

If California Imposes Genetically Modified Food Requirements, All Consumer Product Labeling Is at Risk

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California may impose the nation's first mandatory labeling of genetically modified food products if voters face and approve the "California Right to Know Genetically Engineered Food Act" in November. (While more than the requisite number of signatures were collected, the initiative has not yet been certified.) Though the Act would exempt certified "organic" and other food that is not genetically modified, along with alcoholic beverages, it would impose significant obligations on retailers of a large swath of food products by requiring "genetically engineered" food products to be labeled as such, and by prohibiting retailers from labeling or advertising such food as "natural."

Though some proponents maintain the Act is intended to have no cost impact on consumers or food producers, it is likely to impose significant compliance obligations on anyone selling food products in the state of California. Indeed, enforcement is designed to be costly to regulated entities and beneficial to private litigants. In addition to state enforcement, the Act would authorize "consumer representatives" to bring suit without showing injury, and would entitle successful parties to recover costs and attorney's fees, as well as damages, reflecting the retail value of all products deemed to have been misbranded.

It is also likely to be costly to California. The attorney general identifies increased annual state administrative costs of several million dollars – to monitor and enforce the labeling requirements – as well as a potential capital outlay of several million dollars to construct facilities to test the genetic material of certain food

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products. The attorney general also identifies significant costs for the courts, the attorney general, and district attorneys due to litigation over possible violations.

The Food and Drug Administration (FDA) has determined that labels like these are not necessary, though similar disclosures are mandatory in other parts of the world. Other states are watching California to see if the Act succeeds, and some may follow California's lead. Food retailers, growers, and producers should examine this Act and watch closely how it fares at the ballot box.

And the food industry should not be the only concerned group. If passed, the initiative could be a catalyst for other public interest groups to demand mandatory labeling on any given consumer product. It is clear that disclosure labeling, even of facts widely known to the American public, is a key issue for activists right now, and they consider no product safe enough to avoid scrutiny. Indeed, other examples are addressed in this newsletter. See First Amendment concerns about FDA's draconian tobacco labeling requirements.

If passed, the requirement to label genetically engineered food is likely to be subject to legal challenge.