

SB1265

**TESTIMONY OF THE STATE ATTORNEY GENERAL  
TWENTY-FIFTH LEGISLATURE, 2010**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 1265, S.D. 1, H.D. 1, RELATING TO LABELING OF MEAT AND FISH PRODUCTS.

**BEFORE THE:**

HOUSE COMMITTEES ON CONSUMER PROTECTION & COMMERCE AND ON THE JUDICIARY

**DATE:** Thursday, February 4, 2010 **TIME:** 2:00 PM

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** Mark J. Bennett, Attorney General  
or Wade H. Hargrove III, Deputy Attorney General

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Chairs Herkes and Karamatsu and Members of the Committees:

The Department of the Attorney General provides these comments regarding a constitutional defect in this measure.

This bill proposes changes to the statutory requirements for labeling meat and fish products. Section 1 of this bill adds a new section to chapter 328, Hawaii Revised Statutes (HRS), that would require fish products, when gas treated to approximate the appearance of freshness, to be labeled as having been gas treated for that purpose. Section 2 amends the definition of "misbranded" in section 159-3, HRS, to require a similar label for meat products that are gas treated to approximate the appearance of freshness. Section 3 amends the penalty provision in section 328-29(a), HRS, to reference the new section of chapter 328 created by section 1 of this bill. Last, section 4 requires the Department of Agriculture to post information about these new labeling requirements on its website.

Section 2 of this bill is unconstitutional and preempted by federal law, specifically the Federal Meat Inspection Act. The Supremacy Clause, declaring the laws of the United States supreme to those of the individual states, and the Commerce Clause, which gives Congress the authority to regulate interstate commerce, mandate that when state law is inconsistent with federal law, the state statute or regulation at issue is invalid and unconstitutional. The federal

regulation at issue is invalid and unconstitutional. The federal government's role in the regulation of the production, packaging, and labeling of meat products in interstate commerce is very well established. The Federal Meat Inspection Act of 1907 (FMIA), later amended by the Wholesome Meat Act of 1967, provides federal labeling requirements for meat products in section 7 (21 USCA §607). Section 408 provides for the preemption of state meat labeling laws (21 USCA §678). The preemption language found in section 408, actions taken by the federal Food and Drug Administration (FDA) and the decision in Jones v. Rath Packing Co., 430 U.S. 519 (1977), make clear that this measure, if challenged on constitutional grounds, will be struck down.

FMIA section 7 requires the Secretaries of the Federal Departments of Health and Human Services and of Agriculture to collaborate in the development of standards for labels and containers of meat products. These comprehensive meat product standards have been promulgated by the United States Department of Agriculture (USDA) and appear in 9 CFR part 317. The nature of these regulations is such that it could be argued that any state law on this same subject matter would be preempted simply as a result of the completeness of the federal scheme. Removing, however, any ambiguity as to the congressional intent to preempt state efforts to regulate in the field of meat labeling, section 408 of FMIA provides that "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter . . . ." Subchapter I of FMIA contains a definition of "misbranded" that is identical to the definition currently found in section 159-3, HRS. Section 2 of this measure would add to this definition and, thus, create an inconsistency and additional labeling requirement that section 408 of the FMIA expressly prohibits.

In addition to the unambiguous language of section 408, the FMIA also addresses "packaging, or ingredient requirements." The FDA, which works in concert with the Food Safety and Inspection Service (FSIS) of the USDA to develop meat labeling standards pursuant to 21 USCA §607(c), has accepted the gas treatment of meat with carbon monoxide as "generally recognized as safe" or "GRAS." This serves as a federal certification of gas treatment as a "safe and suitable ingredient used in the production of meat and poultry product" (21 CFR §184.1240). Thus, the FDA has specifically addressed gas treatment and, in consultation with the FSIS, decided against regulating this common practice of the meat packing industry. The FDA's decision not to regulate in this area further supports our concern that a state law requiring labels where meat is gas treated will be deemed preempted by the FMIA.

Finally, the United States Supreme Court in Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305 (1977), found that California statutes and regulations prescribing labels with specific weight and measures on packages of, in this case, bacon, were preempted by federal law. The Jones court found the preemption provision of the FMIA, referring to section 408 of the FMIA, 21 USCA §678, so clear and convincing that the "explicit pre-emption provision dictates the result in the controversy between Jones and Rath." Jones at 532, 1313. Furthermore, an attempt by Jones, the Director of the Department of Weights and Measures of the County of Riverside, to avoid this result by arguing that the California law was something other than a "labeling requirement" as defined in section 408 was flatly rejected by the court. Id.

Based on the foregoing analysis of the preemption language of section 408 of the FMIA, recent FDA action on gas treatment and the decision in Jones v. Rath Packaging Co., section 2 of this measure relating to the labeling of meat products, if challenged, will be found unconstitutional. If the committees choose to advance this measure,

section 2 should be deleted. Section 1 of the bill, pertaining to fish products, is not preempted by federal law.

**LINDA LINGLE**  
Governor



State of Hawaii  
**DEPARTMENT OF AGRICULTURE**  
1428 South King Street  
Honolulu, Hawaii 96814-2512

**SB 1265**

**SANDRA LEE KUNIMOTO**  
Chairperson, Board of Agriculture

**DUANE K. OKAMOTO**  
Deputy to the Chairperson

**WRITTEN TESTIMONY OF SANDRA LEE KUNIMOTO  
CHAIRPERSON, BOARD OF AGRICULTURE**

**BEFORE THE HOUSE COMMITTEES ON  
CONSUMER PROTECTION & COMMERCE  
AND  
JUDICIARY**

**THURSDAY, FEBRUARY 4, 2010  
2:00 P.M.  
ROOM 325**

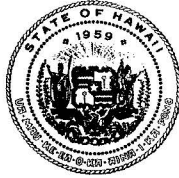
**SENATE BILL NO. 1265, SD1, HD1  
RELATING TO LABELING OF MEAT AND FISH PRODUCTS**

Chairpersons Herkes and Karamatsu and Members of the Committees:

Thank you for this opportunity to provide testimony on Senate Bill No. 1265, SD1, HD1, relating to the treatment of pre-packaged meat with gas or other technology to enhance its color only. The department defers to the Department of Health.

Due to the recent reductions in force, the Department of Agriculture is no longer staffed to enforce implementation requirements in support of this bill.

LINDA LINGLE  
GOVERNOR OF HAWAII



CHIYOME LEINAALA FUKINO, M.D.  
DIRECTOR OF HEALTH

STATE OF HAWAII  
DEPARTMENT OF HEALTH  
P.O. Box 3378  
HONOLULU, HAWAII 96801-3378

In reply, please refer to:  
File:

**House Committee on Consumer Protection & Commerce**

**House Committee on Judiciary**

**SB 1265, SD 1, HD 1, RELATING TO LABELING OF MEAT AND  
FISH PRODUCTS**

**Testimony of Chiyome Leinaala Fukino, M.D.  
Director of Health**

**February 4, 2010  
2:00pm**

1 **Department's Position:** We respectfully oppose the bill's amendment of HRS Chapter 328. We have  
2 concerns regarding its application to the Department.

3 **Fiscal Implications:** As yet unquantified funds to support the proposed amendments.

4 **Purpose and Justification:** In part, this bill amends HRS Chapter 328 by introducing new language  
5 that labeling be required for fish products that have been gas-treated to enhance the product's color.

6 This testimony only addresses the proposed changes to HRS Chapter 328, a health statute. We defer to  
7 the Department of Agriculture regarding the proposed changes to HRS Chapter 159 regarding meat  
8 labeling.

9 We appreciate that consumers may think that the carbon monoxide treated food is younger than  
10 it is and that consumers may want to know if it has been treated.

11 However, we believe the proposed change to HRS chapter 328 is unnecessary, because HRS  
12 section 328-10 and Chapter 11-19, Hawaii Administrative (HAR) already require fish has been treated  
13 with chemical preservatives, like carbon monoxide, to bear a label or signage stating for example, "Ahi

1 preserved with carbon monoxide to promote color retention.” And HRS Section 328-30 already  
2 provides administrative penalties up to \$10,000 for each separate offense.

3 The Department checks for proper labeling requirements through routine food safety inspections  
4 and based on complaints will remind firms to comply, or take stronger action as appropriate. We also  
5 check to see that products are not offered for sale beyond their expiration date.

6 We thank you for the opportunity to testify.



Date: Thursday, Feb. 4, 2010

Time 2:00 PM

Place: RM 325

To: Committee on Consumer Protection & Commerce  
Rep. Robert N. Herkes, Chair  
Rep. Glenn Wakai, Vice Chair

Committee on Judiciary  
Rep. Jon Riki Karamatsu, Chair  
Rep. Ken Ito, Vice Chair

From: Hawaii Food Industry Association  
Dick Botti, President and Lauren Zirbel, Government Relations

Re: SB 1265, SD1 RELATING TO LABELING OF MEAT AND FISH PRODUCTS.

HFIA objects to this measure. These labeling requirements are not universal across the United States; thus, meat and fish products which are imported must be labeled once they arrive at the grocery store. This would require a significant investment in labor to accomplish. Grocers are already overwhelmed and burdened by a multitude of government labeling requirements. This bill will cost time and money that the food industry does not have during this economic recession.

This bill amends HRS Chapter 328 by introducing new language that labeling be required for fish products that have been gas-treated to enhance the product's color. HFIA believes this to be unnecessary as HRS Section 328-10 and Chapter 11-19, Hawaii Administrative Rules (HAR), already address the issue of proper labeling of products treated with chemical preservatives.

Carbon monoxide is often used in modified atmosphere packaging (MAP) to maintain food quality by altering the atmospheric conditions within the package; replacing air with inert gasses and then heat sealing products. This low-oxygen packaging system extends the shelf-life of meat and other perishable foods by up to 15 days, but also keeps meat looking fresh even when it isn't. Labeling MAP packaged foods is unnecessary because these products are regarded as safe by the FDA and MAP packaged foods have a clearly labeled expiration date posted on all fresh meat and fish products. These products are not a danger to the consumer yet by forcing mandatory labeling of MAP products the State is implying to the consumer that they are.

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This is an unnecessary and costly measure.



## **HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996**

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Rep. Robert Herkes, Chair  
Rep. Glenn Wakai, Vice-Chair  
Committee on Consumer Protection and Commerce

Rep; Jon Riki Karamatsu, Chair  
Rep. Ken Ito, Vice-Chair  
Committee on Judiciary

Thursday, Feb. 4, 2010, at 2 PM  
Conference Room 325

The Hawaii Teamsters Local 996 strongly supports SB1265, SD 1, HD 1, Relating to the Labeling of Meat and Fish Products.

Gas technology does nothing to maintain the sanitation or freshness of the meat product. Gas technology only maintains the color of the meat, which allows the expiration date to be moved by up to five days depending on the cut of meat. This practice can be misleading because the consumer can only base their buying decision on appearance and the expiration date. Compare that to the purchasing of fresh fruit, which can be directly handled, inspected from all sides and even sniffed, for freshness.

SB 1265, SD 1, HD 1, will require that gassed meat packages be appropriately labeled to advise the consumer what has been added the meat package during processing similar to the labeling of fish products containing Carbon Monoxide Gas.

The Hawaii Teamsters Local 996 strongly supports SB1265, SD1, HD 1, Relating to the Labeling of Meat and Fish Products.

Thank you for the allowing me to testify on this important matter.

Glenn Ida  
Reprentative