LEGIS. INTERSTATE - PACKAGING OR LABELING
H.R. 15440 (HOS)

NATIONAL ASSOCIATION OF MARGARINE MANUFACTURERS

HARLEY O. STAGGERS
2D DISTRICT, WEST VIRGINIA

HOME ADDRESS:
KEYSER, WEST VIRGINIA

CHAIRMAN:
COMMITTEE ON
INTERSTATE AND FOREIGN
COMMERCE

# Congress of the United States
## House of Representatives
### Washington, D.C.

August 24, 1966

Mr. Siert F. Riepma
President
National Association of Margarine Manufacturers
545 Munsey Building
Washington, D. C. 20004

Dear Mr. Riepma:

Thank you very much for your letter of August 19, enclosing copy of your testimony before our House Interstate and Foreign Commerce Committee, August 15, 1966.

I appreciate your thoughtfulness in having hand delivered the samples of margarine.

You may be assured I shall keep in mind your views when we begin marking up the labeling and packaging legislation.

With every good wish to you and yours, I am

Sincerely yours,

HARLEY O. STAGGERS

national association of margarine manufacturers

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Siert F. Riepma
*President*

August 19, 1966

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Hon. Harley O. Staggers, Chairman
Committee on Interstate and Foreign Commerce
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

You and your distinguished Committee are carefully hearing testimony concerning the proposed packaging-labelling bills, principally your own proposal, H. R. 15440.

I am taking the liberty of sending you a copy of my testimony, which emphasizes our feeling that, if enacted, the standards-making proposal is bound to discourage package-size innovation by confronting manufacturers with a government authority that can cause a new package to seek approval, and thereby inform competitors of the new package and product idea therein.

Because the testimony refers to a specific new kind of margarine package, which utilizes a "tub" or dish, I am sending with this two examples of that new packaging to illustrate my point. Whether these new packages would have been adopted, had the proposed bills been law, is, I respectfully submit, a legitimate question. We think the chances are that they would not.

I know, Mr. Chairman, that this point of view will receive your always courteous consideration, and I thank you.

With highest personal regards, and all good wishes,

Sincerely yours,

Siert F. Riepma
President

SFR:db
encl.

Mrs. Staggers took samples -

Statement of
S. F. Riepma, President
National Association of Margarine Manufacturers
Relative to H. R. 15440 and S. 985

Submitted to the Committee on Interstate and Foreign Commerce
U. S. House of Representatives
August 15, 1966

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As President of the National Association of Margarine Manufacturers, I appreciate this opportunity to express its views to this distinguished Committee.

The Committee already has heard much testimony concerning the proposed packaging and labeling legislation embodied in the measures H.R.15440, S.985, and other bills. These bills seek to delegate to the Secretary of Health, Education, and Welfare, and to the Federal Trade Commission, broad administrative powers to control packaging and labeling practices involving virtually all "consumer commodities" in commerce.

The National Association of Margarine Manufacturers is a non-profit trade association organized under the Illinois Not-For-Profit Corporation Act, and composed of most of the margarine producers in the United States.

The proposed legislation has been characterized as a "fair packaging and labeling bill". It is unnecessary to assure your distinguished Committee that this Association is wholly in support of truthful packaging, labeling and wording. I further note that margarine is unique in the number of specific laws, Federal and state, which regulate its labeling. It also specifically is covered by the Model Weights and Measures Law, as enacted in 14 states, by provisions of many other state laws, and by a provision in Federal law controlling retail weight.

Therefore, it would seem justifiable for your Committee to conclude that the margarine industry for all practical purposes is already subject to the proposals in H.R.15440, S.985, and similar measures, noting also that margarine with any animal fat is exempt altogether.

Nevertheless, for all its special position under existing laws and regulations, the margarine industry like the rest of the food industry is indeed sharply affected by the proposed legislation. I am particularly referring to the built-in barrier the bill's Section 5 contains to new product innovation and consequent new packaging. The Committee has received excellent testimony concerning problems involved in the proposed standards-making machinery. I wish to devote my testimony to this one important aspect of the proposed legislation.

The Restriction on Innovation is a Real One

Like so many foods in today's expanding consumer economy, margarine is constantly undergoing study with a view to creating new consumer services. New margarines have been developed in recent years. They have met with consumer acceptance. They have provided new markets for their farm-produced ingredients.

New packaging has been necessary. Where once this form of food was bought in the familiar rectangular shape, it has been developed into other forms. The now-familiar "eastern flat" and "western flat" cartons were adopted to meet the desirability of a distinctive container for this type of table spread, and to meet regional preferences. Whipped margarine required a larger-sized box than any margarine has

previously had, to accommodate its extra volume. Now we have soft margarines, which are proving highly popular, and which must be sold in a tub because they cannot be packaged in the usual wrappers and cartons. Another new form is liquid margarine, which requires a bottle-like closed container to facilitate keeping and pouring.

I personally question whether these new products, necessary to bring the consumer the new margarine products which offer special product features such as better spreadability, lighter texture, and in some instances formulas aimed to meet new nutritional suggestions, would have been realized if either of the proposed measures H.R.15440 or S.985 had been law prior to their development. They do not depart from the customary and required weights and labeling. They do not present problems of quality, fill, "confusion", or price comparison. But as departures from the so-called "standard", very traditional forms of table spread packaging -- of which the "Elgin" package is the prime example -- it is necessary to ask ourselves if they might not have been denied the approval of the agencies and panels set up by the bills to create standards of containers.

There are two parts to this built-in problem.

The manufacturer with a new product and its necessary and creative new package must consider the very distinct likelihood that it will be required to go through administrative procedure and hearings, possibly duplicative -- voluntary and regulatory -- before his package, and therefore his product, can be made available. He must consider that the agency or panel given the power to review is in no way

undertaking any part of his risk, and may not have the background to understand the product idea back of the package. In this respect a basic marketing policy decision would be given over to the government.

Secondly, he must know that, in the process, his competitors will surely be informed. His competitive advantage will be lost. This is a most serious deterrent to innovation created by the proposed legislation.

The small businessman is discriminated against, for his proportionate risk is greater. Government policy as expressed through the Federal Trade Commission, the Food and Drug Administration, the Department of Commerce, and, particularly, the Small Business Administration is to protect and help small business. The practical restriction or innovation in the proposed bills, which I have sought to illustrate with the margarine example, would accomplish the opposite.

Earlier in the hearings the distinguished Chairman has emphasized correctly that there is no wish to inhibit innovation. Yet the restriction, though implicit , is there. During these hearings it has been forcibly brought to our attention by the gentleman who noted the novelty at any one time of the polyethylene bag for convenient packaging of vegetables; by the distinguished Committee member who alluded to the proposal for a spray container for a cheese product, and by the distinguished Committee member who initially described the margarine "dish" container as a novel idea that might very well have not been realized if the contemplated law had been in effect.

The restriction on incentive I have described may not be intended. But it is real. It is bound to affect the practical decision-making that goes with the process of putting a new product before the consumer and new expenditures into this part of our economy. It could be effective in limiting innovation that, actually, is to the benefit of all concerned -- consumers, farm producers, distributors, and manufacturers. I urge your Committee, which has carefully sought information on the many implications of these proposals to include in your deliberations a critical review of this harmful aspect. For packaging, which is by no means always patentable, is a significant part of product improvement. Margarine is not the only item for which enterprise in package sizes and shapes is a positive aid in bringing new products into the market, and providing the consumer with new services.

Related Problems of Section 5

While this is the central problem, it should be noted that various ambiguities and particularly undesirable aspects of the proposed legislation contributes to it. I respectfully bring to your attention four instances:

(1) Section 5(e)(5) of H.R.15440 (but not S. 985) authorizes discretionary regulations to establish standards of package sizes and shapes where a package is found by the appropriate agency to be "likely to deceive retail purchasers". This regulatory authority is completely unnecessary in view of the existence of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1) and Section 403(d)

of the Food, Drug, and Cosmetic Act). Section 5 of the Federal Trade Commission Act prohibits any "unfair or deceptive acts or practices in commerce...." Section 403(d) of the FDC Act (21 U.S.C. § 343(d)) considers any food to be misbranded "if its container is so made, formed or filled as to be misleading".

Apart from the lack of need for this regulatory authority, its existence would entail economic costs that would have to be passed on to consumers. The time and cost likely to be involved in obtaining an initial or an amended voluntary standard, or a mandatory standard, or a voluntary standard which became mandatory, is bound to be considerable. And the delay and cost inevitably would restrict the ability of the margarine or any other industry to continue to create new packaging to handle new product innovations.

Small businesses might well find these adverse factors sufficient to bar their making such innovations. The cost of new packaging -- a major area of effective competition for small companies as well as large -- would very possibly become prohibitive for many firms. The margarine industry includes small as well as medium-size and larger firms.

(2) Effects of "voluntary standards" not made clear. I am unable to determine, with certainty, whether the "voluntary standards" provided by Section 5(e) of both H.R. 15440 and S.985 are to have the force and effect of law. Section 7 provides for the enforcement of any regulations "issued" pursuant to the proposed legislation. However, voluntary regulations prepared with the participation of the

Secretary of Commerce pursuant to Section 5(e) are to be promulgated pursuant to the established procedure of the Secretary of Commerce for the development of voluntary product standards (15 C.F.R. § 10). The established procedures of the Secretary of Commerce (15 C.F.R. § 10.7(a)) provide:

> A standard published by the Department under these procedures is a voluntary standard and thus by itself has no mandatory or legally binding effect. Any person may choose to use or not to use such a standard.

Indicative of the likelihood that the proposed legislation does not intend voluntary standards to be enforceable is the absence from the legislation of any provision directly vesting in the enforcing agencies authority to prosecute violations of voluntary standards.

However, if it is intended that the voluntary standards are to have the force and effect of law, they are objectionable because no procedural safeguards are provided to protect the rights of those who do not agree with any such standard. The voluntary standards are not made subject to Section 7 of the Administrative Procedure Act or any equivalent procedural due process.

(3) Concurrent "voluntary" and mandatory standards proceedings are possible. The "voluntary" standard procedure of Section 5(e) contemplates that after the initiation by the appropriate agency of a mandatory standard proceeding, affected industry may initiate a voluntary standard under the auspices of the Secretary of Commerce. However, assuming that the voluntary standard proceeding progresses,

the proposed legislation provides no mechanism to prevent the initiating agency (FDA or FTC) from continuing with their mandatory standard proceeding.

If the mandatory standard proceeding is not automatically to be stayed by the initiation of a voluntary standard proceeding, affected industry will be placed in the absurd position of having to proceed with two concurrent proceedings concerned with the same commodity.

(4) Conversion of "voluntary standards" to mandatory standards not clarified. The Senate Commerce Committee's Report on S. 985 advises that (p. 8):

> Where a voluntary standard promulgated by the Secretary of Commerce is in effect but is not being complied with, the promulgating authority may initiate a proceeding to establish a mandatory standard.

If our evaluation of the voluntary standard procedure is accurate, i.e., such standards are not legally enforceable, it appears that voluntary standards could be adopted by the appropriate agency as mandatory standards. The proposed legislation does not specifically provide for this procedure, nor does it prohibit it. And the proposed legislation contains no provision prohibiting the authorized agencies from promulgating, as a mandatory standard, any voluntary standard notwithstanding the fact that the affected industry is complying with such voluntary standard.

If one assumes that each voluntary standard will be adopted as a mandatory standard, the affected industry in each instance will be subjected to the cost inherent in participating in two proceedings to result in one regulation:

(a) Under the procedures adopted by Section 5(e), industry participating in a voluntary standard would bear the costs inherent in that procedure. If the appropriate agency then determines to adopt such "voluntary" standard as a "mandatory" standard, Section 6 of the proposed legislation appears to require that the authorized agency promulgate the regulations after a proceeding conducted pursuant to subsections (e), (f), and (g) of Section 701 of the Federal Food, Drug, and Cosmetic Act.

(b) The same duplicate procedure would seem to be required of an affected industry whenever an amendment is sought to be made to a "voluntary" standard. It appears necessary that the affected industry seek to obtain a desired amendment pursuant to the procedure established by the Secretary of Commerce and, if such "voluntary" standard has been adopted as a mandatory standard by the appropriate agency, affected industry must then participate pursuant to Section 701 of the Federal Food, Drug and Cosmetic Act.

It is not unreasonable to anticipate that the adoption or amendment of any "voluntary" standard which is converted to a mandatory standard would require a minimum of two years' time, and consequent considerable expense.

To sum up, the standards procedures will entail for the manufacturer serious considerations of delay, expense, and disclosure of trade secrets that will operate to discourage and hamper the innovation in the packaging of margarine and other products. This is bound to be a factor working against the consumer's freedom of choice, and the maintenance of the lowest possible cost.

Conflict with Existing State Laws

Regulations promulgated under authority of the proposed legislation will create substantial conflicts with established regulation of margarine, at both the Federal and state levels.

This possibility of conflict is increased by virtue of the fact that, for the most part, state regulation of margarine packaging and labeling, over the years, has been modified to eliminate conflicts with Federal regulation of margarine packaging and labeling. The Model Law on Weights and Measures, being progressively adopted by the states, specifically provides for margarine to be sold at retail only in 1 pound, ½ pound, ¼ pound, and multiples of 1 pound.

Regulations promulgated pursuant to the proposed law may, through more careful liaison between the regulating agencies than the bills require, eliminate conflict at the Federal level. In their present form, however, the bills provide no means for eliminating conflict between Federal and state regulations except only in respect of Federal regulations dealing with the labeling of the net quantity of contents of packages. The bills provide that regulations in this limited area will simply supersede state laws concerned with the same subject.

This Association's efforts to eliminate conflict between state and Federal laws regulating the packaging and labeling of margarine stand to be obliterated by the enactment of new Federal regulations which will necessitate renewed efforts, at the expense of industry (and ultimately, the consumer) to eliminate conflicts between state and Federal regulation in this are.

No Safeguard against Waste of Packaging in Changeover

Nowhere in the proposed legislation is there a safeguard preventing administrative officials from ignoring or inadequately complying with the intent stated in the report on S. 985 of the Senate Committee on Interstate Commerce (Report No. 1186, 89th Congress, 2nd Session) that "no regulation under the mandatory or discretionary sections ... should take effect until the manufacturers involved have had full opportunity to effect any necessary packaging or labeling changes and to allow reasonable time for the disposal of existing stocks and inventories".

The potential costs involved in any failure to follow this intent are so substantial that it would seem an essential amendment to the bills to make the specific provision that no regulation produced under the proposed legislation will be effective until time has been allowed to make a changeover without unreasonable waste and loss.

Recommendation

The National Association of Margarine Manufacturers respectfully recommends, in the light of the considerations described in this statement and others received by the Committee, that the proposed legislation not be enacted.

I thank the members of the Committee for their attention and consideration.

S. F. Riepma
President
National Association of Margarine Mfrs.