

REPEALING THE TAXES ON OLEOMARGARINE

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Mr. GEORGE, from the Committee on Finance, submitted the following

REPORT

To accompany H. R. 2023

The Committee on Finance, to whom was referred the bill (H. R. 2023) to regulate oleomargarine, to repeal certain taxes relating to oleomargarine, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

LEGISLATIVE BACKGROUND OF REGULATION OF OLEOMARGARINE THROUGH THE TAXING POWER

The act of August 2, 1886 (24 Stat. 209), defined "butter" and "oleomargarine" and imposed the following taxes on oleomargarine: Manufacturers, \$600; wholesalers, \$480; retailers, \$48; domestic oleomargarine, 2 cents per pound; and imported oleomargarine, 15 cents per pound. This tax statute contained packaging and labeling provisions and, in addition to providing for the forfeiture of unstamped oleomargarine, it provided for the forfeiture of oleomargarine which was adjudged to be deleterious to the public health.

It was clear from its inception that this exercise of the taxing power was primarily designed to achieve certain regulatory effects in the field of competition between oleomargarine and butter. In opening the Senate debate on this 1886 act, Senator Miller said:

I resort to no subterfuges in this case, Mr. President. My object in bringing forward this bill and supporting it is, not to secure a large increase to the revenue of our Government; but I have sought to invoke the taxing power of the Government in order that under it the Government might take absolute control of this manufacture, might properly regulate it, and so regulate and control it that it should be carried on in a legitimate way and that the product should be sold to the consumer in all cases for what it is, and it is for that purpose that the friends of this measure have invoked the taxing power of the Government (Congressional Record, July 17, 1886, p. 7073).

The present difference in tax treatment between yellow oleomargarine and other oleomargarine was inserted in the law by the act of May 9, 1902 (32 Stat. 193). The purpose of this differential tax treatment was to regulate further the competition of oleomargarine and butter. This act imposed a 10-cents-per-pound tax on oleomargarine artificially colored to look like butter.

By the act of March 4, 1931 (46 Stat. 1549), the 10-cent tax was made to apply to all oleomargarine which met a statutory definition of "yellow," whether or not colored artificially.

REVENUES

Total collections under all of the internal revenue taxes on oleomargarine have been estimated by the Bureau of the Budget for the fiscal years 1949 and 1950 at \$16,000,000 for each year. Actual collections for the first 9 months of the fiscal year 1949 amount to \$13,401,608. The following table gives a break-down of the various internal-revenue taxes on oleomargarine for the fiscal years 1947 and 1948:

Internal-revenue taxes on oleomargarine

	Rates, present law	Collections (thousands of dollars) (actual), fiscal years—	
		1947	1948
Excise taxes:			
Colored oleomargarine.....	10 cents per pound.....	4,132	5,290
Uncolored oleomargarine.....	¼ cent per pound.....	1,441	2,066
Total excise taxes.....		3,573	7,356
Special taxes:			
Manufacturers.....	\$600 per year.....	34	
Wholesale dealers:			
Colored oleomargarine.....	\$480 per year.....	74	132
Uncolored oleomargarine.....	\$200 per year.....	84	424
Retail dealers:			
Colored oleomargarine.....	\$48 per year.....	224	411
Uncolored oleomargarine.....	\$6 per year.....	1,604	1,460
Total special taxes.....		2,301	2,450
Total oleomargarine taxes.....		5,874	9,806

POWERS OF THE FEDERAL TRADE COMMISSION TO REGULATE COMPETITION BETWEEN OLEOMARGARINE AND BUTTER

Competition between yellow oleomargarine and butter in interstate commerce falls within the scope of the jurisdiction of the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts or practices. Section 5 (a) of the Federal Trade Commission Act (title 15, U. S. C., sec. 45 (a)) states:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful

Misrepresentation of oleomargarine as butter is prohibited by this section, and in the past the Federal Trade Commission has proceeded against labeling and advertising practices which were deceptive in confusing oleomargarine with butter.

PROTECTION AGAINST ADULTERATION AND MISBRANDING OF OLEOMARGARINE THROUGH THE FOOD, DRUG, AND COSMETIC ACT

The Federal Food, Drug, and Cosmetic Act in its present form prohibits the introduction of any adulterated or misbranded food in interstate commerce, and proffered delivery or receipt in interstate commerce of any adulterated or misbranded food.

On the basis of the testimony presented to your committee on this bill there does not appear to be any doubt but that the standards provided by the Food, Drug, and Cosmetic Act (Public Law 717, 75th Cong., 3d sess., June 23, 1939; U. S. C., title 21, sec. 301 et seq.) are adequate to protect against adulterated oleomargarine in interstate commerce.

With respect to the misbranding of food the act prohibits, in section 301 (k)—

the alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded.

The United States Supreme Court held, in *U. S. v. Sullivan*, (332 U. S. 689), with reference to section 301 (k) that—

* * * the language used by Congress broadly and unqualifiedly prohibits misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment (332 U. S. 689, 696).

Under the provisions of the Food, Drug, and Cosmetic Act the Federal Security Administrator, who is charged with its administration, has assumed jurisdiction over oleomargarine moving in interstate commerce. The Administrator has established a standard of identity for oleomargarine in accordance with provisions of section 401 of the act, and oleomargarine in interstate commerce is regulated in accordance with this standard of identity.

EXPLANATION OF PROVISIONS OF THE BILL

The House bill (H. R. 2023) repeals the internal-revenue taxes on oleomargarine and permits the oleomargarine interests to sell their product in harmless colors of their own choice in free competition with butter unhindered by the burden of discriminatory Federal taxation. However, the bill eliminates any possibility that the consumer of table spreads will not know what he is getting. The competition between the two principal table spreads for consumer preference is to be free of confusion as to identity. At the present time oleomargarine which has moved in interstate commerce is required to meet the exacting requirements of the Federal Food, Drug, and Cosmetic Act with respect to labeling. There is little danger that the consumer of interstate oleomargarine will be confused as to the product he obtains. There remain however two principal levels at which confusion of identity may occur: One is at the restaurant level where the applicability of the Federal Food, Drug, and Cosmetic Act is uncertain, and the other exists with respect to oleomargarine produced and sold in the same State. The House bill (H. R. 2023) brings the regulation of colored oleomargarine squarely within the

Federal Food, Drug, and Cosmetic Act, irrespective of the source of the oleomargarine, and specifically regulates the restaurant transaction of serving colored oleomargarine. Thus, intrastate colored oleomargarine would be held to the same standards respecting purity and labeling as colored oleomargarine which is shipped in interstate channels.

Of perhaps even greater importance than the elimination of the possibility for confusion of identity between colored oleomargarine and butter, the bill makes possible the effective regulation of colored oleomargarine and butter moving in interstate channels.

Oleomargarine is not dependent upon local supply of raw materials as is butter, which depends upon an adequate supply of fluid milk and cream, and it would be entirely feasible and practicable to establish manufactories in each of the several States to avoid the effects of the Federal law. It is clear that close regulation of colored oleomargarine from interstate producers, while oleomargarine of local production is left free of control, would in practical effect give local producers a great competitive advantage. The substitute for butter or sale as butter of colored oleomargarine not clearly identified as such, or which is otherwise adulterated or misbranded, would not only depress the interstate market in butter but would also bring colored oleomargarine which fully complies with Federal regulation into disrepute and depress the interstate market for it.

Without regulation of colored oleomargarine from all sources there cannot be effective regulation of that part of the colored oleomargarine which comes from out-of-State sources. As a matter of enforcement it would be difficult, and in some cases impossible, to prove that colored oleomargarine substituted or sold for butter had been previously in interstate commerce. The regulation of the whole is necessary in order to provide effective regulation of that part which originates from outside the State of consumption.

The regulation by Congress under the commerce power of purely intrastate transactions is constitutionally permissible if such regulation is reasonably necessary to protect interstate commerce and to make its regulation effective.

Following the *Shreveport Rate cases* (234 U. S. 342), in which it was held that railroad rates of an admittedly intrastate character and fixed by authority of the State might still be revised by the Federal Government because of the economic effects which they had upon interstate commerce, the Supreme Court has frequently sustained Federal regulations under the commerce power when applied to intrastate transactions (*Mulford v. Smith*, 307 U. S. 38; *United States v. Darby*, 312 U. S. 100; *Currin v. Wallace*, 306 U. S. 1; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; *Wickard v. Filburn*, 317 U. S. 102).

In *United States v. Wrightwood Dairy Co.*, *supra* (1942), the issue was raised as to whether a Chicago milk dealer who purchased milk within the State and sold it locally could be properly subjected to the provisions of the Agricultural Marketing Agreement Act of 1937 for the purpose of setting minimum prices. The Court in upholding this exertion of the Federal power states:

* * * the national power to regulate the price of milk moving interstate into the Chicago, Ill., marketing area, extends to such control over intrastate transactions as is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for

the marketing of intrastate milk whose sale and competition with interstate milk affects its price structure so as in turn to affect adversely the congressional regulation (p. 121)

In defining the scope of the commerce power the Court had this to say:

The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce (p. 119).

TECHNICAL PROVISIONS OF THE BILL WITH EXPLANATION OF THE COMMITTEE AMENDMENTS

The first section of the bill (H. R. 2023) repeals section 2301 of the Internal Revenue Code, which sets the rate of tax on oleomargarine at one-fourth cent per pound and at 10 cents per pound if yellow in color, declares by whom and how the tax shall be paid, and the manner of assessment.

Section 2 repeals the occupational taxes on oleomargarine manufacturers, wholesalers, and retailers and provides that such repeal shall not entitle any manufacturer, wholesaler, or retailer to a refund of any occupational tax heretofore paid.

The committee makes no amendments to the first two sections of the bill.

Section 3 (a) comprises a declaration and finding that the sale, or the serving in public eating places, of colored oleomargarine or colored margarine without clear identification as such, or which is otherwise adulterated or misbranded, burdens interstate commerce by depressing the market for butter and for oleomargarine or margarine which is clearly identified and which is neither adulterated nor misbranded. This burden exists irrespective of whether such oleomargarine originates from an interstate source or from the State or Territory in which it is sold. The committee makes no amendment to the declaration and finding contained in this subsection.

Section 3 (b) amends section 301 of the Federal Food, Drug, and Cosmetic Act by adding a new paragraph thereto which prohibits the serving of colored oleomargarine or colored margarine in violation of the new section 407 (b) of such act. Section 407 (b) regulates not only the public eating place transaction of serving colored oleomargarine or colored margarine but also places certain requirements upon public eating places which possess colored oleomargarine or colored margarine in a form ready for serving. A violation therefore can occur without an actual serving if the public eating place has in its possession colored oleomargarine or colored margarine in a form ready for serving without complying with the provisions of 407 (b). The committee amendment to section 3 (b) clarifies this point and brings the amendment made in section 3 (b) in line with the new section 407 (b) of the Federal Food, Drug, and Cosmetic Act. Paragraph (m) of section 301 of the Federal Food, Drug, and Cosmetic Act without the committee amendment reads as follows:

(m) The serving of colored oleomargarine or colored margarine in violation of section 407 (b).

With the committee amendment, which is italicized, it will read:

(m) *The serving or the possessing in a form ready for serving* of colored oleomargarine or colored margarine in violation of section 407 (b).

Section 3 (c) amends chapter IV of the Federal Food, Drug, and Cosmetic Act by adding thereto a new section (sec. 407). Subsection (a) of section 407 subjects colored oleomargarine or colored margarine which is sold in the same State or Territory in which it is produced to the same controls under the act as if it had been introduced in interstate commerce. Thus, intrastate oleomargarine or margarine, if it is colored as defined in 407 (d), will be held to the same standards respecting labeling and purity as colored oleomargarine or colored margarine which is shipped in interstate channels. The committee makes no amendments to this subsection.

Subsection (b) of section 407 specifically regulates the use of colored oleomargarine or colored margarine by public eating places. Subsection (b), as it passed the House, appears to require persons who possess colored oleomargarine or colored margarine in a form ready for serving at public eating places to (1) post a notice that oleomargarine or margarine is served in a prominent and conspicuous place in the establishment, or (2) to place such a notice on the menu in type or lettering not smaller than that normally used to designate other food items, or (3) to keep such oleomargarine or margarine only in a form which is molded and shaped so as to have three sides (exclusive of the ends). Subsection (b) of section 407 would appear further to require that persons who serve colored oleomargarine or margarine at a public eating place (1) cause each separate serving thereof to bear labeling, or to be accompanied by labeling, identifying it as oleomargarine or margarine, or (2) cause each separate serving thereof to be triangular in shape.

The committee feels that subsection (b) in the form in which it passed the House is somewhat ambiguous. Although the foregoing would appear to be what the language of the subsection says, other interpretations are possible and have been offered. The committee amendment seeks therefore to clarify subsection (b), to make its terms explicit, and eliminate the possibility for misinterpretation and confusion. Since the requirements of 407 (b) are enforceable by criminal actions as well as suits for injunction (secs. 302 and 303, Federal Food, Drug, and Cosmetic Act), it is very essential that the language of this subsection be clear and unmistakable.

Subsection (b) as amended by your committee requires persons who possess colored oleomargarine or colored margarine in a form ready for serving at public eating places to (1) post a notice that oleomargarine or margarine is served in a prominent and conspicuous place in the establishment, or (2) place such a notice on the menu in type or lettering not smaller than that normally used to designate other food items. Persons who shall serve colored oleomargarine or colored margarine at a public eating place are required to (1) cause each separate serving thereof to bear labeling, or to be accompanied by labeling, identifying it as oleomargarine or margarine, or (2) cause each separate serving thereof to be triangular in shape.

Subsection (c) of section 407 exempts colored oleomargarine or margarine from most of the labeling requirements of section 403 of the act at the time of service at public eating places, provided com-

pliance is had with the requirements of subsection (b) discussed above. Exception is made of section 403 (a) and 403 (f). By section 403 (a) a food becomes misbranded if its labeling is false or misleading in any particular. Section 403 (f) specifies that identifying marks shall be "prominently placed" on the food—

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

These provisions would require that the word "oleomargarine" or "margarine" appear in some contrasting color either on the receptacle, or on a wrapping, or on a slip placed upon the individual pat or serving. The requirement that each separate serving bears labeling identifying it as oleomargarine or margarine is not met by imprinting the word oleomargarine or margarine on the individual pat constituting the serving. The yellow color makes it difficult to read the imprint and such pats tend to melt at room temperature. The committee makes no amendment to this subsection.

Subsection (d) of section 407 defines colored oleomargarine or colored margarine. The definition is drawn from the Oleomargarine Tax Act. If it is any color other than one within the defined ranges the provisions of the amendment will not apply. The committee makes no amendment to this subsection.

Section 4 of the bill provides for the transfer of funds available for enforcement of the Oleomargarine Tax Act to the Food and Drug Administration. These funds will be made available to that Administration in an amount determined to be proper by the Director of the Bureau of the Budget. There is to be no lapse of time between repeal of the tax statute and enforcement of the controls provided in the amended Federal Food, Drug, and Cosmetic Act. The committee makes no amendment to this section.

Section 5 of the bill, as it passed the House, declares that—

this Act shall not abrogate or nullify any statute of any State or Territory now in effect or which may hereafter be enacted.

The committee feels that as a matter of policy this section seeks to and should accord to the various States and Territories the right to ban the possession, sale, or serving of colored oleomargarine or colored margarine, or to place upon its use or sale additional requirements not in conflict with the Federal law. The language of section 5, however, as it passed the House is sufficiently broad to permit a State or Territory to circumvent the Federal law entirely and to permit the completely unregulated use and sale of colored oleomargarine or colored margarine within its jurisdiction. To permit this would defeat the policy and purpose upon which the Federal regulation is predicated. The committee amends section 5, therefore, to read as follows:

SEC. 5. Nothing in this Act shall be construed as authorizing the possession, sale, or serving of colored oleomargarine or colored margarine in any State or Territory in contravention of the laws of such State or Territory.

The committee feels that section 5, as amended, reserves to the States and Territories the power to regulate colored oleomargarine or colored margarine in harmony with the Federal law but does not grant to the States and Territories the power to destroy the effectiveness of the Federal law which is designed to provide a minimum of

protection to consumers of butter and colored oleomargarine, and to assure honesty, fair dealing, and an absence of all deception in the competitive sale of such products.

The committee amendment to section 6 of the bill makes the act effective on July 1, 1949. The provisions of section 6 as it passed the House made the repeal of the special occupational taxes on manufacturers, wholesalers, and retailers of oleomargarine effective 30 days after enactment, or July 1, 1949, whichever date is earlier, and denies refund of taxes previously paid. This might produce inequitable results. The special-tax year commences July 1, and the tax is due for the whole year in case of one in business during the month of July, and for the balance of the year in case of one commencing business after the month of July. Therefore, if the special taxes should be repealed as of June 1, 1949, a person who prior thereto paid the tax for the current special-tax year ending June 30, 1949, will have paid a tax (which is not refundable) for the month of June; whereas a person commencing business in June would not incur any special-tax liability for the remainder of the current special-tax year. In order to avoid this type of inequity the committee feels that the act should have one effective date and that it should be July 1, 1949.

In the opinion of your committee the bill (H. R. 2023), as amended, is in the public interest and should be enacted without delay.

