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# ONE SIZE FITS ALL: A FEDERAL APPROACH TO ACCURATE LABELING OF CONSUMER PRODUCTS

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Accurate labeling of food and other consumer commodities empowers citizens to make informed decisions concerning the products they choose to bring into their lives.<sup>1</sup> Consumer demand greatly impacts markets and directly affects what businesses, producers, and manufacturers put out into the marketplace.<sup>2</sup> In 1913, prior to being appointed to the Supreme Court, Louis Brandeis described the development of competition in the market for consumer commodities.<sup>3</sup> Brandeis noted that historic bartering was merely a “contest of wits”; an exchange of two unknown values.<sup>4</sup> Upon the development and growth of the uses of money in exchanges, the monetary value on one end of the transaction was now apparent, however the commodity’s true value remained unclear.<sup>5</sup> The law at the time gave no sympathy to the ill-informed buyer, espousing the notion of “let the buyer beware.”<sup>6</sup>

Beginning in the late 1970s, the American public became increasingly interested in promoting and demanding access to information regarding the health and safety of workplaces, consumer products, environmental practices,

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1. Clifford Rechtschaffen, *CPR Perspective: The Public Right to Know*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/perspright.cfm> (last visited Jan. 10, 2020).

2. *Id.*

3. Louis D. Brandeis, *Competition that Kills*, HARPER’S WEEKLY, Nov. 15, 1913, *reprinted in* LOUIS D. BRANDEIS, BUSINESS—A PROFESSION Ch. 15 (1914), *reprinted in* Louis D. Brandeis, *Competition that Kills*, LOUIS D. BRANDEIS SCH. OF L. LIBR.: WRITINGS BY LOUIS D. BRANDEIS, <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-15> (last visited Jan. 10, 2020).

4. *Id.*

5. *Id.*

6. *Id.*

and chemical substances used in everyday life.<sup>7</sup> This movement, popularly known as the ‘right to know’ movement, began with a push towards disclosure of toxic substances used in production, as well as workplace exposure.<sup>8</sup> Developing into a distinct body of rules and regulations, ‘right to know’ laws have served as an effective means of protecting public health and the environment.<sup>9</sup> Supporters of the movement suggest that these laws empower consumers to make informed decisions, encourage both consumers and employees to advocate for their own safety and interest, and incentivize companies and businesses to engage in clean and environmentally sound practices.<sup>10</sup> ‘Right to know’ laws have been extremely effective, and it is imperative to consumer and environmental safety for their effectiveness to endure.<sup>11</sup>

This comment will discuss the impetus for enacting federal legislation to regulate labeling of potentially hazardous chemicals in consumer products, first by exploring existing legislation at both the federal and state level.<sup>12</sup> Then, closer examination of the issues and shortfalls of current law will illustrate the need for a new, uniform federal standard.<sup>13</sup> Finally, this comment will analyze a potential solution to ongoing consumer confusion and excessive burdens to business—the Accurate Labels Act.<sup>14</sup> Through an analysis of a law recently enacted by Congress to address similar problems related to food labeling, it is clear that the Accurate Labels Act serves as a viable solution to combat overregulation and effective preemptive qualities.<sup>15</sup>

## I. BACKGROUND

### A. Current Relevant Federal Legislation

Regulatory law in the United States often takes the shape of a web of legislation and rules—a complex system filled with directives and ambiguity, requirements and exclusions.<sup>16</sup> Regulation of product labeling is no exception, governed by rules with varying jurisdictional and preemptive qualities.<sup>17</sup> In the

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7. Eula Bingham, *The ‘Right-to-Know’ Movement*, 73 AM. J. PUB. HEALTH 1302, 1302 (1983).

8. *Id.*

9. Rechtschaffen, *supra* note 1.

10. *Id.*

11. *Id.*

12. *Infra* Sections IA, IB.

13. *Id.*

14. *Infra* Section II.

15. *Id.*

16. See *Regulation & the Economy: The Relationship & How to Improve It*, COMM. FOR ECON. DEV. OF THE CONFERENCE BD. (Sept. 27, 2017) <https://www.ced.org/reports/regulation-and-the-economy> (discussing the nature and complexity of the regulatory scheme).

17. *Infra* Sections IA, IB.

realm of product labeling, the Fair Packaging and Labeling Act (FPLA)<sup>18</sup> was enacted in 1966, serving as the primary vehicle for implementing labeling requirements on consumer commodities to identify the product and its contents.<sup>19</sup> Congress originally enacted the FPLA to bolster existing deficient federal legislative efforts; offering requirements for nutritional labeling, safety warnings, and notice of toxic substances.<sup>20</sup> Together, pre-FPLA legislation, the FPLA itself, and subsequent laws work together to establish a comprehensive regulatory scheme intended to protect consumers in the marketplace, yet still falls short of providing consumers with accurate and consistent safety labels and warnings of potentially hazardous substances.<sup>21</sup>

*1. Pre-FPLA: Gaps in Pre-Existing Federal Legislation Spurring Congressional Action*

Prior to the passage of FPLA, existing federal labeling and consumer protection laws proved inadequate due to critical gaps in their scope and ultimate inability to efficiently regulate and protect consumers.<sup>22</sup> Congress first passed a comprehensive federal consumer protection law with the Pure Food and Drugs Act (the “Act”)<sup>23</sup> in 1906.<sup>24</sup> The Act delegated authority to the U.S. Food and Drug Administration (FDA)<sup>25</sup> to prohibit the use of false or misleading labels.<sup>26</sup>

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18. Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–1461 (1966).

19. *Id.* at § 1451.

20. *Id.*; See also *infra* Section IA1.

21. See *infra* Sections IA2, IA3, IB.

22. See 15 U.S.C. § 1451 (suggesting that the purpose of the FPLA was to create a “fair and efficient function of a free market economy”).

23. Pure Food Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed in 1938). See *Part I: The 1906 Food and Drugs Act and Its Enforcement*, U.S. FOOD & DRUG ADMIN., (last updated Apr. 24, 2019) <https://www.fda.gov/about-fda/fdas-evolving-regulatory-powers/part-i-1906-food-and-drugs-act-and-its-enforcement> (highlighting the 1906 Act, which went by many names including the “Wiley Act,” the “Pure Food and Drugs Act,” and the “Federal Food and Drugs Act”).

24. *How did the Federal Food, Drug, and Cosmetic Act come about?*, U.S. FOOD & DRUG ADMIN. (last updated Mar. 28, 2018) <https://www.fda.gov/aboutfda/transparency/basics/ucm214416.htm>.

25. Today’s U.S. Food and Drug Administration was originally created as the Patent Office’s Agricultural Division. In 1862, the U.S. Department of Agriculture created the office and the office was transferred, becoming the new Department’s Division of Chemistry in 1890 and later the Bureau of Chemistry in 1901. Later in 1927, the office became the United States Food, Drug and Insecticide Administration. In 1930, the name was shortened to the U.S. Food and Drug Administration. However, it was not until 1940 that the FDA was transferred from the USDA to the then-called Federal Security Agency—which ultimately was renamed to the Department of Health and Human Services in 1979. *History of FDA’s Internal Organization: Brief Organizational History*, U.S. FOOD & DRUG ADMIN. (last updated Jan. 31, 2018) <https://www.fda.gov/about-fda/history-fdas-fight-consumer-protection-and-public-health/history-fdas-internal-organization>. Therefore, information published and laws enacted prior to 1930 will not refer to the agency that is delegated authority as the FDA, but rather the USDA and/or the Bureau of Chemistry. *Id.*

26. Eric Wall, A Comprehensive Look at the Fair Packaging and Labeling Act of 1966 and the FDA Regulation of Deceptive Labeling and Packaging Practices: 1906 to Today, DIGITAL ACCESS TO SCHOLARSHIP AT HARV., 5 (May 2002), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:8846774>.

While the Act focused on regulation of food branding and drugs, gaping holes existed among the categories of consumer products the Act covered, particularly in the realm of hazardous material.<sup>27</sup> The Act failed to require an accurate statement of ingredients or a statement of quantity, and provided no penalties for misleading packaging.<sup>28</sup> Realizing these severe shortcomings, Congress passed an amendment in 1913 requiring a statement on packages declaring the contents of food products.<sup>29</sup> However, even with the amendment, the Food and Drugs Act was inadequate in protecting consumers from fraud committed by deceptive companies using misleading marketing tactics.<sup>30</sup> Most commonly, consumers fell victim to tactics such as “slack fill” and “deceptive packaging,” two forms of fraudulent practices used to trick consumers into believing a package contained more of a product than actually present.<sup>31</sup>

While the harms to consumers were obvious, the Act failed to grant the FDA appropriate authority to execute the mandates of the law, resulting in barriers to enforcement of the Act.<sup>32</sup> The FDA was held to have no authority to correct fraudulent or abusive practices, leaving consumers with no remedy.<sup>33</sup> The FDA lobbied Congress in attempt to gain control over deceptive practices causing confusion among consumers, however most efforts failed.<sup>34</sup> However, eventually in 1930, Congress did enact legislation<sup>35</sup> which specifically granted the FDA teeth to enforce regulations specifically relating to canned food—requiring the FDA to set standards and for manufacturers to provide notice to consumers if those standards were not complied with.<sup>36</sup>

By the mid-1930s, the existing regulatory scheme continued to prove ineffective despite lawmakers’ efforts to protect consumers.<sup>37</sup> Harsh living conditions exacerbated by the Great Depression and epidemics sweeping the

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27. How did the Federal Food, Drug, and Cosmetic Act come about?, *supra* note 24.

28. Wall, *supra* note 26, at 5.

29. *Id.*

30. *Id.*

31. *Id.* Slack fill involves intentionally only filling a portion of a container so that consumers believe they are purchasing more of the product than the package actually contains. Slack fill can also involve adding water to a product to meet the advertised net weight. Deceptive packaging involves changing the form of the package itself, so that consumers are unable to perceive the true capacity. For example, bottles can contain inverted bottoms designed give the illusion that a greater quantity of the contents is present. *Id.*

32. *Id.*

33. *See id.* at 6 (explaining that the Solicitor of the Department of Agriculture found that the FDA could not remedy abusive practices employed by businesses).

34. *Id.*

35. Pub. L. No. 71-538, Ch. 874, 46 Stat. 1019–20 (1930).

36. *Id.* *See also* Wall, *supra* note 26, at 6 (highlighting the battle in Congress to enact new legislation, yet only with limited scope).

37. How did the Federal Food, Drug, and Cosmetic Act come about?, *supra* note 24.

country brought attention to the absence of legal safeguards.<sup>38</sup> Consumers still faced manipulative tactics in everyday purchases and the number of consumers physically harmed by everyday products had drastically escalated.<sup>39</sup> Citizens, including many children, were injured, poisoned, and killed by everyday products which spurred public outrage and a demand for action.<sup>40</sup> The failures of the original Food and Drugs Act were apparent, and new legislative efforts became necessary.<sup>41</sup> After years of debate, Congress responded to consumers' plights through passage of the 1938 Food, Drug, and Cosmetic Act (FDCA).<sup>42</sup>

The FDCA authorizes the FDA to regulate manufacturing processes; evaluate drugs, medical devices, and food additives; inspect any new or existing products on the market; recall products; and issue standards for labeling and marketing.<sup>43</sup> Congress intentionally designed the FDCA to grant the FDA inherently broad authority to adequately respond to threats to public health and safety and protect the public against misbranded and adulterated products.<sup>44</sup> However, the FDCA fell short in achieving a fair consumer market and the FDA was largely unsuccessful in litigation on misbranding.<sup>45</sup>

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38. Comm. On Interstate and Foreign Commerce, 93d Cong., A Brief Legis. Hist. of the Food, Drug, and Cosmetic Act 14, 3 (Comm. Print 1974).

39. How did the Federal Food, Drug, and Cosmetic Act come about?, *supra* note 23.

40. Id.; Marian Moser Jones & Isidore Daniel Benrubi, Poison Politics: A Contentious History of Consumer Protection Against Dangerous Household Chemicals in the United States, AM. J. OF PUB. HEALTH e1, e4–e55 (Mar. 14, 2013) (describing the hazards families faced in the early twentieth century as poisons proliferated homes); see also Poison in Common Products: The Poisoner's Handbook, PBS, <https://www.pbs.org/wgbh/americanexperience/features/poisoners-handbook-poison-common-products-other-photo-galleries/> (last visited Jan. 10, 2020) (displaying images of common household products in the early twentieth century containing poison). See also COMM. ON INTERSTATE AND FOREIGN COMMERCE, *supra* note 38, at 3. Highlighted as influential upon Congress in working to enact legislation, the disaster of “Elixir of Sulfanilamide” spurred legislators into action. This poison, marketed and administered to the general public as medication, had been tested for its “flavor, appearance, and fragrance, but, unfortunately, not for safety”—resulting in over one hundred tragic deaths. Id.; See also Carol Ballentine, Sulfanilamide Disaster: Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident, FDA CONSUMER MAG., June 1981, <https://www.fda.gov/files/about%20fda/published/The-Sulfanilamide-Disaster.pdf> (explaining the incident, including the victims, impact, and response to the event).

41. Wall, *supra* note 26 at 5–6.

42. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–99 (1938); See also COMM. ON INTERSTATE AND FOREIGN COMMERCE, *supra* note 38, at 3 (describing briefly the struggle to pass legislation to protect consumers and the market).

43. Food, Drug, and Cosmetic Act (FDCA), WESTLAW PRAC. L. GLOSSARY, [https://1.next.westlaw.com/Browse/Home/PracticalLaw?transitionType=Default&contextData=\(sc.Default\)&tabName=Practice%20Areas](https://1.next.westlaw.com/Browse/Home/PracticalLaw?transitionType=Default&contextData=(sc.Default)&tabName=Practice%20Areas) (in Westlaw Practical Law, search “Food, Drug, and Cosmetic Act;” then choose the first result from the Practical Law Glossary); see also COMM. ON INTERSTATE AND FOREIGN COMMERCE, *supra* note 38, at 4–6 (highlighting the major provisions of the 1938 Act).

44. COMM. ON INTERSTATE AND FOREIGN COMMERCE, *supra* note 38, at 3–4. Defined in the previous 1913 Amendment to the Food and Drugs Act, misbranding refers to the failure to plainly and conspicuously label the quality of contents of a package as to the weight or count of the product. Wall, *supra* note 26, at 5.

45. Wall, *supra* note 26, at 7.

Following World War II, industry faced a challenging and competitive economic environment, and therefore even honest businessmen were compelled to engage in deceitful tactics to stay economically viable.<sup>46</sup> Slack filling and deceptive packaging continued to plague consumers in everyday purchases of household products.<sup>47</sup> Further, packaging methods and marketing of food changed drastically due to increased consumer demand for supermarkets and prepackaged food.<sup>48</sup> Food manufacturers became the producer, the marketer, and the advertiser of their products.<sup>49</sup> Dominating the entirety of the industry through vertical integration, companies took advantage of consumers in a way previously unimaginable, which paved the way for the necessity of new legislation – the Fair Packaging and Labeling Act.<sup>50</sup>

*2. The FPLA: Filling in the Gaps of Previously Inadequate Federal Labeling Requirements*

The Fair Packaging and Labeling Act (FPLA),<sup>51</sup> first enacted in 1966, regulates “consumer commodities” with the primary goal of fostering fair competition and preventing deceptive labeling and packaging.<sup>52</sup> Despite other efforts to reduce harm to consumers, throughout the mid-twentieth century Americans struggled with unfair and inaccurate labeling of everyday products.<sup>53</sup> Consumers continued to criticize the food industry for embracing misleading tactics such as reducing net contents of a container while maintaining price, slack fill, illegible net weight or volume labels, obscure measurements in labels, misleading and meaningless language, lack of serving size labels, and misleading bargains or markdown labeling.<sup>54</sup> In 1962, President John F. Kennedy noted the importance of finding a solution for widespread problems in the labeling and marketing industry in the first Presidential message dedicated specifically to consumer interest.<sup>55</sup> President Kennedy laid out four rights belonging to all consumers that he believed the federal government had an affirmative duty to protect, including the right to safety, the right to be informed, the right to choose,

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46. *Id.* at 14.

47. *Id.*

48. *Id.*

49. *Id.* at 14–15.

50. *Id.* at 14–16.

51. Fair Packaging and Labeling Act, 15 U.S.C. § 1451–61 (1966).

52. *Fair Packaging and Labeling Act: Rule Summary*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-packaging-labeling-act> (last visited Jan. 15, 2020).

53. Wall, *supra* note 26, at 14–15.

54. *Id.*

55. *Id.* at 15–16.

and the right to be heard.<sup>56</sup> The President urged Congress to act,<sup>57</sup> which jumpstarted a lengthy research project which ultimately resulted in the passage of the FPLA.<sup>58</sup>

Throughout the four-year drafting and investigative process, Congress dedicated itself to assisting both consumers and manufacturers striving to meet the marketing-oriented objectives highlighted by President Kennedy.<sup>59</sup> In 1961, the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee began to investigate the need for new federal legislation to protect consumers from packaging and labeling abuses.<sup>60</sup> Senator Hart on the Subcommittee declared that consumers should be able to know the products they are buying, how much they are buying, and what the cost is.<sup>61</sup> Further, the Subcommittee's stated central goal in drafting new legislation was to protect the consumer from powerful companies using deceitful tactics.<sup>62</sup> Congress enacted the FPLA in response to the inadequacies of then-existing federal legislation, which left critical gaps in consumer protection laws.<sup>63</sup> Upon implementation of the FPLA, Congress stated its awareness that "informed consumers are essential to the fair and efficient functioning of a free market economy."<sup>64</sup> In order for consumers to be truly informed, packaging and labeling must accurately portray content and value.<sup>65</sup>

The FPLA grants the Federal Trade Commission (FTC) and the FDA the regulatory authority to require specific labels on products, including disclosure of contents, identification of the commodity, and information on the manufacturer, packer, or distributor of the product.<sup>66</sup> Under the law, the FDA and the FTC retain authority to create additional regulations in order to facilitate a fair market and prevent against deceptive practices.<sup>67</sup> To promote honesty in labeling, the FDA and the FTC can promulgate restrictions on ingredient descriptions, package fill, price labeling, and package size labeling as necessary.<sup>68</sup>

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56. PRESIDENT JOHN F. KENNEDY, *Special Message to Congress on Protecting Consumer Interest*, in PAPERS OF JOHN F. KENNEDY, PRESIDENTIAL PAPERS, PRESIDENT'S OFFICE FILES (Mar. 15, 1962) <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028>.

57. *Id.*

58. Wall, *supra* note 26.

59. Fair Packaging and Labeling Act, 15 U.S.C. § 1451 (1966).

60. Wall, *supra* note 26 at 16.

61. *Id.* at 16–17.

62. *Id.* at 16–18.

63. *Id.* at 18.

64. Fair Packaging and Labeling Act, 15 U.S.C. § 1451 (1966).

65. *Id.*

66. FED. TRADE COMM'N, *supra* note 52.

67. *Id.*

68. *Id.*



Though both the FTC and the FDA are granted authority to promulgate regulations under the FLPA, the agencies' authorities encompass varying categories of consumer commodities.<sup>69</sup> While the FDA issues regulations pertaining to food, drugs, cosmetics, and medical devices,<sup>70</sup> the FTC oversees and promulgates rules with respect to all other "consumer commodities," which refers to any item that is used in the household.<sup>71</sup> Further, the FPLA directs the Office of Weights and Measures of the National Institute of Standards and Technology, within the Department of Commerce, to ensure consistency and uniform labeling requirements exist between state and federal regulations.<sup>72</sup> The bilateral approach undertaken by the FPLA, with the FTC and the FDA acting in concert to enforce provisions of the Act, established revolutionary protection for consumers; yet despite the obvious successes, this approach still fails to adequately protect consumers today.<sup>73</sup>

### *3. Other Federal Legislation: Labeling Requirements Supplementing the FPLA*

Since Congress enacted the FPLA, several additional product safety and labeling requirement laws passed, adding to the growing web of consumer protection laws.<sup>74</sup> Through the various laws that have been enacted, multiple agencies have been granted authority to regulate the increasingly wide variety of products and labels.<sup>75</sup> A few of the more prominent pieces of legislation designed to protect consumer interests include the Consumer Product Safety Act,<sup>76</sup> the Toxic Substances Control Act,<sup>77</sup> and the Nutritional Labeling and Education Act.<sup>78</sup>

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See COALITION FOR ACCURATE PRODUCT LABELS, <https://www.accuratelabels.com/> (last visited Jan. 18, 2020) (explaining that while the FPLA successfully requires some types of labels, holes exist where states and cities have implemented their own labeling requirements).

74. *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/Regulations-Laws—Standards/Products-Outside-CPSCs-Jurisdiction/> (last visited Jan. 17, 2020).

75. See *id.* (listing several laws and products regulated by the federal government). Several agencies regulate a number of consumer products of varying type including the Federal Aviation Administration (aircrafts); Federal Trade Commission (business practices); National Highway Traffic and Safety Administration (automobiles, trucks, motorcycles, tires, car seats); Food and Drug Administration (cosmetics, drugs, foods, medical devices, veterinary medicines, electronic product radiation, tobacco and tobacco products); Environmental Protection Agency (pesticides, fungicides, toxic substances); U.S. Coast Guard (boats); Occupational Safety & Health Administration (Industrial/Commercial Products, some farm products); U.S. Chemical Safety and Hazard Investigation Board (Chemical Safety). *Id.*

76. Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972).

77. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976).

78. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990).

*a. The Consumer Product Safety Act*

The Consumer Product Safety Act (CPSA) was enacted in 1972 to ensure safety of consumer products.<sup>79</sup> This Act established an independent federal regulatory agency titled the Consumer Product Safety Commission (the Commission) and delegated to the Commission the authority to develop standards and regulate bans on certain products.<sup>80</sup> The Commission implements CPSA by issuing and enforcing mandatory standards on consumer products; developing voluntary standards for organizations, businesses, and manufacturers; overseeing recalls and their aftermath; researching potential hazards; and educating and informing consumers across the supply chain on safe product features.<sup>81</sup>

Congress, through the CPSA and several subsequent product safety laws,<sup>82</sup> has granted the Commission authority to regulate many types of consumer products.<sup>83</sup> The Commission regulates products ranging from “dishwashers to toys, from all-terrain vehicles to art supplies, from children’s sleepwear to portable gas generators, from cigarette lighters to household chemicals,” ensuring safety and appropriate labeling.<sup>84</sup> Additionally, the Commission must ensure that manufacturers and importers of consumer products confirm that their products comply with mandatory rules and testing procedures.<sup>85</sup> The Commission’s overarching goal is to protect the public from unreasonable risk from products they use daily.<sup>86</sup>

*b. The Toxic Substances Control Act of 1976*

In addition to CSPA’s scheme to protect consumers from products they bring into their homes every day, the Toxic Substances Control Act (TSCA) of

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79. *Contact/FAQ*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/About-CPSC/Contact-Information> (last visited Jan. 18, 2020).

80. *Consumer Product Safety Act (CPSA)*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Regulations-Laws—Standards/Statutes/Summary-List/Consumer-Product-Safety-Act> (last visited Jan. 18, 2020).

81. *Contact/FAQ*, *supra* note 79.

82. *Consumer Product Safety Act (CPSA)*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Regulations-Laws—Standards/Statutes/> (last visited Jan. 18, 2020). Congress has extended the Commission’s authority to protect the public by granting additional jurisdiction over products through the Consumer Product Safety Improvement Act (CPSIA), Children’s Gasoline Burn Prevention Act (CGBPA), Federal Hazardous Substances Act (FHSA), Child Safety Protection Act (CSPA), Flammable Fabrics Act (FFA), Labeling of Hazardous Art Materials Act (LHAMA), Poison Prevention Packaging Act (PPPA), Refrigerator Safety Act (RSA), Virginia Graeme Baker Pool and Spa Safety Act (VGB Act), Child Nicotine Poisoning Prevention Act of 2015 (CNPPA), and the Drywall Safety Act of 2012 (DSA). *Id.*

83. *Contact/FAQ*, *supra* note 79.

84. *Id.*

85. *Id.*

86. *Id.*

1976 provides the Environmental Protection Agency (EPA) with the regulatory authority over chemical substances and mixtures used in manufacturing and production of consumer products.<sup>87</sup> Excluded from TSCA are substances in food, drugs, and cosmetics, which are regulated under the FDCA by the FDA, and pesticides, which are regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>88</sup> by the EPA.<sup>89</sup> Generally, TSCA requires the reporting, record-keeping, and testing of certain hazardous substances that pose an extreme threat to consumers and public health.<sup>90</sup> TSCA was enacted after a series of “worker-related chemical scares” occurred in the 1960s and 1970s.<sup>91</sup> Congress spent several years debating several versions of the law until TSCA was finally enacted in 1976.<sup>92</sup> Through the new law, EPA’s Office of Toxic Substances (OTS) was delegated the authority to enforce requirements under TSCA, which worked closely with industry groups working to establish new regulations due to the need for safety and prevention of further accidents.<sup>93</sup> Congress intended for OTS to require manufacturers and companies to identify levels of risk, provide notice when new chemicals were used, establish a labeling and disposal system of dangerous chemicals, and keep detailed record of these chemicals.<sup>94</sup>

In 2016, the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act<sup>95</sup> amended TSCA in effort to better protect consumers from hazardous substances.<sup>96</sup> The amendment required the EPA to evaluate chemicals already on the market, implement risk-based assessments, increase consumer and public transparency, and provide consistent funding for the EPA to administer the law.<sup>97</sup> This bipartisan legislation was designed to protect the American public and update the outdated process in labeling products as toxic or hazardous.<sup>98</sup> Further, the ultimate goal of the amendment was to balance regulation of toxic chemicals

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87. *Summary of the Toxic Substances Control Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act> (last updated Sept. 10, 2019).

88. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 (1996).

89. *Summary of the Toxic Substances Control Act*, supra note 87.

90. *Id.*

91. *TSCA: From Inception to Reform*, SCI. HISTORY INST., <https://www.sciencehistory.org/tzca-from-inception-to-reform> (last visited Jan. 4, 2019).

92. *Id.*

93. *Id.*

94. *Id.*

95. Frank R. Lautenberg Chemical Safety For the 21st Century Act, Pub. L. 114-182, 130 Stat. 448 (2016).

96. *Assessing and Managing Chemicals under TSCA: The Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/assessing-and-managing-chemicals-under-tzca/frank-r-lautenberg-chemical-safety-21st-century-act> (last updated Aug. 14, 2019).

97. *Id.*

98. *Id.*

to protect families, while also promoting businesses through the development of new and better technology.<sup>99</sup> Today, TSCA heavily regulates products including asbestos, radon, lead, formaldehyde, and other extremely dangerous substances.<sup>100</sup> To protect the average citizen from these hazardous substances, TSCA requires the EPA to conduct testing and risk evaluations on both new and existing chemicals, which can ultimately result in restrictions or bans in the use of substances which could harm consumers.<sup>101</sup>

*c. The Nutrition Labeling and Education Act*

The Nutrition Labeling and Education Act (NLEA) passed in 1990 as an amendment to the Food, Drug, and Cosmetic Act.<sup>102</sup> Prior to implementation of NLEA, the U.S. lacked a comprehensive nutritional labeling scheme.<sup>103</sup> Through enacting NLEA, Congress delegated more specific authority to the FDA on the requirements of nutritional labeling and content claims on food products.<sup>104</sup> As consumer demands shifted, required labels shifted.<sup>105</sup> The scope of labeling expanded from messages purely on content or fill to messages on nutritional information and relevant health information.<sup>106</sup> Specifically, NLEA authorizes the FDA to require labeling of serving size, amount of fats, carbs, sugars, sodium,

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99. President Barak Obama, Remarks by the President at Bill Signing of the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (June 22, 2016, 11:34 AM), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/22/remarks-president-bill-signing-frank-r-lautenberg-chemical-safety-2st>.

100. *Toxic Substances Control Act and Federal Facilities*, U.S. ENVTL. PROT. AGENCY, [https://www.epa.gov/enforcement/toxic-substances-control-act-tsca-and-federal-facilities\\_\(last updated Jan. 29, 2018\)](https://www.epa.gov/enforcement/toxic-substances-control-act-tsca-and-federal-facilities_(last%20updated%20Jan.%2029,%202018)).

101. *Assessing and Managing Chemicals under TSCA: How EPA Evaluates the Safety of Existing Chemicals*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/how-epa-evaluates-safety-existing-chemicals> (last updated June 23, 2020). For example, under TSCA the EPA is currently reviewing a substance called trichloroethylene (TCE). TCE is toxic to humans, however, is used in the refrigerant manufacture industry and the dry-cleaning industry. TCE can have extremely harmful effects on humans including causing illness, birth defects, and cancer. While it is mostly used in a closed manufacturing system, some may be exposed to consumers, particularly in the dry-cleaning industry. Therefore, EPA has proposed a ban on TCE in certain uses to protect consumers. *Assessing and Managing Chemicals under TSCA: Risk Management for Trichloroethylene (TCE)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-trichloroethylene-tce> (last updated Jan. 18, 2020).

102. Michelle Meadows, *A Century of Ensuring Safe Foods and Cosmetics*, U.S. FOOD & DRUG ADMIN. CONSUMER MAG., Jan.–Feb. 2006.

103. *Id.*

104. U.S. Food & Drug Admin., Guide to Nutrition Labeling and Educ. Act (NLEA) Requirements, 2 (Aug. 1994).

105. See Meadows, *supra* note 102 (describing the changing laws and consumer responses, including the shift into more health-based labels).

106. U.S. Food & Drug Admin., A Food Labeling Guide: Guidance for Industry, 4 (Jan. 2013) <https://www.fda.gov/media/81606/download>.

etc., as well as other contents in the food, such as vitamins and minerals.<sup>107</sup> Congress granted FDA broad discretion in promulgating additional regulations regarding the nutritional content of food as the agency may determine to be necessary in the future, as consumer demands continue to evolve.<sup>108</sup>

NLEA further authorizes the FDA to administer a number of other regulatory measures ensuring disclosure of the nutritional content of products.<sup>109</sup> For instance, the FDA is authorized to develop a consumer education program regarding nutritional content labeling.<sup>110</sup> NLEA granted FDA jurisdiction to regulate font size of nutritional labels, language of labels, phraseology of nutrition information, other health claims, as well as other administrative aspects of nutritional labels.<sup>111</sup> Restrictions are put upon certain claims related to food, especially those pertaining to the nutritional nature of the food.<sup>112</sup> Further, the Act provides for specific exemptions from labeling requirements, including foods sold for immediate consumption in restaurants, certain small businesses, foods in certain types packaging, among others.<sup>113</sup>

While an extensive regulatory scheme exists to regulate hazardous products and consumer commodities, no federal law adequately provides a standard for additional disclosure of potential carcinogens, substances that may cause other health problems, or other pieces of information a consumer may desire to know before purchasing their product.<sup>114</sup> While existing federal law mandates various labels on a number of safety and health messages, no limit exists on what producers and manufactures may additionally claim on their product labels.<sup>115</sup> This structure has allowed states to develop individual regulatory schemes—some building off the existing federal legislation and taking it a step further, whereas others choose not to act at all. Today, most states have either established

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107. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990); CONG. RESEARCH SERV., SUMMARY: NUTRITION LABELING AND EDUC. ACT OF 1990, H.R. 3562, 101st Cong. (1990) <https://www.congress.gov/bill/101st-congress/house-bill/3562>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*; *See also* Meadows, *supra* note 102 (explaining phraseology used in labels required by NLEA). NLEA focuses upon statements such as “reduced risk of coronary heart disease,” or “reduce your risk of osteoporosis,” either granting or denying use of particular language. NLEA’s requirements are structure orientated, mandating use of particular phrases and the location of those phrases. In an effort to promote uniformity and consistency, NLEA has successfully imposed requirements on countries nationwide, providing consistency regarding health and nutritional labels. *Id.*

112. Summary: Nutrition Labeling and Educ. Act of 1990, *supra* note 107.

113. *Id.*

114. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 72 There should be a law to protect consumers’ ‘right to know’ of any potential hazard in their products. Currently, there is neither federal law which provides such standards, nor adequately limits states from creating their own laws which go beyond national standards. Several states and cities have passed inconsistent laws requiring mandatory labels on packages. *Id.*

115. *Id.*

highly restrictive requirements beyond the federal mandates, have not regulate labeling at all, or have embraced a combination of both.<sup>116</sup>

### *B. State Legislation*

Several states have promulgated labeling requirements with variations in restrictiveness and in the consumer products they encompass.<sup>117</sup> In 2017, eleven different states offered at least thirty different proposals which required warning labels or ingredient listings which go above and beyond national standards.<sup>118</sup> These requirements have affected labeling of products ranging from soda to cell phones and typically involve inconsistent mandates from state to state.<sup>119</sup> Inconsistencies in product labeling results in confusion and frustration, not only for industry working to comply with the requirements, but also consumers trying to decide what products to bring into their homes.<sup>120</sup>

#### *1. California leading the charge: Encompassing the most restrictive labeling requirements*

California has arguably the most comprehensive legislative scheme in place pertaining to labeling requirements through the Safe Drinking Water and Toxic Enforcement Act of 1986,<sup>121</sup> most commonly referred to by its original ballot initiative name – Proposition 65.<sup>122</sup> The law, which originally had an estimated cost of implementation to exceed over \$1 million,<sup>123</sup> was aimed at preventing business entities from engaging in activities harmful to public health by implementing strict labeling requirements.<sup>124</sup> Proposition 65 generally prohibits businesses from exposing people to any “chemicals known to cause cancer or reproductive toxicity without first giving clear and reasonable warning.”<sup>125</sup> Further, businesses may not “discharge such chemicals into drinking water,” which could cause significant health concerns.<sup>126</sup> Proposition 65 directs business owners to conduct exposure assessments and provide clear warnings that

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116. Id.

117. Id.

118. Id.

119. Id.

120. Id.

121. Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5-25250.25 (1986).

122. *Proposition 65 Law and Regulations*, OFF. ENVTL. HEALTH HAZARD ASSESSMENT, (Nov. 14 2016), <https://oehha.ca.gov/proposition-65/law/proposition-65-law-and-regulations>.

123. *Restrictions on Toxic Discharges into Drinking Water; Requirement of Notice to Persons' Exposure to Toxics*, PROPOSITION 65 BALLOT INITIATIVE STATUTE NOTICE, (1986), <https://oehha.ca.gov/media/downloads/proposition-65/general-info/prop65ballot1986.pdf>.

124. Id.

125. Id.

126. Id.

chemicals may be in the products consumers purchase, in homes or workplaces, or released into the environment so that consumers, armed with these warnings, can make “informed decisions about their exposure to these chemicals.”<sup>127</sup> Even if a business complies with federal standards related to chemical use and disclosure statements, that business must still undergo California’s exposure assessment process and a Proposition 65 warning label may still be required.<sup>128</sup>

The law requires California’s Office of Environmental Health Hazard Assessment (OEHHA) to release a list of chemicals that cause cancer, birth defects, or other reproductive harm.<sup>129</sup> OEHHA updates the list on a yearly basis, and it currently contains over 900 naturally occurring and synthetic chemicals.<sup>130</sup> The list contains a variety of substances, including dyes, additives, pesticides, household products, foods, drugs, and other consumer commodities that could pose a public health risk.<sup>131</sup> Warnings must not only be placed on products, but also located outside of buildings, rental homes, and workplaces that may contain a substance on the list.<sup>132</sup> Today, businesses must continually review the updated list and must provide a warning label with specific language if it becomes aware that it may expose one of the over 900 chemicals to any person or the environment.<sup>133</sup>

Proposition 65 has not only created substantial regulatory burdens for businesses to label products, but the law also comes with a heavy enforcement policy overseen by the California Attorney General.<sup>134</sup> Proposition 65 contains a citizen suit provision, allowing any member of the public to sue “in the public

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127. *About Proposition 65*, OFF. ENVTL. HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/about-proposition-65> (last visited Jan. 18, 2020).

See also PROPOSITION 65 BALLOT INITIATIVE STATUTE NOTICE, *supra* note 122. The original ballot initiative notice stated that a warning would be required for anything containing a carcinogen or chemical that could cause reproductive harm in an amount that exceeds 1/1,000th of the amount necessary for harm to actually occur.

128. *Proposition 65 Enforcement Reporting: Frequently Asked Questions*, CAL. OFF. ATT’Y GEN., <https://oag.ca.gov/prop65/faq> (last visited Jan. 18 2020).

129. *About Proposition 65*, *supra* note 127.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Businesses and Proposition 65*, OFF. ENVTL. HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/businesses-and-proposition-65> (last visited Jan 18, 2020). The only business automatically exempt from Proposition 65 labeling requirements are businesses with under 10 employees and government agencies. Further, if a business is able to determine that exposure levels are below OEHHA’s “safe harbor levels,” a label is not necessary. Not all chemicals have safe harbor levels, and therefore if there is any presence, a warning must be provided. Further, the label must contain a warning symbol and the word “warning,” as well as the language “known to the State of California to cause cancer, birth defects, and/or other reproductive harm.” The warning label should also direct consumers to the Proposition 65 website for more information. *Id.*

134. *Proposition 65 Enforcement Reporting*, CAL. OFF. ATT’Y GEN., <https://oag.ca.gov/prop65> (last visited Jan. 4 2019).

interest” pursuant to the law.<sup>135</sup> An individual filing suit must notify the state Attorney General to raise awareness of a potentially dangerous situation, and the Attorney General may intervene in the lawsuit if necessary.<sup>136</sup> Heavy litigation results from the aggressive stance Proposition 65 takes, often costing parties a substantial amount of money and resulting in consent decrees.<sup>137</sup>

## 2. Labeling Restrictions in Other States: Varying Approaches

While California has taken the greatest initiative in placing affirmative requirements on product labels, several other states have enacted laws and regulations encompassing similar standards.<sup>138</sup> However, no other state has resorted to measures as sweeping as California’s Proposition 65.<sup>139</sup> Nonetheless, by 2015 thirty-eight states had established over 250 laws and regulations regarding the use of toxic substances, with several other state legislatures continually considering new proposed chemical safety laws.<sup>140</sup> As such, states are becoming increasingly active in taking initiative to regulate potentially hazardous substances within their marketplaces, often focusing specifically on children.<sup>141</sup>

The state of Washington has established a law governing the use of certain substances in children’s products, known as the Washington State Children’s Safe Products Act (CSPA),<sup>142</sup> passed in 2008.<sup>143</sup> The CSPA limits industry’s ability to use lead, cadmium, phthalates, and other specific chemicals in consumer products.<sup>144</sup> Washington, like California, has developed a list of chemicals of concern which is updated annually.<sup>145</sup> However, under Washington’s law, manufactures are only required to report the presence of those

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135. Id.

136. Id.

137. Id.

138. Susan DeRagon & Jennifer Buoniconti, Presentation at the Promotional Products Association International Expo: CA Prop 65 and Other State Regulations, <https://expo.ppai.org/Sessions/handouts/Sunday%20320pm%20Prop%2065%20and%20State%20Regs.pdf> (last visited Jan. 18, 2020); Presentation at the Promotional Products Association International Expo: Prop 65 and State Regulations <https://expoeast.ppai.org/Sessions/handouts/Prop%2065%20for%20Expo%20East.pdf> (last visited Jan. 18, 2020).

139. Id.

140. Id.

141. Id.

142. Children’s Safe Products Act, WASH. REV. CODE ANN. §§ 70.240.010-70.240.060 (West 2016).

143. *Children’s Safe Products Act*, DEP’T ECOLOGY ST. WASH., <https://ecology.wa.gov/Waste-Toxics/Reducing-toxic-chemicals/Childrens-Safe-Products-Act> (last visited Jan. 18, 2020).

144. Id.

145. *Chemicals of high concern to children reporting list*, DEP’T ECOLOGY ST. WASH., <https://ecology.wa.gov/Regulations-Permits/Reporting-requirements/Reporting-for-Childrens-Safe-Products-Act/Chemicals-of-high-concern-to-children> (last visited Jan. 18, 2020).



chemicals if they appear in children's products.<sup>146</sup> Further, the law encompasses an enforcement component, which requires the government and manufacturers to test products ensuring information reported to consumers is accurate.<sup>147</sup> Products that have been reported are then logged into an online database, allowing consumers to search for products they have purchased for their children.<sup>148</sup>

Maine has also taken an aggressive stance in attempts to improve the chemical safety of consumer products through the Toxic Chemicals In Children's Products Law,<sup>149</sup> passed in 2008.<sup>150</sup> The law encourages an increased awareness of childhood and household chemical exposures, in hopes that consumers will choose safer alternatives.<sup>151</sup> Maine, similar to California and Washington, developed a list of chemicals which could pose a health risk to consumers.<sup>152</sup> However, unlike California or Washington, Maine structures the list into three tiers of priority, ranking and prioritizing the nearly 1,400 chemicals on the list based on level of concern.<sup>153</sup> Manufacturers that market products containing a chemical on the list must disclose use of that chemical to the Maine Department of Environmental Protection or eliminate it from its products.<sup>154</sup>

Further, several states have taken action limiting specific chemicals that pose a uniquely substantial threat to individuals and the public at large.<sup>155</sup> For example, several states have issued regulations banning the chemical Bisphoenol-A (BPA), which was historically used in manufacturing of plastics, particularly in water bottles and baby bottles. Research suggests that BPA can cause cancer and developmental defects.<sup>156</sup> BPA is now banned in a number of states including California, Connecticut, Delaware, Maine, Maryland, Minnesota, New York, Washington, Wisconsin, and Vermont.<sup>157</sup> Additionally, as the 'right to know' movement grows and develops, several states have issued

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146. *Children's Safe Products Act*, *supra* note 142.

147. *Id.*

148. *Children's Safe Product Act Reported Data*, DEP'T ECOLOGY ST. WASH., <https://fortress.wa.gov/ecy/cspareporting/> (last visited Jan. 18, 2020).

149. Toxic Chemicals In Children's Products Law, ME. REV. STAT. ANN. tit. 38, §§1691-1699 (2011).

150. *Safer Chemicals in Children's Products*, ME. DEP'T ENVTL. PROTECTION, <https://www.maine.gov/dep/safechem/> (last visited Jan. 18, 2020).

151. *Id.*

152. *Safer Chemicals in Children's Products*, ME. DEP'T ENVTL. PROTECTION, <https://www.maine.gov/dep/safechem/childrens-products/index.html> (last visited Jan. 18, 2020).

153. *Id.*

154. *Id.*

155. DeRagon & Buoniconti, *supra* note 138.

156. *Exposure to Chemicals in Plastic*, BREASTCANCER.ORG: LOWER YOUR RISK <https://www.breastcancer.org/risk/factors/plastic> (last visited Jan. 18, 2020).

157. DeRagon & Buoniconti, *supra* note 138.

a variety of regulations which target a range of products and chemicals, ranging from lead to mercury.<sup>158</sup>

## II. ANALYSIS

States across the country have taken their own paths to regulate warning labels on consumer products in varying degrees to supplement existing federal laws.<sup>159</sup> Rather than one unified standard, consumers are left to sort through a myriad of labels on their products.<sup>160</sup> While these laws have commendable goals to promote public safety and prevent harm, under the current system businesses are needlessly burdened by overregulation and consumers are left utterly confused or even misled.<sup>161</sup> Businesses which market products across the country are forced into complying with dozens of laws all promulgated for the same purpose.<sup>162</sup> For example, a single entity doing business across the country and marketing a consumer product manufactured with a certain chemical must meet standards under TSCA, additionally attach a label with a Proposition 65 warning so that it can be sold in California, while also meet reporting requirements in states such as Washington and Maine.<sup>163</sup> Compliance with individualized requirements can be difficult to maintain and lead to heavy litigation, which comes with a hefty price tag.<sup>164</sup>

As President Kennedy stated in 1962, it is essential for our nation to have an informed public, capable of making decisions on products and the risks those products might present.<sup>165</sup> Consumers should be informed of any risk they are presented with upon using necessary or convenience products, however that notification must be accurate and understandable.<sup>166</sup> Today, consumers are exposed to a variety of warning labels that often do not provide enough information for an informed choice to be made.<sup>167</sup> Consumers find it impossible to fully understand warning labels without statements pertaining to the risk level,

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158. *See id.* (pointing out Rhode Island's jewelry warning label legislation; Pennsylvania's legislation regarding labeling of stuffed toys; and several other states with legislation warning consumers about various dangers, including a polybag suffocation warning found in many states' statutes).

159. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

160. *Id.*

161. Lisa A. Robinson et al., *Efficient Warnings, Not "Wolf or Puppy" Warnings*, HARV. KENNEDY SCH. FACULTY RESEARCH WORKING PAPER SERIES, 14-15 (2016).

162. *Id.*

163. DeRagon & Buoniconti, *supra* note 138; COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

164. *Id.*

165. President John F. Kennedy, *supra* note 56.

166. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

167. Robinson, *supra* note 161, at 2-3.

and many may ignore warning labels altogether given their sheer abundance.<sup>168</sup> This can lead to a confused and misled public, uncertain of the meaning behind the label or whether their product is safe.<sup>169</sup>

To prevent severe overregulation on business and industry across the country and to genuinely support the ‘right to know’ movement, Congress should take action to develop a national labeling standard which prevents overregulation and contains strong preemptive qualities.<sup>170</sup> In order to combat overregulation, a new federal standard must only target actual, science-based risk.<sup>171</sup> As a result, consumers will be more in tune with the magnitude of the risks they face when purchasing products.<sup>172</sup> Further, to prevent states from continuing to create alternative standards and requirements, a new federal law must establish complete preemption.<sup>173</sup> The Accurate Labels Act,<sup>174</sup> proposed by the 115<sup>th</sup> Congress in 2018 offered a solution to address both overregulation and

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168. Robinson, *supra* note 161, at 17–21. Using California’s proposition 65 warning labels as an example, Robinson describes such labels as “wolf or puppy” warnings. Considering the vast scope of the products required to bear a label, and no indication of the magnitude of the risk, consumers are confused and left with a binary choice—does this product present great danger (wolf) or is it the risk so diluted or miniscule that the product is essentially harmless (puppy)? For example, a consumer noting a warning tag on a cup of coffee that contains the Proposition 65 cancer and birth defects warning may believe that coffee poses as much of a threat to them as smoking cigarettes. With no clear indication otherwise, consumers are left to their own volition to assess the risk in their cup of coffee, which in reality presents “puppy” type risk, almost no risk at all. Daily coffee drinkers may come to ignore this warning, along with other Proposition 65 warnings, once they come to realize their coffee does not present a significant “wolf” type risk to them. Then, when consumers actually do encounter a product that does present a more significant “wolf” type risk, the warning might be altogether ignored. Rather than producing an informed public capable of making decisions, consumers are misled and confused through this type of labeling system. *Id.*

169. *Proposition 65 Enforcement Reporting: Frequently Asked Questions*, *supra* note 127128. The “Frequently Asked Questions” section of the California Attorney General’s website exemplify confusion consumers face when interpreting Proposition 65 warnings. The page explains that Proposition 65 warnings are “on so many products and on the premises of so many business” so that consumers can decide whether or not to be exposed to those chemicals. The page goes on to explain that the lack or existence of a warning does not make a place or a product “safe” or “unsafe.” *See also* Proposition 65 Fact Sheet for Tenants, OFF. ENVTL HEALTH HAZARD ASSESSMENT, (Feb. 1 2014), <https://oehha.ca.gov/proposition-65/proposition-65-fact-sheet-tenants>. In a “Frequently Asked Questions Fact Sheet” created for concerned tenants of apartment complexes which bear the Proposition 65 warning label, OEHHA explains that there is not an immediate health risk to families from living in the apartment. The warning can be provided “even though the level at which the chemical is present is actually too low to pose a significant health risk.” *Id.*

170. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

171. *Id.*

172. *Id.*

173. *Id.*

174. Accurate Labels Act, H.R. 6022, 115<sup>th</sup> Cong. (2018); Accurate Labels Act, S. 3019, 11<sup>th</sup> Cong. (2018) (hereinafter Accurate Labels Act). The House and Senate versions of the Accurate Labels Act were identical.

preemption of state laws while supporting an accurate system of labeling to create a more informed consumer population.<sup>175</sup>

*A. A Potential Solution: Accurate Labels Act*

In June of 2018, both the Senate and House of Representatives introduced the Accurate Labels Act.<sup>176</sup> The Accurate Labels Act would amend the FPLA by requiring all federal and state laws and regulations governing labeling or information declarations to comply with minimum scientific standards set by the federal government.<sup>177</sup> The proposed law primarily aimed to ensure consumers receive accurate and clear information in a uniform fashion on the products they use, purchase, and consume.<sup>178</sup> The Accurate Labels Act would support the FPLA's original purpose—"to prevent unfair or deceptive packaging and labeling" of consumer goods.<sup>179</sup> As compared to other federal laws which protect consumers from hazards in specific categories of everyday products, the FPLA's broad jurisdictional scope offers Congress the flexibility to enact sweeping reform to labeling laws through such as the Accurate Labels Act.<sup>180</sup> An amended FPLA containing provisions like those proposed in the Accurate Labels Act would further the intent of Congress in enacting FPLA by providing consumers the ability to make informed decisions and providing compliance consistency for industry.<sup>181</sup>

The Accurate Labels Act extends the directive granted to the FDA and FTC in the FPLA to set minimum, national standards.<sup>182</sup> The Accurate Labels Act focuses on science-based and risk-based requirements in developing labeling mandates regarding chemical composition of products.<sup>183</sup> To avoid overregulation and consumer confusion, reliance upon sound science is imperative.<sup>184</sup> The Accurate Labels Act mandates the use of the "best available science" to determine the true health hazards of organic or inorganic chemical constituents or radiation.<sup>185</sup> Agency experts promulgating new regulations must

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175. *Id.*

176. *Id.* See also *Legislative FAQs*, <http://clerk.house.gov/legislative/legfaq.aspx> (last visited Jan. 8 2019). With a new Congress sworn in on January 3, 2019, this version of the Act is dead. However, in the new session similar legislation should be proposed.

177. Accurate Labels Act; COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

178. *Id.*

179. FEDERAL TRADE COMMISSION, *supra* note 52.

180. *Id.* Rather than narrowly focusing on health claims like NLEA, or particular hazardous substances like TSCA, FPLA offers an avenue flexible enough to create an effective amendment such as the Accurate Labels Act.

181. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

182. *Id.*

183. Accurate Labels Act.

184. *Id.*

185. *Id.* The Accurate Labels Act covers hazards to consumers that could come from chemical substances (constituents) or radioactive substances (radiation).

rely upon “sound and objective scientific practices” which are reliable, ideally peer-reviewed, and collected through the best or most widely accepted method.<sup>186</sup> Using the “best available science,” experts must determine the “de minimis” level of risk a chemical substance presents to an individual as a carcinogen or systemic toxicant causing reproductive or developmental problems.<sup>187</sup> The risk evaluation must consider a number of factors including a “biologically plausible pathway,” the “nature and severity” of the health impacts, the likelihood of injury, the size of the at-risk population, potential exposure to multiple constituents, and the “degree of any relevant scientific uncertainties.”<sup>188</sup>

Based upon the scientific evidence and risk assessment, labeling of “covered information”<sup>189</sup> regarding consumer products or commodities can be triggered.<sup>190</sup> These “covered products”<sup>191</sup> may then expressly, or through implication, state a claim “regarding or characterizing the relationship between any constituent” and a disease, a health-related condition or likelihood of a health-related condition, or a toxicological endpoint.<sup>192</sup> The responsibility to display or communicate this information is legally enforceable, however businesses are given flexibility to provide the information to a consumer in several ways.<sup>193</sup> All information declarations must be “clear, accurate, and not misleading or deceptive to consumers.”<sup>194</sup>

The Accurate Labels Act contains important provisions regarding exemptions of certain otherwise “covered” product information, as well as an avenue for businesses to provide additional information beyond the law’s requirements.<sup>195</sup> Generally, no declaration is required if the presence of a constituent or radiation falls below the science- and risk-based de minimis

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186. *Id.*

187. *Id.* With respect to carcinogens, if the risk evaluation involves a linear model, the de minimis risk level of exposure to the constituent or radiation every day for 70 years would result in a not greater than 1 in 100,000 chance of developing cancer in the exposed individual. If the risk evaluation involves a non-linear model, the de minimis risk level of exposure to the constituent or radiation every day for 70 years would result in a not greater than 1 in 1,000 chance of developing cancer in the exposed individual. With respect to a systemic toxicant which cause reproductive or developmental harm, the de minimis risk level of exposure to the constituent or radiation would result in a not greater than 1 in 1,000 chance of a significant adverse health impact. *Id.*

188. *Id.* at § 14(a)(13).

189. *Id.* at § 14(a)(4). Information that is legally required to be declared, such as exceedance of the de minimis level.

190. *Id.* at § 14(a).

191. *Id.* at § 14(a)(13). Products that are legally required to have a declaration attached.

192. *Id.* at § 14(a)(5–6).

193. *Id.* at § 14(a)(4). Information may be provided through: a statement; a notice; a caution; a warning; a symbol; a pictogram; a vignette; packaging information; a sign; pamphlet; an instruction; a list of ingredients; ingredient declaration information; a database; an internet website; or other media, including social media. *Id.*

194. *Id.* at § 14(b)(2).

195. *Id.* at § 14(b)(2)(A)(vi).

standard.<sup>196</sup> The law goes on to exempt “non-functional constituents”<sup>197</sup> and “naturally occurring constituents,”<sup>198</sup> offering protection for farmers, manufacturers, and businesses which may produce products inadvertently containing trace amounts of chemical constituents.<sup>199</sup> Importantly, these exemptions only apply when the constituent poses no threat to public health.<sup>200</sup> When a declaration is necessary, the Act also provides industry the opportunity to include supplemental or clarifying information, provided that the information is clear and accurate.<sup>201</sup> Businesses are allowed to disclose the “covered information” and additional accurate clarifying information via electronic or digital links or telephone numbers printed on the package, leading customers to additional information regarding the composition of the product.<sup>202</sup>

A key provision of the Accurate Labels Act offers strong preemptive qualities.<sup>203</sup> To prevent states, cities, territories, or any other political subdivision from creating standards that diverge from the standard laid out by the Accurate Labels Act, the law forbids any other requirements from existing, unless they directly reflect the Act’s requirements.<sup>204</sup> Furthermore, the Act emphasizes that no state, or political subdivision of a state, “may impose a requirement or prohibition with respect to information, warning, and labeling requirements applicable to consumer commodities or consumer products that is in addition to, or different than, the requirements” laid out by the Accurate Labels Act.<sup>205</sup> This provision will effectively preempt state laws such as California’s Proposition 65,

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196. *Id.* at § 14(b)(2)(C). Declarations are not required regarding a constituent (organic or inorganic chemical substance) when the concentration in the covered product is below 0.1 percent. Declarations are not required regarding radiation if the level of emissions is below the established de minimis standard.

197. *Id.* at § 14(a)(9). A product is exempt when the constituent is non-functional, meaning the constituent is an insignificant, incidental component of an ingredient; an insignificant breakdown product of an ingredient; a byproduct of manufacturing; has not been added intentionally during manufacturing; serves no technical or functional effect; and does not endanger public health.

198. *Id.* at § 14(a)(8). A product is exempt when the constituent is naturally occurring, meaning the constituent occurs in “any plant, animal, or microorganism,” or “any raw material or a constituent derived from a plant, animal, or microorganism that composes or is a part of the covered product.” Constituents are also considered naturally occurring, thus exempting the product, when the constituent occurs in the product due to permitted activity; activity authorized by regulation; human activity; “physical processing, preparation, or packaging” of a “plant, animal, microorganism,” or “any raw material or constituent derived from permitted or authorized activity.”

199. *Id.* at § 14(b)(2)(A)(v). The law additionally exempts trade secrets from inclusion.

200. *Id.*

201. *Id.* at § 14(b)(2)(A)(vi); *Id.* at § 14(c).

202. *Id.* at § 14(c). The product’s packaging must contain enough information to direct a consumer to a website with covered information, direct a consumer to digitally scan a smart label that can be read by an electronic device leading to a website with covered information, or direct a consumer to call a telephone number where they will receive covered information. *See also* COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73 (explaining that 83% of Americans support receiving information via smart label).

203. Accurate Labels Act § 14(b)(1).

204. *Id.*

205. *Id.* at § 2(b)(1).

Washington's Children's Safe Products Act, and Maine's Toxic Chemicals In Children's Product Law from existing.<sup>206</sup>

*B. The Accurate Labels Act: Addressing the Issue of Overregulation*

*1. Current Issues with Overregulation: Proposition 65*

While Proposition 65 was originally designed to warn consumers of potential exposure to carcinogenic or dangerous chemicals,<sup>207</sup> these warnings reach too far and have become increasingly meaningless to consumers and costly to businesses.<sup>208</sup> Health hazard warning labels complying with Proposition 65 can be found nearly everywhere in the state of California—from Starbucks to Disneyland, furniture to tuna, hotels to cocktails.<sup>209</sup> Proposition 65's overbearing nature has not only caused confusion for consumers, but also heavy litigation.<sup>210</sup> Businesses across the United States lost a total of \$182.1 million between 2010 and 2017 in settling Proposition 65 law suits alone, and this figure does not include the amount of money that went towards cases that went to trial.<sup>211</sup> Several of these cases illustrate Proposition 65's overreach, igniting frivolous litigation that perpetuates excessive labeling on products that are not hazardous.<sup>212</sup>

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206. *Id.*

207. Revised Final Statement of Reasons, CAL. CODE REGS. tit. 22, §2201 (1988), <https://oehha.ca.gov/media/downloads/cmr/12102form12201fsornov1988.pdf>.

208. See The Times Editorial Board, *Warning: Too many warning signs are bad for your health*, L.A. TIMES (Sept. 30 2017), <http://www.latimes.com/opinion/editorials/la-ed-proposition-65-warning-coffee-20170930-story.html> (pointing out that businesses use a "prophylactic" approach to avoid liability, and that these warnings do not describe the risk or explain the severity or chemical at issue).

209. Sara Chodosh, *California needs to stop saying everything causes cancer*, POPULAR SCI. (Apr. 4 2018), <https://www.popsi.com/california-coffee-cancer-warning#page-2>.

210. DeRagon & Buoniconti, *supra* note 138. See also *Proposition 65 Enforcement Reporting: Annual Reports of Settlements*, <https://oag.ca.gov/prop65/annual-settlement-reports> (listing summaries of settlements by year since 2000).

211. Brianne Kincaid, *2018 Proposition 65 State Impact Report*, CTR. FOR ACCOUNTABILITY IN SCI. (2018), <https://www.accountablescience.com/wp-content/uploads/2018/06/2018-Proposition-65-State-Impact-Report.pdf>.

212. See Hogan Lovells, *California Judge Rules Against the Coffee Industry in Notable Acrylamide Proposition 65 Case*, LEXOLOGY: A SEAT AT THE TABLE, (Apr. 5 2018), <https://www.lexology.com/library/detail.aspx?g=4791cf19-c2fa-4e15-8cf1-5cb05f752030> (noting that Proposition 65's private litigant provision creates "bounty-hunters" which go after several companies each year in effort to compel labeling and reap massive financial gains in court proceedings). See also The Times Editorial Board, *Coffee isn't going to kill anyone. California needs a smarter system to let us know what's dangerous*, L.A. TIMES (June 19 2018), <https://www.latimes.com/opinion/editorials/la-ed-prop-65-coffee-20180619-story.html> (describing a court ruling that coffee must carry a Proposition 65 warning label as "an unfortunate outcome of a ridiculous lawsuit by an opportunistic attorney that never should have been filed").

Proposition 65's labeling requirements can extend to products that are not hazardous and may even provide health benefits, such as coffee.<sup>213</sup> In *Council for Education and Research on Toxics v. Starbucks Corp.*,<sup>214</sup> the plaintiffs alleged that Starbucks<sup>215</sup> failed to provide a Proposition 65 warning on ready-to-drink coffee.<sup>216</sup> When coffee beans are roasted, a chemical substance called acrylamide forms, which is on California's Proposition 65 list of potentially hazardous chemicals.<sup>217</sup> However, acrylamide's cancer causing qualities have been debated in the scientific community.<sup>218</sup> In Phase I of the trial, the defendants argued that coffee is a complex substance, composed of several chemicals, which as a whole do not increase cancer risks.<sup>219</sup> Nonetheless, Judge Berle ruled on the side of the plaintiffs, arguing that Proposition 65 requires a specific type of "quantitative risk assessment" which assesses the risk from exposure of the acrylamide itself, not coffee as a mixture.<sup>220</sup>

In March of 2018, Judge Berle issued a Phase II decision, again siding with the plaintiffs.<sup>221</sup> Defendants argued that acrylamide should fall under an exception in Proposition 65, allowing an exemption to the labeling requirement if chemicals are formed in food through a cooking process to make the food

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213. See Karen Kaplan, *Two big studies bolster the claim that coffee—even decaf—is good for you*, L.A. TIMES (July 10 2017), [https://www.latimes.com/science/sciencenow/la-sci-sn-coffee-health-20170710-story.html?int=lat\\_digitaladshouse\\_bx-modal\\_acquisition-subscriber\\_ngux\\_display-ad-interstitial\\_bx-bonus-story](https://www.latimes.com/science/sciencenow/la-sci-sn-coffee-health-20170710-story.html?int=lat_digitaladshouse_bx-modal_acquisition-subscriber_ngux_display-ad-interstitial_bx-bonus-story), (explaining that research has shown that drinking coffee can decrease risk of health disease, diabetes, and cancer).

214. *Council for Educ. and Res. on Toxics v. Starbucks Corp.*, No. BC435759, (Cal. Super. Ct. L.A. Cty Mar. 28 2018), <http://www.lawbc.com/uploads/docs/00237823.pdf>.

215. See Hogan Lovells, *supra* note 212 (noting that Starbucks was the named defendant, along with 91 other defendants).

216. DLA Piper, *California court's narrow Prop 65 coffee ruling should not be misinterpreted*, LEXOLOGY (Apr. 9 2018), <https://www.lexology.com/library/detail.aspx?g=d9d8d3c4-d0a8-46fd-a1af-8f6c32135152>.

217. *Id.*

218. *Id.* A study conducted in 2011 noted that "studies on dietary intake of acrylamide and cancer risk suffer from several potential sources of bias." Further, while not completely ruling out any cancer risk, the study concluded that "epidemiologic studies do not suggest an increased risk of cancer from dietary or occupation exposure to acrylamide." Nonetheless, California requires a warning label. See also *supra* note 196 (pointing out that acrylamide is formed when starchy foods are cooked at a high heat, including coffee beans, potatoes (chips and french fries), asparagus, and more. While a study found that acrylamide may cause more cases of cancer, the dosage would have to be extraordinarily high. Other studies suggest that acrylamide is not carcinogenic in any way. Nonetheless, the issue remains debated). See also Hogan Lovells, *supra* note 212 (suggesting that bounty hunters have taken advantage of the listing of Acrylamide on the Proposition 65 list, filing several actions against companies that market foods that contain acrylamide).

219. Hogan Lovells, *supra* note 212.

220. DLA Piper, *supra* note 216.

221. *Id.*; *Council for Educ. and Res. on Toxics v. Starbucks Corp.*, *supra* note 214.



palatable or to avoid microbiological contamination.<sup>222</sup> Again, however, the defendants failed to correctly perform a “quantitative risk assessment,” focusing on acrylamide’s risk generally, and not the risk of acrylamide in coffee.<sup>223</sup> Despite the fact that neither the plaintiffs nor Judge Berle asserted that coffee does cause cancer, defendants are now compelled to label products containing acrylamide with Proposition 65 carcinogenic warnings, warning all consumers that their morning coffee could cause cancer.<sup>224</sup> Required labeling of products clearly not hazardous to consumers, such as coffee, stands as an example of Proposition 65’s sweeping overbreadth—burdening both businesses compelled to label and consumers attempting to understand how a cup of coffee might give them cancer.<sup>225</sup>

Proposition 65’s broad grasp reaches both substances considered safe or healthy, such as coffee, and also controversial substances already heavily regulated though federal and state law.<sup>226</sup> While the cancer causing nature of glyphosate,<sup>227</sup> the active ingredient in the weed-killer known as RoundUp has been widely debated, recent litigation clearly demonstrates the tension between the state and federal regulatory schemes.<sup>228</sup> The potential dangers of glyphosate aside, without an accurate product label, consumers are incapable of accessing valuable health information regarding the product.

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222. Council for Educ. and Res. on Toxics v. Starbucks Corp., *supra* note 214. This exemption is known as the Alternative Significant Risk Level (ASRL). Typically, producers must label if the No Significant Risk Level (NSRL) is exceeded. However, when sound science and considerations of public health support an alternative level, and exception can be made.

223. *Id.*; Hogan Lovells, *supra* note 212.

224. *Id.*

225. *Id.*; See also DLA Piper, *California’s Prop 65 regulator moves to counteract court ruling, exclude Prop 65 cancer warnings for coffee*, LEXOLOGY (June 21 2018), <https://www.lexology.com/library/detail.aspx?g=1c689f48-3d2c-4f9f-a694-1551f11b33ec>. The state of California itself seems to have recognized this regulatory overreach. OEHHA has proposed to exempt specifically coffee manufacturers from Proposition 65 requirements, effectively counteracting its favorable ruling from Judge Berle. While no final action has been taken, California has acknowledged the beneficial effects of coffee and that it “should be viewed differently.” *Id.*

226. Rachel Graf, *Calif. Can’t Require Monsanto To Add Weed Killer Warning*, LAW360 (Feb. 27 2018), <https://www.law360.com/articles/1016449/calif-can-t-require-monsanto-to-add-weed-killer-warning>.

227. *Glyphosate*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/ingredients-used-pesticide-products/glyphosate> (last visited Jan. 18, 2020). Glyphosate is more commonly known as Roundup. It has been used in agriculture and commercially since the 1970s as an herbicide to combat weeds. The Environmental Protection Agency (EPA) states that “glyphosate has low toxicity for humans.” See also *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities>, (last visited Jan. 18, 2020). Like all pesticides, glyphosate is regulated by the federal government through FIFRA.

228. *Nat’l Ass’n of Wheat Growers v. Zeise*, 309 F.Supp.3d 842 (E.D. Cal. 2018).

Decided in 2018, in *National Association of Wheat Growers v. Zeise*,<sup>229</sup> agricultural associations filed suit in federal district court against OEHHA seeking an injunction against the state of California from requiring a Proposition 65 warning on glyphosate products.<sup>230</sup> The plaintiffs argued that the label requirement violates the First Amendment, compelling the associations to make “false, misleading, and highly controversial statements” regarding the carcinogenic qualities of glyphosate, considering the EPA and other organizations have found no cancer causing evidence.<sup>231</sup> Judge Shubb concluded that the warning label can be considered to be “government speech” and therefore escapes First Amendment regulation.<sup>232</sup> However, Judge Shubb found that the warning does require commercial speech, which must be “purely factual and uncontroversial.”<sup>233</sup> The Judge ultimately held that the warning label would not be “factually accurate and uncontroversial because it conveys the message that glyphosate’s carcinogenicity is an undisputed fact, when almost all other regulators have concluded that there is insufficient evidence that glyphosate causes cancer,” therefore misleading the average customer.<sup>234</sup> Attempting to require carcinogenic labeling of glyphosate products considered non-carcinogenic by the EPA illustrates the length of Proposition 65’s regulatory arm, which continues to cause confusion for consumers and burdens business owners.<sup>235</sup>

## 2. Solving Issues of Overregulation: The Accurate Labels Act

The central goal of both the FPLA and the Accurate Labels Act is to provide consumers with accurate and clear information on consumer products.<sup>236</sup> Establishing a unified risk-based standard, grounded in the best available science, will combat overregulation causing consumer confusion and burdens to businesses.<sup>237</sup> Overregulation results from varying laws and rules across the country, requiring different standards from state to state, many of which are not grounded in science, such as Proposition 65.<sup>238</sup> Without a consistent or accurate baseline for requirements, regulatory bodies are free to impose rules on products

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229. *Id.*

230. Graf, *supra* note 226. When updating the Proposition 65 list, OEHHA considers outside group’s classifications of chemicals such as the EPA, the FDA, and the International Agency for Research on Cancer (IARC). Glyphosate was classified as “probably carcinogenic” by the IARC, however is not considered to be carcinogenic according to the EPA.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Accurate Labels Act.

237. *Id.*

238. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

that are already regulated or not hazardous to consumers, completely counteracting the laudable intentions of the laws.<sup>239</sup> New federal legislation, such as the Accurate Labels Act, can bridge the gap between intentions to provide consumers with the ability to make informed decisions and effective rulemaking, severing the tendency to overregulate.<sup>240</sup> As required by the Accurate Labels Act, only science-based and risk-based requirements can be imposed which will provide a clearer image for both producers required to label, and consumers attempting to navigate their meaning.<sup>241</sup>

### *C. The Accurate Labels Act: Addressing the Issue of Preemption*

#### *1. Current Issues with Preemption: Local Laws*

A necessary tool to combat overregulation in the current labeling system is federal preemption.<sup>242</sup> Preemption occurs when state or federal government takes legislative or regulatory action to limit or eliminate the authority of a lower level jurisdiction in a particular area of law.<sup>243</sup> The Supremacy Clause within the U.S. Constitution establishes Congress's dominant power and ability to preempt state and local laws, if they so choose.<sup>244</sup> Preemption in the realm of public health is more difficult to establish, due to the effectiveness of policies maintained at the local level as opposed to federal.<sup>245</sup> Local officials and policy-makers have the ability to craft laws and regulations satisfying the unique needs of their individual community.<sup>246</sup> However, some issues that appear in the public health space are more effectively regulated by the federal government, including the safety of consumer commodities and accurate and consistent labeling of these products.<sup>247</sup>

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239. *Id.*

240. *Id.*

241. Accurate Labels Act. For example, this requirement could eliminate confusion over acrylamide in coffee and glyphosate. Rather than considering listing of chemicals as carcinogens from IARC or requiring specific forms of quantified assessments, the Accurate Labels Act will ensure one standard, based on science and risk, will guide labeling requirements. *Id.*

242. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

243. *Preemption*, PUB. HEALTH LAW CTR., <http://publichealthlawcenter.org/topics/tobacco-control/preemption> (last visited Jan. 18 2020).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* For example, grassroots movements can be effective in advancing policies such as limited tobacco and cigarette use on airplanes. However, as airplanes travel quickly from state to state, city to city, it would be very difficult to create a strong law equally applied across the country if done at the local level.

Without a strong federal scheme, states, cities, and localities have been able to promulgate requirements mandating warnings on various products.<sup>248</sup> When particular labels are required in one city, but not another, businesses face a troubling decision of whether to comply with the requirement, or choose not to market their product in that area.<sup>249</sup> Further, consumers may see certain labels in one part of the country, but not in another, adding to their confusion in purchasing these products.<sup>250</sup> Most importantly, however, the clear the need for a uniform federal standard is evidenced by patchwork legislation resulting in different requirements from city to city, and some may not be grounded in accurate science.<sup>251</sup> The variations have resulted in confusion, as well as litigation which exemplifies the need for a single, unified standard.<sup>252</sup>

In 2015, San Francisco passed an ordinance requiring businesses to label certain sugary drinks with health warnings about the effects of consuming such beverages.<sup>253</sup> In *American Beverage Association v. City and County of San Francisco*,<sup>254</sup> several associations which would face the burden of labeling their products filed suit, arguing that the required label violated the First Amendment.<sup>255</sup> Reversing the district court, a panel of judges on the Ninth Circuit<sup>256</sup> found “that the warning was not purely factual and uncontroversial because consumers could read it to convey a direct correlation between consumption of these beverages and the named health conditions, regardless of the amount consumed or other lifestyle choices,” effectively skewing consumers decision making process.<sup>257</sup> While the label may be true, it concurrently offers

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248. DeRagon & Buoniconti, *supra* note 138. See also Jeff Gelski, *Industry coalition supports new labeling act*, FOOD BUSINESS NEWS (June 8, 2018), <https://www.foodbusinessnews.net/articles/11958-industry-coalition-supports-new-labeling-act>, (pointing out as an example that New York, San Francisco, and Baltimore proposed warning labels on sweetened beverages in 2017).

249. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

250. *Id.* In merely crossing state lines, consumers could find completely different labels on products they wish to purchase. Further, businesses engaged in selling products across state lines could be forced to comply with drastically different labeling requirements. *Id.*

251. *Id.* More than half of U.S. citizens believe that additional labeling must be done through sound science and based on legitimate risk. Further, consumers believe that accuracy, clarity, and simplicity are most important when it comes to warning labels on products.

252. *Id.*

253. *Am. Beverage Ass'n v Cty & Cty. of S.F.*, No. 16-16073, slip op. (N.D. Cal. 2017). The required warning stated: WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.

254. *Am. Beverage Ass'n v Cty. & Cty. of S.F.*, No. 16-16073, slip op. (N.D. Cal. 2017).

255. *Id.*

256. Seyfarth Shaw, *Ninth Circuit Reconsidering San Francisco Soda Health Warning*, LEXOLOGY (Nov. 14, 2018), <https://www.lexology.com/library/detail.aspx?g=8e7c0638-9db9-4820-b047-50a53649cc49>. Following the panel's decision, the Ninth Circuit granted a rehearing en banc. The case was reheard in September of 2018, however the court has not issued an opinion.

257. *Id.*

the possibility of deception, which can mislead customers.<sup>258</sup> Without a single, unifying federal standard, cities across the country can enact this type of requirement, notwithstanding the label's scientific validity or the confusion it might cause consumers.<sup>259</sup>

Conversely, in *Nat. Restaurant Ass'n v. The New York City Dept. of Health & Mental Hygiene*,<sup>260</sup> the Supreme Court of New York upheld a local ordinance requiring additional labeling.<sup>261</sup> In 2015, New York City passed an ordinance requiring restaurants in the City to place a symbol<sup>262</sup> next to any menu item containing more than 2,300 mg of sodium.<sup>263</sup> Restaurant defendants argued that the warning violated their First Amendment rights and that the label was a health claim, governed by NLEA, which preempted the local law.<sup>264</sup> Agreeing with the City, Judge Gesmer found there to be no First Amendment violation because the warning is "factual, accurate, and uncontroversial," and not leading to consumer deception.<sup>265</sup> Further, the court found that the label was not preempted by NLEA, as it squarely fit within NLEA's preemption exception clause, meaning New York City was free to require this type of claim.<sup>266</sup> Without a strong federal scheme, the federal government is incapable of preempting labels such as these, which according to restaurant owners, will harm their businesses.<sup>267</sup>

As illustrated by these cases, without a single federal standard, states and cities are left to their own volition to impose additional labeling requirements.<sup>268</sup> These issues work their way into the courtroom, resulting in conflicting opinions from state and federal judges spanning the country.<sup>269</sup> Businesses are forced to label their products to fit the needs of not only every state they market to, but

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258. *Am. Beverage Ass'n v. Cty. & Cnty. Of San Francisco*, No. 16-16073, slip op. at \*16 (N.D. of Cal. 2017).

259. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

260. *Nat'l Rest. Ass'n v. N.Y.C. Dep't. of Health & Mental Hygiene*, 148 A.D.3d 169 (N.Y. App. Div. 2017).*Nat.*

261. *Id.*

262. Etan Yeshua, *New York City Sodium Rule Caught in Litigation is One of Many State and Federal Food Labeling Requirements Currently in Limbo*, FDA LAW BLOG, (Mar. 9, 2016), <http://www.fdalawblog.net/2016/03/new-york-city-sodium-rule-caught-in-litigation-is-one-of-many-state-and-federal-food-labeling-require/>. The symbol is a small image of a salt shaker. This warning must also be stated: "Warning: [Salt shaker symbol image] indicates that the sodium (salt) content of this item is higher than the total daily recommended limit (2300 mg). High sodium intake can increase blood pressure and risk of heart disease and stroke." *Id.*

263. *Id.*

264. *Id.*

265. 148 A.D.3d at 178.

266. *Id.* at 179–80.

267. *Id.* Restaurant owners fear that if consumers see a label such as this on their menus, which they may have never seen before and would not see in any other jurisdiction, would prevent consumers from purchasing their products for fear of increase risk than what the product might otherwise provide.

268. *Id.*; *Am. Beverage Ass'n v. Cty & Cty. of S.F.*, No. 16-16073, slip op. (N.D. Cal. 2017).

269. *Id.*

also every city and local jurisdiction.<sup>270</sup> Without a single scientific standard, consumers are forced to interpret on their own the risk they face when they see a warning on their soda or their menu at a restaurant.<sup>271</sup> While these warnings may yield strong health benefits, varying messages are unfair to both consumers and businesses.

## 2. Solving Issues of Preemption: The Accurate Labels Act

Legislation such as the Accurate Labels Act offers a preemptive solution to overregulation of producers and give consumers a clearer vision on the safety of products they purchase.<sup>272</sup> In a national marketplace, creating a streamlined, effective regulatory labeling system is essential to producing a well-informed consumer.<sup>273</sup> With variation across cities and states, consumers cannot accurately gauge the risk they face when presented warning labels on every product they purchase.<sup>274</sup> For example, due to California's strict Proposition 65 requirements, companies from across the U.S. must comply with overly strict labeling requirements, often inciting concern and worry amongst a broad customer base extending beyond the borders of California.<sup>275</sup> The establishment of a single federal standard will also create stability in the marketplace. Both consumers and businesses will have the ability to rely upon a single standard produced by a single agency to deliver instruction on how to label, and what that label means.

Considering the strong preemptive qualities of the Accurate Labels Act, similar state or local legislation would have the power to accomplish these goals and create needed constancy.<sup>276</sup> If any state or political subdivision chooses to enact laws or ordinances requiring additional labeling, the label must still be consistent with the federal standard as laid out in the Accurate Labels Act.<sup>277</sup> No state or city may determine its own standard to require labeling, effectively eliminating regulatory overreaches such as Proposition 65 and San Francisco's

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270. COALITION FOR ACCURATE PRODUCT LABELS, *supra* note 73.

271. *Id.*

272. Accurate Labels Act.

273. Rechtschaffen, *supra* note 1.

274. *Id.*

275. *Cancer Warning Labels Based on California's Proposition 65*, AMERICAN CANCER SOCIETY, <https://www.cancer.org/cancer/cancer-causes/general-info/cancer-warning-labels-based-on-californias-proposition-65.html> (last visited Jan. 8, 2019), Consumers are often confused why their products contain a label stating: "this product is known to the State of California to cause cancer or reproductive toxicity." Manufacturers are forced to put the label on all their products, regardless of what state the item is sold in to avoid high costs of individualized labeling. Groups such as the American Cancer Society have had to create informational pages on their website to help consumers, particularly those unfamiliar with California laws, navigate the realities of the risk they take using products that bear this label.

276. DeRagon & Buoniconti, *supra* note 138.

277. *Id.*

sugar warning.<sup>278</sup> In order to truly support and accomplish the goals of the ‘right to know’ movement, consumers must be accurately informed.<sup>279</sup> Without a consistent feed of information, this goal will not be accomplished.<sup>280</sup> Only through accurate, science-based, and risk-based information will America truly realize an informed consumer base, free from unwieldy overregulation.<sup>281</sup>

*C. Comparative Success and States’ Concerns: The National Bioengineered Food Disclosure Law*

The development of a national standard to eliminate consumer confusion and industry frustration is not a novel concept. In 2016, with bipartisan support, Congress passed the National Bioengineered Food Disclosure Law (NBFDL) with underlying goals paralleling the intent of the Accurate Labels Act.<sup>282</sup> The NBFDL amended the Agricultural Marketing Act of 1946 to establish a national mandatory bioengineered food disclosure standard in effort to avoid a patchwork of regulatory schemes across states.<sup>283</sup> Prior to passage of the NBFDL, many states had implemented individual biotech labeling mandates which varied in scope and labeling requirements.<sup>284</sup> Like the deficient current federal consumer product regulatory scheme failing to provide clear labels to inform consumers, a number of federal laws govern food labeling, however none of which addressed the unique issue of biotech labeling.<sup>285</sup> In effort to work with existing legislation, the NBFDL unifies the single biotech disclosure standard with other national labeling requirements, such as the National Organic Program and meat labeling in effort to avoid consumer confusion.<sup>286</sup> Similar to the Accurate Labels Act, the NBFDL seeks to protect small businesses, producers, and consumers through ensuring predictability and clarity in labeling of all food products.<sup>287</sup> Additionally, like the Accurate Labels Act, the law provides manufacturers and

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278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. National Bioengineered Food Disclosure Standard Law, Pub. L. No. 114-216, 130 Stat. 834 (2016) (codified at 7 U.S.C. § 1639); *see also National Biotech Disclosure Law*, COALITION FOR SAFE, AFFORDABLE FOOD, <http://coalitionforsafeaffordablefood.org/common-sense-solution/> (last visited Mar. 20, 2020) (describing the goals of the law). Bioengineered food is also categorized as “biotech” or “genetically modified organisms” (GMOs). *Id.*

283. CONG. RESEARCH SERV., SUMMARY: PUB. L. NO: 114-216, S. 764, 114th Cong. (2016) <https://www.congress.gov/bill/114th-congress/senate-bill/764>.

284. *The National Bioengineered Food Disclosure Standard: Overview and Select Considerations*, CONG. RESEARCH SERV., 18 (last updated Feb. 7, 2020) <https://crsreports.congress.gov/product/pdf/R/R46183> (hereinafter: *Overview and Select Considerations*).

285. COALITION FOR SAFE, AFFORDABLE FOOD, *supra* note 282. *See also infra* Section I. for discussion on the deficient federal consumer products regulatory scheme.

286. National Bioengineered Food Disclosure Standard Law; COALITION FOR SAFE, AFFORDABLE FOOD, *supra* note 282.

287. *Id.*

producers with a variety of options to convey accurate information, including through smart label technology.<sup>288</sup> The NBFDL, provides these general mandates to the U.S. Department of Agriculture (USDA), along with an explicit directive to create the new mandatory standard through its rulemaking authority, similar to the delegation the Accurate Labels Act gives to the FDA.<sup>289</sup>

While some states welcomed the introduction of a federal standard to alleviate the burden on the state government to regulate such a complex area of law, other states now face the daunting task of reconciling their current laws with a new federal standard.<sup>290</sup> Similar to California enacting strict regulation of consumer products through Proposition 65, Vermont enacted a strict law governing labeling of biotech food (Vermont Law).<sup>291</sup> Supporters of the Vermont Law argued that it supported the ‘right-to-know’ movement, supplying consumers with valuable information they desire when making food purchases.<sup>292</sup> However, other supporters of the ‘right-to-know’ movement argue that state-by-state regulation will only result in consumer confusion, making it more difficult for consumers to discern what labels mean.<sup>293</sup> Additionally, many farmers and producers pushed back significantly on the bill, arguing that laws such as the Vermont Law places significant burdens on the ability of farmers and food companies to sell their products in the state of Vermont.<sup>294</sup> Following the passage of Vermont’s strict labeling law, companies such as Coca-Cola indicated it would no longer send some of its products to the state of Vermont, indicating the harsh implications labeling laws have in industry.<sup>295</sup>

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288. *Id.*

289. National Bioengineered Food Disclosure Standard Law. SUMMARY: PUB. L. NO: 114-216 *supra* note 281.

290. *Overview and Select Considerations supra* note 283, at 18. For example, Michigan and North Dakota enacted legislation to urge the U.S. Congress to enact a national uniform labeling law, while other states, such as Vermont, previously enacted its own labeling law which it wanted to maintain. *Id.*

291. *Vermont’s GMO Labeling Law Takes Effect, but Future Is Still in Limbo*, CONSUMER REPORTS (Jul. 1, 2016) <https://www.consumerreports.org/food-safety/vermonts-gmo-labeling-law-takes-effect/>.

292. *Vermont’s GMO labeling law is live!*, VERMONT RIGHT TO KNOW GMOs (July 1, 2016) <http://www.vtrighttoknowgmoss.org/vermonts-gmo-labeling-law-live/>.

293. COALITION FOR SAFE, AFFORDABLE FOOD, *supra* note 282. See *Overview and Select Considerations supra* note 283, at Summary (describing the intent behind the NBFDL is to support the consumer’s right to know).

294. COALITION FOR SAFE, AFFORDABLE FOOD, *supra* note 282. Small businesses and farmers raised significant concerns with the meeting strict requirements in order to sell their products. Further, many argued that these labels will harm their livelihoods given the negative connotation associated with GMOs. Peter Hirschfeld, *As Labeling Law Goes into Effect, Vermont Farmers Divided on Value of GMO Crops*, VPR (July 5, 2016) <https://www.vpr.org/post/labeling-law-goes-effect-vermont-farmers-divided-value-gmo-crops#stream/0>.

295. CONSUMER REPORTS, *supra* note 290. Consider if the Vermont Law impacted sales decisions of a massive company such as Coca-Cola what the impact of the Law would be on small producers and farmers.



Despite the pushback from some states and other third-party labeling groups,<sup>296</sup> Congress enacted the NBFDL and the USDA subsequently established the final standard in effort to stop states from enacting laws such as Vermont's.<sup>297</sup> While states understandably have concerns with the federal government impeding upon their jurisdictions, the NBFDL took action to alleviate many of the issues raised, and the Accurate Labels Act can follow a similar path. For example, the NBFDL delegated rulemaking authority to the USDA, which allowed for a public comment period, furthering the discussion and forcing cooperation between the agency, states, and industry.<sup>298</sup> The FDA will be required to take similar action with each rulemaking under the law if the Accurate Labels Act is enacted, giving the agency the opportunity to work directly with states to address their concerns.<sup>299</sup> Another major concern states have in both consumer product and food labeling is allowing the inclusion of voluntary labels and the ability to include more information on the product's contents.<sup>300</sup> Both the NBFDL and the Accurate Labels Act allow the agency to offer producers some flexibility with voluntary labels and make use of electronic labeling so that consumers may receive more information as they desire.<sup>301</sup>

Through a closer look at the cooperation between the federal government, states, and industry in passing the NBFDL and allowing USDA to create the new standard, it is clear that the Accurate Labels Act can overcome similar hurdles. The NBFDL and Accurate Labels Act are both grounded in science, relying accurate information to produce fair standards that work well for industry and producers across the nation. Through close consultation with states, the federal government can work to ensure states' concerns are addressed in the creation of a final standard by the agency. Further, despite the potential burden imposed on small businesses located in states that may not otherwise enact a labeling standard, the benefit of eliminating a patchwork of rules for those selling across

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296. The Non-GMO Project is one third party group which supports strict regulation and labeling of all biotech food. The Project did not support the creation of a national standard, and instead preferred Vermont's stricter standard. 2019: *The Year in Review*, NON-GMO PROJECT (Dec. 31, 2019) <https://www.nongmoproject.org/blog/2019-the-year-in-review/>.

297. *BE Disclosure*, U.S. DEP'T OF AG, <https://www.ams.usda.gov/rules-regulations/be> (last visited Mar. 20, 2020).

298. *Establishing the National Bioengineered Food Disclosure Standard*, Press Release No. 0278.18, U.S. DEP'T OF AG (Dec. 20, 2018) <https://www.usda.gov/media/press-releases/2018/12/20/establishing-national-bioengineered-food-disclosure-standard>.

299. The Accurate Labels Act has not been enacted, and therefore no agency has taken any action yet. However, like any rulemaking, the agency will be required to accept public comment upon establishing a standard rule.

300. Greg Jaffe, *Biotech Blog: The Final National Bioengineered Food Disclosure Standard*, Center for Science in the Pub. Interest (Apr. 8, 2019) <https://cspinet.org/news/biotech-blog-final-national-bioengineered-food-disclosure-standard> (discussing some arguments raised in the debate on voluntary disclosures and disclosures of additional information).

301. National Bioengineered Food Disclosure Standard Law at Sec. 293 (codified at 7 U.S.C. § 1639b). Accurate Labels Act at § 14(b)(2)(A)(vi).

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state lines outweighs concerns and better supports the national ‘right-to-know’ movement. Both the producer and the consumer are entitled to clarity and uniformity in the law, so that producers can accurately and scientifically determine what the labeling requirements are and that consumers can make an informed decision in purchasing everyday products and food.

### III. CONCLUSION

Dating back decades, the United States has significant history of regulating consumer products at the federal level.<sup>302</sup> While these efforts may have fallen short in several aspects, resulting in a variety of state laws, Congress has the opportunity to protect consumers and businesses by ensuring the accuracy and consistency of product labels.<sup>303</sup> Legislation such as the Accurate Labels Act will allow the FLPA to realize its ultimate goal of producing an informed public.<sup>304</sup> The Accurate Labels Act can assist in avoiding overregulation while simultaneously providing the federal government with an effective tool to regulate—a uniform federal standard.<sup>305</sup> In conjunction with a strong preemption provision, the utilization of sound science and accurate risk assessments to develop federal labeling requirements will ensure businesses are not needlessly overregulated.<sup>306</sup> The success and widespread support of the NBFDL exemplifies the Accurate Labels Act’s potential for success.<sup>307</sup> While states may raise concerns over the federal government overtaking their established laws and regulatory jurisdiction, the benefits of a clear national standard significantly outweigh these fears.<sup>308</sup> Ultimately, in order to support the ‘right to know’ movement, Congress must act.

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302. *Supra* Section IA.

303. *Supra* Section IA, IB.

304. *Supra* Section IIA.

305. *Supra* Section IIA, IIB, IIC.

306. *Id.*

307. *Supra* Section IIC.

308. *Id.*