

# **A TASTE OF ALOHA: FOOD LABELING LAWS IN HAWAII**

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## **FOREWORD**

This study was prepared in response to Senate Resolution No. 160, S.D. 1, adopted during the Regular Session of 1990. The resolution requested an examination of two issues relating to food labeling. The first issue was whether the laws prohibiting geographical misbranding were achieving the intent of protecting Hawaii-made products, and the second was whether the food labeling laws, presently enforced by the Department of Agriculture and the Department of Health, should be combined and placed into one department.

The Bureau extends its appreciation to all who cooperated and assisted with its investigation, and wishes to extend specific thanks to Jim Maka, Acting Administrator of the Division of Measurement Standards, Department of Agriculture; Maurice Tamura, Chief of the Food and Drug Branch, Environmental Health Services Division, Department of Health; Dana Grey, President, The Hawaiian Kukui Nut Company; Guy Nagai, General Manager, Kona Farmers Co-op; and Haunani Burns, Deputy Attorney General.

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## **Chapter 1**

### **INTRODUCTION**

#### **Nature of the Study**

Senate Resolution No. 160, S.D. 1 (see Appendix A), entitled "Senate Resolution Requesting the Legislative Reference Bureau to Review the Laws and Administrative Rules Relating to Food Labeling," was adopted by the Senate of the Fifteenth Legislature of the State of Hawaii, Regular Session of 1990, on April 16, 1990. S.R. No. 160, S.D. 1, stated that the proper labeling of Hawaii-made and non-Hawaii-made food products is important, as the significant marketing advantage accompanying the Hawaii-labeled foods should be attributed only to those items that are genuinely Hawaiian. The resolution requested a review of Hawaii's food labeling laws to assure that the intent of marketing authentic Hawaiian food products is achieved. Specifically, the resolution asked for a review of section 486-26, *Hawaii Revised Statutes*, the "Made in Hawaii" law, which is currently administered by the Department of Agriculture, and of the rules establishing identity, quantity, and labeling foods under Chapter 20 of Title 11 (chapter 11-20) of the Hawaii Administrative Rules, which is under the jurisdiction of the Department of Health.

The resolution focuses on two aspects of the food labeling laws. The Senate expressed its position that the geographical misbranding laws, those that prevent non-Hawaiian products from marketing themselves as Hawaiian products, are important to protect consumers and Hawaii's economy. The resolution states there has been recent controversy over the content and labeling of Hawaii-made products, and that it is important that geographical misbranding laws be carefully monitored. The intent of the state laws are to ensure that products marketed as Hawaiian use Hawaiian materials where appropriate, and that confusion exists regarding the interpretation and enforcement of the geographical misbranding laws that do not achieve this intent.

Another concern revolves around the fact that the food labeling laws are being jointly administered by the Department of Agriculture and the Department of Health. The resolution stated that a review of the laws would be appropriate to determine whether consolidation of the laws in one department for purposes of administration and enforcement will eliminate confusion and promote efficiency in enforcement.

#### **Objective of the Study**

Senate Resolution No. 160, S.D. 1, requests two analyses. First, the food labeling laws are to be reviewed to ensure that the intent of marketing authentic Hawaiian products is achieved. Second, a study of the administration of all food labeling laws is requested to determine the feasibility of placing all food labeling laws under the jurisdiction of one

department, and, if feasible, to determine which department would be the most appropriate to monitor and enforce the law.

This report is organized into five chapters. Chapter 1 discusses the nature and scope of the study. Chapter 2 provides background concerning the genesis of the request and the current organization of the food labeling responsibilities. Chapter 3 describes and analyzes the laws pertaining to geographical labeling in Hawaii, reports on the industry responses to the current organization of the law, and recommends a solution. Chapter 4 investigates the responsibilities of the Department of Agriculture and the Department of Health concerning food labeling, including a look at federal and selected state models, lists several options, and makes a recommendation. Last, chapter 5 enumerates the findings and recommendations.

## **Chapter 2**

### **THE SCOPE OF THE PROBLEM**

Senate Resolution No. 160, S.D. 1, was introduced to address two areas of concern regarding food labeling: impersonation of Hawaii-made goods by non-Hawaii sources, leading to market loss by local producers, and the feasibility of combining all food labeling laws in one department to eliminate confusion and increase administrative efficiency.<sup>1</sup> These two areas meet only tangentially, in that the geographical labeling laws are currently enforced by three state departments, and a reorganization of food law placement would affect enforcement of the geographical labeling laws. The areas of concern will be discussed in separate chapters, with mention of overlap when necessary.

Senate Resolution No. 160, S.D. 1, elicited very little testimony. The resolution originally requested that the study be performed by the Governor's Agriculture Coordinating Committee (GACC). GACC's testimony stated it lacked the capability to perform the study, and recommended that the study be directed to the Legislative Reference Bureau. It also stated that GACC had contracted with the Department of Food Sciences at the College of Tropical Agriculture and Human Resources at the University of Hawaii to conduct a study on U.S. mainland consumers to determine their perception and buying habits relating to goods identified as made in Hawaii.

Dean N. P. Kefford of the College of Tropical Agriculture and Human Resources submitted testimony to the effect that the GACC study will address the issues raised in S.R. No. 160 and will provide the review called for in the resolution. It was estimated that the study would be submitted to GACC and the Department of Agriculture by the end of 1990. At the time this report was finalized, the report was not yet ready. Persons interested in obtaining a copy of the full report can contact Dr. Aurora Hudson at the College of Tropical Agriculture and Human Resources.

Dean Kefford also testified that due to coordination between the United States Department of Agriculture and the Federal Drug Enforcement Administration with the state Department of Agriculture and Department of Health, enforcement of the food labeling laws should remain with the two state agencies and not be consolidated.

Only one private entity testified on the resolution. Rick Vidgen, general manager of Mac Farms of Hawaii, raised several concerns. Vidgen stated that imports of foreign-grown macadamia nuts to Hawaii is the primary reason for the current [April 1990] decrease of the price of local nut-in-shell. These imported nuts are coated with imported chocolate, packaged in materials generally from mainland suppliers, and sold as a "Product of Hawaii" in distinctly Hawaiian packaging. Vidgen states that this is arguably legal under current laws, but seems to conflict with what should be the intent of state packaging laws, to protect both consumers and

local producers. Tariff protection is not the answer, he stated, but the unique marketing advantage created by the glamour of the State should be preserved for products generally grown and produced by local industries.

Vidgen notes that two sets of packaging laws exist: one administered by the state Department of Health (DOH) and the other by the state Department of Agriculture (DOA). He finds fault, and conflict, with both of them. The DOH rule is flawed as it permits products to be labeled Hawaiian that have very little to do with Hawaii. Under the DOH rule, the act of manufacture in the State validates the item's status as a product of Hawaii, even though all the ingredients are imported. Vidgen states that under the DOH rule, macadamia nut chocolate candy made with imported nuts would qualify as a Hawaiian product.

On the other hand, Vidgen points out, under the DOA "made in Hawaii" statute, the product must have 50 [sic: section 486-26, *Hawaii Revised Statutes*, actually requires 51% or more] percent of its wholesale value added in the State before it can be labeled "Made in Hawaii." Since the labor and overhead required to make macadamia nut chocolates are only approximately 20% of the wholesale price, macadamia nut chocolates produced with imported nuts would not qualify as "made in Hawaii" under the Department of Agriculture statute. Vidgen additionally criticizes the statute by noting that it would be difficult for the Department to obtain the information necessary to determine how much of the retail sale value was added in Hawaii.

Vidgen appears frustrated by what he perceives as the "iniquity" of these laws. A copy of his testimony is included as Appendix B.

The Mac Farms testimony is not always accurate in its details, but it does successfully portray the facial disparity between the laws. However, as is discussed in chapter 3, the conflict between the laws is more apparent than real, although the lack of protection for Hawaii-grown foods is serious.

The Department of the Attorney General, which was consulted on the conflict between the statute and the rule, came to the interesting conclusion that the legislative history of the statute indicates that the legislature never intended food products to come within the purview of the statute.<sup>2</sup> The department's conclusion was apparently based on the deletion of the term "food products" from an earlier draft of the bill:

[T]he legislative history to Act 201, Session Laws of Hawaii 1989, strongly suggests that the Legislature intended to exclude food products from section 486-26 coverage. On that basis, we conclude that section 486-26 does not apply to food products. In particular, we are persuaded by H. Stand. Comm. Rep. No. 1210 ... and H. Conf. Comm. Rep. No. 73 ... which, respectively, reference deletion of the proposed terms "food products" and "raw agricultural commodity" from various drafts of [the bill], and in



## THE SCOPE OF THE PROBLEM

the instance of "food products," deletion on the basis of testimony by the Department of Agriculture.

This report takes no position on the attorney general's opinion, except to point out that the Senate, from the wording of the resolution, seems to adopt the position that the law does apply to food products, a position that the Department of Agriculture also takes, since it was, at the time this report was researched, enforcing the law against at least one food manufacturer.

Whether or not the legislature intended to include food products must be clarified by the legislature itself. For the purposes of this report, the section will be treated as though it does include food products, in order to be responsive to the resolution. This report does recommend that section 486-26 be amended for various reasons. The opinion of the Attorney General's office is yet another reason to clarify and modify the statute.

## ENDNOTES

1. An additional area of concern discovered in research for this report is the sale, on the mainland, of Hawaii-labeled products that are not in fact made here. This dilutes the market for genuine Hawaii-made goods and can even damage it if the imitation products are inferior and discourage the customer from purchasing Hawaii-made goods in the future. See, e.g., "Maui Kula onion growers cry foul," The Honolulu Star-Bulletin, July 9, 1990, at A-3. Unfortunately, this problem cannot be solved by Hawaii state legislation, as Hawaii's jurisdiction stops at Hawaii's borders. At present, the Hawaii Department of Agriculture will contact its counterpart on the mainland to seek its help in stopping the sale of imitation goods. The federal Food and Drug Administration (FDA) can also be contacted for its help, but geographical misbranding is a low priority with the FDA. Telephone interview with Allan Izen, Inspector, Food and Drug Branch, Department of Health on July 23, 1990.
2. Letter from Deputy Attorney General Haunani Burns to researcher, dated October 18, 1990. A copy of the letter is attached as Appendix C.

## Chapter 3

### GEOGRAPHICAL MISBRANDING

#### What Laws Exist?

Hawaii has three<sup>1</sup> specific laws<sup>2</sup> enforced by the State<sup>3</sup> that establish geographical labeling standards for food labels. The first is a statute that applies to dairy products only. The second is a Department of Health (DOH) administrative rule that applies to food products only. The third is a statute applying to all products, including food, that is enforced by the Department of Agriculture (DOA).

#### Section 486-26.5, *Hawaii Revised Statutes*

The dairy statute is a specific law, applicable only to milk products, which states that:

§486-26.5 "Island fresh" milk. (a) No person shall keep, offer, display, expose for sale, or solicit for the sale of any processed milk or milk product which is labeled with the term "island fresh", or like terms, or which by any other means misrepresents the origin of the item as being from any place within the State unless the processed milk or milk product has been at least ninety per cent produced in the State.

(b) It shall be unlawful for any person to sell or offer to sell to a consumer, or expose for sale to a consumer, any processed milk or milk product for human consumption which has been at least ninety per cent produced within the State, without providing notice to the consumer that the processed milk or milk product has been locally produced. The notice shall be made by displaying on a conspicuous area on the principal display panels of the carton or container a label or sign printed in bold face or other distinctive type stating that the product is "island fresh" or using another similar term.

The figure 90% was used instead of 100% to allow for addition of flavors and other ingredients to produce types of milk such as chocolate and acidophilus that could still be labeled as local. There have been few problems<sup>4</sup> with the current law, which became effective in 1989. As the law seems well-focused and has raised little complaint, no further discussion of this law is necessary for this study.

All other food products fall under the protection of the two more general geographical misbranding laws that seek to protect food items manufactured in the State.

Section 11-29-9, Hawaii Administrative Rules

The older of the laws enforcing geographical labeling requirements is a Department of Health rule. Section 11-29-9 of the Hawaii Administrative Rules requires a food product or ingredient that indicates that its origin is in Hawaii to be made here. There is an exception for non-deceptive trademarks or trade names.

**§11-29-9 False or misleading representation of geographical origin.** Any representation that expresses or implies that a food product or any ingredient of a food product has its geographical origin in the State may render such food product misbranded except when such representation is either:

- (1) A truthful representation of geographical origin;
- (2) A trademark or trade name; provided that as applied to the food product in question, its use is not deceptively misrepresented. A trademark or trade name composed in whole or in-part [sic] of geographical words shall not be considered deceptively misrepresentative if:
  - (A) Such product or trade name has been long and exclusively used by the manufacturer or distributor and is generally understood by the consumer to mean the product or a particular manufacturer or distributor; or
  - (B) Is so arbitrary or fanciful that it is not general understood by the consumer to suggest geographic origin; or
  - (C) Is a part of the name required by applicable state or federal law or regulation; or
  - (D) Is a name whose market significance is generally understood by the consumer to connote a particular class, kind, type, or style of food rather than to indicate geographical origin.<sup>5</sup>

This rule is patterned on a federal Food and Drug Administration regulation.<sup>6</sup> The penalty for violation is a fine of not more than \$10,000 and/or up to a year in jail.<sup>7</sup> This rule is relatively easy to enforce, since it focuses on the final act of manufacture. If the finished product is manufactured in the State, the product qualifies.

One problem with this rule is that it is fairly easy to circumvent the intent of the law while obeying its letter by importing almost-finished products that need just a minimum of processing to reach their final form. This undercuts the local manufacturing industry. Another problem is the lack of protection for local raw goods. It makes no difference under the rule

whether the manufacturer uses local or imported raw foods and ingredients. This is a matter of concern to local growers, who feel that sales of their goods are being undercut through the use of cheaper imported food ingredients. Confusion and frustration over this point was expressed by a number of people interviewed for this study.

Section 486-26, *Hawaii Revised Statutes*

The more recent general law is a statute that covers all products, including food. Section 486-26, *Hawaii Revised Statutes*, prohibits the use of the phrase "Made in Hawaii" or other representation that the product is made in the State, unless 51% of its wholesale value is added by manufacture within the State.

**§486-26 Hawaii-made products.** No person shall keep, offer, display, expose for sale, or solicit for the sale of any item, product, souvenir, or any other merchandise which is labeled "made in Hawaii" or which by any other means misrepresents the origin of the item as being from any place within the State, which has not been manufactured, assembled, fabricated, or produced within the State and which has not had at least fifty-one per cent of its wholesale value added by manufacture, assembly, fabrication, or production within the State.

This report will refer to section 486-26 as the "value-added" statute. The penalty for a first violation is a fine of between \$200 and \$500 and/or imprisonment for up to three months, and for subsequent violations, a fine of between \$500 and \$1000 and/or imprisonment for up to one year.<sup>8</sup>

As first adopted in 1988, the percentage necessary to qualify under the statute was only 25%. However, such a low percentage was perceived as an unsatisfactory solution as it permitted "a vast number of overseas made products, with minimum value added in Hawaii, [to] be labeled 'made in Hawaii.' This ... work[s] against the interests of local manufacturers."<sup>9</sup> In less than a year, S.B. 819 was introduced in the 1989 session to raise the value added to 100%.

The 100% figure was modified in committee. Testimony submitted by the Department of Business and Economic Development reported that the manufacture of many items is essentially a step-by-step work process in which value is added to raw materials as they pass through the stages to becoming a finished product. DBED stated that many items have value added through processing outside the State, and concluded that "By requiring the totally manufactured and totally produced definitions, many products made in Hawaii such as apparel, gift items, and most food products would not be eligible to be labeled as 'made in Hawaii.'"<sup>10</sup>

The Legislature reduced the value-added quantum to 51%. The bill became Act 201, Session Laws of Hawaii 1989, and has been in effect since October 1, 1989.

The language of the statute includes a prohibition against misrepresentation by use of the phrase "made in Hawaii" or by representing an item's origin as being in the State "by any other means." Although not specified, it appears that the prohibition would include pictorial as well as written misrepresentations, since certain images are so indelibly linked with Hawaii that they symbolize the State to consumers. Under this section, familiar symbols of Hawaii such as Diamond Head, Hawaiian hula dancers, Iolani Palace, and Hawaiian royalty probably could not be used on non-Hawaii products, as they imply a source in Hawaii. Words commonly used to describe Hawaii, such as "Maui," "Kauai," "Kona," "Fiftieth State," and "Aloha State," would also be proscribed.

This statute is more precise than the DOH rule but raises a number of problems in implementation:

- (1) The statute appears to protect manufacturing processes only, not raw goods grown in Hawaii.**

The phrase, "and which has not had at least fifty-one per cent of its wholesale value added by manufacture, assembly, fabrication, or production within the State" seems to refer to value added through the manufacturing process in Hawaii, and not value added through use of locally-grown raw foodstuffs. This lack of protection is a source of concern on the part of local growers. While it may be argued that the term "production" could be expanded to include raw food items grown in Hawaii,<sup>11</sup> this reading is questionable in light of the fact that the other terms clearly refer to processing and that the use of the obvious and unambiguous term "grown" is avoided.

During the investigations for this study, growers of raw goods such as macadamia nuts, Kona coffee, and kukui nuts expressed their negative position on the use of imported raw goods in products made in Hawaii and labeled as such. Indeed, there seemed to be some confusion over whether the Hawaii raw goods were to be included in the 51% value added figure.<sup>12</sup> Yet the statute clearly would permit the use of imported ingredients as long as the in-state manufacturing process increased the wholesale value sufficiently. Under the current law, the only impact of the source of food ingredients on the laws is a tangential one; the cheaper the raw goods, and the higher the wholesale value, the easier it will be to qualify under the value-added statute.

To sum up, this statute is ambiguous as to whether local raw goods can help a product qualify as made in Hawaii and should be clarified as will be discussed below.

- (2) The statute only covers items in which the manufacturing component reaches 51% or more.**

This loophole disqualifies goods with a minimal manufacturing component. The statute requires 51% of the wholesale value to be added by manufacture, fabrication, assembly, or production in the State. For some commodities where the value of the raw material is high and the value of the processing low, a product made entirely in Hawaii could not technically be labeled as such because 51% of the wholesale value does not come from the manufacturing process. This means that these products, even if wholly manufactured in Hawaii, cannot be labeled as such.

There are at least two food items for which the total manufacturing component does not reach 51% of the wholesale value. According to the testimony submitted on the resolution by Mac Farms, labor and overhead required to process chocolate-covered macadamia nut candy would be "on the order of 20% on the wholesale value." Since the manufacturing process -- although done in Hawaii -- does not equal or exceed 51%, under the statute the product could not be labeled made in Hawaii. In researching this study, questionnaires were distributed to members of the now-dissolved Made in Hawaii Association and to members of the Hawaii Food Manufacturers Association. Few were returned. One survey respondent whose baked goods (cookies, bread, manju) indicate their origin in the State broke down its general expenses as follows: 60% for ingredients, 20% for manufacture, and 20% for overhead. Under the statute as written, this company also should not be permitted to label its products as coming from Hawaii. The lack of response from other manufacturers may be due in part to their recognition that their products do not qualify under the statute.

Even if the statute is interpreted as including Hawaii raw goods in the 51%, there still may be products wholly made in Hawaii that fail to qualify under the statute because certain raw goods -- sugar, flour, and chocolate, for instance -- must be purchased from mainland sources.<sup>13</sup>

- (3) By failing to distinguish between Hawaii manufacturing and Hawaii raw goods, the statute inadvertently excludes the sugar industry.**

Under a literal reading of the statute, it would seem that even the final form of Hawaii's largest agricultural crop cannot be labeled "Made in Hawaii." The statute prohibits the sale of any item labeled "made in Hawaii" or which by any other means misrepresents the origin of the item as being from the State unless two conditions are met: (1) that it is manufactured in the State, and (2) 51% of the value has been added in the State. Sugarcane is grown in the State, harvested here, and turned into raw sugar here. However, the final refinement into the finished product is done in California. Thus refined white sugar fails to meet the first condition of the statute, as its intermediate stage, but not the final product, is made in Hawaii (although it may be true that 51% of the wholesale value is added in the State through the earlier refinement process). Under the statute, it cannot be represented as being from the State. Yet

the C&H White Sugar box displays a picture of Diamond Head and palm trees and the words "fresh from Hawaii." This labeling could be considered a violation of the statute, if the statute is interpreted as encompassing food products, as it may give the impression that the finished product is made in Hawaii.

C&H could avoid problems by substituting phrases such as "grown in Hawaii." This problem again highlights the need for special protection for Hawaii's produce, such as the certification program outlined below.

**(4) The lack of criteria to be used in calculating the 51% inhibits enforcement.**

The statute merely states that 51% of the wholesale value is to be added by manufacture, assembly, fabrication, or production in the State. It does not specify the factors that are to be used in calculating the 51%. The Division of Measurement Standards of the DOA has characterized making that decision "a daunting task."<sup>14</sup> One company recently presented the Department of Agriculture with a balance sheet to prove that 51% of the value was added here -- and included garbage removal as part of its 51%.

The factors to be used in calculating the 51% need clarification. Potential specific items to be included or excluded are overhead items (rent, utilities), employee benefit items (health plans, retirement plans), and purchase of equipment. More guidance from the Legislature may be needed in aiding the department in carrying out this function.

**Comparison of the Laws**

Senate Resolution No. 160, S.D. 1, expressed a concern that the existence of two laws on the same subject was creating confusion. However, since one law is a statute and the other only an administrative rule, there is no real conflict in the law. The statute, as the direct will of the Legislature, will prevail over an administrative rule adopted by a department where both are in conflict, and to that extent, the DOH rule is redundant. Compliance with the rule will not excuse violation of the statute. But this observation alone will not solve the legislative concern over the efficacy of the Made in Hawaii laws. Hawaii needs the best law it can devise to protect its industries. As pointed out in the Standing Committee Report to S.R. No. 160, S.D. 1, the proper labeling of Hawaii-made products can be an effective marketing tool.<sup>15</sup> The Hawaii name carries a certain mystique that can be used to bolster local manufacturers and growers and the local economy.<sup>16</sup> If the current statute is not providing adequate assistance, modification should be made to best promote the state's interests is needed.

The primary difference between the statute and the DOH rule lies in the amount of manufacturing needed to be done in Hawaii. The DOH rule is a mechanical test focusing on the final manufacturing phase. Under the DOH rule, even minimal assembly is sufficient to declare a product Hawaiian. In contrast, the value-added statute takes a deeper, more economically-oriented look at the product. The product must have at least 51% of its value

added by manufacture, assembly, fabrication, or production in the state. More intensive processing would be needed, which presumably would benefit local industries more as it would require more value added to the product, and thus more work from the manufacturers.

### **The Industry Perspective on the Laws**

The Legislative Reference Bureau (Bureau) sought to contact a number of local businesses to ascertain whether any problems were perceived with the Made in Hawaii law, or any other part of the food labeling laws. The Bureau contacted the Hawaii Food Industry Association, members of the Hawaii Food Manufacturers Association, companies manufacturing macadamia nut products, dairies, members of the now-dissolved Made in Hawaii Association, Kona coffee cooperatives, and a seller of kukui nut products.

The vast majority of respondents found no problem with the geographical labeling laws. The Hawaii Food Industry Association's response makes no mention of any problem in this area.<sup>17</sup> The macadamia nut companies who responded<sup>18</sup> generally indicated no problem with the law regarding manufacturing. Two companies brought up the issue of use of Hawaii-grown nuts. Hawaii Candies & Nuts suggested use of a certification process for products made with 100% locally-grown nuts.<sup>19</sup> Mauna Loa cautioned that Hawaii manufacturers need to be able to import nuts to make up for variations in local production.<sup>20</sup> Mac Farms, which was the only industry representative to submit testimony on S.R. No. 160, was contacted to determine what changes, if any, should be made to the statute.<sup>21</sup> Mac Farms took the position that the Legislature did intend to protect Hawaii growers, not just Hawaii producers, but that the current statute is indeed unclear as to whether the value added includes the use of Hawaii-grown raw goods. To the extent that it does not, it benefits Hawaii manufacturers but not Hawaii growers. Mac Farms stated that under the current laws, "you couldn't have chocolate macadamia nut candies labeled made in Hawaii at all," because the manufacturing component does not reach 51% of the wholesale value, and that the statute should be expanded to include protection for Hawaii-grown food products.

The Kona coffee industry seems beset by a problem that is only peripheral to this study. The big issue in Kona coffee is how to address the issue of blends: should they be allowed, and if so, what quantity of Kona coffee would be required to be composed of beans from the Kona Coast in order to qualify?<sup>22</sup> There is no consensus among the growers, processors and roasters, and retailers on this issue.<sup>23</sup> In fact, in 1986 House Bill No. 2142, which would have established standards for Kona coffee and Kona coffee blends, passed the Legislature but was vetoed by Governor Ariyoshi on several grounds, including the grounds that the bill was not supported by the entire Kona coffee industry as roughly 50% of the industry opposed the bill.<sup>24</sup> This is still an issue with the Kona coffee industry.<sup>25</sup> However, this issue -- what percentage of Kona coffee beans should be required -- does not pertain to the thesis of this report, which is whether the geographical misbranding laws are effective. This issue does highlight the need for some kind of certification program for Hawaii-grown food products, however.



Kukui Nuts of Hawaii, Inc. was contacted because of its recent involvement in litigation on this issue. In Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc. et al.,<sup>26</sup> Kukui Nuts sued retailers and wholesalers who sold imported nut jewelry, claiming that they misled consumers into thinking they were selling genuine kukui nuts grown in Hawaii, when in fact the jewelry was made with imported nuts. It was claimed that this jewelry unfairly competed with Kukui Nuts' own made in Hawaii jewelry to the point where Kukui Nuts was forced to file for bankruptcy. The suit was not filed under section 486-26; it was filed under section 480-2 (unfair and deceptive trade practices), *Hawaii Revised Statutes*, and the criminal statutes prohibiting false advertisement. Kukui Nuts alleged that it had spent considerable money and effort in developing the market for kukui nut jewelry, and had built its business into a successful enterprise, which was undermined by the defendants' conduct.

Kukui Nuts' case was dismissed in summary judgment, before trial, and so it appealed. The Hawaii Intermediate Court of Appeals reversed the dismissal. The court noted that the imported kukui nut products had two tags: a descriptive tag, which implied that the products were genuine kukui nuts, prized by native Hawaiians, and an origin tag that was much smaller and stated that the item was made in Taiwan in letters a sixteenth of an inch in height or less. The court stated that it was a material issue of fact whether the second tag was sufficient to counteract the implication of Hawaii origin in the first tag.

The implications of this case for this study are that (1) foreign manufacturers can literally bankrupt legitimate Hawaii companies by evading the geographical labeling laws unless the State provides safeguards; and (2) the current system of enforcement needs to be enhanced. The researcher spoke with Dana Grey, present president of Kukui Nuts, who went to a number of state and federal agencies to resolve continuing problems with kukui nut jewelry importers.<sup>27</sup> Kukui Nuts had received an order from the International Trade Commission enjoining future violations by the importers of the foreign-made kukui nut jewelry. According to Mr. Grey, the order was taken to the police, to the Office of the U.S. Attorney, to the FBI, to Customs, and to the Office of Consumer Protection (OCP) for enforcement, but was told by each agency that it was out of their jurisdiction or (as in the case of the OCP) that the agency was too busy to handle it.

### **Proposed New Statutes**

#### **(1) Certify Hawaii-grown Food Products**

The lack of a certification program leaves local growers without protection and can be misleading to consumers. Which product, to the consumer, is more a "product of Hawaii": one made here of imported ingredients, or one made elsewhere, with Hawaiian ingredients? Most people would focus on the content of the product, not its place of manufacture. For example, they would probably consider sugar grown in Hawaii and processed in California to be a product of Hawaii, yet under the statute it is not and cannot be labeled as such.

The statute fails to address this concern. Local growers could be protected and the concern resolved by adoption of a separate law that would certify locally grown produce, so that products which contain it could display a seal representing it as "Island-fresh" or "Hawaii-grown." Maine has a program that could serve as a model.<sup>28</sup> The Maine law is contained in Appendix D. After hearings, the Maine commissioner of the department of agriculture establishes official grades and standards for all farm products (except dairy products, and for packaged sardines).<sup>29</sup> The commissioner also establishes brands, labels, or trademarks to identify products that meet the standards.<sup>30</sup> Anyone wishing to use the brand must apply to the department and receive acceptance. If a grower does not want to use the brand, the grower may use terms such as "native," "native-grown," or "locally-grown." These terms are reserved by the State and cannot be used for produce grown outside the State.<sup>31</sup>

The law also protects Maine products by requiring the commissioner to register a trademark in the form of a seal with the United States Patent and Trademark Office.<sup>32</sup> The commissioner, for each commodity group, defines the requirements necessary to consider an item "produced within the State" and the minimum percent of the content of any package that must have been produced in the State to meet the requirements for the use of the seal.<sup>33</sup> There is a waiver of the minimum content during emergency shortages, as defined by the commissioner. Any product also needs to meet the official grades and standards. The commissioner contracts for service in promoting the trademarks.

The department is authorized to inspect freely to assure compliance with the law.<sup>34</sup> The department, along with the Maine Agricultural Experiment Station, the Cooperative Extension Service, and other public or private agencies maintains a program of quality assurance.<sup>35</sup>

Hawaii also establishes grades and standards for agricultural produce, including a few processed food products.<sup>36</sup> However, the Hawaii program goes no further; it does not apply to most processed foods and it does not require or regulate the use of any place of origin terms. The Commodities Branch Chief of the Marketing Division of DOA expressed the opinion that chapter 147, *Hawaii Revised Statutes*, could be modified to increase the Department's responsibilities to include some type of certification of origin program.<sup>37</sup> The branch chief noted that, to be effective, on-line inspection of manufacturing facilities would be necessary, which would require additional staffing.

If this or a similar program were to be adopted in Hawaii, it obviously would require a commitment to increased staff and funding to assure that the program was properly administered to legitimate Hawaii businesses and swiftly and effectively enforced against those who transgress.

**(2) Revise Manufacturing Statute**

Which law would better serve the purpose of ensuring that the intent of marketing authentic Hawaiian products is achieved? Neither law is ideal. Under the DOH rule, food products can be partially prepared elsewhere, but the final act of manufacture in the State, even if minimal, can qualify the food as made in Hawaii. However, the DOH rule is straightforward and fairly easy to enforce. As all agencies presently handling geographical misbranding are understaffed, ease of enforcement is a viable consideration.

The value-added statute, while requiring more of Hawaii manufacturers, could inadvertently exclude some products made wholly in Hawaii whose manufacturing component is not 51% or greater. The statute is also cumbersome to enforce. This burdensome procedure requires complex calculations, and is compounded by the fact that businesses can change from year to year or even month to month as the prices of raw goods and labor costs fluctuate, so that a business adding 51% of the wholesale value in Hawaii during January could slip to 49% in February. The Department of Agriculture, with its limited personnel, could easily be run ragged by having to make repeated, time-consuming calculations, leading to a much slower rate of enforcement.

A new statute might have some of the following provisions:

- (1) Have the DOA and DBEDT establish standards for each food item seeking to use or imply Hawaii as its origin. The standards would include percentage of manufacturing costs to be incurred here as well as percentage of locally-produced goods to be used.
- (2) Define with precision which costs are to be included in calculating the percentage of local manufacturing costs. Require DBEDT, as the department whose statutory duties include economic research and analysis<sup>38</sup> to assist the DOA by devising factors to determine the factors to be used in meeting the percentage requirement. Once these factors are established, require each business seeking to use the Made in Hawaii or similar designation to submit a brief letter to the DOA outlining its compliance with them. This change would clarify confusion currently experienced by manufacturers and the DOA, as well as ease enforcement.
- (3) Permit any product wholly manufactured in Hawaii to be labeled as such, even if the percentage of value added by manufacturing does not reach the requisite percentage.
- (4) Permit suits by members of the public, including consumers and other manufacturers, who would act as "private attorneys general" to enforce the laws. Permit these plaintiffs to receive court costs and attorneys' fees if they prevail.

- (5) Require DBEDT to run a public relations campaign to inform residents and visitors of the special qualities of Hawaii-made and Hawaii-grown products.

## Who Enforces the Laws?

### The Department of Agriculture

The Division of Measurement Standards in the Department of Agriculture enforces section 486-26. The division is divided into three sections, the Commodities and Trade Practices Branch (CTPB), the Standards and Technical Services Branch, and the Weighing and Measuring Instruments Branch. The CTPB is the branch involved with geographical labeling.

The primary function of the CTPB is to ensure that products are not short-weighed. The branch conducts four types of audit programs in which individual units of food are removed and weighed to determine whether they are short-weighed: *on-line checking*, in which inspectors travel to the place of manufacture; retail market auditing, subdivided into meat, groceries, and produce; the school milk program audit, and the retail checkout scanner audit program.<sup>39</sup> In addition to these functions, the CTPB also has the responsibility of enforcing the geographical labeling law, "Island Fresh" milk labeling, misbranding, and labeling laws.

The CTPB has been severely understaffed. All these functions are carried out by only one and a half inspectors.<sup>40</sup> The 1990 session authorized two additional positions effective October 1, 1990, but even if those positions are filled promptly, the branch is still understaffed for the size and magnitude of the tasks involved. The CTPB branch manages to sample-test half a million packages per year, but it has been roughly estimated that Hawaii residents use about three packages per day each -- over a billion packages per year.<sup>41</sup> To the extent that this figure is correct, it indicates that only .05% of all packages are sample tested in Hawaii.

Due to the lack of staff, the division has had to place priorities on its functions. The division has decided that short-weighing is the more serious problem and thus places less focus on the geographical labeling law. The lack of time accorded to geographical labeling is accentuated by its demands. These cases require auditing skills. The CTPB inspectors do not have such skills and the department is unable to provide training for them.<sup>42</sup>

Nevertheless, the division does try to enforce the statute. At present, as it has no time or staff for any active enforcement, the CTPB only responds to complaints, generally from competitors, about violations.

Representative Maizie Hirono has asked the division to devise and present a program that would actively seek out violations of the statute, but this program was not ready by the time this report went to press.

### The Department of Health

The Department of Agriculture and the Department of Health both perform different functions relating to food labeling. The Department of Agriculture handles the short-weighting functions, and the Department of Health handles public health and safety issues such as ingredient lists, size and placement of statements on the labels, and health claims. The overlap between functions led to a Memorandum of Agreement between the two departments in 1976, in which the departments noted their concurrent responsibility, and divided up their joint functions.<sup>43</sup> Both departments agreed to resolve all conflicts administratively before taking enforcement action where the other department has similar responsibilities.

The departments have been working closely for almost fifteen years. When section 486-26 was enacted in 1988, the departments appear to have treated the issue of geographical labeling as another joint responsibility.

The Department of Health adopted section 11-29-9 in 1981. The rule is enforced by the Food and Drug Branch (F&DB) of the Environmental Health Services Division. The F&DB handles issues relating to adulteration and misbranding of almost all foods,<sup>44</sup> over-the-counter and prescription drugs, medical devices, cosmetics, and poisonous household substances. The F&DB has 25 authorized positions: 1 branch chief, 2 supervisors, 2 clerical, and 20 inspectors.<sup>45</sup> Currently, only 12 inspector positions, or 60%, are filled. Six more are expected to be filled by January 1, but it is uncertain when the other two will be available to be filled as the Department of Personnel Services has not approved the position descriptions.

Of the 12 inspectors, only 9 handle food labeling issues, in addition to their other tasks. When the DOH inspects an establishment, food labeling is only one of the items checked. The inspectors also check to ascertain that good manufacturing practices are being followed. They look at the structure for possible health-related problems, check storage of ingredients, determine if pull dates have been violated, look for insect and rodent infestation, and determine whether the finished product is safe and suitable for human consumption and properly labeled. The portion of the review devoted to labeling involves, among other things, checking the labels to see if they meet the standards for size of type and representations, and to see if any health claims are made (e.g., low salt, no cholesterol). If any labels appear improper, a formal label review is initiated. The F&DB handles 700-800 label reviews per year, and has no resources to do additional reviews until its vacancies are filled.<sup>46</sup>

Food labeling in general is a lower priority with the DOH, and within that category, the geographical misbranding aspect has a very low priority as the DOH does not consider it to be a true health issue. The F&D branch chief expressed his opinion that the working relationship with the Department of Agriculture's Division of Measurement Standards was "terrific," and that they work in tandem on geographical misbranding. However, the F&D branch chief did indicate that he thought it would be better if one agency took the lead responsibility for enforcing the law. He was emphatic in stating that the lead should not be the DOH, since

geographical origin has very little to do with health. Because one of the missions of the DOA is to promote local agriculture, the branch chief felt that the lead agency responsibility should be with the DOA.<sup>47</sup>

### The Department of Business, Economic Development, and Tourism

The Department of Business, Economic Development, and Tourism (DBEDT) had initiated a program entitled "Made in Hawaii with Aloha," in which the department furnished local businesses with stickers and hang tags with that phrase to promote local businesses. DBEDT was contacted to determine whether the department was involved in policing that program, and whether it would be interested in becoming involved in enforcing it, given the lack of enthusiasm for the program in both the DOA and DOH.

DBEDT stated that the "made in Hawaii with Aloha" effort was not a program per se, but was merely a promotional effort by the department.<sup>48</sup> No funds were provided for the promotions this year, so no stickers or hang tags were produced. When the promotion was in effect, DBEDT did not seek to enforce or judge the proper use of the promotional material, relying instead on local industry groups to police use of the materials.

DBEDT stated that it is not a regulatory agency, has no staff for regulation, and would not be interested in enforcing the geographical misbranding law.<sup>49</sup>

### The Department of Commerce and Consumer Affairs

The Office of Consumer Protection (OCP) in the Department of Commerce and Consumer Affairs (DCCA) has statutory authority<sup>50</sup> to prosecute unfair and deceptive acts or practices under section 480-2, *Hawaii Revised Statutes*:

**§480-2 Unfair competition, practices, declared unlawful.** (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

\*\*\*

(d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.

The OCP has taken the position that geographical misbranding is a deceptive act and has been prosecuting violations as it has come across them.<sup>51</sup> The OCP has approximately 27 permanent employees, of which 14 are investigators and 4 are attorneys. Geographical labeling enforcement is only a small, voluntary portion of OCP's duties, which include landlord-tenant problems, the refund law, door to door sales, charitable solicitation, endless chain schemes, discrimination in real estate transactions, health clubs, and a host of other issues.

Although OCP executive director Philip Doi and DCCA director Robert Alm did express a willingness to handle additional geographical misbranding cases,<sup>52</sup> both did indicate that their resources are stretched to capacity now. The DCCA has substantially increased the level of litigation done by the OCP, and believes that it needs to be cautious about adding to its mandate without assuring adequate resources to carry out new duties.<sup>53</sup> Alm stated that if geographical misbranding is given to the OCP, some other functions currently performed by the office will have to be dropped.

While the OCP is willing to take over the enforcement of the geographical labeling law if adequately funded, it must be remembered that OCP has general investigatory capabilities but no technical expertise in this area. Any laws given to the OCP must be clearly drawn and within its capabilities.

### Summary

There is no true conflict between the existing geographical mislabeling laws, since one is an administrative rule that will yield to the other, the Made in Hawaii statute, where they conflict. However, the current statute is not the most effective statute for Hawaii businesses and consumers as it appear to protect only goods manufactured in the State without specifically protecting goods grown in the State. A separate certification program for Hawaii-grown foods could provide more complete protection for Hawaii businesses.

The geographical misbranding laws are being enforced by three departments: the Department of Agriculture, the Department of Health, and the Office of Consumer Protection in the Department of Commerce and Consumer Affairs. The DOA is extremely understaffed and places a low priority on geographical misbranding as it believes that protecting consumers from short-weighting is more important. The DOH cooperates with the DOA but again places a very low priority on geographical misbranding as it is not a health-related measure. Only the OCP is willing to enforce the statute. The OCP is an excellent choice as it has a trained investigative staff and has experience in this area. However, if the OCP is to be given the responsibility for tasks now carried out by two other department, the OCP would need increased staffing to enable it to fully protect businesses and consumers, and increased funding to support its staff and obtain outside expertise where necessary.

### ENDNOTES

1. In addition to laws concerning foods, Hawaii regulates geographical misbranding of alcoholic beverages. The legislature did not request a review of the geographical misbranding as it relates to alcoholic beverages. Nevertheless, as they are potables, a brief description of the law is in order. No one shall:

...label, designate, or sell any liquor using the word "Hawaii", "Hawaiian", "Aloha State", "50th State", "Kauai", "Maui", "Oahu", or "Honolulu" unless such liquor is wholly or partially manufactured in the State, and all of the primary ingredients are wholly rectified or combined

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in the State of Hawaii in compliance with the Bureau of Alcohol, Tobacco and Firearms standards.

Section 281-3, Hawaii Revised Statutes. The section is enforced by members of the county liquor commissions.

2. A number of laws condemn misbranding in general, such as section 159-3, Hawaii Revised Statutes, defining meat as misbranded if its label is false or misleading in any particular. See also sections 161-3 (poultry) and 328-20 (food, drugs, devices, cosmetics).
3. Section 481A-3, Hawaii Revised Statutes, prohibits deceptive designation of geographic origin in connection with goods or services, but it is enforced by member of the public, not the State. It is not a particularly powerful law as its sole remedy is to enjoin (stop) the deceptive practice. There are no provisions for monetary recompense.
4. The LRB contacted dairies throughout the State. The response rate was low, and the four replies received from Meadow Gold dairies, S&S Dairy, Inc., Foremost Dairies, and the 50th State Dairy Farmers' Cooperative indicated no pressing problems. Meadow Gold indicated that they occasionally import mainland milk when local milk cannot meet the demand, and that this law inconveniences them to the extent that they must use two types of packages, one with the Island-Fresh logo and one without. Telephone conversation with Harolyn Fukuda, Meadow Gold Dairies, August 29, 1990. Foremost Dairies indicated that they have no problem with the letter of the law but that they question the inclusion of another company's products in the Department of Agriculture's newspaper tabloid insertion promoting island-fresh products, on the grounds that they are not produced here. Letter from John T. Komeiji, counsel for House Foods Hawaii, dba Foremost Dairies-Hawaii, to researcher, dated August 31, 1990. This problem appears to be one with the administration, and not the substance, of the law. The 50th State Dairy Farmers Cooperative, representing producers of 30% of the total milk production on Oahu, strongly supported the bill and feels that the law is "extremely effective" in differentiating local milk from imported milk. Letter from Terry Y. Yamane, 50th State Dairy Farmers' Cooperative, to researcher, dated September 6, 1990. It is assumed that the other dairies did not respond because they do not believe that any problem with the law exists.
5. Section 11-29-9, Hawaii Administrative Rules (Department of Health).
6. Title 21, Code of Federal Regulations §101.18.
7. Section 328-30, Hawaii Revised Statutes. Section 11-29-10, Hawaii Administrative Rules (DOH).
8. Section 486-32, Hawaii Revised Statutes.
9. Statement of Roger A. Ulveling, Director of Business and Economic Development, before the House Committee on Consumer Protection and Commerce on S.B. 819, S.D. 1, March 13, 1989.
10. Statement of Roger A. Ulveling, Director of Business and Economic Development, before the Committee on Consumer Protection and Commerce on S.B. 819, February 27, 1989 (emphasis in original).
11. The Mac Farms testimony on this resolution apparently took this position as it pointed out that in some cases, chocolate-covered mac nuts are being sold as "Made in Hawaii" when the packaging is imported, the chocolate is imported, and even the nuts are imported. Mac Farms believes that "Made in Hawaii" should be reserved for candy made with Hawaii-grown nuts. That, however, is not the current tenor of the laws. One might legitimately question whether protection of manufacturers necessarily protects consumers. Under the current statute, candy made with imported macadamia nuts in Hawaii may be labeled made in Hawaii, while



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candy made in California with Hawaii-grown nuts and then shipped to Hawaii cannot. But which, to the consumer, is the more authentically Hawaiian product?

12. The DOA has been including the value of the raw goods to make up the 51% where the raw goods are grown in Hawaii. Telephone interview with Jim Maka, Acting Administrator, Division of Measurement Standards, Department of Agriculture, August 28, 1990.
13. A clear-cut example might be Hawaiian gold jewelry. The intrinsic value of the gold, which must be imported as Hawaii produces none, may be so high that the finished product has a manufacturing component of less than 51%. This may mean that "Hawaiian gold jewelry" cannot be marketed as such.
14. "Mac nut stats raise question," Pacific Business News, August 6, 1990, at 1.
15. Senate Standing Committee Report No. 3207 on S.R. No. 160 (April 12, 1990).
16. See, e.g., "Jungle Jerky: Using Hawaii's mystique as a marketing tool," Pacific Business News, September 3, 1990 at 5.
17. Letter from Richard C. Botti, Executive Director, the Hawaii Food Industry Association, to the researcher, dated June 13, 1990.
18. Letters were sent to Mauna Loa Macadamia Nut Corp., Hawaiian Host, 5-H Island Foods, Inc., Hawaiian Candies & Nuts, and the Rocky Mountain Candy franchise in Maui. Responses were received from all but Hawaiian Host.
19. Made in Hawaii questionnaire submitted by Hawaiian Candies & Nuts, Ltd. to the researcher.
20. Letter from J. Alan Kugle, Chairman and President, Mauna Loa Macadamia Nut Corp. to researcher, dated June 20, 1990.
21. Telephone interview with Rick Vidgen, General Manager of Mac Farms, with researcher, September 10, 1990.
22. Telephone interview with Guy Nagai, Manager, Kona Farmers' Cooperative, with researcher, July 1990.
23. Id.
24. George Ariyoshi, Governor of Hawaii, Statement of Objections to House Bill No. 2142-86, Regular Session of 1986. The other grounds were the fact that no technical means existed to distinguish between types of coffee once they were packaged, so that extensive record-keeping would be required for enforcement. However, no funding was provided for additional personnel in the Department of Agriculture to reconcile the records. Also, the bill would apply only to Hawaii, and 50% of the coffee grown here is processed and blended on the mainland, placing it out of reach of any restrictions. This could deter local processing in favor of Mainland processing.
25. See Stuart T. Nakamoto and John N. Halloran, Final Report: the Markets and Marketing Issues of the Kona Coffee Industry, prepared for the Department of Agriculture, State of Hawaii (July 1989) at 44 ("Blended Kona Coffee is a major issue and point of contention within the Kona Coffee industry.")
26. Hawaii Intermediate Court of Appeals, No. 12782 (March 30, 1990)
27. Mr. Grey is the new president of the company and was not a party to the earlier lawsuit.

28. Title 7, Maine Revised Statutes, chapter 101, subchapter II, entitled "Grades and Standards for Farm Products."
29. Id., §442.
30. Id., §443.
31. Id., §443-A.
32. Id., §443-B.
33. Id.
34. Id., §§446, 447.
35. Id., §448.
36. Chapters 4-41, 4-42, 4-43, and 4-44, Hawaii Administrative Rules (Department of Agriculture).
37. Telephone interview with Samuel G. Camp, Commodities Branch Chief, Marketing Division, Department of Agriculture, October 10, 1990.
38. The DOA is not really equipped to make this type of determination.
39. Telephone interview with Robert Imamura, Supervisor of the Commodities and Trade Practices Branch, Department of Agriculture, July 9, 1990.
40. Although in-plant meat and poultry inspections at federally-inspected plants are assisted by the federal government, the federal government performs no audits at the wholesale or retail level.
41. Interview with Jim Maka, Acting Administrator of the Division of Measurement Standards, Department of Agriculture, June 29, 1990.
42. Id.
43. Agreement between John Farias, Chairperson, Department of Agriculture, and George Yuen, Director, Department of Health, dated February 13, 1976. DOH agreed to act as the clearing agency for pre-use clearance or approval of any labels subject to misbranding and other labeling laws and to seek counsel of the Division of Weights and Measures (the former name of the present Division of Measurement Standards) on matters solely relating to quantitative aspects of the label. DOA agreed to permit DOH to process the pre-use clearances and aid DOH in matter relating to quantitative standards. The agreement is to remain in force until terminated by one or both parties or by statutory conflict. This Agreement was apparently authorized by to section 486-34, Hawaii Revised Statutes, which stated that the director may cooperate and enter into agreements with any federal, state, or county agency with similar statutory functions for the purpose of carrying out the chapter. (This provision is now contained in section 486-2, Hawaii Revised Statutes). Earlier versions of the statute made it even more clear that the Department of Agriculture was to cooperate with the Department of Health. See, e.g., section 22B-23, 1965 Supplement to the Revised Laws of Hawaii 1955, which provided that the division shall send a copy of any report on misbranding to the Department of Health and shall "in all other respects" coordinate its activities with DOH as to health matters.
44. Except for meats and poultry, which are handled by the Department of Agriculture.

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45. Telephone interview with Maurice Tamura, Chief of the Food and Drug Branch of the Environmental Health Services Division, Department of Health, July 16, 1990.
46. Id.
47. Id.
48. Telephone interview with Bill Lee, Acting Branch Chief of the Garment Industry Branch, DBEDT, July 25, 1990.
49. Id.
50. Sections 480-14, -15, Hawaii Revised Statutes.
51. Telephone interview with Philip Doi, Executive Director of the Office of Consumer Protection, DCCA, July 23, 1990.
52. Id., and telephone interview with Robert Alm, Director, DCCA, July 26, 1990.
53. The OCP executive director has stated that additional staffing to cover the peak level of geographical mislabeling as previously experienced by the OCP would consist of two investigators, an attorney, and a secretary. However, the OCP has not discussed with the DOA or DOH the full extent of needed mislabeling enforcement. Until the DOA and DOH have informed the OCP of the full extent, staffing discussions can only be preliminary.

## **Chapter 4**

### **PROPOSED CONSOLIDATION OF FOOD LABELING LAWS**

The second issue selected for review in S.R. No. 160, S.D. 1, was the feasibility of placing all laws and rules relating to food labeling functions under the jurisdiction of one state department or agency, and if this were feasible,<sup>1</sup> to determine the appropriate department or agency. The functions are currently performed by two departments, the Department of Agriculture and the Department of Health. While combining the functions into one department seems logical, an analysis of the functions of the departments shows little overlap and a high degree of specialization in each department's duties. These factors mitigate the perceived benefits to be gained through reorganization.

One caveat should be mentioned at the outset of the following description of departmental functions. The federal government, both through Congress and the Food and Drug Administration (FDA), is considering sweeping changes to food labeling laws, as is discussed in more detail below. The latest Congressional bill, H.R. 3562, which passed the House and was before the Senate at the time this report was finalized, would establish mandatory food labeling guidelines, especially in the area of nutritional labeling, and would preempt many areas currently covered by state law, especially those dealing with ingredient labeling, standards of identity, nutritional labeling, and net-weight labeling. This may have some effect on the duties described below, particularly in regard to the Department of Health. However, the general outline of duties would probably remain the same, according to the Center for Science in the Public Interest, in that the states would still be designated to enforce these laws,<sup>2</sup> rather than the federal government.<sup>3</sup>

The Department of Agriculture's (DOA) food labeling functions are carried out by the Division of Measurement Standards. The tasks of the division are the inspection, testing, and certification of all measurement standards and devices kept, offered, sold, or used in the State; inspection and measuring of packages and amounts of commodities kept, offered, sold, or in the process of delivery; and the issuance of measure masters licenses.<sup>4</sup> The division may also test measurement devices and standards used in determining the measurement of commodities or things sold.<sup>5</sup> In addition to their responsibility for checking on the accuracy of commodity weights and weighing devices, the division also has responsibility for the accuracy of fuel pumps,<sup>6</sup> passenger car odometers,<sup>7</sup> bread weight,<sup>8</sup> taximeters, petroleum testing, and calibration services in the areas of mass, length, and volume.<sup>9</sup>

The food weighing portion of DOA's duties is handled by its Commodities and Trade Practices Branch (CTPB).<sup>10</sup> The CTPB's responsibilities, unlike those of the Food and Drug Branch of the DOH, cover a wide range of products besides food items. The CTPB had only one and a half inspector positions up to July 1, 1990, when two additional inspectors were authorized, for a total of three and a half.

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The CTPB inspectors follow four audit programs in carrying out their functions.<sup>11</sup> The CTPB activities are divided into two major programs: quantity assurance and labeling enforcement. The quantity assurance program includes: (1) auditing of industry's on-line processing to monitor the output of packaged commodities for accuracy of fill; (2) package inspection and testing for weight or fill accuracy at the retail, wholesale and processing levels; (3) monitoring/surveillance of the school milk program to determine accuracy of fill; and (4) testing scanners at the checkout counters of supermarkets, department stores, and major drug stores. The labeling enforcement program includes: (1) inspection and analysis of existing or proposed new labels for compliance with labeling laws and conducting investigations as required in cases of noncompliance; and (2) enforcement of the "Made in Hawaii," misbranding, and "Island Fresh" laws.

The inspectors of the CTPB utilize "sample-testing," in which representative samples are removed from their packaging and weighed to determine whether the weight statement on the packaging is correct.

No federally mandatory weights and measures standards for food packages exist. The National Institute of Standards and Technology (NIST), formerly known as the National Bureau of Standards, has no regulatory powers. The NIST only has statutory responsibility for cooperation with the states in securing uniformity of weights and measures laws and methods of inspections.<sup>12</sup> To fulfill that duty, NIST sponsors the National Conference on Weights and Measures, an organization of state, county, and city officials weights and measures officials.<sup>13</sup> Both NIST and the National Conference's Conference Committee on Laws and Regulations can develop technical publications or amendments to existing model laws, which then can be proposed to and adopted by the National Conference. After adoption, each state and local jurisdiction can decide whether to adopt the uniform laws and regulations. The Division of Measurement Standards has adopted, for the most part, the Uniform Laws and Regulations, including the Weights and Measures Law, of NIST Handbook 130. These have been adopted through the legislative process (for the laws) and through the Administrative Procedures Act (for the regulations). NIST Handbook 133, "Checking the Net Contents of Packaged Goods," is used as a procedural manual for determining the net contents of the packaged goods.

The Department of Agriculture also administers section 486-25, *Hawaii Revised Statutes*, prohibiting general misbranding of food items and other consumer commodities.

The Department of Health (DOH) has a much broader responsibility in regard to food labeling functions. Upon inspection, the DOH checks samples to determine whether they comply with recipe standards. Enforceable pull dates are checked. Labels are examined to ascertain whether, among other things, they meet the requirements for size of type and placement of statements. The DOH also enforces the dual quantity declarations on the labels, in which items over a certain weight or size must declare the weight or size in small units (ounces), and well as larger units (pounds, gallons).<sup>14</sup> The penalties range from embargoing the goods (taking them off the shelves), to a \$10,000 administrative fine, to prosecution as a

misdeemeanor.<sup>15</sup> Most labeling reviews are handled amicably, with most companies acquiescing to DOH's critiques and changing their labels. However, the small number of companies who resist them take up more time than all of the rest. One case can tie up an inspector for months, and so some concessions are made, such as permitting a manufacturer to use up a stock of labels.<sup>16</sup>

The DOH is not limited only to the labeling aspect of food; it is also involved in the content since its statutory duty is to protect consumer health.<sup>17</sup> The DOH Food and Drug Branch handles the contamination of almost all foods products,<sup>18</sup> over-the-counter and prescription drugs, cosmetics, medical devices, and poisonous household substances. It has been estimated that 24 cents out of every dollar spent by a consumer in Hawaii is spent on goods regulated by the DOH.<sup>19</sup>

The department has 20 inspector positions authorized, but as of July 1, 1990, only 12 positions were filled, or 60%. The department expects to fill 6 of the 8 vacancies by January 1, 1991.<sup>20</sup> Of the twelve inspectors presently employed, nine handle food labeling issues in addition to their other duties and three handle chemical contaminant issues.<sup>21</sup> In addition, the DOH administers section 328-6, *Hawaii Revised Statutes*, that prohibits general types of misbranding.

The only function (aside from geographical misbranding discussed in chapter 3) that both the DOA and DOH have in common is to prohibit general types of misbranding. The Department of Agriculture enforces section 486-25, *Hawaii Revised Statutes*, which states:

**§486-25 Misbranding.** (a) No person shall deliver for introduction, hold for introduction or introduce; or keep, offer or expose for sale; or sell any consumer commodity which is misrepresented or misbranded in any manner.

(b) The board, pursuant to section 486-7 and chapter 91, shall adopt rules relating to misbranding. The rules may:

- (1) Require any person involved with a specified consumer commodity to keep and make available for inspection or copying by the administrator adequate records to substantiate the source of the consumer commodity, or in the case of blends, the source of such constituents, as may be required by the board;
- (2) Establish fanciful names or terms, and in the case of blends, minimum constituent content by weight, to be used in labeling to differentiate a specific consumer commodity from an imitation or look-alike; or
- (3) Establish requirements to reconcile the respective volumes of specific consumer commodities received versus

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the total amounts output, either as whole or processed product or as blends.

In addition, the board may adopt other rules as the board deems necessary for the correct and informative labeling of consumer commodities.

The Department of Health administers chapter 328, *Hawaii Revised Statutes*, which contains two pertinent sections:

**§328-6 Prohibited acts.** The following acts and the causing thereof within the State by any person are prohibited:

- (1) The manufacture, sale, delivery, holding, or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;
- (2) The adulteration or misbranding of any food, drug, device, or cosmetic;
- (3) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise[.]

Section 328-10, *Hawaii Revised Statutes*, a copy of which appears in Appendix E, prohibits:

- (1) False or misleading labeling;
- (2) Labeling not in conformance with stated labeling standards;
- (3) Labeling not in conformance with the federal laws regarding net quantity of contents;
- (4) Offering a food for sale under the name of another food;
- (5) Selling imitation food products without labeling them as such;
- (6) Misleading containers;
- (7) Packages that do not list the name and address of the manufacturer, distributor, or packer, and the quantity of the package;
- (8) The inconspicuous placement of statements required by law;

- (9) Food claiming to be a food for which a standard of identity has been established that does not conform to that standard;
- (10) Food failing to meet predetermined standards of quality;
- (11) Foods failing to meet predetermined standards of fill of container unless the label reveals that it fails to meet the standard;
- (12) For foods for which a standard of identity has not been set, failure to state the common or usual name of the food and to list its ingredients (with some exceptions);
- (13) Representations of special dietary uses unless the label contains information on its vitamin, mineral, and other content as established by the department;
- (14) Use of food coloring in most foods unless specified on the label;
- (15) If it is a product intended as an ingredient of another food, a label with a suggested use such that if used as suggested the result will be the adulteration or the misbranding of the other food product;
- (16) Use of color additives not in compliance with federal law;
- (17) For raw agricultural produce, use of pesticides on the product after harvest unless stated on the shipping container; and
- (18) A confectionary containing alcohol in excess of 1/2% by weight if the label does not state that fact.

These misbranding laws display the wide range of possible types of misbranding and illustrate the need for consumer protection. They also overlap. It may be argued that two such laws are unnecessary, that only one department should have the power to regulate mislabeling, and that to have two departments regulating this area is inefficient and a waste of resources. This argument is not persuasive when all the facts are considered. The dual laws provide a safety net for consumers. Using two departments to monitor problem areas aids in preventing violations from slipping through. It must be remembered that neither department has sufficient resources to check every package in the state. Only a small number of random samples are checked. It is quite possible for one department to find a violation on a package not sampled by the other.

Resources are not wasted as the department work in conjunction with each other. In the 1976 Memorandum of Agreement, the departments recognize the overlap in functions and agree to resolve such matters internally.<sup>22</sup> This dual statutory scheme, guided by the



memorandum, provides maximum administrative flexibility, allowing the departments to assist each other if one is pressed for time or personnel to prosecute an alleged violation. Matters have proceeded smoothly to date, and the Food and Drug Branch Chief and the Acting Administrator of the Division of Measurement Standards describe their working arrangement as good.

One possible objection to the two statutes is that it could lead to dual punishment for one violation. Dual punishment would be prohibited by the double jeopardy clause of the United States Constitution only if both lawsuits were deemed to be criminal in nature. It is unclear whether actions under both general misbranding laws would be considered criminal, thus triggering the constitutional prohibition. Criminal actions are characterized by being punitive, rather than remedial, in nature.<sup>23</sup> Section 328-30, *Hawaii Revised Statutes*, which sets forth the penalties for violations of the DOH administrative rules, states that "any action taken to collect the penalty provided for in this subsection shall be considered a civil action," (emphasis added) but that language cannot prevent the application of the United States Constitution if in fact the \$10,000 penalty is deemed by the courts to be punitive.

If explicit legislative protection of violators against dual prosecution is desired, however, the misbranding statutes can simply be amended not to allow the application of one to a set of facts previously prosecuted under the other. This would provide the requisite safeguard for wrongdoers without depriving the consumers of the very real protection of both department's supervision.

### **The Federal Model**

There are two federal agencies regulating food labeling for food products that are sold in interstate commerce. The United States Department of Agriculture (USDA) regulates red meat, eggs, and poultry, and the Food and Drug Administration (FDA) in the Department of Health and Human Services regulates all other foods.<sup>24</sup> There are four primary laws that regulate labeling of specific products. The Food, Drug, and Cosmetics Act,<sup>25</sup> administered by the FDA requires packaged foods to be labeled with the name and address of the manufacturer, packer, or distributor, and to show the quantity of the product in terms of weight, volume, or content.<sup>26</sup> Foods must be listed on the label by their common names in order of predominance by weight, unless the food product has an established standard of identity.<sup>27</sup>

The label must bear the name and place of business of the manufacturer, packer, or distributor.<sup>28</sup> The label must state nutritional information if a vitamin, mineral, or protein is added to the product or when the labeling or advertisement makes a claim of nutritional value.<sup>29</sup> If the labeling lists the number of servings in the package, the label must state the serving size.<sup>30</sup> Nutritional labeling information includes listing the amount of calories, protein, carbohydrates, and fat per serving, and the percentages provided by each serving of protein, sodium, and seven specified vitamins and minerals.<sup>31</sup>

Federal action is pending in both Congress and the FDA to expand nutritional labeling, standardize serving sizes, and define certain health claims such as "low cholesterol."<sup>32</sup> This could lead to federal preemption of state laws in this area, depending on the wording of the statute or rule. At present, the Food, Drug, and Cosmetics Act does not contain an express provision prohibiting states from enacting their own state labeling laws. However, even if state laws become preempted, it is probable that the main line of defense will still be the state departments who enforce the existing federal standards.<sup>33</sup>

The Fair Packaging and Labeling Act,<sup>34</sup> also administered by the FDA, requires packages to be labeled with the identity of the product, the name and place of business of the manufacturer, packers, or distributor, and the net quantity of the contents. The Act prohibits state labeling laws regarding net weight of packages that are less stringent than the federal requirements or require information different from the federal requirement.<sup>35</sup>

The Meat Inspection Act<sup>36</sup> and the Poultry and Poultry Products Inspection Act<sup>37</sup> are administered by the United State Department of Agriculture. Both laws require origin information, and the declaration of artificial flavorings and colorings, and require coordination with the Department of Health and Human Services in regard to standard of fill and standard of identity established under the Food, Drug, and Cosmetics Act.<sup>38</sup> The Acts preempt state law.<sup>39</sup>

The NIST does not establish the weights and measure requirements for these Acts. The implementing departments, the Department of Agriculture and the Department of Health and Human Services, promulgate their own standards.

### **Selected State Models**

Eight states whose populations approximate that of Hawaii were contacted to ascertain how their food labeling laws were administered.<sup>40</sup> The three largest states were also contacted to provide an alternate view.

#### **Idaho**

Idaho is similar to Hawaii. The net-weight food labeling function is assigned to the Bureau of Weights and Measures in the Department of Agriculture.<sup>41</sup> The other food labeling functions are handled by the Department of Health and Welfare.<sup>42</sup>

#### **Maine**

In Maine, all food labeling functions are performed by the Department of Agriculture.<sup>43</sup> The department handles weighing functions, content, and the made in Maine program, which is called the "Maine quality" seal program.

### **Nebraska**

All Nebraska food labeling functions are administered by the Department of Agriculture by its Division of Weights and Measures and its Bureau of Dairies and Foods.<sup>44</sup> Their focus is determination of quantity, and labeling is not a high priority.

### **Nevada**

The food labeling functions in Nevada are distributed as they are in Hawaii. The net-weighting functions are performed by the Department of Agriculture, and the other functions are administered by the Health Division of the Department of Human Resources.<sup>45</sup>

### **New Hampshire**

New Hampshire divides its food labeling duties between the Bureau of Weights and Measures in the Department of Agriculture, which handles short-weighting and enforcing pull-dates, and the Department of Health and Welfare, which handles "palatability" issues.<sup>46</sup>

### **New Mexico**

New Mexico also divides its food labeling functions. The Department of Agriculture is responsible for net content weighing and identity labeling (labeling the finished item, not its ingredients).<sup>47</sup> The Department of Health, through its Bureau of Food Quality, Environmental Improvement Division, enforces the other aspects of food labeling.<sup>48</sup>

### **Rhode Island**

The food labeling functions are all handled by the Department of Health.<sup>49</sup> Rhode Island has no Department of Agriculture. The labeling functions are divided between two divisions within the department, one for content and one for weights and measures.

### **Utah**

All food labeling laws are enforced by the Department of Agriculture.<sup>50</sup> In addition, Salt Lake County had a food labeling specialist position, although that is primarily advisory.

### **California**

California divides its food labeling functions as Hawaii does: the Department of Health is responsible for labeling, but the Department of Agriculture is responsible for the net-weighting functions.<sup>51</sup> However, the Department of Health has the authority to act against any kind of misbranding, including misweighing.

## **New York**

All food labeling functions are handled by the Agricultural and Markets Department, Food Inspection Services.<sup>52</sup> If the Department of Health were to discover a potential violation, it would be referred to the Agricultural and Markets Department.

## **Texas**

Virtually all of the state labeling laws are administered by the Department of Health.<sup>53</sup> All labeling laws are primarily under Texas Food and Drug Labeling Act, which is administered by the DOH. Some commodities, such as fresh produce, are under the Department of Agriculture. Other food products, such as meat inspection, shellfish sanitation control, and dairies, are under the Department of Health. While the Weights and Measures Division is in the Department of Agriculture, all that department does is to verify the accuracy of the scales. The short-weighing checking of packages is done by the Department of Health.

## **Summary**

No standard organization of food labeling laws exists in the states surveyed. Half of states similar to Hawaii in population size organize their food labeling functions as Hawaii does: by placing the net weighing functions in the Department of Agriculture and the rest of the food labeling functions in the Department of Health (or, in one case, the Department of Human Resources). Of the remaining four, three give all food labeling functions to the Department of Agriculture, and one gives the functions to its Department of Health. The three largest states also lack unanimity in their administrative forms and in fact each state follows a different model: California divides the functions, Texas utilized the Department of Health, and New York uses its Department of Agriculture.

## **Options**

The resolution asked the Bureau to consider the feasibility of placing all food labeling functions in one department. The range of options are:

### **(1) Place all food labeling functions in the Department of Agriculture.**

This option<sup>54</sup> would require an almost complete revamping of the CTPB of the Division of Measurement Standards. Currently, the CTPB staff is trained in sampling techniques and weighing and measuring techniques. The staff would have to increase significantly in size if it were to handle all functions, perhaps triple in size, as the bureau only has four inspectors now versus the nine DOH inspectors currently handling food labeling functions.<sup>55</sup> The staff would also have to receive specialized training and obtain access to a laboratory to follow up on suspected violations.

In addition, there has been considerable discussion at the federal level of establishing mandatory federal labeling regulations that would preempt or otherwise affect state labeling rules. The DOA could initially adopt the DOH rules, but then would be responsible for keeping informed of, and adapting state rules to, the federal laws. This may lead to additional and unexpected burdens on the department.

It may be possible to transfer positions from the DOH directly to the DOA, but DOH Food and Drug Branch Chief Maurice Tamura cautioned that transfer of positions, while appearing feasible on paper, was often quite difficult in implementation as the unions, the Department of Personnel Services, and the Department of Budget and Finance need to get involved. Tamura's position was to leave the departments as they are now.

The Acting Administrator of the Division of Measurement Standards, Jim Maka, also agrees that the food labeling administration should remain as it is.<sup>56</sup>

**(2) Place all food labeling functions in the Department of Health.**

At first glance, this may seem more feasible than the alternative, as fewer changes in personnel would be involved.<sup>57</sup> However, some transfer or addition of personnel would still be needed. Implementing the net weighing program is not simply a matter of entering a factory and weighing items. There are specific protocols and sampling procedures necessary to obtain a fair sample. Training would be necessary, and the scales used by the DOH would still need to be calibrated by the DOA.

Again, both Tamura and Maka take the position that the food labeling functions are currently being performed by those best able to perform them and that combining food labeling functions is neither necessary nor helpful.

**(3) Give misbranding enforcement to DOH only, and leave the rest of the statutory scheme as is.**

If the Legislature decides to revise the statutory requirements so that only one department handles general misbranding, the responsibility should be given to the Department of Health. Not only is it the larger department<sup>58</sup> but some of the misbranding functions could only be done by them. The enumerated types of misbranding under section 328-10, *Hawaii Revised Statutes*, include determining the percentage of alcohol in confectionery, determining whether lawful color and food additives have been used, establishing vitamin, mineral, and other types of content for foods making special dietary claims, and establishing and enforcing standards of identity for foods. These functions are more appropriately done by the trained professional staff and services of the Department of Health.

**(4) Leave the administration and organization of the food labeling laws as it is.**

This is the recommended alternative. The functions performed by the two departments rarely overlap. Each performs specialized functions and investigates different issues relating to food labeling. There is little infringement on each other's areas and when it exists, the departments have a coordinated mechanism for dealing with them. The departments have expressed their preference for retaining their separate responsibilities and coordinating on the areas they share. They describe their working relationship as good.

This statutory scheme should lead to little or no confusion on the part of the food industry. Enforcement is done by regular monitoring or in response to a complaint. As long as the complaints are properly referred by the departments, little if any confusion should exist for the public. Comments received in the course of this study do not reflect confusion about the roles of the two departments; they reflect frustration with what the complainants perceive as inadequate enforcement. Perhaps additional personnel would resolve that problem, but total reorganization would not address it. For those who are confused or who want to make a complaint, the departments could produce an informational pamphlet outlining their respective responsibilities and listing appropriate points of contact.

This option is recommended as it would take a system that is basically working and improve it through additional personnel and informational pamphlets for the public. It would not require the time and expense of transferring positions and establishing training programs for those positions. It would not require specialists in one area to develop specialization in another. This is the cleanest and most cost-effective option.

## ENDNOTES

1. There would be no federal bar to such a consolidation. Telephone interview with Robert C. Howell, Resident Investigator, Food and Drug Administration, United States Department of Health and Human Services, June 26, 1990.
2. Telephone interview with Bruce Silverglade, Attorney, Center for Science in the Public Interest, September 17, 1990. It is unclear whether the proposed FDA regulations will ultimately preempt the states, due to the continuing controversy over preemption. See "FDA to Propose New Standards for Food Labels," The Wall Street Journal, June 27, 1990, at B-1.
3. The federal government currently participates in cooperative programs with the states in regard to meat and poultry inspection.
4. Sections 486-11, -13, -22, -28, Hawaii Revised Statutes.
5. Section 486-11, Hawaii Revised Statutes.
6. Chapter 486, Part II, Hawaii Revised Statutes.
7. Chapter 486, Part III, Hawaii Revised Statutes.

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8. Chapter 486, Part IV, Hawaii Revised Statutes.
9. Section 486-6 and 486-7, Hawaii Revised Statutes.
10. The other two branches are the Standards and Technical Services Branch, and the Weighing and Measuring Instruments Branch.
11. Interview with Robert Imamura, Chief of the Commodities and Trade Practices Branch, July 6, 1990.
12. See 15 U.S.C.A. §272.
13. The need for uniformity in state weights and measures laws was first noted at the second National Conference in April 1906. The NCWM had its 75th annual meeting in 1990.
14. Telephone interview with Allan Izen, Inspector, Food and Drug Branch, Department of Health, July 17, 1990, and interview with Maurice Tamura, Chief, Food and Drug Branch, Department of Health on July 16, 1990 (hereafter Tamura interview).
15. Tamura interview, supra note 14.
16. Id.
17. See section 26-13, Hawaii Revised Statutes.
18. Except meat and poultry, which are handled by the DOA. Tamura interview, supra note 14.
19. Tamura interview, supra note 14.
20. Id.
21. Id.
22. Agreement between John Farias, Chairperson, Department of Agriculture, and George Yuen, Director, Department of Health, dated February 13, 1976. The departments agreed "to administratively resolve all conflicts [with each other] prior to enforcement action being taken where [the departments have] similar responsibilities." The agreement is to remain in force until terminated by one or both parties or by statutory conflict. This Agreement was apparently authorized by to section 486-34, Hawaii Revised Statutes, which stated that the director may cooperate and enter into agreements with any federal, state, or county agency with similar statutory functions for the purpose of carrying out the chapter. (This provision is now contained in section 486-2, Hawaii Revised Statutes). An earlier version of the statute made it even more clear that the Department of Agriculture was to cooperate with the Department of Health. See section 22B-23, 1965 Supplement to the Revised Laws of Hawaii 1955, which provided that the division [of weights and measures] shall send a copy of any report on misbranding to the Department of Health and shall "in all other respects" coordinate its activities with DOH as to health matters.
23. See "Criminal Law," 21 American Jurisprudence 2d §249.
24. Michael W. Kern, "Federal and State Food-Labeling Laws," Research Response (Illinois General Assembly, Legislative Research Unit, February 3, 1988) at 1.
25. 21 U.S.C.A. §§301 et seq.

26. 21 U.S.C.A. §343.
27. Id.
28. 21 C.F.R. §101.5.
29. 21 C.F.R. §101.9.
30. 21 C.F.R. §101.8.
31. 21 C.F.R. §101.9.
32. "FDA to Propose New Standards for Food Labels." The Wall Street Journal (June 27, 1990) at B-1.
33. Telephone interview with Bruce Silverglade, Attorney, Center for Science in the Public Interest, September 17, 1990.
34. 15 U.S.C.A. §§1451 et seq.
35. 15 U.S.C.A. §1461.
36. 21 U.S.C.A. §§601 et seq.
37. 21 U.S.C.A. §§451 et seq.
38. 21 U.S.C.A. §457(b), §607(c).
39. 21 U.S.C.A. §467f, §678.
40. The eight states are: Rhode Island (population 993,000), Idaho (1,003,000), Nevada (1,054,000), New Hampshire (1,085,000), Maine (1,205,000), New Mexico (1,507,000), Nebraska (1,602,000), and Utah (1,690,000). Hawaii's population is 1,098,000. Source: Mark S. Hoffman, ed., The World Almanac and Book of Facts 1990 (New York: Pharos Books) - Table, Population by State: 1988, estimates by the U.S. Bureau of Census).
41. Section 4.1, Idaho Regulations for Weights and Measures.
42. Telephone interview with Donald Brothers, State Food Program Compliance Officer, Bureau of Preventative Medicine, Department of Health and Welfare, State of Idaho.
43. Telephone interview with Sylvia Fanning, Supervisor of Consumer Foods Unit, Division of Regulation, Department of Agriculture, State of Maine, July 13, 1990. In Maine, the Department of Health licenses and inspects eating and lodging establishments, and inspects drinking, plumbing, and waste water systems.
44. Telephone interview with Dick Suter, Field Supervisor, Weights and Measures Division, Department of Agriculture, State of Nebraska, July 11, 1990.
45. Letter from Joseph L. Nebe, Public Health Rating and Survey Officer, Consumer Health Protection Services, Health Division, Department of Human Resources, State of Nevada, to researcher on August 28, 1990, and telephone conversation with Joseph L. Nebe on September 19, 1990.
46. Telephone interview with Richard Cote, Inspector, Bureau of Weights and Measures, State of New Hampshire, July 10, 1990.



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47. Telephone interview with Gary West, Agricultural Standards and Consumer Services, Department of Agriculture, State of New Mexico, July 13, 1990.
48. Telephone interview with Edward Horst, Environmental Improvement Division, Health and Environment Department, State of New Mexico, August 1, 1990.
49. Telephone interview with Ernie Julian, Division Chief of the Food Protection Division, Department of Health, State of Rhode Island, July 11, 1990.
50. Telephone interview with Becky Shreeve, Food and Dairy Officer, Department of Agriculture, State of Utah, July 11, 1990.
51. Telephone interviews with Jim Tollefson, Division of Measurement Standards, Department of Food and Agriculture, State of California, August 1, 1990 (the department is responsible for identity, quantity, and responsibility (packer or manufacturer's name and address)), and Dr. Jack Sheneman, Food and Drug Scientist, Food and Drug Branch, Department of Health Services, State of California, August 2, 1990.
52. Telephone interview with Donnelly Whitehead, Senior Inspector, Department of Agriculture and Markets, State of New York, August 2, 1990.
53. Telephone interview with Dan Sowards, Director of Food Programs, Division of Food and Drugs, Department of Health, State of Texas, August 2, 1990.
54. This option was suggested by the Hawaii Food Industry Association on the grounds that the DOA already handles the net-weighting function, "which cannot be realistically transferred," it would create a "one-stop" approval location for new labels, that declaration of ingredients relates to measurement by percentage of ingredients, it should be cost-effective since the Division of Measurement Standards already calls on retailers and processors for scale inspection, it is the most logical option, and it will avoid the dual jurisdiction problem. Letter from Richard C. Botti, Executive Director, Hawaii Food Industry Association, to researcher on June 13, 1990. It should be noted that Hawaii does not require pre-use approval of new labels.
55. The Division of Measurement Standards appears understaffed as compared to other states. Prior to July 1990, it had only one and a half inspectors involved in food labeling. Recent legislation changed that to four. Other states generally have more: New Mexico has five inspectors who handle food labeling, net weighing, and petroleum measurement devices in the Department of Agriculture; Maine has a total of eight inspectors in weights and measures; Utah has "three or four;" Nebraska has eleven inspectors total involved in the food labeling area (as opposed to thirteen total in Hawaii) and Rhode Island has fifteen inspectors total.
56. This is also the position of the College of Tropical Agriculture and Human Resources, which testified on S.R. No. 160. Testimony of Dean N.P. Kefford, College of Tropical Agriculture and Human Resources, University of Hawaii, on S.R. No. 160, April 12, 1990, before the Senate Committee on Agriculture.
57. Placing all functions in the Department of Health was encouraged by the local FDA investigator. Telephone interview with Robert C. Howell, Resident Investigator, Food and Drug Administration, United States Department of Health and Human Services, June 26, 1990.
58. The Department of Health is the largest department in the State.

## **Chapter 5**

### **FINDINGS AND RECOMMENDATIONS**

#### **Findings**

- (1) Hawaii has two general laws regulating geographical misbranding. One is an administrative rule under the Department of Health (DOH), and the other is a statute administered by the Department of Agriculture (DOA).
- (2) Where the two laws conflict, under the general principles of statutory construction, the statute must prevail; therefore, there is an apparent, but not an actual conflict in the laws.
- (3) The Attorney General's office has taken the position that section 486-26, the DOA statute, does not apply to food products. The legislature appears, by this resolution, to take the opposite position. The DOA is enforcing the statute against food manufacturers.
- (4) The DOH rule declares that a food product expressly or impliedly labeled to indicate its origin in Hawaii must in fact be manufactured here. This law is easy to understand and enforce, but can lead to violations of the law by businesses bringing in mostly completed items and finishing them in Hawaii.
- (5) The DOA statute prohibits the labeling of an item as made in Hawaii, or use of terms implying an origin in the State, unless 51% of its wholesale value had been added by manufacture, assembly, fabrication, or production in the State.
- (6) The DOA statute does not fully protect growers and certain manufacturers as it is ambiguous in regard to whether the 51% added value can be added by use of raw foods grown in the State. The statute does not clearly distinguish between the concepts of Hawaii-made and Hawaii-grown food products.
- (7) If the DOA statute does not include the use of Hawaii-grown food products, then certain manufacturers whose total manufacturing component does not reach 51% can be adversely affected. Examples are as chocolate covered macadamia nut candy and local baked goods, whose manufacturing component is only 20%.
- (8) If the DOA statute does not include the use of Hawaii-grown food products, then local food growers are adversely affected because there is no incentive for manufacturers to use their products, as opposed to cheaper imports.

## FINDINGS AND RECOMMENDATIONS

- (9) The statute would appear to have an adverse impact on the sugar industry, as it should prohibit them from indicating that refined sugar is a Hawaii product since the final stage of production is done in California, not Hawaii.
- (10) The lack of criteria to be used in calculating the 51% manufacturing component inhibits enforcement.
- (11) Neither the DOA nor the DOH wants to administer the geographical misbranding law. It is a low priority with the DOA, and a very low priority with the DOH.
- (12) The Department of Business, Economic Development, and Tourism does not want to administer the law.
- (13) The Office of Consumer Protection (OCP) within the Department of Commerce and Consumer Affairs does want to administer the law if it is given adequate funding and staffing. The OCP has a trained investigative staff and has prosecuted similar actions.
- (14) The DOA and the DOH also have some overlap in the area of general misbranding of food products.
- (15) This overlap helps protect the consumer and poses minimal threat of double prosecution of the guilty.
- (16) The DOA and the DOH have a long-standing Memorandum of Agreement in which both departments recognize their overlapping functions and agree to coordinate internally.
- (17) The DOA and the DOH have a good working rapport.
- (18) Aside from the misbranding overlap, the DOA and the DOH have different interests in food labeling functions. The DOA is concerned with the accurate net weight of the packages and in detecting and prosecuting any short-weighting. The DOH is concerned with more general areas and with health matters, and investigates recipe standards, pull dates, size and placement of type, and health claims. Each department requires specialized training of its investigators.
- (19) A review of the eight states closest in population size to Hawaii reveals that half of the states divide their food labeling functions as Hawaii does, three place all food labeling responsibilities in their Departments of Agriculture, and one places the duties in its Department of Health.

## FINDINGS AND RECOMMENDATIONS

- (20) A review of the three largest states shows that each organizes its food labeling functions differently: California divides the functions as Hawaii does, New York places all responsibilities in its Department of Agriculture, and Texas, in its Department of Health.
- (21) Neither DOA nor DOH wants to reorganize the current system and give all its responsibilities to, or take them from, the other.
- (22) Public comments revealed very little interest in consolidating functions in one department. The public concern was with (1) protecting Hawaii-grown foods, and (2) *enhancing enforcement*.

### Recommendations

- (1) The State should have a strong geographical labeling law to protect local businesses. The current statute should be clarified to include food products.
- (2) The responsibility for enforcing geographical misbranding should be transferred to the OCP with *sufficient funds for it to do the job*.
- (3) The DOH rule should be repealed. The DOA statute should be redrafted pursuant to the suggestions made in the text to protect manufacturers.
- (4) A new certification statute to protect Hawaii growers should be investigated by the DOA.
- (5) *The general misbranding laws administered by the DOA and the DOH should be retained by each.*
- (6) The DOA and the DOH should produce a pamphlet outlining for the public their division of functions and responsibilities in the food labeling area.
- (7) The food labeling functions otherwise should be left to the DOA and the DOH as they are now.

THE SENATE  
FIFTEENTH LEGISLATURE, 1990  
STATE OF HAWAII

S.R. NO.

160  
S.D. 1

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## SENATE RESOLUTION

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO REVIEW THE LAWS  
AND ADMINISTRATIVE RULES RELATING TO FOOD LABELING.

WHEREAS, the subject of food labeling, especially regarding products that are labeled "Made in Hawaii," has become an important issue in recent years since products of Hawaiian origin have a significant marketing advantage; and

WHEREAS, Section 486-26, Hawaii Revised Statutes, which deals with the labeling of Hawaii-made products, is presently under the jurisdiction of the Department of Agriculture; and

WHEREAS, rules establishing standards of identity, quality, and labeling of foods under Chapter 20, Title 11, Hawaii Administrative Rules, are under the jurisdiction of the Department of Health; and

WHEREAS, it is important that food labeling be carefully monitored, especially in light of recent controversy over the content and labeling of "Hawaii-made products"; and

WHEREAS, the intent of State labeling laws is to ensure that products sold as "Hawaiian" and marketed as such, in fact utilize Hawaiian materials as appropriate; and

WHEREAS, there is confusion regarding the interpretation and enforcement of laws and rules which do not achieve this intent; and

WHEREAS, it appears appropriate to review these laws and to give authority to one specific State department or agency to eliminate confusion and promote efficiency in enforcing the laws and rules governing food labeling; now, therefore,

BE IT RESOLVED by the Senate of the Fifteenth Legislature of the State of Hawaii, Regular Session of 1990, that the Legislative Reference Bureau is requested to review the laws and administrative rules relating to food labeling to ensure that the intent of marketing authentic Hawaiian products is achieved; and

BE IT FURTHER RESOLVED that the review include a study of the feasibility of placing all laws and administrative rules under the jurisdiction of one State department or agency and determining the appropriate agency to monitor food labeling and enforce State labeling laws and rules; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau submit a report of its findings and recommendations to the Legislature at least twenty days before the convening of the Regular Session of 1991; and

BE IT FURTHER RESOLVED that a certified copy of this Resolution be transmitted to the Director of the Legislative Reference Bureau to the Governor's Agricultural Coordinating Committee.

## Appendix B

April 2, 1990



To: Senator Donna R. Ikeda, Chairperson  
Hawaii State Senate Committee on Agriculture

Subject: Testimony in Support of SR 160 and SCR 176 Regarding a Review of Labelling Laws

Presented by Rick J. Vidgen, General Manager, MacFarms of Hawaii.

There is an increasing concern amongst Hawaiian macadamia farmers that imports of foreign kernel to Hawaii are the primary reason for the current decrease in the price of nut-in-shell. MacFarms is an integrated landowner, grower, processor and marketer in Hawaii. As well, our parent company is an orchard owner and processor of macadamias in Australia and part-owner of an orchard in Costa Rica. Thus, we are uniquely placed to understand this situation.

The facts are

- o While the complete 1989 import statistics to Hawaii have not yet been released by the Department of Commerce, it appears that the final total will be of the order of 1.3 million pounds macadamia kernel imported to Hawaii -- almost double the previous year and in excess of 10% of the local production.
- o This kernel was imported virtually entirely from Guatemala and Australia (about 50% from each source).
- o This imported kernel goes into the manufacture of chocolate covered macadamias, other macadamia candy items and macadamia cookies.

The issue of concern for local farmers is that this imported material is brought into Hawaii (generally at a lower cost than local kernel), commanding a tariff of only five cents per pound (around 1% of its value). It is then coated with chocolate which is also imported, packaged in materials generally from mainland suppliers and sold as a "Product of Hawaii" in distinctly Hawaiian packaging. This is arguably "legal" under current laws -- but seems to be in conflict with what should be the intent of state packaging laws, i.e., to set out to protect both consumers and local producers.

Page 2 - Senator Ikeda  
Testimony in Support of SR 160 and SCR 176  
April 2, 1990

We do not believe that tariff protection is an answer. However, we are very conscious that "Product of Hawaii" and a strong Hawaiian association is a unique marketing advantage created by the glamour of our state and its agricultural industry. We believe this advantage should be preserved for products that are genuinely grown and produced by this industry and that the intent and practice of labelling legislation should reflect this.

There are presently two sets of packaging laws administered by the Department of Health and Department of Agriculture.

Under Department of Health statutes, the act of "manufacture" of a product in Hawaii apparently validates its status as a "Product of Hawaii" - even though all materials are imported.

Under the Department of Agriculture "Made in Hawaii" law, these macadamia products really do not qualify. However, it would be difficult for the Department to have the information necessary to enforce the law which requires "50% Hawaiian content." In fact, the only Hawaiian content is labor and overheads, which will be of the order of 20% of wholesale value.

I believe this resolution will allow for a review and rationalization of these laws to give a legislation that reflects the intent and is easily interpreted and enforceable by the relevant department.

It should thus set us on the way to overcome a presently unquittous situation.

  
(RJV:bm)



## Appendix C

JOHN WAIHEE  
GOVERNOR



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ATTORNEY GENERAL

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FIRST DEPUTY ATTORNEY GENERAL

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DEPARTMENT OF THE ATTORNEY GENERAL  
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October 18, 1990

Ms. Susan Ekimoto Jaworowski  
Legislative Reference Bureau  
State of Hawaii  
State Capitol  
Honolulu, Hawaii 96813

Dear Ms. Jaworowski:

Re: Interpretation of Section 486-26, "Hawaii Made Products"

This is in response to your letter request dated September 18, 1990, for a written opinion regarding a perceived conflict in Hawaii's food labeling laws, specifically section 486-26, Hawaii Revised Statutes (HRS), entitled "Hawaii Made Products" and Department of Health administrative rule section 11-29-9 entitled "False or Misleading Representation of Geographical Origin."

Response to your inquiry requires that we address the threshold question of whether section 486-26 applies to food products since only in that instance does a conflict result between the statute and the Department of Health rule. As originally enacted in 1986, the forerunner statute to section 486-26 (former section 486-26.8) was silent as to food products, as was the legislative history and testimony. (See Act 330, Session Laws of Hawaii 1986.) However, the legislative history to Act 201, Session Laws of Hawaii 1989, strongly suggests that the Legislature intended to exclude food products from section 486-26 coverage. On that basis, we conclude that section 486-26 does not apply to food products. In particular, we are persuaded by H. Stand Comm. Rep. No. 1210 Haw. H.J. 1279 (1989) and H. Conf. Comm. Rep. No. 73, Haw. H.J. 790, 1989, which, respectively, reference deletion of the proposed terms "food products" and "raw agricultural commodity"

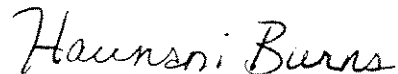
Ms. Susan Ekimoto Jaworowski  
October 18, 1990  
Page 2

from various drafts of S. B. No. 819 (which became Act 201), and in the instance of "food products," deletion on the basis of testimony by the Department of Agriculture.

In our view, section 486-26 does not provide authority for the Department of Agriculture, Measurement Standards Division, to regulate food products. Consequently, we see no actual conflict between section 486-26 and the Department of Health's rule section 11-29-9. The statute and the rule appear to regulate different areas, although this separation could be clarified in the statute. If, however, authority for regulation of food products pursuant to section 486-26 is intended, we believe that the statute must be amended to make this authority clear.

Please let us know if we can be of further assistance in this area.

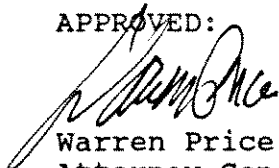
Very truly yours,



Haunani Burns  
Deputy Attorney General

HB:kn  
0222R

APPROVED:



Warren Price, III  
Attorney General

## Appendix D

### MAINE REVISED STATUTES

#### Title 7, Chapter 101, Subchapter II Grades and Standards for Farm Products

##### § 441. Rules and regulations

The commissioner may prescribe, in a manner consistent with the Maine Administrative Procedure Act,<sup>1</sup> rules and regulations for carrying out this subchapter, including the fixing of fees to be charged any individual, firm or organization requesting an inspection pursuant to section 446. These fees shall, as nearly as possible, cover the costs of the inspection services for the commodity inspected. All fees collected shall be paid by the commissioner to the Treasurer of State and are appropriated for the purposes of this subchapter. Any unexpended balance from the funds thus appropriated shall not lapse, but shall be carried forward to the same fund for the next fiscal year.

##### § 441-A. Legislative purpose

The Legislature finds that Maine agricultural producers have, in many cases, tended to focus on production, with less attention to marketing, including the adoption of and adherence to quality standards. Consistent high quality of Maine agricultural products is essential to the maintenance and expansion of Maine markets and to the success of agriculture in the State. In order to assure that those quality standards are properly adopted, enforced and promoted, the Legislature finds it is necessary to provide state assistance in these aspects of marketing.

##### § 442. Hearings

The commissioner may establish and promulgate official grades and standards for farm products, excepting dairy products produced within the State for the purposes of sale, and may from time to time amend or modify such grades and standards. Before establishing, amending or modifying any such grades or standards, the said commissioner shall hold public hearings in such places within the State as shall be most convenient to producers of the commodity under consideration. Notice of such hearings shall be provided in the manner specified in the Maine Administrative Procedure Act<sup>1</sup> and shall further be provided in a newspaper or newspapers of general circulation within the county where the hearing is to be held.

**§ 443. Brands, labels and trademarks; revocation**

The commissioner may determine or design brands, labels or trademarks for identifying farm products and sardines packed in accordance with such official grades and standards established as provided by law and may furnish information to packers and shippers as to where such labels and trademarks may be obtained. A written application to the said commissioner requesting permission to use said brands, labels or trademarks, and a written acceptance thereto by the said commissioner or duly authorized assistants, shall be a condition precedent to the use of such brands, labels or trademarks. The right to use such brands, labels or trademarks may be suspended or revoked in a manner consistent with the Maine Administrative Procedure Act<sup>1</sup> whenever it appears on investigation that they have been used to identify farm products and sardines not in fact conforming to the grade indicated.

**§ 443-A. Native produce**

No farm produce sold or offered for sale within the State shall be labeled or advertised as "native," "native-grown," "locally-grown" or by a similar designation, unless that produce was actually grown in the State of Maine. Violation of this provision shall be a civil violation punishable by a fine of not less than \$100 nor more than \$200. This section shall be enforced by the Division of Markets of the Department of Agriculture, Food and Rural Resources.

**§ 443-B. Certification trademark for Maine products**

1. **Registration of trademark.** The Commissioner of Agriculture, Food and Rural Resources shall, before December 31, 1988, apply to the United States Patent and Trademark Office for registration for a certification trademark or trademarks consisting of a seal in the form of the outline of the State, the word "Maine" and any other appropriate identifying words. Any certification trademark obtained may only be used on farm products produced within the State. Any certification trademark obtained may be registered with the State in accordance with Title 10, chapter 301-A.<sup>1</sup>

2. **Origin of product.** For purposes of this section, the commissioner shall define, by rule, for each commodity group, the meaning of the term "produced within the State" and the minimum percent of the content of any package that must have actually been produced within the State to meet the requirements for use of any mark under this section.

The commissioner shall grant a waiver to the minimum content criteria when emergency market conditions arise which are abnormal to the historic flow of a specific commodity, with the degree of the waiver to be determined by the commissioner. The commissioner shall determine what constitutes an emergency condition.

3. **Quality grades and standards.** Any product bearing a certification trademark obtained under this section shall meet the official grades and standards established by the commissioner under section 443 for that commodity.

4. **Promotion.** The commissioner shall contract for services to promote the use of the proposed state trademark.

#### § 444. Publicity

Upon the establishment of the grades or standards, brands, labels or trademarks, the commissioner shall give due publicity through the newspapers of the State, setting forth the grade or grades so established and the date on which such establishment is to become effective, and distribute information explaining the same and their use.

#### § 445. Permits

After notice of the establishment of grades or standards and the determination of brands, labels or trademarks, it shall be unlawful to use a brand, label or trademark to identify farm products and sardines as being of a grade established before a permit is granted or after the revocation of the right to use such brand, label or trademark by the commissioner. Violation of this section is a civil violation for which a forfeiture not to exceed \$50 may be adjudged for the first violation and a forfeiture not to exceed \$200 may be adjudged for each subsequent violation.

#### § 446. Inspections

The commissioner or his duly authorized agents may inspect any fruits, vegetables, poultry, eggs, farm products, sardines or other commodities that are marked, branded or labeled in accordance with official grades or standards established and promulgated by the commissioner for the purpose of determining and certifying the quality and condition thereof and other material facts relative thereto. Certificates issued in pursuance of that inspection and executed by the inspector shall state the date and place of inspection, the grade, condition and approximate quality of the fruits, vegetables, poultry, eggs, farm products, sardines or other commodities inspected and such other pertinent facts as the commissioner may require. Such a certificate relative to the condition or quality of the farm products and sardines shall be prima facie evidence in all courts of the State of the facts required to be stated in the certificate.

#### § 447. Access for inspection purposes

The commissioner, in person or by deputy, shall have free access at all reasonable hours to any building or other place wherein it is reasonably believed that farm products are marked, branded or labeled in accordance with official grades established and promulgated by the said commissioner or are being marketed or held for commercial purposes. He shall have power in person or by deputy to open any bags, crates or other containers containing said farm products and examine the contents thereof and may, upon tendering the market price, take samples therefrom. Whoever obstructs or hinders the commissioner or any of his duly qualified assistants in the performance of his duties under this subchapter commits a civil violation for which a forfeiture of not less than \$10 nor more than \$100 shall be adjudged.

**§ 448. Quality assurance**

The commissioner shall, in conjunction with the Maine Agricultural Experiment Station, the Cooperative Extension Service and other public or private agencies, maintain a program of quality assurance by the diligent enforcement of all provisions of this Part which pertain to grading, labeling, licensing and advertising of agricultural products, and by providing direct and indirect assistance to the industry in the adoption of those new technologies and methods of production which will improve the quality of Maine agricultural products.

## Appendix E

### HAWAII REVISED STATUTES

#### Section 328-10

**§328-10 Foods deemed misbranded when.** A food shall be deemed to be misbranded:

- (1) If its labeling is false or misleading in any particular; or if its labeling or packaging fails to conform with the requirements of sections 328-2 and 328-19.1;
- (2) If it is offered for sale under the name of another food;
- (3) If it is an imitation of another food for which a definition and standard of identity has been prescribed by rules as provided by section 328-8; or if it is an imitation of another food that is not subject to paragraph (7), unless its label bears in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated;
- (4) If its container is so made, formed, or filled as to be misleading;
- (5) If in package form, unless it bears a label containing (A) the name and place of business of the manufacturer, packer, or distributor; (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count, which statement shall be separately and accurately stated in a uniform location upon the principal display panel of the label; provided that under subparagraph (B) reasonable variations shall be permitted, and exemptions as to small packages shall be established, by rules adopted by the department of health;
- (6) If any word, statement, or other information required by or under authority of this part to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;
- (7) If it purports to be or is represented as a food for which a definition and standard of identity have been prescribed by rules as provided by section 328-8, unless (A) it conforms to such definition and standard, and (B) its label bears the name of the food specified in the definition and standards, and, insofar as may be required by the rules, the common names of optional ingredients (other than spices, flavoring, and coloring) present in the food;
- (8) If it purports to be or is represented as:
  - (A) A food for which a standard of quality has been prescribed by rules as provided by section 328-8 and its quality falls below such standard unless its label bears, in such manner and form as the rules specify, a statement that it falls below such standard; or

- (B) A food for which a standard or standards of fill of container have been prescribed by rules as provided by section 328-8, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as the rules specify, a statement that it falls below such standard;
- (9) If it is not subject to paragraph (7), unless its label bears (A) the common or usual name of the food, if any there be, and (B) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings, without naming each; provided that to the extent that compliance with the requirements of subparagraph (B) is impractical or results in deception or unfair competition, exemptions shall be established by rules prescribed by the department; and, provided further that the requirements of subparagraph (B) shall not apply to food products which are packaged at the direction of purchasers at retail at the time of sale, the ingredients of which are disclosed to the purchasers by other means in accordance with rules prescribed by the department;
- (10) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the department determines to be, and by rules prescribes, as necessary in order to fully inform purchasers as to its value for such uses;
- (11) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact; provided that to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by rules prescribed by the department; and, provided further that this paragraph and paragraphs (7) and (9) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream. The provisions of this paragraph regarding chemical preservatives shall not apply to a pesticide chemical when used in or on a raw agricultural commodity which is the produce of the soil;
- (12) If it is a product intended as an ingredient of another food and, when used according to the directions of the purveyor, will result in the final food product being adulterated or misbranded;
- (13) If it is a color additive unless its packaging and labeling are in conformity with the packaging and labeling requirements applicable to the color additive prescribed under the Federal Act;
- (14) If it is a raw agricultural commodity which is the produce of the soil, bearing or containing a pesticide chemical applied after harvest, unless the shipping container of such commodity bears labeling which declares the presence of such chemical in or on such commodity and the common or usual name and the function of such chemical; provided that no such declaration shall be required while such commodity, having been removed from the shipping container, is being held or displayed for sale at retail out of such container in accordance with the custom of the trade;
- (15) If it is a confectionery and contains alcohol in excess of one-half of one per cent by weight and that fact does not appear on the label for the food.