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Food Industry Advances In Labeling Fight

Bill in Congress Would Ban Many State, Local Rules And Set National Regulations

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WASHINGTON -- Some state and local governments require food makers, restaurants and grocery stores to post warnings about products containing ingredients regulators deem harmful.


Those laws are often tougher than federal Food and Drug Administration rules or cover substances not regulated by federal law. California, for example, requires businesses to disclose the presence of chemicals that the state believes cause cancer, birth defects or other reproductive harm. Michigan and Connecticut mandate allergen warnings about preservatives such as sulfur dioxide at salad bars and other settings.

The food industry has been pressing Congress and the federal government to ban such state laws ever since California voters approved what is known as Proposition 65 in 1986. Recently, it has made some progress. A bill that would override many such laws sailed through the House Energy and Commerce Committee in December, and its sponsors include more than half the members of the House. A Senate version hasn't been introduced and it's unclear if the bill will move soon, but it already has set off a firestorm, pitting the food industry against consumer activists and state food-safety officials.

Under the proposed legislation, many state and local laws, such as California's Proposition 65, would be annulled unless states obtain FDA approval to keep them. Through the FDA and the Agriculture Department, the federal government sets national policy on nutrition and health-claim labeling, as well as on food safety and labeling of meat, poultry and egg products. The proposed federal law would set similar national standards by stripping states of the right to require safety warnings on food packages or where food is sold.

Food regulation has been largely a federal responsibility. Two landmark 1906 federal laws -- the Food and Drug Act and the Meat Inspection Act -- granted the federal government the power to conduct sanitary inspections in meat-packing plants and regulate adulterated foods and the use of poisonous preservatives and dyes in foods. States can, however, make their own laws, especially in areas where the federal government hasn't acted. Over the past few decades, as Americans became increasingly aware of food-related health problems, state and local governments have

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passed laws to address regional needs or cover gaps in federal law. "Sometimes states can act faster," says Joy Johnson Wilson, health-policy director at the National Conference of State Legislatures. "We don't believe that should be precluded."

The federal bill would invalidate any food-safety and labeling laws considered "not identical" to FDA regulations. But how to determine "identical" -- or "substantially the same," as defined in the bill -- remains a question. The bill says states would be allowed to keep their safety standard if the FDA fails to take a position, but some state officials worry that any state regulation could be judged as "not identical" to the FDA's "zero" regulation -- and then annulled. States could appeal to the FDA to keep their laws, but such exemptions would be granted only under three conditions. States must demonstrate that their law would cover an otherwise unprotected "important" interest, and wouldn't "unduly burden interstate commerce," or "cause any food to be in violation of any applicable requirement or prohibition under federal law."

There is little doubt that the proposed federal legislation would undo Proposition 65 in California, the state's Democratic Attorney General Bill Lockyer wrote in a recent letter to the bill's main sponsor, Rep. Mike Rogers (R., Mich.). In the past 17 years, Mr. Lockyer wrote, the law has forced "quiet compliance" among businesses, with many voluntarily removing chemicals that are on California's list -- now totaling 750 -- that would require labeling.

The effects extend beyond California. While the FDA advises on its Web site that pregnant women should avoid certain fish with high levels of mercury, such as swordfish, California requires restaurants and supermarkets to post that information. In October, supermarket chain **Safeway Inc.**, of Pleasanton, Calif., said it will place mercury warning posters in stores nationwide. California also wants mercury-warning labels on canned tuna, but food companies have gone to court to stop that.

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California requires warnings when food products contain certain chemicals that may pose health risks, but a bill that would nullify such state laws has drawn support in the House of Representatives.

Excerpt from Proposition 65 Warning Notice:
 "Nearly all fish and seafood contain some amount of mercury and related compounds, chemicals known to the State of California to cause cancer, and birth defects or other reproductive harm. Certain fish contain higher levels than others."



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California state-mandated warnings at fish counters in Safeway (above) and Whole Foods (left)

The federal bill has drawn fire from state attorneys general, food-safety officials and consumer activists. "States want to preserve the right to protect ... citizens; sometimes our needs are regional and local, and we want to do it effectively and expeditiously, and this legislation will prevent that," says Steve

Steinhoff, food-safety administrator at the Wisconsin Department of Agriculture. "The legislation is aimed at Proposition 65. Unfortunately, rather than fight the battle in California, we are going to adjust the whole national system."

"What [the industry] really wants is a regulatory vacuum where state and local governments will be unable to fill the gap left by the FDA," says Benjamin Cohen, senior staff attorney at the Center for Science in the Public Interest, a consumer advocacy group in Washington.

Food-industry lobbyists say varying state laws add uncertainty, confusion and extra costs to interstate commerce. "You could have two different labels, three different labels, 50 labels depending on inconsistent state requirements," says Hunt Shipman, executive vice president at the Food Products Association, a trade group. While almost all companies have chosen to remove certain chemicals to avoid a warning label in California, he says, things could get complicated if another state adopts a law as broad as Proposition 65.

Industry lobbyists and congressional aides who have discussed the subject during the decade-long push for legislation say the bill would still give states authority to respond to an imminent hazard, inspect foods and restaurants and require labeling for freshness dating, religious dietary issues, organic designation and geographic origin. The proposed federal law would cover warnings on labels, posters, public notices, advertising, "or any other means of communication." It would allow states to require public-service announcements on television or radio and billboards, says Susan Stout, a vice president at the Grocery Manufacturers Association, which represents the \$680 billion-a-year food and beverage industry.

An FDA spokeswoman says the agency won't comment on pending legislation.

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