

Client Alert

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Like a Zombie, Mandatory Genetically Engineered Food Labeling Proposal Resuscitated in California

By Michael Jacob Steel and Alejandro Bras

California voters roundly rejected mandatory labeling requirements for genetically engineered (GE) foods last year. However, the specter of California requiring such GE labels, which could apply to 75 percent of grocery store foods, is now being revived in the form of State Senate Bill 1381. Introduced by Noreen Evans (D – Santa Rosa) on February 21, 2014, SB 1381 is being promoted as a “simpler, cleaner version” of Proposition 37, the voter initiative that California’s voters rejected at the polls just over a year ago. (See <http://www.mofo.com/prop37/>.)

While Senator Evans and other proponents of this new GE labeling bill claim that it removes the reasons that voters rejected Prop 37, many of the initiative’s main attributes seem to have been retained and in some instances made more burdensome. For example:

	SB 1381	Prop 37
REQUIREMENTS		
• Manufacturers must label packages of GE raw agricultural commodities	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
• Suppliers to retail stores must label containers transporting GE raw agricultural commodities	<input checked="" type="checkbox"/>	<input type="checkbox"/>
• Retailers must provide signs for GE raw agricultural commodities not individually labeled	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
• Manufacturers of packaged foods containing GE ingredients must label packages “[Partially] Produced with Genetic Engineering”	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

The similarities between the main requirements in SB 1381 and Prop 37 are striking. The bottom line is that the vast majority of all foods that will be sold in California will, if this law is enacted, have to be labeled “Genetically Engineered” or “Partially Produced with Genetic Engineering.”

As was true of Prop 37, there are a handful of exemptions to the newly proposed California-imposed GE labeling requirements, such as for food sold in restaurants and foods sold with qualified “organic” labels. Notably, while Prop 37 contained an exemption for alcoholic beverages, SB 1381 does not.

In what appears to be an effort to avoid some of the strongest criticisms of Prop 37, SB 1381 does contain new exemptions for farmers who are not manufacturers or retailers, and for retailers who did not “knowingly and willfully” fail

Client Alert

to provide signs. Unfortunately, the bill still leaves retailers with the burden of having to prove that they were not “knowing and willful,” a legal standard that can be hard to meet. Also, unlike Prop 37, SB 1381 has no prohibition on the marketing of GE foods as “natural,” although the plethora of class action litigation recently filed in California regarding the use of this and other terms in marketing food products may have quelled GE advocates’ urge for such a legislated prohibition.

Perhaps most significantly, as was the case with Prop 37, if SB 1381 is enacted, California’s Attorney General as well as California’s army of more than 38 million private citizens may act as enforcers of the state’s GE labeling requirements. If enacted, SB 1381 may lead to yet another deluge of lawsuits similar to those that businesses have faced under the California’s notorious Proposition 65 law. A comparison of SB 1381 and Prop 65 is revealing:

	SB 1381	Prop 65
ENFORCEMENT		
• Enforceable by the Attorney General	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
• Enforceable by citizen suits	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
a. Requires 60-day notice	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
b. Attorneys’ fees and costs recoverable	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

One potentially significant distinction between SB 1381 and both Prop 65 and Prop 37 is that SB 1381 specifies that only “injured” citizens may bring suit. But even this provision may not get businesses out of the woods – it is unclear what is meant by “injury” and, as with recent class actions on foods labeled as “natural,” plaintiffs filing SB 1381 lawsuits may try to claim they meet the injury requirement simply as the result of not being informed about the fact foods they purchased were genetically engineered.

All things considered, it does not appear that the changes to Prop 37 reflected in SB 1381 are particularly significant, and the cynically inclined may conclude that these modest changes are only designed to provide enough political support in California’s legislature to adopt a bill that is fundamentally the same as the one the state’s voters only recently rejected.

While SB 1381 is debated in the months ahead in California, similar GE labeling laws are beginning to gain traction in other states. Both Maine and Connecticut have passed GE labeling laws, but neither law will become effective until similar laws are passed in other nearby states. Vermont’s legislature is currently considering a GE labeling bill, while a similar proposal was recently defeated in the New Hampshire House of Representatives. So far, the U.S. government has yet to show an appetite for getting involved, but the Grocery Manufacturers Association, alongside other industry stakeholders, has recently formed a Coalition for Safe Affordable Food to push for more uniform and sensible GE labeling requirements at the federal level.

Morrison & Foerster LLP has been advising businesses and trade groups on GE, food labeling, and Proposition 65 issues, and defending companies that have been targeted in associated class actions and enforcement lawsuits for

Client Alert

many years. For more information on these issues, please refer to our website at <http://www.mofo.com/>. We have also created a specific website on GE labeling issues at <http://www.mofo.com/prop37/>.

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