AGRICULTURE: Regulations 3, sub-part a and 4, sub-part a, are valid and enforceable insofar as they do not conflict with applicable federal regulations upon the same subject.

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Honorable Robert T. Thornburg
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, which request reads in part as follows:

> "Registrations of some canned dog food products have been refused as the labels for these products were not in compliance with regulation 3 and regulation 4 (page 11, Missouri 1951 Feed Bulletin).
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> "Regulation 3, in part, reads as follows: 'A brand name may not be derived from one or more ingredients of a mixture. A distinctive name shall not be one representing any component of a mixture.'
>
> "Regulation 4, in part, reads as follows: 'The label must be printed on one side of a tag attached to the package itself in type of sufficient size to be easily read and the names of all ingredients must be printed in type of the same size.'
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> "Reference, herein, is specifically made to 'Chappel Horsemeat' a product of The Quaker Oats Company. The label for their product, being in violation of the above noted regulations, has been the cause for refusing registration of this product with the Department of Agriculture.

> "Will you please give us an opinion on these regulations as they pertain to the labeling of canned dog food and the request for compliance therewith before accepting such products for registration for sale in Missouri."

In 1941 the General Assembly enacted the laws relating to the manufacture, sale and distribution of adulterated, mislabeled or unregistered dog food within this state. Said laws are carried in the 1949 Revised Statutes as Sections 273.190 to 273.320.

Section 273.210 prohibits the sale, offer or exposure for sale in this state of any dog food which is mislabeled or unregistered as follows:

> "No person shall, within this state, manufacture, sell distribute, offer or expose for sale any dog food, which is adulterated, mislabeled or unregistered, within the meaning of sections 273.190 to 273.320."

Section 273.230 provides what dog foods shall be deemed to be mislabeled as follows:

> "Dog food shall be deemed to be mislabeled:
>
> (1) If it is not labeled; or
>
> (2) If the label contains any inaccurate statements, or does not conform in all particulars with the label approved by the said commissioner in connection with the registration of the distributor's dog food under sections 273.190 to 273.320."

Section 273.240 specifies certain conditions which must be complied with by a distributor before he may sell or distribute in this state any brand or kind of dog food. Said section provides as follows:

> "Before any manufacturer, importer, jobber, firm, association, corporation, partnership or individual, herein called a distributor, shall sell, offer or expose for sale or distribution in this state any brand or kind of

> of dog food, as defined in section 273.200, he shall have certified to the said commissioner that his product meets with and conforms to all the provisions of sections 273.190 to 273.320 and such regulations as the said commissioner may prescribe. Upon receipt of such certification, the said commissioner shall make such investigation as may be necessary to determine whether the distributor is complying with all provisions of sections 273.190 to 273.320 and all regulations issued by the said commissioner thereunder. If the said commissioner finds that the certificate furnished by the distributor is a correct statement, and that the product complies with the provisions of sections 273.190 to 273.320, he shall then, and then only, register the brand or kind of dog food, concerning which the distributor has made a certification. Nothing herein contained shall be construed as requiring the registration by any distributor or dealer of any brand or kind of dog food which is already once registered for the current license year with the said commissioner."

Section 273.270 specifies the contents of the certification required by Section 273.240. Sub-part 3 of said section reads as follows:

> "(3) A copy of the label of the brand or kind of dog food, which is being submitted for registration. The label must have imprinted thereon, in a conspicuous manner, a clear and legible statement in the English language, which covers the following:
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> (a) The net weight of the contents;
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> (b) The name, brand or trade-mark;
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> (c) The name and principal address of the distributor or person responsible for placing the commodity on the market;
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> (d) Minimum percentage of crude protein;
>
> (e) Minimum percentage of crude fat;

(f) Maximum percentage of crude fiber;

(g) The specific (common) name of each ingredient used in its manufacture."

Such laws are enacted under the police powers of the state and have as their purpose the prevention of fraud and deception in the sale of food for domestic animals. Section 273.300 authorizes the Commissioner of Agriculture to adopt such regulations as may be necessary to effectuate the purpose of the law. Said section reads as follows:

"The commissioner is authorized to promulgate reasonable regulations, not contrary to the terms and the intent of sections 273.190 to 273.320, in order to effectuate any of the purposes of sections 273.190 to 273.320."

Pursuant to the authority conferred by Section 273.300, the Department of Agriculture through the commission adopted certain rules and regulations which have been filed with the Secretary of State and became effective June 1, 1950, your opinion request is directed specifically to regulations 3, sub-part a, and regulation 4, sub-part a, which reads as follows:

"Regulation 3. Brand Names.

a. The name of a brand must not tend to mislead the purchaser with respect to any quality of the feed. If the brand name indicates that the feed is made for a specific use, the character of the feed must conform therewith. A mixture labeled 'dairy feed,' for example, must be adapted for that purpose.

A brand name may not be derived from one or more ingredients of a mixture. A distinctive name shall not be one representing any component of a mixture.

"Regulation 4. Labels Required on All Packages; Forms to be Used.

a. Each package of feeding-stuffs shall bear a complete label conforming to the 'uniform label' herein set forth and adopted by the Department of Agriculture. The label must be printed on one side of

> a tag attached to the package, or upon one side of the package itself in type of sufficient size to be easily read and the names of all ingredients must be printed in type of the same size."

The obvious and stated purpose of Regulation 3a is to prohibit a label upon an article of food offered for sale which would tend to mislead the purchaser with respect to the quality. If the brand name is derived from one or more of the components of the mixture it would tend to lead the purchaser to believe that that was the sole ingredient of the product, for it is common knowledge that the ordinary purchaser, either through inadvertence or disinterest, fails to read the less conspicuous ingredient statement. Such a regulation, we believe, is warranted by the purpose and intent of the dog food law and within the authorization conferred upon the Commissioner of Agriculture by Section 273.300, supra.

The same conclusion would likewise be reached in regard to Regulation No. 4, which requires that the ingredients of a mixture be printed on a label in type of the same size. To allow one ingredient to appear more conspicuous than the others would lead a purchaser to believe that that was the most important or sole ingredient, when in fact it was the least or one of many. Clearly this was the evil which the dog food law was aimed at and which was properly the subject of legislative action.

Such regulations as here considered are nondiscriminatory and do not constitute an unreasonable burden upon interstate commerce, such as would be prohibited by the Federal Constitution.

We now turn to your question regarding compliance with these regulations prior to registration of a dog food for sale in this state. It is sufficient here to say that such regulations should be complied with by a distributor wishing to sell, offer for sale or distribute in this state so long as they do not conflict with federal legislation upon the same subject.

Pursuant to the provisions of Section 203 of the Agricultural Marketing Act (7 U.S.C.A. 1622), the Secretary of Agriculture, in 1950, adopted certain regulations in regard to the inspection, certification and identification as to class, quality, quantity and condition of canned wet normal maintenance food for dogs.

Regulation No. 155.32 provides, in part, as follows:

> "Sec. 155.32. Labeling required. Each container of inspected and certified products shall have affixed thereto a label bearing the following information prominently displayed:

> "(a) The name of the product, the ingredient statement, and the statement of certification, in the manner provided by subparagraphs (1), (2) and (3) of this paragraph in the case of canned certified maintenance food, and in the manner provided by subparagraphs (4), (5), and (6) of this paragraph in the case of canned or fresh frozen certified 32% component.
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> * * * * * * * * * * * * * * * * * *
>
> "(4) The name of the canned or fresh frozen 32% component shall be the true name, such as 'meat', 'horse meat,' etc., and there shall appear contiguous to the name of the product the name of the decharacterizing agent used, followed by the word 'added,' as, for example, 'bone added. '"

We here take note that the dog food here in question, "Chappel Horse Meat," a product of the Quaker Oats Company, is, as defined in the federal regulations, a 32% component, and so have only quoted portions of the above regulations as pertain to such product.

Regulation 155.32(a) (4) requires the name of the canned 32% component to be the true name. The state regulation prohibits a brand name from containing the name of one or more ingredients of the mixture.

It is generally held that where there exists state and federal regulation upon the same subject of commerce which are in direct conflict, the state law is superseded. This rule is stated in 15 C.J.S., Commerce, Section 15, page 273:

> "A valid federal regulation of commerce supersedes existing, and excludes new, legislation by a state on the same subject, but where congress occupies only a limited field, state legislation outside that field and otherwise admissible is not displaced or forbidden.
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> "Where congress regulates commerce by enacting a statute, within its competency, that covers the same subject matter as, or is in direct conflict with, a state statute, the exercised power of congress is not only supreme and paramount but also

> exclusive, superseding the state law and excluding additional or further regulation covering the same subject by the state legislature. * * *"

There exists between Federal Regulation 155.32 and Regulation No. 3, adopted by the state, a direct conflict, and therefore the operation of the state regulation is suspended insofar as it pertains to 32% component dog foods. However, such federal regulation does not have the effect of invalidating or repealing the state regulation.

Regulation No. 4 presents somewhat of a different question. Although the federal regulation requires the label of a dog food shipped in interstate commerce to contain an ingredient statement such regulations are silent upon that to which the state regulation is directed, i.e., the size of type.

Although the rule is as above stated in regard to a conflict between state and federal regulations it is limited in its application to cases where the conflict is direct and positive and there would seem to be a presumption against complete occupancy of the field by the federal government barring any state regulation upon the same subject of commerce.

It is stated in 11 Am. Jur., Sec. 24, page 26 as follows:

> "It is established that the exercise of the state's police power must yield when it comes in conflict with an affirmative exercise by Congress of its power to regulate commerce. However, the intention of Congress to supersede or exclude state action is not lightly to be inferred. In order for an act of Congress to supersede a state statute, the repugnance or conflict must be direct and positive, so that the two acts cannot be reconciled or consistently stand together, or, at least, Congress must have manifested a purpose to exercise its paramount authority over the subject. Congressional regulation of a business does not nullify state regulation of the same business, if the Federal act does no t cover the same field or is consistent with the state legislation or if the Congress has so circumscribed its regulation as to leave part of the subject open to state action. It is only where there is an actual and distinct conflict that the state law will be displaced and then only as to that part of the state law in actual conflict with the Federal law."

This rule has been adopted by the Supreme Court of the United States in the case of McDermott v. Wisconsin, 228 U.S. 115, 57 L. Ed. 754 in regard to state and federal regulation of articles of food stuff shipped in interstate commerce. The court in its opinion said:

> "While these regulations are within the power of Congress, it by no means follows that the state is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in Savage v. Jones, 225 U.S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715, in which the power of the state to make regulations concerning the same subject-matter, reasonable in their terms, and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the state of Indiana were held not to be inconsistent with the food and drugs act of Congress. * * *"

This regulation requiring the list of ingredients printed on the label to be of the same size does not conflict with the federal regulation since none bear upon this point. The state in making such a regulation does not thwart the applicable federal regulation since a label can comply both with the state and federal regulation. Such requirement as is contained here is for the legitimate and further protection of the citizens of this state against misbranded dog food and not being inconsistent with any federal regulation is valid and enforceable.

CONCLUSION

Therefore it is the opinion of this department that Regulations 3 sub-part a and 4, sub-part a, of the Department of Agriculture are consistent with the purposes and intent of Sections 273.190 to 273.320, RSMo 1949, and within the authority of the Commissioner of Agriculture by Section 273.300 to promulgate such regulations and are therefore valid and enforceable insofar as they do not conflict with applicable regulations.

We are further of the opinion that a distributor of dog food (32% component), who has fully complied with federal regulations relating to such product need not comply with Regulation 3, sub-part a, since it conflicts with Regulation 155.32 issued by the

Honorable Robert T. Thornburg

Secretary of Agriculture and is superseded thereby.

Regulation 4, sub-part a, is not in conflict with any federal regulation upon the same subject.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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