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## **OLR Bill Analysis**

**sHB 6527 (as amended by House "A")\***

### ***AN ACT CONCERNING GENETICALLY ENGINEERED BABY FOOD.***

#### **SUMMARY:**

This bill generally prohibits anyone from selling, offering for sale, or distributing in the state certain foods that are entirely or partially genetically-engineered unless they are labeled as produced with genetic engineering. It generally deems such items misbranded if they do not contain the required label. But these requirements only go into effect when five other states meeting certain criteria enact a substantially similar law. The five states must have a total population of over 25 million, and they must include (1) two states bordering Connecticut or (2) New York and New Jersey.

The bill generally applies to food intended for human consumption, or seed or seed stock intended to produce such food. But certain food items are exempt, such as (1) alcohol, (2) food not packaged for retail sale that is intended for immediate consumption, and (3) certain farm products. There are also two situations where the labeling requirement applies, but failure to comply does not render the food items misbranded.

The bill generally subjects knowing violators to a daily fine of up to \$1,000 per product. But retailers are only liable for failure to label under certain conditions.

By deeming food that violates the bill's labeling requirements to be misbranded, the bill also allows the Department of Consumer Protection (DCP) to place an embargo on, and in some circumstances, seize, the food. A person who misbrands food or sells misbranded food in Connecticut may be subject to criminal penalties (see

BACKGROUND).

The bill requires the DCP commissioner to enforce the bill's labeling requirements, within available appropriations. It authorizes him to adopt regulations to implement and enforce these requirements.

Among other things, the bill also:

1. specifies that infant formula is included in the definition of "food" for purposes of the bill's labeling requirements as well as other provisions in the existing state Food, Drug, and Cosmetic Act (presumably, infant formula already fits within the act's definition of food) and
2. specifically excludes genetically-engineered foods from the definition of "natural food," for purposes of the laws regulating the advertisement, distribution, or sale of food as natural.

The bill also makes technical and conforming changes.

\*House Amendment "A" replaces the underlying bill. It (1) expands the type of items to which the labeling requirement applies (in the underlying bill, the requirement applied only to baby food and infant formula) and (2) adds the provision that the labeling requirement only goes into effect when five other states enact similar laws (in the underlying bill, the requirement would go into effect on July 1, 2015). Among other things, the amendment also adds and changes certain exceptions to the labeling requirement.

EFFECTIVE DATE: October 1, 2013

## **MISBRANDED GENETICALLY-ENGINEERED FOOD, SEED, AND SEED STOCK**

### ***Genetically-engineered***

Under the bill, "genetically-engineered" or "genetic engineering" is a process through which food intended for human consumption, or seed or seed stock intended to produce such food, is produced from an organism or organisms in which the genetics are materially changed

by:

1. in vitro nucleic acid techniques (see below), including recombinant DNA techniques, directly injecting nucleic acid into cells or organelles (parts of cells), encapsulation, gene deletion, and doubling or
2. fusing cells that are not in the same taxonomic family (in taxonomy, a family is a group of related species), in a way that overcomes natural physiological reproductive or recombinant barriers and that is not used in traditional breeding and selection (such as conjugation, transduction, and hybridization).

“Genetically-engineered” or “genetic engineering” also includes food intended for humans, or seed or seed stock intended to produce such food, that (1) contains an ingredient, component, or substance produced as described above or (2) is treated with a material produced as described above for, among other purposes, increasing a raw agricultural commodity’s resistance to herbicides and pesticides. By law, a raw agricultural commodity is a food in its raw or natural state, including fruit that is washed, colored, or otherwise treated in its unpeeled, natural form before marketing.

The bill defines “in vitro nucleic acid techniques” as techniques, including recombinant DNA techniques, that use vector systems and techniques involving the direct introduction into organisms of hereditary material (e.g., genes) prepared outside the organisms, such as microinjection, macroinjection, chemoporation, electroporation, microencapsulation, and liposome fusion.

### ***General Labeling Requirement***

The bill generally prohibits anyone from selling, offering for sale, or distributing in the state food intended for human consumption, or seed or seed stock intended to produce such food, that is entirely or partially genetically-engineered, unless the item is labeled with the clear and conspicuous words “Produced with Genetic Engineering.” Such food, seed, and seed stock is deemed misbranded if it does not

contain the required label, subject to the exceptions set forth below.

The labeling requirement goes into effect when five other states, with a total population of over 25 million, enact a mandatory labeling law for genetically-engineered food that is substantially consistent with the bill. These states must include (1) two bordering states or (2) New York and New Jersey.

The label must be displayed in the same size and font as the ingredients in the food label's nutritional facts panel. (It is unclear how this provision applies to products that do not have such panels.) The specifics of the labeling location vary depending on the type of item, as shown in Table 1.

**Table 1: Location of "Produced with Genetic Engineering" Label**

<i>Item Type</i>	<i>Required Location of Label</i>
Wholesale food not intended for retail sale	The bill of sale accompanying the food during shipping
Packaged food for retail sale	Presumably on the package
Raw agricultural commodity	(1) The package offered for retail sale or (2) for such commodities that are not separately packaged or labeled, on the retail store shelf or bin that displays them for sale
Seed or seed stock	(1) The container holding the items displayed for sale or (2) any label identifying the commodity's ownership or possession.

**Responsibility for Labeling.** Under the bill, anyone selling, offering for sale, or distributing in this state food, seed, or seed stock subject to the labeling requirement must ensure that the item is labeled. But despite this provision, a retailer is not liable for failing to label such items unless the retailer is the producer or manufacturer of the item and sells it under a brand the retailer owns, unless the failure to label was knowing and willful.

The bill defines a retailer as a person or entity that engages in the sale of food intended for human consumption to a consumer. A manufacturer is a person who produces such food, or seed or seed stock intended to produce such food, and sells such items to a retailer or distributor. A distributor is a person or entity that sells, supplies,

furnishes, or transports food intended for human consumption in this state that the person or entity did not produce.

***Exemptions from Labeling Requirement.*** The bill exempts from the labeling requirement:

1. alcoholic beverages;
2. food intended for humans that is not packaged for retail sale and is (a) a processed food prepared and intended for immediate consumption or (b) served, sold, or otherwise provided in a restaurant or other food facility primarily engaged in the sale of food prepared and intended for immediate consumption;
3. farm products sold by a farmer or his or her agent to a consumer at a pick-your-own farm, roadside stand, on-farm market, or farmers' market;
4. food consisting entirely of, or derived entirely from, an animal that was not genetically engineered, regardless of whether the animal was fed or injected with any genetically-engineered food or any drug that was produced through genetic engineering;
5. products derived from a single type of crop raised on a farm that produces not more than \$1.5 million in gross sales for the farmer on whose farm the crop was raised in the previous 12 months; and
6. processed foods that would be subject to such labeling solely because one or more processing aids or enzymes were produced or derived from genetic engineering.

Under the bill, a "processed food" is any food intended for human consumption other than a raw agricultural commodity. The term includes food produced from a raw agricultural commodity that has been processed through canning, smoking, pressing, cooking, freezing, dehydration, fermentation, or milling.

A "processing aid" is a substance added during processing to a food

intended for human consumption that:

1. is removed before packaging,
2. is converted into constituents normally present in the food without significantly increasing the amount of the constituents naturally found in the food, or
3. was added for its technical or functional effect in processing but is present in the finished food at insignificant levels without any technical or functional effect in the finished food.

***Exemptions from Being Deemed Misbranded.*** While subject to the bill's labeling requirement, the following are exempt from being deemed misbranded if they are not labeled:

1. food for humans that was produced without the producer's knowledge that a seed or food component was genetically-engineered (the bill does not specify how a producer would show this) or
2. on or before July 1, 2019, processed food subject to the bill's labeling requirement solely because it contains one or more genetically-engineered materials that in the aggregate do not account for more than 0.9% (9/10 of 1 percent) of the processed food's total weight.

However, it appears that knowing violations of the labeling requirement in regard to such items are still subject to the civil penalty described below.

### ***Civil Penalty***

Under the bill, anyone found to knowingly violate the labeling provisions is subject to a civil penalty of up to \$1,000 per day. The penalty applies per each uniquely named, designated, or marketed product, but not per individual item of the same product.

### **INFANT FORMULA**

Under existing law, the Food, Drug, and Cosmetic Act defines food

as (1) articles used for food or drink for people or other animals, (2) chewing gum, and (3) articles used for components of these. The bill specifically includes infant formula in the definition. Presumably, infant formula already fits within the act's definition of food.

Thus, the bill specifies that genetically-engineered infant formula is subject to the bill's labeling requirement unless an exception applies, as set forth above. Also, all infant formula is subject to the other provisions applicable to food in the Food, Drug, and Cosmetic Act. Among other things, the act bans the sale in intrastate commerce of food that is adulterated or misbranded.

The bill defines "infant formula" as a milk- or soy-based powder, concentrated liquid, or ready-to-feed substitute for human breast milk that is commercially available and intended for infants.

## **NATURAL FOOD**

Under existing law, "natural food" means food that has not been (1) treated with preservatives, antibiotics, synthetic additives, or artificial flavoring or coloring and (2) processed in a way that makes it significantly less nutritious.

Under the bill, food also cannot be described as "natural" if it is genetically-engineered. By law, foods that are advertised, distributed, or sold as "natural" without meeting the definition of that term are deemed misbranded.

## **DISTRIBUTOR AND MANUFACTURER**

Under the bill, the definitions of distributor and manufacturer (see above) apply to an existing provision providing that packaged food is deemed misbranded if it does not have a label indicating the name and place of business of the manufacturer, packer, or distributor. As this provision applies to food intended for humans as well as animals, the effect of this is unclear.

## **BACKGROUND**

### ***Misbranding Criminal Penalties***

The law prohibits misbranding food, or selling, or receiving and then selling misbranded food, in Connecticut (CGS § 21a-93). A first violation of this law is punishable by up to six months in prison, a fine of up to \$500, or both. Subsequent violations, or violations done with the intent to defraud or mislead, are punishable by up to one year in prison, a fine of up to \$1,000, or both (CGS § 21a-95).

Generally, a person is not subject to criminal penalties for selling misbranded food within the state, or receiving and then selling it, if he or she obtains a document signed by the person from whom he or she received the food in good faith, stating that the food is not misbranded in violation of this law. But this exemption does not apply to violations committed with the intent to defraud or mislead (CGS § 21a-95).

#### ***DCP Embargo and Seizure of Misbranded Food***

The law authorizes the DCP commissioner to embargo food that he determines or has probable cause to believe is misbranded. Once the commissioner embargoes an item, he has 21 days to either begin summary proceedings in Superior Court to confiscate it or to remove the embargo.

Once the commissioner files a complaint, the law requires the court to issue a warrant to seize the described item and summon the person named in the warrant and anyone else found to possess the specific item. The court must hold a hearing within five to 15 days from the date of the warrant. The court must order the food confiscated if it appears that it was offered for sale in violation of the law.

If the seized food is not injurious to health and could be brought into compliance with the law if it is repackaged or relabeled, the court may order it delivered to its owner upon payment of court costs and provision of a bond to DCP assuring that the product will be brought into compliance (CGS § 21a-96).

#### ***Federal Regulatory Authority***

In general, the U.S. Food and Drug Administration and the U.S. Department of Agriculture regulate labeling requirements of certain

foods through the federal Food, Drug, and Cosmetic Act (21 USC § 301 et seq.), the Poultry Products Inspection Act (21 USC § 451 et seq.), and the Meat Inspection Act (21 USC § 601 et seq.). These acts generally prohibit states from requiring that these foods be labeled in a manner inconsistent with federal labeling requirements.

### **Related Case**

The constitutionality of state laws requiring specific food labeling has been raised in federal courts, including the U.S. Second Circuit Court of Appeals.

In a case involving a Vermont law requiring dairy manufacturers to label milk and milk products derived from or that may have been derived from cows treated with recombinant bovine somatotropin (a synthetic hormone used to increase milk production), the Second Circuit ruled the law was likely unconstitutional on First Amendment grounds. The district court below had denied the dairy manufacturers' request to prevent the law's enforcement by ruling that they had not shown a likelihood of success under the First Amendment or Commerce Clause of the U.S. Constitution. But the Second Circuit concluded that Vermont's asserted state interest of a public "right to know" and strong consumer interest was inadequate to compel the commercial speech (i.e., the labeling requirement). Because the Second Circuit ruled on First Amendment grounds, it did not reach the Commerce Clause claims (*International Dairy Foods Association v. Amestoy*, 92 F. 3d 67 (2d Cir. 1996)).

The Commerce Clause of the U.S. Constitution gives Congress the power to regulate commerce among the states (U.S. Const. Art. I, § 8). It has also been held to mean that states cannot pass laws that improperly burden or discriminate against interstate commerce (i.e., the "dormant" Commerce Clause). Under this doctrine, a law that, on its face, discriminates against interstate commerce violates the Constitution unless there is no other means to advance a legitimate local interest. If a law is facially nondiscriminatory, supports a legitimate state interest, and only incidentally burdens interstate commerce, it is constitutional unless the burden is excessive in relation

to local benefits.

**Related Bills**

sSB 802, as amended and passed by the Senate on May 21, contains a similar labeling requirement. It contains fewer exceptions than this bill, and would go into effect (1) July 1, 2016 or (2) July 1, 2015 if similar laws are adopted in three nearby states before that date. It also specifically excludes genetically-engineered foods from the definition of “natural food.”

sHB 6519 (File 576), reported favorably by the Public Health Committee, generally provides that certain food items, seed, or seed stock are considered misbranded unless labeled as “Produced with Genetic Engineering.” The requirement would go into effect when similar mandatory labeling laws are adopted in any two nearby states. It specifically excludes genetically-engineered foods from the definition of “natural food.”

**COMMITTEE ACTION**

Children Committee

Joint Favorable  
Yea 11 Nay 1 (03/12/2013)

Public Health Committee

Joint Favorable  
Yea 21 Nay 3 (04/23/2013)

Judiciary Committee

Joint Favorable  
Yea 40 Nay 0 (05/07/2013)