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STATE OF MINNESOTA
DEPARTMENT OF AGRICULTURE

IN THE MATTER OF THE PROPOSED RULE OF THE DEPARTMENT OF AGRICULTURE GOVERNING VARIETY NAME LABELING (MINNESOTA RULES 1510.0011)

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The subject of this rulemaking is the proposed rule of the Minnesota Department of Agriculture governing variety name labeling.

The rule pertaining to variety name labeling is proposed for adoption pursuant to Minnesota Statutes 21.82, subdivision 2, part (a) and Minnesota Statutes 21.85, subdivision 11. These statutes authorize the Department to establish a list of the kinds of seed for which the variety name is required to be shown on the seed label and to make rules for the proper enforcement of the seed law.

The proposed new rulemaking is necessary as a result of a major revision of the Minnesota Seed Law, Minnesota Statutes 21.80 through 21.92, which became effective on July 1, 1983.

The specific item to be considered in the new rulemaking pertains to the establishment of a list of the kinds of seeds for which the variety name must be shown on the seed label and the situations where this requirement would not apply.

The notice of intent to adopt rules without a public hearing was published in the State Register by the Department on June 24, 1985. The Commissioner of the Minnesota Department of Agriculture proposes that the rules be adopted in accordance with Minnesota Statutes 14.22 to 14.28. Responses to the solicitation of outside opinion and consultations with seed industry representatives indicate that the proposed rulemaking is non-controversial.

The discussion provided in this statement is divided into the following parts:

II. Small Business Impact

III. General Overview

IV. Need For And Reasonableness Of The Proposed New And Amended Rules

V. Attachments

II. SMALL BUSINESS IMPACT

Minnesota Statutes 14.115 requires an assessment of the impact on small businesses when laws and rules are enacted that affect them.

In Minnesota, a majority of the small seed businesses are selling agricultural seed as classes of certified seed. A class of certified seed is one which has been verified for pureness of variety by the officially designated but privately operated agency called the Minnesota Crop Improvement Association. In 1983, approximately 1,150 of these small businesses applied for certification on 237,165 acres and over five million bushels of agricultural seed were produced and certified for planting in 1984. Certified seed is divided into three separate classes and the name of each class is indicative of the number of generations of reproduction from the initial seed produced by the plant breeder. These three classes are named Foundation, Registered, and Certified, with the Certified class being the last generation eligible for certification by the Minnesota Crop Improvement Association.

In 1970, a Federal law was enacted in the United States Congress entitled the Plant Variety Protection Act. This act provides that the owner of a newly developed variety of seed may apply for and receive patent protection. This protection provides the owner with the exclusive right to reproduce and sell the variety for a period of 18 years. Title 7, sections 2481 to 2486 of this act provides that in the application for protection, the owner of the variety may specify that it can be sold only as a class of certified seed. When this option is

chosen, the seed of a protected variety must be produced and marketed in Minnesota according to the requirements of the Minnesota Crop Improvement Association.

The certification process costs these small businesses extra because of services which must be provided by the Minnesota Crop Improvement Association. These extra costs include field inspection fees, laboratory testing fees, and the purchase of certification tags. These extra costs result in a higher selling price for the seed produced. In recent years, a number of small seed businesses have sought a marketplace advantage by foregoing the certification process and selling protected varieties without naming the variety on the seed label. By doing this, they avoid direct violation of the U.S. Plant Variety Protection Act. This also means that the selling price for the seed they produce is less than for those small businesses who follow the Act explicitly. This situation has created an unfair marketplace condition for small seed businesses. To correct this problem, the Department is proposing this new rule which would require the variety name to be listed on the seed label. Enactment of this rule would close a loophole by which violators of the U.S. Plant Variety Protection Act could operate without regulatory intervention.

When writing this proposed new rule, consultations with seed industry representatives revealed that in certain situations, requiring variety labeling would be a hardship and in effect, deny consumers access to some kinds of lower priced seed. Because of these situations,

exceptions to required variety labeling were written into this proposed new rule which will not jeopardize the original intent of correcting unfair marketplace conditions for small seed businesses.

In summary, the overall impact of this proposed new rule would be that small seed businesses who obey the U.S. Plant Variety Protection Act, can continue to do so in a fair and competitive marketplace for seed. The impact on small seed businesses who have previously bypassed the U.S. Plant Variety Protection Act by omitting the variety name from the seed label will be that they will now have to label the variety and comply with the Act.

The only alternative method to achieving a fair marketplace for small seed businesses would be to continue with our present seed law and rules. To enforce the U.S. Plant Variety Protection Act, under present law and rules, the Department would have to increase surveillance of small seed businesses in hopes of detecting more of the violations of this Act. This would increase the costs for the seed regulatory program because it would require extra surveillance staff and more administrative costs for the handling of violations. Documentating violations would still be difficult because evidence of the violation wouldn't be readily available without the variety name on the seed label.

A comparison of the advantages and disadvantages of the proposed new rule and that of an existing rule cannot be made since there aren't any existing rules which pertain to required variety labeling.

III. GENERAL OVERVIEW

A. The Need For Variety Name Labeling

A kind of seed is easily identified by generally apparent characteristics of the seed itself. As an example, corn is easily distinguished from oats or wheat seed. Subdivisions of each kind are not so easily identified. Subdivisions of a kind generally must be identified through review of production and sale records of the seed grower and labeler. If conclusive proof of subdivision identity is not provided by records, specialized seed laboratory testing and grow-out trials may need to be conducted. Review of records is the most economical way to make subdivision determination. However, for the keeping of records to be effective for subdivision determination, the subdivision name must be required on the label associated with each sale of seed.

For over 50 years, the universally accepted nomenclature for subdivisions of each kind has been the variety name. Each variety name represents a single subdivision of a kind. As a result, the variety name is commonly used and recognized by consumers, plant breeders, and the seed industry. As an indication of the importance of the variety name, the U.S. Plant Variety Protection Act was enacted by Congress in order that the owners of new subdivisions of kinds could attain patent protection for them.

Before seed of a new variety is accepted and purchased by consumers, testing must indicate performance capability which is superior to other presently used varieties. Comparative variety trials are conducted by both publicly and privately financed research personnel to indicate which varieties show advantage for use by consumers. Consumers have access to performance testing results either in publicly financed research publications or in promotional literature provided by the seed industry. The reference for consumers that ties this performance information to certain superior subdivisions of a kind is the variety name. Required variety name labeling is of utmost importance to consumers in order for them to make objective purchasing decisions based on performance testing results. In addition, required variety labeling will aid in curtailing excessive or exaggerated claims for performance by seed labelers.

In certain situations, requiring variety labeling would be impossible or a hardship on the seed industry. The first situation is when a kind of seed does not have recognized subdivisions and therefore no variety could be stated.

The second situation is when a variety name cannot be determined because records are not available and visual observation or laboratory testing cannot distinguish the variety.

The third situation is when two or more varieties are combined to form a blend based on research that is privately financed. These blends usually have certain advantages for consumers such as a lower price or a performance advantage when compared to popular single varieties. The performance advantage would result from research which shows that a certain combination of varieties will perform nearly as well or even better than a single variety when the crop is subjected to adverse environmental conditions. The varieties in a blend affected by this exception would not be protected. Therefore, forcing the owner of the blend to reveal proprietary information about the amount and name of each varietal component in the blend would penalize research and development of this information.

The fourth situation is when lawn and turf grass seeds are sold in mixtures. In the definitions section of the seed law, a blend is defined as a combination of two or more varieties. Also in this section, a mixture is defined as a combination of two or more kinds. This situation deals only with mixtures of seed and specifically to lawn and turf grass seed mixtures. Consumers of lawn and turf grass seeds are generally considered urban homeowners. This group of consumers is not as sophisticated in seed technology and normally does not recognize either variety or kind names. Requiring the variety name to be stated on the seed label would have only limited value in this situation. Instead of mandating variety name labeling, the seed law has established minimum standards of quality that must be met before lawn and turf grass seed can legally be sold. Because a minimum standard of

quality is assured, variety name labeling is not nearly as important as with other agricultural crops. Therefore, in this situation the variety name and the words "variety not stated" can be omitted from the seed label but only as long as the components of a lawn and turf grass mixture are not represented by any other name such as a trademark or brand name.

The proposed rulemaking is necessary and reasonable to provide protection for consumers through complete and truthful information on labeling for seed sold in Minnesota. Uniformly truthful label information aids in promoting a fair and competitive marketplace for seed and thereby benefits the seed industry as well.

B. <u>Format Of The Proposed Rule</u>

The proposed rule is set forth in the following manner: Labeling variety, variety not stated, and brand; examples.

In this statement, the contents of the proposed rule will not be repeated for the sake of brevity. The number and title of the rule has been noted for reference purposes.

IV. NEED FOR AND REASONABLENESS OF THE PROPOSED RULE

The need for and reasonableness of the proposed rule follows:

1510.0011 Labeling Variety, Variety Not Stated, And Brand; Examples.

This rule is all new material. Minnesota Statutes 21.82, subdivision 2, part (a), of the Minnesota Seed Law, specifies that the Commissioner shall by rule designate the kinds of seed which must be labeled by variety name. Establishing a list proved to be a nearly impossible task which would have required a very elaborate and detailed rule with specific reference to each kind of agricultural seed. Instead of a list, conditions were established that would apply to all agricultural seeds whereby variety name or the words "variety not stated" would be required to be shown on the seed label. It is necessary to establish these variety labeling requirements to inform labelers of the conditions under which the variety name must be shown on the seed label in order to be legally sold in Minnesota. It is further necessary to provide exceptions to required variety labeling because it is not always possible to do so and because under some circumstances it would be an economic hardship for labelers to do so. This is a reasonable rule because it balances the needs of both consumers and sellers of seed. It is further reasonable because it will require a uniform system of labeling seed and thereby encourage a more fair and competitive marketplace for seed.

V. ATTACHMENTS

FACTS ABOUT:

NAMING AND LABELING VARIETIES OF SEED

Every year many new varieties of agricultural and vegetable seed reach America's marketplace. New seed varieties, when added to varieties already on the market, provide farmers and home gardeners with a wide selection of seed. But, in order for them to buy intelligently, seed must be correctly named and labeled. This is not always done.

Marketing a product by its correct name might seem to be the most likely way to do business. However, U.S. Department of Agriculture (USDA) seed officials have found that seed, unfortunately, is sometimes named, labeled, or advertised improperly as it passes through marketing channels.

Marketing seed under the wrong name is misrepresentation. It can lead to financial loss for several participants in the seed marketing chain.

The farmer, for example, buys seed to achieve specific objectives such as increased yield, competitiveness in a specialized market, or adaptability to growing conditions of a specific region. If seed is misrepresented and the farmer buys seed other than what was planned, the harvest may be less valuable than anticipated, or worse yet, there may not even be a market for the crop.

In one case, a farmer bought seed to grow cabbage to be marketed for processing into sauerkraut. As the cabbage matured, the farmer found that his crop was not suitable for processing and even worse, that he had no market for the cabbage in his fields. In this case financial hardship was brought about by improper variety labeling.

Seed companies and plant breeders also suffer in a market where problems with variety names exist. For instance, if the name of a newly released variety is misleading or confusing to the potential buyer, the variety may not attract the sales that it might otherwise.

This fact sheet outlines requirements for naming agricultural and vegetable seed. It is based on the Federal Seed Act , a truth-in-labeling law intended to protect farmers and home gardeners who purchase seed. Exceptions to the basic rules and the do's and don'ts of seed variety labeling and advertising also are explained.

WHO NAMES NEW VARIETIES?

The originator or discoverer of a new variety may give that variety a name. If the originator or discoverer can't or chooses not to name a variety, someone else may give that variety a name for marketing purposes. In such a case, the name first used when the seed is introduced into commerce will be the name of the variety.

It is illegal to change a variety name once the name has been legally assigned. In other words, a buyer may not purchase seed labeled as variety "X" and resell it as variety "Y." An exception to this rule occurs when the original name is determined to be illegal. In such an instance, the variety has to be renamed according to the rules mentioned above. Another exception to this rule applies to a number of varieties which were already being marketed under several names before 1956. (See section on synonyms.)

WHAT'S IN A NAME?

To fully understand what goes into naming a variety, you need to know the difference between a "kind" of seed and a seed "variety."

"Kind" is the term used for the seed of one or more related plants known by a common name such as carrot, radish, wheat, or soybean.

"Variety" is a subdivision of a kind. A variety has different characteristics from another variety of the same kind of seed. For example, "Oxheart" carrot and "Danvers 126" carrot or "Bragg" soybean and "Ransom" soybean.

The rules for naming plants relate to both kinds and varieties of seed:

1. A variety must be given a name that is unique to the kind of seed to which the variety belongs. For instance, there can only be one variety of wheat named "Prairie Road."
2. Varieties of two or more different kinds of seed may have the same name if the kinds are not closely related. For example, there could be a "Prairie Road" wheat and "Prairie Road" oat because wheat and oat are kinds of seed not closely related. On the other hand, it would not be permissible to have an "Alta" tall fescue and "Alta" red fescue because the two kinds of seed are closely related.
3. Once assigned to a variety, the name remains exclusive. Even if "Prairie Road" wheat has not been marketed for many years, a newly developed and different wheat variety can't be given the name "Prairie Road."
4. A company name may be used in a variety name as long as it is part of the original, legally assigned name. Once part of a legal variety name, the company name must be used by everyone including another company that might market the seed.

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When a company name is **not** part of the variety name, it should not be used in any way that gives the idea that it **is** part of the variety name. For example, Ajax Seed Company can't label or advertise "Prairie Road" wheat variety as "Ajax Prairie Road" since "Ajax" may be mistaken to be part of the variety name.

The simplest way to avoid confusion is to separate the company and variety names in advertising or labeling.

5. Although USDA discourages it, you may use descriptive terms in variety names as long as such terms are not misleading. "GBR," for instance, is accepted among sorghum growers as meaning "green bug resistant." It would be illegal to include "GBR" as part of a variety name if that variety were not green bug resistant. Similarly, if a sweet corn variety is named "Better Yield Bantam," the name would be illegal if this variety did not produce a higher yield than the standard Bantam sweet corn.

6. A variety name should be clearly different in spelling and in sound. "Alan" cucumber would not be permissible if an "Allen" cucumber were already on the market.

HYBRIDS

Remember that a hybrid also is a variety. Hybrid designations, whether they are names or numbers, also are variety names. Every rule discussed here applies to hybrid seed as well as to nonhybrid seed.

In the case of hybrids, however, the situation is potentially more complex since more than one seed producer or company might use identical parent lines in producing a hybrid variety. One company could then produce a hybrid that was the same as one already introduced by another firm.

When this happens, the same name must be used by both firms since they are marketing the same variety.

If the people who developed the parent lines have given the hybrid variety a name, that is the legal name. Otherwise, the proper name would be the one given by the company that first introduced the hybrid seed into commerce.

U.S. Department of Agriculture seed regulatory officials believe the following situation occurs far too often:

"State University" releases hybrid corn parent lines A and B.

John Doe Seed Company obtains seed of lines A and B, crosses the two lines, and is the first company to introduce the resulting hybrid into commerce under a variety name. John Doe Seed Company names this hybrid "JD 5259."

La Marque Seeds, Inc., obtains lines A and B, makes the same cross, and names the resulting hybrid variety "SML 25." There has been no change in the A and B lines that would result in a different variety. La Marque ships the hybrid seed, labeled "SML 25," in interstate commerce, and violates the Federal Seed Act because the seed should have been labeled "JD 5259."

SYNONYMS—VARIETIES WITH SEVERAL NAMES

As noted earlier, the name originally assigned to a variety is the name that must be used forever. It can't be changed unless it is illegal.

This does not mean that all varieties must be marketed under a single name. In fact, some old varieties may be marketed legally under more than one name. If several names for a single variety of an agricultural or vegetable seed were in broad general use before July 28, 1956, those names still may be used. For hybrid corn this exception applies to names in use before Oct. 20, 1951.

Here are some examples:

The names "Acorn," "Table Queen," and "Des Moines" have been known for many years to represent a single squash variety. They were in broad general use before July 28, 1956, so seed dealers may continue to use these names interchangeably.

If "Ajax 79EDX" hybrid field corn, released in 1949, also became known as "Golden Ajax 79EDX" in the late 1950's, it would be illegal to label or advertise that variety as "Golden Ajax 79EDX." If the two names had been in use before Oct. 20, 1951, the variety could then be marketed under either name.

With the exception of old varieties with allowable synonym names, all vegetable and agricultural varieties may have ***only one*** legally recognized name, and that name must be used by anyone who represents the variety name in labeling and advertising. This includes interstate seed shipments and seed advertisements sent in the mail or in interstate or foreign commerce.

IMPORTED SEED

Seed imported into the United States can't be renamed if the original name of the seed is in the Roman alphabet.

For example, cabbage seed labeled "Fredrikshavn" and shipped to the United States from Denmark can't be given a different variety name such as "Bold Blue."

Seed increased from imported seed also can't be renamed. If "Fredrikshavn" were increased in the United States the resulting crop still couldn't be named "Bold Blue."

Seed with a name that is not in the Roman alphabet must be given a new name. In such a case, the rules for naming the variety are the same as stated previously.

BRAND NAMES

USDA officials have found evidence of confusion over the use of variety names and brand or trademark names. This includes names registered with the Trademark Division of the U.S. Patent Office.

Here are some rules to keep in mind:

1. The brand or trademark name must be clearly identified as being other than part of the variety name.

For example, "Red Giant Brand Arthur 71 wheat" adequately distinguishes between "Red Giant" brand

and the variety "Arthur 71." "Red Giant Arthur 71 wheat," on the other hand, is not an adequate distinction.

2. A brand name must never take the place of a variety name.

Let's say a firm uses "Super Nova" as a brand name for its line of sunflowers. This firm may not relabel or advertise variety "894" hybrid sunflower seed as variety "Super Nova" hybrid sunflower or even "Super Nova 894" variety.

3. If a brand or trademark name is part of a variety's name, that trademark loses status. Anyone marketing the variety under its name is required to use the exact, legal variety name, including brand or trademark.

For instance, say Ajax Seed Company uses "Ajax Deluxe" as a brand or trademark for its line of vegetable seed. If the Ajax people introduce a new tomato variety named "Ajax Deluxe Cherry," they can't retain exclusive rights to that name. If John Doe Seed Company later makes an interstate shipment of seed of this same variety, it must be labeled as "Ajax Deluxe Cherry."

MIXTURES OR BLENDS

The labeling and advertising of a varietal mixture or blend must not create the impression that the seed is a single variety.

The Federal Seed Act allows seed in mixtures or blends to be assigned a brand name but not a variety name. Either the percentages of each varietal component of the blend or the phrase "varieties not stated" must be printed on the label. This rule applies to 36 kinds of agricultural seed.

For example, if a soybean product were a blend of three varieties, the label or advertising could not read "Peninsula Soybean" because "Peninsula" could be mistaken for a variety name. The same soybeans could be sold as "Peninsula Brand Soybean Blend, Varieties Not Stated."

Vegetable seed containing more than one variety must be labeled with the name and percentage of each variety present. The "Varieties Not Stated" option can't be used.

DO YOUR HOMEWORK

If you are in a position to name a new variety, you should investigate the name you wish to use. You should not use a name if it has been used before, or if a confusingly similar name exists.

Let's say Ajax Seed Company is marketing a new variety of red clover called "Verdant." Unknown to Ajax, a "Verdant" red clover was released by another firm more than 18 years ago. This original "Verdant" never did become popular, and today it has all but disappeared from the marketplace. The fact that it has disappeared doesn't matter. Journals, old catalogs, or other records would prove the existence of the original "Verdant," and therefore Ajax Seed Company must rename its variety.

Researching a name to avoid potential conflict is not foolproof. The Seed Regulatory Branch in USDA's Agricultural Marketing Service can assist you in your research. However, there is no official registry of variety names, so the branch's files are incomplete. USDA can't assure you that a name is completely clear.

SUMMARY

If the naming, labeling, and advertising of a seed variety is truthful, it is probably in compliance with the Federal Seed Act.

Keep these simple rules in mind to help eliminate violations and confusion in the marketing of seed:

- Research the proposed variety name before adopting it.
- Make sure the name cannot be confused with company names, brands, trademarks, or names of other varieties of the same kind of seed.
- Never change the variety name, whether marketing seed obtained from another source, or from your own production—for example, hybrid seed that already has a legal name.

FOR MORE INFORMATION

For more information on naming, labeling, and advertising seed, contact the Seed Regulatory Branch of the Livestock, Meat, Grain, and Seed Division, Agricultural Marketing Service, U.S. Department of Agriculture.

Write to: Seed Regulatory Branch, Rm. 2603-S, AMS, USDA, Washington, D.C., 20250, or call: (202) 447-9340.

The use of company and variety names in this guide is for illustration only and does not constitute endorsement or indictment by the U.S. Department of Agriculture.