

FOOD ADDITIVES

Unsafe Food Additives

SEC. 409. [21 U.S.C. 348] (a) A food additive shall, with respect to any particular use or intended use of such additives, be deemed to be unsafe for the purposes of the application of clause (2)(C) of section 402(a), unless—

(1) it and its use or intended use conform to the terms of an exemption which is in effect pursuant to subsection (j) of this section;

(2) there is in effect, and it and its use or intended use are in conformity with, a regulation issued under this section prescribing the conditions under which such additive may be safely used; or

(3) in the case of a food additive as defined in this Act that is a food contact substance, there is—
(A) in effect, and such substance and the use of such substance are in conformity with, a regulation issued under this section prescribing the conditions under which such additive may be safely used; or

(B) a notification submitted under subsection (h) that is effective.

While such a regulation relating to a food additive, or such a notification under subsection (h)(1) relating to a food additive that is a food contact substance, is in effect, and has not been revoked pursuant to subsection (i), a food shall not, by reason of bearing or containing such a food additive in accordance with the regulation or notification, be considered adulterated under section 402(a)(1).

Petition To Establish Safety

(b)(1) Any person may, with respect to any intended use of a food additive, file with the Secretary a petition proposing the issuance of a regulation prescribing the conditions under which such additive may be safely used.

(2) Such petition shall, in addition to any explanatory or supporting data, contain—

(A) the name and all pertinent information concerning such food additive, including, where available, its chemical identity and composition;

(B) a statement of the conditions of the proposed use of such additive, including all directions, recommendations, and suggestions proposed for the use of such additive, and including specimens of its proposed labeling;

(C) all relevant data bearing on the physical or other technical effect such additive is intended to produce, and the quantity of such additive required to produce such effect;

(D) a description of practicable methods for determining the quantity of such additive in or on food, and any substance formed in or on food, because of its use; and

(E) full reports of investigations made with respect to the safety for use of such additive, including full information as to the methods and controls used in conducting such investigations.

(3) Upon request of the Secretary, the petitioner shall furnish (or, if the petitioner is not the manufacturer of such additive, the petitioner shall have the manufacturer of such additive furnish, without disclosure to the petitioner), a full description of the methods used in, and the facilities and controls used for, the production of such additive.

(4) Upon request of the Secretary, the petitioner shall furnish samples of the food additive involved, or articles used as components thereof, and of the food in or on which the additive is proposed to be used.

(5) Notice of the regulation proposed by the petitioner shall be published in general terms by the Secretary within thirty days after filing.

Action on the Petition

(c)(1) The Secretary shall—

(A) by order establish a regulation (whether or not in accord with that proposed by the petitioner) prescribing, with respect to one or more proposed uses of the food additive involved, the conditions under which such additive may be safely used (including, but not limited to,

specifications as to the particular food or classes of food in or on which such additive may be used, the maximum quantity which may be used or permitted to remain in or on such food, the manner in which such additive may be added to or used in or on such food, and any directions or other labeling or packaging requirements for such additive deemed necessary by him to assure the safety of such use), and shall notify the petitioner of such order and the reasons for such action; or

(B) by order deny the petition, and shall notify the petitioner of such order and of the reasons for such action.

(2) The order required by paragraph (1) (A) or (B) of this subsection shall be issued within ninety days after the date of filing of the petition, except that the Secretary may (prior to such ninetieth day), by written notice to the petitioner, extend such ninety day period to such time (not more than one hundred and eighty days after the date of filing of the petition) as the Secretary deems necessary to enable him to study and investigate the petition.

(3) No such regulation shall issue if a fair evaluation of the data before the Secretary—

(A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: *Provided*, That no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal, except that this proviso shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds (i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended, and (ii) that no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (f) and (g)) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal; or

(B) shows that the proposed use of the additive would promote deception of the consumer in violation of this Act or would otherwise result in adulteration or in misbranding of food within the meaning of this Act.

(4) If, in the judgment of the Secretary, based upon a fair evaluation of the data before him, a tolerance limitation is required in order to assure that the proposed use of an additive will be safe, the Secretary—

(A) shall not fix such tolerance limitation at a level higher than he finds to be reasonably required to accomplish the physical or other technical effect for which such additive is intended; and

(B) shall not establish a regulation for such proposed use if he finds upon a fair evaluation of the data before him that such data do not establish that such use would accomplish the intended physical or other technical effect.

(5) In determining, for the purposes of this section, whether a proposed use of a food additive is safe, the Secretary shall consider among other relevant factors—

(A) the probable consumption of the additive and of any substance formed in or on food because of the use of the additive;

(B) the cumulative effect of such additive in the diet of man or animals, taking into account any chemically or pharmacologically related substance or substances in such diet; and

(C) safety factors which in the opinion of experts qualified by scientific training and experience to evaluate the safety of food additives are generally recognized as appropriate for the use of animal experimentation data.

Regulation Issued on Secretary's Initiative

(d) The Secretary may at any time, upon his own initiative, propose the issuance of a regulation prescribing, with respect to any particular use of a food additive, the conditions under which such additive may be safely used, and the reasons therefor. After the thirtieth day following publication of such a proposal, the Secretary may by order establish a regulation based upon the proposal.

Publication and Effective Date of Orders

(e) Any order, including any regulation established by such order, issued under subsection (c) or (d) of this section, shall be published and shall be effective upon publication, but the Secretary may stay such effectiveness if, after issuance of such order, a hearing is sought with respect to such order pursuant to subsection (f).

Objections and Public Hearing

(f)(1) Within thirty days after publication of an order made pursuant to subsection (c) or (d) of this section, any person adversely affected by such an order may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating reasonable grounds therefor, and requesting a public hearing upon such objections. The Secretary shall, after due notice, as promptly as possible hold such public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public.

(2) Such order shall be based upon a fair evaluation of the entire record at such hearing, and shall include a statement setting forth in detail the findings and conclusions upon which the order is based.

(3) The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication, unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

Judicial Review

(g)(1) In a case of actual controversy as to the validity of any order issued under subsection (f), including any order thereunder with respect to amendment or repeal of a regulation issued under this section, any person who will be adversely affected by such order may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a petition praying that the order be set aside in whole or in part.

(2) A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose, and thereupon the Secretary shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm or set aside the order complained of in whole or in part. Until the filing of the record the Secretary may modify or set aside his order. The findings of the Secretary with respect to questions of fact shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(3) The court, on such judicial review, shall not sustain the order of the Secretary if he failed to comply with any requirement imposed on him by subsection (f)(2) of this section.

(4) If application is made to the court for leave to adduce additional evidence, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper, if such evidence is material and there were reasonable grounds for failure to adduce such evidence in the proceedings below. The Secretary may modify his findings as to the facts and order by reason of the additional evidence so taken, and shall file with the court such modified findings and order.

(5) The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code. The commencement of proceedings under this section shall not, unless specifically ordered by the court to the contrary, operate as a stay of an order.

Notification Relating to a Food Contact Substance

(h)(1) Subject to such regulations as may be promulgated under paragraph (3), a manufacturer or supplier of a food contact substance may, at least 120 days prior to the introduction or delivery for introduction into interstate commerce of the food contact substance, notify the Secretary of the identity and intended use of the food contact substance, and of the determination of the manufacturer or supplier that the intended use of such food contact substance is safe under the standard described in subsection (c)(3)(A). The notification shall contain the information that forms the basis of the determination and all information required to be submitted by regulations promulgated by the Secretary.

(2)(A) A notification submitted under paragraph (1) shall become effective 120 days after the date of receipt by the Secretary and the food contact substance may be introduced or delivered for introduction into interstate commerce, unless the Secretary makes a determination within the 120-day period that, based on the data and information before the Secretary, such use of the food contact substance has not been shown to be safe under the standard described in subsection (c)(3)(A), and informs the manufacturer or supplier of such determination.

(B) A decision by the Secretary to object to a notification shall constitute final agency action subject to judicial review.

(C) In this paragraph, the term "food contact substance" means the substance that is the subject of a notification submitted under paragraph (1), and does not include a similar or identical substance manufactured or prepared by a person other than the manufacturer identified in the notification.

(3)(A) The process in this subsection shall be utilized for authorizing the marketing of a food contact substance except where the Secretary determines that submission and review of a petition under subsection (b) is necessary to provide adequate assurance of safety, or where the Secretary and any manufacturer or supplier agree that such manufacturer or supplier may submit a petition under subsection (b).

(B) The Secretary is authorized to promulgate regulations to identify the circumstances in which a petition shall be filed under subsection (b), and shall consider criteria such as the probable consumption of such food contact substance and potential toxicity of the food contact substance in determining the circumstances in which a petition shall be filed under subsection (b).

(4) The Secretary shall keep confidential any information provided in a notification under paragraph (1) for 120 days after receipt by the Secretary of the notification. After the expiration of such 120 days, the information shall be available to any interested party except for any matter in the notification that is a trade secret or confidential commercial information.

(5)(A)(i) Except as provided in clause (ii), the notification program established under this subsection shall not operate in any fiscal year unless—

(I) an appropriation equal to or exceeding the applicable amount under clause (iv) is made for such fiscal year for carrying out such program in such fiscal year; and

(II) the Secretary certifies that the amount appropriated for such fiscal year for the Center for Food Safety and Applied Nutrition of the Food and Drug Administration (exclusive of the appropriation referred to in subclause (I)) equals or exceeds the amount appropriated for the Center for fiscal year 1997, excluding any amount appropriated for new programs.

(ii) The Secretary shall, not later than April 1, 1999, begin accepting and reviewing notifications submitted under the notification program established under this subsection if—

(I) an appropriation equal to or exceeding the applicable amount under clause (iii) is made for the last six months of fiscal year 1999 for carrying out such program during such period; and

(II) the Secretary certifies that the amount appropriated for such period for the Center for Food Safety and Applied Nutrition of the Food and Drug Administration (exclusive of the appropriation referred to in subclause (I)) equals or exceeds an amount equivalent to one-half the amount appropriated for the Center for fiscal year 1997, excluding any amount appropriated for new programs.

(iii) For the last six months of fiscal year 1999, the applicable amount under this clause is \$1,500,000, or the amount specified in the budget request of the President for the six-month period involved for carrying out the notification program in fiscal year 1999, whichever is less.

(iv) For fiscal year 2000 and subsequent fiscal years, the applicable amount under this clause is \$3,000,000, or the amount specified in the budget request of the President for the fiscal year involved for carrying out the notification program under this subsection, whichever is less.

(B) For purposes of carrying out the notification program under this subsection, there are authorized to be appropriated such sums as may be necessary for each of the fiscal years 1999 through fiscal year 2003, except that such authorization of appropriations is not effective for a fiscal year for any amount that is less than the applicable amount under clause (iii) or (iv) of subparagraph (A), whichever is applicable.

(C) Not later than April 1 of fiscal year 1998 and February 1 of each subsequent fiscal year, the Secretary shall submit a report to the Committees on Appropriations of the House of Representatives and the Senate, the Committee on Commerce of the House of Representatives, and the Committee on Labor and Human Resources of the Senate that provides an estimate of the Secretary of the costs of carrying out the notification program established under this subsection for the next fiscal year.

(6) In this section, the term "food contact substance" means any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food.