



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
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ATTORNEY GENERAL

September 25, 2003

The Honorable Richard Burr
United States House of Representatives
1526 Longworth House Office Building
Washington, D.C. 20515

Dear Representative Burr:

I am writing to express my opposition to H.R. 2699, the "National Uniformity for Food Act of 2003." This bill would preempt all state laws requiring any warnings or information disclosures concerning the safety of foods, with only very narrow exemptions. In particular, this bill would preempt California's Proposition 65, an initiative measure passed by California's voters in 1986, through which the State of California has accomplished reformulation of a number of food and food-related products to reduce or remove toxic chemicals, greatly benefitting the public. It not only would preclude states from requiring informational disclosures on product labels, but would bar state requirements for disclosure in any form, even those that may be made within a single state.

After fifteen years experience of applying Proposition 65 requirements to food, we have found that Proposition 65 has provided a useful supplement to federal standards in three primary respects. First, Proposition 65 has resulted in reductions in toxic levels in foods or warnings, prior to U.S. Food and Drug Administration ("FDA") action and, indeed, in some instances may have spurred FDA to take action that otherwise never would have been taken. Second, Proposition 65 has been used to take important health information about foods that FDA agreed was valid, but only provided through seldom-seen "advisories" and presented it in a visible format to consumers at the point-of-sale. Third, Proposition 65 has resulted in "quiet compliance" through the removal of toxic chemicals years ahead of FDA standards, even where there has been no enforcement litigation under Proposition 65.

The following are situations in which California took action concerning a food-related problem under Proposition 65, ultimately followed by the FDA:

Lead in Ceramic Tableware: In October of 1991, California took action concerning levels of lead that leach from ceramic tableware into food and beverages, by requiring warnings for dishes that leach lead above certain levels and filing suit to enforce the law. In 1989, FDA had proposed new lower action levels for lead in tableware, acknowledging the inadequacy of existing standards, but declined to proceed in the face of industry opposition. (54 Fed.Reg. 23485.) After California's suit in July of 1992, FDA adopted new "action levels" for ceramic tableware, still less restrictive than the standards applied under Proposition 65. (57 Fed.Reg. 29734.)¹ Initially, a large number of products required warning under the Proposition 65 standards, but the marketplace incentive provided by conspicuous point-of-sale warnings has resulted in lead reduction beyond that achieved by the command-and-control methods used by FDA.

Lead Foil Wine Bottle Caps: In August 1991, California filed suit concerning the use of lead in foil caps on wine bottles, the residue of which remains on the lip of the bottle and transfers into the wine when poured. Rather than continue to provide Proposition 65 warnings, in December of 1991, over 300 vintners agreed to switch to non-lead caps (which actually are less expensive than lead caps). In November of 1992, FDA adopted a regulation precluding lead-foil caps. (57 Fed.Reg. 55485.)

Lead in Calcium Supplements: In June of 1997, California reached agreement with makers of calcium supplements to reduce levels of lead contamination in their products below the level at which a warning would be required under Proposition 65. Because of the importance of encouraging women to increase their intake of calcium, this resolution was negotiated without ever providing a consumer warning. FDA has issued advisories concerning some sources of calcium as early as 1982, and requested additional data in 1994, but has never taken regulatory action.

Arsenic in Bottled Water: Arsenic in bottled water has been reduced to less than 5 parts per billion in settlement of a Proposition 65 action reached in 2000. FDA still applies a standard of 50 parts per billion, although this presumably will be lowered to 10 parts per billion, based on the Environmental Protection Agency's recent adoption of a new drinking water standard.

These are situations in which Proposition 65 has transmitted information to consumers more effectively than FDA:

¹ FDA officials have written of many of their actions concerning reduction of lead in the food supply, without acknowledging the role of Proposition 65. See Bolger, et al., "Identification and reduction of sources of dietary lead in the United States," *Food Additives and Contaminants* (1996) v. 13, p. 476.

Leaded Crystal: Based on information showing that substantial quantities of lead leach from fully-leaded crystal (defined as 24% lead) into beverages, California took action to require visible warnings at the point of sale in California, as early as September of 1991. Leaded crystal—as distinguished from other types of glassware—now carries prominent warnings in California stores. Since 1991, FDA has provided a consumer advisory addressing this hazard, but has never publicized the information in a manner likely to be seen or read by consumers.

Mercury in Fish: FDA's website advises that women who are pregnant or may become pregnant should not consume certain types of fish (such as swordfish and shark) and should limit consumption of all types of fish, because of their mercury content. California has given life to this requirement by requiring that similar information be posted in stores in which fresh fish is sold. Ten other states have instituted similar public disclosure requirements concerning mercury in fish.

Alcoholic Beverages: Before the federal government required warnings that pregnant women should not drink alcoholic beverages, California required warnings wherever liquor is sold or consumed. California's requirement for these warnings in bars and restaurants assures that the warnings will be seen by those who do not see the bottle.

In addition, quiet compliance with Proposition 65 has resulted in public health benefits without litigation:

Potassium Bromate in Bread: Potassium Bromate is a listed carcinogen under Proposition 65, and FDA has engaged in a multi-year process to encourage bakers to stop using this additive. Informal surveys in 2002, of stores in California, found no bread containing potassium bromate for sale in California, but did find it contained in bread in other states.

Lead Soldered Cans: Lead soldered cans leach substantial amounts of lead into foods stored in the cans. As soon as Proposition 65 took effect in early 1988, our investigations found that food processors were switching to cans that do not use lead, before enforcement action was even necessary. FDA issued "emergency" action levels in 1993.

While I recognize the concern many have expressed concerning enforcement of Proposition 65 by private parties, my office and the California Legislature have taken vigorous action in order to assure that private lawsuits brought under Proposition 65 are pursued only in the public interest. In 1999, the Legislature amended the statute to require that private plaintiffs report to the Attorney General concerning their enforcement activities. In 2001, I sponsored additional legislation that requires all persons seeking to bring private Proposition 65 cases seeking consumer warnings to first provide my office with appropriate scientific documentation and requiring that all settlements of those cases be reviewed by my office and approved by courts in a public proceeding and under specific legal standards. These actions by the State of California have reduced the number of suits filed that are not in the public interest.

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I am aware that many in the food industry have expressed great concern over the chemical acrylamide, its presence in many foods and the potential application of Proposition 65 to those foods. To date, no court has required that warnings concerning acrylamide be given, and California's Office of Environmental Health has formulated a responsible "Work Plan," under which important scientific, legal and policy issues concerning this subject will be explored. FDA is engaging in a similar process and has declined to cooperate with our state officials on the matter, simply sending a letter advising state officials to abandon that process pending FDA's determinations, which it expects will take two to three years.

Proposition 65 has an excellent record of providing additional protection of public health within California directly and by spurring greater action by FDA. Moreover, Proposition 65 is an important component of the state's historical function of protecting the health and safety of its citizens. Federal preemption of this law and similar state requirements is bad federalism, bad science and bad public policy.

Sincerely,

BILL LOCKYER
Attorney General

cc: The Honorable Dianne Feinstein, United States Senate
The Honorable Barbara Boxer, United States Senate
Members of California Congressional Delegation