WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

September 24, 1971

FILE NO. S-348

FOOD, DRUG, COSMETIC and PESTICIDE LAW STUDY COMMISSION - Constitutionality of State Laws

-

Honorable George M. Burditt
Assistant Majority Leader
House of Representatives
State Capitol
Springfield, Illinois

Dear Representative Burditt:

I have your recent inquiry, in which you ask:

"Are the sections of the Illinois Food, Drug, and Cosmetic Act of 1969 [Food, Drug, and Cosmetic Act, 56-1/2 Ill. Rev. Stat. paragraphs 509, 521(c), 521(d), 521(e) and 521(f) (1969)] which provide for the automatic adoption by Illinois of certain Federal regulations constitutional?"

Relevant parts of the Illinois Food, Drug and Cosmetic Act read as follows:

"§ 9. Definitions and standards of identity, quality and fill of container and their amendments, now or hereafter adopted under authority of the Federal Food, Drug and Cosmetic Act are the definitions and standards of identity, quality and fill of container in this State. * * * "

Illinois Revised Statutes 1969, Chap. 56 1/2, par. 509.

"§ 21. * * *

"(c) All pesticide chemical regulations and their amendments now or hereafter adopted under authority of the Federal Food, Drug and Cosmetic Act are the pesticide chemical regulations in this State. However, the Director may adopt a regulation which prescribes tolerances for pesticides in finished foods in this State even though the regulation is contrary to a federal regulation."

Illinois Revised Statutes 1969, Chap. 56 1/2, par. 521(c).

"(d) All food additive regulations and their amendments now or hereafter adopted under authority of the Federal Food, Drug and Cosmetic Act are the food additive regulations in this State. However, the Director may adopt a regulation which prescribes conditions under which a food additive may be used in this State, even though the regulation is contrary to a federal regulation."

Illinois Revised Statutes 1969, Chap. 56 1/2, par. 521(d).

"(e) All color additive regulations and their amendments now or hereafter adopted under

> authority of the Federal Food, Drug and Cosmetic Act are the color additive regulations in this State. However, the Director may adopt a regulation which prescribes conditions under which a color additive may be used in this State, even though the regulation is contrary to a federal regulation."
>
> Illinois Revised Statutes 1969, Chap. 56 1/2, par. 521(e).
>
> "(f) All special dietary use regulations and their amendments now or hereafter adopted under authority of the Federal Food, Drug and Cosmetic Act are the special dietary use regulations in this State. However, the Director may, if he finds it necessary to inform purchasers of the value of a food for special dietary use, prescribe special dietary use regulations, even though the regulation is contrary to a federal regulation."
>
> Illinois Revised Statutes 1969, Chap. 56 1/2, par. 521(f).

As noted above, in section 9 of the Illinois Food, Drug and Cosmetic Act, the General Assembly adopted as the applicable definitions and standards in Illinois the "Definitions and standards . . . and their amendments now or hereafter adopted under authority of the Federal Food, Drug and Cosmetic Act." The section then provides that under certain conditions ". . . the Director may promulgate regulations establishing definitions and

standards . . . where no federal regulations exist." In addition, the section provides " . . . the Director may promulgate amendments to any federal or state regulations which set definitions and standards of identity, and the Director of Agriculture may promulgate amendments to any federal or state regulations which set standards of quality and fill of container for foods."

The question is whether the adoption of present and future Federal standards renders the Illinois Act unconstitutional as failing to set adequate standards and as an improper delegation of legislative powers.

There is no doubt that a statute incorporating definitions, standards, and regulations "now" adopted by the Federal Government, or even by another state, is constitutional. The present existence of the language adopted satisfies all requirements that the statute be definite and certain. The legal maxim "That is certain which can be made certain" is applicable. There is no question accordingly that the statute is constitutional so far as it adopts "definitions and standards now adopted" by the Federal Government. See Thorpe v. Mahin, 43 Ill.

2d 36, 250 N.E. 2d 633 (1969). The problem arises from the prospective effect of the language "now or hereafter adopted".

Section 321 of the Federal Food, Drug and Cosmetic Act (21 U.S.C.A., 321) covers "definitions" which are all inclusive as relating to "interstate commerce between any state or territory and any place outside thereof" or moving within the District of Columbia or any territory.

Section 371(a) of the Federal Act states: "The authority to promulgate regulations for the effective enforcement of this chapter . . . is vested in the Secretary". Section 371(e)1 sets up procedure and (e)2 grants 30 days after a regulation is made public within which "any person who will be adversely affected may file objections and request a hearing". The regulation is thereupon stayed until final action on the objections.

As stated in United States v. Walsh, 331 US 432, the Federal Act rests upon the constitutional power of Congress to regulate interstate commerce and seeks to keep interstate channels free of deleterious, adulterated

and mis-branded articles of specified types to the end that public health and safety might be advanced.

In Thorpe v. Mahin (cited above), a statute adopting the language of existing federal regulations was approved; while the court did not pass on prospective language, it said at page 49:

> "There is some scholarly opinion, as well as case law from other jurisdictions, that the legislature could adopt a statute providing that future modifications of the Code [I.R.C.] would have consequences in the meaning and application of the Act . . . [b]ut, we are not here faced with that problem because the italicized portion of section 102 of the Act specifically adopts the terms of the Code as they existed at the time of its enactment and does not contemplate that subsequent changes in the code shall be automatically applied to the Act."
>
> 43 Ill. 2d 36, 49; 250 N.E. 2d 633, 640.

In Home Insurance Company v. Swigert, 104 Ill. 653 (1881) our Supreme Court held the General Assembly had the power to pass a law, the ultimate operation of which could depend on the future action of some foreign legislative body. In that case the court upheld a retaliatory corporate tax statute which based Illinois

foreign corporate tax rates on the rates then or thereafter adopted by a particular foreign state towards Illinois corporations doing business there. At page 665, the court said:

> "Whatever the rule may be in other states, it is well settled in this, that it is competent for the legislature to pass a law the ultimate operation of which may, by its own terms, be made to depend on some contingency. Where the contingency upon which the ultimate operation of the law is made to depend, consists of the action of some foreign deliberative or legislative body, as is the case here, it is erroneous to suppose the legislature in such case abandons its own legislative functions, or delegates its powers to . . . such foreign deliberative or legislative body . . . In either case the law is complete when it comes from the hands of the legislature. Nothing is better settled than that the operation and even the remedial character of a perfect and complete law may, by virtue of limitations contained in the law itself, based upon contingent extrinsic matters be enlarged, diminished or wholly defeated."

Other jurisdictions have upheld prospective adoption by reference statutes. Underwood Typewriter Co. v. Chamberlin, 94 Conn. 47, 108 A 154 (1919) (adoption of federal definition of "net income" and prospective changes and corrections dictated by federal law);

People ex rel Pratt v. Goldfogle, 242 N.Y. 277, 151 N.E. 452 (1926) (adoption of prospective federal determination of properties to be classified in manner affecting their taxation); Ex parte Lasswell, 1 Cal. App. 2d 183, 36 P. 2nd, 678 (1934) (adoption of National Recovery Administration Industry Codes); Commonwealth v. Alderman, 275 Pas 483, 119 A. 551 (1923) (prospective adoption of federal definitions of "intoxicating liquors"); Hogood v. Daughton, 195 N.C. 811, 143 S.E. 841 (1928) (adoption of prospective federal estate tax laws); Brown v. State, 323 Mo. 138, 19 S.W. 2d 12 (1928) (adoption of prospective federal estate tax laws); and State v. Wakeen, 263 Wis. 401, 57 N.W. 2d 364 (1953) (adoption of the definition of "drug" by prospective reference to the U.S. Pharmacopoeia, National Formulary, etc. and supplements thereto).

The United States Supreme Court upheld federal legislation providing that criminal prosecutions in federal enclaves should be controlled by the existing and future criminal law of the state surrounding the enclave. This decision in United States v. Sharpnack, 355 U.S. 286 (1958) put an end to the argument that this adoption was

an improper delegation of legislative power from Congress to the several states. The Sharpnack case cites numerous examples of federal adoption of future state legislative action and concluded that such activity was a "reasonable exercise of legislative power and discretion." 355 U.S. 286, 294-297.

Mr. Orval Etter has concluded that such prospective adoption by reference legislation should be upheld as constitutional. Etter, Referential Practices in Municipal Legislation, 39 Ore. L. Rev. 209 (1960). This view is supported by Sutherland: "The better view favors the validity of the statute in all three situations (including prospective adoption)", 1 A. Sutherland, Statutory Construction, section 310, at 69; by a recent California Attorney General's opinion: "We believe that such an incorporation of prospective federal regulations in the field of food and drug law would be upheld," (64/12 Cal. Att'y. Gen. June 10, 1964); and by a study by Professor J. Nelson Young for the Illinois Revenue Study Commission, Young, "Constitutional Problems," Report of the Commission on Revenue, 1963.

In his article, Etter states on page 270:

> "When a problem appropriate for legislative solution is so complex and the circumstances of the referring legislative body are such that its approach to the problem must, as a matter of convenience or necessity be general; when the problem concerns two or more governments, particularly governments in a common federal system . . .; and when the nature of the problem and the policy of the referring legislative body are such that a uniform approach to the problem on the part of all agencies concerned with it is deemed advisable - - in this three fold situation, the courts may, in the interests of a uniform approach, appropriately uphold legislative references by one government to the future promulgations of another government . . . ."

It must be admitted that several courts have struck down somewhat similar legislation. See State v. Johnson, (S.D.) 173 N.W. 2d 894 (1970); Hutchins v. Mayo, 143 Fla. 707, 197 So. 495 (1940); Dawson v. Hamilton, 314 S.W. 2d 532 (Ky. App. 1958); State v. Webber, 125 Me. 319, 133 A. 738 (1926); Darweger v. Staats, 267 N.Y. 290, 196 N.E. 61 (1935); State v. Urquhart, 50 Wash. 2d 131, 310 P. 2d 261, 265 (1957); State v. Lookabill, 170 Neb. 254, 125 N.W. 2d 695, 698 (1964); and Seale v. McKennon, 215 Ore. 562, 336 P. 2d 340, 345 (1959).

Only one of the cases just cited - State v. Johnson (S.D.) 173 N.W. 2d 894 - involved the automatic

adoption of regulations under the Federal Food, Drug and Cosmetic Act. In a prosecution for selling LSD, the defendant alleged the State Drug Abuse Control Act was unconstitutional. The act did not list LSD and the court said ". . . reference to regulations promulgated under the federal act must be made to determine if a crime has been committed". The court concluded:

> "The statute does not adopt the regulations of the federal government or one of its agencies at a given time, but attempts to adopt any and all regulations and changes therein promulgated under the federal act in futuro ad infinitum. This the legislature could not constitutionally do and was an unlawful delegation of legislative power . . . "

The South Dakota case may be distinguished because it involved a felony prosecution under the Drug Abuse Control Act while our statute sets up police-power regulations controlling pure food, food and color additives and pesticide chemicals with only misdemeanor penalties for violation. While the South Dakota Drug Abuse Act applied to anyone selling such drugs without any right to a hearing as to the propriety of the regulation, our statute provides that any regulation shall be

stayed pending a hearing if written objections are filed within 30 days by anyone alleging he is adversely affected. (Illinois Revised Statutes 1969, Chap. 56 1/2, par. 521(g)) Section 371e2 of the Federal Act provides a similar stay order.

The Illinois Act embodies a comprehensive policy for Illinois in the area of public health and safety. The subject is very complex and concerns both the federal and state governments. As is stated in the Oregon Law Review article quoted above, the nature of the problem is such that a uniform approach on the part of all agencies concerned is deemed advisable. The author concludes that in the interests of such uniform approach, courts can "appropriately uphold legislative references by one government to the future promulgations of another government". Further, the second sentence of section 21(a) of the Illinois Act reads:

> ". . . The Director is authorized to make the regulations promulgated under this Act conform, in so far as practicable, with those promulgated under the Federal Act."

This clearly indicates the intent of the General Assembly that the operation of the Illinois Act should be uniform with that of the Federal Act.

The need for uniformity is especially strong in the field of pure food and drugs. The research facilities of the federal government and its ready access to those of all the states make it eminently qualified to determine what regulations are needed in this constantly expanding field.

The decisions of the U. S. Supreme Court in the Sharpnack case and of our Supreme Court in the Home Insurance case, both quoted above, support the principle that in proper cases both present and future regulations of other legislative bodies may be incorporated by reference. The reasons announced by Mr. Etter and the California Attorney General, both quoted above, are very persuasive as supporting the prospective application of our statute.

In addition it is the rule in the State of Illinois that a statute will, if reasonably possible, be so construed as to render it constitutional in preference to a construction which would invalidate it. (Klein v.

Dept. of Reg. & Ed. 412 Ill. 75, cert. den. 344 U.S. 855, Schofield v. Bd. of Ed. of Community Consol. School Dist. No. 181, 411 Ill. 11; People v. Vale 406 Ill. 238; People ex rel. Barrett v. Thillens, 400 Ill. 224; People ex rel. Barrett v. Anderson, 398 Ill. 480; Douglass v. Village of Melrose Park, 389 Ill. 98; Durkin v. Hey, 376 Ill. 292; Village of Downers Grove v. Harley, 372 Ill. 560; City of Chicago v. Lawrence, 42 Ill. (2) 461, and it is the duty of the Supreme Court so to construe Acts of the General Assembly as to uphold their constitutionality and validity if it can reasonably be done. (People v. Adduci 412 Ill. 621; Illinois Crime Investigation Commission v. Buccieri, 36 Ill. (2) 556 cert. den. 389 U.S. 848.)

All presumptions are in favor of the constitutionality of legislation and the burden of showing unconstitutionality is on the person who asserts it. (Johnson v. Halpin, 413 257, cert. den. 345 U.S. 923; Morey v. Doud, 354 U.S. 457).

The courts of this State have not yet passed upon the validity of statutes incorporating by reference Federal statutes or regulations "as now or hereafter

amended." The courts of other jurisdictions, as cited above, have split on the constitutional validity of such legislation. However, the commentators quoted hereinabove hold that the better view is that such legislation is constitutional. For these reasons, it is my opinion that section 9 of the Illinois Food, Drug and Cosmetic Act (Illinois Revised Statutes, 1969, Chap. 56 1/2, par. 509) is constitutional.

With respect to the four quoted sub-sections of section 21, all of the foregoing observations as to section 9 apply. There are, however, certain further observations which should be made concerning these sections. Each of the four lettered subsections of section 21 is substantially identical except for the product it covers and reads (deleting the references to a particular class of product) as follows:

> "All * * * regulations and their amendments now or hereafter adopted under authority of the Federal Food, Drug and Cosmetic Act are the * * * regulations in this State. However, the Director may adopt a regulation which prescribes conditions * * * in this State, even though the regulation is contrary to a Federal regulation."

In addition, sub-section (g) of the said section 21 provides additional rules for the promulgation and adoption of amendments as follows:

> "(g) A federal regulation automatically adopted pursuant to this Act takes effect in this State on the date it becomes effective as a federal regulation. No publication or hearing is required. The Director shall publish all other proposed regulations in the official State newspaper. A person who may be adversely affected by a regulation may, within 30 days after a federal regulation is automatically adopted, or within 30 days after publication of any other regulation, file with the Director, in writing, objections and a request for a hearing. The timely filing of substantial objections to a federal regulation automatically adopted stays the effect of the regulation.
>
> "If no substantial objections are received and no hearing is requested within 30 days after publication of a proposed regulation it shall take effect on a date set by the Director. The effective date shall be at least 60 days after the time for filing objections has expired.
>
> "If timely substantial objections are made to a federal regulation within 30 days after it is automatically adopted or to a proposed regulation within 30 days after it is published, the Director, after notice, shall conduct a public hearing to receive evidence on the issues raised by the objections. Any interested person or his representative may be heard. The Director shall act upon objections by order and shall mail the order to objectors by certified mail as soon after the hearing as practicable. The order shall be based on substantial evidence in the record of the hearing.

> If the order concerns a federal regulation it may reinstate, rescind or modify it. If the order concerns a proposed regulation it may withdraw it or set an effective date for the regulation as published or as modified by the order. The effective date shall be at least 60 days after publication of the order."

The provisions of subsection (g) with respect to written objections and hearing parallel those in the Federal Act (21 U.S.C.A. §301 et seq.) and together with the quoted language of the sections of the Illinois Act in question, permitting the Director to adopt regulations contrary to Federal regulations, indicate a legislative intent to provide for flexible administration of the Illinois Act while, at the same time, rendering it possible to keep up with the constant flow of new and amended regulations in the highly complex field of food, drug and cosmetic control.

For the reasons cited with respect to section 9 and for the further reasons discussed above, I am of the opinion that subsections (c), (d), (e) and (f) of section 21 of the Illinois Food, Drug and Cosmetic Act as amended (Illinois Revised Statutes 1969, Chap. 56 1/2,

pars. 521(c), (d), (e) and (f)) are constitutional. Therefore, the answer to your inquiry is "yes".

Very truly yours,

ATTORNEY GENERAL