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WHAT IS “MANDATORY PRODUCT LISTING”?

HATCH PASSES, DURBIN POUNCES.

By Jay Jacobowitz

Those of you who entered the natural products industry in the 2000s may not know the story of the late U.S. Senator Orrin G. Hatch (R-UT), who served six terms, and passed away on April 23rd. Hatch, whose home state of Utah was and is headquarters to many significant vitamin and supplement manufacturers, was naturally a strong advocate for our industry.

Through his efforts, the Dietary Supplement Health and Education Act of 1994 (“DSHEA,” pronounced ‘dis-shay’) became law. Prior to its passage, the U.S. Food and Drug Administration freely entered health food stores, seized product off the shelf, and shut retailers down. The issue was labeling and free speech; what natural products retailers could legally tell the public about the efficacy of vitamins and supplements.

A significant legislative coup, the free speech protections under Hatch’s DSHEA birthed the modern natural products industry, enabling vitamins, supplements and herbal products to grow by tens-of-billions of dollars. But we are a government of competing interests, the relevant one in our industry being pharmaceuticals. The pharmaceutical industry has never been comfortable with *natural* products, and DSHEA was a thorn in its side. Enter Senator Dick Durbin (D-IL), a close confidant of his major constituent, the Illinois-based American Medical Association, and its de-facto sponsor, the pharmaceutical industry.

Many times since the passage of DSHEA, we’ve had to defend against Durbin’s efforts to curb its freedoms, most recently with the *Dietary Supplement Listing Act of 2022* (DSL^A), introduced in the Senate on April 26, just three days after Senator Hatch’s passing. If enacted as currently worded, every dietary supplement now on the market, and every one subsequently introduced will need to file a separate, mandatory product listing with FDA. Any minor formula change will trigger *another* listing. Dietary supplements are regulated as a type of food. Imagine if Kellogg, for example, had to file a mandatory product listing every time it switched from, say, high-fructose corn syrup to sucrose in its Frosted Flakes?

Are Natural Products Retailers Aware?

Unlike his previous frontal assaults on vitamins and supplements, Durbin’s latest under-the-radar effort is couched in the language of protecting consumer “safety.” We are already a very safe industry, with less than one-percent reported adverse events out of hundreds-of-millions of consumer uses of the products.

In 1994, to pass DSHEA, independent natural products retailers banded together, with the help of the Washington-D.C.-based Natural Products Association (NPA)—then named National Nutritional Foods Association (NNFA). Retailers slung black fish-netting over their vitamin and supplement shelves with signs telling customers they couldn’t buy the products, and explained the legislative battle in the Capital. Upset citizen vitamin users flooded Congress with hundreds of thousands of faxes (this before email, remember), the largest public response to any issue in its history.

Could this sort of coordinated effort happen today? To find out, I called several of my independent natural retailer friends. As I suspected, many were unaware of DSL^A, although all expressed a desire to help defend against it. But today we are without an organized central body to help coordinate a response.

Are We Unified?

Also unlike 1994, when the natural products industry was unified in its effort to pass DSHEA, today we are a more fragmented, less cohesive industry. Two of our major advocacy associations, NPA and Washington-D.C.-based Council for Responsible Nutrition (CRN), find themselves on opposite sides of DSLA; CRN for, NPA against. Both organizations represent significant industry suppliers, manufacturers, and brands of vitamins, supplements and herbal products.

News of the disagreement between our two largest advocacy groups was a shock to my independent retailer friends, who could not understand how any supplier could favor burdensome regulations that will raise costs. But certain mature suppliers with very large revenues and stable product portfolios appear to feel the extra regulatory costs will be bearable. Not so for the hundreds or thousands of smaller natural brands that stand to be crushed by the new legislation.

A Strong Majority?

In late April, just after Durbin introduced DSLA, WholeFoods Magazine interviewed the Senator, who stated, “A strong majority of dietary supplement industry now supports responsible reporting requirements and stronger protections.” Leaving aside his slight implying that our industry only “now supports” responsible reporting requirements, how does the Senator know a majority of the industry supports his bill? He appears to be referring to CRN.

In a press release, Steve Mister, CRN President and CEO, noted, “CRN member companies produce a large portion of the dietary supplements marketed in the United States, so we know responsible industry supports mandatory product listing for supplements.” Fair enough, but NPA member companies also represent a “large portion” of the dietary supplements marketed in the United States.

Will DSLA Pass?

As we go to press we don’t know the fate of DSLA. Gathering its forces in New York at the end of June, CRN will host the Legal, Regulatory, and Compliance Forum on Dietary Supplements. Co-chairing the event is Tara Falsani, General Counsel, Vice President of Nature’s Way. The vitamin company was formerly based in Lehi, Utah, and an important constituent of Senator Hatch.

In An Ideal World...

For most of its 86-year history until 2016, NPA was governed jointly by suppliers and retailers; an unusual arrangement for a trade organization because of potentially conflicting interests. But it was this uniquely close advocacy cooperation in 1994 that made our efforts to pass DSHEA so effective.

As we face DSLA, supplier organizations would do well to make an urgent outreach to retailers—*especially* independent natural products retailers whose interests in protecting dietary supplements are more profound than other retailers whose supplements are only a small part of sales. A coordinated effort could once again unleash the U.S. consumer who, more than ever, depends on vitamins and supplements.

Courtesy or Cowardice?

At least Senator Durbin waited until three days after Senator Hatch passed away to introduce DSLA. In doing so, he has spared himself a rebuke from his long-time Senate colleague, and helped certain suppliers avoid considerable embarrassment. **JJ**