TESTIMONY OF JOHN DILORENZO, JR.

ON BEHALF OF OREGONIANS FOR FOOD & SHELTER

BEFORE THE HOUSE COMMITTEE ON AGRICULTURE AND NATURAL RESOURCES

IN OPPOSITION TO H.B. 2175, 2530, 2532, and 3177

March 21, 2013

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Good Morning, Mr. Chair and members of the committee. For the record my name is John DiLorenzo. I am a partner at the law firm of Davis Wright Tremaine and am I here today on behalf of my long-time client Oregonians for Food and Shelter in opposition to House Bill 2530, House Bill 2175, House Bill 2532, and House Bill 3177.

You will, no doubt, hear from many in the natural resources community who oppose these bills for a variety of practical reasons. The purpose of my testimony, however, is to apprise you of legal concerns which we have with respect to all of these bills. We believe that legislation that requires the labeling of genetic engineered (GE) foods like House Bill 2175, House Bill 2532, and House Bill 3177 violate the First Amendment as compelled speech. We also believe that laws regulating GE food through labeling requirements or farming restrictions like those proposed in House Bill 2175, House Bill 2532, and House Bill 3177 are preempted by federal law because they conflict with decisions of the Federal Food and Drug Administration or undermine the federal regulatory scheme for GE crops. Finally, we believe that GE labeling requirements like those in House Bill 2175, House Bill

2532, and House Bill 3177 also violate the Dormant Commerce Clause since they substantially burden interstate commerce and since the state cannot articulate a legally recognized local benefit from the labels. We further believe that the GE aquaculture ban in House Bill 2530 also violates the Dormant Commerce Clause, since it substantially burdens interstate commerce, since the state will not be able to demonstrate a legally recognized local benefit, and since there are less burdensome alternatives to a complete ban.

Yesterday, we addressed a letter to Chairman Witt outlining those concerns in great detail and citing to authorities and cases which we believe support our position. That letter is attached to my testimony at Tab 2. Last week, while we were in the course of developing our letter, the Attorney General of the State of Hawaii issued an opinion which happens to agree on all fours with our analysis. The Hawaii Attorney General was asked to opine as to the constitutionality of a bill in the Hawaii legislature which imposes labeling requirements on imported genetically modified or engineered produce. In his opinion of March 12, 2013, the Hawaii Attorney General concluded that the bill is unconstitutional because (1) state efforts to require genetic engineering labels have been preempted by the federal government, (2) that the labeling requirements violate the First Amendment protections for commercial speech, and (3) that the requirements in the bill violate

the commerce clause of the Federal Constitution. A copy of that Attorney General's opinion is appended to my testimony at Tab 3.

I. First Amendment Issues

Freedom of speech prohibits the government from telling people what they must say. This right to not speak pertains to commercial speech as well as political speech and extends to statements of fact as well as to statements of opinion. And although there is a distinction between commercial speech and political speech in the First Amendment context, under Article I, Section 8 of the Oregon Constitution, commercial speech is afforded the same protection as non-commercial or political speech.

The federal courts have applied two tests to evaluate whether or not food labeling requirements run afoul of the First Amendment. The first test, known as the "*Central Hudson*" test, asks whether the governmental interest is substantial, whether the regulation directly advances that interest, and whether the regulation is more extensive than necessary to advance the interest. The second test, called the "*Zaurderer* " test inquires as to whether the disclosure requirements are reasonably related to the state's interest in preventing deception of consumers. This test applies only where mandated disclosures are purely factual and uncontroversial.

It is our position that forcing retailers to display a sign stating that fish has been genetically engineered or requiring the labeling of packaged foods as

containing genetic engineered components is not related to a legitimate government interest and is not "factual and uncontroversial". At page 4 of our letter to Chairman Witt we cite to the *International Dairy Foods v. Amnestoy* case. In that case, dairy manufacturers successfully challenged a law which required them to identify products which were or might have been derived from dairy cows treated with synthetic growth hormones used to increase milk production. The state was unable to argue that the requirements were to protect public health given the lack of scientific evidence suggesting that concern. Rather, the state argued what the proponents of these bills have said in the press – that consumers have a right to know what is in their food to make their own decisions about these foods. However, the court held that this type of consumer curiosity – absent a public health threat, was insufficient to compel speech and thus failed to demonstrate that the government's interest was substantial. In particular, the court said:

> We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernible impact on a final product.

Just like the circumstance in the *International Dairy Foods Association* case, all available scientific evidence shows that "genetically engineered" fish are simply "fish" and genetically engineered corn is simply "corn". The only possible

reason to motivate that type of disclosure is that consumers are curious but that justification is plainly insufficient to support compelled speech under the *Central Hudson* Test. Even under the less stringent *Zaurderer* test, these labeling requirements are unsustainable. On page 6 of our letter, we cite to the *Wireless Association v. City and County of San Francisco* case in which the federal court examined a San Francisco ordinance which required the disclosure of certain facts relating to radio frequency energy from cell phones. San Francisco required disclosure of accurate and true statements such as "cell phones radiate radio frequency" and "cell phone users are subjected to radio frequency and the closer the phone the stronger the radio frequency energy" and so on. The court held that even though these discreet facts taken in isolation were true, the overall impression left was that a cell phone was dangerous and that it somehow had escaped the regulatory process. The court said:

> That impression is untrue and misleading, for all of the cell phones sold in the United States must comply with safety limits set by the FCC. In other words, the uninitiated will be left with a misleading impression that the phones on sale have never been vetted by the FCC (or any other agency – which, of course, is untrue.)

Here, given the highly controversial status of genetically engineered foods, any required disclosure is not going to be "factual and noncontroversial." Just like the cell phone customers in the *San Francisco* case, consumers reading a message at retail establishments may well assume that "genetically engineered" fish or other

products have somehow escaped regulatory scrutiny, despite the fact that the fish, or other products, have been approved by the FDA for human consumption.

The GE labeling requirements in House Bill 2175, House Bill 2532 and House Bill 3177 also imply a significant difference between products where one does not exist. That implication is not factual and uncontroversial. In these circumstances, where there is no plausible public health threat to address, the state would merely be requiring retailers to provide information to satisfy a consumer's curiosity which, as we know, is an insufficient interest to overcome the First Amendment. A more complete discussion of this issue is at pages 3 to 8 of our letter.

II. Some State GE Regulation is Preempted by Federal Law Including Food Labeling Requirements

Under the Supremacy Clause of the U.S. Constitution, federal law prevails in any conflict with state law. The Federal Food, Drug and Cosmetic Act provides that no state or political subdivision of a state may directly or indirectly establish as to any food in interstate commerce, requirements regarding (a) federally mandated standards of identity for certain types of food or (b) nutritional or other labeling standards that are not identical to federal requirements.

Federal courts have consistently held that state food labeling laws are preempted when they conflict with federal law. Although this preemption does not apply to state labeling of food that provides a warning concerning of the safety of

the food, state food warnings may not conflict with federal food safety decisions. Many federal courts have struck down state food labeling laws on these preemption grounds.

A California court recently struck down a law that warned consumers of mercury levels in tuna. The court in *Brown v. Tri Union Seafoods* reasoned that the label conflicted with the FDA's determination that a mercury warning was inappropriate. The FDA had previously concluded that a mercury warning would unreasonably discourage consumers from eating tuna given the overall health benefits of eating these fish.

The FDA has repeatedly determined that labeling of GE foods is not required. For example, the FDA concluded in 2001 that the presence of GE technology in food need not be indicated on the food label. The FDA is currently considering whether to require a GE label on aqua-advantage salmon. And so the GE posting requirement in House Bill 3177 is premature at best. It will be preempted by federal law if the FDA declines to require a GE disclosure for genetically engineered salmon. The genetic engineered labeling requirements in House Bill 2175 and House Bill 2532 are likely also preempted by federal law because the FDA has not required disclosure of genetic engineered components in packaged food products either. A more complete discussion of the preemption issues can be found at pages 8 – 10 of our letter.

III. State GE Food Labeling and Farming Requirements May Also Place Unconstitutional Burdens on Interstate Commerce

The Commerce Clause of the U.S. Constitution grants Congress the power to regulate interstate commerce and mandates a common market across the United States. One aspect of the Commerce Clause is referred to as the "Negative Commerce Clause" or the "Dormant Commerce Clause". Under the Dormant Commerce Clause, states may not discriminate against interstate commerce or place undue burdens on interstate commerce.

State laws that protect local commercial interests against out of state competition are almost always unconstitutional under the Dormant Commerce Clause. This rule applies to state laws that directly regulate or discriminate against out of state commerce as well as laws which appear to be neutral yet have the effect of favoring in-state economic interests. A state creates an undue burden on interstate commerce when the negative commercial effects of the state law exceed the local benefits of the law.

GE labeling requirements like those in House Bill 2175, House Bill 2532, and House Bill 3177 place a substantial burden on interstate commerce by imposing costs on food manufacturers and depressing sales. Labeling increases production costs by requiring manufacturers to segregate products destined for Oregon and to produce special packaging for these products. In addition, there are economic studies which indicate that consumers are less likely to buy products

labeled as genetically modified and will not pay the same price for GE labeled products versus those not labeled as genetically engineered.

GE labeling does not provide any legally recognized benefit to Oregon Consumers. The FDA has repeatedly concluded that GE foods are safe and just as healthy as their non-GE counterparts. For example, the FDA stated the following regarding the GE AquaAdvantage salmon:

> We conclude that food from the [AquaAdvantage] salmon that is the subject of this application is as safe as food from conventional salmon and that there is a reasonable certainty of no harm from consumption of food from [AquaAdvantage] salmon.

Furthermore, GE farming prohibitions like those in House Bill 2530 place an extreme burden on interstate commerce by completely blocking the commercial activity. When a state seeks to block commerce, the state must show that the blocking regulation is essential to protect the state's legitimate interests and that there are no less burdensome means of accomplishing the state's goal. We do not believe that the proponents of the legislation will be able to identify any particular health interest or other scientific reason to ban the importation or farming of GE fish. In addition, there are obviously less burdensome alternatives to a complete ban on these activities. For example, another bill, House Bill 3292, would require state permitting of GE salmon hatcheries. This alone suggests that a state permitting scheme may be a possible means of regulating GE aquaculture and that

there are less burdensome alternatives to a complete ban. A more complete discussion of this issue is at pages 10 and 11 of our letter.

IV. Conclusion

Mr. Chairman, although the government may occasionally compel commercial speech, the bills before you run afoul of the First Amendment. The compelled speech required by these bills is not factual and uncontroversial, nor is it targeted at a sufficient governmental interest like preventing deception or protecting human health. At best, the bills are aimed at satisfying consumer curiosity which is an insufficient interest to warrant intrusion into protected speech.

State GE food labeling requirements are also preempted by FDA decisions concluding that GE labels are not required. The broader federal regulatory scheme also preempts other state regulations that undermine the federal regulatory efforts.

Finally, state GE labeling laws and farming restrictions will also likely violate the commerce clause by placing excessive burdens on interstate commerce. GE food labels to do not provide a benefit to Oregon sufficient to justify the commercial burden of the labeling requirements. A ban on importation of live GE salmon also excessively burdens interstate commerce. We do not believe that the proponents can justify the ban based on health or other legitimate interests nor can they show that there are no less burdensome alternatives.

For all these reasons, and because the Hawaii Attorney General has independently concurred on all fours with our opinion, we strongly urge that it would be most appropriate for you to request the opinion of the Oregon Attorney General as to the legal validity of these legislative proposals before you act on them.

Mr. Chair, I want to thank you for the opportunity to share these concerns with your committee and am pleased to answer any questions you may have or to elaborate on any of these points at your convenience.

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Davis Wright Tremaine LLP

Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5610

John DiLorenzo, Jr.
503.778.5216 tel
503.276.5716 fax

johndilorenzo@dwt.com

March 20, 2013

Honorable Brad Witt
Chair, House Agriculture and
Natural Resources Committee
Oregon State Capitol
900 Court St. NE, H-374
Salem, OR 97301

Re: HB 2175, HB 2532, HB 3177, and HB 2530

Dear Chair Witt:

I am writing this letter on behalf of my longtime client, Oregonians for Food and Shelter ("OFS"). I will be providing testimony on behalf of OFS at the hearings you will be conducting tomorrow with respect to the above referenced bills. As you also know, OFS along with significant segments of the natural resources community oppose these bills for a variety of practical reasons which will become clear during the hearings. The purpose of this letter is to apprise you of legal concerns which my client has with respect to the above referenced legislation. It is in that spirit that we have formulated a number of questions and answers which we hope are useful to you and your committee members as you consider the arguments relating to all of these proposals.

QUESTIONS PRESENTED AND BRIEF ANSWERS

Q1. Do bills that require labeling of genetically engineered (GE) foods, like HB 2175, HB 2532 and HB 3177 violate the First Amendment?

A1. Yes. Although government compelled commercial speech is allowed in some circumstances, the compelled speech must be both "factual and uncontroversial" and must be reasonably related to a government interest. Forcing the labeling of certain foods as "genetically engineered" is both controversial and unrelated to a legitimate government interest. Satisfying customer curiosity is not a sufficient interest to warrant compelled speech.

Q2. Are state laws regulating genetically GE foods through labeling requirements or farming restrictions preempted by federal law?

A2. State GE labeling requirements like those in HB 2175, HB 2532 and HB 3177 are generally preempted by federal law because they conflict with decisions of the

federal Food and Drug Administration concluding that such labels are inappropriate. GE farming restrictions may also be preempted to the extent that they undermine the federal regulatory scheme for GE crops.

Q3. Do labeling laws and proposed laws like HB 2530 violate the Commerce Clause of the U.S. Constitution?

A3. GE labeling requirements like those in HB 2175, HB 2532 and HB 3177 are also likely unconstitutional because they substantially burden interstate commerce and the state has not articulated a cognizable local benefit from GE labels. The GE aquaculture ban in HB 2530 is also likely unconstitutional because they substantially burden interstate commerce and the state has not demonstrated a cognizable local benefit or that there are no less burdensome alternatives to a complete ban.

INTRODUCTION

State laws attempting to regulate genetically modified organisms or genetically engineered ("GE") foods face a number of legal hurdles. Primarily, such laws potentially violate the First Amendment, as well as the Supremacy Clause and the Commerce Clause of the U.S. Constitution.

Many laws attempting to regulate GE food violate the First Amendment by requiring certain speech. Commercial speech is protected by the First Amendment, and any forced disclosure can violate a producer's or retailer's right to refrain from speaking where the state forces the speaker to convey a controversial message without a legitimate government interest.

In addition, many types of state GE laws are preempted by federal law under the Supremacy Clause of the U.S. Constitution. For example, the federal Food, Drug and Cosmetics Act ("FDCA") grants the Food and Drug Administration ("FDA") authority over food labeling and expressly prohibits states from imposing labeling requirements that are different from FDA's requirements. State GE food labeling requirements are therefore preempted by the FDCA because the FDA has explicitly decided not to require labeling of GE foods.

State GE farming prohibitions may also be preempted because they undermine the federal approval processes for GE crops and food products. These farming prohibitions also contradict the federal policies favoring the development of nutritious foods.

Finally, state GE laws may run afoul of the dormant Commerce Clause of the U.S. Constitution due to the burdens they place on interstate commerce. GE food labeling requirements increase logistical and packing costs to food manufacturers and these labels will likely depress sales of GE foods in Oregon. This burden is unjustified given that the FDA has determined that GE salmon and other GE foods are safe to eat and just as healthy as comparable non-GE foods.

The commercial burden imposed by GE farming bans is especially great because this type of regulation completely blocks interstate commerce. Outright bans likely would not withstand judicial scrutiny because the Oregon Legislature has not considered less commercially burdensome alternatives.

Against this backdrop, is our evaluation of a series of bills which will be having hearings this week before the House Agriculture and Natural Resources Committee.

The first and second are HB 2175 and HB 2532 which make packaged food containing or produced using genetically engineered materials subject to requirements that labels be attached providing clear and prominent statements that the food contains genetically modified materials.

The third is HB 3177 which requires signage in areas where genetically engineered fish are sold, displayed for sale or offered for sale at retail for human consumption. The bill also makes foods that contain genetically engineered fish subject to labeling requirements.

The final bill is HB 2530 which is an outright ban on importation of genetically engineered live fish into the state. It also prohibits farming, cultivation or spawning of genetically engineered fish and releasing or attempting to release genetically engineered fish into the state.

DISCUSSION

A. The First Amendment prohibits government compulsion of commercial speech unless the speech is factual and uncontroversial and reasonably related to a legitimate government interest.

"[F]reedom of speech prohibits the government from telling people what they must say." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 US 47, 61 (2006)). While commercial speech is accorded somewhat less protection than other expression under the First Amendment,[1] "[t]he right not to speak inheres in political and commercial speech alike, and extends to statements of fact as well as statements of opinion." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F3d 67, 71 (2d Cir. 1996) (internal citation omitted) (hereinafter "*IDFA*"). Thus, where the government compels speech—even commercial speech—the First Amendment is implicated. *Id.* at 72.

Federal courts have applied two tests when evaluating whether or not a labeling requirement runs afoul of the First Amendment. The first test, known as the "*Central Hudson*"

[1] Under Article I, section 8 of the Oregon Constitution, "commercial speech" is afforded the same protection as noncommercial speech. *Northwest Advancement, Inc. v. Bureau of Labor, Wage & Hour Division*, 96 Or App 133, 141 (1989).

test after the case *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 US 557, 563 (1980), asks whether the asserted governmental interest is substantial, whether the regulation directly advances that interest, and whether the regulation is more extensive than necessary to advance that interest. Though not frequently employed in the forced commercial speech context, courts have employed that test where the sole justification for a government regulation was consumer curiosity. *Int'l Dairy Foods Ass'n v. Amnestoy*, 92 F3d 67, 72-73 (2d. Cir. 1996) (hereinafter "*IDFA*"); *see also Nat'l Elec.*, 272 F3d at 115 n6 (so noting); *Borgner v. Brooks*, 284 F.3d 1204, 1210-13 (11th Cir. 2002) (applying *Central Hudson* test to required disclaimer).

The second test was announced in *Zauderer v. Office of Disciplinary Counsel*, where the Supreme Court considered the compelled disclosure of litigation costs in advertisements for contingent fee litigation. The court stated that:

> We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

471 U.S. 626, 651 (1985). The *Zauderer* test—whether the requirements are reasonably related to a state interest in preventing deception—only applies where the mandated disclosures are "purely factual and uncontroversial." *Id.*; *see also Video Software Dealers*, 556 F.3d at 966 ("The Court has upheld compelled commercial speech where the state required inclusion of 'purely factual and uncontroversial information" in advertising.') (quoting *Zauderer*).

B. Forcing retailers to display a sign stating that fish has been genetically engineered or labeling packaged foods as containing genetically engineered components is unrelated to a legitimate government interest, and is not "factual and uncontroversial."

Under either the *Central Hudson* test or the *Zauderer* test, laws like those proposed in HB 3177, which requires "a sign disclosing that [] fish has been genetically engineered" or HB 2175/2532 which require labeling of GE food will run afoul of the First Amendment.

Under the *Central Hudson* test, these mandated labeling requirements requiring "clear and prominent statements that the food contains genetically modified materials" fail because there is no legitimate government interest in the disclosure. The *IDFA* case considered a law strikingly similar to the requirements proposed by these bills. In *IDFA*, dairy manufacturers demonstrated a likelihood of prevailing on a First Amendment challenge to a law requiring them "to identify products which were, or might have been, derived from dairy cows treated with a synthetic growth hormone used to increase milk production." *IDFA*, 92 F.3d at 69. The law stated that "[i]f rBST has been used in the production of milk or a milk product for retail sale in

this state, the retail milk or milk product shall be labeled as such." *Id.* The dairy food association requested a preliminary injunction, arguing that the compelled speech violated their First Amendment rights and that the state had not advanced a governmental interest sufficient to require the speech. The state did not argue that the requirements were to protect public health—instead—the state argued that customers wanted to know whether or not the milk products contained rBST. The court held that simple customer curiosity—absent a public health threat—was insufficient to compel speech and thus failed to demonstrate that the government's interest was substantial:

> Vermont's failure to defend its constitutional intrusion on the ground that it negatively impacts public health is easily understood. After exhaustive studies, the FDA has "concluded that rBST has no appreciable effect on the composition of milk produced by treated cows, and that there are no human safety or health concerns associated with food products derived from cows treated with rBST." Because bovine somatotropin ("BST") appears naturally in cows, and because there are no BST receptors in a cow's mammary glands, only trace amounts of BST can be detected in milk, whether or not the cows received the supplement. Id. Moreover, it is undisputed that neither consumers nor scientists can distinguish rBST-derived milk from milk produced by an untreated cow. Indeed, the already extensive record in this case contains no scientific evidence from which an objective observer could conclude that rBST has any impact at all on dairy products. It is thus plain that Vermont could not justify the statute on the basis of "real" harms.
>
> We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernible impact on a final product.
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> *Id.* at 73 (citations omitted).

The court cited *Zauderer* to support the proposition that "customer curiosity" alone is insufficient to sustain the compulsion of an accurate, factual statement. *Id.* Accordingly, even if *Zauderer* (as opposed to *Central Hudson*) is the proper standard to apply, *IDFA* holds that a compelled factual disclosure to satisfy customer curiosity also fails to satisfy *Zauderer's* requirements.

Statutes compelling retailers to note that food contains genetically engineered substances or to state that certain fish are "genetically engineered" are not designed to prevent "deception of customers" or to protect public safety or health. Like the rBST in *IDFA*, all available scientific evidence shows that "genetically engineered" fish are simply "fish" and genetically engineered corn is simply "corn". The only possible reason to motivate such disclosure is that consumers are curious—but such a justification is plainly insufficient to support compelled speech under the First Amendment when applying the *Central Hudson* test.

Under the *Zauderer* test, the labeling requirements also fail. First, the labeling requirements are not "factual and uncontroversial." In *CTIA—The Wireless Ass'n v. City and County of San Francisco*, 827 F Supp 2d 1054, 1061-62 (ND Cal. 2011), the court made clear that whether or not a message is "factual and uncontroversial" must be considered in context and based as a message on the whole. That case considered whether the City of San Francisco could require dissemination of information regarding the release of radio frequency ("RF") energy from cell phones. The city sought to avoid First Amendment scrutiny by only requiring disclosure of discrete "facts" which, taken in isolation, were true. This attempt, however, failed, when the court ruled that the required "disclosures" were themselves misleading because they *implied* that RF radiation from cellphones was somehow dangerous, despite the fact that all phones sold in the United States comply with FCC regulations:

> On the fact-sheet, San Francisco has edited the mandated disclosures down to a few statements—largely accurate as far as they go—such as … cell phones radiate RF (true); cell phone users are subjected to RF energy (true); the closer the phone, the stronger the RF energy (true), and so on. Given that the factoids are accurate or at least have some anchor in the scientific literature, it is hard to see why, subject to the criticisms below, San Francisco cannot require their disclosure so long as there is a plausible public health threat and so long as it is clear to everyone that the warnings come from local government and not from the store.
>
> Nonetheless, the fact-sheet is misleading and must be corrected. Although each factoid in isolation may have an anchor in some article somewhere, the overall message of the fact-sheet (and the poster, for that matter) is misleading * * *. The overall impression left is that cell phones are dangerous and that they have somehow escaped the regulatory process. That impression is untrue and misleading, for all of the cell phones sold in the United States must comply with safety limits set by the FCC. In other words, the uninitiated will be left with the misleading impression that the phones on sale have never been vetted by the FCC (or any other agency)—which, of course, is untrue.

Id. at 1062. In addition, the court struck down a portion of the law that required the production of an image showing silhouettes with RF beaming into the head and hips, because a "plausible interpretation" of the image was that cellphones were dangerous—which was "neither factual nor uncontroversial." *Id.*

Here, given the highly controversial status of genetically engineered foods, any required disclosure is not necessarily "factual and uncontroversial." Like the cell phone customers in *CTIA*, consumers reading a message at retailers may well assume that "genetically engineered" fish have somehow escaped regulatory scrutiny, despite the fact that the fish are approved by the FDA for human consumption. *See* FDA Briefing Packet, AquAdvantage Salmon at 109 ("ABT salmon meets the standard of identity for Atlantic salmon as established by FDA's Reference Fish Encyclopedia. All other assessments of composition have determined that there are no material differences in food from ABT salmon and other Atlantic salmon."), *available at:* http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/VeterinaryMedicineAdvisoryCommittee/UCM224762.pdf; *cf. Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (requiring video game distributors to place "18" sticker on sexually explicit games "ultimately communicates a subjective and highly controversial message."); *R.J. Reynolds Tobacco v. United States Food & Drug Administration*, 823 F Supp 2d 36, 46 (D DC 2011) (compelled images on tobacco products do not fit exception for "purely factual and uncontroversial information."). In addition, a "plausible interpretation" of the required signage is that the fish is dangerous—which is completely unsupported—making the disclosure "neither factual nor uncontroversial." The same arguments apply to GE labels on food packaging.

Similar statements, like "this milk is from cows not supplemented with rbST," have been held to be misleading because they imply that milk from cows that *were* supplemented with rbST is materially different. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 642-43 (6th Cir. 2010). The "genetically engineered" labeling requirements in HB 2175, HB 2532 and HB 3177 are in themselves misleading because they imply a significant difference between products where one does not exist. A misleading statement is not "factual and uncontroversial." *CTIA*, 827 F Supp at 1062[2].

[2] The statements are not "factual and uncontroversial" for a final reason—the very subject matter of "genetically modified" foods is highly charged and the meaning and import of the term will vary widely with consumers. Widely varying news accounts and customer perceptions make it virtually impossible to term something "genetically engineered" without engendering strong feelings—whether warranted or not—towards the product. That is not consistent with First Amendment compelled speech, which only allows compulsion of factual information.

In these circumstances, there is no plausible public health threat to address.[3] At best, the state would seek to require retailers to provide information to satisfy a customer's curiosity, which is an insufficient interest to violate a retailer's First Amendment rights.

C. Some areas of state GE regulation are preempted by federal law, including state GE food labeling requirements.

Under the Supremacy Clause of the U.S. Constitution, federal law prevails in any conflict with state law. *See* U.S. Const. art. VI, cl. 2. The U.S. Supreme Court has defined three basic situations where federal law preempts state law. First, Congress may expressly prohibit states from making a particular type of law. This is called "Express Preemption". Second, a federal regulatory scheme may be so comprehensive that it leaves no room for additional state regulation. This is known as "field preemption." Third, state laws are preempted when they conflict with federal law such that it is impossible to comply with both laws or where the state law undermines the purpose of the federal law. *See, e.g*, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

1. Preemption of state GE labeling requirements

The FDCA provides the FDA with authority over food labeling and expressly preempts state laws that contradict FDA labeling decisions. Specifically, the FDCA states that "no state or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce" requirements regarding (a) federally mandated "standards of identity" for certain types of foods or (b) nutritional or other labeling standards that are "not identical" to federal requirements. *See* 21 U.S.C. 343-1(a).

Although Congress has qualified this preemption somewhat, courts have consistently held that state food labeling laws are preempted when they conflict with federal law. The Nutrition Labeling and Education Act of 1990 ("NLEA") states that the above preemption does not apply to "any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food." *See* NLEA Sec. 6(c)(2) (uncodified). State food warnings, however, may not conflict with federal food safety decisions. The U.S. Supreme Court explained that:

> Conceding to the state the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded foods . . . we think to permit such regulation . . . is to permit a state to discredit and burden legitimate

[3] This circumstance is unlike *National Electric*, where the state of Vermont compelled manufacturers to disclose the presence of mercury in products. In that case, the disclosure met the state's interests of "protecting human health and the environment from mercury poisoning." 272 F.3d at 115. Unlike mercury pollution, there is no evidence that genetically engineered fish pose an environmental or public health threat.

> Federal regulations of interstate commerce, to destroy rights arising out of federal statute . . . and to impair the effect of a Federal law.

McDermott v. Wisconsin, 228 U.S. 114, 133-34 (1913). More recently, numerous courts have struck down state food labeling laws on preemption grounds. *See, e.g.*, *Grocery Manufacturers of America, Inc. v. Gerace*, 755 F.2d 993 (1st Cir. 1985) (imitation cheese); *Vermont Pure Holding. Ltd. v. Nestle Waters North America, Inc.*, No. Civ.A.03-11465 (D. Mass. Sept. 9, 2004) (spring water); *Cohen v. McDonald's Corp.*, 808 N.E.2d 1 (Ill. App. 2004) (Happy Meals).

A California court recently struck down on preemption grounds a Proposition 65 label warning consumers of mercury levels in tuna. The court reasoned that the label conflicted with FDA's determination that a mercury warning was inappropriate. The FDA had concluded that a mercury warning would unreasonably discourage consumers from eating tuna given the overall health benefits of eating these fish. *See People Ex Rel. Brown v. Tri-Union Seafoods*, 171 Cal. App. 4th 1549, 1558-59 (discussing trial court's reasoning and affirming on other grounds).[4]

The FDA has repeatedly determined that it is inappropriate to require labeling of GE foods. For example, FDA concluded in 2001 that the presence of GE technology in food need not be indicated on the food label. FDA further determined that voluntary labels stating that foods are non-GE may be false and misleading under federal law. *See Guidance for Industry, Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering*, 66 Fed. Reg. 4839, 4840 (Jan. 11 2001). In 2002, the FDA sent a letter to Governor Kitzhaber expressing the agency's disapproval of state food labeling laws. *See* Letter from FDA Deputy Commissioner Lester M. Crawford (Oct. 4, 2002). The FDA is currently considering whether to require a GE label on the AquAdvantage salmon that is pending FDA approval. *See* http://www.fda.gov/Food/LabelingNutrition/FoodLabelingGuidanceRegulatoryInformation/Topic-SpecificLabelingInformation/ucm222608.htm. The GE labeling requirement in HB 3177 is therefore premature at best, and will be preempted by federal law if the FDA declines to require a GE disclosure for GE salmon. The GE labeling requirements in HB 2175 and HB 2532 may also be preempted by federal law where the FDA has not similarly required disclosure in packaged food products.

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[4] Other aspects of Proposition 65 remain in force because Congress in 1997 created special FDCA preemption exemptions for Prop 65 labeling of non-prescription drugs and cosmetics. *See* 21 U.S.C. 379r(d)(2), 379s(3) (stating that preemption "does not apply to a State requirement adopted by a State public initiative or referendum enacted prior to September 1, 1997"). The California Supreme Court has nevertheless held that Prop. 65 drug labeling requirements are preempted when they conflict with FDA labeling decisions. *See Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P. 3d 1 (Cal. 2004).

2. Preemption of state GE farming prohibitions

GE farming restrictions are similarly preempted to the extent that they conflict with the federal GE regulatory scheme. For example, legislation like HB 3292 which prohibits growing GE material unless incapable of reproducing and declared incapable of damaging crops, deems GE foods "adulterated" unless the United State Department of Agriculture ("USDA") or the Oregon Department of Agriculture ("ODA") deem the GE food safe for consumption. The USDA, however, only has food safety authority over meat, poultry and eggs. Other foods, including GE foods, are primarily regulated by the FDA. *See* Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,213 at 23,302 (June 26, 1986). In most cases, therefore, HB 3292 requires ODA to duplicate FDA food safety oversight, which undermines the federal regulatory regime. State GE farming restrictions, therefore, also face preemption issues.

D. State GE food labeling and farming requirements may place unconstitutional burdens on interstate commerce.

The Commerce Clause of the U.S. Constitution grants Congress the power to regulate interstate commerce and mandates a common market across the United States. *See* U.S. Const. arts. 1 & 8, cl. 3. Under the dormant Commerce Clause states may not discriminate against out-of-state commerce nor place undue burdens on interstate commerce. As the Supreme Court has explained:

> Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.

S-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984).

1. Discrimination against out-of-state commerce

State laws that protect local commercial interests against out of state competition are almost always unconstitutional under the dormant Commerce Clause. This rule applies to state laws that directly regulate or discriminate against out-of-state commerce as well as facially neutral laws that have the effect of favoring in-state economic interests. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

The Oregon Legislature, therefore, must be careful to avoid GE laws that privilege local economic interests. *See, e.g, Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935) (striking down law banning importation of milk unless price paid to producer met minimum New York price standard).

2. Undue burden of GE labeling

Even state laws that regulate commerce evenhandedly violate the dormant Commerce Clause if they place an undue burden on interstate commerce. A state creates an undue burden on interstate commerce when the negative commercial effects of a state law exceed the local benefits of the law. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1979).

GE labeling requirements like those in HB 2175, HB 2532 and HB 3177 place a substantial burden on interstate commerce by imposing costs on food manufacturers and depressing sales. Labeling increases production costs by requiring manufacturers to segregate products destined for Oregon and produce special packaging for these products. In addition, economic studies indicate that consumers are less likely to buy products labeled as genetically modified and will not pay the same price for GE-labeled products as products not labeled as GE. *See, e.g., Consumer Willingness to Pay for Genetically Modified Food Labels in a Market with Diverse Information: Evidence from Experimental Auctions*, J. Ag. & Res. Econ, 28(3): 481-502 (2003).

Moreover, GE labeling does not provide any cognizable benefit to Oregon consumers. The FDA has repeatedly concluded that GE foods are safe and just as healthy as their non-GE counterparts. For example, FDA stated the following regarding the GE AquAdvantage salmon:

> We conclude that food from the [AquAdvantage] salmon that is the subject of this application is as safe as food from conventional salmon, and that there is a reasonable certainty of no harm from consumption of food from [AquAdvantage] salmon.

AquAdvantage Briefing Packet at 109 (Sept. 20, 2010). Although consumers may be curious about whether foods contain genetically modified ingredients, federal law prohibits labeling requirements that are based solely on consumer interest. *See, e.g., Stauber v. Shalala*, 895 F.Supp 1178, 1193 (W.D. Wisc. 1995) (holding that consumer demand is not a basis for requiring labeling of milk from rBST-treated cows). Oregon therefore may not be able to show a benefit from GE labeling to justify the burden that this labeling would place on interstate commerce.

3. Undue burden of GE farming prohibitions

GE farming prohibitions such as those in HB 2530 place an extreme burden on interstate commerce by completely blocking commercial activity. When a state seeks to block commerce, the state must show that the blocking regulation is essential to protect the state's legitimate interests and that there are no less burdensome means of accomplishing the state's goal. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

The Oregon Legislature has not identified the state's interest in banning the importation and farming of GE fish via HB 2530 nor justified the ban. There are very likely less burdensome alternatives to a complete ban on these activities. For example, HB 3292 requires state permitting of GE salmon hatcheries, which suggests that state a state permitting scheme may also be a possible means of regulating GE aquaculture.

CONCLUSION

Though government may occasionally compel commercial speech, bills like HB 2175, HB 2532 and HB 3177, which would compel retailers to place labels or signs stating "genetically engineered" on packaged food products or near certain fish, run afoul of the First Amendment. The compelled speech in this instance is not factual and uncontroversial, nor is it targeted at a sufficient government interest like preventing deception or protecting human health. At best, it is aimed at satisfying customer curiosity, which is an insufficient interest to warrant intrusion into protected speech.

State GE food labeling requirements are also preempted by FDA decisions concluding that GE labels are inappropriate. The broader federal GE regulatory scheme also preempts other state regulations that undermine federal regulatory efforts.

Finally, state GE labeling laws and farming restrictions may also violate the Commerce Clause of the U.S. Constitution by placing excessive burdens on interstate commerce. GE food labels do not provide a benefit to Oregon sufficient to justify the commercial burden of a labeling requirement. HB 2530's ban on importation of live GE salmon also excessively burdens interstate commerce. The State Legislature similarly cannot justify HB 2530's ban on the importation and farming of GE salmon nor has it shown that less burdensome alternatives are available.

For these reasons, we believe it would be most appropriate to request the opinion of the Attorney General as to the legal validity of these legislative proposals prior to acting on the legislation.

Thank you for the opportunity to share these concerns with you. I would be pleased to answer any questions you may have or to elaborate on any of these points at your convenience.

Very truly yours

Davis Wright Tremaine LLP

John DiLorenzo, Jr.
JAD:rmp

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NEIL ABERCROMBIE
GOVERNOR

DAVID M. LOUIE
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HEALTH & HUMAN SERVICES DIVISION
465 SOUTH KING STREET, Room 200
HONOLULU, HAWAII 96813
Ph. (808) 587-3050 Fax (808) 587-3077

March 12, 2013

The Honorable Rosalyn H. Baker
Senator, Sixth District
The Twenty-Seventh Legislature
State Capitol, Room 230
415 South Beretania Street
Honolulu, Hawaii 96813

senbaker@capitol.hawaii.gov

Re: Your inquiry dated February 28, 2012, regarding H.B. No. 174, H.D. 2 ("HB174") – Genetically Engineered Organism; Produce; Labeling; Import

Dear Senator Baker:

Thank you for your questions regarding the constitutionality of HB174.[1] You also asked whether the State has the legal authority to restrict the import of genetically engineered or genetically modified organism (GMO) food into the State that otherwise complies with all federal requirements.

This bill will very likely be found unconstitutional because (1) state efforts to require GMO labels have been preempted by the federal government, (2) it violates the First Amendment protections of commercial speech, and (3) it violates the Commerce Clause. In addition, the Commerce Clause will prohibit the State from restricting the importation of GMO food into Hawaii that meets applicable federal requirements.

As a preliminary matter, we note that the Legislature provides no articulation of the basis for its presumption that HB174 furthers a state interest. Pursuant to any constitutional inquiry, a federal court will seek to find justification for the proposed state action. The federal government, as discussed in more detail below, has taken the position that GMO food poses no threat to consumers and is not, from a scientific perspective, materially distinguishable from non-GMO food. For purposes of a constitutional analysis of what the likely outcome of litigation in federal court will be, any information that runs counter to conclusions embraced by the Food and Drug Administration (FDA) will certainly be treated as suspect. The absence of any statement of

[1] HB174 imposes labeling requirements on imported genetically modified or engineered produce. The bill authorizes labeling of non-genetically engineered food and creates a private right of action to enjoin violations.

purpose at all, which is the case here, precludes a federal court from even considering whether a legitimate state interest exists.

1. Express or Field Preemption

State law can either be expressly or field preempted. Express preemption is exactly what it sounds like, Congress has explicitly determined and stated that federal law will preempt state law. In the absence of express preemption language in a federal statute, courts may infer an intention to preempt state law where the federal regulatory scheme is pervasive. In this instance, Congress is said to occupy the entire field of regulation to the exclusion of the states. Congress, in enacting the Federal Food Drug and Cosmetic Act (FDCA), empowered the FDA with the authority to create a federal scheme for the labeling of food.

State GMO labeling laws may be expressly preempted by section 403A[2], an amendment to the FDCA under the Nutrition, Labeling and Education Act, which provides that "[n]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce [a]ny requirement for the labeling of food of the type required by [various sections related to misbranded articles] that is not identical to the requirement of such section." See 21 U.S.C. § 343-1(a). The misbranding sections of the FDCA to which this preemption language refers include prescriptions for "definition and standard of identity," "standards of quality and fill of container," and "nutrition levels and health-related claims." See 21 U.S.C. § 343(g), (h), and (r), respectively. These provisions strongly suggest that, where there is no federal mandate to label GMO food, any state effort to do so would be contrary and inconsistent with the misbranding provisions of the FDCA and be expressly preempted. Interestingly, the FDCA does not require any nutritional labeling on produce, to which HB174 is currently directed. See 21 U.S.C. § 343(q)(4). Nutritional labeling for what the FDA describes as "conventional" foods, by which it means fruits and vegetables, is voluntary. However, the same analysis that applies to food more broadly also applies to produce, i.e., the FDA has determined that, in both instances, there is no basis in fact or in the federal misbranding laws to require what would amount to a GMO "warning" label.

Requirements to label GMO food may also be field preempted. The federal government, via the FDA and its authority to prescribe the content of food labels pursuant to the FDCA, in furtherance of Congress' power to regulate commerce, has arguably "occupied the field" of food labeling. The FDA's regulations are expansive and cover all aspects of what a food label must and must not contain. Specifically, the FDA has examined the question of whether food labels should contain information about the content of GMO and has determined that no such information should be on the label. In fact, the FDA has suggested that even the voluntary labeling of food as "non-GMO" by the industry might be a violation of its rules because it would constitute the misbranding of food. The FDA reaches this conclusion because it has found no scientific basis for the claim that there is a material difference between GMO foods and non-

[2] Note that the FDCA contains section 403A, which consists of nutrition labeling requirements, and section 403(a), which is part of the material defining misbranding. Thus, what appears at first to be a possible typo is, instead, a reference to different sections of the FDCA.

GMO foods. Therefore, the requirement by state law, as contemplated by HB174, of GMO labeling is inconsistent with the scope of FDA's rules regarding food labeling and is thus preempted. Even if the Legislature were to amend HB174 by articulating a state interest, it is likely to be viewed as inconsistent with the conclusions reached by the FDA. The FDA has advised that,

> [T]he use or absence of use of bioengineering in the production of a food or ingredient does not, in and of itself, mean that there is a material difference in the food. Therefore, a label statement that expresses or implies that a food is superior (e.g., safer or of higher quality) because it is not bioengineered would be misleading.

Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering: Draft Guidance in Docket Number 00D-1598 (Draft released for comment January 2001 for comment purposes only).

2. First Amendment Protection of Commercial Free Speech

In addition to facing preemption challenges, state measures requiring GMO food labeling will likely be subject to claims that such measures violate the First Amendment. In the case of Vermont's effort to require the dairy industry to label milk produced from cows treated with growth hormones (International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996)), the Second Circuit Court of Appeals undertook a very methodical review of the rationale provided by the Vermont legislature and determined that the state label requirement was an impermissible restriction on the dairy producers' right to free (commercial) speech. The court reached this conclusion despite Vermont's argument that the legislation was justified on the basis of consumer protection and a citizen's right to know. Id. at 73. This case was decided strictly on First Amendment grounds without reaching the preemption or Commerce Clause issues raised in the lower court. Id. at 70. This suggests that any state effort (regardless of how well-intentioned) to require labeling that is inconsistent with federal law, particularly where the veracity and relevance of the information sought to be mandated remains a matter of contention at the federal level, will be met with great skepticism in federal court. The decision in International Dairy also demonstrates the lengths to which a federal court will go to call into question the state's rationale in support of its labeling requirement. The court found:

> Vermont's failure to defend its constitutional intrusion on the ground that it negatively impacts public health is easily understood. After exhaustive studies, the FDA has "concluded that rBST has no appreciable effect on the composition of milk produced by treated cows, and that there are no human safety or health concerns associated with food products derived from cows treated with rBST." 898 F.3d at 248. Because bovine somatotropin ("BST") appears naturally in cows, and because there are no BST receptors in a cow's mammary glands, only trace amounts of BST can be detected in milk, whether or not the cows received the supplement.

> Id. Moreover, it is undisputed that neither consumers nor scientists can distinguish rBST-derived milk from milk produced by an untreated cow. Id. at 248-49. Indeed, the already extensive record in this case contains no scientific evidence from which an objective observer could conclude that rBST has any impact at all on dairy products. It is thus plain that Vermont could not justify the statute on the basis of "real" harms. See Edenfield v. Fane, 507 U.S. 761, 770-71 (1993). We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product.

Id. at 73.

3. The Dormant Commerce Clause

State action to restrict the importation of GMO, whether taking the form of a labeling requirement, an additional tax burden or an outright ban, will likely run up against the Commerce Clause's overarching goal of ensuring a national marketplace. The Supreme Court has said:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949).

> [W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.

Baldwin v. Seelig, 294 U.S. 511, 527 (1935).

Article I, section 8, clause 3 of the United States Constitution empowers the federal government to regulate commerce among the states. A line of Supreme Court cases, exemplified most recently in United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste, 550 U.S. 330 (2007), has developed the concept of a dormant Commerce Clause which dictates that, in addition to the power it vests in the federal government, the Commerce Clause also acts as a limitation on the individual states' authority to regulate commerce even in the absence of a contrary federal statute. This line of cases is summarized by the United Haulers decision as follows:

> Moreover, as appellants correctly note, that "residuum" [of legislative authority] is particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963). By the same token, however, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951). Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "common market," we are confronted with the task of effecting an accommodation of the competing national and local interests.

Id. at 350.

4. Conclusion

It is likely that any state effort to require GMO labeling (of any kind) will be viewed as either expressly preempted by the FDCA or an intrusion on the comprehensive federal scheme of food labeling. Furthermore, as the International Dairy decision clearly demonstrates, the federal courts will apply strict scrutiny to examine whether a labeling requirement violates the First Amendment protection of commercial speech. Finally, the Commerce Clause may be implicated where a state seeks to impose a restraint on interstate commerce and a court examining, for example, a labeling requirement, an import tax, or some other import restriction, may find that law invalid where the facts are not sufficiently compelling to justify state action.

Very truly yours,

Wade H. Hargrove III
Deputy Attorney General

APPROVED:

David M. Louie
Attorney General