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LEGISLATION

The Fair Packaging and Labeling Act: Its Legislative History, Content, and Future

Wesley E. Forte*

The Fair Packaging and Labeling Act (FPLA), which became effective on July 1, 1967,¹ was designed to protect consumers by requiring informative labeling and nondeceptive packaging for consumer commodities. The statute has been described as "an information bill. The first part is information largely about the label. . . . The second part of the bill is really, in a way, to try to eliminate the confusion in words so we have a common terminology, so we all speak the same language. . . . It is like establishing an alphabet . . . in size designations."² The author seeks to provide an insight into the new alphabet of the FPLA and the controversial regulations issued by the FTC and the FDA pursuant to the FPLA through a discussion of the legislative history and some of the present difficulties under the statute.

I. THE LAW PRIOR TO THE FAIR PACKAGING AND LABELING ACT

Among the most elemental and most important laws protecting consumers are federal statutes dating from the early 1900's, which prevent the false and misleading labeling of consumer products.³

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1. 15 U.S.C. §§ 1451-61 (Supp. II, 1967).

2. *Hearings on H.R. 15440 & S. 985 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., 176-77 (1966).

3. The false and misleading labeling of foods and drugs was prohibited by the Food and Drugs Act of June 30, 1906, ch. 3915, 34 Stat. 768, which was superseded by the Federal Food, Drug, & Cosmetic Act of 1938, 21 U.S.C. §§ 301-92 (1964). The power to regulate false and misleading labeling was assumed by the FTC under § 5 of the FTC Act, which originally prohibited "unfair methods of competition in commerce," 38 Stat. 719 (1914), *as amended*, 15 U.S.C. § 45(a)(1) (1964). See G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 179-93 (1924). The FPLA reflected, in part, congressional dissatisfaction with the inefficiencies of case-by-case law enforcement. While many of the practices outlawed by the FPLA were also illegal under existing statutes to the extent that these practices were deceptive (*e.g.*, cents-off labeling and slack-fill), Congress believed that it would be more efficient and effective to permit FDA and FTC to promulgate substantive rules regulating these matters. Almost concurrently with the drive for fair packaging and labeling legislation, the FTC began the issuance of "Trade Regulation Rules," 16 C.F.R. § 401.1-413.6 (1968). See Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8364-73 (1964) for a statement by FTC of its authority to issue these rules. The

These statutes have traditionally been enforced against individual offenders on a case by case basis, although the federal agencies having jurisdiction over these matters (primarily the Food and Drug Administration and the Federal Trade Commission) have also published advisory "guides," "trade practice rules," or "trade correspondence" to assist sellers in properly labeling their products.⁴ The importance of these laws has increased with the proliferation of packages and with the greater dependence of consumers on labels rather than upon the services of the corner grocer of another generation.⁵

The FDA has jurisdiction over false and misleading labeling of the most basic consumer products, such as foods, drugs, and cosmetics,⁶ while the FTC's concurrent jurisdiction extends to all unfair methods of competition and unfair or deceptive acts or practices in commerce, including the false and misleading labeling of all products.⁷ However, the FTC generally defers to the FDA in regulating the labeling of products within the FDA's jurisdiction.⁸ The Department of Agriculture has jurisdiction over the false and misleading labeling of meats and poultry,⁹ but no further comments concerning this power are contained in this article since meat and poultry are excluded from the FPLA.¹⁰

concurrent enactment of the FPLA and development of FTC's Trade Regulation Rules (which would have permitted FTC to accomplish many of the objectives of the FPLA under existing law) will probably be viewed as an incongruity in later years.

4. The FTC's Trade Practice Conference Rules and Guides, which are collected at 16 C.F.R. § 16.1-240.16 (1968), extend beyond labeling to all unfair methods of competition and unfair or deceptive acts and practices. FDA issued publications entitled "Trade Correspondence," which consisted of advisory opinions, until the enactment of the Administrative Procedure Act. For a collection of Trade Correspondence, see V. KLEINFELD & C. DUNN, *FEDERAL FOOD, DRUG, & COSMETIC ACT, JUDICIAL AND ADMINISTRATIVE RECORD 1938-1949*, at 561-753 (1949). At the present time, the FDA issues "Statements of General Policy or Interpretation," which are also advisory rather than legally binding opinions, and are published in the *Federal Register*.

5. See, e.g., *Hearings on S. Res. 52 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 10-17 (1961)* (hereinafter cited as *1961 Hearings*). As one witness testified, the retailer's influence has so declined that we now have a product-buyer rather than a seller-buyer relationship. *Id.* at 12.

6. Federal Food, Drug, & Cosmetic Act, 21 U.S.C. §§ 343(a), 352(a), 362(a) (1964). For a description of the various connections with interstate commerce sufficient to bring these products under federal jurisdiction, see 21 U.S.C. § 331(a)-(c),(k) (1964).

7. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1964); *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917, 919 (2d Cir. 1942).

8. See 3 TRADE REG. REP. para. 9850.03 (June 9, 1954). A separate Liaison Agreement between FDA and FTC governs over-the-counter drugs. 3 TRADE REG. REP. para. 9850.04 (Jan. 23, 1968).

9. Meat Inspection Act, 21 U.S.C. § 75 (1964); Poultry & Poultry Products Inspection Act, 21 U.S.C. §§ 457-58 (1964); 9 C.F.R. § 317.8 (1968).

10. 15 U.S.C. § 1459(a)(1) (Supp. II, 1967).

The FTC has the power to compel affirmative disclosure of facts in labeling through the issuance of cease and desist orders.¹¹ Likewise, the FDA may also indirectly compel affirmative disclosure, since the determination of whether labeling is false and misleading often depends upon the extent to which relevant and material facts remain undisclosed.¹² Although the FDA's and the FTC's powers to compel affirmative disclosure are limited to the prevention of deception,¹³ these powers are supplemented by statutes which require statements of certain specific information on the labels of specific products. The Federal Food, Drug, and Cosmetic Act imposes such requirements on foods, drugs, and cosmetics,¹⁴ while the various textile and fur statutes require similar disclosures on textile and fur products.¹⁵ These statutes do more than prevent deception; by requiring disclosure of the quantity or composition of products, they prevent confusion and permit the consumer to make value comparisons.

Also intended to prevent deception and confusion in the marketplace are restrictions upon the use of certain words in labeling or advertising except in conformity with certain pre-determined definitions.¹⁶ These restrictions primarily define generic names for products although they also restrict many other types of words and phrases

11. 15 U.S.C. § 45(b) (1964). See *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922).

12. Federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 321(n) (1964). The question of affirmative disclosure frequently arises when a seller wants to use the name of a minor ingredient as part of the name of the product. The FDA has said that it may be necessary to disclose the quantity of the minor ingredient on the label. See V. KLEINFELD & C. DUNN, *FEDERAL FOOD, DRUG, & COSMETIC ACT—JUDICIAL AND ADMINISTRATIVE RECORD 1938-1949*, at 669, 676 (1949).

13. See *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1047-51 (1967); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 489-90 (1964). The FTC's power to compel affirmative disclosure in labeling presents the same issues, arises under the same statute, and is governed by the same principles as the FTC's power to compel affirmative disclosure in advertising, with one exception: when a product contains no label and consumers would be deceived by its physical appearance, the FTC can compel the seller to affix the required information to the product. See, e.g., *Schachnow v. FTC*, 1940-1943 Trade Cas. para. 56, 118 (3d Cir. 1941) (respondent prohibited from representing hats as new by failing to affix a statement that the hats were "second-hand" or "used"). The FDA in effect gets affirmative disclosure in similar situations because products under its jurisdiction must bear certain information (see statutes cited note 14 *infra*) and because foods which resemble other foods must be labeled and sold as imitations. Federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 343(c) (1964).

14. 21 U.S.C. § 343(e), (i) (1964) (foods); *id.* § 352(b)-(f) (drugs); *id.* § 362 (cosmetics).

15. Wool Products Labeling Act, 15 U.S.C. §§ 68-68j (1964); Textile Fiber Products Identification Act, *id.* §§ 70-70k; Fur Products Labeling Act, *id.* §§ 69-69j.

16. The restrictions appear in the FTC's Guides and Trade Practice Rules and the FTC's Trade Regulation Rules. See notes 3 & 4 *supra*.

which may influence the decisions of prospective purchasers.¹⁷ The FDA's definitions and standards of identity, which regulate the physical composition of products also, in effect, define the generic designations of foods.¹⁸ These restrictions have resulted in a modest glossary of words and phrases which can only be used in conformity with federal regulations, trade practice rules, or guides.¹⁹ This glossary, when supplemented by requirements of affirmative disclosure, government restrictions on the form of such disclosure, and prohibitions against confusing packaging and labeling practices, is the "old alphabet," which in some respects has a remarkable resemblance to the "new alphabet" established by the FPLA.²⁰

17. Guides and Trade Practice Rules defining generic names for products are so varied that they almost exceed the imagination. Examples of the many names so defined and restricted are "fall-out shelter," 16 C.F.R. § 229 (1968); "Epoxy adhesives," *id.* § 235.4; "gold," *id.* § 23.22; "pearl," *id.* § 23 (1968); "braided rugs," *id.* § 71; "fruit jam," *id.* § 114.1; and "cedar chest," *id.* § 217.2. Some of the terms are of universal applicability to all products, such as "free" and "comparable value" (see FTC Guides Against Deceptive Pricing, *id.* §§ 233.1-233.5), while restrictions on other words and phrases are meaningful only in relation to specific products such as "moth repellent" in connection with cedar chests, *id.* § 217.3.

18. The Federal Food, Drug, & Cosmetic Act provides that the Secretary can promulgate regulations fixing and establishing for a food, "under its common or usual name so far as practicable," a reasonable definition and standard of identity. 21 U.S.C. § 341 (1964) (emphasis added). The effect of the promulgation of such a standard is to define the food and to prevent the sale of any other food which purports to be or is represented as the standardized food, but which does not comply with the standard. See 21 U.S.C. § 343(g) (1964); *United States v. 30 Cases of Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S.D. Iowa 1950); *United States v. 20 Cases of Buitoni 20% Protein Spaghetti*, 130 F. Supp. 715 (D. Del. 1955), *aff'd*, 228 F.2d 912 (3d Cir. 1956); *United States v. 306 Cases of Sandford Tomato Catsup with Preservative*, 55 F. Supp. 725 (E.D.N.Y. 1944), *aff'd sub nom. Libby, McNeill & Libby v. United States*, 148 F.2d 71 (2d Cir. 1945). For a review of the circumstances under which a food may be considered to purport or to be represented as the standardized food, see Forte, *Definitions and Standards of Identity for Foods*, 14 U.C.L.A. L. Rev. 796, 811-20 (1966).

19. The glossary is, of course, negative as well as positive, since it describes the improper uses of words at least as often as the approved uses. The legally binding Trade Regulation Rules contain restrictions on the use of such words as "automatic" on sewing machines, 16 C.F.R. §§ 401.1-5 (1968); "binoculars" for binoculars, *id.* §§ 402.1-5; and "leakproof" for dry cell batteries, *id.* §§ 403.1-6.

20. Probably the closest example of the similarity lies in the power to regulate cents-off labeling under section 5(c)(2) of the FPLA. 15 U.S.C. § 1454(c)(2) (Supp. II, 1967). Prior to the FPLA, the FTC had issued its Guides Against Deceptive Pricing (see note 17 *supra*), which are concerned with similar practices. While the Guides were only advisory, the FTC could presumably have re-issued the Guides as a Trade Regulation Rule which is legally binding. If so, it is difficult to see how FTC's jurisdiction has been enlarged and indeed, it may be argued that FTC's jurisdiction has been contracted, since, prior to the FPLA, the FTC might have tried to ban all cents-off labeling when the manufacturer does not control the retail price on the ground that such labeling was inherently deceptive. The FTC would find it very difficult to take the same approach today as the legislative history of the FPLA indicates that cents-off labeling is to be regulated rather than banned even when the manufacturer does not sell directly to consumers. See H.R. REP. No. 2076, 89th Cong., 2d Sess. (1966).

Additionally, both the FDA and the FTC have the power to prevent the sale of products packed in misleading containers (for example, deceptively slack-filled foods)²¹ The FTC's power again is contained in section 5 of the FTC Act; under this section it can issue cease and desist orders,²² guides, rules, and possibly regulations to prevent the use of deceptive containers.²³ The Federal Food, Drug, and Cosmetic Act allows the FDA to institute seizure proceedings against foods, drugs, and cosmetics which are packaged in containers "so made, formed or filled as to be misleading,"²⁴ and, under this Act, it may also require a disclosure that a food is "Below Standard in Fill" when its fill fails to meet FDA regulations.²⁵ Under the law prior to the FPLA, it seems likely that an affirmative disclosure of any slack-fill would constitute compliance with the law by making the container not "misleading."²⁶

In summary, legal restrictions for the economic protection of the consumer prior to the FPLA were intended to prevent both confusion and deception in the marketplace. The dominant theme of the law was that if the consumer was given a full and fair disclosure of the

21. For a review of law prior to the FPLA, see Forte, *The Food and Drug Administration, The Federal Trade Commission and the Deceptive Packaging of Foods*, 40 N.Y.U. L. REV. 860 (1965).

22. See, e.g., Papercraft Corp., (1963-1965 Transfer Binder) TRADE REG. REP. para. 16,721 (FTC 1964). Prior cases include Pioneer Specialty Co., 39 F.T.C. 188 (1944); United Drug Co., 35 F.T.C. 643 (1942); Burry Biscuit Corp., 33 F.T.C. 89 (1941); Trade Labs, Inc., 25 F.T.C. 937 (1937). See also United States Packaging Corp., 53 F.T.C. 1174 (1957) (consent order).

23. E.g., 16 C.F.R. § 144.8 (1968), prohibiting the sale of slack-filled sardine and tuna products. The FTC also may have the power to issue trade regulation rules preventing deceptive slack-fill. See Forte, *supra* note 21, at 885-87.

24. 21 U.S.C. § 343(d) (1964). Due to its inability to convince the courts that the seized packages were misleading, the FDA has been uniformly unsuccessful in all such actions in which the seizure was contested. E.g., *United States v. 174 Cases of Delson Thin Mints*, 302 F.2d 724 (3d Cir. 1962); *United States v. Cataldo*, 157 F.2d 802 (1st Cir. 1946); *United States v. 116 Boxes of Arden Assorted Candy Drops*, 80 F. Supp. 911 (D. Mass. 1948); *United States v. 738 Cases of Jiffy-Lou Vanilla Flavor Pudding*, 71 F. Supp. 279 (D. Ariz. 1946).

25. 21 C.F.R. § 10.7 (1968).

26. See, e.g., Brennan, *Affirmative Disclosure in Advertising and Control of Packaging Design Under the Federal Trade Commission Act*, 20 BUS. LAW. 133, 143-44 (1964), suggesting that such disclosure would probably solve FTC problems. No similar comment seems to have appeared about FDA, probably because of FDA's abysmal record in packaging cases even without such disclosure. See note 24 *supra*. The Federal Food, Drug, & Cosmetic Act specifically provides that an affirmative disclosure that a food is "Below Standard in Fill" is sufficient to avoid problems under the FDA's standards of fill. 21 U.S.C. § 343(h) (1964). Such labeling probably would have also prevented the container from being misleading and violating section 403(d). 21 U.S.C. § 343(d) (1964). While the FTC might have been able to ban all unnecessary slack-fill, even in presence of an affirmative disclosure of the empty space, by issuing a Trade Regulation Rule so providing, no such rules were ever issued and Chairman Dixon indicated he had doubts about FTC's power to issue such rules.

facts, he could protect himself sufficiently.²⁷ The Fair Packaging and Labeling Act, in part, follows the same general principles.

II. THE LEGISLATIVE HISTORY OF THE FPLA

In his opening remarks to the Senate Subcommittee on Antitrust and Monopoly, which began an investigation into packaging and labeling practices in 1961,²⁸ Senator Philip A. Hart of Michigan, the Subcommittee Chairman, stated that:

The purpose of this inquiry is to determine whether the information concerning the products on sale is such that the consumer can make a reasonably intelligent choice between competing products in today's marketplace. Do the packages and labels aid in performing this essential economic function by giving necessary information, clearly stated? Are packages and labels designed so that the shopper can reasonably obtain and understand necessary and significant information pertaining to quantity, quality and value? Do there appear to be techniques or practices which confound or confuse the consumer? If so, how extensive are they? Finally, if such practices do exist, what effect do they have on the producer who does not engage in them but prefers to use a package and label designed to give pertinent information in a clear and easily understood manner?²⁹

The manufacturer of consumer commodities was clearly the "target defendant" of these hearings. The retailer, who was in part respon-

27. There are, of course, important exceptions to this theme. Both standards of identity for foods and the economic adulteration statutes are based upon the premise that the consumer cannot protect himself against fraud simply by reading a statement of the ingredients of a food, and hence an ingredient statement is no defense to a charge that these laws have been violated. See Federal Food, Drug, & Cosmetic Act, §§ 402(b), 403(g), 21 U.S.C. §§ 342(b), 343(g) (1964). See also Forte, *Definitions and Standards of Identity for Foods*, 14 U.C.L.A. L. REV. 796, 812-13 (1967), and Forte, *The Food and Drug Administration and the Economic Adulteration of Foods*, 41 IND. L.J. 346, 363-65 (1966). However, other labeling may be sufficient to evade a violation. See Forte, *Definitions and Standards of Identity for Foods*, supra at 820, and Forte, *The Food and Drug Administration and the Economic Adulteration of Foods*, supra at 364 n.76 (1966). Although theoretically a food labeled and sold as an imitation of another food may be economically adulterated under § 402(b) (see Austern, *Ordinary English But Not Ordinary Jam*, 6 FOOD DRUG COSM. L.J. 909, 912-13 (1951)), there are no reported cases in which such a food has ever been challenged. Such labeling certainly takes the food outside the scope of a standard of identity. See 62 Cases of Jam v. United States, 340 U.S. 593 (1951). Similarly, outside the mainstream of consumer protection law are statutes intended primarily to preserve the economic interests of certain producers by restricting the sale of truthfully labeled foods. See, e.g., Filled Milk Act, 21 U.S.C. §§ 61-64 (1964). When the issue is economic protection of the consumer, the general rule is that full and adequate disclosure of the facts is enough to comply with the law. When the issue is health protection for the consumer, such labeling is, quite properly, often considered insufficient. See, e.g., 21 U.S.C. §§ 321(s), 342(a), 348 (1964), since the consequences can be disastrous for consumers who fail to understand the labeling.

28. Although the subcommittee was given broad authorization to investigate the sale, marketing and furnishing of consumer goods and services, the investigation quickly focused upon the packaging and labeling of household consumer products.

29. 1961 Hearings 2.

sible for the confusion in the marketplace,³⁰ the consumer, who could have reduced that confusion by more attentive purchasing,³¹ and the government officials, who could have prevented much of the confusion by more vigorous enforcement of existing law,³² were all generally exempted from culpability.

Since there are approximately 6,000 to 8,000³³ articles in the average supermarket, those who desired additional federal regulation of packaging and labeling were able to come to the hearings well-supplied with consumer complaints and examples of alleged confusing or deceptive labeling and packaging.³⁴ Every complaint which went unchallenged strengthened the case for new legislation.³⁵ Among their

30. For example, witnesses complained about containers of products bearing cents-off labeling which were not stamped with prices reflecting the full price reduction indicated in the labeling. See, e.g., *Hearings on S. 387 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 15, 58-59 (1963) (hereinafter cited as *1963 Hearings*); *Hearings on H.R. 15440 & S. 985 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 722, 931-37 (1966) (hereinafter cited as *1966 House Hearings*). Since the retailer stamped the prices on these containers, he was certainly responsible, in part at least, for the confusion. Similarly, witnesses ridiculed the proliferation of packages with different and fractional quantities (e.g., "Net Wt. 14 15/16 oz.") which made it difficult for consumers to compute the price per ounce and make price comparisons. See, e.g., *1961 Hearings* 103-10 and testimony cited at note 37 *infra*. However, the approach favored by proponents of the legislation was to try to restrict the manufacturer to packaging his product in standard net weights without fractional net contents. An alternative approach to the same problem would have been to require the retailer to stamp the price per ounce on all commodities held for sale after shipment in interstate commerce. *1961 Hearings* 125-26. This could have set the pattern for state legislation compelling similar markings on consumer commodities produced and sold intrastate, but this approach was rejected, apparently because it would be a burden on the retailer. The reason that retailers were exempted from the congressional inquiry is probably because they are more numerous than manufacturers and thus more difficult to regulate and more powerful politically. However, the result is an incongruity. Despite the congressional concern about price comparisons, there is no requirement that the retailers stamp the price on consumer commodities or have the price displayed near consumer commodities to aid consumers in making purchasing decisions.

31. See, e.g., *1961 Hearings* 7, 13, 32, 44.

32. FDA was probably exempted from responsibility on the theory that Congress had not given it sufficient funds to prosecute this practice. See *1961 Hearings* 809, *1963 Hearings* 366-67 for suggestions that FDA needed greater appropriations. FTC probably escaped responsibility because under the Working Agreement between the two agencies, FDA was supposed to handle these problems. See Forte, *supra* note 21, at 862 n.8.

33. *1961 Hearings* 13; *Report of the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary Pursuant to S. Res. 262*, 88th Cong., 2d Sess., 2 (1964) (hereinafter cited as *1964 Senate Report*).

34. See, e.g., *1961 Hearings* 24-30, 31-42, 71-79.

35. See *1961 Hearings* 115-17 for an example of a situation in which a witness asked minority counsel to explain such complaints. When complaints were not justified, the manufacturer's reasons for adopting that labeling or packaging were often not readily available and it was thus impossible immediately to explain why the packaging or labeling was proper.

complaints, which were to be a source of controversy in Congress for the next five years, were: (1) "slack-filled" packages;³⁶ (2) excessive proliferation of package sizes (which made price comparisons difficult);³⁷ (3) qualifications of net contents statements (*e.g.*, "jumbo half quart");³⁸ (4) net contents statements in obscure locations and type sizes;³⁹ (5) confusing or deceptive cents-off labeling;⁴⁰ (6) size designations which were confusing and had no definite meaning (*e.g.*, "tall," "giant" and "king-size");⁴¹ (7) distinctively shaped packages which were difficult to compare visually with other packages;⁴² (8) deceptive pictures and symbols on packages;⁴³ (9) misleading identity and ingredient statements;⁴⁴ and (10) representations concerning "servings" when the quantity of the serving was not described and was often inadequate.⁴⁵

As a result of the hearings, Senator Hart in 1962, introduced a packaging and labeling bill for the purpose of receiving comments and suggestions from interested parties.⁴⁶ The bill was revised in the light of those comments, and on January 21, 1963, Senator Hart introduced the Truth in Packaging Bill,⁴⁷ proposing it as an amendment to section 3 of the Clayton Act.⁴⁸ Following traditional lines of authority, the bill gave the FDA jurisdiction to promulgate and enforce all regulations relating to labeling and packaging of foods,

36. *See, e.g.*, 1961 Hearings 6, 26, 37-38, 89.

37. *Id.* at 6, 10, 49, 103-10, 113-15. Complaints particularly focused on packages with fractional net contents (*e.g.*, 11 7/8 oz.). The suggested remedy was to limit the different weights in which commodities can be sold, thus making comparisons of price per ounce easier. *Id.* at 125.

38. *Id.* at 6, 25, 74, 76, 91.

39. *Id.* at 10-11, 26, 35, 37, 40, 73, 88. An early suggestion was to require all net weights to be printed under the brand name on the package in type proportional to the label size. *Id.* at 125. Another suggestion was a uniform location for both the ingredient and net weight statement. *Id.* at 49.

40. *Id.* at 34, 76. *E.g.*, "5¢ off regular price." Manufacturers placing such representations on their labels give an allowance to their customers to permit them to sell the product to the consumer at the reduced price while maintaining their usual margin of profit. However, witnesses questioned whether the retailer always passed the saving along to the consumer and whether cents-off had become perpetual for some products. *Id.* at 206.

41. *Id.* at 72, 75, 154.

42. *Id.* at 26, 34, 37-38, 154-55.

43. *Id.* at 10, 72, 158.

44. 1961 Hearings 75-76, 161.

45. *Id.* at 93-94, 154, 209-10, 227.

46. *See* S. 3745, 87th Cong., 2d Sess. (1962), and Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255, 1257 n.11 (1966).

47. S. 387, 88th Cong., 1st Sess. (1963).

48. § 3 of the Clayton Act, 15 U.S.C. § 14 (1964), prohibits exclusive-dealing contracts and tying agreements which may substantially lessen competition or tend to create a monopoly in any line of commerce. *See generally* REPORT OF THE ATT'Y GEN. NAT'L COMM. TO STUDY THE ANTI-TRUST LAWS, 137-49 (1955).

drugs, devices and cosmetics, while the FTC was given jurisdiction over other commodities.⁴⁹ Specifically, the bill directed these two agencies to promulgate regulations which would: (1) require the net contents statement to be placed upon the front panel of packages of consumer commodities and establish minimum standards for the prominence (including type size) of those statements; (2) prohibit the addition of qualifying words or phrases to the net contents statement; (3) prohibit cents-off labeling and similar promotions; and (4) prevent the placement of deceptive illustrations or pictures on packages of consumer commodities.⁵⁰ The bill also authorized the FDA and the FTC to promulgate discretionary regulations when necessary to establish or preserve fair competition or to enable consumers to make price comparisons.⁵¹ Although the agencies were required to give interested persons an opportunity to consult with them prior to the issuance of the regulations, no provision was made for a hearing prior to the promulgation of regulations.⁵² While non-compliance with the FTC's regulations could only result in a cease and desist order,⁵³ noncompliance with the FDA's regulations could result in criminal penalties.⁵⁴ The bill also required manufacturers, upon request, to send to the FDA or the FTC a sample of each package used by them.⁵⁵

The Truth in Packaging Bill was assigned to the Senate Judiciary Committee, and in March and April of 1963, hearings were held by the Subcommittee on Antitrust and Monopoly under the direction of Senator Hart. With the introduction of this specific legislation, those who opposed regulation of packaging and labeling took the offensive. Proponents of the legislation could no longer merely

49. S. 387, 88th Cong., 1st Sess. § 3A(d)-(e) (1963).

50. *Id.* § 3A(c). S. 387 also provided that the regulations adopted by the FDA and the FTC should be uniform in content and application to the greatest practicable extent, as determined by consultation between the Secretary and the Commissioner. *Id.* § 3A(d)(2). At a later date, the FDA and FTC acting under the FPLA were to propose precisely what the sponsors of the original Truth-In-Packaging Bill intended to prevent—nonuniform regulations for labeling and packaging of consumer commodities. Compare 32 Fed. Reg. 4172 (1967), with 32 Fed. Reg. 9109 (1967). The nonuniformity of regulations caused much of the opposition to the FTC's proposal.

51. These discretionary regulations authorized the agencies: (1) to establish the reasonable weights or quantities for consumer commodities; (2) to prohibit packages which might deceive consumers as to quantity; (3) to establish designations of size which may be used to characterize packages (as "small," "medium," and "large"); (4) to establish the net quantity of a commodity which constitutes a serving; (5) to establish standards for measuring commodities which cannot be measured meaningfully by weight, measure or count; and (6) to require the disclosure of ingredients and composition of consumer commodities. S. 387, 88th Cong., 1st Sess. § 3A(e) (1963).

52. *Id.* § 3A(f)(1).

53. *Id.* § 3A(h)(2); 15 U.S.C. § 45 (1964).

54. S. 387, 88th Cong., 1st Sess. § 3A(h)(1) (1963); 21 U.S.C. § 333 (1964).

55. S. 387, 88th Cong., 1st Sess. § 3A(g) (1963).

criticize packaging and labeling practices; they also had to defend the specific legislation advocated to remedy these practices, and criticism of this legislation was as abundant as it was intensive.

Critics attacked the substantive provisions of the bill chiefly on the ground that the practices prohibited were, in general, already illegal under existing law. They argued that detailed specification of the type, size, color, and location of the net contents statement was unnecessary, because the Federal Food, Drug, and Cosmetic Act already required that statement to be prominent and conspicuous.⁵⁶ Opponents also argued that it was unnecessary to prohibit the addition of qualifying words to the net contents statements or the use of deceptive illustrations since the Federal Food, Drug, and Cosmetic Act already prohibited "false and misleading labeling."⁵⁷ Finally, the authority in the bill to bar deceptive packages was attacked as redundant of the Federal Food, Drug, and Cosmetic Act's prohibition against containers "so made, formed or filled as to be misleading,"⁵⁸ while the requirement of labeling the composition of products was considered repetitive of the Federal Food, Drug, and Cosmetic Act's requirement of an ingredient statement on food labels.⁵⁹ Critics also challenged the prohibition against cents-off labeling as detrimental to consumers,⁶⁰ the proposed limitations on package sizes or weights as impractical and likely to cause manufacturers enormous expense,⁶¹ and government standardization of servings as extremely difficult or impossible because of differences of opinion concerning what constituted a proper "serving."⁶²

The procedural provisions of the bill also came under serious attack. The procedure for promulgating regulations was criticized as inadequate, because it did not provide a hearing,⁶³ and the procedure for enforcing the bill was criticized as improper, because non-compliance could result in criminal penalties.⁶⁴ Critics also contended that the provision permitting the continued enforcement of more

56. See, e.g., 1963 *Hearings* 64, 84-85, 664, 743-44, 766. While no similar federal law governed mandatory labeling of supermarket products other than foods, drugs and cosmetics, this void was not particularly advantageous to proponents of the legislation. It was clear that the legislation would have had little effect if foods, drugs and cosmetics were exempted and the bill covered only some so-called kitchen and bathroom products. See 1963 *Hearings* 9.

57. *Id.* at 65, 86, 334, 745, 783.

58. *Id.* at 66-67, 712-14, 743.

59. *Id.* at 666-67.

60. *Id.* at 561, 598-99, 665.

61. *Id.* at 231-32, 251-52, 784. As witnesses noted, weights and volumes cannot both be standardized because product densities vary. *Id.* at 263.

62. *Id.* at 233, 784-85.

63. *Id.* at 67-68, 338, 430, 558, 775.

64. *Id.* at 68, 339, 554-55, 770-71, 775.

stringent state laws should be changed to pre-empt all such laws.⁶⁵ Although there seemed to be opposition to virtually every substantive and procedural provision, Senate Bill (S.) 387 was favorably reported to the full Judiciary Committee, where no action was taken. The bill, therefore, died at the end of the 88th Congress in 1964.⁶⁶

In 1965, Senator Hart introduced a revised bill⁶⁷ entitled the "Fair Packaging and Labeling Act," S. 985, which no longer purported to be an amendment to the antitrust laws and was therefore assigned to the Senate Commerce Committee rather than the Senate Judiciary Committee. The new bill expressly precluded the possibility that criminal penalties could be imposed for noncompliance.⁶⁸ It also provided that the discretionary regulations (including limitations on package sizes) could only be issued after a public hearing⁶⁹ and that no regulation promulgated under it could take effect until a reasonable time was allowed to permit persons to comply with the new law.⁷⁰ The substantive provisions of S. 985 were, however, almost exactly the same as those of the earlier "Truth In Packaging Bill."

In the 1965 Senate Commerce Committee hearings, witnesses cited the same general reasons for their oppositions⁷¹ to S. 985 as they had advocated in their opposition to S. 387, again arguing primarily that existing law was adequate to regulate packaging and labeling. Proponents of S. 985 argued that the case-by-case enforcement of packaging laws was inadequate and that the FDA and the FTC should be granted the unambiguous power to issue substantive regulations.⁷² Witnesses from these agencies endorsed the bill, thereby substantially strengthening the argument for the new legislation.⁷³

Early in the 1965 Hearings it became apparent that the Administration desired regulation, rather than prohibition, of cents-off labeling.⁷⁴ The FDA argued that if cents-off labeling was to be regulated,

65. *Id.* at 339-41.

66. Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, *supra* note 46.

67. S. 985, 89th Cong., 1st Sess. (1965).

68. *Id.* § 5(b).

69. *Id.* § 4(b).

70. *Id.* § 4(d).

71. See *Hearings on S. 985 Before the Senate Comm. on Commerce*, 89th Cong., 1st Sess. 55-68, 96-111, 217-21, 235-63 (1965) (hereinafter cited as *1965 Hearings*).

72. *Id.* at 19-20, 89-93, 357-58, 677.

73. *Id.* at 23-36, 77-96. The argument that existing law was adequate was industry's prime argument against both S. 387 and S. 985. This put the FDA and the FTC in a cross-fire; if existing law was adequate, the question was why these agencies had not used this law to prevent packaging and labeling abuses. Both the FDA and the FTC were probably more comfortable when the Administration supported packaging and labeling legislation, and they could ascribe abuses in the market to their lack of authority to handle these practices efficiently.

74. *1965 Hearings* 9-12, 17-18, 81-82, 224.

authority was needed to require the production of cost and pricing information,⁷⁵ but this suggestion drew no discernable support from proponents of the bill. The Administration also unsuccessfully suggested that labels should be submitted to the government for approval before use in commerce,⁷⁶ while the FDA made a lonely and unsuccessful plea for the reinstatement of criminal penalties in the bill.⁷⁷ As the controversy continued it grew more bitter; proponents of the legislation began criticizing and even ridiculing specific products by their brand names⁷⁸ and charged that industry was using its advertising expenditures to get editorials opposing the legislation printed by leading magazines.⁷⁹

In May, 1966, the Senate Commerce Committee, having made extensive modification, reported an amended or "compromise"⁸⁰ bill to the Senate and recommended its enactment. The revised bill directed the FDA and the FTC to promulgate regulations requiring a statement of the identity of the product and of the name and place of business of the manufacturer, packer, or distributor⁸¹ on the labels as well as a separate net contents statement, placed in a uniform location on the principal display panel of the commodity.⁸² The net contents designation was required to be parallel to the base of the package, stated in ounces,⁸³ printed in conspicuous and contrasting type,⁸⁴ and in a type size which was uniform for all packages of substantially the same size.⁸⁵ The only other mandatory regulation required by the bill prohibited the use of qualifying words in conjunction with the net contents statement.⁸⁶ The bill did not authorize the issuance of regulations prohibiting deceptive illustrations,⁸⁷ nor did it permit the prohibition of cents-off labeling, although the FDA and the FTC were permitted to regulate this practice through discretionary regulations.⁸⁸

75. *Id.* at 8, 27.

76. *Id.* at 9-10, 20, 82, 224.

77. *Id.* at 7-8, 29.

78. *E.g.*, 1965 *Hearings* 85. Senator Hart, (D.-Mich.) originally kept all brand names out of the 1961 *Hearings*. *E.g.*, 1961 *Hearings* 73, 83.

79. 1963 *Hearings* 256-269. *See also* Hart, *supra* note 46, at 1261-64.

80. *See* S. REP. No. 1186, 89th Cong., 2d Sess. (1966) (hereinafter cited as 1966 *Senate Report*). *See also* Hart, *supra* note 46, at 1258.

81. S. 985, 89th Cong., 2d Sess. § 4(a)(1) (1966), as reported by the Senate Comm. on Commerce, 1966 *Senate Report* 33.

82. *Id.* § 4(a)(2) and 4(a)(3)(D).

83. *Id.* § 4(a)(3)(A).

84. *Id.* § 4(a)(3)(B).

85. *Id.* § 4(a)(3)(C).

86. *Id.* § 4(b).

87. This was an apparent concession to the industry argument that existing law was adequate.

88. S. 985, 89th Cong., 2 Sess. § 5(c)(3) (1966) as reported by Senate Comm. on Commerce, 1966 *Senate Report* 34.

The discretionary regulations section of the bill was less changed. The FDA and the FTC were still given the authority to define the meaning of package size characterizations and servings and to require labeling of the ingredients and composition of consumer commodities.⁸⁹ However, the package standardization sections of Senator Hart's bill were greatly modified. A complex procedure was included in the bill, whereby producers could join in voluntary package standardization in cooperation with the Department of Commerce. Upon failure to do this, the producers might be subject to involuntary package standardization by the FDA and the FTC.⁹⁰ The provision in the original Truth in Packaging Bill permitting the FDA and the FTC to establish standards for the quantitative designation of commodities which cannot be measured meaningfully by weight, measure, or count⁹¹ was deleted in its entirety. Finally, the revised bill provided that the FDA's and the FTC's regulations were to be promulgated in conformity with section 701 of the Federal Food, Drug, and Cosmetic Act,⁹² which requires public hearings on proposed regulations when objections are filed raising factual issues.⁹³

With these modifications, the Senate passed S. 985 by a 72-9 vote and hearings on the bill and a substitute House bill⁹⁴ were then held in the House Commerce Committee in July, August, and September of 1966. At the House hearings, the industry witnesses centered their attack primarily upon the package standardization authority in S. 985 and the House bill,⁹⁵ basing their opposition primarily upon the enormous costs likely to be caused by such restrictions.⁹⁶ Government witnesses uniformly supported enactment of S. 985,⁹⁷ and on October 3, 1966, the House passed a bill which generally followed S. 985. However, the House bill differed from the Senate bill in the following important respects: (1) regulations were authorized requiring dual declarations of net contents (*i.e.*, net weight stated in ounces and, if applicable, in pounds);⁹⁸ (2) although the FDA and the FTC were not granted the power to legislate the quantity of a

89. *Id.* § 5(c)(1), (2), (4).

90. *Id.* § 5(d)-(g), 1966 *Senate Report* 34-35.

91. S. 985, 89th Cong., 1st Sess. § 3(c)(5) (1965).

92. S. 985, 89th Cong., 2d Sess. § 6 (1966), as reported by the Senate Comm. on Commerce, 1966 *Senate Report* 36.

93. See Forte, *Fair Administrative Hearing: Recent Experience Under The Federal Food, Drug & Cosmetic & Fair Packaging and Labeling Act*, 1968 *DUKE L.J.* 1.

94. H.R. 15440, 89th Cong., 2d Sess. (1966).

95. See, *e.g.*, 1966 *House Hearings* 295-306, 314-316; 360-365, 384-390.

96. See, *e.g.*, 1966 *House Hearings* 485-492, 525-527.

97. *Id.* at 31-53.

98. S. 985, 89th Cong., 2d Sess. § 4(a)(3)(A) (1966) as passed by the House.

-serving, as in S. 985,⁹⁹ a statement of the net quantity of a serving was required where there was any representation on the label of the commodity concerning servings;¹⁰⁰ (3) regulations were authorized prohibiting nonfunctional "slack-fill" (*i.e.*, slack-fill not necessary for protection of contents of the package or requirements of machines closing the packages);¹⁰¹ (4) package standardization was made entirely voluntary and was placed under the jurisdiction of the Department of Commerce;¹⁰² and (5) all state and local laws governing labeling of the net contents were pre-empted by the federal statute.¹⁰³ The Senate-House Conference Committee then switched the requirement for the disclosure of the net quantity of servings from the discretionary to the mandatory section of the bill and, with a few other minor changes,¹⁰⁴ the Fair Packaging and Labeling Act was enacted into law.

Although others found the final bill far less significant, Senator Hart declared that ninety per cent of his original bill was contained in the Fair Packaging and Labeling Act and 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.¹⁰⁵

III. THE FAIR PACKAGING AND LABELING ACT

A. *The Ambiguous Policy Declaration*

In the FPLA Congress expressly adopted a policy of regulating packages and labels of consumer commodities so as to assist consumers in obtaining accurate information concerning the net quantity of contents, and to facilitate value comparisons.¹⁰⁶ The meaning of this commitment is already a source of dispute among those who enacted the statute.

99. Compare § 5(c)(2) of S. 985 as passed by the Senate, *with* the same section as passed by the House.

100. § 5(c)(2) of S. 985 as passed by the House.

101. *Id.* § 5(c)(5).

102. However, if the Department of Commerce did not receive the cooperation of manufacturers when it believed limitations on the number of package sizes were desirable, it was to report to Congress with a recommendation for possible future action. *Id.* § 5(d), (e).

103. *Id.* § 12. See also H.R. REP. NO. 2076, 89th Cong., 2d Sess. (1966).

104. These changes are described in STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE, CONF. REP. NO. 2286, 89th Cong., 2d Sess. (1966).

105. *Truth-in-Packaging Revisited*, 22 FOOD DRUG COSM. L. J. 314 (1967).

106. 15 U.S.C. § 1451 (Supp. II, 1967).

The commitment to facilitate "value comparisons" was inserted in S. 985 by the House in lieu of a provision in the Senate bill which stated that Congress would regulate packages and labels to facilitate "price comparisons."¹⁰⁷ The House Conference Report explained: "The conferees wish to make it 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."¹⁰⁸ However, there is some dispute over the use and meaning of the term "value comparison,"¹⁰⁹ which makes it clear that there was no general commitment in Congress to utilize revolutionary new proposals in regulating consumer commodities. Although some Congressmen may have intended to pledge their allegiance to such goals through the FPLA policy declaration, others have given the declaration a restrictive meaning. While the phrase "value comparisons" also appears in the discretionary regulations section, the apparent confusion resulting from the different meanings ascribed to the phrase is not likely to have any practical effect upon the administration of the Act.¹¹⁰

B. *The Mandatory Regulations—Identity, Manufacturer, Net Contents and Servings*

Section four of the FPLA requires a statement on the package label of the most basic information concerning the commodity contained therein.¹¹¹ The importance which Congress attached to such labeling is reflected in the fact that Congress directed (not authorized) the FDA and the FTC to issue regulations requiring the disclosure of this information. Section four provides for regulations which require

107. Compare the Senate version of S. 985, 89th Cong., 2d Sess. § 2 (1966), with that passed by the House.

108. H.R. CONF. REP. No. 2286 on S. 985, 89th Cong., 2d Sess. (1966).

109. Congressman Gilligan (D-Ohio), who authored the phrase "value comparison," has explained that price is only one element in a value decision and that it was his intention in making the change to prevent the agencies from promulgating regulations solely to facilitate mathematical or "price" comparisons. See Rogers, *The Philosophy behind the Fair Packaging and Labeling Act of 1966*, 22 FOOD DRUG COSM. L.J. 322, 325 (1967). See also 1966 Hearings 164-65. Congressman Rogers (D-Colo.) has stated that a value decision is a highly subjective decision which government cannot make for consumers. See Rogers, *supra* at 325. Senator Hart's view is that in adopting the phrase "value comparisons" Congress opened the door to a wide variety of regulations, including grade labeling and government testing of consumer commodities. Also, Senator Hart has noted that Congressman Gilligan's explanation was made after the passage of the bill and is, therefore, not a part of the legislative history of the statute. See Remarks by Senator Hart, *supra* note 108, at 6.

110. See, Note, *Federal Fair Packaging and Labeling Act*, 8 B.C. IND. & COM. L. REV. 626, 628 (1967).

111. 15 U.S.C. § 1453 (Supp. II, 1967).

a statement of the identity and net contents of the commodity, the name and place of business of the manufacturer, packer or distributor, and the net quantity of a serving if representations are made concerning servings.

By regulation, the FDA and the FTC have required that the statement of identity must appear on the principal display panel of the package.¹¹² The regulations requiring a statement of the name and place of business of the manufacturer, packer or distributor aroused some consternation in the business community,¹¹³ since many corporations had been using either fictitious or divisional names on the labels of consumer commodities.¹¹⁴ These regulations were interpreted as requiring a mailing address; however, the street address may be omitted where the address is listed in a current city directory or telephone directory.¹¹⁵ Under the regulations, the city and zip code must be stated on the label. Initially, the FDA and the FTC implemented in diverse ways the requirement in section 4(a)(2) that the label bear a statement in a uniform location, of the commodity's net quantity of contents. The FDA proposed that the statement should appear on the last line of the label,¹¹⁶ while the FTC proposed that it should appear in close proximity to the most conspicuous statement of the trade or brand name.¹¹⁷ Since trade names are placed in varying locations on commodity labels, the locations of the net contents statement would have varied on packages under the FTC's jurisdiction.¹¹⁸ The diversity of these two proposals contrasts with the original drafts of S. 985 and S. 387, which required that the FDA and the FTC regulations be uniform in content and application whenever possible.¹¹⁹ The deletion of this provision in the final bill

112. See FDA Regs. for Foods, 21 C.F.R. § 1.8(a) (1968) (hereinafter cited as FDA Regs. for Foods); FDA Proposed Regs. for Drugs & Cosmetics, § 1.102(a) and § 1.202(a), 33 Fed. Reg. 404, 405-406, 408 (1968) (hereinafter cited as FDA Regs. for Drugs & Cosmetics); and FTC Proposed Regs. for Consumer Commodities § 500.4(a), 33 Fed. Reg. 4718, 4720 (1968) (hereinafter cited as FTC Regs. for Consumer Commodities).

113. The questions were raised primarily in regard to FDA's First Proposed Regs. for Foods § 1.8(a), 32 Fed. Reg. 4172, 4173 (1967) (hereinafter cited as FDA's First Proposed Regs. For Foods), since these were the first regulations proposed under the FPLA.

114. Several corporations suggested that the fictitious or divisional names had become more familiar and meaningful to consumer than the actual corporate names. See generally FDA's Rulings on Objections to Food Regs., 32 Fed. Reg. 13276 (1967).

115. See §1.8a, 32 Fed. Reg. 13278 (1967).

116. FDA's First Proposed Regs. for Foods §1.8b (f).

117. FTC's First Proposed Regs. for Consumer Commodities § 500.6, 32 Fed. Reg. 9109, 9110 (1967).

118. It is questionable whether this proposed regulation would have established a uniform location for the net contents statement as required by law. See 15 U.S.C. § 1453(a)(2) (Supp. II, 1967).

119. See note 50 *supra*.

may have led the FDA and the FTC to believe that Congress intended each agency to use its independent judgment. The complexity of selecting a uniform location for the enormous variety of sizes and shapes of packages may also explain their differing approaches. However, the decision of both agencies to ultimately use a uniform location, the bottom thirty per cent of the label, probably was an important gain for consumer protection.¹²⁰

In its proposed regulations, the FDA interpreted the requirement for a net contents statement to mean a statement of the minimum net contents,¹²¹ while prior law had required a statement of the average net contents and unreasonable variations above and below the stated average were prohibited.¹²² The practical impossibility of making every package contain the minimum contents and the necessity of overpacking to even approach this goal caused a furor in industry. Some believed that if this regulation became final, manufacturers would merely reduce their stated net contents and put the same quantity in the package, which probably would have resulted in more fractional ounces (*e.g.*, a "1 lb." package might become "15% oz.") and a highly inaccurate net contents statement.¹²³ which re-considered and returned to the "average" requirement,¹²⁴ which is also followed by the FTC.¹²⁵

The requirement for a dual declaration of ounces and larger units of weight and measure in the net contents statement was implemented by the FDA and the FTC in consistent regulations and without controversy with industry.¹²⁶ The statutory provision making ounces the primary unit for net contents statement was directly contrary to most state laws and regulations prior to the FPLA. The states had required the net contents statement to be in the largest unit of weight or measure.¹²⁷ The theory behind the new "ounce" declaration of net contents is that the consumer can more easily make price comparisons between competing commodities,¹²⁸ since the ounce declaration elim-

120. See FDA Regs. for Foods § 1.8b (f); FDA Regs. for Drugs & Cosmetics § 1.102d(e), § 1.202b(f); FTC Regs. for Consumer Commodities § 500.6, all of which require the statement in the bottom 30% of the label.

121. FDA's First Proposed Regs. for Foods § 1.8b(q).

122. 21 C.F.R. § 1.8(i) (1963).

123. As stated in the Declaration of Policy of the FPLA, Congress believes packages and their labels should enable consumers to obtain "accurate" information as to the quantity of contents. 15 U.S.C. § 1451 (Supp. II, 1967).

124. FDA Regs. for Foods § 1.8b(g); FDA Regs. for Drugs & Cosmetics §§ 1.102d (f) & 1.202b(g).

125. FTC Regs. for Consumer Commodities § 500.22.

126. FDA Regs. for Foods § 1.8b(1); FDA Regs. for Drugs and Cosmetics §§ 1.02d (1), 1.202b(j); FTC Regs. for Consumer Commodities § 500.9.

127. See 1966 House Hearings 692-93.

128. See, *e.g.*, 1966 House Hearings 226.

inates the necessity for the consumer to convert the net quantity of the commodities to a common denominator.

The remainder of section 4 requires a statement of the net quantity of servings if representations are made concerning servings on product labels, and prohibits "supplemental statements" from appearing in conjunction with the net contents statement;¹²⁹ however, the term "supplemental statements" has not been defined by either Agency.¹³⁰

C. *The Discretionary Regulations—Package Size Characterizations, Cents-Off Labeling, Ingredients and Slack-Fill*

Section 5(c) of the FPLA authorizes the FDA and the FTC to promulgate regulations which define package size characterizations, regulate cents-off labeling, require ingredient statements, and prevent nonfunctional slack-fill.¹³¹ Most of these discretionary regulations which deal with more complex problems than the mandatory regulations have not been issued. However, the legislative hearings made it clear that many Congressmen believed that there is a necessity for regulation of these practices; it is therefore anticipated that more discretionary regulations will soon be promulgated.

The authority to define package size characterizations is generally the authority to determine what packages of each commodity can be labeled "small," "medium" and "large." Since these regulations will have to be issued for each separate category of consumer products, it will probably take considerable time before regulations are issued governing any substantial number of commodities.¹³²

The FDA and the FTC are also authorized to regulate bargain-type statements,¹³³ such as "2 cents off regular price" or "economy size." When a manufacturer uses cents-off labeling, the cents-off legend is printed on the label, and the wholesaler or retailer is given an allowance at least equivalent to the stated price-reduction. How-

129. 15 U.S.C. §1453(4), (5) (Supp. II, 1967). The FTC has by analogy required the same information for uses and applications as is required for servings. FTC Regs. for Consumer Commodities § 500.23.

130. "Supplemental statements" apparently refers to other ways of stating the mandatory information (e.g., placing "1/2 lb." in large type at the top of a package required to be labeled "8 oz.>"). See, e.g., 1966 House Hearings 187.

131. 15 U.S.C. §1454(c) (Supp. II, 1967).

132. *Id.* §1454(a). See 1966 House Hearings 198-201; "Small," "medium" and "large" would seem to be inherently connected with product identity. For example, a "small" tube of toothpaste would probably have very different net contents than a "small" package of potato chips. It would therefore seem to take an enormous period of time to standardize each size designation for each commodity.

133. 15 U.S.C. § 1454(c)(2) (Supp. II, 1967).

ever, the manufacturer cannot fix the retail price of the commodity,¹³⁴ with the exception of fair trade situations. It was therefore suggested during the FPLA hearings that the manufacturer was making a price representation to the consumer which he could not fulfill and that the proper approach was to give the retailer or wholesaler the allowance without cents-off labeling.¹³⁵ The difficulty with this approach, however, is that the consumer may be deprived of the benefit, thus discouraging the manufacturer from further promotions. Although there was conflicting testimony as to the actual benefit received by the consumer,¹³⁶ most industry representatives testified that cents-off labeling generally worked.¹³⁷ The end result was a compromise; the FPLA requires that cents-off labeling be regulated rather than prohibited.¹³⁸ The FDA and the FTC regulations will probably provide that a manufacturer must give an allowance, at least equivalent to the amount stated in cents-off labeling, if he uses this promotion.¹³⁹ Additionally, the regulations will probably provide either that over fifty per cent of the manufacturer's volume for a given period of time must be sold without cents-off labeling, or that the manufacturer must offer his product without cents-off labeling for more than half of a specified time period.¹⁴⁰ Since the FDA has no subpoena power to compel the furnishing of information from manufacturers in order to regulate cents-off labeling,¹⁴¹ it may have difficulty in enforcing its regulations.

The regulations for the ingredient disclosure section of the FPLA, which have been promulgated by the FDA for foods, generally require that ingredients shall be listed in the order of decreasing predominance and that when the proportion of an ingredient becomes material, there must be a quantitative declaration of the ingredient.¹⁴² However, the latter regulation is so vague that it may prove difficult to interpret and enforce. No ingredient disclosure of cosmetics has

134. See 1966 House Hearings 215 (testimony of Chairman Dixon of the FTC). An agreement to fix maximum resale prices is as illegal as an agreement to fix minimum resale prices under the Sherman Act. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

135. See, e.g., 1963 Hearings 238-240.

136. See, e.g., 1963 Hearings 58-59; 1966 House Hearings 50, 931-37.

137. *Id.* at 423-24, 583-84, 642, 672, 679-80.

138. 15 U.S.C. § 1454(c)(2) (Supp. II, 1967).

139. See H.R. REP. No. 2076, 89th Cong., 2d Sess. 12 (1966).

140. As the House Report suggests, the FDA and the FTC can regulate either the duration of and intervals between "cents-off" promotions or the percentage of annual output which can be marketed under "cents-off" promotions. *Id.*

141. 1966 House Hearings 197. The FDA twice during the 1965 hearings stated that if it were to regulate cents-off labeling rather than prohibit it, Congress should give it the authority to compel the production of this information. 1965 Hearings 8, 27.

142. 32 Fed. Reg. 13278 (1967); see FTC Regs. for Consumer Commodities § 500.4(d).

been required by FDA regulations, presumably because the composition of these products is a trade secret.¹⁴³

The FPLA also authorizes regulations to prevent nonfunctional slack-fill in consumer commodities.¹⁴⁴ If these slack-fill regulations are to be more than generalities, they will have to be issued individually for each commodity since the amount of settling and the amount of protective packaging required usually varies with different commodities. The new regulations are directed at packages which are filled to substantially less than capacity, thus relieving the FDA and the FTC of their burden under prior law of proving that the empty space was misleading or deceptive.¹⁴⁵ However, problems remain in determining when a "substantial" slack-fill exists.¹⁴⁶ Even if the slack-fill is "substantial," it is excused if its purpose is to protect the contents of the package,¹⁴⁷ or if it is necessary for the machinery to close the package.¹⁴⁸ Finally, it is unclear whether transparent packages are exempt from slack-fill restrictions. Although the statute itself provides that deception is no longer an element in slack-fill cases, the legislative history of the FPLA seems to exclude transparent containers.¹⁴⁹

D. *Voluntary Package Standardization—The Department of Commerce*

One of the most significant and effective parts of the FPLA may be the package standardization program of the Department of Commerce. The Act provides that when the Secretary of Commerce determines that there is undue proliferation of weights, measures or quantities which impairs the reasonable ability of consumers to make value comparisons, he shall request manufacturers, packers, and

143. The statute specifically provides that trade secrets cannot be required to be divulged. 15 U.S.C. § 1454(c)(3) (Supp. II, 1967).

144. *Id.* § 1454(c)(4).

145. See *Federal Fair Packaging and Labeling Act*, 8 B. C. IND. & COM. L. REV. 626, 634-35 (1967).

146. The difference in determining whether slack-fill is "substantial" under the FPLA or "misleading" under the Federal Food, Drug, & Cosmetic Act may be illusory. It may be argued that slack-fill violates both laws because it is "substantial" (when compared to competition) and "misleading" (since the ordinary purchaser would not anticipate extraordinary slack-fill).

147. 15 U.S.C. § 1454(c)(4) (Supp. II, 1967).

148. *Id.* The exemption for slack-fill necessary to protect the contents of the package and close the package is a direct descendant of the old technological justification defense. See Forte, *The Food and Drug Administration, The Federal Trade Commission and The Deceptive Packaging of Foods*, *supra* note 21, at 874 n.71.

149. See H.R. REP. No. 2076, 89th Cong., 2d Sess. 8 (1966) stating, "When a consumer buys a *nontransparent* package containing a consumer commodity, he expects it to be as full as can be reasonably expected." (emphasis added).

distributors to participate in the development of a voluntary product standard.¹⁵⁰ If after a year of the date of the request, the Secretary decides that a standard will not be published, or, if one has been published, that it is not being observed, he must report to Congress with a recommendation for legislative action.¹⁵¹ Such a voluntary package standardization program will not be all "voluntary."¹⁵² The Department of Commerce is not passively waiting for converts, but is instead advising some manufacturers that they had better agree to a voluntary package standard. Implicit in this suggestion is the threat of publicity and danger of congressional action for those who fail to agree to a standard or depart from it. Also, the FTC may take action against those who depart from a voluntary package standard.¹⁵³

E. Jurisdictional Problems Under the FPLA

One of the Act's unresolved problems is the jurisdictional quagmire which may result from the fact that the FPLA does not repeal or supersede the FTC Act,¹⁵⁴ which prohibits unfair methods of competition and unfair or deceptive acts in commerce. As a result, the FTC conceivably could prosecute slack-fill, cents-off labeling and similar practices relating to foods, drugs and cosmetics, even though the FDA is specifically given the power to regulate these practices under the FPLA.¹⁵⁵ Thus, there may be jurisdictional conflicts between the two agencies. Additionally, the scope of the FTC's jurisdiction under the FPLA itself is unclear. Although the FPLA gives the FTC jurisdiction over "consumer commodities," the FTC regulations have failed to define this term.¹⁵⁶ Instead, the FTC is answering inquiries individually, and it may be several years before it becomes apparent what is and what is not encompassed by the FPLA.¹⁵⁷

150. 15 U.S.C. § 1454(d) (Supp. II, 1967).

151. *Id.* § 1454(e).

152. See *Voluntary Package Controls—The Test Is Going On Now*, NATIONAL ASS'N OF MANUFACTURERS REPORTS, March 18, 1968, at 15-16, where it is noted that the initiative is now held by the Government, not industry.

153. Proof of deception would be needed, since regulatory action would be under § 5 of the FTG Act. However, there are several cases resulting in cease and desist orders in which respondents deviated from voluntary agreements and sold fractional net weights. *F.T.C. v. Ozark Creamery Co.*, 8 F.T.C. 377 (1925); *FTC v. Meriden Creamery Co.*, 6 F.T.C. 444 (1923); *FTC v. Wichita Creamery Co.*, 6 F.T.C. 435 (1923); *FTC v. Mountain Grove Creamery, Ice and Elec. Co.*, 6 F.T.C. 425 (1923).

154. 15 U.S.C. § 1460 (Supp. II, 1967).

155. *Id.* § 1454.

156. A substantial number of comments were filed with the FTC commenting adversely on the FTC's failure in its proposed Regulation to amplify the term. 33 Fed. Reg. 4723 (1968).

157. Many inquiries were filed as part of the comments, and these are pending. *Id.*

Another jurisdictional problem is the possibility of federal-state differences. The FPLA seems to pre-empt all state laws providing for the labeling of the net quantity of contents of consumer commodities.¹⁵⁸ However, some commodities are excluded from the FPLA by the express terms of the statute, while others will be exempted by administrative action.¹⁵⁹ When a commodity is excluded or exempted from the FPLA, the statute (including the pre-emption clause) may not apply. Thus, the states may regulate these exempted commodities if they so choose, thereby negating the practical effect of excluding these commodities from the FPLA.

IV. THE NEW ALPHABET—ITS SIGNIFICANCE AND FUTURE

Despite the furor which accompanied its enactment, the FPLA is much more evolutionary than revolutionary. The mandatory regulations section of the FPLA is only a slight extension beyond prior law.¹⁶⁰ Implicit in this section (and in the discretionary regulations section) is a continuation of the trend from enforcement of packaging and labeling laws on a case-by-case basis to enforcement by substantive administrative regulations.¹⁶¹ The underlying theory of the mandatory regulations is simply that increased affirmative disclosure of the facts, in the form prescribed by the FPLA and the regulations, will be beneficial to consumers. The impact of these regulations is more economic than legal. So far as the manufacturers are concerned, the mandatory regulations are most significant because they involve a change in the information on labels, and not because of the particular information required. The change has made obsolete an enormous investment in artwork and printing plates. The manufacturers' resistance to such change is probably strengthened by the argument that existing law was adequate, and, therefore, that change was unnecessary.

158. 15 U.S.C. § 1461 (Supp. II, 1967).

159. 15 U.S.C. § 1459(a) (Supp. II, 1967) contains statutory exemptions. It will be some time before the FDA and FTC complete their rulings on petitions for exemption by administrative action.

160. The Federal Food, Drug, & Cosmetic Act already required a prominent and conspicuous statement of the net quantity and the name of the manufacturer, packer, or distributor and place of business on all packaged foods, drugs and cosmetics, 21 U.S.C. §§ 343(e)-(f), 352(b)-(c) (1964), and of the common or usual name on all food and drugs, *Id.* §§ 343(i), 352(e). The principal advantages of the FPLA mandatory regulations were, therefore, more detailed regulations prescribing the location and type sizes for the net contents statement and the authority to compel affirmative disclosure of the quantity of servings for these products. The FPLA also contained the same authority for other consumer commodities. However, state laws also covered much of the subject matter of the FPLA.

161. This is the trend elsewhere in administrative law. See Forte, *The GMP Regulations and The Proper Scope of FDA Rulemaking Authority*, 56 Geo. L. J. 688 (1968).

The section authorizing discretionary regulations is the more significant portion of the statute. Although the ingredient-labeling provision rests upon affirmative disclosure, the other provisions for discretionary regulations go further. The regulations dealing with slack-fill, package characterization, and cents-off labeling will prohibit certain practices regardless of disclosure of the facts to consumers,¹⁶² on the theory that practices contrary to these regulations are deceptive per se, even when all facts are disclosed. While this approach is not unprecedented, the number of per se prohibitions will be substantially increased by the FPLA. Thus, an analysis of the FPLA reveals its "new alphabet" to have three major elements: increased affirmative disclosure of facts, increased regulation of the form of such disclosure, and increased prohibition of certain packaging and labeling practices as illegal per se when they tend to confuse consumers, including the use of certain words contrary to government definitions. The same elements will probably also be the basis of future packaging and labeling proposals for economic protection of consumers.

Under the FPLA, affirmative disclosure of the identity, the net quantity, and the name of the manufacturer, packer or distributor is required.¹⁶³ It is unlikely that proposals to mark the price on commodities will be given serious consideration because retailers are too politically powerful and too numerous to be easily regulated. Therefore, proposals for increased affirmative disclosure in the future will probably relate to the quality of goods. Indeed, such a proposal has already been advanced by Senator Hart.¹⁶⁴ One obvious difficulty in such a suggestion is the selection of the factors most relevant to a determination of quality. Since it would seem impossible to disclose all information relevant to a quality judgment concerning a commodity, some selectivity will be necessary. There are probably broad differences of opinion among consumers concerning those elements most relevant to a determination of quality, and a decision to disclose information on a label concerning some elements and not others may make some products appear more attractive. Such labeling could easily be the equivalent of a half-truth and, having the implied imprint of government authority, could be more misleading to consumers than the representations now made by manufacturers.

162. For example: if the regulations require 85% fill in cereal boxes, it will be a violation to sell an 80% fill package even if it is labeled "80% full."

163. If representations concerning servings are made on the label, the quantity of such servings must also be disclosed. 15 U.S.C. § 1453(a)(4) (Supp. II, 1967).

164. See S. 2186, 90th Cong., 1st Sess. (1967) (introduced on July 27, 1967). The bill authorizes collection and dissemination of information relating to the value, quality and suitability of goods affecting consumers. Senator Hart suggests the information relating to such products as washing machines, wall coverings, soaps, paints and furniture could be disseminated from vending machines placed in stores.

Similarly, a suggestion that administrative officials be given uncontrolled discretion to select those quality factors which should be disclosed is not likely to be popular with manufacturers, who may foresee declining sales if the government selects quality factors unfavorable to their products. It can reasonably be questioned whether such officials should be given uncontrolled discretion to make decisions having such a significant effect upon our economy. Appointment to a position with one of the regulatory agencies does not necessarily qualify one to make value judgments necessary to determine those elements which comprise quality. While it is true that administrative officials can be shielded from financial bias in selecting the factors to be disclosed, they may have an intellectual bias which is just as troublesome. For example, the FDA once considered artificially sweetened soft drinks as products which were economically adulterated,¹⁶⁵ despite the now well-demonstrated consumer demand for such products. Additionally, compulsory disclosure of quality elements might require disclosure of trade secrets. If so, this would tend to deter the enactment of these proposals.¹⁶⁶

The advantages of further prescribing the form in which facts must be disclosed are also probably limited. It is now required that the identity and net quantity of consumer commodities be disclosed on the principal display panel of packages in certain specified sizes.¹⁶⁷ The ingredients of foods¹⁶⁸ and name of the manufacturer, packer or distributor of consumer commodities must also appear prominently and conspicuously on labels.¹⁶⁹ While it is possible that additional information could be moved to the front panel of packages, there are obvious limitations on the quantity of information which can be placed there, particularly for smaller packages. It therefore seems unlikely that additional restrictions on the form of disclosure will be enacted.

Finally, there is the question of whether additional practices will be declared illegal per se by Congress. The affirmative disclosure of

165. See *United States v. 70 Gross Bottles of Quenchies* (S.D. Ohio 1952), reported in V. KLEINFELD & C. DUNN, *FEDERAL FOOD, DRUG, & COSMETIC ACT, JUDICIAL AND ADMINISTRATIVE RECORD 1951-1952*, at 141 (1953); FDA Trade Correspondence 311 & 381, V. KLEINFELD & C. DUNN, *FEDERAL FOOD, DRUG, & COSMETIC ACT, JUDICIAL AND ADMINISTRATIVE RECORD, 1938-1949*, at 691, 724 (1949).

166. The sensitivity of Congress to the trade secret argument was made clear in § 5(c)(3) of the FPLA, 15 U.S.C. § 1454(c)(3) (Supp. II, 1967) authorizing regulations requiring ingredient labeling if this did not require divulging of trade secrets.

167. See FDA Regs. for Foods, §§ 1.8(a), (d), 1.8b (f), (i); FDA Regs. for Drugs & Cosmetics §§ 1.102a, d, 1.202(a), (d), 1.202b; FTC Regs. for Consumer Commodities §§ 500.4, 500.6, 500.18.

168. FDA Regs. for Foods, § 1.10(h).

169. FDA Regs. for Foods § 1.8a; FDA Regs. for Drugs & Cosmetics §§ 1.102b, 1.202a; FTC Regs. for Consumer Commodities § 500.5.

the net contents in the form prescribed by law and the limitation on nonfunctional slack-fill should eliminate any misleading representations by packages concerning quantity. While Congress could authorize further limitations on the use of certain words on packages, it is difficult to see where such definitions are needed. It has long been clear that manufacturers of consumer commodities cannot give words whatever meaning they choose, since false and misleading labeling is prohibited by both the Federal Food, Drug, and Cosmetic Act and the FTC Act. Since Congress has already authorized the FDA and the FTC to give standardized meanings to representations concerning quantity and to manufacturers' statements concerning price, the major elements in purchasing decisions other than quality elements (which present selection problems) are already regulated. If the voluntary package standardization program of the Department of Commerce does not work, there could, of course, also be sentiment for compulsory package standardization. At present, however, the voluntary program does seem to be working satisfactorily, and there is thus no reason to propose involuntary standardization (which would, in any event, raise the specter of substantial cost increases for manufacturers and price increases for consumers).¹⁷⁰

In summary, it seems that there will be no new letters added to the new alphabet in the near future. New proposals for regulation of packaged consumer goods are likely to concentrate on disclosure of the elements which relate to quality, rather than quantity or price. However, the problems presented by such proposals are formidable and may quite properly prevent the passage of any such legislation.

170. The cost objections caused the drafters of the FPLA to make package standardization voluntary rather than mandatory.

