

AMENDED IN ASSEMBLY AUGUST 19, 2013

AMENDED IN ASSEMBLY AUGUST 7, 2013

AMENDED IN SENATE APRIL 23, 2013

AMENDED IN SENATE APRIL 16, 2013

**SENATE BILL**

**No. 465**

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**Introduced by Senator Correa**

February 21, 2013

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An act to amend Sections 12606 and 12606.2 of the Business and Professions Code, and to amend Section 110375 of the Health and Safety Code, relating to packaging and labeling.

LEGISLATIVE COUNSEL'S DIGEST

SB 465, as amended, Correa. Packaging and labeling: containers: slack fill.

(1) Existing law establishes the Department of Food and Agriculture and sets forth its powers and duties, including, but not limited to, enforcement of the Fair Packaging and Labeling Act. The act prohibits specified persons from distributing any packaged commodity that is not in conformity with prescribed packaging and labeling requirements, except as provided. The act prohibits a container wherein commodities are packed to have a false bottom, false sidewalls, false lid or covering, or to be constructed or filled as to facilitate the perpetration of deception or fraud. The act prohibits a container from being made, formed, or filled as to be misleading. The act provides that a container that does not allow a consumer to fully view its contents violates this provision if it contains nonfunctional slack fill. The act provides that nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for other than specified reasons.

The act also prohibits a food container, subject to the Federal Food, Drug, and Cosmetic Act, from being made, formed, or filled as to be misleading. The act provides that a container that does not allow a consumer to fully view its contents violates this provision if it contains nonfunctional slack fill. The act provides that nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for other than specified reasons. However, existing law provides that these state provisions regarding food containers are operative only to the extent they are identical to specified federal requirements.

Subject to the requirement that food containers conform to those federal requirements, the bill would define nonfunctional slack fill instead as the empty space in a package that is filled to substantially less than its capacity for other than any one or more of the specified reasons. *Except with respect to food containers, the bill would provide that slack fill in a package shall not be used as grounds to allege a violation of specified provisions based on its presence unless it is nonfunctional slack fill.*

(2) Existing law, *the Sherman Food, Drug, and Cosmetic Law*, also provides for the regulation by the State Department of Public Health of the packaging and labeling of foods, drugs, devices, and cosmetics, and provides requirements for containers containing these commodities that are similar to existing requirements for containers under the Fair Packaging and Labeling Act.

The bill would define nonfunctional slack fill instead as the empty space in a package that is filled to substantially less than its capacity for other than any one or more of the specified reasons referenced above. *The bill would provide that slack fill in a package shall not be used as grounds to allege a violation of specified provisions based on its presence unless it is nonfunctional slack fill.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 12606 of the Business and Professions
- 2 Code is amended to read:
- 3 12606. (a) No container wherein commodities are packed shall
- 4 have a false bottom, false sidewalls, false lid or covering, or be
- 5 otherwise so constructed or filled, wholly or partially, as to
- 6 facilitate the perpetration of deception or fraud.

1 (b) No container shall be made, formed, or filled as to be  
2 misleading. A container that does not allow the consumer to fully  
3 view its contents shall be considered to be filled as to be misleading  
4 if it contains nonfunctional slack fill. Slack fill is the difference  
5 between the actual capacity of a container and the volume of  
6 product contained therein. Nonfunctional slack fill is the empty  
7 space in a package that is filled to substantially less than its  
8 capacity for reasons other than any one or more of the following:

9 (1) Protection of the contents of the package.

10 (2) The requirements of machines used for enclosing the  
11 contents of the package.

12 (3) Unavoidable product settling during shipping and handling.

13 (4) The need to utilize a larger than required package or  
14 container to provide adequate space for the legible presentation of  
15 mandatory and necessary labeling information, such as those based  
16 on the regulations adopted by the United States Food and Drug  
17 Administration or state or federal agencies under federal or state  
18 law, laws or regulations adopted by foreign governments, or under  
19 an industrywide voluntary labeling program.

20 (5) The fact that the product consists of a commodity that is  
21 packaged in a decorative or representational container where the  
22 container is part of the presentation of the product and has value  
23 that is both significant in proportion to the value of the product  
24 and independent of its function to hold the product, such as a gift  
25 combined with a container that is intended for further use after the  
26 product is consumed, or durable commemorative or promotional  
27 packages.

28 (6) An inability to increase the level of fill or to further reduce  
29 the size of the package, such as where some minimum package  
30 size is necessary to accommodate required labeling, discourage  
31 pilfering, facilitate handling, or accommodate tamper-resistant  
32 devices.

33 (7) The product container bears a reasonable relationship to the  
34 actual amount of product contained inside, and the dimensions of  
35 the actual product container, the product, or the amount of product  
36 therein is visible to the consumer at the point of sale, or where  
37 obvious secondary use packaging is involved.

38 (8) The dimensions of the product or immediate product  
39 container are visible through the exterior packaging, or where the  
40 actual size of the product or immediate product container is clearly

1 and conspicuously depicted on any side of the exterior packaging  
2 excluding the bottom, accompanied by a clear and conspicuous  
3 disclosure that the representation is the “actual size” of the product  
4 or the immediate product container.

5 (9) The presence of any headspace within an immediate product  
6 container necessary to facilitate the mixing, adding, shaking, or  
7 dispensing of liquids or powders by consumers prior to use.

8 (10) The exterior packaging contains a product delivery or  
9 dosing device if the device is visible, or a clear and conspicuous  
10 depiction of the device appears on the exterior packaging, or it is  
11 readily apparent from the conspicuous exterior disclosures or the  
12 nature and name of the product that a delivery or dosing device is  
13 contained in the package.

14 (11) The exterior packaging or immediate product container is  
15 a kit that consists of a system, or multiple components, designed  
16 to produce a particular result that is not dependent upon the  
17 quantity of the contents, if the purpose of the kit is clearly and  
18 conspicuously disclosed on the exterior packaging.

19 (12) The exterior packaging of the product is routinely displayed  
20 using tester units or demonstrations to consumers in retail stores,  
21 so that customers can see the actual, immediate container of the  
22 product being sold, or a depiction of the actual size thereof prior  
23 to purchase.

24 (13) The exterior packaging consists of single or multiunit  
25 presentation boxes of holiday or gift packages if the purchaser can  
26 adequately determine the quantity and sizes of the immediate  
27 product container at the point of sale.

28 (14) The exterior packaging is for a combination of one  
29 purchased product, together with a free sample or gift, wherein  
30 the exterior packaging is necessarily larger than it would otherwise  
31 be due to the inclusion of the sample or gift, if the presence of both  
32 products and the quantity of each product are clearly and  
33 conspicuously disclosed on the exterior packaging.

34 (15) The exterior packaging or immediate product container  
35 encloses computer hardware or software designed to serve a  
36 particular computer function, if the particular computer function  
37 to be performed by the computer hardware or software is clearly  
38 and conspicuously disclosed on the exterior packaging.

1 (c) *Slack fill in a package shall not be used as grounds to allege*  
2 *a violation of this section based solely on its presence unless it is*  
3 *nonfunctional slack fill.*

4 (e)

5 (d) Any sealer may seize a container that facilitates the  
6 perpetration of deception or fraud and the contents of the container.  
7 By order of the superior court of the county within which a  
8 violation of this section occurs, the containers seized shall be  
9 condemned and destroyed or released upon conditions the court  
10 may impose to insure against their use in violation of this chapter.  
11 The contents of any condemned container shall be returned to the  
12 owner thereof if the owner furnishes proper facilities for the return.  
13 A proceeding under this section is a limited civil case if the value  
14 of the property in controversy is less than or equal to the maximum  
15 amount in controversy for a limited civil case under Section 85 of  
16 the Code of Civil Procedure.

17 SEC. 2. Section 12606.2 of the Business and Professions Code  
18 is amended to read:

19 12606.2. (a) This section applies to food containers subject to  
20 Section 403(d) of the Federal Food, Drug, and Cosmetic Act (21  
21 U.S.C. Sec. 343(d)), and Section 100.100 of Title 21 of the Code  
22 of Federal Regulations. Section 12606 does not apply to food  
23 containers subject to this section.

24 (b) No food containers shall be made, formed, or filled as to be  
25 misleading.

26 (c) A container that does not allow the consumer to fully view  
27 its contents shall be considered to be filled as to be misleading if  
28 it contains nonfunctional slack fill. Slack fill is the difference  
29 between the actual capacity of a container and the volume of  
30 product contained therein. Nonfunctional slack fill is the empty  
31 space in a package that is filled to substantially less than its  
32 capacity for reasons other than any one or more of the following:

33 (1) Protection of the contents of the package.

34 (2) The requirements of the machines used for enclosing the  
35 contents in the package.

36 (3) Unavoidable product settling during shipping and handling.

37 (4) The need for the package to perform a specific function,  
38 such as where packaging plays a role in the preparation or  
39 consumption of a food, if that function is inherent to the nature of  
40 the food and is clearly communicated to consumers.

1 (5) The fact that the product consists of a food packaged in a  
2 reusable container where the container is part of the presentation  
3 of the food and has value that is both significant in proportion to  
4 the value of the product and independent of its function to hold  
5 the food, such as a gift product consisting of a food or foods  
6 combined with a container that is intended for further use after the  
7 food is consumed or durable commemorative or promotional  
8 packages.

9 (6) Inability to increase the level of fill or to further reduce the  
10 size of the package, such as where some minimum package size  
11 is necessary to accommodate required food labeling exclusive of  
12 any vignettes or other nonmandatory designs or label information,  
13 discourage pilfering, facilitate handling, or accommodate  
14 tamper-resistant devices.

15 (d) This section shall be interpreted consistent with the  
16 comments by the United States Food and Drug Administration on  
17 the regulations contained in Section 100.100 of Title 21 of the  
18 Code of Federal Regulations, interpreting Section 403(d) of the  
19 Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)),  
20 as those comments are reported on pages 64123 to 64137, inclusive,  
21 of Volume 58 of the Federal Register.

22 (e) If the requirements of this section do not impose the same  
23 requirements as are imposed by Section 403(d) of the Federal  
24 Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any  
25 regulation promulgated pursuant thereto, then this section is not  
26 operative to the extent that it is not identical to the federal  
27 requirements, and for this purpose those federal requirements are  
28 incorporated into this section and shall apply as if they were set  
29 forth in this section.

30 (f) Any sealer may seize any container that is in violation of  
31 this section and the contents of the container. By order of the  
32 superior court of the county within which a violation of this section  
33 occurs, the containers seized shall be condemned and destroyed  
34 or released upon any conditions that the court may impose to ensure  
35 against their use in violation of this chapter. The contents of any  
36 condemned container shall be returned to the owner thereof if the  
37 owner furnishes proper facilities for the return. A proceeding under  
38 this section is a limited civil case if the value of the property in  
39 controversy is less than or equal to the maximum amount in

1 controversy for a limited civil case under Section 85 of the Code  
2 of Civil Procedure.

3 SEC. 3. Section 110375 of the Health and Safety Code is  
4 amended to read:

5 110375. (a) No container wherein commodities are packed  
6 shall have a false bottom, false sidewalls, false lid or covering, or  
7 be otherwise so constructed or filled, wholly or partially, as to  
8 facilitate the perpetration of deception or fraud.

9 (b) No container shall be made, formed, or filled as to be  
10 misleading. A container that does not allow the consumer to fully  
11 view its contents shall be considered to be filled as to be misleading  
12 if it contains nonfunctional slack fill. Slack fill is the difference  
13 between the actual capacity of a container and the volume of  
14 product contained therein. Nonfunctional slack fill is the empty  
15 space in a package that is filled to substantially less than its  
16 capacity for reasons other than any one or more of the following:

17 (1) Protection of the contents of the package.

18 (2) The requirements of machines used for enclosing the  
19 contents of the package.

20 (3) Unavoidable product settling during shipping and handling.

21 (4) The need to utilize a larger than required package or  
22 container to provide adequate space for the legible presentation of  
23 mandatory and necessary labeling information, such as those based  
24 on the regulations adopted by the United States Food and Drug  
25 Administration or state or federal agencies under federal or state  
26 law, laws or regulations adopted by foreign governments, or under  
27 an industrywide voluntary labeling program.

28 (5) The fact that the product consists of a commodity that is  
29 packaged in a decorative or representational container where the  
30 container is part of the presentation of the product and has value  
31 that is both significant in proportion to the value of the product  
32 and independent of its function to hold the product, such as a gift  
33 combined with a container that is intended for further use after the  
34 product is consumed, or durable commemorative or promotional  
35 packages.

36 (6) An inability to increase the level of fill or to further reduce  
37 the size of the package, such as where some minimum package  
38 size is necessary to accommodate required labeling, discourage  
39 pilfering, facilitate handling, or accommodate tamper-resistant  
40 devices.

1 (7) The product container bears a reasonable relationship to the  
2 actual amount of product contained inside, and the dimensions of  
3 the actual product container, the product, or the amount of product  
4 therein is visible to the consumer at the point of sale, or where  
5 obvious secondary use packaging is involved.

6 (8) The dimensions of the product or immediate product  
7 container are visible through the exterior packaging, or where the  
8 actual size of the product or immediate product container is clearly  
9 and conspicuously depicted on any side of the exterior packaging  
10 excluding the bottom, accompanied by a clear and conspicuous  
11 disclosure that the representation is the “actual size” of the product  
12 or the immediate product container.

13 (9) The presence of any headspace within an immediate product  
14 container necessary to facilitate the mixing, adding, shaking, or  
15 dispensing of liquids or powders by consumers prior to use.

16 (10) The exterior packaging contains a product delivery or  
17 dosing device if the device is visible, or a clear and conspicuous  
18 depiction of the device appears on the exterior packaging, or it is  
19 readily apparent from the conspicuous exterior disclosures or the  
20 nature and name of the product that a delivery or dosing device is  
21 contained in the package.

22 (11) The exterior packaging or immediate product container is  
23 a kit that consists of a system, or multiple components, designed  
24 to produce a particular result that is not dependent upon the  
25 quantity of the contents, if the purpose of the kit is clearly and  
26 conspicuously disclosed on the exterior packaging.

27 (12) The exterior packaging of the product is routinely displayed  
28 using tester units or demonstrations to consumers in retail stores,  
29 so that customers can see the actual, immediate container of the  
30 product being sold, or a depiction of the actual size of the container  
31 prior to purchase.

32 (13) The exterior packaging consists of single or multiunit  
33 presentation boxes of holiday or gift packages if the purchaser can  
34 adequately determine the quantity and sizes of the immediate  
35 product container at the point of sale.

36 (14) The exterior packaging is for a combination of one  
37 purchased product, together with a free sample or gift, wherein  
38 the exterior packaging is necessarily larger than it would otherwise  
39 be due to the inclusion of the sample or gift, if the presence of both

1 products and the quantity of each product are clearly and  
2 conspicuously disclosed on the exterior packaging.

3 *(c) Slack fill in a package shall not be used as grounds to allege*  
4 *a violation of this section based solely on its presence unless it is*  
5 *nonfunctional slack fill.*

6 ~~(e)~~

7 *(d) Any sealer may seize a container that facilitates the*  
8 *perpetration of deception or fraud and the contents of the container.*  
9 *By order of the superior court of the county within which a*  
10 *violation of this section occurs, the containers seized shall be*  
11 *condemned and destroyed or released upon any condition as the*  
12 *court may impose to ensure against their use in violation of this*  
13 *chapter. The contents of any condemned container shall be returned*  
14 *to the owner if the owner furnishes proper facilities for the return.*