LEGAL REVIEW NOTE

Bill No.: SB 206

LC#: LC1273, To Legal Review Copy, as of January 25, 2019

Short Title: Revise the labeling and marketing of certain ag products

Attorney Reviewer: Todd Everts

Date: February 11, 2019

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

LC1273, as drafted, may raise potential federal constitutional issues related to the Supremacy Clause under the United States Constitution, Art. VI, cl. 2, which provides that the Constitution, federal laws passed pursuant to the Constitution, and treaties made under the Constitution's authority constitute the supreme law of the land. Under the Supremacy Clause, if a conflict between state law and federal law exists, federal law prevails. California v. ARC America Corp., 490 U.S. 93 (1989), and Jones v. Rath Packing, 430 U.S. 519 (1977).

In 2005, Montana passed House Bill 406 (Chapter 279, 2005 Laws of Montana), the "Country of Origin Placarding Act", requiring a placard be conspicuously placed in grocery stores indicating that the meat products were produced in Montana. House Bill 406 (2005) was never implemented. House Bill 406 (2005) included a contingent voidness section (Section 8, Ch. 279, L. 2005) that voided the Act "upon the funding and full implementation of federal mandatory country of origin labeling, adopted as part of the 2002 federal farm bill". Pursuant to the final rule that was adopted by the federal Department of Agriculture and that became effective on March 16, 2009, as found on page 2658, Volume 74, of the Federal Register, mandatory country of origin labeling was implemented at the federal level and House Bill 406 (2005) was voided. During the 2005 Legislative Session, potential constitutional preemption conformity issues were raised during both the legislative legal review process and the Senate and House committee hearings on House Bill 406 (2005) (House Bill 406 (2005) hearing minutes for the Senate (March 25, 2005) and House (February 15, 2005)).

Country of Origin Labeling (COOL) is a federal consumer labeling law (2002 and 2008 federal farm bills and 2016 Consolidated Appropriations Act amended the Agricultural Marketing Act of 1946) that requires retailers to identify the country of origin on certain foods. The 2016 Consolidated Appropriations Act removed muscle cut beef and pork and ground beef and pork from the COOL federal requirements in order to bring the United States into compliance with a ruling by the World Trade Organization that COOL at the national level violates trade treaty obligations. On March 2, 2016, the U.S. Department of Agriculture (USDA) through rule, removed the muscle cut beef and pork and ground beef and pork from the mandatory COOL requirements.

In June 2016, cattle producers in Washington state filed suit alleging that USDA was unlawfully allowing imported beef to be sold to consumers without a country of origin label and that country of origin labeling on beef and pork products should be reinstated. The U.S. District Court judge dismissed the lawsuit, ruling that the statute of limitations prohibited the producer's challenge and that Congress clearly intended to have the COOL labeling end. Ranchers-Cattlemen Action Legal Fund v. USDA, 2018 U.S. Dist. LEXIS 94527.

In addition to the federal COOL requirements regarding labeling, Congress through the passage of the Federal Meat Inspection Act (FMIA) of 1906 extensively regulates the labeling of meat products and Section 678 of FMIA expressly preempt state laws regarding marketing, labeling, packaging ingredient requirements. FMIA's preemption clause provides:

> Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded . . . . (Section 678, FMIA)

Numerous federal court decisions have upheld FIMA's preemption of state law: Natl. Meat Assn. v. Harris, 132 S. Ct. 965, 968 (2012); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008); Bates v. Dow Agrosciences, 544 U.S. 431 (2005), Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)); Jones v. Rath Packing, 430 U.S. 519 (1977); Holk v. Snapple Bev. Corp., 575 F.3d 329 (3d Cir. 2009); Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237 (3d Cir. 2008); and Sanderson Farms, Inc. v. Tyson Foods, Inc., 549 F. Supp. 2d 708, 719 (D. Md. 2008).

LC1273, as drafted, resurrects many of the provisions of House Bill 406 (2005) regarding country of origin placarding of beef and poultry products. LC1273 also defines cell-cultured edible products and prohibits those products from being labeled, advertised, or marketed in Montana as a livestock product or poultry product.

LC1273, as drafted, may raise potential constitutional conformity issues with respect to the Supremacy Clause pursuant to the United States Supreme Court holdings and the federal circuit and district court holdings noted in this legal review note.

Requester Comments: