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SENATE BILL NO. 510

Offered January 8, 2020

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A *BILL to amend and reenact §§ 3.2-5120, 3.2-5121, and 3.2-5123 of the Code of Virginia, relating to milk; definition; misbranding.*

Patrons—Reeves and Suetterlein; Delegates: Cole, M.L., Orrock and Runion

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 3.2-5120, 3.2-5121, and 3.2-5123 of the Code of Virginia are amended and reenacted as follows:

§ 3.2-5120. Definitions.

As used in this article, unless the context requires a different meaning:

"Advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of food.

"Butter" means the food product generally known as butter, which is made exclusively from milk or cream, or both, with or without common salt, and with or without coloring matter, and containing not less than 80 percent by weight of milk fat, having allowed for all tolerances.

"Contaminated with filth" applies to any food not securely protected from dust, dirt, and as far as may be necessary by all reasonable means, from all foreign or injurious contaminations.

"Federal act" means the Federal Food, Drug and Cosmetic Act (Title 21 U.S.C. § 301 et seq.).

"Food" means all articles used for food, drink, confectionery, or condiment, for humans or other animals, whether simple, mixed, or compound, and all substances or ingredients used in the preparation thereof.

"Immediate container" does not mean package liners.

"Label" means a display of written, printed, or graphic matter upon the immediate container of any article.

"Labeling" means all labels and other written, printed, or graphic matter upon an article or any of its containers or wrappers, or accompanying such article.

"Milk" means the lacteal secretion, practically free of colostrum, obtained by the complete milking of a healthy hooved mammal, including any member of the order Cetartiodactyla, including a member of the family (i) Bovidae, including cattle, water buffalo, sheep, goats, and yaks; (ii) Cervidae, including deer, reindeer, and moose; and (iii) Equidae, including horses and donkeys.

"Selling of food" means the manufacture, production, processing, packing, exposure, offer, possession, and holding of any such article for sale; the sale of any such article; and the supplying of any such articles in the conduct of any food establishment.

§ 3.2-5121. Authority to adopt regulations; conformity with federal regulations; hearings; enforcement of article; review of regulations.

A. The Board is authorized to adopt regulations for the efficient enforcement of this article, unless that authority is specifically granted to the Commissioner. The Board may make the regulations adopted under this article conform, insofar as practicable, with those adopted under the federal act. Notwithstanding any other requirement under the Administrative Process Act (§ 2.2-4000 et seq.) to the contrary, the Commissioner may adopt any regulation under the federal act without public hearing. Such regulation shall be effective upon filing with the Registrar of Regulations. The Board, at its next regular meeting, shall adopt the regulation after notice but without public hearing unless a petition is filed in accordance with subsection F.

B. The Board may adopt any edition of the Food and Drug Administration's Food Code, or supplement thereto, or any portion thereof, as regulations, with any amendments as it deems appropriate. In addition, the Board may repeal or amend any regulation adopted pursuant to this subsection. No regulations adopted or amended by the Board pursuant to this subsection shall establish requirements for any license, permit, or inspection unless such license, permit, or inspection is otherwise provided for in this title. The provisions of the Food and Drug Administration's Food Code shall not apply to farmers selling their own farm-produced products directly to consumers for their personal use, whether such sales occur on such farmer's farm or at a farmers' market, unless such provisions are adopted in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).

C. The provisions of the Administrative Process Act (§ 2.2-4000 et seq.) shall not apply to the

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59 adoption of any regulation pursuant to subsection B if the Board of Health adopts the same edition of
60 the Food and Drug Administration's Food Code, or the same portions thereof, pursuant to subsection C
61 of § 35.1-14, and the regulations adopted by the Board and the Board of Health have the same effective
62 date. In the event that the Board of Health adopts regulations pursuant to § 2.2-4012.1, the effective date
63 of the Board's regulations may be any date on or after the effective date of the regulations adopted by
64 the Board of Health.

65 Notwithstanding any exemption to the contrary, a regulation adopted pursuant to subsection B shall
66 be subject to the requirements set out in §§ 2.2-4007.03, 2.2-4007.04, and 2.2-4007.05, and shall be
67 published in the Virginia Register of Regulations. After the close of the 60-day comment period, the
68 Board may adopt a final regulation, with or without changes. Such regulation shall become effective 15
69 days after publication in the Virginia Register, unless the Board has withdrawn or suspended the
70 regulation, or a later date has been set by the Board. The Board shall also hold at least one public
71 hearing on the proposed regulation during the 60-day comment period. The notice for such public
72 hearing shall include the date, time, and place of the hearing.

73 D. Hearings authorized or required by this article shall be conducted by the Board, the
74 Commissioner, or such officer, agent, or employee as the Board may designate for the purpose.

75 E. The Commissioner shall coordinate enforcement of this article with the applicable federal agencies
76 charged with enforcement of the federal act, in order to avoid unnecessary or unjustified conflict
77 between enforcement of this article and the federal act as to Virginia food manufacturers, processors,
78 packers, and retailers.

79 F. The Board or Commissioner shall from time to time for good cause shown to review the
80 regulations and enforcement guidelines adopted pursuant to this article. If the Commissioner finds that
81 any federal regulation or enforcement guideline that includes any tolerance or action level that does not
82 protect the health and welfare of the citizens of the Commonwealth, he shall petition the appropriate
83 federal agency to change the federal regulation or enforcement guideline.

84 G. The Commissioner or any interested party for good cause shown may request the Board to hold a
85 public hearing concerning any regulation or enforcement guideline. If the Board after hearing finds that
86 the regulation or enforcement guideline does not protect the health and welfare of the citizens of the
87 Commonwealth, it shall adopt a new regulation or enforcement guideline. Within the limits of personnel
88 and funds available all state agencies and institutions shall cooperate and assist in furnishing information
89 and data as to whether the regulations or enforcement guidelines in question protect the health and
90 welfare of the citizens of the Commonwealth.

91 H. No regulation adopted or amended by the Board pursuant to subsection B shall require that
92 commercially slaughtered or processed rabbits that are offered for sale or service be slaughtered or
93 processed under (i) the voluntary inspection program that is conducted by the state agency that has
94 animal health jurisdiction or (ii) a voluntary inspection program that is administered by the U.S.
95 Department of Agriculture. However, nothing in this subsection shall exempt any person who is
96 commercially slaughtering or processing rabbits that are offered for sale or service from any other
97 applicable provision of this chapter.

98 *1. The Board shall develop and implement a plan to enforce the prohibition established in*
99 *subdivision A 15 of § 3.2-5123. Such plan shall include a ban on the sale or offer for sale of any*
100 *product that violates such prohibition, including any plant-based product that is misbranded as milk.*

101 **§ 3.2-5123. Misbranded food.**

102 A. A food shall be deemed to be misbranded:

103 1. If its labeling is false or misleading in any particular.

104 2. If any word, statement, or other information appearing on the label does not also appear on the
105 outside container or wrapper, if present, of the retail package of such article, or is not easily legible
106 through the outside container or wrapper.

107 3. If any word, statement, or other information required by this article is not prominently placed on
108 the label with such conspicuousness (as compared with other words, statements, designs, or devices, in
109 the labeling) and in such terms as to render it likely to be read and understood by the ordinary
110 individual under customary conditions of purchase and use.

111 4. Unless its label bears:

112 a. The common or usual name of the food, if there is any;

113 b. When the food is fabricated from two or more ingredients, the common or usual name of each
114 ingredient. Spices, flavorings, and colors not required to be certified under section 721(c) of the federal
115 act, other than those sold as such, may be designated as spices, flavorings, and colorings, without
116 naming each; and

117 c. When the food purports to be a beverage containing vegetable or fruit juice, a statement with
118 appropriate prominence on the information panel of the total percentage of such fruit or vegetable juice
119 contained in the food.

120 To the extent that the Commissioner believes that compliance with the requirements of subdivision 4

b is impractical or results in deception or unfair competition, exemptions shall be established by the Commissioner. The requirements of subdivision 4 b shall not apply to any carbonated beverages, ingredients of which have been fully and correctly disclosed to the extent prescribed by subdivision 4 b to the Commissioner in an affidavit.

5. If it is offered for sale under the name of another food.

6. If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word, imitation, and immediately thereafter, the name of the food imitated.

7. If its container is made, formed, or filled as to be misleading.

8. If in package form, unless it bears a label containing: (i) the name and place of business of the manufacturer, packer, or distributor; (ii) the name of the article; (iii) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count; provided, that under clause (iii) of this subdivision reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Board.

9. If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by § 3.2-5101 unless: (i) it conforms to such definition and standard; and (ii) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients, other than spices, flavoring, and coloring, present in such food.

10. If it purports to be or is represented as:

a. A food for which a standard of quality has been prescribed by regulations as provided by § 3.2-5101 and its quality falls below such standard unless its label bears, in such manner and form as regulations specify, a statement that it falls below such standards; or

b. A food for which a standard or standards of fill of container have been prescribed by regulations as provided by § 3.2-5101, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard.

11. If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Board requires through regulation to fully inform purchasers as to its value for such uses.

12. If it bears or contains any artificial flavoring, artificial coloring or chemical preservative, unless it bears labeling stating that fact; provided that to the extent that the Commissioner believes that compliance with the requirements of this subdivision is impracticable, exemptions shall be established by the Commissioner; provided, that the provisions of this subdivision and of subdivisions 4 and 9 with respect to artificial colorings shall not apply in the case of butter, cheese or ice cream.

13. If it is a food intended for human consumption, it is offered for sale, and its label and labeling do not comply with the requirements of Section 403 (q) of the federal act pertaining to nutrition information.

14. If it is a food intended for human consumption, it is offered for sale, and its label and labeling do not comply with the requirements of Section 403 (r) of the federal act pertaining to nutrient content claims and health claims.

15. *If it purports to be or is represented as milk unless it meets the definition of milk in § 3.2-5120. This subdivision shall not apply to human breast milk.*

B. If an article is alleged to be misbranded because the label is misleading, or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device, sound, or in any combination thereof, but also the extent to which the labeling or advertisement fails to reveal facts material in the light of such representations or material with respect to consequences that may result from the use of the article to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement or under such conditions of use as are customary or usual.