



# MANDATED BIOTECH FOOD LABELING: A California Initiative By Lawyers And For Lawyers

by  
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California's Proposition 37—which is included on the state's November 2012 ballot—purports to empower consumers to make more informed decisions about genetically modified foods. Its expansive reach, in conjunction with its private attorney general provisions, suggest the law could more appropriately be said to empower attorneys to bring a flood of new litigation. This LEGAL BACKGROUNDER assesses the scope of the proposition, its loopholes and inconsistencies, and the fit of its means to its ends.

## *Labeling Requirements*

**Mandatory Labeling.** Proposition 37 (hereinafter Prop 37) would regulate the content of California food labels and related promotional materials in an effort, according to the initiative's drafters, to “create and enforce the fundamental right” of Californians to be “fully informed about whether the food they purchase and eat is genetically engineered and not misbranded as natural... .”<sup>1</sup> Under Section 110809, any food offered for retail sale in California that is “entirely or partially produced with genetic engineering” (GE) must be labeled as such. Packaged products must be labeled with “clear and conspicuous” language, while unpackaged foods must be accompanied by a similar disclosure on the relevant bin or shelf.

This provision will require new packaging for a wide variety of goods on the market—more products than it may appear at first glance. Many staple ingredients are commonly genetically modified—including corn, soy beans, sugar beets, and cotton oil. GE corn is estimated to compose up to 88% of the U.S. maize crop,<sup>2</sup> and a Corn Refiners Association study found that corn is used in almost

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<sup>1</sup> The California Right to Know Genetically Engineered Food Act,  
[http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i1044\\_11-0099\\_genetically\\_engineered\\_food\\_v2\).pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i1044_11-0099_genetically_engineered_food_v2).pdf)

<sup>2</sup> USDA Economic Research Service, “Adoption of Genetically Engineered Crops in the U.S.” *available at* <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us.aspx> (last visited 8/28/12).

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4,000 products, not including meat, dairy, and poultry products that use corn for feed<sup>3</sup>.

Further, while nominally a local law, in effect this provision may dictate standards for food labeling across the country, as manufacturers must either create separate labels for those products they intend to sell in California, or conform all of their labels to the California mandate. What's worse, if other states follow suit, manufacturers could be tasked with creating several different labels in order to meet each state's requirements.

Alternatively, GE food producers could pull their products from California shelves, or reengineer food altogether so as not to be impacted by biotechnology. The latter option would not only be costly to those in the industry, but quite possibly to society as well, as genetic modification is used to enable plants to resist disease, produce higher yields, and combat drought.

***Prohibited Labeling.*** Prop 37 further defines “natural”—a word that is the subject of much litigation—for food labeling purposes. Because the U.S. Food and Drug Administration has not provided a definition for “natural,” plaintiffs have used the vagueness of the term to bring mislabeling and deceptive labeling suits.<sup>4</sup> Prop 37 provides a definitive definition of the term—but in doing so goes far beyond the purpose of the proposal, deems seemingly innocuous products “unnatural,” and further expands the list of potential defendants.

Under Section 110809.1, any genetically engineered food *or* any processed food (“any food other than a raw agricultural commodity” including any raw food that has been “cann[ed], smok[ed], press[ed], cook[ed], fr[ozen], dehydrat[ed], ferment[ed] or mill[ed]”) may not be labeled as natural. The scope of this section encompasses a vast amount of food on the market, as it pertains to all processed foods, *whether genetically modified or not*. The provision thus sweeps within its breadth manufactured foods that have no relationship to genetic modification, and when carried to its logical conclusion, presents arbitrary, if not irrational, results.

To use as an example the vegetable of the moment—broccoli—under Prop 37's definition, a raw head of broccoli may be labeled “natural,” while that same head of broccoli, if frozen, may not. The same follows for a variety of products made from raw, GE-free ingredients: apples but not apple juice, cucumbers but not pickles, plums but not prunes, raw almonds but not roasted almonds, are natural according to Prop 37. All sorts of nonsensical exclusions result. Apparently there is some *je ne sais quoi* about freezing, milling, or *placing in a can* that makes natural ingredients no longer natural. It is unclear *quoi*—what—makes these ingredients unworthy of the title.

What's more, because this labeling restriction pertains to all accompanying advertising or promotional materials, it is likely to set a standard for the entire country. It would be difficult if not impractical to monitor and control promotional materials for only one state. Thus, in effect, the provision limits companies' ability to market themselves in *all* states, even when these companies' self-characterizations are arguably truthful.

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<sup>3</sup> Iowa Corn Growers Association, “FAQs” available at [http://www.iowacorn.org/en/corn\\_use\\_education/faq/](http://www.iowacorn.org/en/corn_use_education/faq/) (last visited 8/28/12).

<sup>4</sup> See, e.g., *Astiana v. Ben and Jerry's Homemade, Inc.*, No. 10-CV-4387 PJH (N.D. Cal. 2012) (challenging use of term “all natural” where product used Dutch cocoa—cocoa processed with a synthetic ingredient), *Astiana v. Dreyer's Grand Ice Cream Inc.*, No. C-11-2910 EMC (N.D. Cal. 2012) (asserting that potassium carbonate is not “natural”), *Littlehale v. The Hain Celestial Group, Inc.*, No. C 11-6342 PJH (N.D. Cal. 2012) (where cosmetics contained glycerin), *Hairston v. South Beach Beverage Co.*, No. 120cv-1429 (C.D. Cal. 2012) (where product contained synthetic vitamins).

***Curious Exemptions.*** Notably, the proposal provides for certain exemptions from the labeling provisions. Animal products, alcoholic beverages, food “intended for immediate consumption” (restaurant food), and certified organic goods are dubiously exempt. All of these exempt categories may sometimes include low levels of genetic engineering—indeed alcohol may contain high level of GE ingredients—which calls into question the rationality of and motivations behind such exemptions.

Likewise, Prop 37 adopts a zero tolerance policy for unintentional traces of GE ingredients beginning in 2019—a policy that goes beyond even that of the European Union, which allows a .9% accidental presence of GE materials.<sup>5</sup> However, organic producers—conspicuously exempt from labeling—can continue their status as “certified organic” if their products show the inadvertent presence of GE materials.<sup>6</sup> Thus, organic foods are exempt from the law and yet held to a lower standard than the targeted foods.<sup>7</sup>

Due to the danger of comingling, and the threat of strike suits for non-labeled products, manufacturers may find it easier under the zero tolerance policy to provide a blanket label rather than risk being subject to litigation under Prop 37’s private attorney general provisions. Of course, if such a label were frequently used as a precaution, its ubiquitous presence would undermine the law’s purpose of enabling consumers to distinguish between differently composed products. Nonetheless, this might be a rational response for those liable under the act. At any rate, like the breadth of the term “natural” and the selective exemptions, it unclear how the zero tolerance policy will contribute to the proposal’s purported purpose.

### ***Who Can Sue?***

While its labeling provisions create a large source of potential defendants, the act’s enforcement mechanism creates a large source of potential plaintiffs. Prop 37’s “private attorney general” provisions transform each and every consumer into a potential plaintiff and generate opportunity for attorney-driven litigation.

Sections 1110809.4 and 111910 provide that “any person” shall be able to bring an action for a violation. These provisions further stipulate that such an individual “shall not be required to show... injury or damages.” Thus Prop 37 severs its enforcement mechanism from traditional standing rules and creates a prospective plaintiff in any consumer, even those who suffer no harm from a violation. The potential for abuse is clear: any product not labeled as GE is subject to a strike-suit, by anyone. After all, a plaintiff need only allege, not establish, that the product contains a GE ingredient in order to file. In many cases it will be enough to allege a mislabeling suit where the product contains an ingredient that is commonly GE. Because it is often economically rational for defendants to settle rather than endure costly litigation, and because attorneys’ fees are recoverable, strike suits are not only plausible, but foreseeable. This will especially be true where the suit is a class action, which is authorized under the

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<sup>5</sup> European Commission, “Rules on GMOS in the EU-Traceability” *available at* [http://ec.europa.eu/food/food/biotechnology/gmo\\_traceability\\_en.htm](http://ec.europa.eu/food/food/biotechnology/gmo_traceability_en.htm) (last visited 8/28/12).

<sup>6</sup> The USDA has stated that “organic food products do not have a zero tolerance for the presence of GMO materials.” USDA, “National Organic Program-Genetically Modified Organism” *available at* <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5096493> (last visited 8/28/12).

<sup>7</sup> It is true that under Section 110809.2(b), food produced “without the knowing and intentional use of genetically engineered seed or food” is exempt if those responsible for complying obtain a sworn statement from their provider stating that the food “(i) has not been knowingly or intentionally genetically engineered; and (ii) has been segregated from, and has not been knowingly or intentionally commingled with” GE foods. Nonetheless, maintaining such documentation would be cumbersome; especially considering what would be an effective and truthful statement for those products containing many ingredients. Further, the availability of these statements is not guaranteed to deter strike suits.

enforcement provisions.

The fallout from a similar California enactment, Proposition 65 (Prop 65), is instructive. Prop 65 requires warnings on products that contain substances the state claims are linked to cancer. Like Prop 37, Prop 65 includes provisions that authorize private lawsuits for violations of the act. Prop 65 is now known for the explosion of frivolous litigation it has spawned; indeed entire firms are devoted to filing such suits,<sup>8</sup> and according to the California Office of the Attorney General, 74% of the settlement awards in 2011 went to attorneys' fees and costs.<sup>9</sup> Prop 65 suits have been brought against fish oil makers, vinegar companies, potato chip proprietors, fast food restaurants, Christmas lights manufacturers, and even Whole Foods Markets. Due to the threat of litigation, Prop 65 warning signs now bombard Californians, and decorate such innocuous products as flashlights, footwear, and jewelry. Prop 37, if enacted, would likely share the same fate, especially in light of the scope of the proposition. Everyone in the "food chain" —from seed manufacturer to distributor—associated not only with GE food, but also with "processed" food, is at risk.

### ***Much Ado About What?***

The breadth of litigation and the potential for abuse that Prop 37 invites should be startling. The measure is sweeping not only for what it demands and prohibits, but further for the parties it allows to sue and be sued. So benevolently deemed "The Right to Know" initiative, Prop 37 will impose costs on industry (who must re-label), the government (who must enforce), and the courts (who must endure the flood of litigation). Many important voices in the scientific community—including the Food and Drug Administration, American Medical Association, the National Academy of Sciences, and the World Health Organization—agree that GE food is safe for consumption. The real question is whether Prop 37 is safe for consumers' consumption.

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<sup>8</sup> Indeed, attorney James Wheaton, known for Prop 65 litigation, submitted the Prop 37 initiative to the California attorney general.

<sup>9</sup> California Office of the Attorney General, "Proposition 65 Executive Settlement Summary 2011" available at [http://oag.ca.gov/sites/all/files/pdfs/prop65/Alpert\\_Report2011.pdf?&\(2011\);&](http://oag.ca.gov/sites/all/files/pdfs/prop65/Alpert_Report2011.pdf?&(2011);&) (last visited 8/28/12).