

**NATIONAL UNIFORMITY in FOOD REGULATION: A CLOSER LOOK  
AT NATIONAL UNIFORMITY FOR FOOD ACT**

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# **NATIONAL UNIFORMITY in FOOD REGULATION: A CLOSER LOOK AT NATIONAL UNIFORMITY FOR FOOD ACT**

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The 2006 National Uniformity for Food Act is an effort to obtain uniformity in food labeling and warning requirements. The legislation if passed would amend the Federal food, Drug and Cosmetic Act, creating a national uniform system. The Act intrudes upon the state's longstanding power to regulate food labeling and warnings for the protection of its citizens under the state's police power. This proposed legislation would unduly interfere with state authority and expertise in the area of food labeling and warning negating many of the safeguards currently in place to protect consumers.

This paper will argue both the pros and cons of having a uniform food-labeling requirement in the United States. Part I will provide a brief history food uniformity legislation in the United States beginning in 1906. Included in this section will be a discussion of the Meat Inspection Act of 1906, the Food, Drug, and Cosmetic Act of 1938, and the most recent food inspection acts beginning in 1990. Part II will address the specific provisions of the bill in an effort to analyze whether the changes will be done in a subtle or a more drastic way and how its implementation may affect American consumers in the process. Part III will feature the arguments of proponents of the legislation and its possible benefits for the safety of our food products and the health of American citizens. Conversely, Part IV of the paper will discuss the possible disadvantages of having a uniform food labeling system and its restraints on local and

state agencies. Finally, Part V will conclude the paper by stating why the National Uniformity for Food Act of 2006 should not be enacted into law.

## **I. A HISTORY OF FOOD UNIFORMITY IN THE UNITED STATES**

### ***A. Early Legislation***

The Meat inspection Act of 1906 was the United States' first attempt pass legislation relating to food safety.<sup>1</sup> President Theodore Roosevelt passed this legislation in the wake of Upton Sinclair's *The Jungle*, which exposed the horrors of the Chicago meat packing industry in great and horrific detail. Amidst the public outcry, Roosevelt mandated inspection of meat packaging plants that conducted business through interstate commerce. One of the primary requirements of the Meat Inspection Acts was the inspection of livestock before slaughter, which included: cattle, goats, swine, and chicken.<sup>2</sup> The act also required mandatory post mortem inspections of every carcass.<sup>3</sup> The final two explicit requirements of the Meat Inspection Act of 1906 were to establish sanitation standards for meat processing plants along with slaughterhouses and to authorize an ongoing system to monitor such facilities by the United States Department of Agriculture. This legislation marked the first step in the process of providing uniform standards to ensure the safety of meat.

The Federal Food, Drug, and Cosmetic Act of 1938 effectively established the Food and Drug Administration, now known by widely as the FDA. There was a strong push by proponents of the Act to prohibit false therapeutic claims for drugs, along with

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<sup>1</sup> National Uniformity for Food Coalition. "*History of Uniformity*." November 23, 2007.

<http://www.uniformityforfood.org/legislation.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

other medical devices. The Act also established the FDA's right to inspect factories and control advertising made by companies.<sup>4</sup> One example of the horrors that this new agency tried to cure occurred when a Tennessee drug company marketed a product that had pediatric appeal, Elixir Sulfanilamide. The highly toxic drug was untested and was the modern equivalent to anti-freeze. Use of the product, due to its deceptive marketing, resulted in the deaths of over one hundred children.<sup>5</sup> After this legislation drugs were required to have directions as to their safe and effective use and companies were no longer allowed to put their drug on the market without adequate FDA approved testing.

### ***B. Recent legislation***

Most recently Congress has addressed issues of Food Inspection within the past twenty years. In 1990, The Nutrition Labeling and Education Act mandated that all packaged products carry a label with standard nutrition information.<sup>6</sup> This standard information required the serving size or other units per container. It also required the number of servings or other units per container, and the number of calories derived from saturated and unsaturated fat. Also included in the acts provisions were requirements regarding the amount of vitamins, nutrients, minerals, dietary fibers, sodium, and cholesterol to be placed on food and drug labels.<sup>7</sup>

The 1997 Food Quality Protection Act required a health-based standard for

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<sup>4</sup> Food and Drug Administration. "*The History of the FDA: 1938 Food, Drug, and Cosmetic Act.*" Nov. 17, 2007. <http://www.fda.gov/oc/history/historyoffda/section2.html>.

<sup>5</sup> *Id.*

<sup>6</sup> The Library of Congress. "*National Uniformity for Food Act 2006: Text.*" May 25, 2006. <http://thomas.loc.gov/cgi-bin/query/z?c109:S.3128>

pesticides in foods. The Act provided special incentives for infants and children, while creating special incentives for American Farmers for the development of safer crop protection tools.<sup>8</sup> The Act was a massive effort to evaluate and examine pesticides used on products. The overall goal was to achieve a uniform scientific health based standard for all pesticides in foods.

Throughout the past one hundred years the United States has been very proactive in establishing reliable and uniform food safety standards ranging from the inspection of meat processing facilities to evaluations of pesticides used on foods. Lawmakers have worked to ensure that food safety standards are not communal but that the same stringent requirements are provided in all fifty states. As our society has evolved, the public has become more aware and concerned with the products that are consumed and in what condition did they originate. The National Uniformity for Food Act is seen by many as a necessary step in the evolution of food safety that has taken place over the past century.

## **II. TEXT and LANGUAGE OF PROPOSED LEGISLATION**

### ***a. Section by Section Analysis***

#### ***1. Section 403 (a)***

Section 403(a) includes food adulteration in the uniformity requirement for food labeling provisions. This section is substantively different from prior attempts to create a uniform food labeling systems because in the text of previous bills there was no mention of food adulteration as being one of the areas reached by national uniformity.

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<sup>7</sup> *Id.*

<sup>8</sup> National Uniformity for Food Coalition. "About the Legislation." November 23, 2007.

<http://www.uniformityforfood.org/legislation.htm>

Food adulteration is the act of intentionally debasing the quality of food offered for sale either by the admixture or substitution of inferior substances or by the removal of some valuable ingredient. Food adulteration has long been thought to decrease the value of the food. Section 403(a) recognizes that food adulteration has long been as a problem in the area of mass food production. With this current language in place, the bill can clearly regulate and require a uniform standard be established in terms of the substances that are added to foods resulting in food adulteration.

The text of the bill does not address food sanitation and makes no effort to propose the establishment of a national uniform standard in this area. Presumably, the rationale behind this is that states and local agencies are in the best possible position to regulate areas of sanitation because of their increased knowledge of particular restaurants and locations that have reputations for cleanliness. It would be impracticable for the federal food regulatory agencies to have the responsibility for sanitation oversight in each location that sells food in some capacity. States and local agencies under this proposed language maintain complete control in ensuring that conditions are sanitary based on the state's respective requirements.

## ***2. Section 403 (b)***

403 (b)(1a) provides that “no state may establish any notification as it applies to food . . . unless such a notification requirement has been proscribed by this Act and the state or political subdivision notification requirement is identical. . .” This gives rise to the explicit power of federal agencies in implementing a national uniformity requirement. It also prohibits states from overriding the requirements set forth by the national agencies in terms of food labeling and adulteration. This section also provides a definition for warning which include: food labeling, labeling, advertising, posters, public

notices, and any other means of communication. The broad legislative drafting continues by including “any form of notification requirement, whether by a law specifically classified as a flood statute, a consumer protection or unfair competition law, or a law that more generally applies to all chemicals present in consumer products or the environment.”<sup>9</sup>

Section 403(b) (3b) also establishes a procedure under which existing non-uniform state requirements will be reviewed. The bill provides a lengthy process by which state warning and notification requirements will remain in effect until they are thoroughly reviewed by the FDA. The agency will then make a determination as to whether the state provisions will be exempt from the requirement of national uniformity or whether they will be adopted as the national standard that will be applied throughout the country. Section B of this same provision sets forth the time frame for state petitions and mandates that states are required to petition the FDA within 180 days after the enactment of the statute. If submitted within the 180-day timeframe the state must receive a response by the FDA within 270 days after the enactment of the Act. The act seeks to create transparency in the FDA’s decision to either adopt or deny the legislation by requiring that the agency publish a notice of the petition in the Federal Register and provide 180 days for public comment on it. The final decision whether to grant or deny the state provision must be made within one year after deadline for public comment has expired.

403 (b)(c1) provides for exemptions from national standards if the state convinces the FDA that the provision may be directly linked to an important public

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<sup>9</sup> *Id.*



interest that would otherwise be unprotected, would not cause the food to be in violation of any federal law, and would not unduly burden interstate commerce. Section 3 provides the applicable timeline for state petitions, which is thirty days. This time period is substantially shorter than the time period for review of existing state requirements. After the public comment time period has expired the FDA has sixty days to grant or deny the petition and in no circumstances may this time period exceed 120 days. States have the option of seeking judicial intervention in order to obtain a ruling within a reasonable amount of time. States will know in a matter of months whether their particular warnings can be exempt due to a special public interest specific to their region or locale. The language of this provision indicates that the drafters were aware of certain special circumstances where a warning requirement should be specific to a certain location or region and should not apply throughout other parts of the country.

403 (b)(d1) addressed the state's authority to act when faced with an imminent hazard. This section gives states authority to establish provisions that are against the national uniformity standards if they are made as a result of an imminent hazard to health that is likely to result in serious adverse health effects or death. However, states must adhere to specific guidelines for submitting their petition. States must submit petitions to the FDA within thirty days of the adopting the non-uniform emergency requirement and the FDA must respond within seven days to each state's respective petition. The shorter timeline provided for in this section reveals the importance that imminent hazards pose to health and the need for it to be addressed in an expeditious manner. The FDA will determine the duration of the state's exception to the national uniformity requirement. This will depend mostly on the severity of the hazard that the state is confronted with.

The remaining portions of the Act have no effect on product liability law, identical state laws, or certain state laws that constitute local food enforcement activities. If a state law is identical to the national uniformity standard then the state law may remain in effect.<sup>10</sup> States are free to enforce state provisions that the Act has not explicitly addressed. It is arguable whether the Act delves into certain state laws that have an effect on local food enforcement. These activities include: open date labeling, grade labeling, state inspection stamp, religious dietary labeling, organic or natural designation; returnable bottle labeling, unit pricing, and statements of geographical origin.<sup>11</sup>

### **III. PROPONENTS OF NATIONAL UNIFORMITY FOR FOOD ACT**

#### ***A. Problems with the food-labeling system***

Advocates of the National Food for Uniformity Act first point to the fact that the need for a national uniformity standard for labeling food is long overdue. As it currently stands, food-labeling regulations vary from state to state.<sup>12</sup> Consumers are safer and will have more confidence in the products they buy because a national labeling system would require the same level of knowledge and expertise in food labeling regardless of location. Because foods travel interstate at a high frequency, consumers should be able to rely upon one uniform standard of food labeling and warnings instead of guessing at each state's requirements when purchasing products. Customers are more at risk and left in the dark regarding food safety standards under the current inconsistent food labeling

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<sup>10</sup> *Id.*

<sup>11</sup> The Library of Congress. "National Uniformity for Food Act 2006: Text." May 25, 2006. <http://thomas.loc.gov/cgi-bin/query/z?c109:S.3128>

<sup>12</sup> United Fresh Produce Association. "National Uniformity for Food Act: 2006." November 24, 2007.

system. The rapid development in food science can result in confusing and conflicting information about food warnings and labeling.<sup>13</sup> This bill seeks to harmonize these differences to achieve a national uniform standard.

### ***B. Benefits of National Uniformity for Food Act.***

Proponents argue that ultimately food labeling should be in the hands of the FDA, which is the world's leading food safety agency.<sup>14</sup> Because the FDA is the leader in food safety, it is in the best position to review all the facts and scientific information needed to make the best determinations on food labeling and warnings. The FDA unlike state labeling agencies will not succumb to the various lobbying groups and trial lawyers seeking to negotiate on hundreds of food labeling issues.<sup>15</sup> Having this legislation in the hands of a federal agency gives the entire process more transparency and credibility. Taxpayers must pay more annually because of the conflicting scientific information obtained by various state agencies on food labeling issues.<sup>16</sup> This legislation would reduce complaints and consumer confusion regarding the regulation of food labels and warnings and its inconsistency throughout the nation.

#### ***i. No intrusion upon the States***

The FDA will take a thorough approach by providing states the opportunity to submit its respective regulations for review in an effort to convince the FDA to adopt its

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[http://www.unitedfresh.org/newsviews/national\\_uniformity](http://www.unitedfresh.org/newsviews/national_uniformity)

<sup>13</sup> National Uniformity for Food Coalition. "About the Legislation." Nov. 17, 2007.

<http://www.uniformityforfood.org/legislation.htm>

<sup>14</sup> *Id.*

<sup>15</sup> National Uniformity for Food Coalition. "About the Legislation." Nov. 23, 2007.

<http://www.uniformityforfood.org/legislation.htm>

<sup>16</sup> United Fresh Produce Association. "National Uniformity for Food Act: 2006." Nov. 24, 2007.

[http://www.unitedfresh.org/newsviews/national\\_uniformity](http://www.unitedfresh.org/newsviews/national_uniformity)

standard or exempt it from national uniformity. The public would also have input before the legislation is adopted as final because each section of the legislation is open for public comment for a significant amount of time prior to the FDA making its final decision. This opens up the debate to scholars on the subject of food labeling and distribution, as well as other notable persons in this field who would like to have input in this area. States would remain autonomous in regulating food sanitation because this has traditionally been regulated at the local and state government level. States would also be able to maintain their regulatory laws that were not addressed by the Act. This ensures that states will be held to the highest standards of safety when they are involved in the most critical areas of food labeling and warning. It also gives states an opportunity to justify an exemption from the national standards because the particular omitted issue was not pertinent enough to be explicitly included in the Act. In cases of an emergency of imminent hazard, states are able to use its police powers to enact immediate legislation to ensure the health and safety of its citizens. States would theoretically retain a great deal of authority in the specified fields within the Act which includes: freshness dating, open date labeling, grade labeling, state inspection stamp, religious dietary labeling, organic or natural designation, returnable bottle labeling, unit pricing, statement of geographical origin. Finally, states would also maintain its power to enforce embargos, recall products, or other enforcement powers.

Lastly, proponents argue that national uniformity is not a new concept. Congress has repeatedly attempted to create a uniform system of food regulation<sup>17</sup>. Recently, in 1990 Congress has passed the Nutrition Labeling and Education Act and the Food

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<sup>17</sup> *Id.*

Quality Protection Act in 1996. The National Uniformity for Food Act is the next step in the slow progression and is needed due to the high amount of interstate commerce within the food industry. It provides stability and accountability for consumers who have concerns about their food's labels and warnings.

#### **IV. OPPONENTS OF THE NATIONAL UNIFORMITY FOR FOOD ACT**

##### ***a. The Act Greatly Reduces State Authority***

The Act would have the effect of prohibiting state or local governments from enacting laws that provide food safety protections. Local laws allowing states to regulate in the areas of adulterated or contaminated foods would be nullified unless they were deemed to be identical to federal law.<sup>18</sup> In the event of a hurricane, states would not be able to ensure seafood and dairy safety of its foods. States would have to go through a long and arduous petition process to federal authorities if their respective laws are not identical to the National Uniformity for Food Act. This process could take as long as two years from start to finish, leaving states with no ability to act in its own judgment for the health and safety of its citizens.

The Consumer's Union vehemently opposes the National Uniformity for Food Act for several reasons. First, they argue that the Food and Drug Administration has not adequately enacted strong protections regarding food safety and that state and local governments should be given this responsibility<sup>19</sup>. States have a long history of regulating in the area of food safety and for this reasons are in a better position to

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<sup>18</sup> The Library of Congress. "*National Uniformity for Food Act 2006: Text.*" May 25, 2006.

<http://thomas.loc.gov/cgi-bin/query/z?c109:S.3128>

<sup>19</sup> The Consumer's Union. "*Opposition to Food Uniformity Bill.*" Feb. 15, 2006,

[http://www.consumersunion.org/pub/core\\_food\\_safety/003165.html](http://www.consumersunion.org/pub/core_food_safety/003165.html)

ensure those standards are strictly adhered to. In 2001, states took action in 45,000 separate instances to remove adulterated foods from the marketplace.<sup>20</sup> The federal government is not in a position to go to the local level at the same frequency and thoroughness as state and local agencies. The FDA is already overburdened, underfunded, and overstaffed. There have been accusations by organizations such as National Environmental Trust which suggests that the FDA has a recent history of being the last to act as evidenced by the most recent issue of treating meat with carbon dioxide to mask that it has become spoiled<sup>21</sup>. When state oversight is limited, consumers are at a greater health risk. In 2005, when the Act was initially introduced, over eighty percent of food safety oversight was regulated at the state level. Because of the fact that states have carried a tremendous load in regulating food labels and warnings, questions have also arisen regarding the logistical and practical demands that would accompany any federal attempt at national food labeling uniformity.

Other opponents of the legislation include: National Association of State Departments of Agriculture (NSADA), Association of Food and Drug Officials (AFDO), and Georgia Department of Agriculture. The Act effectively pre-empts nearly 200 state laws and constitutionally mandated authorities due to its broad language when defining commonly used terms such as “food”. As it currently stands the food labeling systems is designed so that local, state, and federal authorities work together to ensure that food is safe in all communities regardless of their population or locale. Enactment of this Act would centralize all authority at the federal level greatly reducing the hands on

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<sup>20</sup> The Association of Food and Drug Officials. “*Concerns Regarding National Uniformity for Food Act.*” Nov. 16, 2007. <http://www.net.org/health/PresidentAllerLetter.pdf>

<sup>21</sup> *Id.*

inspections done at the state and local level. Thirty-seven state attorney generals also oppose the bill as unnecessarily endangering human health and undercutting the longstanding and constitutionally recognized principle of state's rights. Other examples where the state would not have the ability to regulate in an effort to protect its citizens include: consumer warnings regarding mercury contamination in fish, arsenic in bottled water, lead in ceramic tableware, the alcohol content in candies, the content of fats and oils in foods, and post harvest pesticides in fruits and vegetables.<sup>22</sup> This is seen as an attempt by lawmakers in Washington to impose its will upon the states to satisfy lobbyist. Special interest groups in the food production industry, along with the Grocery Manufacturers of America may have the most to gain from the legislation. If regulations are eliminated, food producers have the ability to sell products with higher levels of chemical or biological substances. Meats would be on shelves longer because certain agents used to maintain the meat's sellable appearance would be freely used, making the product more appealing to consumers, in turn decreasing the amount of unsold products and increasing profits.<sup>23</sup>

### ***b. Cost to Taxpayers and Terrorist Prevention***

The estimated cost of the proposed legislation to taxpayers is approximately 100 million dollars. This averages to approximately \$400,000.00 per state petition as estimated by the Congressional Budget Office. It is predicted by legal experts that this litigation will spawn numerous lawsuit by states challenging federal laws forcing the

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<sup>22</sup> The Association of Food and Drug Officials. "Letters from State Attorney Generals in Opposition to National Uniformity for Food Act 2006." Nov. 16, 2007. <http://www.net.org/health/AG%20Letter-FoodSafety-3-1-06.pdf>

<sup>23</sup> Food and Water Watch. "Protecting State Labeling Laws." Nov. 26, 2007.

federal government to spend time responding to such petitions. The FDA would also be expected to be forced to hire more experts to perform the duties of local and state officials. This would create further financial strain on the government by forcing it pay more individuals to perform duties historically reserved for the states.

With the ever-changing war on terror being a real and present danger, many believe this Act severely limits the state's ability to protect its citizens in the event of a terrorist threat to the state's food supply. State and local officials' ability to regulate and enforce protection laws are severely limited by the legislation. The Act weakens the first line of defense against the threat of a terrorist attack against our nation's food supply.<sup>24</sup> Opponents feel that this is the wrong time to strip states of its regulatory authority because of the ongoing and increasing war on terror. The nation's food supply must be protected at the state and local level from terrorist. This can only be accomplished by allowing states to be expansive and proactive in drafting legislation and regulations to protect against terrorist threats.

## **V. Conclusion**

The National Uniformity for Food Act of 2006 should not be adopted into legislation. The requirements of the bill effectively eliminate numerous state laws that have become the backbone of state and local regulation of food labeling and warnings. The impact of this legislation would be to create a massive overhaul in the food labeling industry. If it is determined that the food labeling industry needs a massive overhaul, it should be done in a deliberate and methodical manner. A phased implementation of

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<http://www.foodandwaterwatch.org/food/food-labeling/national-uniformity-of-food-act-1>

<sup>24</sup> Association of Food and Drug Officials. "Concerns Regarding the National Uniformity for Food Act." Dec. 6, 2005. <http://www.afdo.org>



these provisions would ensure that states are adequately involved in the new process and are not overlooked during the legislative drafting process. For the past century states have been at the forefront in forming and implementing regulations and legislation of food labeling and warnings. Local and state agencies have become more familiar with its own state's strengths and weaknesses in regard to food labeling and warnings. Over the years, officials have been able to pinpoint problem areas in specific locations. It would be impracticable to assume that a federal agency such as the FDA would be able to pick up where states left off in terms of familiarity.

The National Uniformity for Food Act does address the problem of non-uniformity in food labeling and warning, which must eventually be considered. However, states are entrusted with the responsibility to look after the health, safety, morals, and welfare of its citizens pursuant to its police powers enumerated in the Constitution. Congress exempted acts such as California's Proposition 65 from a 1996 national uniformity law regarding food safety<sup>25</sup>. California's Proposition 65 implemented similar food safety provisions employed by many state agencies today. For this reason, state officials should be convened to collectively draft legislation that allows for a greater amount of national uniformity in the areas of food labeling and warnings without completely preempting over 200 state laws in the process. FDA officials must be able to rely on the states as their eyes and ears at the local level when enforcing these regulations. In 2005 alone, states took action in over 45,000 separate instances to remove adulterated foods from stores across the country. There is no disputing the fact

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<sup>25</sup> Wendy Aguilar, Comment, *The Lowest Common Denominator: The National Uniformity for Food Act*, 16 San Joaquin Agric. L. Rev. 57-72 (2006).

that state officials play a major role in the regulation process. State official must be given a reasonable amount of discretion to either remove products from the shelves that do not meet certain requirements, or a faster petition process must be made available so that states may challenge laws and/or food labeling regulations that they do not agree with. A greater amount of collaboration must be sought from both sides if this legislation is to achieve its intended purpose, which is to provide safer products for consumers throughout the country, irregardless of what state the purchase product is purchased from. The ideal legislation would allow the federal agencies to use its expenditures and resources to oversee the legislative drafting process by soliciting experts in the field of food labeling and warnings. Simultaneously, state and local officials must be given the opportunity to rely upon their local knowledge of their respective states and regions when regulating and enforcing these new laws. Unfortunately, the current National Uniformity for Food Act does not strike this important balance and for the reasons stated above should not be enacted into law.