

(July 12, 1943, ch. 221, title II, 57 Stat. 500; 1953 Reorg. Plan No. 1, §5, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631.)

#### CODIFICATION

Section was enacted as part of the Labor-Federal Security Appropriation Act, 1944, and not as part of the Federal Food, Drug, and Cosmetic Act which comprises this chapter.

#### TRANSFER OF FUNCTIONS

For transfer of functions of Federal Security Administrator to Secretary of Health, Education, and Welfare [now Health and Human Services], and of Food and Drug Administration in the Department of Agriculture to Federal Security Agency, see notes set out under section 321 of this title.

### § 378. Advertising of foods

#### (a) Determination of misbranding; notification of Federal Trade Commission by Secretary; contents

(1) Except as provided in subsection (c) of this section, before the Secretary may initiate any action under subchapter III of this chapter—

(A) with respect to any food which the Secretary determines is misbranded under section 343(a)(2) of this title because of its advertising, or

(B) with respect to a food's advertising which the Secretary determines causes the food to be so misbranded,

the Secretary shall, in accordance with paragraph (2), notify in writing the Federal Trade Commission of the action the Secretary proposes to take respecting such food or advertising.

(2) The notice required by paragraph (1) shall—

(A) contain (i) a description of the action the Secretary proposes to take and of the advertising which the Secretary has determined causes a food to be misbranded, (ii) a statement of the reasons for the Secretary's determination that such advertising has caused such food to be misbranded, and

(B) be accompanied by the records, documents, and other written materials which the Secretary determines supports his determination that such food is misbranded because of such advertising.

#### (b) Action by Federal Trade Commission precluding action by Secretary; exception

(1) If the Secretary notifies the Federal Trade Commission under subsection (a) of this section of action proposed to be taken under subchapter III of this chapter with respect to a food or food advertising and the Commission notifies the Secretary in writing, within the 30-day period beginning on the date of the receipt of such notice, that—

(A) it has initiated under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] an investigation of such advertising to determine if it is prohibited by such Act or any order or rule under such Act,

(B) it has commenced (or intends to commence) a civil action under section 5, 13, or 19 [15 U.S.C. 45, 53, or 57b] with respect to such advertising or the Attorney General has commenced (or intends to commence) a civil ac-

tion under section 5 [15 U.S.C. 45] with respect to such advertising,

(C) it has issued and served (or intends to issue and serve) a complaint under section 5(b) of such Act [15 U.S.C. 45(b)] respecting such advertising, or

(D) pursuant to section 16(b) of such Act [15 U.S.C. 56(b)] it has made a certification to the Attorney General respecting such advertising,

the Secretary may not, except as provided by paragraph (2), initiate the action described in the Secretary's notice to the Federal Trade Commission.

(2) If, before the expiration of the 60-day period beginning on the date the Secretary receives a notice described in paragraph (1) from the Federal Trade Commission in response to a notice of the Secretary under subsection (a) of this section—

(A) the Commission or the Attorney General does not commence a civil action described in subparagraph (B) of paragraph (1) of this subsection respecting the advertising described in the Secretary's notice,

(B) the Commission does not issue and serve a complaint described in subparagraph (C) of such paragraph respecting such advertising, or

(C) the Commission does not (as described in subparagraph (D) of such paragraph) make a certification to the Attorney General respecting such advertising, or, if the Commission does make such a certification to the Attorney General respecting such advertising, the Attorney General, before the expiration of such period, does not cause appropriate criminal proceedings to be brought against such advertising,

the Secretary may, after the expiration of such period, initiate the action described in the notice to the Commission pursuant to subsection (a) of this section. The Commission shall promptly notify the Secretary of the commencement by the Commission of such a civil action, the issuance and service by it of such a complaint, or the causing by the Attorney General of criminal proceedings to be brought against such advertising.

#### (c) Secretary's determination of imminent hazard to health as suspending applicability of provisions

The requirements of subsections (a) and (b) of this section do not apply with respect to action under subchapter III of this chapter with respect to any food or food advertising if the Secretary determines that such action is required to eliminate an imminent hazard to health.

#### (d) Coordination of action by Secretary with Federal Trade Commission

For the purpose of avoiding unnecessary duplication, the Secretary shall coordinate any action taken under subchapter III of this chapter because of advertising which the Secretary determines causes a food to be misbranded with any action of the Federal Trade Commission under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] with respect to such advertising.

(June 25, 1938, ch. 675, §707, as added Pub. L. 94-278, title V, §502(b), Apr. 22, 1976, 90 Stat. 412.)

## REFERENCES IN TEXT

The Federal Trade Commission Act, referred to in subsecs. (b) and (d), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (§41 et seq.) of chapter 2 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 58 of Title 15 and Tables.

**§ 379. Confidential information****(a) Contractors**

The Secretary may provide any information which is exempt from disclosure pursuant to subsection (a) of section 552 of title 5 by reason of subsection (b)(4) of such section to a person other than an officer or employee of the Department if the Secretary determines such other person requires the information in connection with an activity which is undertaken under contract with the Secretary, which relates to the administration of this chapter, and with respect to which the Secretary (or an officer or employee of the Department) is not prohibited from using such information. The Secretary shall require as a condition to the provision of information under this section that the person receiving it take such security precautions respecting the information as the Secretary may by regulation prescribe.

**(b) Ability to receive and protect confidential information obtained from foreign governments****(1) In general**

The Secretary shall not be required to disclose under section 552 of title 5 (commonly referred to as the "Freedom of Information Act"), or any other provision of law, any information relating to drugs obtained from a foreign government agency, if—

(A) the information concerns the inspection of a facility, is part of an investigation, alerts the United States to the potential need for an investigation, or concerns a drug that has a reasonable probability of causing serious adverse health consequences or death to humans or animals;

(B) the information is provided or made available to the United States Government voluntarily on the condition that it not be released to the public; and

(C) the information is covered by, and subject to, a written agreement between the Secretary and the foreign government.

**(2) Time limitations**

The written agreement described in paragraph (1)(C) shall specify the time period for which paragraph (1) shall apply to the voluntarily disclosed information. Paragraph (1) shall not apply with respect to such information after the date specified in such agreement, but all other applicable legal protections, including the provisions of section 552 of title 5 and section 247d-7e(e)(1) of title 42, as applicable, shall continue to apply to such information. If no date is specified in the written agreement, paragraph (1) shall not apply with respect to such information for a period of more than 36 months.

**(3) Disclosures not affected**

Nothing in this section authorizes any official to withhold, or to authorize the withhold-

ing of, information from Congress or information required to be disclosed pursuant to an order of a court of the United States.

**(4) Relation to other law**

For purposes of section 552 of title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

**(c) Authority to enter into memoranda of understanding for purposes of information exchange**

The Secretary may enter into written agreements to provide information referenced in section 331(j) of this title to foreign governments subject to the following criteria:

**(1) Certification**

The Secretary may enter into a written agreement to provide information under this subsection to a foreign government only if the Secretary has certified such government as having the authority and demonstrated ability to protect trade secret information from disclosure. Responsibility for this certification shall not be delegated to any officer or employee other than the Commissioner of Food and Drugs.

**(2) Written agreement**

The written agreement to provide information to the foreign government under this subsection shall include a commitment by the foreign government to protect information exchanged under this subsection from disclosure unless and until the sponsor gives written permission for disclosure or the Secretary makes a declaration of a public health emergency pursuant to section 247d of title 42 that is relevant to the information.

**(3) Information exchange**

The Secretary may provide to a foreign government that has been certified under paragraph (1) and that has executed a written agreement under paragraph (2) information referenced in section 331(j) of this title in only the following circumstances:

(A) Information concerning the inspection of a facility may be provided to a foreign government if—

(i) the Secretary reasonably believes, or the written agreement described in paragraph (2) establishes, that the government has authority to otherwise obtain such information; and

(ii) the written agreement executed under paragraph (2) limits the recipient's use of the information to the recipient's civil regulatory purposes.

(B) Information not described in subparagraph (A) may be provided as part of an investigation, or to alert the foreign government to the potential need for an investigation, if the Secretary has reasonable grounds to believe that a drug has a reasonable probability of causing serious adverse health consequences or death to humans or animals.

**(4) Effect of subsection**

Nothing in this subsection affects the ability of the Secretary to enter into any written