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Legal/Regulatory Developments Affecting Food–Perspective of the Consumers Union

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Legal/Regulatory Developments Affecting Food—Perspective of the Consumers Union

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I AM PLEASED that the Food and Drug Law Institute included a consumer representative on this panel exploring food legislation, because the consuming public relies heavily upon the government to assure the safety and honest labeling of the food supply. Food adulteration, for example, is not usually apparent to the eye and often not to the palate, and thus consumers cannot easily protect themselves against it. I think that the public generally has had considerable confidence in the American food supply, but its confidence has been severely shaken in the recent past because of the problems of some vichyssoise and many mushrooms—not to mention the revelations of my own organization about filth in such products as tuna fish and lead in evaporated milk. The public's increasing skepticism about food safety is probably justified, not by the isolated reports about one company or one food, but by the weakness of the federal legislation governing food safety. Consumers Union is extremely hopeful that the Congress, with the support of the Food and Drug Administration (FDA) and the deserved support of all responsible food processors, will soon remedy some omissions in the law by passage of strong food surveillance legislation. New authority, properly utilized, could help restore the now waning public confidence in the food supply.

In order to keep these opening statements short, I will just highlight those aspects of proposed reforms which are of particular importance to consumers.

Importance of Legislation

Although assurance of food safety requires that processors themselves bear primary responsibility, legislation is needed to strengthen the incentive provided by the prospect of government enforcement. Increasing this incentive, we feel, is to the advantage of the careful and caring processor as well as to the consumer. It is not, after all, without cost that certain food processors are particularly careful in the processing and handling of foods. If others in the industry care less, they will save money thereby which others spend on consumer protection. A strong law would revoke this unfair competitive disadvantage now suffered by the safety-conscious processor and would provide greater safety assurance for the consumer than now exists.

Turning now to the specifics: The food surveillance provisions of S. 2373, as passed by the Senate, offer a reasonable legislative scheme for the improvement of FDA's food safety powers. They rely, for safety assurance in the first instance, upon processor development, implementation, and maintenance of safety assurance procedures, which must be reported to the government. The industry substitute, which requires *only* development of procedures, must be rejected as an emasculation of the purpose of reliance upon industry cooperation. Further, the processor's system should not be created only (and I quote from the industry bill) "to the best of his ability"—whatever that is. Nor should the processor identify control points only to assure that food "will not be unsafe or rendered injurious to health." Such a standard would eliminate the preventive function of this legislation, which more properly focuses, as in the Senate bill, on control points "important in the prevention of adulteration." The difference is, I would contend, very significant.

Safety Assurance Standards

The proposed additions to FDA authority constitute the incentive to adequate industry self-surveillance, and thus need to be strong and enforceable. The idea of a safety assurance plan is an interesting one, because it will cast the sanitizing glow of sunshine into a process now all too often obscured by nonpublication of variously-described "tolerances" and "guidelines." The FDA's power to promulgate safety assurance *standards* will allow the accomplishment of the goals in its safety assurance plan. It will allow interested parties, both industry competitors and consumers, to initiate action leading to regulaton in this important area hitherto consigned almost exclusively to the Agency itself. The House bill speaks of "critical

control points standards," which are to me less satisfactory than "safety assurance standards," as the Senate bill denominates them, because the latter appear to encompass a broader spectrum of problems. The House would institute an "offeror" program to write its critical control points standards, in language more than vaguely reminiscent of the Consumer Product Safety Commission (CPSC) offeror program. The CPSC has yet to promulgate a standard prepared by an offeror, and there are considerable difficulties in the program from the consumer point of view. For instance, there are few technically competent consumer group offerors in the product safety field, although some consumer groups have teamed up with standards-writing organizations and others for this purpose. Nevertheless, we are outgunned. Financing standards development is expensive, particularly if you are a voluntary organization with no profits to be gained from the field. These problems would be magnified in the very technical area of critical control points standards, because the subject of the standards would be process, which takes place wholly behind industry's doors. At least lawnmowers and architectural glass and the like are and have been observable apart from their place of manufacture. So we would favor the route chosen by the Senate instead of an offeror plan.

Inspection of Records

Records crucial to food safety should be subject to inspection, and so should records bearing upon the accuracy of label statements. With the advent of nutrition and other consumer labeling programs, it is imperative that FDA have access to the data necessary for enforcing compliance.

The notification procedure, another protection borrowed from the Consumer Product Safety Act, must also be incorporated in the law. The Senate provision goes only part way. Processors should be required to report information which reasonably supports a finding of adulteration, but the government, not the processor, should, upon notification, make the determination whether the apparent adulteration is, in fact, a violation of the Act or regulations.

The detention authority, increased civil penalties, the right of citizens to bring civil suits against the government or any person allegedly in violation of the regulations, are all important to the consumer. The broad exemptions in the law—such as for retail sales and fresh produce—should be carefully reexamined.

All the bills refer to Section 1905 of title 18, U. S. Code, on information release matters. That Section has been held only to

implement other sections of the law prohibiting disclosure, and may by itself mean nothing. Instead, the law should incorporate the protections of the Freedom of Information (F. O. I.) Act.

Food Labeling

Other issues abound here. Food registration is, I think, universally recognized as a necessary and reasonable proposal. Also, it should be almost without controversy that the law should require the listing on food labels of the optional ingredients in standardized food products. I believe that the Senate bill properly includes food colorings in this requirement, and also properly requires that a determination be made about the feasibility and necessity of full ingredient labeling of spices and flavorings. The Senate bill's inclusion of open dating would be extremely useful to consumers anxious to save food dollars, by helping to prevent the purchase of outdated food. Although statutory authority is not needed for nutrition and percentage ingredient labeling initiatives, I am pleased to see them affirmed in this legislation—although I might be interested in some rewording to assure that FDA's powers are not limited by these inclusions.

Preemption

Just one more item requires attention, and that is the preemption section of this law. As I indicated in testimony on the Senate bill, preemption is a sort of two-edged sword. On the one hand, it is the consumer who suffers if proliferating regulations, all in conflict, increase product costs. On the other hand, complete preemption prevents experimentation on a small scale which might be too risky to initiate on a large scale without a test; it also prevents forward-looking legislators in states and cities from trying to deal with problems which they encounter in their jurisdictions. I believe there should be a preemption clause, but with an exemption section that would truly allow exemption, as the Senate's would hardly do. As written, someone seeking an exemption from the Senate's rule would have to argue that the desired law or regulation is "inappropriate for promulgation by the federal government" but desirable for the locality—a somewhat anomalous position to be forced to take. I propose instead that the locality need only show that the proposal imposes a higher level of performance and does not unduly burden interstate commerce. Nothing more is required for the protection of industry, yet this proposal would allow some deviations from federal takeover in the field. **[The End]**

FDA EXTENDS EFFECTIVE DATE FOR NEW FOOD LABELING REGULATIONS

In a notice published in the *Federal Register* on October 10, 1974, the Food and Drug Administration established procedures to be followed for granting delays in the December 31, 1974 uniform effective date for compliance with certain new food labeling and food standard regulations. Recent developments, such as President Ford's program for identifying and eliminating federal rules and regulations that increase consumer costs without good reason, as well as objections from the milk, grocery, and canning industries, have caused the FDA to reconsider portions of that notice. The FDA concluded that the uniform effective date should be extended through June 30, 1975 for many of the products covered. The effective date for 21 CFR 1.8d, *Food labeling; information panel,* was postponed by the Administration until December 31, 1975 for products for which no other labeling changes have been or will be made after March 14, 1973. With regard to an inability to comply with the new uniform effective date because of unforeseeable intervening events, extensions up to, but, except in extraordinary circumstances, not exceeding six months beyond June 30, 1975 will be granted on a case-by-case basis if good cause is shown. There are no changes from the original notice in regard to products subject to pending rulemaking, except that the deadline for receipt of requests has been extended to May 1, 1975 and no exception will be granted beyond December 31, 1975 except in special circumstances. The FDA also advised that there were no changes from the original notice in regard to food for special dietary uses.

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