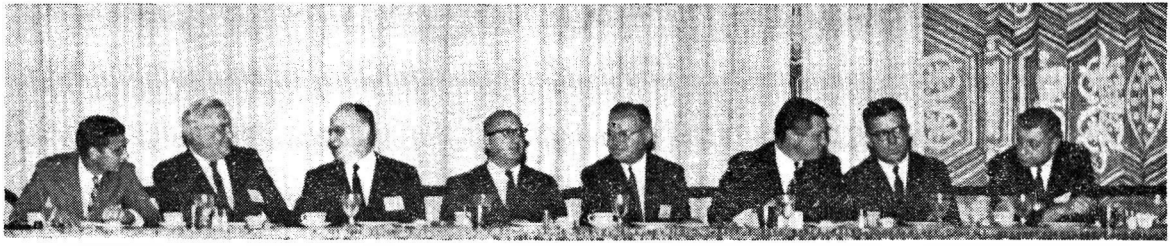
on the Fair Packaging and Labeling Act of 1966, May 25, 1967

(Seated from left to right) Adolph Magidson, Associate Editor, BNA Antitrust & Trade Regulation Report; Jerome T. Murphy, Department of Health, Education and Welfare; James McI. Henderson, General Counsel, Federal Trade Commission; Cornelius B. Kennedy, Washington, D. C.; Hon. Mary Gardiner Jones, Commissioner, Federal Trade Commission; Aaron S. Yohalem, Senior Vice President, Corn Products Co.; Hon. Everette MacIntyre, Commissioner, Federal Trade Commission; Frederick M. Rowe, Washington, D. C.; Hon. Thruston B. Morton, U. S. Senator, Kentucky.



(Seated from left to right) Francis M. Beudert, President, Mead Johnson Nutritional; Hon. Paul Rand Dixon, Chairman, Federal Trade Commission; H. Thomas Austern, Washington, D. C.; Hon. Philip Elman, Commissioner, Federal Trade Commission; J. Kenneth Kirk, Associate Commissioner for Compliance, Food and Drug Administration; Hon. John R. Reilly, Commissioner, Federal Trade Commission; Edwin M. Zimmerman, First Assistant, Antitrust Division, Department of Justice; Charles A. Sweeny, Director, Bureau of Deceptive Practices, Federal Trade Commission.

Program Participants and Head Table Guests at Briefing Conference on the Fair Packaging and Labeling Act of 1966, May 26, 1967

(Seated from left to right) John C. Scott, Managing Editor, BNA Antitrust & Trade Regulation Report; William A. Geoghegan, Washington, D. C.; Malcolm W. Jensen, Executive Secretary, National Conference on Weights and Measures; Edgar E. Barton, New York, N. Y.; Robert E. Giles, General Counsel, Department of Commerce; Frederick M. Rowe, Washington, D. C.; Hon. Paul G. Rogers, Member, Committee on Interstate and Foreign Commerce, House of Representatives.

(Seated from left to right) William W. Goodrich, General Counsel, Food and Drug Administration; S. Jerry Cohen, Staff Director and Chief Counsel, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U. S. Senate; Joseph E. Sheehy, Director, Bureau of Restraint of Trade, Federal Trade Commission; Larry L. Williams, Washington, D. C.; Ronald J. Wilson, Washington, D. C.; Matt Jennings, Chairman, Committee on Weights and Measures, National Conference on Weights and Measures; Marvin M. Karpatkin, New York, N. Y.

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The Fair Packaging and Labeling Act of 1966: An Introductory Appraisal

By FREDERICK M. ROWE

The Following Article Was Delivered at the Briefing Conference on the Fair Packaging and Labeling Act of 1966, Sponsored by the Federal Bar Association and the Foundation of the Federal Bar Association in Cooperation with the Bureau of National Affairs, Inc., on May 25-26, 1967 in Washington, D. C. Mr. Rowe Is Chairman, Council on Antitrust and Trade Regulation, Federal Bar Association, and Is with Kirkland, Ellis, Hodson, Chaffetz & Masters in Washington, D. C. The Succeeding Articles in this Issue Were Presented at the Same Conference.

THE FAIR PACKAGING AND LABELING ACT OF 1966, signed into law by the President on November 3, constitutes a milestone in the field of government regulation of marketing. Aimed at deceptive practices and other commercial abuses, both real and imaginary, the Act culminated years of legislative hearings before several committees of Congress.

Beginning with the first Hart Bill before the Senate Antitrust Subcommittee in 1962, Congressional hearings ranged over a wide spectrum of assertions, grievances, explanations, and rationalizations by consumer and business interests and government representatives—all espousing the radiant goals of maximizing mercantile honesty, while preserving the creativity of our dynamic marketing system, for the greater satisfaction of the American housewife and consumer.

As finally enacted, the Fair Packaging and Labeling Act of 1966 became a broad compromise solution. On the one hand, the Act codified a series of labeling requirements and authorized regulations to

curtail deceptive marketing practices, embellishing or supplementing the regulatory powers already vested by Congress in the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA). Conversely, the ultimate form of the Act omitted the provocative provisions enabling the regulatory agencies to control product diversity by compulsory "standardization" of package dimensions.

Fundamentally, during the rush for adjournment of the 89th Congress, the yen for consensus and the yearning for *some* consumer legislation spawned a practical legislative accommodation: the basic controversy over government standardization was carried over by a provision for experimental "voluntary" product standardization by industry, under the auspices of the Department of Commerce, antitrust policies notwithstanding, and subject to ultimate reconsideration by Congress as to its feasibility and success.

From the legal standpoint, these contours emerge from the Congressional debris: As of July 1, 1967, the effective date of the Act, broad regulatory powers are authorized for the FDA and the FTC in the field of packaging and labeling of "consumer commodities," and the Department of Commerce can exercise a mandate to promote voluntary product standardization by industry. All three implementing agencies are expected to promulgate regulations, both procedural and substantive, establishing new guideposts and directions for manufacturers and packagers of consumer commodities.

Above all, novel statutory criteria for controlling "undue proliferation" of package dimensions and for facilitating "value comparisons" by consumers may symbolize a Congressional breakthrough into new conceptual perspectives for the marketing of consumer products and the potential limitation of consumer choice in an affluent society.

In advance of the official birthday of the law, the implementing agencies have already anticipated the ceremonies. Proposed labeling regulations for food products were promulgated by the FDA on March 17, 1967. Proposed procedural regulations governing the determination of "undue proliferation" were released by the Department of Commerce on May 19, 1967, delineating the shape of things to come for a government-industry joint venture in "voluntary standardization." The FTC's first blueprints for action were unveiled on March 6, 1967 before a Congressional Appropriations Committee.

In this context, the Council on Antitrust and Trade Regulation of the Federal Bar Association, in conjunction with The Bureau of National Affairs, Inc., organized a Briefing Conference and Sym-

posium where prominent legislative participants in the shaping of this landmark enactment could present their reflections and expectations,* and where policy-making officials of all three implementing agencies were provided a forum to preview the Act's prospective implementation.

The following articles represent the first authoritative symposium of viewpoints for the guidance of the business community and business counsellors in planning for compliance and co-existence with the forthcoming officials edicts in a new era of marketing regulation.

Only the future will tell whether the American housewife or the American lawyer will emerge as the happiest beneficiary of this Act.

Based on past experience with detailed statutory constraints on dynamic commercial activities, countless controversies, commentaries, disputations, interpretations and symposia will proliferate from the fertile forensic minds of ingenious counsel, both government and private, before the practical implications of the Fair Packaging and Labeling Act of 1966 for the marketing patterns of the American economy are fully perceived and resolved. **[The End]**

STUDIES OF NATION'S DRUG SUPPLY TO BE CARRIED OUT BY NEW UNIT

The Food and Drug Administration has announced that on July 1 it will establish a new Division of Pharmaceutical Sciences which will make intensive studies of the nation's drug supply. The Division will be composed of four units. One is the St. Louis drug testing center which was started on a pilot basis in spring of 1966. The others are the Drug Bioanalysis Branch, the Drug Chemistry Branch, and the Instrumental Systems Research Branch. Acting director of the new division will be Dr. Daniel Banes.

The FDA's plans for the Division include analysis of 300,000 drug samples a year, although it will take several years before the Division can reach this goal. Division laboratories in Washington, D. C. will also conduct research on the chemical composition of drugs and will develop new methods of analyzing drugs. The Division will also be concerned with developing new methods of determining the concentration of drug compounds in tissues and body fluids.

The new Division, which will be a part of the FDA's Bureau of Science, will include the already existing Division of Pharmaceutical Chemistry, the Division of Pharmacology's bioassay laboratories, and the Division of Microbiology's drug microscopy group.

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* Senator Philip A. Hart was prevented by an urgent trip to Vietnam from participating in the program for May 25. Senator Thruston B. Morton graciously consented to deliver some informal remarks in lieu of Senator Hart's scheduled presentation, which was subsequently made available for publication.

Truth-In-Packaging Revisited

By SENATOR PHILIP A. HART

Senator Hart of Michigan Is Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U. S. Senate.

WHEN THE 89th CONGRESS FINALLY PASSED—almost unanimously—the Truth-in-Packaging bill, I said, "It is my belief that the passage of the Truth-in-Packaging bill in its final form is a historic breakthrough in the area of consumer legislation; that this breakthrough is the beginning of a long and successful program of consumer assistance legislation; that the Truth-in-Packaging bill is strong, effective and meaningful legislation."

Yes, my fingers were crossed. But only to wish that strong regulations would be promulgated under the directions and standards of the bill. For as the President noted at its signing, the bill would prove either effective or non-effective, depending on how the administrative agencies responded to the legislative mandate.

The Response of Administrative Agencies

There is always some danger when the writing-in of details is left to an administrative agency. However, because of the nature of the subject, it seemed to me that the need for flexibility and specific expertise demanded this approach. Congress is not equiped to write detailed specifications for hundreds of product lines. Nor does freezing this kind of detail into a statute make much sense.

Therefore, the possibility of Congressional intent being thwarted by agency inaction or timidity seemed a necessary risk in the interest of sound, meaningful and fair legislative draftsmanship.

The Food and Drug Administration (FDA) regulations now have been written and the Federal Trade Commission (FTC) can be expected to conform with those of FDA. In addition, the Department of Commerce has established procedures and set up machinery to develop weight and measure standards where "undue proliferation" requires it.

Since publication of the FDA proposed regulations, I have heard no informed source apply the description "watered down" to the law as some were doing at the time of its passage. Indeed, at the Federal Bar Association Briefing Conference on the legislation, expressions suggested quite the contrary.

It is apparent to me from the FDA regulations and the procedures established by the Department of Commerce that the agencies entrusted with formulating regulations have fairly interpreted both the spirit and intent of Congress. The regulations appear strong enough to assure meaningful improvement in consumer assistance and at the same time are not unduly harsh for industry. The regulations published thus far, I believe, are well balanced and deserve industry support.

Unfortunately, this support does not look likely. Hundreds of comments have been filed by industry groups. While some are constructive and reasoned, many are not. They appear, instead, to be raising the same arguments which were used in an attempt to defeat the legislation. Industry serves neither its own best interest nor that of consumers when it closes its eyes to the fact that Truth-in-Packaging is now the law of the land. Congress considered—and rejected—the objections which are being made in response to publication of the proposed regulations. I cannot emphasize too much one point which I think is obvious—the bill has passed; these objections are now resolved.

The goal of affected parties now should be not to frustrate the law's implementation but to insure that regulations are workable and fair. Some diehards seem not to understand that they only hurt their own long-term best interest when they adopt an obstructionist instead of a constructive stance.

They should remember that the bill was passed to assist consumers. This policy must be uppermost in the actions of the agencies involved. Certainly there will be some inconvenience and difficulties for industry in the first instance. But these were carefully weighed in Congress (for almost five years) and on balance the present formula contained in the "Truth-in-Packaging" bill was accepted.

I hope that in the future the more constructive lead of the more realistic companies and trade associations would become the standard for the industry.

Of course, the regulations proposed to date deal only with the mandatory provisions of the bill. We have yet to see what action will be taken under the discretionary sections. It will be necessary for the agencies to continue their momentum if the consumer is to

gain the full measure of assistance the bill provides. However, a sound beginning is a good omen for a successful program. It is likely the agencies are no more anxious to have Congress begin further consideration on ways to strengthen the Truth-in-Packaging bill than is industry. Yet Congress surely will re-enter the picture if effective agency effort lags.

Undue Proliferation

Congress also left the door open on one of the most controversial aspects of the proposal. This related to establishment of reasonable weights and measures where undue product proliferation requires it. The law contains a House amendment of a voluntary procedure for the so-called mandatory provision of the Senate version. It is this section which truly puts the good faith of industry on trial.

Industry argument ran that reforms in this area can best be accomplished voluntarily. Enough House members believed these arguments to give industry its chance. But if industry does not make good on its promise, not only will it invite swift legislative response from those who took its word in good faith; in addition, grave doubts will be cast on such arguments in regard to other legislation. Whether or not voluntary solutions to economic problems are possible is the sole issue here. And how it is resolved in this case will have far-reaching legislative consequences.

One fact must be evident—Congress has given a clear mandate that undue proliferation must cease. And in many respects the mandate in the House version is more clearly set forth than in the earlier Senate version.

First, the House removed the Senate's complex procedural steps. All appeal procedures were removed in regard to this provision.

Second, the House removed all the "due regard" provisions which would have required extensive evidence by the agency in five different categories, all difficult of proof.

Third, the House removed all exceptions to the provision contained in the Senate bill.

Fourth, the House version requires a yearly report to Congress and suggestions for legislation if voluntary procedures are not working.

The final act, therefore, removes all exemptions, all strictures regarding specific findings to be made by the agency and all appeal procedures which had been contained in the Senate version.

The House action, agreed to by the Senate, makes clear the intent of Congress that the "unreasonable weight and measure" provision

"be a simple, direct and uncluttered demand" to industry to work out reasonable solutions with the Department of Commerce or face tough mandatory legislation.

A word is also in order on the concept of "undue proliferation." It does not refer to numbers alone but must be considered in relationship to the product market involved. It is a relative term. An individual manufacturer may have no more than four separate weights. And his principal competitors may have no more than four separate weights. But if the weights are not standardized, so that in the aggregate the consumer is faced with a larger number of differing weights in competing brands, undue proliferation may exist. The purpose of this provision is not to encourage a counting game—rather to consider realistically the problem of the consumer in attempting to compare prices of competing brands.

Value Comparison

Shifting to another area, at the time the bill was passed I said:

The Senate Truth-in-Packaging bill declared it a policy of the United States to assist consumers by "facilitating *price* comparisons." The House very deliberately changed the word *"price"* to *"value,"* and this change has been concurred in by the Senate. What this means is that the U. S. Congress has now assumed responsibility for assisting consumers by facilitating *"value* comparisons." This declaration is significant because it enlarges Congressional policy to include "quality" comparison—a component of value. This *"quality"* element has vastly greater implications than the more limited concept of *price.* For instance, it opens the door to consideration of legislation such as grade labeling and government testing of consumer products.

After passage of the bill the reason for the change was given a different interpretation by the author of the amendment, Congressman Gilligan. He said:

It is designed to insure that the government agencies and officials charged with enforcing the law and issuing regulations thereunder do not exercise the powers conferred upon them, particularly section 5, for the sole purpose of facilitating a mathematical computation; that is, a price comparison, in the supermarket aisle. Price is only one element in a *consumer value decision;* other factors of equal or greater importance are product performance, the convenience of the package, and the suitability of the size or quantity of the product in satisfying a *consumer's* personal desire or need. Obviously what constitutes value is highly subjective.

Congressman Gilligan did not give this explanation until the Act had been passed by both houses; hence it is not part of the Congressional history of the bill when one determines Congressional intent.

It seemed to me that the House amendment was clear and unambiguous on its face. Changing the word "price" to "value," it appears to me now, as it did at the time of consideration and passage,

obviously adds the element of quality to the policy statement. Had Congressman Gilligan made his after-the-fact explanation before the bill was passed, there are many of us who might not have been so ready to accept the amendment.

Indeed, the conferees' report states:

> Section 2 of the Senate-passed bill states that the label on packages of consumer commodities should facilitate "price" comparisons, and section 5(c) of the Senate-passed bill provides that the discretionary regulatory requirements would be applicable where necessary to facilitate "price" comparisons. In both instances, the House amendment uses the term "value" in lieu of "price." The conference substitute adopts the House version and uses the term "value" in both instances. The conferees wish to make clear that the concept of "value comparison" is broader than the concept of "price comparison" and includes the latter within the former as a very important factor in making a value comparison.

This is the only reference I am aware of either in the floor debates or in any report on the matter. And I for one accepted the language at face value. It is doubtful that the clear, unambiguous language can be modified by the unspoken motives of the sponsor.

Conclusion

One last word. Relatively modest requests were made by the agencies involved for appropriations to cover their Truth-in-Packaging activities. These were cut, in some cases substantially, by the House Appropriations Committee. It would indeed be ironic if, after five years of legislative battle ending in almost unanimous Congressional approval, the war were to be lost because of inadequate agency appropriations.

The bill is entitled to a fair chance. The consumer is entitled to save the money which proper agency response to the law's direction will make available.

It is neither good economics nor good sense after a house has been built to let it rot by saving a few dollars on paint.

I am confident that the modest requests will be restored, for certainly this, at least, is the commitment of Congress to the American consumer implicit in passage of the legislation.

The Truth-in-Packaging bill is a historic breakthrough in consumer legislation. It heralds increasing Congressional awareness of consumer problems. The measure of its application depends on agency determination and good sense, and industry cooperation. The outcome will determine the direction of Congressional action for many years to come in this field. I would hope that an awareness of this basic fact is clear to all concerned. **[The End]**

The Philosophy Behind the Fair Packaging and Labeling Act of 1966

By PAUL G. ROGERS

Congressman Rogers, a Representative from Florida, Is a Member of the House Committee on Interstate and Foreign Commerce.

IF WE ARE TO COMPREHEND the present status of the Fair Packaging and Labeling Act and from it measure the shape of its future we must first understand what brought this legislation into being. In considering a bill as complicated as the Fair Packaging and Labeling Act, this entails a review of the legislative process and Congressional intent and how they influenced the enactment of this new law.

From the vantage point of the House Interstate and Foreign Commerce Committee, I would say that this Packaging and Labeling Act is an example of the Congressional deliberative process at its best. It is legislation that was molded into shape by many months of thoughtful consideration, extensive discussion, and unlimited debate.

So this bill came out of the House Committee and Congress *not* as the Administration's bill, *not* as industry's bill, *not* as the bill of any specific interest or pressure, but rather as Congress's own bill—a bill reflecting what the people's representatives in Congress determined was needed to advance the interest of consumers in today's complex marketplace.

Of course, not a few would have preferred a different and possibly less onerous law. Some emphatically cried out for requirements far more severe. Others preferred no legislation at all. But to every shade of opinion our House Committee gave a full and fair hearing.

It was then, in this careful and reasoned fashion, that the 89th Congress incubated and hatched out the Fair Packaging and Labeling

bill of 1966. And having so carefully fashioned this legislative child, Congress has no intention of shirking its responsibility as the parent. This is to say that we who labored long and hard to make this bill the law of the land are determined to have it enforced and observed in the manner and to the extent that we intended.

Congress, therefore, is going to watch carefully how the business community positions itself with respect to this new law.

Responsibility of Industry

The Fair Packaging and Labeling Act, as it finally emerged, was based on a major premise that the overwhelming majority of the nation's consumer products manufacturers, processors and producers are honest and responsible citizens who seek to deal fairly with their customers, the consuming public. It follows that this legislation presumes full compliance and cooperation on the part of the industries concerned. It would be a grave error for these industries to misread this premise, and default on their responsibilities.

The need for federal regulation of certain packaging and labeling practices has been demonstrated.

The question now is "How much regulation is needed?" How much depends on industry's reaction to the bill as enacted. The more successfully industry can get its own house in order, and can itself correct packaging and labeling practices which confuse or mislead consumers, the less need there will be for federal regulation or intervention. I hope that industry will clearly recognize this and will not delay in effecting the steps necessary to carry out the intent of Congress as expressed in the Packaging and Labeling Act.

Responsibility of Administrators

But there is another side to the coin. Congress will be equally watchful of the manner in which the bill is implemented by the agencies charged with such responsibility.

I stress this for a number of reasons, but especially because of the attitude—sometimes held by some departments and agencies in downtown Washington—that the legislative branch, after having passed a bill, loses custody of the child as soon as it is signed into law. From that point on, according to this view, the law becomes a ward solely of the administrators charged with its implementation.

I would not mention this attitude if it were uncommon in official Washington. But a number of times in recent years the intent of a

law passed by Congress has been so stretched on the rack of regulatory interpretation as to disfigure it beyond recognition.

Such an unhealthy tendency must not pervade the proposed administration of this new labeling and packaging statute. Where existing regulations are clearly adequate, where industry and various echelons of government have already acted responsibly and reasonably, and, also, where experts in this difficult area have labored long and conscientiously to satisfy consumer need—then change *for its own sake* becomes worse than unnecessary: it becomes an unwarranted cost burden upon the consuming public, a needless imposition upon industry, a distortion of Congressional intent, and an indulgence of bureaucratic pettiness.

I say this in the best of spirit and not to impugn motives. But I do give voice to a growing apprehension lest inter-agency relationships and a yen to blaze new consumer trails generate results harmful to objectives that we all share. These results are likely to be directly at variance with the manifest intent of the Congress to help the consumer, not add to his financial burden.

Federal "Take-Over" Not Needed

Unfortunately, there *are* irresponsible elements in business, as in all other human endeavors. But common sense suggests that if consumer product industries were as hostile to the public interest as some critics contend, our entrepreneurial system would long ago have failed.

The evidence is directly to the contrary. It demonstrates that we have the most successful consumer economy in the world. And I would be among the first to acknowledge that its success arises from the intensity of *competition* for *consumer favor,* not from Federal fiat and dictation.

Precisely for that reason, I find an inner contradiction in the contention of some that massive Federal intrusions into the marketplace are needed to protect consumer interests. The implication is that the government must take over to bring rationality and order into the mounting "complexity" of the marketplace. Yet, this very "complexity" is the response of a delicately balanced, continually adjusting, consumer-oriented economy that is driven by its own internal forces to meet the ever-changing needs of American consumers.

This point is particularly relevant on the question of product proliferation. You will recall that early drafts of the bill would have

required the federal regulatory agencies to impose mandatory solutions wherever problems of "undue proliferation" of package sizes, weights, etc., exist. After considerable testimony on this subject and careful consideration by the House Commerce Committee it became apparent that this was a much more difficult problem than had at first been supposed. The end result was to adopt a different approach and permit *voluntary* solutions to "undue proliferation," and to enable such problems to be solved more sensibly on a case by case basis. We trust, therefore, that industry will move ahead expeditiously in developing voluntary and workable solutions to problems of product proliferation, thereby justifying our confidence in industry's ability to carry out Congressional intent in this area.

A final important point pertains to the requirements in the statute's "Declaration of Policy" that packages and labels should facilitate "value comparisons" by consumers. The change from the words "price comparisons" in the original bill to "value comparisons" in the final version again was made after lengthy testimony and careful congressional deliberation. Perhaps it would be well to reiterate briefly the reason for this change as explained by its author, Congressman Gilligan:

> It is designed to insure that the government agencies and officials charged with enforcing the law and issuing regulations thereunder do not exercise the powers conferred upon them, particularly section 5, for the sole purpose of facilitating a mathematical computation; that is, a price comparison, in the supermarket aisle. Price is only one element in a *consumer value decision;* other factors of equal or greater importance are product performance, the convenience of the package, and the suitability of the size or quantity of the product in satisfying a *consumer's* personal desire or need. Obviously what constitutes value is highly subjective.

The point here is that each value decision must be made by the *individual* involved. It is a personal judgment of the kind the federal government is ill-equipped to make and should not be—*and is not*—asked to make for the consumer. Thus, it is important for all to remember that it is "value" *according to the judgment of the consumer,* which is here involved, and not "value" according to the judgment of the federal regulatory agencies. There has been some comment from the Senate side revealing a misunderstanding of the intent of this House Amendment on this very point. The intent of the change was clearly stated by the author of the amendment himself.

In sum, I view the Fair Packaging and Labeling Act as a reasonable, balanced legislative instrument. It was created to apply addi-

tional safeguards in behalf of consumer interests, but without repressive regulation of manufacturing and marketing. We acted on the belief that since an informed and free choice is the goal of our consumer economy, it can best be achieved through industry cooperation, not Government decisions substituted for marketplace decisions.

What now of the future? I see it this way:

If the departments and agencies cleave to Congressional intent, the Fair Packaging and Labeling Act of 1966 is likely to become a legislative landmark in developing a climate in which government and industry can work together effectively and harmoniously to advance the interests of the consuming public. It is, as I have pointed out, the responsibility of both parties, government and industry, to produce the desired result. Time will tell whether or not they will meet that responsibility.

But this we can safely predict: If they fail this responsibility, Congress will act. We will not tolerate either an encroachment by the bureaucracy or intransigence on the part of private industry.

Conclusion

In conclusion, then, let me focus attention on three points:

First, Congress has not washed its hands of responsibility in packaging and labeling areas. We will continue to follow, with active interest, the manner by which this new law is implemented by both the agencies and industry.

Second, we in the legislative branch are determined to fulfil our duties and responsibilities in areas of consumer problems.

And finally, I am convinced that the Legislative Branch will continue to adhere to the principle that our political and economic system is based on the protection of the interests of citizen-consumers who have minds of their own, are capable of making intelligent decisions in the supermarket, and neither need nor want their decision-making power turned over to Big Brotherism in Washington.

This then, as I view it, is the sum of the philosophy behind the Fair Packaging and Labeling Act of 1966, a law enacted to protect the most basic consumer interest, which is the right to a free and informed choice in an abundant, free economy. **[The End]**

The Role of the Department of Commerce

By J. HERBERT HOLLOMON

Mr. Hollomon Is Acting Under Secretary of Commerce.

THE RESPONSIBILITIES OF THE SECRETARY OF COMMERCE under the Fair Packaging and Labeling Act of 1966 are not regulatory in nature. However, the Congress has clearly set forth in this Act particular duties which the Secretary of Commerce must undertake in cooperation with industry and consumers in achieving the objectives of the Act. I think the declaration of policy in the law provides the tone and purpose for carrying out our responsibilities, which the Secretary of Commerce has now delegated to the Assistant Secretary for Science and Technology. Let me quote the declaration of policy:

> Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer goods.

I should like to discuss these responsibilities, explain how they will be administered organizationally within the Department, and generally indicate the nature of the recently published proposed procedures for determining when there is undue proliferation of weights, measures or quantities in which any consumer commodity is being distributed in packages for retail sale.

Under this Act, we have essentially four duties:

(1) Making determinations of undue proliferation;

(2) Processing voluntary product standards under our published procedures;

(3) Reporting to Congress with recommendations, both annually and in specific instances where the voluntary standards process does not work; and

(4) Cooperating with State weights and measures officials.

Let me first elaborate on each of these responsibilities and then discuss the arrangements we have made for the administration of these responsibilities.

Undue Proliferation

Section 5(d) of the Act states:

> Whenever the Secretary of Commerce determines that there is undue proliferation of the weights, measures, or quantities in which any consumer commodity or reasonably comparable consumer commodities are being distributed in packages for sale at retail and such undue proliferation impairs the reasonable ability of consumers to make value comparisons with respect to such consumer commodity or commodities, he shall request manufacturers, packers, and distributors of the commodity or commodities to participate in the development of a voluntary product standard for such commodity or commodities under the procedures for the development of voluntary products standards established by the Secretary pursuant to section 2 of the Act of March 3, 1901 (31 Stat. 1449, as amended; 15 U. S. C. 272). Such procedures shall provide adequate manufacturer, packer, distributor, and consumer representation.

I think it would be helpful to eliminate some of the possible confusion regarding our responsibilities for making determinations of undue proliferation. The section I have just read was very carefully drawn by the Congress. The words have special meanings that we shall take quite seriously in administering this provision. The first point I should make is that the purpose of this section is to identify those situations in which the consumer's *reasonable* ability to make value comparison with respect to a consumer commodity is impaired *because* there is *undue* proliferation of the weights, measures or quantities in which the commodity is being distributed for sale at retail. This provision—

Does not condemn the proliferation of consumer commodities. (No one is suggesting that a diversified market choice is not good in a consumer-oriented economy.)

Does not apply to the performance of the product itself.

Does not substitute the Government's judgment of marketplace choices for that of the consumer.

The provision *does* require the Secretary to be concerned about—

Weights, measures or *quantities* in which consumer commodities are being distributed in packages for retail sale.

Whether any proliferation of these weights, measures or quantities is *undue*.

Whether the ability of an objective, reasonable and prudent consumer to make value comparisons is impaired by any undue proliferation.

Our proposed procedures seek to provide a clear and orderly process by which these determinations can be made. This would begin with information gathering and cooperation, and would extend to a notice of any formal inquiry, which would give the opportunity for full presentation of views, notice of any proposed determination and the possibility of oral hearings before a final decision is made. The procedures we have proposed do not contain substantive criteria as to what is or what is not a situation of undue proliferation. Though in time substantive criteria may be developed, for the present we shall proceed on a case by case basis. It is difficult for us at this point to state that what is undue proliferation in the weights or quantities of one product is the same as that of another. But I am sure that we will be asking such questions as what patterns exist in particular areas; how many quantities there are within a reasonable range of sizes; whether there is any pattern of marketing in weights, quantities or measures; whether price comparisons can be easily made; what classes of products are sold in the weights or quantities in question; and whether it is reasonable to compare one kind of a product with another for purposes of making a value comparison.

Processing of Voluntary Product Standards

Once a determination is made that undue proliferation exists, then the Act requires the Secretary of Commerce to request manufacturers, packers and distributors to participate in the development of a voluntary product standard under the Department's published procedures which govern the voluntary standards program. These procedures, in a revised form, were issued in December 1965.

A distinguishing characteristic of the voluntary process is that the Government does not determine what the standard for a particular class of products should be. Our 1965 procedures make it clear that the general agreement of representation of producers, distributors and consumers of a commodity is required in the process of developing and reviewing the standard. In addition to consumer participation, our procedures require, in the interest of safeguarding all interests, that there be a consensus in support of the standard. We define con-

sensus to mean general concurrence, with no substantive objection deemed valid by the Department.

This process differs from the mandatory standard process in which the Government itself proposes and has the final responsibility to prescribe a standard, such as for auto safety or foods and drugs. Interested persons participate in setting mandatory standards through the rulemaking process; this means that, under the Administrative Procedures Act, proposed rules must be published and interested parties afforded an opportunity to comment before a mandatory standard is issued. In the voluntary standards process, the Government acts as an impartial arbiter in making certain that there is general concurrence, and that there is no technical or substantive objection to a standard which has merit, and in determining that, if published, the standard would neither be adverse to the public interest nor against the law.

In adopting the principle of voluntary standardization for the weights, contents or measures in which consumer commodities are sold once undue proliferation has been found, the Congress made clear that it did not wish to delegate to the agencies any authority to make the choice for industry or, for that matter, for consumers. Rather, it wished to provide opportunity for the operation of the tradition of advance consent of all interested parties in a voluntary process, before any mandatory regulation is authorized. However, the Congress did recognize that if undue proliferation is identified and no voluntary action takes place to correct it, there may be a need for the Government to mandate a standard. Therefore, Congress wisely provided that the Secretary of Commerce *must* report back to Congress if the voluntary standards process does not work.

Our voluntary standards procedures require a proposed standard to be worked out in a balanced committee appointed by the Department to include members from producers, distributors, packagers, users and consumers of a particular commodity. If the committee agrees by a three-quarter vote on a particular standard, the committee may recommend it to the Department with a report which explains both the standard and the reasons for it and explains why any objections were rejected.

When it receives a proposed voluntary standard from a committee, the Department determines whether the standard is technically adequate, is adverse to the public interest or is inconsistent with law or established public policy. Upon preliminary approval, the standard is circulated to a representative list from the industry concerned to

determine whether it is supported by a general concurrence in each segment of the industry (producer, distributor, consumer or user segments). Even with general concurrence, there must be no valid substantive objections. After all requirements have been met, the standard is published by the Department of Commerce as a voluntary standard.

Reporting to Congress

Under the Fair Packaging and Labeling Act, if the Department of Commerce makes a determination of undue proliferation, then the Secretary *must* request the affected industry to participate in working out a voluntary standard through the process I have just described. If this process does not succeed within a year, or if a standard is published and it is not being observed, then the Secretary of Commerce *must* report this situation to the Congress with his legislative recommendations. This requirement is found in Section 5(e) of the Act which reads as follows:

> If (1) after one year after the date on which the Secretary of Commerce first makes the request of manufacturers, packers, and distributors to participate in the development of a voluntary product standard as provided in subsection (d) of this section, he determines that such a standard will not be published pursuant to the provisions of such subsection (d), or (2) if such a standard is published and the Secretary of Commerce determines that it has not been observed, he shall promptly report such determination to the Congress with a statement of the efforts that have been made under the voluntary standards program and his recommendation as to whether Congress should enact legislation providing regulatory authority to deal with the situation in question.

Reporting to Congress is the final action which the Secretary of Commerce can take. It is intended to be a last resort to be used when the process of voluntary agreement or compliance fails. But I stress the fact that this requirement is not a discretionary requirement. The Congress has directed the Secretary to report if, having gone through the entire procedure I have outlined above, there are no results. The remedy in the final analysis will be both the sanction of public opinion and Congressional action.

In addition to the specific reports required by Section 5(e), the Secretary is required to transmit a general annual report describing the Department's activities during the preceding fiscal year.

Cooperation with State Weights and Measures Officials

The Act also requires the Secretary of Commerce to transmit to States copies of regulations promulgated by the Federal Trade

Commission (FTC) and the Secretary of Health, Education, and Welfare. He is also directed to furnish the States information and help in promoting uniformity in state and federal regulations in the labeling of consumer commodities. These duties appear in Section 9(a) which reads:

> A copy of each regulation promulgated under this Act shall be transmitted promptly to the Secretary of Commerce, who shall (1) transmit copies thereof to all appropriate State officers and agencies, and (2) furnish to such State officers and agencies information and assistance to promote to the greatest practicable extent uniformity in State and Federal regulation of the labeling of consumer commodities.

For over half a century, the National Bureau of Standards in the Department of Commerce has sponsored the National Conference on Weights and Measures, an organization of state and local weights and measures officials. Its interest is in promoting national uniformity in weights and measures regulations. From the legislative history of the Fair Packaging and Labeling Act, it is clear that Congress intends us to continue to use this organization in helping to achieve the purposes of the Act.

The cooperation function is significant in light of Section 12 of the Act which declares it to be the express intent of Congress to supersede State laws which provide less stringent labeling requirements as to the net quantity of contents of packages covered by the Act or which require information different from that contained in the regulatory section (Section 4) of the Act.

Administration of Responsibilities

The responsibilities of the Secretary of Commerce under this Act have been delegated to the Assistant Secretary for Science and Technology. On May 24, we issued a directive which covers the administration and redelegation of authority concerning the Act. The directive establishes an Office of Standards Review as a staff arm of the Assistant Secretary of Commerce for Science and Technology. It also redelegates to the Director of the National Bureau of Standards most of the authority under the Act. The following functions, however, are retained by the Assistant Secretary, who will use the newly created Office of Standards Review for helping him make appropriate determinations:

(1) To determine whether or not there is undue proliferation of weights, measures, or quantities of a consumer commodity

if there is, to request industry to participate in a voluntary process.

(2) To report to Congress as appropriate.

(3) To determine whether a voluntary standard proposed by the National Bureau of Standards in cooperation with the industry should be published.

The Director of the National Bureau of Standards now has authority to initiate and conduct inquiries for the purpose of gathering facts and views concerning the existence of undue proliferation. We fully expect the cooperation of many businessmen and consumer groups, and we know that much can be done by the National Bureau of Standards without even reaching the point of having to commence a formal proceeding to determine whether there is undue proliferation.

As our proposed procedures state, the National Bureau of Standards would commence a formal inquiry into undue proliferation only after the information which is collected indicates that undue proliferation exists. Under these proposed procedures, the Director of the National Bureau of Standards will have the discretion to take into account whether an industry is taking steps to correct a situation which is troublesome. I do not think that anyone would want a formal proceeding, whatever the results, if it can honestly and effectively be avoided by voluntary cooperation. But there is a safeguard for business and consumers alike in the requirement that before the Department makes any determination which begins a process which might lead to a report to Congress, there will be adequate notice and opportunity for the full consideration of the views of the private parties affected.

In summary, the Congress has given us a purpose to accomplish. We are charged to carry out this purpose in a voluntary cooperative manner. We hope that Congress will not have to pass legislation to correct specific abuses. I know that Secretary Trowbridge and the other officers of the Department and the National Bureau of Standards will want to do everything in their power to obtain results in cooperation with industry and business for the benefit of the consuming public, which is all of us. **[The End]**

The Role of the Department of Health, Education and Welfare

By DEAN W. COSTON

Mr. Coston Is the Deputy Under Secretary of Health, Education and Welfare.

THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE has a long and active concern in the field of consumer legislation. One of the major consumer protection agencies in government is the Food and Drug Administration (FDA). But our concerns for consumers are seen in every aspect of our operations. They can be seen in the interest of the Office of Education in assuring access to the higher education system; of the Public Health Service in the quality of medical care; and of the income-maintenance efforts of the Welfare Administration and the Social Security Administration. In all of our agencies and activities, the interest of people --consumers all—is paramount.

So it is only natural that we would have a concern and an interest in the Hart Act—"Truth-in-Packaging," or more correctly, "The Fair Packaging and Labeling Act."

We have an equal concern to speed the enactment of legislation long considered the companion piece, the Truth-in-Lending bill conceived by Senator Paul Douglas.

We have, as a Department, and I have personally, supported constructive consumer legislation since the beginning of the 87th Congress in 1961. Senator Hart's proposals were endorsed by President Kennedy in his 1962 consumer message and again by President Johnson in his 1964 message. But it was not until the 89th Congress that we felt that a real opportunity to enact a fair packaging bill present. And ultimately, as you well know, a bill passed late in session was signed by President Johnson on November 3, 1963.

The legislative history in the 89th Congress of the Fair Packaging and Labeling Act demonstrated the Department's support of that legislation and its unqualified commitment to the task of carrying out the congressional mandate. Under Secretary Cohen, Deputy Commissioner Rankin of the (FDA), Mr. Goodrich of the General Counsel's Office, and other members of the Department offered testimony in support of the bill during the crucial stages of its consideration by the Congress. The position of the Department as stated by these witnesses was and is that while this legislation is not a panacea for all of the confusion existing at the retail counter, it is a large step toward the elimination of such confusion.

We do not share the views of those who think this Act is a weak and watered-down version of what had been originally proposed and of what had been passed earlier by the Senate. We believe that this legislation offers significant and new consumer protection features. The authority of the Secretary of Health, Education, and Welfare to designate a uniform location for the net quantity declaration on the labels of foods, over-the-counter drugs, cosmetics and devices, to set uniform type sizes for the net quantity declaration, and to simplify cost per unit computations by requiring dual declarations of the quantity of contents will be exercised in the best interests of the consumer and the industry. Despite what we have been reading recently in business publications, we do not believe that the interests of the consumer and the industry in this area are unalterably opposed. For example, we cannot see how labels that produce confusion and eye strain simultaneously promote the fair competition that most manufacturers seek. We believe that exercise of these powers and promulgating regulations controlling servings declarations, prohibiting misleading qualification of net quantity declarations, setting standards for package-size characterizations, limiting "cents-off" representations, designating ingredient listings for cosmetics and making regulations preventing nonfunctional-slack-fill of containers will, in the eyes of consumer and industry alike, work a change for the better in the market place. The Department worked vigorously for the enactment of this legislation and will, with equal vigor, support implementation and enforcement of the Act in the coming months.

Administration of the Act

On January 23, 1967, Secretary Gardner delegated to Commissioner Goddard of FDA all of the functions vested in the Secretary of Health, Education, and Welfare by the provisions of Public Law

89-755. The Federal Register of May 4, 1967, carried notice of this delegation. When the Office of the Secretary delegated this authority, it did not delegate its interest in the further implementation of the Act. On the contrary, the Office of the Secretary continues to share FDA's concern and desire that this congressional mandate be put into effect with zeal and imaginative administration. The Secretary's Office has taken part in the development and review of the initial proposed regulations under the Act and will continue its concern with future regulations. It may interest you to know that the Office of the Secretary encouraged the early publication of the initial proposed regulations so that the final orders might be published coincident with the July 1 effective date of the Act.

The Department intends to make this legislation work. As we said to the House Committee on Interstate and Foreign Commerce, this legislation is a reasonable and practical compromise "between those who want the Federal Government to take a stronger role in regulating and preventing the use of unfair or deceptive methods and those who favor exclusive reliance on present methods." We believe that through a judicious application of the mandatory and discretionary powers of sections 4 and 5 combined with enlightened voluntary standardization by the industry under paragraph (d) of section 5, a substantial number of the retail counter abuses, confusions and deceptive practices considered by the Congress can be eliminated. We recognize there will be some inconvenience to the industry in carrying out the initial label revisions required by the Act and the implementing regulations, but we do not accept statements that the law is unnecessary and unworkable. We heard the same lament about the Federal Hazardous Substances Labeling Act (FHSLA) a few years ago. The label changes required by this Act will, of course, have a greater impact on industry as a whole than those of FHSLA, but they are no less required by law.

The Congress recognized the necessity of a gradual phase-out of non-complying packages and labels, and the Department stands ready to discuss inventory problems with any manufacturer or association of manufacturers in relation to statutory "Law Days" and administrative effective dates of regulations. The Department sees no merit in arguments to the effect that all or certain segments of the Act are unnecessary or should be placed in administrative abeyance. These arguments either should have been made to the Congress or were made and rejected by the Congress. The time has come for the representatives of industry and government to address themselves to

the task of making this legislation do the job Congress intended should be done and which the housewife expects is going to be done. The Department's present and future role will be that of assisting all affected parties in the execution of this task. The Department will see to it that FDA is supplied with the resources adequate to promulgate and enforce the necessary regulations under the Act.

We agree with Senator Hart's analysis that the congressional policy stated in the Fair Packaging and Labeling Act marks the beginning of a new and continuous program of consumer assistance. I think the words addressed by Under Secretary Cohen to Chairman Staggers on July 26, 1966, are particularly in point:

> We pledge our Department's full cooperation with industry and the other governmental agencies in making this legislation work fairly, efficiently, and effectively. We believe it can be administered in a way which will assure continued legitimate innovation in packaging, labeling, and merchandising, and at the same time protect the consumer's interest.

The time for commenting on the proposed regulations of March 17, 1967, closed in May. In response to the government's invitation to submit comments and briefs, approximately 200 separate pieces of correspondence comprising many hundreds of pages were submitted to the Hearing Clerk, Department of Health, Education, and Welfare, by firms, associations, and individuals who used the opportunity to participate in the rule-making procedure. The cooperative effort to which I referred above will be exercised in the review, analysis, and compilation of these submissions. Let me assure all those who took the time and made the effort to comment that there will be no pro forma review. Each comment or brief will be carefully weighed and considered before any decision is reached on the final content of the regulations. I use the term "final content" with reservations because, as you know, the order, which will result from the proposal and the comments, is subject to objections, public hearings, and/or appeal to the U. S. Circuit Court of Appeals. We hope that objections and prolonged hearing or appeal procedures will not delay needed consumer protection. The Department will make every effort to insure that objections do not result from the failure to consider a reasonable suggestion for modification of the proposed regulations. Mr. Goodrich, Assistant General Counsel for FDA, has a habit of saying that our regulations are not everlastingly etched in stone with tongues of fire. If that be the case (again borrowing from Mr. Goodrich's vocabulary), a fortiori, the Department's proposed regulations are plastic enough to be molded by reason under the law. **[The End]**

The Role of the Federal Trade Commission

By JOHN R. REILLY

Mr. Reilly Is a Commissioner of the Federal Trade Commission.

WE CAN ALL AGREE that at this time there is much that is unclear about the scope and enforcement of the Fair Packaging and Labeling Act. Now, just prior to its enforcement date, the statute, like many pieces of federal legislation that have preceded it, appears to many in both the private and public sectors as either a calamity, an unsolvable mystery, or if I may use the vernacular, "a can of worms." If history is any guide, the Act is none of these things and whatever alarm or puzzlement that exists stems merely from novelty.

There are numerous problems ahead in enforcing and abiding with the terms of the Fair Packaging and Labeling Act. But these problems can be solved by communication—communication between the businessman, trade association executive and trade regulation specialist on one hand and the interested government agencies on the other. After all, the Fair Packaging and Labeling Act is a fact. It contemplates equitable treatment of competitors, and businessmen when placed upon an equal footing with their competition are noted for fair and open dealings with the consuming public, which is the primary purpose of the legislation. The principal effort required by the Act is cooperation between industry and government. We must engage in a continuing dialogue to ensure that enforcement efforts will not only further the purposes of the statute but will also take into consideration commercial realities.

In discussing the role of the Federal Trade Commission (FTC) in the implementation of the Fair Packaging and Labeling Act, I will briefly outline the primary duties entrusted to our agency and

tell you what we are doing to effectuate our assignment. Of course, I represent but one of five voters, and as a member of a quasi-judicial body my opinions are subject to radical change based upon personal acquaintance with advocacy and briefs not yet heard or read.

The basic role of the FTC under the Fair Packaging and Labeling Act is readily evident from a reading of the statute. Essentially, the Commission is entrusted with promulgating regulations governing the packaging and labeling of consumer commodities other than foods, drugs and cosmetics. Its initial duty is to promulgate what has come to be known as "mandatory" labeling regulations requiring: (a) the identification of a particular consumer commodity and the name and place of business of its manufacturer, packer or distributor; (b) the uniform location of an accurate statement of the packaged commodity's net contents; and (c) a statement of the net quantity in terms of weight, measure, or numerical count of each serving when net content of a publicly offered commodity is given in number of servings.

The Fair Packaging and Labeling Act also delegates authority to the Commission to promulgate additional regulations when "necessary to prevent the deception of consumers or to facilitate value comparisons." Such "discretionary" regulations would concern: (1) standards for describing packages as "small," "medium" or "large" etc.; (2) rules for the imprinting of special-price or "cents-off" claims on a package; (3) requirements for the disclosure of ingredients ("listed in order of decreasing predominance"); and (4) prohibitions against "non-functional slack-fill" of packages.

The Commission, among other things, is also authorized to exempt a particular consumer commodity from full compliance with regulations when such compliance "is not necessary for the adequate protection of consumers." It may also postpone by regulation the effective date of the Act when such action is determined to be within the public interest.

The foregoing, of course, is common knowledge. However, if there is to be communication in the interest of dispelling initial confusion, the following matters should be explored to the extent that answers are possible at this moment: (1) The Commission's apparatus for enforcing the Act—its staff, and its procedures; (2) The proposal of "mandatory regulations" and "discretionary regulations"; and (3) THE Commission's general policy toward enforcement of the statute.

The Commission's Enforcement Staff

In implementing the Act, the Commission is in the process of restructuring and enlarging its enforcement staff, revising its Rules of Practice, and preparing the promulgation of, or considering the need for, regulations.

With respect to the Commission's enforcement apparatus, we have only recently created a new operating Division called the Division of Special Projects, the primary duty of which will be the preparation of regulations under the Act and the surveillance of compliance with such regulations. The Division is headed by Mr. Harold Kennedy, a very capable career official, and will operate under the direct supervision of Mr. Charles A. Sweeny, the Director of the Commission's Bureau of Deceptive Practices. The new enforcement Division has been initially manned by the reassignment of some of the Commission's more experienced attorneys and will be supplemented, provided there is Congressional approval of an outstanding budget request, by additional legal and technical personnel. Therefore, if you need immediate advice or wish to offer immediate counsel, the men you should contact are Messrs. Sweeny and Kennedy.

Revision of Commission Rules of Practice and Procedure

Under Section 6 (b) of the statute, Commission regulations must be promulgated in conformity with certain provisions of the Federal Food, Drug and Cosmetic Act. This requirement has occasioned extensive revisions in the Commission's Rules of Practice and has consequently delayed promulgation of our proposed "mandatory" regulations. The Rule revisions are presently under consideration and their public adoption may be expected within the next week or so. However, I believe that you may reasonably expect the Commission to adopt the following procedural steps for the promulgation of regulations under the Fair Packaging and Labeling Act:

(1) A notice of proposed rulemaking will be published in the Federal Register which will include the substance or terms of the proposed rule or rules and an opportunity for interested parties to participate in the proceeding through the submission of written data and arguments.

(2) Oral hearings on a proposed rule may be held at the discretion of the Commission. Such hearings will be conducted by the Commission, a member of it, or a member of the Commis

sion's staff. At the hearings all interested persons may appear and express their views.

(3) After consideration of all relevant matters before it, the Commission will adopt and publish an appropriate rule, together with a general statement of the rule's basis and purpose.

(4) On or before the thirtieth day after publication of a rule, any person "who will be adversely affected" may file objections with the Secretary of the Commission (a) specifying provisions of the order deemed objectionable, (b) stating the grounds of objection and (c) requesting a public hearing.

(5) A public hearing will be warranted only if the objections specify the provisions of the order in dispute, and establish: (a) that petitioner will be adversely affected by the order; and (b) that the petition is supported by reasons which, if true, are adequate to justify the relief sought.

(6) Hearings will be held before an examiner whose initial decision may be appealed by the parties before the Commission.

(7) The final order of the Commission disposing of adjudicative hearings under the Act will be published in the Federal Register and, if it contains a rule or regulation, will specify an effective date not prior to the ninetieth day after its publication.

The Commission's expected procedure under the Act, therefore, may be summarized as follows:

(1) Proposing regulations;

(2) Holding adjudicative hearings on some of the final regulations which have been subject to objection; and

(3) Promulgating final regulations, subject to judicial review.

Proposed "Mandatory Regulations"

Staff proposals for the promulgation of initial regulations under the mandatory requirements of the new law are presently being considered by the Commission. As with the revisions in our procedures, these regulations are expected to be publicly proposed within a very short time. In preparing them, the Commission has had the advantage of being able to weigh the comments of members of the food industry regarding the already proposed regulations of the Department of Health, Education and Welfare. It has also had the opportunity of examining the comments of representatives of those industries particularly within Commission jurisdiction. In my opinion, you

can reasonably expect substantial similarity between the regulations proposed by the Food and Drug Administration and those proposed by the Commission.

"Discretionary" Regulations

With regard to the question of "discretionary" regulations, about all I can tell you is that the Commission is now running pilot studies in some industries to ascertain the need for such regulations. Among the practices being surveyed are; (1) the pricing of large sizes at a per-ounce price higher than smaller sizes; (2) the use of premium coupons or reduction of product quantity while increasing or maintaining the retail price; and (3) "cents-off" and other savings claims.

Commission Enforcement Policy

As for the Commission's general policy concerning enforcement of the Act, I can, of course, offer only one man's interpretation. The Commission is on record as viewing the statute as a "Congressional mandate to mount an aggressive, intensive study of all phases of point-of-sale promotional practices affecting the consumer." With some degree of assurance, I can say that this at least means that the Commission intends to implement the Act in such a manner as to enable consumers to obtain accurate information as to the quantity contents of packaged consumer commodities in the interest of facilitating value comparisons. In my personal opinion, it also means that future Commission effort concerning packaging and labeling will extend beyond the terms of the Act. I believe that the statute has neither expanded nor diminished Commission jurisdiction under Section 5 of the Federal Trade Commission Act. Section 5 of the Commission's organic statute prohibits all varieties of deceptive business practices. Accordingly, the Commission could examine a particular industry and determine that the promulgation of so-called "discretionary regulations" concerning savings claims or "non-functional slack-fill" of packages was not needed as such matters did not constitute an industry-wide practice. However, such practices while not industry-wide in scope, could be present as a result of the actions of a few of the many industry members, and could amount to both deception of the public and unfair competition. In such instances, while discretionary regulations would not be in order, case-by-case proceedings under Section 5 of the Federal Trade Commission Act would be appropriate.

This is as much as I can tell you at present about the Commission's role in the enforcement of the fair packaging and labeling act. I am, of course, well aware that there are some rather sticky problems ahead. What is a consumer commodity? What constitutes grounds for promulgation of discretionary regulations or for the exemption of particular products from the scope of the Act? What standards should be required in a statement of net contents: should it be a minimum serving or an average serving, etc.?

I would emphasize the fact that those of us in government are aware of the magnitude of effort the Act imposes upon the business community, but we believe that this burden can be greatly reduced through a continuous dialogue. To date, the cooperation extended by industry, particularly the various trade associations, has exceeded our expectations. As we propose our initial regulations under the Act, we expect to hear further from you. We would be either impossibly vain or naive not to anticipate objections to our proposals. However, we would be disappointed to receive objections grounded solely upon the premise of opposition for the sake of opposition to the original purpose of the Act.

We need your constructive counsel. In recent years, the Commission has followed the "open-door" approach, encouraging comment on various matters from the business community and offering, in advance of action, advice as to the legality of a proposed transaction. Certainly, we are not about to deviate from this policy in regard to the enforcement of the Fair Packaging and Labeling Act.

[The End]

NEW DRUG APPLICATION PROCEDURES

Regulations governing the filing of new drug applications have been issued by the Food and Drug Administration. They establish a uniform system for presenting data that must be filed. The regulations, applying only to drugs for human use, require that applications include a summary of the essential elements, a table of contents, an evaluation of the safety and effectiveness of the drug, and reports of all adverse experiences submitted on a standard form (FD 1639).

Specific requirements are included for binding, assembling and numbering pages and volumes of applications. The regulations also require samples of advertising copy for prescription drugs, and mailing pieces and other labeling devised for the promotion of a new drug at the time of their initial distribution. CCH FOOD DRUG COSMETIC LAW REPORTS ¶ 71,301 and following, 32 *Federal Register* 8080.

Key Issues Posed for FTC Staff by the Act— Coverage of the Act

By CHARLES A. SWEENY

Mr. Sweeny Is the Director of the Bureau of Deceptive Practices of the Federal Trade Commission.

IT IS A MATTER OF ROUTINE for me to begin a talk such as this by explaining that I am speaking for myself—not officially for the Federal Trade Commission (FTC). That explanation was never more necessary, because I have no indication from the five Commissioners with respect to their attitudes on coverage—as to scope and exemptions.

I propose to address myself to what I consider to be issues posed for determination by the Commissioners, and we may well find that what appear to me to be issues present no problems whatever at that superior level.

The Food and Drug Administration administers the statute as it applies to a food, drug, device, or cosmetic as defined by section 201 of the Federal Food, Drug and Cosmetic Act.

The scope of the Act, in terms of broader application, is referred to as extending to "any consumer commodity," or to "any packaged consumer commodity."

Consumer Commodity

By reference to the definition of "consumer commodity," we learn that the jurisdiction of the Commission extends generally to any product or commodity, other than a food, drug, device or cosmetic, of any kind or class which is customarily produced or distributed for

sale through retail outlets for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use. While the statute clearly excludes specific products, such as tobacco, insecticides, fungicides, rodenticides and some seeds, which might otherwise fall within the general categories of products subject to control by FTC, I am being asked questions as to whether certain classes of products are within the contemplation of the Act.

There are some which would appear to present no problem. Laundry detergents, and scouring powder, for example, are used by individuals in the performance of services ordinarily rendered within the household, and are expended in the course of such use.

However, I do not feel that I, as a staff member, am competent to express a view as to whether some other products are covered.

If a house is not covered by the Act, is wall paint? Is the painting of a wall the performance of a service ordinarily rendered within the household—any more or less than scrubbing the wall with a detergent? Even though it becomes in effect a part of the wall after application, the can of paint, as such, is consumed or expended in the course of such application. Floor wax may be more readily accepted as within the definition. We have had questions raised as to whether floor tile, and linoleum floor covering, are included. I have been unable to supply authoritative answers.

I am equally unable to give you definitive answers today. These determinations are of the sort which are to be answered by the Commission—and some of its determinations may be reviewed by the courts before the questions are finally answered.

Senate Commerce Committee

The legislative history does not, in my opinion, provide clear and complete guidance to me as a staff member. The Senate Commerce Committee and its Chairman, Senator Warren G. Magnuson, made it quite clear that these legislators were concerned primarily with products customarily found in supermarkets; with those expendable commodities used for personal care and household services. I have referred to paint expended in caring for the wall of your home. Senator Magnuson informed the Senate that the bill was not intended to cover paints and kindred products.

He also expressed the view that the bill was not intended to cover:

1. Durable articles or commodities;

2. Textiles or articles of apparel;

3. Any household appliance, equipment or furnishings;

4. Bottled gas for cooking or heating purposes;

5. Flowers, fertilizers and fertilizer materials, plants or shrubs, garden and lawn supplies;

6. Pet care supplies;

7. Stationery and writing supplies, gift wraps, fountain pens, mechanical pencils, and kindred products.

It may be significant that the definition of a consumer commodity in section 10 carefully excludes some classes of products from coverage of the Act, as I mentioned earlier. Additionally the Act specifically excludes exports to foreign countries and vests authority over imports to the Secretary of the Treasury. The question in my mind (the Act having provided so specifically for exclusion of certain products) is to what extent the Commission will be assisted in its interpretation of the general coverage provisions by the legislative history as expressive of the intent of Congress in the final enactment of this statute.

Section 5(b) provides for exempting commodities from full compliance with the regulations. Such an exemption will be granted by the promulgating authority upon a finding that full compliance is impracticable or is not necessary for the adequate protection of consumers because of the nature, form, or quantity of a particular consumer commodity, or for other good and sufficient reasons. The regulations exempting such commodity shall spell out the extent and conditions of the exemption, consistent with the policy of the statute.

I have advised some industry representatives that in my personal opinion an orderly procedure would call for exempting a commodity from a regulation only after the regulation is promulgated, so that a petition for exemption is not yet timely. But my personal opinion in this respect is not an effective bar to submission of such a petition at any time. If one is received it will be considered by the Commission, and I do not intend to anticipate the action which the Commission may find appropriate.

I realize that I have raised questions rather than answered them. I could see no point in staying with the clear provisions of the statute —you can read it. I have instead followed the pattern set by Mr. Kennedy in his discussion appearing in the December issue of Food-Drug-Cosmetic Law Journal.[1]

I should like to close by quoting from him: "Although this article raises many questions, it does not mean that there are no answers to the questions, but only that the answers have not yet been determined." He said also that "This is not a task which can be deferred with prudence."

I agree with both statements. I assure Mr. Kennedy, and I assure you, that these questions can and will be answered, and answered just as promptly as possible.

One thing more. The declaration of policy set forth in section 2 comes through to the staff loud and clear. We are dedicated to a program which will respond in meaningful terms to the mandate we have from the President, the Congress and the American consumer.

[The End]

FAIR PACKAGING AND LABELING RULES PROPOSED BY SECRETARY OF COMMERCE

The Secretary of Commerce has proposed regulations for determining the existence of undue proliferation of weights, measures, or quantities in which consumer commodities are being distributed at retail sale, and for the establishment of voluntary standards by the industry, where the Secretary of Commerce has determined such undue proliferation to exist. In addition, the proposed regulations establish procedures that require the Secretary of Commerce to determine if voluntary standards are not likely to be established by industry or if they are not being observed. Such matters would be reported to Congress with recommendations for appropriate action. CCH Food Drug Cosmetic Law Reports ¶ 40,261, *32 Federal Register* 7532.

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[1] Cornelius B. Kennedy, "Now That Fair Packaging and Labeling Act Is Law," 21 Food Drug Cosmetic Law Journal 632 (December, 1966).

Mandatory Regulations: Labeling Requirements and Regulatory Procedures

By J. K. KIRK

Mr. Kirk Is the Associate Commissioner for Compliance of the Food and Drug Administration of the Department of Health, Education and Welfare.

ANY DISCUSSION OF THE REQUIREMENTS and implementation of Section 4 of the Fair Packaging and Labeling Act of 1966 must be incomplete and ambiguous unless there is concurrent consideration given to several of the provisions of the Federal Food, Drug, and Cosmetic Act of 1938.

As you heard this morning, the procedure for promulgating regulations under Sections 4 and 5, the "mandatory" and "discretionary" sections, respectively, is, in effect, the procedure found in subsections (e), (f) and (g) of Section 701 of the Federal Food, Drug, and Cosmetic Act (FFDC Act). You may also be familiar with the provisions of the Fair Packaging and Labeling Act (FPLA) limiting the Food and Drug Administration's (FDA) regulatory activities to those consumer commodities which are foods, drugs, devices, or cosmetics, as those terms are defined in the FFDC Act. And you may have perused Section 7 of FPLA, which provides that foods, drugs, devices, or cosmetics introduced or delivered for introduction into interstate commerce in violation of any of the provisions of FPLA, or the implementing regulations, shall be deemed to be misbranded within the meaning of the FFDC Act except that the criminal sanctions of the latter Act are not available in the enforcement of FPLA.

The above-cited dependencies should be kept in mind in any discussion of FPLA, but several other relationships are particularly germane to our consideration of the mandatory regulations under Section 4 of FPLA.

First, I would draw your attention to Section 11 of FPLA which states, in effect, that the requirements of this Act are not in lieu of, but rather in addition to, the requirements of the FFDC Act.

Second, you should be aware that three out of the four basic label declarations regulated by Section 4 of the 1966 Act, and for which the 1966 Act requires that regulations be written, are also covered under the 1938 Act, for which interpretative regulations have been in effect for many years. I believe the similarities and differences in the treatments accorded by these two Acts to the three basic label declarations are well worth our attention.

Section 4 provides that the label of a consumer commodity shall specify the identity of the commodity. Compare this requirement with Section 403(i) of the FFDC Act, which finds a nonstandardized food to be misbranded unless its label identifies it by common or usual name, if any there be.

Happily, from a drafting and enforcement standpoint, these provisions can be read to be in harmony, so that it would be possible in one regulation to tell a manufacturer how to identify his food, rather than leave to the individual the task of harmonizing the requirements of two different regulations issued under separate Acts pertaining to the label declaration of the same piece of information.

However, assuming a case of non-compliance, we find that a new uncertainty appears to be introduced; namely, whether the Government will choose to act under the seizure and injunction proceedings available under both Acts, or invoke the criminal sanctions available only under the older Act.

In short, while promulgation of one regulation will make easier the lawyer's task of advising on what the law requires, the fact remains that in a case of non-compliance, different enforcement provisions are available to the Government under separate Acts.

What has just been illustrated is equally true with respect to the requirement of Section 4, that the label of a consumer commodity shall specify the name and place of business of the manufacturer, packer, or distributor. This is identical with Section 403(e)(1) of the FFDC Act.

The 1938 Act makes the same requirement for the labels on packages of drugs, cosmetics, and devices.

Net Quantity of Contents

The label declaration given the greatest amount of attention in the legislative history of FPLA, and indeed in Section 4 itself, is that pertaining to the net quantity of contents. There are points of similarity, identical provisions and, of greater significance, points of contrast.

Both Acts require an accurate statement of the quantity of contents in terms of weight, measure, or numerical count. Both specify that the statement must be conspicuous.

FPLA provides that the statement shall be in easily legible type. The 1938 Act similarly provides that such a statement shall be in terms likely to be read and understood. FPLA specifies that the statement shall appear upon the principal display panel, which is defined by the Act to be that part of a label that is most likely to be displayed, presented, shown, or examined under normal and customary conditions of display for retail sale.

Compare this specification with the interpretative regulations under the 1938 Act, which imply that prominence and conspicuousness requirements of the 1938 Act are complied with when the required statement appears on the part or panel of the label which is presented or displayed under customary conditions of purchase.

Section 4 requires the net quantity declaration to be in distinct contrast (by typography, layout, color, embossing, or molding) with other matter on the package. The FFDC Act provides that the required statement be prominently and conspicuously placed as compared with other words, statements, designs or devices in the labeling.

Therefore, we are convinced that regulations implementing these requirements of Section 4 can be written without doing violence to the FFDC Act or the interpretative regulations thereunder, but, just as in the case of the declarations of identity and name and place of business of manufacturer, packer or distributor, whether there are two sets of regulations or merely one set, the choice of enforcement provisions (essentially seizure v. criminal sanctions) is still the Government's where there is non-compliance.

The mandatory regulations under Section 4 of FPLA pertaining to label statements of quantity of contents will specify other requirements, some of which are not covered in the regulations interpretative of the 1938 Act, and some of which are contrary to the requirements found in the regulations interpretative of the 1938 Act.

Section 4 requires a dual net quantity declaration (for example, ounces followed by pounds and ounces) for most consumer commodities. The FFDC Act makes no such requirement, and has, by regulation, been interpreted to require a different type of declaration.

Section 4 prohibits the use of qualifying words or phrases in conjunction with the mandatory net quantity statement. The FFDC Act contains no such prohibition and has, in fact, been interpreted by regulation to require qualifying words in certain instances.

Section 4 requires the setting of a uniform location on the label for the net quantity statement. Interpretative regulations under the 1938 Act do not speak to this point, nor to the necessity of separation of the net quantity statement.

While regulations under the FFDC Act warn that the prominence and conspicuousness requirements of the Act may be offended by smallness of type, regulations under Section 4 of FPLA must positively state that the size of the letters or numerals of the net quantity statement shall be established in relation to the area of the principal display panel of the package and shall be uniform for all packages of substantially the same size.

Section 4 (unlike the FFDC Act, which is silent on the subject) goes on to state that the net quantity statement shall be generally parallel to the display base. Therefore, either because regulations under the FFDC Act require less of the net quantity statement than is required by Section 4 of FPLA, or because the new Section 4 requirements for net quantity declarations vary from the existing interpretations of the FFDC Act, the promulgation of an additional set of regulations under FPLA could create two sets of regulations under the same Title, imposing essentially different requirements for declaring the net quantity statements on most labels of foods, drugs, devices and cosmetics.

I say "most" because the new requirements of Section 4 apply only to labels of commodities for retail sale, and do not apply to prescription and insulin-containing drugs. To the non-retail commodity and to Rx and insulin-containing drugs, the requirements of the FFDC Act would be solely applicable.

Coming upon the differing requirements in the same Title of the Code of Federal Regulations, one might reasonably ask if the Government offers a choice of compliance, or requires the individual to harmonize, if possible, two sets of regulations.

A number of comments submitted in response to FDA's proposed regulations of March 17, have recognized the applicability of two different acts to the mandatory label declarations, have recognized the possibility of conflicting regulations, and yet have indicated a suspicion of something sinister in the proposed issuance of one set of regulations implementing related sections of the two Acts.

The suspicion stems naturally enough from the fact that criminal sanctions are not available under FPLA. One writer proposed that FDA propagate any inconsistencies or conflicts between the two Acts by issuing regulations for the time being under Section 4 of

FPLA, and then at a later date "propose" to remove any problems created thereby by amendment of the FFDC regulations. Others have insisted that the issuance of additional regulations without revision of the FFDC regulations would in every case of offensive labels resolve the question of which Act would be invoked by the Government.

Lightening our burden somewhat is the fact that the last major label declaration required by Section 4 has no counterpart in the 1938 Act. I refer to the requirement of stating the net quantity (in terms of weight, measure, or numerical count) of any servings represented to be present. Dual declaration of quantity of contents in the cases of linear and square measured commodities also introduces a concept foreign to the FFDC Act.

So, we decided that it would be better for all concerned to end up with one set of regulations, not two. To us, the only problem which may arise will rear its ugly head when and if a violation appears to call for criminal action.

But we expect compliance with these labeling requirements, and we will do everything we can to foster compliance. Thus, the need for criminal action should be rare. And we'll have to rely on our people, including the General Counsel, to be sure that any such criminal action is based on violations of the FFDC Act, not the FPLA. And we know that in these cases you lawyers will be right up in the front row to call us on any mistakes you think we are making.

I have avoided going into the details of how FDA has attempted to harmonize the requirements of the applicable Acts in the proposed regulations of March 17, in order to avoid the appearance of defending what are merely proposals.

I think it is proper that neither you nor we regard the proposals as the Government's last word on the subject, in view of the fact that the law provides that each of the more than 280 parties submitting comments and briefs on the proposals be afforded a real opportunity to participate in the rule-making.

I can tell you that although I haven't studied all the comments, I've seen a number which offered real constructive criticism which we will want to take advantage of.

I would echo the comments concerning the thoroughness with which we intend to carry out the review. I note that a national magazine recently informed its readers that the regulations under Section 4 will be a far cry from what was characterized as the "stringent and highly technical proposals," and that the regulations would be a long time in coming. At this stage of the rule-making procedure, it would

not be proper to comment on the first part of that statement. I can tell you that it is not our intent that the regulations be a long time in coming. We are working toward July 1 of this year as the publication date for the initial food labeling regulations.

We have made it known that we intend to hold off publishing the initial proposals covering OTC drugs, devices and cosmetics under Section 4 until the food labeling regulations have been published. We reason that many of the concepts hammered out under the rule-making procedure, and embodied in the food regulations, will be useful in developing the other regulations.

We have also made it known that we would be glad to consider any comments or statistics submitted by the cosmetic, drug, and device industries in relation to initially proposed regulations under Section 4. A like option was available to the food industry before the initial proposals on food labels were published.

This practice, of course, opens FDA to the charge being made in several quarters that no attention is then paid by FDA, in formulating the proposals, to industry comments and suggestions. We did and will continue to listen to and consider all parties concerned.

Practical Aspects

In discussing the mandatory regulations, I have touched on enforcement through seizure and injunction under the two Acts and through prosecution under the FFDC Act. I would like to add a few comments concerning the practical aspects of enforcing the net weight declaration and the various label requirements discussed above.

First, being a relatively small agency with a relatively large piece of legislation to enforce, FDA has, over the years, had to husband its resources carefully and work with, and, in fact, depend upon, state food and drug as well as weights and measures and other officials in the enforcement of the requirements of the federal law. Our dependency upon state officials to spot violations, take corrective action as commissioned officials under state laws, or refer the matter to local FDA offices, is increased by this new consumer protection responsibility. This cannot be a one-way street.

For this reason, plans are now being made by FDA to integrate state officials into FDA rule-making governing label declarations of the Section 4 and Section 5 variety.

The proposed mechanics of a continuing system for tapping the opinions and broad experience of state officials is being worked out. We intend to listen to the states and to ask for a continuation of their assistance. **[The End]**

Discretionary Regulations Under the Fair Packaging and Labeling Act

By WILLIAM W. GOODRICH

Mr. Goodrich Is Assistant General Counsel, Food and Drug Division, Department of Health, Education and Welfare, Washington, D. C.

IT MUST BE QUITE CLEAR AT THIS POINT that the Agencies have a long way to go before the real meaning and effect of the Fair Packaging and Labeling Act can be either ascertained or felt.

The day before the Act passed in Congress, we thought we fully understood what it meant insofar as the Food and Drug Administration (FDA) was concerned, and how we were to proceed with its implementation. But our mail so far plainly shows that a great many people think we do not know what was intended by this law. And it is equally plain that there are few indeed who are ready as of now to have it placed fully into effect.

All of us, I think, have worked diligently to prepare for the effective date—July 1, 1967. Press stories report that important packaging and labeling changes will occur about that time. Some lawyers contend that we have moved too fast in even offering a proposal. Yet it seems that July 1 will come and pass without any of the major changes in packaging and labeling design that this new law promises.

Even the proposed mandatory regulations have run into a barrage of criticism. A firm named "Old Honesty" wrote that it was extremely unfair to require weight statements in both pounds and ounces and in total ounces. It called all of our proposals impractical and unnecessary. In sum, it did not think much of our initial endeavors.

The regulations I am to deal with are more difficult to design than the much criticized mandatory regulations. I am here to offer

an explanation of what we think the law requires in its provisions for discretionary regulations, what problems and issues there are to be resolved in moving ahead with these regulations, what general and specific plans our agency might have in this regard, and how quickly we may expect some action here.

There are five classes of discretionary regulations. They are:

(1) regulations to establish standards for size characterizations used to supplement the quantity of contents declaration—in simple terms, standards for "large," "medium," "small," "family" and "king" size packages;

(2) regulations to control but not prohibit "cents-off" promotions;

(3) regulations to require additional ingredient information on containers of drugs and cosmetics;

(4) regulations to prohibit non-functional slack-filling of packages; and

(5) regulations to provide exemptions from the mandatory regulations for particular consumer commodities when full compliance is impracticable or unnecessary.

I will take up these points in order, but first a brief statement about how the agency is expected to proceed:

All of the discretionary regulations, except for the exemptions, must be initiated by a determination that the prohibitions and requirements contemplated are necessary to prevent deception or to facilitate value comparisons.

In some instances, for example on package sizes, it will obviously be necessary to move on a commodity-by-commodity basis. But with others, for example "cents-off" promotions, there can and will be some regulations of general applicability to all such promotions.

It seems probable that some general rules can be developed for ingredient labeling and slack-fill prevention, as well.

So, we may anticipate that the Department's first move to issue the discretionary regulations will be a notice of proposed rule-making announcing the controlling principles applicable to cents-off, ingredient labeling, and slack-filling of containers. This will have to be followed by more specific regulations dealing with particular commodities and perhaps even with particular packages.

Package Sizes

The most controversial feature of this legislation in the Congress had to do with the standardization of sizes and shapes of packages in

which consumer commodities may be sold. The law makes it perfectly clear that package standardization which limits size, shape, weight, dimension, or number of packages that may be used to enclose any consumer commodity will have to be wholly voluntary.

Our role in size standardization is a limited one—being sure that one producer's "king size" package is not another man's "jumbo," or yet another's "large."

In short, we are charged with the duty to provide a uniform meaning for these supplemental size designations as they are used on the same commodity or the same class of competitive commodities. A variety of sizes could still be used, absent voluntary standards, but the supplemental designations could be applied only to the sizes that met our standards for them.

Our first step here is to conduct market surveys to determine exactly where these size designations present a problem for purchasers.

Cents-Off

The Truth in Packaging proposals made by Senator Hart's Subcommittee in the 88th Congress would have prohibited "cents-off" and similar promotions, on the ground that the manufacturer did not fix the retail price and could not fulfill his promise of cents-off.

But this ban could not survive our natural desire to obtain a bargain. Price competition and bargain promotions are irresistible to most Americans. And the Congress would not forbid this special type of price competition.

So the bills, as finally enacted, directed the agencies to regulate the placement on any package of any representation or implication that the package was offered for sale at less than the ordinary and customary retail price, or that the purchaser would get a bargain by reason of the size of the container or the quantity of its contents.

The House Committee explained its intention that this was to make the promised bargains real ones and not illusory. The Department was told to regulate these practices so as "to assure that insofar as practicable any price reductions claimed on the package will be passed on to the consumer."

And we were told, by way of examples, that the regulations may require a showing on the part of the manufacturer that the wholesale price has been reduced in an amount sufficient to enable retailers to pass the appropriate "cents-off" on to the consumer; also that the regulations may limit the duration of, or the intervals between, such

promotions, or the percentage of the output annually which may be marketed under "cents-off" promotions.

These ideas plainly contemplate general rules of conduct, as well as rules which may require specific showing on invoices of cents-off merchandise or otherwise that a real price reduction has been made to enable the retailer to reduce the customary or usual price of the commodity.

The Federal Trade Commission (FTC) has had greater experience with this kind of problem than has the FDA. We intend to take advantage of that experience, as reflected in the Commission's decisions and in its guides against deceptive pricing.

FDA itself has had two seizure cases that I can recall involving false or misleading "cents-off" and "economy size" labeling. Neither case was contested, but as a matter of interest I can say that the "cents-off" charge arose out of an introductory offer—the charge was that there was no established retail price for the new product and thus no basis for a "cents-off" claim; and the "economy size" package was actually priced at more per ounce than the smaller sized jar of the same product.

FDA will have to develop not only a better information base on pricing practices, but also new techniques for investigating the realities of the promised bargains before it can carry out this added responsibility.

There is some urgency because a cents-off promotion by one producer quickly forces his competitors to the same discounting practice. Reasonable rules would serve the interest of producers as well as consumers.

Ingredient Labeling

Ingredient labeling for food and drugs has been required for a great many years, but it has not been required for cosmetics.

The original Hart proposals called for the package to provide sufficient information about the ingredients and composition of consumer commodities, without disclosure of proprietary trade secrets.

When Commissioner Larrick testified on this bill in 1963, he noted this new requirement, and he endorsed the idea of composition labeling for cosmetics.

As the bill passed the Senate, it contained a proviso that regulations for ingredient labeling should be consistent with requirements imposed by or pursuant to the Federal Food, Drug and Cosmetic Act.

It was arguable that this would make cosmetics exempt from any ingredient disclosure, because the Federal Food, Drug and Cosmetic Act did not require it.

But the House Committee specifically noted that this type of information may become very valuable to the consumer in making comparisons of cosmetics, as well as other consumer commodities such as detergents. Thus, it is clear that ingredient labeling for cosmetics was contemplated, and the bill as enacted called for ingredients to be declared by their common or usual names in order of decreasing predominance.

We know, of course, that full declaration will not be necessary for all cosmetics, but we have not yet developed a starting policy for cosmetic-ingredient labeling. We expect to meet with the industry's representatives on this and other problems created by this new law at an early date.

Slack-Fill

Slack-filling of packages was one of the consumer abuses challenged by the 1938 Federal Food, Drug and Cosmetic Act. That Act included a provision making any food, drug, or cosmetic misbranded if its package was so made, formed, or filled as to be misleading.

Soon after enactment there was a noticeable improvement in packaging practices. False bottoms, excess padding, and other obvious abuses disappeared.

But after the War, slack-filling in a more subtle form reappeared. Rising costs and competitive pressures provided the incentive for cutting down the contents of the container, rather than filling it up and raising its price. Apparently consumers are much more alert to upward price changes than to price increases which result from cutting down the contents of a familiar package.

FDA initiated several cases under the general misbranding provisions, but was generally unsuccessful in convincing trial judges that the packages were slack-filled—or for that matter that this was even an important problem.

Four competitive candy companies reduced the 1-lb. box to 14 oz. and then to 12 oz. size. When pressed for further economies, one of the companies decided to change the box by using internal padding. The ostensible reason was that this better protected the contents. But, in any event, the package was filled only to 75% of its practical capacity—even allowing for round candy in a square box.

A protracted trial and two appeals followed. The result was that the district judges finding that the box was not slack-filled withstood appellate challenge.

In that case, we did obtain a statement of legal principles that should control here—and with which both government and industry can live.

The Court of Appeals said that a packer could justify a package too big for its contents by proving that the circumstantial deception was necessary for safeguarding the contents. And there has to be a finding that the container's effectiveness outweighs its deceptive quality, as well as a finding that no less deceptive container is available.

One of the major problems in enforcing the original slack-fill provision was the lack of packaging rules. Judge Wyzanski noted this in a case he decided against the government. So we endorsed slack-fill provisions when we testified on the original proposals.

The slack-fill provision of the Fair Packaging and Labeling Act was in and out of the bill before its final enactment.

S-985 did not contain it. Instead, it would have authorized regulation of sizes and shapes of permissible containers. The House Committee rejected that idea, but in doing so, restored the slack-fill authority.

The agencies are directed to prevent the non-functional slack-filling of packages. And a package is deemed to be non-functionally slack-filled if filled to substantially less than capacity for reasons other than protection of the contents or the requirements of machine packing. The House Committee explains that this allows only those measures necessary for product protection and the actual needs of sound manufacturing practices in machine filling.

What the FDA must do to implement this is to promulgate general rules applicable to slack-filling and then to provide specific rules to deal with particular packaging practices.

There is a good deal more to this than extra padding in a box. More difficult questions arise out of the use of excess liquid packing media in canned or frozen foods, excess head space in canned products and inordinate amounts of sweetening in frozen fruits or sauce in canned products.

In addition to the slack-fill provision of the new law, the agency is authorized to promulgate standards of fill of containers for foods under its basic law.

Thus we have ample law to tackle the slack-fill problem, but each case taken up so far has required a heavy effort in investigation and preparation. So results cannot be produced overnight.

Exemptions

Upon a finding that the nature, form, or quantity of a consumer commodity, or other good and sufficient reasons, make full compliance with the mandatory labeling and packaging requirements impracticable, or make them unnecessary for adequate protection of consumers, the Secretary is directed to provide exemptions for particular consumer commodities.

Thus, it seems that exemptions under this law at least must be related to particular consumer commodities and not to across-the-board packaging problems.

So the proposed regulations would cancel the existing blanket exemptions for small packages of less than ½ ounce and less than 6 units.

The idea is to require a showing that the weight declaration and other mandatory labeling requirements are impracticable or not necessary for adequate protection on a product or commodity basis before exemption is granted.

Discretion is involved in making the exemptions, and the fact that the blanket exemptions are to be revoked does not mean that the exemption authority will be grudgingly exercised. To the contrary, it means that it will be used carefully to provide rules for the special cases where it is needed to ameliorate requirements that do not fit those special cases, but which are appropriate for the general run of consumer commodities. In this way, the general rules can operate better, so long as there is a mechanism for taking care of the hard cases without making bad law for the entire line of similar products to accommodate a special situation.

Conclusion

The issuance of these discretionary regulations is a big order for the Department. They will take time. We hope to have a more constructive industry response to proposed rules than what we have received to the initial proposals.

We think the Fair Packaging and Labeling Act called for change in design of some packages and general improvement in the message that containers project to the customer.

The response to the original proposals was largely that present practices are quite good and need at most only minimal change.

It is hard for us to read this out of the legislative development and enactment of the 1966 law. **[The End]**

Antitrust Aspects of Industry Cooperation and Product Standardization

By DONALD F. TURNER

Mr. Turner Is Assistant Attorney General in Charge of the Antitrust Division of the United States Department of Justice.

WHILE THIS CONFERENCE IS PRIMARILY CONCERNED with the Fair Packaging and Labeling Act of 1966, and industry actions that might be taken in connection with it, I shall largely confine myself to an analysis of the antitrust aspects of industry cooperation and standardization generally.

The *Radiant Burners*[1] case is a good framework for beginning the discussion. That case, though raising only one comparatively easy antitrust issue, could well have raised a good many more. Let me briefly summarize the allegations of the plaintiff's complaint in that case, allegations which the Supreme Court held were sufficient to charge a violation of the Sherman Act. The plaintiff sued the American Gas Association (AGA) and assorted members, including both gas distributors and manufacturers of gas equipment and appliances. The plaintiff charged an unlawful combination to exclude from the market gas appliances not receiving a seal of approval from AGA's testing laboratories. AGA's testing laboratories, according to the complaint, purported to test the utility, durability and safety of gas burners and other equipment. Yet, it was asserted, AGA approval was not based on "valid, unvarying, objective standards" and that AGA could and did make determinations arbitrarily and capriciously as to whether a given gas appliance had passed its tests. Plaintiff alleged that its own gas burners, denied the seal of approval, were more safe and more efficient than, and at least as durable as, burners approved by AGA.

[1] *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. et al.*, 1961 TRADE CASES ¶ 69,896, 364 U. S. 656, 81 S. Ct. 365.

The alleged consequences were described as follows:

> Plaintiff avers that it is not possible to successfully market gas equipment, including its Radiant Burner, unless AGA approved because AGA and Utilities (a) refuse to provide gas for use in equipment not AGA approved, (b) refuse or withdraw authorization and certification of dealers who handle gas burners or equipment not AGA approved, (c) prepare and circulate false and misleading reports that equipment not AGA approved is unsafe, unreliable or lacking in durability, (d) Utilities discourage prospective purchasers from buying or installing equipment not AGA approved and refuse to permit its display in public areas of their offices and (e) induce municipalities and government agencies to pass ordinances which require that no gas burner or equipment shall be used within their limits unless such gas burner or equipment bears the seal of approval by AGA.

As you know, the District Court dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted; and the Court of Appeals affirmed, holding that no per se violation of the antitrust laws was alleged, and that in the absence of such an allegation the plaintiff was required to allege general injury to the competitive process and harm to the public at large. The Supreme Court unanimously reversed in a per curiam opinion, holding that the collective refusal to supply gas for use in plaintiff's burners fell into the category of restraints that are unlawful in and of themselves, and that plaintiff need establish only his injury in order to recover.

In view of the fact that plaintiff was allegedly excluded from the market by a collective refusal to deal, *Radiant Burners*[2] raised no novel antitrust points. But suppose that there had been no allegation of a collective refusal to deal on the part of the gas distributor members of the AGA. It seems clear to me that serious antitrust problems would still have remained. Failure to obtain AGA's seal of approval would tend to exclude a manufacturer's product from all or a substantial part of the market for the following reasons:

(a) The existence of municipal and other ordinances prohibiting the use of non-approved equipment within the limits of their jurisdictions;

(b) The high likelihood of individual refusals by AGA's gas distributors to supply gas for use in non-approved appliances; and

(c) The high likelihood that denial of the seal of approval would impose upon a manufacturer a serious competitive disadvantage in the advertising and other promotion of his wares.

Given these exclusionary effects, I think the complaint in *Radiant Burners*[3] still stated a cause of action. An allegation that plaintiff's products were arbitrarily and capriciously denied a seal of approval

[2] Cited at footnote 1.

[3] Cited at footnote 1.

would support a claim that the AGA and its various members were carrying on a combination plainly in unreasonable restraint of trade. Certainly, where competitors are involved in an organization granting a seal so important to business success—and even, I believe, where competitors are not involved—the group is under an obligation to insure that its decisions to grant or withhold the seal are fairly made. Cf. *Silver v. New York Stock Exchange*.[4] Morever, they are under a duty to insure that the testing procedures and the seal of approval are available to all interested manufacturers on nondiscriminatory terms. It should not be limited to members only; it should not be limited to American manufacturers only.

Formulation of Standards

Moreover, where a seal of approval or promulgation of standards has such practical exclusionary effects, it seems to me that the group must, at the least, establish appropriate procedures for the formulation of standards for approval; and serious questions are raised as to whether particular bases for exclusion are appropriate for private group action at all. Let us look again to the facts alleged in the *Radiant Burners*[5] case. I point in particular to the following:

(a) There was an inferable conflict among appliance manufacturers as to the minimum standards that had to be met before the seal of approval was given.

(b) There was no indication that the ultimate purchasers of gas appliances had any representation in the formulation of standards (although the gas distribution utilities might arguably have represented the consumers' interests at least in part).

(c) The AGA's seal of approval required the meeting of minimum standards not only on safety but also on "utility" (which I take to mean efficiency) and durability.

Such circumstances raise at least two dangers:

(1) Due to diverse manufacturer interests, the standards procedure might be used by a dominant group of manufacturers to handicap or exclude competitors for any one of several wholly unacceptable reasons—that the competitor is a price cutter or that he has developed a new product which threatens a serious invasion of established producers markets.

(2) Due either to diverse manufacturer interests or conflict of interest between manufacturers and consumers, the standards might

[4] 1963 TRADE CASES ¶ 70,787, 373 U. S. 341.

[5] Cited at footnote 1.

cut off from the ultimate consumer product options that a substantial number of them would very much like to have.

A good case might well be made for safety standards which kept unquestionably unsafe products off the market, at least until there has been an opportunity for legislative action. Indeed, one might assume that no consumer wants an unsafe gas burner in view of the potentially disastrous consequences that are involved. I might note, however, that even on safety standards a point could well be reached where the added cost of further enhanced safety would arguably be too high; that is, where the risk to be guarded against is so remote that many consumers would prefer to disregard it rather than pay the price.

But whatever the case for safety standards, questions of efficiency and durability are quite different. Why deprive consumers who know what they are about from purchasing a less efficient or less durable stove at a lower cost if they wish to do so? As I said a few months ago in discussing agreements among competitors to eliminate certain product options:

> For many consumers, the extra quality is not worth the extra price; others may not be able to afford the more expensive product at all. If there are sellers willing to supply them with cheaper merchandise, which they wish to buy, this is simply what competitive allocation of resources is designed to permit. An agreement to remove from the market alternatives which some buyers want and which some sellers are prepared to supply is not "improving" competition but interfering with it.

To restate this in terms of our present subject, it is not "protecting" consumers to deprive them of safe product options which they, fully aware of all the facts, prefer to buy.

The dangers that a standards procedure or seal of approval may be used by a dominant group of manufacturers to unreasonably handicap their competitors and/or to drive desired product options off the market are of course reduced by affording to all affected groups an opportunity to make their views known and to have some voice in the ultimate results. They are reduced if non-member manufacturers as well as member manufacturers participate, and if consumers have effective representation. But if there are substantial differences among these diverse groups, is there any completely satisfactory way of determining on what basis decisions are to be made? Is each manufacturing member to have one vote; or plural votes depending upon his sales? How many votes should consumer representatives have? The short of the matter is that the problems raised by conflicting interests of this kind cannot be appropriately solved by any voting

procedures within the private group. It seems to me that they can only be resolved satisfactorily by establishment of an impartial tribunal of some sort to make the ultimate determination. But if this is so, have we not really said that the kind of standards which the group is attempting to impose are of such a nature that the responsibility should be given, at least ultimately, to a governmental body?

The dangers I have described—unreasonable exclusion of competitors and/or unwarranted elimination of product options—would also be minimized by adopting, instead of a single standard or single seal of approval, a grading scheme based upon generally acceptable testing standards. In *Radiant Burners,*[6] for example, the AGA could have simply made testing reports on safety, efficiency and durability of the various products submitted to it. This would have given consumers a large amount of highly useful information, but would leave them free—insofar as their local distribution utilities did not interfere—to assign their own weights to price and performance characteristics. Moreover, if AGA had confined its activities to the publication of testing reports, this would have forced local governments who wished to establish some control over gas appliances to make for themselves an appropriate legislative determination of what minimum performance standards should be met.

I have said that this method of procedure would tend to minimize the dangers, but of course they would not wholly eliminate them. There still may be serious good faith dispute on whether particular characteristics of a product are of enough significance to warrant testing and grading. But I would guess that this problem would be of serious proportions in only a comparatively few cases.

So far, I have been discussing the inadequacies of private group action to protect consumer interests largely in terms of correlative antitrust risks. It is obvious, however, that the absence of antitrust risks does not mean that private group action is an adequate or appropriate means of doing the job. To illustrate this, let me return for the moment to problems of safety. While members of an industry might conceivably push safety requirements to an excessively high level, the much more likely danger is probably the reverse, namely that the diverse interests of various private producers will be accommodated in such a way that safety standards will tend to be based on the lowest common denominator. Either that, or the standards will be set at such a point that one or more manufacturers will simply refuse to adhere.

[6] Cited at footnote 1.

The main conclusion to be drawn from all of this is that the prospects for satisfactory private solution of the problems of protecting or helping consumers is directly dependent upon the extent of conflicts of interests among the groups affected. The greater the conflicts of interest—either among competing manufacturers, or between manufacturers and parties with whom they deal—the more likely it is that private group action will prove comparatively unsuitable as a device for protecting consumers from products they do not want or should not be allowed to have. The more the conflicts of interest, the more likely that private group action will either harm the kind of competitive and consumer interests which antitrust law can protect, or simply prove inadequate for establishing the kind of standards that the public interest would dictate. I realize of course that legislation, with or without implementation by an administrative agency, is not without problems of its own. But it is the only appropriate solution where serious conflicts of interest are involved and where the general public interest seems likely to require higher standards of consumer protection than will evolve from private joint action.

This by no means eliminates all room for private activity. There is no doubt that there are widespread opportunities for legitimate and highly beneficial collective private activity in the area of voluntary formulation of and adherence to standards. There are some 300 standards-writing organizations in the United States which have developed more than 13,600 standards. The annual rate of publishing new and revised standards exceeds 3,000. More than 400 of these standards have been developed under procedures established by the United States Department of Commerce. I would not pretend to know very much about the details, and if I did, it would be risky for me—for obvious reasons—to cast any general blessings on these troubled waters. But I can make a few comments. There are many situations in which standardization is in the interests of all concerned. No serious criticism can be directed at the private formulation of standards designed to reduce clearly excessive and pointless proliferation of product variety. No one's interests are served by having an infinite variety of sizes of nuts and bolts. There are many other instances in which product variety—in terms of size, weights, shapes, and the like—has proliferated not in response to any felt consumer need or demand, but by accident or for such other reasons as the desire of competing manufacturers to do something distinctive. If flour manufacturers put out packages in all one-ounce variations from 4 to 104, almost certainly at least some consumers will randomly select packages of each size that is on the

market. But this hardly reflects a "consumer demand" in the ordinary sense of that word. Group action to reduce the number of package sizes would almost certainly be beneficial. They would help the buyer in making comparisons among the products of competing manufacturers, and help protect him against deception and just plain befuddlement.

There are other advantages that are obtainable in appropriate circumstances by standardization of consumer goods. By ensuring that different brands will be equally satisfactory in important functional respects, standards may well lessen the influence of advertising and promotional activities unrelated to actual product differences, and thereby lower the barriers to effective entry by new producers. Standardization may lead to significant reductions in production and distribution costs. Standards which facilitate interchangeability of parts may promote competition by increasing the sources of supply available to the consumer and, by the same token, the markets available to competing producers.

Yet, again, the existence of these actual or potential advantages is not determinative. I don't have to tell you that standardization can be misused. It can be and has been used to facilitate non-competitive pricing. *C-O-Two Fire Equipment Co. v. U. S.*[7]

Conclusion

As I said at the outset, some of the antitrust problems that I have discussed may not be directly relevant to the issues that are likely to come up as a consequence of the Fair Packaging and Labeling Act. It seems fairly clear to me, as indeed passage of the Act would indicate, that there is a great deal of package and size proliferation in consumer goods industries that is unnecessary and unwanted. Voluntary cooperative reduction of this pointless proliferation would not be the kind of elimination of competition that raises antitrust concerns.

There are, as I have pointed out, courses of action that would raise antitrust problems, and caution compels me to reiterate the warning. But my own guess at this point is that the danger will not be one of voluntary cooperation going too far—sophisticated legal counsel will tend to prevent that—but, rather, that voluntary action may prove inadequate to resolve satisfactorily all the problems with which the new Act is concerned. **[The End]**

[7] 1952 TRADE CASES ¶ 67,290, 197 F. 2d 489, 493 (9th Cir. 1952).

Coordination of Federal-State Responsibilities: The State Perspective

By MATT JENNINGS

Mr. Jennings Is the Director of the Tennessee Department of Agriculture's Division of Marketing.

IT IS A PLEASURE FOR ME to present the state perspective relative to the Fair Packaging and Labeling Act. Weights and measures officials have been watching, for some time with a great deal of interest, the proceedings and development of this act, originally considered as the "Truth in Packaging" bill.

The views expressed by me will include not only my personal views but also a combination of views of many state officials, from all sections of this country.

This conference has the possibility of coordinating federal and state responsibilities in regard to this new legislation. It is my hope that the conference will result in an administration of the Fair Packaging and Labeling Act through regulations, yet to be promulgated, that will not decapitate the inherent rights of the states nor weaken provisions that from the National standpoint are important.

We in the states realize that we are not bigger than Congress. Therefore, we recognize the over-all merits of the bill, and at the same time see some provisions which may adversely affect the states. As Bernard Baruch said: "It may be true that we did not come over here on the same ship—but we are all in the same boat." Every citizen is affected by this bill and all should be concerned about its application and administration. My remarks may be considered, in some instances, as adverse criticism. It is my hope that they will be considered constructive, as they represent opinions from the many states affected.

Although Congress was successful in the passage of the Fair Packaging and Labeling Act, administrative success must depend upon the Act's acceptance by industry, the public and the officials upon whose shoulders rests the responsibility of enforcement.

It must be made beneficial to the public and industry alike. Good faith must be established, permitting the closest cooperation between industry and regulatory agencies with respect to the formulation of regulations under the law for the improvement and revision of the law itself.

In the administration of the act and the issuance of regulations pertaining to it, there must be found a reasonable balance between conflicting interests. It is our duty to protect the citizens of the states against the inaccurate use or false markings of weights and measures. On the other hand, there is a national need to promote the flow of commerce through uniform national weights and measures.

Impact on State Law

The section which has the greatest impact and greatest effect upon state law is Section 12, which reads:

> It is hereby declared that it is the expressed intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this act which are less stringent than or require information different from the requirements of Section 4 of this act or regulations promulgated pursuant thereto.

According to this section, state and local laws are superseded only when they concern the labeling of package contents under Section 4 of the act and any supplemental regulations. Of course, weights and measures officials will have plenty to do as our responsibilities extend far beyond labeling requirements. On the other hand, labeling requirements constitute an important part of our responsibility in consumer protection. It is my sincere hope that the entire field can be covered without dissension and to the best interests of all America.

In its present form, the Fair Packaging and Labeling Act expressly preempts conflicting state law in an area that is now largely subject to state control, on the grounds that national uniformity in labeling weights and quantities of consumer commodities is desirable not only as a basis for exchanging products nationally but to provide status to the consumer from a national point of view. As I refer to the term "national" here, I wish to emphasize that I am not referring to national in the sense of federal, but rather in the sense of national uniformity to aid the techniques of commerce.

We weights and measures officials have watched with much interest the proceedings and developments of this legislation. During this time, we have been working, in the absence of action at the federal level, toward uniformity in labeling, to enable consumers to obtain more accurate information as to the quantity of contents. The results are now included in the Model State Law and model package regulations which have been adopted by many states. Enabling consumers to obtain accurate information as to the quantity of contents is one of the purposes of the Fair Packaging and Labeling Act. Yet a regulation has been published in the Federal Register which is in direct conflict with many of the state regulations pertaining to weights and measures.

As you know, the Fair Packaging and Labeling Act is administered by two governmental agencies: The Federal Food and Drug Administration (FDA) as to foods, drugs and cosmetics, and the Federal Trade Commission (FTC) as to other consumer products. The regulation to which I refer is proposed by the FDA. Each agency has rather broad regulatory powers and has the authority to issue regulations as to the consumer products over which it has regulatory authority, and each has its methods of enforcement.

It is my desire to make the states' position emphatically clear. The actual administration of weights and measures supervision in the United States is carried on by the individual states, each exercising complete authority within its own boundaries. Each state is essentially independent in this field.

Under a system that includes 50 separate and independent laws, a wide diversity might seem inevitable. But such is not the case in the administration of weights and measures supervision in the United States. Under its program of cooperation with the states, the National Bureau of Standards has led the successful effort toward national uniformity.

The National Conference on Weights and Measures

The National Conference on Weights and Measures, comprised of weights and measures officials from counties, cities and states throughout the nation is sponsored by the National Bureau of Standards. Among the accomplishments of the National Conference and the National Bureau of Standards, working cooperatively, is a Model State Law on Weights and Measures, which is recommended to the legislative bodies of the state, and model regulations which are recommended for promulgation by the administrative authorities of the states.

Because of the nature of weights and measures supervision, there are overlapping areas of authority between federal and state regulatory agencies.

For example, the FDA has statutory responsibility for the prominence, placement and accuracy of declarations on packages of foods, drugs and cosmetics moving in interstate commerce. A state weights and measures statute normally imposes on the state agency similar responsibility for the quantity declarations on these same packages once they enter intrastate commerce. This is an area in which there is a definite need for closer federal-state coordination.

Technical studies for the benefit of the National Conference and recommendations for actions by the conference are made by standing committees, one of which is the Committee on Laws and Regulations. The field of this committee includes all matters dealing with model laws, model regulations, bills introduced for legislative enactment, methods of sale of commodities and general provisions relating to weights and measures supervision.

The standing committees normally serve rotating terms of five years each. This being my fifth year on the Committee on Laws and Regulations, I have had excellent opportunities to observe the developments toward the enactment of this legislation. At the same time, it has enabled me to view the situation from a federal-state standpoint.

Our committee has recognized that consumers need standards to choose by. We also recognize that sensible regulations should bring user and producer together at a common meeting ground.

One of the best examples of preserving uniformity was the regulation on prominence and placement of the declaration of quantity, as recommended by the Committee on Laws and Regulations and adopted by the National Conference on Weights and Measures. This was an excellent example of how state officials, federal officials and industry representatives can work together and achieve both a desired objective and uniformity. As a result of this cooperative work, industry has formed a committee of those companies and trade associations concerned about weights and measures problems. Two of the main purposes of this committee are (1) to keep industry advised concerning any non-uniform law, regulation or interpretation which affects labeling and (2) to work with state officials and officials of the National Bureau of Standards toward more uniform labeling laws, regulations and interpretations.

Through such cooperation our package regulation on prominence and placement of the declaration of quantity was revised after several

years of study. The regulation as revised was acceptable to industry, approved by the National Conference and adopted by states.

The first Model Law on weights and measures was adopted forty-six years ago by the Sixth National Conference on Weights and Measures. It has been the subject of continued study over the years. Succeeding conferences have revised the Model Law. A provision of the Model Law authorizes the promulgation of regulations pertaining to package-marking requirements. A model regulation on these requirements was adopted by the 37th National Conference. This is mentioned to indicate the fact that weights and measures officials have been in the package control business for quite some time.

The Office of Weights and Measures, National Bureau of Standards provides technical assistance to the states. Then, through their sponsorship of the National Conference, officials, many of whom have spent much of their adult life in weights and measures work, are brought together from all parts of the United States. The purpose is to up-date requirements in order to keep pace with progress. Thus, the states look to the Office of Weights and Measures and the National Conference for guidance in enactment of laws and promulgation of regulations pertaining to weights and measures.

Frankly, the states do not like preemption or conflicting regulation as has been proposed. Enforcement control, for the most part, must be done by the states. Therefore, we are of the opinion that the states and the Office of Weights and Measures should, definitely, be consulted or counseled before any regulation, especially a contradictory one, is passed under the new act.

As I understand it, the new law has two distinct approaches: (1) mandatory government regulation on an all-product basis and (2) discretionary government regulation on a product-by-product basis. I would like to add a third, which is a precautionary approach to the promulgation of regulations.

For the success of the new legislation, and to receive the support of the states, it is my recommendation that the federal-state responsibilities be coordinated through the Office of Weights and Measures, National Bureau of Standards and the National Conference.

We might well heed the advice of Shakespeare. In his *Comedy of Errors,* the two Dromios, after discussing which should go first, decided that:

> We came into the world like brother and brother;
> And now let's go hand in hand, not one before the other.

[The End]

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