

THE FOOD, BEVERAGE
AND COSMETICS
LAW REVIEW

THIRD EDITION

Editors

Kara L McCall and Elizabeth M Chiarello

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PREFACE

Food, beverage and cosmetic companies provide products that are beneficial to consumers, important to the economy and in high demand. Consumers are not only seeking high-quality products at reasonable prices but also increasingly considering sustainability, methods of manufacture and use (or omission) of certain ingredients. These demands require companies to not only be looking ahead towards the ‘next big thing’ in these consumer industries but also considering how those attributes that are so important to customers (some of which have not been universally defined) can be communicated in a true and non-misleading way. Furthermore, companies need to act in compliance with the regulatory schemes of the locations in which they sell, and also make sure that their products – some of which are quite cutting edge – are safe and effective.

Regulatory, legislative and civil litigation frameworks vary dramatically from country to country and from locality to locality within each country. These laws and regulations may be similar or may be directly contradictory. Some types of products may be subject to extreme scrutiny, whereas others seem to be of less interest (and where on that spectrum your product falls may differ from day to day). Each jurisdiction is different, and advice from local legal experts is absolutely necessary before operating in (including selling into) any jurisdiction. This guide, however, is intended to provide a general overview of both the regulatory and civil legal frameworks in key countries for consideration by legal practitioners in these industries.

This is the third edition of *The Food, Beverage and Cosmetics Law Review*. It was developed because of the increase in class action litigation related to claims, particularly health benefit claims, made in the labelling and marketing of food, beverage and cosmetic products. This year brought continued litigation interest in the composition and labelling of food, beverage and cosmetic products, as well as regulatory changes in these areas, including the adoption of the Modernization of Cosmetics Regulation Act. This third edition covers nine countries and includes a high-level overview of each jurisdiction’s legal framework for food, beverage and cosmetic products, and a year in review, followed by discussions of legal frameworks related to food, beverage and cosmetic safety (including recalls); supply chain issues (including sustainability, anti-corruption, and labour and immigration); special legal issues related to sales and marketing (including whether regulatory approvals are required); general product liability and intellectual property laws; the role of trade organisations (including certifications) and unique issues related to financing and mergers and acquisitions in this space.

We hope that all readers find these chapters useful and informative. We wish to thank all of the contributors who have been so generous with their time and expertise. They have made this publication possible.

Kara L McCall and Elizabeth M Chiarello

Sidley Austin LLP

Chicago

August 2023

CALIFORNIA

Amy P Lally, Emily Zipperstein and Adriane Peralta¹

I OVERVIEW

Companies seeking to sell or manufacture food, beverage or cosmetics products in California face a host of laws that regulate their business activities. Perhaps the most far-reaching of these laws is the Sherman Food, Drug, and Cosmetic Law, which regulates the packaging, labelling and advertising of food and cosmetic products sold in California.² Additionally, sellers and manufacturers should also be mindful of Proposition 65, a unique California law that requires companies doing business in California to provide certain warnings if their products cause exposure to one or more of the 900 chemicals on the state's regulated list.³

Recently, California lawmakers have focused on consumer right-to-know laws. For example, the California Transparency in Supply Chains Act of 2010 requires manufacturers and sellers in California to disclose certain information about labour abuses in their supply chains to consumers.⁴ Furthermore, as of January 2022, the California Department of Health requires companies to make certain disclosures that will be added to the California Safe Cosmetics Program Database.⁵

II YEAR IN REVIEW

California has introduced and enacted a number of laws to further regulate the use of chemicals in food and cosmetic products.

i Cosmetic Fragrance and Flavor Ingredient Right to Know Act of 2020

As of 1 January 2022, the Cosmetic Fragrance and Flavor Ingredient Right to Know Act requires manufacturers of cosmetic products sold in California to make certain disclosures to the state's Department of Public Health.⁶ Among other things, manufacturers must disclose each fragrance ingredient or flavour ingredient that appears on any one of a list of chemicals maintained by an 'authoritative body', including state and federal agencies and certain lists

1 Amy P Lally and Emily Zipperstein are partners and Adriane Peralta is a senior managing associate at Sidley Austin LLP. The authors gratefully acknowledge the contributions of Aimee Mackay, Sheri Porath Rockwell, Celia Spalding, Kris Martinez, Marissa Hernandez and Keanu Balani to the chapter.

2 See Section III.iii *infra*.

3 See Section III.iv *infra*.

4 See Section IV.iii *infra*.

5 See Section II.i *infra*.

6 Cal. Health & Safety Code § 111792.6(b)(1).

maintained by the Canadian and European Union governments.⁷ Manufacturers also must disclose any fragrance allergen included in Annex III of EU Cosmetics Regulation No. 1223/2009.⁸ This information is available to the public through the state's Safe Cosmetics Database.⁹ The State Department of Health Services administers and enforces the law.¹⁰

ii Cosmetic Safety Law

Beginning 1 January 2025, this law prohibits the manufacturing and selling of a cosmetic product with any intentionally added amounts of 24 specified chemicals.¹¹ The list includes formaldehyde, certain plasticisers (i.e., phthalates), certain perfluoroalkyl and polyfluoroalkyl substances (PFAS), and mercury.¹² Some of these substances, especially phthalates and PFAS, have become an increasing target of state regulation across various consumer and commercial uses. The law provides for the presence of the listed substances as an impurity only in trace quantities.¹³

On 29 September 2022, California Governor Gavin Newsom signed into law a bill expanding the Cosmetic Safety Law to prohibit the manufacture, distribution or sale of any cosmetic product in California that contains 'intentionally added PFAS' starting 1 January 2025.¹⁴ The law defines 'intentionally added PFAS' as either:

- a* PFAS that a manufacturer intentionally adds to a product for a functional or technical effect; or
- b* PFAS chemicals that are intentional breakdown products of an added chemical.¹⁵

A 'cosmetic product' is in turn defined as any product for retail sale or professional use intended to be applied to the human body for cleansing or cosmetic purposes.¹⁶ The newly expanded Cosmetics Safety Law completely bans the intentional inclusion of PFAS chemicals (or chemicals known to degrade to PFAS) in cosmetic products at all stages of the supply chain.

iii Food packaging and cookware

Signed into law in October 2021, the California Safer Food Packaging Act amended the California Health and Safety Code to apply similar restrictions to those in the Cosmetic Safety Law (discussed in Section II.ii) to food packaging and cookware. Beginning on 1 January 2023, all cookware manufacturers whose products intentionally contain any of the designated chemicals on the product's handle or any area that touches food must post on their website a list of the chemicals present and links to the authoritative lists of chemicals.¹⁷ Beginning on 1 January 2024, manufacturers of cookware intentionally containing any added

7 Cal. Health & Safety Code § 111792.6(a)(2) and (b)(1)(A).

8 Cal. Health & Safety Code § 111792.6(a)(2) and (b)(1)(B).

9 Cal. Health & Safety Code § 111792.6(c)(1); see CSCP Reportable Ingredients List, available at https://cscpsubmit.cdph.ca.gov/submission/assets/files/Reportable_Ingredients_List.xlsx (last visited 5 July 2022).

10 Cal. Health & Safety Code § 11045.

11 Cal. Health & Safety Code § 108980(a).

12 Cal. Health & Safety Code § 108980(a)(1), (2), (3), (7), (12).

13 Cal. Health & Safety Code § 108980(b).

14 Cal. Health & Safety Code § 108981.5.

15 Cal. Health & Safety Code § 108982(c)(1)-(2).

16 Cal. Health & Safety Code § 108982(a).

17 Cal. Health & Safety Code § 109012.

chemicals on the designated list must state the presence of the chemicals on the product label in both English and Spanish.¹⁸ The sale or distribution of food packaging that contains PFAS is banned as of 1 January 2023.¹⁹

iv Small plastic bottles ban

Beginning on 1 January 2023, lodging establishments (including hotels, motels, resorts, bed and breakfasts, and vacation rentals) with more than 50 rooms can no longer provide single-use small plastic bottles containing personal care products (e.g., lotion, shampoo, conditioner and shower gel) to guests.²⁰ Lodging establishments found to violate this law are subject to a civil penalty in the amount of US\$500 for each day the lodging establishment is in violation, but not to exceed US\$2,000 annually. The purpose of the law is to reduce the amount of plastic waste (similar to California's ban on single-use plastic bags at stores²¹ and single-use plastic straws at restaurants²²).

Lodging establishments with less than 50 rooms will be subject to the same requirements beginning on 1 January 2024.

III FOOD AND COSMETIC SAFETY

i Regulatory framework

The California Department of Public Health (CDPH) regulates several aspects of public safety for food, beverages and cosmetics. Notably, CDPH collects information on ingredients in cosmetics and makes it available publicly in its California Safe Cosmetics Program Database.²³ Reporting to the CDPH under the Cosmetic Fragrance and Flavor Ingredient Right to Know Act of 2020 commenced on 1 January 2022.²⁴ CDPH will enforce bans on certain ingredients in cosmetics commencing 1 January 2025 under the Toxic-Free Cosmetics Act.²⁵

Both the CDPH and the California Department of Food and Agriculture, along with local county and city health departments, regulate the food industry, with special programmes for food safety, milk and dairy, meat, produce and, increasingly, cannabis-containing foods.

The California Department of Toxic Substances Control enforces the Toxics in Packaging Prevention Act and regulates green chemistry under its safer consumer products programme and may select any product chemical for regulation.²⁶

The California Department of Resources Recycling and Recovery (CalRecycle) regulates beverage containers and has long administered the California Beverage Container Recycling and Litter Reduction Act, requiring certain beverages to be subject to a US\$0.05 or US\$0.10 California Redemption Value,²⁷ and the Rigid Plastic Packaging Container Law

18 Cal. Health & Safety Code § 109011.

19 Cal. Health & Safety Code § 109000(b).

20 Cal. Public Resources Code § 42372.

21 Cal. Public Resources Code § 42280 et seq.

22 Cal. Public Resources Code § 42270 et seq.

23 See Section II.i supra.

24 See Section II.i supra.

25 See Section II.ii supra.

26 See Cal. Health & Safety Code § 25214.11 et seq.

27 See Cal. Public Resource Code § 14500 et seq.

governing content and recyclability.²⁸ More recently, CalRecycle has regulated the content of the containers, which must have a post-consumer plastic recycled content of 15 per cent as of 1 January 2022, increasing to 25 per cent in 2025 and 50 per cent in 2030.²⁹

Violations of the regulations of all state agencies are subject to investigation and enforcement by the agency itself, by the Attorney General, by local district attorneys and by private citizen enforcers.

ii Hazardous Substances Information and Training Act

Effective 1 July 2020, manufacturers and importers of a hazardous substance that takes the form of a cosmetic are required to post material safety data sheets (SDSs) to their websites and translate the SDSs into four or more languages.³⁰ The Director of Industrial Relations maintains the list of hazardous substances.³¹

The requirements do not apply to cosmetics packaged for distribution to and use by the general public, nor do they apply to retail trade establishments.³² Thus, manufacturers or importers of cosmetics whose sole connection to California is the distribution of finished goods or retail sales are unaffected.³³ The Division of Occupational Safety and Health enforces the rules in the Labor Code.³⁴

iii Food additives and contaminants

The Sherman Food, Drug, and Cosmetic Law regulates the packaging, labelling and advertising of food, including dietary supplements, cosmetics, drugs and medical devices in California.³⁵ As it relates to additives, a food that contains a food additive³⁶ or colour additive³⁷ is considered unsafe and adulterated unless use of the additive is otherwise authorised by state law.³⁸ The Attorney General, a district attorney or a city attorney may bring a civil or criminal action to remedy a violation of the law.³⁹

iv Proposition 65

The Safe Drinking Water and Toxic Enforcement Act (commonly known as Proposition 65) requires companies doing business in California to provide a clear and reasonable warning before causing an exposure to a chemical known to cause cancer, birth defects or other

28 See Cal. Code of Regs, Title 14 § 17944 et seq.

29 On 24 September 2020, California Governor Gavin Newsom signed into law Assembly Bill 793 implementing these new post-consumer plastic recycled content standards. CalRecycle is currently developing regulations to implement Assembly Bill 793, see California Department of Resources Recycling and Recovery (CalRecycle), ‘Plastic Minimum Content Standards (AB 793)’, available at <https://calrecycle.ca.gov/bevcontainer/bevdistman/plasticcontent/>.

30 Cal. Labor Code § 6390.2.

31 Cal. Code. Regs., Tit. 8, § 337 and § 339.

32 See Cal. Labor Code § 6390.3.

33 See Cal. Labor Code § 6390.3.

34 Cal. Labor Code § 6302, 6307.

35 See Cal. Health & Safety Code § 109875 et seq.

36 See Cal. Health & Safety Code § 109940.

37 See Cal. Health & Safety Code § 109895.

38 See Cal. Health & Safety Code § 110555 and § 110445.

39 See Cal. Health & Safety Code § 111825 et seq., § 111840 et seq., § 111860 et seq. and § 11190 et seq.

reproductive harm.⁴⁰ There are approximately 900 chemicals on the list,⁴¹ and ingestion is a form of exposure.⁴² The regulations implementing Proposition 65 contain safe harbour warnings that are deemed to be clear and reasonable warnings if they are displayed prominently and conspicuously.⁴³ There are different safe harbour warnings for exposure to chemicals from food and cosmetics and safe harbour warnings also vary depending on whether the exposure being warned of is to a carcinogen, a reproductive toxicant or both.⁴⁴ The law may be enforced by public enforcers or private citizens acting in the public interest after giving notice and meeting certain other conditions.⁴⁵ Private plaintiff attempts to bypass Proposition 65's notice requirement by pleading claims under the state consumer protection laws have been rejected where 'the claims asserted . . . are entirely derivative of an unspoken Proposition 65 violation'.⁴⁶

Failure to comply with Proposition 65 may result in civil penalties of up to US\$2,500 per day per violation and injunctive relief.⁴⁷ Private enforcers may keep 25 per cent of the civil penalties that they recover and seek attorneys' fees under California law.⁴⁸

v Recalls

The California Product Recall and Safety Act prohibits commercial dealers, manufacturers, importers, distributors, wholesalers and retailers from in any way placing a product into the stream of commerce if the person or entity knows that the product is unsafe.⁴⁹ A product is deemed unsafe if it has been recalled for failure to comply with state or federal laws and regulations or recalled for a safety hazard reason voluntarily or in cooperation with the Consumer Product Safety Commission.⁵⁰ The Act requires the entity that has placed the unsafe product into the stream of commerce to contact customers and prominently post relevant information on the company's website homepage within 24 hours after issuing or receiving the recall notice or warning.⁵¹ Manufacturers must provide for safe no-cost returns by end consumers or retailers and ensure proper disposal of the recalled product.⁵²

The Sherman Food, Drug, and Cosmetic Law requires suppliers to provide the California State Department of Public Health with a list of customers that may or will receive

40 Cal. Health & Safety Code § 25249.5 et seq.

41 Cal. Code Regs., Tit. 27, § 27001(b).

42 Cal. Code Regs., Tit. 27, § 25102(i).

43 Cal. Code Regs., Tit. 27, § 25601(a) and (c).

44 Cal. Code Regs., Tit. 27, § 25602; § 25607.2(a)(2)–(5).

45 Cal. Health & Safety Code § 25249.7(c)–(d).

46 *Sciortino v. Pepsico, Inc.*, 108 F. Supp. 3d 780, 792 (N.D. Cal. 2015); see also *Hanna v. Walmart, Inc.*, No. 520CV01075MCSSHK, 2020 WL 7345680, at *1 (C.D. Cal. Nov. 4, 2020) (finding that complaint for failure to warn about glyphosate in the Roundup-brand herbicide was a Proposition 65 claim even though Proposition 65 was not mentioned in the complaint); but see *Barnes v. Nat. Organics, Inc.*, No. EDCV22314JGBPLAX, 2022 WL 4283779, at *5 (C.D. Cal. Sept. 13, 2022) (finding that complaint for failure to warn about heavy metals in prenatal vitamins was not subject to the Proposition 65 notice requirement since the plaintiff alleged heavy metal consumption contributed to a variety of health complications outside the scope of Proposition 65).

47 Cal. Health & Safety Code § 25249.7(a) and (b).

48 See Cal. Health & Safety Code § 25249.12(d) and Cal. Code Civ. Proc. § 1021.5.

49 Cal. Health & Safety Code § 108044(a).

50 Cal. Health & Safety Code § 108044(b).

51 Cal. Health & Safety Code § 108046(a).

52 Cal. Health & Safety Code § 108046(b).

meat- or poultry-related products that meet the criteria for Class I or Class II recalls according to the United States Department of Agriculture.⁵³ Class I recalls involve a health hazard with a reasonable probability of causing death or health problems if the product is consumed.⁵⁴ Class II recalls involve a potential health hazard with a remote probability of adverse health consequences from eating the food.⁵⁵

In addition to notifying the state, suppliers must contact consumers according to the procedure outlined in the Sherman Food, Drug, and Cosmetic Law.⁵⁶ The State Department of Public Health will then notify local public health officials of the recall and those officials will then determine how to notify the public.⁵⁷ The Sherman Food, Drug, and Cosmetic Law also provides a public relations shield for restaurants: if local health officials determine that the contaminated products were never offered to the public, and the recalled products have been removed from the restaurant's supply, then the restaurant's name may be excluded from the public health notice.⁵⁸

IV SUPPLY CHAINS

i Special legal issues for growers

In addition to the numerous California statutes that apply to California employers, the Industrial Welfare Commission requires California employers to follow the wage orders applicable to their industry. Employers in the food industry may have employees who fall under one of several California wage orders: (1) Manufacturing Industry,⁵⁹ (3) Canning, Freezing, and Preserving Industry,⁶⁰ (8) Industries Handling Products After Harvest,⁶¹ (13) Industries Preparing Agricultural Products for Market, on the Farm⁶² or (14) Agricultural Occupations.⁶³ These wage orders cover topics from hours of work and minimum wage to the employer's obligation to provide uniforms and seats at the workplace.

The wage orders generally apply to all employees in the industry, unless the employee is exempt from some portions of the wage order. In order to be exempt, the employees must

53 Cal. Health & Safety Code § 110806(a).

54 US Department of Agriculture, AskUSDA, Knowledge Article, available at <https://ask.usda.gov/s/article/What-does-it-mean-when-a-meat-or-poultry-recall-is-designated-Class-I-Class-II-or-Class-III#>.

55 US Department of Agriculture, AskUSDA, Knowledge Article, available at <https://ask.usda.gov/s/article/What-does-it-mean-when-a-meat-or-poultry-recall-is-designated-Class-I-Class-II-or-Class-III#>.

56 Cal. Health & Safety Code § 110806(a).

57 Cal. Health & Safety Code § 110806(b).

58 Cal. Health & Safety Code § 110806(c).

59 Industrial Welfare Commission, Order No. 1-2001, Regulating Wages, Hours and Working Conditions in the Manufacturing Industry, available at <https://www.dir.ca.gov/IWC/IWCArticle01.pdf>.

60 Industrial Welfare Commission, Order No. 3-2001, Regulating Wages, Hours and Working Conditions in the Canning, Freezing, and Preserving Industry, available at <https://www.dir.ca.gov/IWC/IWCArticle03.pdf>.

61 Industrial Welfare Commission, Order No. 8-2001, Regulating Wages, Hours and Working Conditions in the Industries Handling Products After Harvest, available at <https://www.dir.ca.gov/IWC/IWCArticle08.pdf>.

62 Industrial Welfare Commission, Order No. 13-2001, Regulating Wages, Hours and Working Conditions in the Industries Preparing Agricultural Products for Market, on the Farm, available at [dir.ca.gov/IWC/IWCArticle13.pdf](https://www.dir.ca.gov/IWC/IWCArticle13.pdf).

63 Industrial Welfare Commission, Order No. 14-2001, Regulating Wages, Hours and Working Conditions in the Agricultural Occupations, available at <https://www.dir.ca.gov/IWC/IWCArticle14.pdf>.

fall into one of the three categories of exemption – executive, administrative or professional – and make a salary of at least twice minimum wage. The employee must have the specific job duties or experience set out by each exemption to be considered exempt, but the rules for each exemption are the same across the wage orders.

Wage Order 14, which applies to agricultural operations, is quite different from the other wage orders and has an expansive definition of what types of employees it covers. This order covers planting, caring for and harvesting agricultural or horticultural commodities, as well as raising and caring for animals such as livestock, fish and poultry. One of the main departures in Wage Order 14 is the graduated overtime pay requirement. As of 1 January 2022, employers of more than 25 employees are required to pay overtime for all hours worked in excess of eight in one day and over 40 in one working week, matching the overtime requirement for other employees in the food industry. Employers with 25 or fewer employees will match up with larger employers and the rest of the industry by 1 January 2025.

ii Special rules regarding processing (non-genetically modified organisms and organic, etc.) and related certifications

The California Organic Foods Act, passed in 1990, established the California State Organic Program.⁶⁴ The Act also created standards for the production and sale of organic foods in California.⁶⁵ In 2003, the Act was revised to apply in conjunction with the Organic Food Products Act of 1990, a federal law establishing the National Organic Program to regulate the sale and production of organic foods across the country.⁶⁶

In 2012, California voters rejected Proposition 37, which would have required foods containing genetically modified organisms (GMOs) to be labelled. Since then, California has not passed any statute regulating GMOs. Several other California laws, however, prohibit the mislabelling of foods. For example, the California False Advertising Act prohibits businesses from making any statements that are untrue or misleading.⁶⁷

iii California Transparency in Supply Chains Act of 2010

The California Transparency in Supply Chains Act⁶⁸ requires large retailers and manufacturers doing business in California to disclose on their websites their efforts to eradicate slavery and human trafficking in their supply chains.⁶⁹ A company falls within the scope of the Act if:

- a* it is a retail seller or manufacturer;
- b* it conducts business in California; and
- c* it exceeds annual worldwide gross receipts in the amount of US\$100 million.⁷⁰

64 Cal. Health & Safety Code § 110810 et seq.

65 Cal. Health & Safety Code § 110820.

66 7 U.S.C. § 6501 et seq.

67 Cal. Bus. & Prof. Code § 17508.

68 Cal. Civ. Code § 1714.43.

69 Cal. Civ. Code § 1714.43(b).

70 Cal. Civ. Code § 1714.43(a)(1).

Notably, the Act may be enforced only by the Attorney General for injunctive relief.⁷¹ The Act does not provide for any kind of monetary relief, nor does it provide for a private right of action. Private citizens, however, have alleged violations of the Act as a predicate for class actions under the state's consumer protection laws.⁷²

iv Animal testing

California law prohibits manufacturers and contract testing facilities in California from testing cosmetics on animals if alternative test methods have been scientifically validated.⁷³ Since 2020, California law imposes similar prohibitions on manufacturers that import cosmetics into the state.⁷⁴ Under this law, a manufacturer may not import for profit, sell or offer for sale in California any cosmetic that was developed or manufactured using an animal test that was conducted or contracted by the manufacturer.⁷⁵ The law does not apply directly to retailers.

The law recognises some instances where animal testing is unavoidable; therefore, it creates certain exceptions to the general prohibition.⁷⁶ The law also contains a 'grandfather' provision that protects the lawfulness of current products. Specifically, the prohibition on animal testing does not apply to:

- a* a cosmetic sold in California or tested on animals prior to 1 January 2020, even if the cosmetic is manufactured after that date; and
- b* an ingredient sold in California or tested on animals prior to 1 January 2020, even if the ingredient is manufactured after that date.⁷⁷

The law authorises public enforcers with enforcement.⁷⁸ Violations are punishable by a fine of US\$5,000 and an additional US\$1,000 for each day the violation continues.⁷⁹

V SALES AND MARKETING

i Regulatory framework

As is discussed in Section III.ii, the Sherman Food, Drug, and Cosmetic Law regulates the packaging, labelling and advertising of food and cosmetics in California.⁸⁰ The Sherman Food, Drug, and Cosmetic Law incorporates the labelling requirements set forth in the federal Food Drug and Cosmetic Act (FDCA) and broadly prohibits the sale of falsely advertised,

⁷¹ Cal. Civ. Code § 1714.43(d).

⁷² *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *aff'd*, 731 F. App'x 719 (9th Cir. 2018); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018); *Hodson v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal. 2016), *aff'd*, 891 F.3d 857 (9th Cir. 2018); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954 (N.D. Cal. 2016), *aff'd sub nom. McCoy v. Nestle USA, Inc.*, 730 F. App'x 462 (9th Cir. 2018).

⁷³ Cal. Civ. Code § 1834.9(a).

⁷⁴ Cal. Civ. Code § 1834.9.5.

⁷⁵ Cal. Civ. Code § 1834.9.5(a).

⁷⁶ Cal. Civ. Code § 1834.9.5(c).

⁷⁷ Cal. Civ. Code § 1834.9.5(g).

⁷⁸ Cal. Civ. Code § 1834.9.5(f).

⁷⁹ Cal. Civ. Code § 1834.9.5(d).

⁸⁰ See Cal. Health & Safety Code § 109875 *et seq.*

adulterated or misbranded food and cosmetics in California.⁸¹ Under the Sherman Food, Drug, and Cosmetic Law, an advertisement for food or cosmetics is false ‘if it is false or misleading in any particular’.⁸² Similarly, a food or cosmetic is misbranded if its ‘labeling is false or misleading in any particular’.⁸³ The misbranding provision of the Sherman Food, Drug, and Cosmetic Law is identical to provisions of the FDCA and is thus not pre-empted by federal law.⁸⁴

The State Department of Health Services administers the Sherman Food, Drug, and Cosmetic Law.⁸⁵ Because the Sherman Food, Drug, and Cosmetic Law does not provide a private right of action, the Attorney General, a district attorney or a city attorney may bring a civil or criminal action to remedy a violation of the law.⁸⁶ Specific provisions of the Sherman Food, Drug, and Cosmetic Law that apply to the sale and marketing of certain types of food and cosmetics are discussed below.

Sale and marketing of food

California Organic Food and Farming Act

The California Organic Food and Farming Act (COFFA) makes it unlawful for any person to sell, offer for sale, advertise or label any product as organic unless it is produced according to regulations promulgated by the National Organic Program (NOP) and consists entirely of products manufactured only from raw or processed agricultural products, with the following two exceptions:

- a* water, air and salt may be added to the product; and
- b* ingredients other than raw or processed agricultural products may be added to the product if these ingredients include non-agricultural substances or non-organically produced agricultural products produced in a manner consistent with or that are on the national list adopted by the United States Secretary of Agriculture pursuant to Section 6517 of the NOP and do not represent more than 5 per cent of the weight of the total finished product, excluding salt and water.⁸⁷

COFFA adopts the federal NOP regulations as the organic food and product regulations of the state.⁸⁸

Sale and marketing of cosmetics

California Safe Cosmetics Act

Enacted in 2005, the California Safe Cosmetics Act requires the manufacturer, packer or distributor named on the label of cosmetic products sold in California to provide the California Safe Cosmetics Program (CSCP) with a list of all cosmetic products that contain

81 See Cal. Health & Safety Code § 110100, § 110390, § 110620, § 111700, § 110760 and § 111765.

82 See Cal. Health & Safety Code § 110390.

83 See Cal. Health & Safety Code § 110660 and § 111730.

84 See *Simpson v. The Kroger Corp.*, 219 Cal. App. 4th 1352, 1368–69 (2013).

85 Cal. Health & Safety Code § 110045.

86 See Cal. Health & Safety Code § 111825 et seq., § 111840 et seq., § 111860 et seq. and § 111900 et seq.

87 See Cal. Health & Safety Code § 110820.

88 See Cal. Health & Safety Code §§ 110811, 110812.

any ingredients known or suspected to cause cancer or developmental or other reproductive harm.⁸⁹ Companies with reportable ingredients in their products must submit information to the CSCP if the company:

- a* has annual aggregate sales of cosmetic products of US\$1 million dollars or more; and
- b* has sold cosmetic products in California on or after 1 January 2007.⁹⁰

As of 1 January 2022, manufacturers of cosmetics sold in California must disclose to the Division of Environmental and Occupational Disease Control listed fragrance and flavour ingredients, fragrance allergens and the Chemical Abstracts Service number for each ingredient or allergen listed.⁹¹

Common cosmetic ingredients that require reporting are titanium dioxide, retinol and retinyl esters, the surfactant cocamide diethanolamine and the preservative butylated hydroxyanisole.⁹² In 2014, the CSCP launched its online searchable database, which provides the public with access to the information reported by cosmetics manufacturers, packers and distributors.⁹³

COFFA

COFFA, discussed in Section V.i, requires that cosmetic products sold, labelled or represented as organic or made with organic ingredients must contain at least 70 per cent organically produced ingredients.⁹⁴ Multi-ingredient cosmetic products sold as organic that contain less than 70 per cent organically produced ingredients may only identify organic content with one of the following methods:

- a* identify each organically produced ingredient in the ingredient statement with the word 'organic' or with an asterisk or other reference mark that is defined below the ingredient statement to indicate that the ingredient is organically produced; or
- b* display the product's percentage of organic contents on the information panel, if the organically produced ingredients are identified in the ingredient statement.⁹⁵

California's newly enacted 'Pink Tax' ban

On 1 January 2023, a new law prohibiting higher prices for products marketed to a particular gender went into effect in California.⁹⁶ The law specifically aims to address higher prices on products marketed for women, sometimes known as the 'Pink Tax'. Under the new law, '[a]

89 Cal. Health & Safety Code § 111791 et seq.

90 Cal. Health & Safety Code § 111792; California Department of Public Health, 'Chemicals in Cosmetics', available at <https://data.ca.gov/dataset/chemicals-in-cosmetics>.

91 Cal. Health & Safety Code § 111792.6.

92 See California Department of Public Health, 'Cosmetics Containing Ingredients Linked to Cancer or Reproductive Harm: Data Reported to the California Safe Cosmetics Program 2009–2015', available at <https://www.cdph.ca.gov/Programs/CCDPPH/DEODC/OHB/CSCP/CDPH%20Document%20Library/DataReport.pdf>.

93 See California Department of Public Health, 'Cosmetics Containing Ingredients Linked to Cancer or Reproductive Harm: Data Reported to the California Safe Cosmetics Program 2009–2015', available at <https://www.cdph.ca.gov/Programs/CCDPPH/DEODC/OHB/CSCP/CDPH%20Document%20Library/DataReport.pdf>.

94 Cal. Health & Safety Code § 110838.

95 Cal. Health & Safety Code § 110839.

96 Cal. Civ. Code § 51.14.

person, firm, partnership, company, corporation, or business shall not charge a different price for any two goods that are substantially similar if those goods are priced differently based on the gender of the individuals for whom the goods are marketed and intended'.⁹⁷ The law applies to any business acting in California, including retailers, suppliers, manufacturers and distributors, that sells 'goods', which the law defines as 'consumer products used, bought, or rendered primarily for personal, family, or household purposes'.⁹⁸

The law applies to products that are 'substantially similar', meaning two goods that exhibit all of the following characteristics:

- a* there are no substantial differences in the materials used in production;
- b* the intended use is similar;
- c* the functional design and features are similar; and
- d* the brand is the same or both brands are owned by the same individual or entity.⁹⁹

Products that may be 'substantially similar' under the law include shampoos, lotions and shaving razors. The law authorises courts to impose a civil penalty up to US\$10,000 for an initial violation, and US\$1,000 for every subsequent violation, with the total penalty not to exceed US\$100,000.¹⁰⁰ Each instance of charging a different price for two substantially similar goods is considered a single violation.¹⁰¹

ii Consumer protection and false advertising

California has three primary consumer protection statutes under which consumers may bring individual and class actions:

- a* the California Consumers Legal Remedies Act (CLRA);
- b* the California Unfair Competition Law (UCL); and
- c* the California False Advertising Law (FAL).¹⁰²

CLRA

The CLRA aims 'to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection'.¹⁰³ The CLRA enumerates several specific types of conduct that amount to 'unfair or deceptive acts' within the meaning of the Act, including 'passing off goods or services as those of another' and 'misrepresenting the source . . . of goods or services'.¹⁰⁴ The CLRA allows consumers to bring individual or class action lawsuits to recover damages or seek injunctive relief.¹⁰⁵

⁹⁷ Cal. Civ. Code § 51.14(b).

⁹⁸ Cal. Civ. Code § 51.14(a)(1)-(2).

⁹⁹ Cal. Civ. Code § 51.14(3)(A)(i)-(iv).

¹⁰⁰ Cal. Civ. Code § 51.14(d)(3).

¹⁰¹ Cal. Civ. Code § 51.14(e).

¹⁰² See Cal. Civ. Code § 1750 et seq., Cal. Bus. & Prof. Code § 17200 et seq. and Cal. Bus. & Prof. Code § 17500 et seq.

¹⁰³ Cal. Civ. Code § 1760.

¹⁰⁴ For the full list, see Cal. Civ. Code § 1770(a).

¹⁰⁵ See Cal. Civ. Code §§ 1780(a), 1782(d).

UCL

The UCL prohibits and provides civil remedies for ‘unfair competition’, which encompasses both illegal business practices and false advertising.¹⁰⁶ The statute defines ‘unfair competition’ as ‘any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising’.¹⁰⁷ Accordingly, the UCL addresses anticompetitive business practices and the public’s right to protection from fraud, deceit and unlawful conduct.¹⁰⁸ California courts have therefore consistently interpreted the UCL broadly.¹⁰⁹ Private standing to bring a UCL claim is limited to individuals who have suffered injury in fact and lost money or property as a result of unfair competition.¹¹⁰ Injunction and restitution are available to private litigants bringing claims under the UCL on an individual or class basis.¹¹¹

FAL

The FAL ‘is the major California legislation designed to protect consumers from false or deceptive advertising’.¹¹² It prohibits advertising property or services with untrue or misleading statements or with the intent not to sell at the advertised price.¹¹³ The FAL’s prohibition on certain untrue or misleading statements is broad in scope, as it encompasses not only advertising that is false but also advertising that, although true, either is actually misleading or has a capacity, likelihood or tendency to deceive or confuse the public.¹¹⁴ Private standing to bring a FAL claim is limited to individuals who have suffered injury in fact and lost money or property as a result of false advertising.¹¹⁵ Similar to the UCL, the FAL allows consumers to bring individual or class action lawsuits to recover restitution or seek injunctive relief.¹¹⁶

VI PRODUCT LIABILITY

In California, there are several potential product liability theories of recovery available to plaintiffs against food manufacturers and distributors. Product liability claims are distinct from other forms of recovery, in that a plaintiff must have actually experienced an injury or harm.

106 See Cal. Bus. & Prof. Code § 17200 et seq.

107 Cal. Bus. & Prof. Code § 17200 et seq.

108 *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 519 (1997).

109 See *Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1474 (2014).

110 See *Hansen v. Newegg.com Ams Inc.*, 25 Cal. App. 5th 714, 723 (2018).

111 Cal. Bus. & Prof. Code § 17203.

112 *People v. Sup Ct (JC Penney Corp, Inc)*, 34 Cal. App. 5th 376, 392 (2019) (quoting *People v. Sup Ct (Olson)*, 96 Cal. App. 3d 181, 190 (1979)).

113 Cal. Bus. & Prof. Code § 17500 et seq.; see also *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1388 (2005).

114 See *People v. Sup Ct (JC Penney Corp, Inc)*, 34 Cal. App. 5th 376, 392 (2019).

115 See *Hansen v. Newegg.com Ams Inc.*, 25 Cal. App. 5th 714, 723 (2018).

116 Cal. Bus. & Prof. Code § 17535.

i Breach of implied warranty of merchantability for food

California recognises an implied warranty for the sale of food, in that food must be fit for human consumption. If the food is contaminated or adulterated in such a way that it makes the food harmful to ingest, then the implied warranty is breached.¹¹⁷

ii Strict product liability – manufacturing defect

Under California law, a product is defective if it deviates from the manufacturer's intended result or from other ostensibly identical units of the same product line.¹¹⁸ The manufacturing defect theory posits that a suitable design is in place but that the manufacturing process has in some way deviated from that design.¹¹⁹ A food manufacturer may be found strictly liable if the food in question contains a harmful defect, such as a bacterial contamination.

iii Strict product liability – failure to warn

In California, a food supplier may be held strictly liable if it was unreasonably dangerous to produce a food without adequate warnings relating to known risks, side effects or allergic reactions.¹²⁰ A food distributor may be liable if a consumer suffers an allergic reaction to a food containing an ingredient to which a substantial number of people are allergic and the supplier failed to adequately warn of the potential allergy.¹²¹

VII INTELLECTUAL PROPERTY

Federal law pre-empts most state law intellectual property (IP) claims. However, there are some important California state law carve-outs for trade secrets and trademark protection. Understanding these distinctions is key to developing a robust IP strategy – particularly within the food, beverage and cosmetics industries.

i California trade secret protection

A trade secret is any practice or process that is generally not known outside of the company and derives economic value from being kept secret. The Defend Trade Secrets Act (DTSA) affords a federal right of action for misappropriation of trade secrets.¹²² However, the DTSA does not pre-empt separate California state law claims under the California Uniform Trade Secrets Act (CUTSA).

A state claim under the CUTSA may provide a narrower scope of protection than a federal claim. First, under the CUTSA, the party alleging trade secret misappropriation must identify the facts supporting the claim with 'reasonable particularity' before initiating

117 CACI No. 1233 (2021).

118 *Barker v. Lull Engineering Co*, 20 Cal. 3d 413, 429 (1978); see also *Garcia v. Sanofi Pasteur Inc*, 617 F. Supp. 3d 1169, 1172 (E.D. Cal. 2022).

119 *Lucas v. City of Visalia*, 726 F. Supp. 2d 1149, 1155 (E.D. Cal. 2010); see also *Zetz v. Bos Sci Corp*, 398 F. Supp. 3d 700, 708 (E.D. Cal. 2019); *Marroquin v. Pfizer, Inc*, 367 F. Supp. 3d 1152, 1160 (E.D. Cal. 2019).

120 CACI No. 1205 (2021).

121 *Livingston v. Marie Callender's, Inc*, 72 Cal. App. 4th 830, 839 (1999); see also *Moore v. PF Changs China Bistro, Inc*, No. B193396, 2007 WL 2121240, at *3 (Cal. Ct. App. 25 July 2007).

122 18 U.S.C. § 1836.

discovery.¹²³ By comparison, a claim brought under the DTSA requires only a plausible claim for relief.¹²⁴ Accordingly, the CUTSA's higher pleading standard means that a California state claim is more likely to be dismissed at the pleadings. Furthermore, unlike the DTSA, a CUTSA claim does not allow for seizure of property without prior notice to the defendant.¹²⁵

However, important carve outs limit California trade secret protections for food, beverage and cosmetic products in California. For example, under the California's Cosmetic Fragrance and Flavor Ingredient Right to Know Act, certain chemicals may nevertheless be subject to disclosure requirements.¹²⁶

ii California trademark protection

For food, beverage and cosmetic companies that market products that contain cannabidiol (CBD), California laws allow for state trademark protection in the absence of federal protection. Federal trademark protection is limited to lawful goods and services.¹²⁷ This requirement makes cannabis-related marks ineligible for federal trademark registration – notwithstanding state laws.¹²⁸

However, cannabis-related products are eligible for California trademark protection.¹²⁹ Of course, state protection is limited to the geographical areas within California where the mark is in use.¹³⁰ For example, the trademark for a lotion containing CBD that is sold in Santa Barbara County would not be protected from trademark infringement by another cosmetics company selling under the same mark in Los Angeles County.

In short, federal laws may pre-empt most state law claims for IP protection. However, those who take advantage of both traditional and underutilised branches of IP protection – including state-level protections – will likely secure a competitive advantage in the market.

123 Cal. Civ. Proc. Code § 2019.210.

124 Fed. R. Civ. P. § 12(b)(6).

125 Of course, in practice, DTSA seizures without notice to the other party are granted only under extraordinary circumstances. See *OOO Brunswick Rail Management v. Sultanov*, No. 5:17-cv-00017-EJD, 2017 WL 67119 (N.D. Cal. 6 January 2017); see also *Balearia Caribbean Ltd, Corp v. Calvo*, No. 16-23300-CIV-WILLIAM, 2017 WL 8780944 (S.D. Fla. Aug. 5, 2016) (denying a DTSA seizure request for failure to satisfy the 'extraordinary circumstances' test and instead issuing a temporary restraining order).

126 See Cal. Health & Safety Code § 111792.

127 See generally Trademark Manual of Examining Procedure § 907; see also USPTO Examination Guide 1–19: Examination of Marks for Cannabis and Cannabis Related Goods and Services after Enactment of the 2018 Farm Bill.

128 Cannabis has been deemed illegal by the federal government under the Controlled Substances Act unless the product falls within the carve out for hemp-derived goods and services with less than 0.3 per cent tetrahydrocannabinol. 21 USC § 802(16). Cannabidiol (CBD), a chemical constituent of the marijuana plant, is included in the Controlled Substances Act's definition of 'marijuana'.

129 See Department of Cannabis Control, 'Registering Cannabis-Related Trademarks in California', <https://cannabis.ca.gov/2019/04/registering-cannabis-related-trademarks-in-california/> (last visited 24 June 2023).

130 Under federal law, the US Food and Drug Administration takes the position that CBD products violate the Federal Food Drug and Cosmetic Act. The FDA has approved only one CBD product. See US Food and Drug Administration, 'What You Need to Know (and What We're Working to Find Out) About Products Containing Cannabis or Cannabis-derived Compounds, Including CBD', <https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis> (last visited 22 June 2022).

VIII TRADE ORGANISATIONS

Trade organisations have played a role in impact litigation for decades. In recent years, trade associations have spearheaded California litigation aimed at limiting the reach of Proposition 65 to two chemicals found in food: glyphosate and acrylamide.

i Glyphosate

In *National Association of Wheat Growers v. Becerra*, plaintiff growers' associations and agribusiness groups sought to enjoin an order from California's Office of Environmental Health Hazard Assessment (OEHHA) requiring a Proposition 65 warning on products containing glyphosate.¹³¹ Glyphosate is a widely used herbicide in the United States and is used to control weeds.¹³² In 2015, the International Agency for Research on Cancer (IARC) classified glyphosate as 'probably carcinogenic' based on 'limited evidence' that the chemical causes cancer in humans.¹³³ Following IARC's lead, OEHHA then listed glyphosate as a chemical known to cause cancer in 2017, thus implicating the warning label requirements of Proposition 65.¹³⁴

On 22 June 2020, the court in *National Association of Wheat Growers* granted the plaintiffs' request for a permanent injunction, holding that the warning label requirements, as applied to glyphosate, violated the plaintiffs' First Amendment rights.¹³⁵ The court determined that, although protecting Californians from chemicals containing cancer-inducing substances is a substantial state interest, 'misleading statements about glyphosate's carcinogenicity and the state's knowledge of that purported carcinogenicity, do not directly advance that interest'.¹³⁶

The State of California appealed the ruling to the United States Court of Appeals for the Ninth Circuit. Oral argument was held on April 19, 2023. In response to this litigation, the California Office of Environmental Health Hazard Assessments (OEHHA) promulgated a new Proposition 65 safe harbour warning for glyphosate qualifying its carcinogenicity.¹³⁷ The new regulation took effect on 1 January 2023.

ii Acrylamide

On 30 March 2021, the California Chamber of Commerce filed a lawsuit against then California Attorney General Xavier Becerra and the Council for Education and Research on Toxics (CERT) challenging Proposition 65 warning requirements as applied to acrylamide-containing food products.¹³⁸ Acrylamide is a 'toxic chemical', 'produced industrially for use in plastic, grouts, water treatment products, and cosmetics'.¹³⁹ Acrylamide, however, can sometimes occur naturally as the chemical can form when cooking certain foods (e.g., coffee, French fries or almonds) at high temperatures.¹⁴⁰

131 *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1252–54 (E.D. Cal. 2020).

132 *Nat'l Ass'n of Wheat Growers*, 468 F. Supp. 3d at 1251 n.1.

133 *Nat'l Ass'n of Wheat Growers*, 468 F. Supp. 3d at 1252.

134 *Nat'l Ass'n of Wheat Growers*, 468 F. Supp. 3d at 1252.

135 *Nat'l Ass'n of Wheat Growers*, 469 F. Supp. 3d at 1266.

136 *Nat'l Ass'n of Wheat Growers*, 469 F. Supp. 3d at 1264.

137 Cal. Code Regs., tit.27, §§ 25607.48 and 25607.49.

138 See *California Chamber of Com v. Becerra*, 529 F. Supp. 3d 1099, 1103 (E.D. Cal. 2021).

139 *California Chamber of Com*, 529 F. Supp. 3d at 1103.

140 *California Chamber of Com*, 529 F. Supp. 3d at 1103–04.

The plaintiff alleged that having to warn that the consumption of acrylamide-containing foods causes cancer in humans would be a forced false statement in violation of the First Amendment because the science on dietary acrylamide is unclear. The court granted the plaintiff's motion for a preliminary injunction precluding any new Proposition 65 lawsuit for acrylamide in food and beverages.¹⁴¹ The Ninth Circuit affirmed.¹⁴²

In response to this litigation, OEHHA promulgated a new Proposition 65 safe harbour warning for acrylamide in food qualifying its carcinogenicity.¹⁴³ The new regulation took effect on 1 January 2023.

IX FINANCING AND M&A

M&A activity in the beauty, cosmetic and personal care sector softened in 2022 after reaching record levels in 2021. However, the industry has proven to be resilient in the face of economic headwinds, and the great margins and cash flow of beauty companies – many of which are based in California – continue to be attractive to buyers and investors. Transaction volume has increased in the first half of 2023, largely driven by minority investments, acquisitions by strategic buyers and growing interest in skincare, haircare and fragrance. The increase in capital directed to female-founded and female-owned companies also should not be underestimated when analysing the strong nature of M&A activity in the sector.

In light of the challenging macroeconomic landscape, many buyers are careful to conduct extensive diligence on acquisition targets in an effort to mitigate uncertainties. A focal point of M&A due diligence for companies based or operating in California is data privacy. California has adopted some of the strongest and most significant data privacy laws in the United States, with potentially far-reaching implications for the food, beverage and cosmetic industries, particularly with respect to digital advertising and websites or other online services that are likely to be accessed by minors under the age of 18.

i California Consumer Privacy Act

The California Consumer Privacy Act (CCPA) is the first broad state data privacy law in the United States and has now been replicated, with slight variations, in several states.¹⁴⁴ It requires for-profit entities that do business in California and generate in excess of US\$25 million in gross annual revenues worldwide (or that meet other more granular thresholds) to make detailed privacy policy disclosures about their collection, use and disclosure of personal information and provide California residents with rights to access, delete and correct their personal information.¹⁴⁵ The law also provides consumers with rights to opt out of the sale of personal information,¹⁴⁶ which includes the use of third-party cookies and other tracking technologies, gives consumers the right to prevent businesses from using sensitive personal information for profiling,¹⁴⁷ and regulates the use of personal information in loyalty

141 *California Chamber of Com*, 529 F. Supp. 3d at 1124.

142 *California Chamber of Com v. Council for Educ & Rsrch On Toxics*, 29 F.4th 468, 483 (9th Cir. 2022).

143 Cal. Code Regs., tit. 27, § 25607.2(b).

144 Cal. Civ. Code § 1798.100 et seq.

145 Cal. Civ. Code §§ 1798.130(a)(5) and 1798.140(d).

146 Cal. Civ. Code § 1798.135(a).

147 Cal. Civ. Code § 1798.121(a).

programmes.¹⁴⁸ The law is enforced by both the California Attorney General and California's privacy agency, the California Privacy Protection Agency (CPPA); there is only a limited private right of action for negligent data breaches.¹⁴⁹

Cosmetic retailer Sephora was the target of the first and, at the time of writing, only public CCPA enforcement action brought by the California Attorney General.¹⁵⁰ The action was focused on the company's use of digital advertising and analytics technologies and alleged failure to offer sale opt-out rights and recognise global opt-out (of sale) preference signals, among other things. Sephora agreed to a US\$1.2 million settlement that also included a two-year compliance program with mandatory audits of tracking technologies and regular reports to the Attorney General. Enforcement of CCPA provisions regulating the use of digital advertising technologies is expected to continue to be a focus of enforcement actions.

ii California Age Appropriate Design Code Act

Modelled after a similar code in the United Kingdom, California's Age Appropriate Design Code Act will come into effect in March 2024 and will regulate ecommerce sites and other online services that are 'likely to be accessed' by minors under the age of 18, a cohort that is potentially significant for all food, beverage and cosmetic companies.¹⁵¹ Targeted to the larger businesses that are also subject to the CCPA, the Design Code Act governs website design, requires detailed privacy impact assessments be conducted and is expected to involve some form of age verification. It is possible that regulatory guidance will be provided in advance of the effective date.

Data privacy obligations under California law can be extensive and are likely to apply to many businesses in the food, beverage and cosmetic industries.

X SPECIAL ISSUES FOR CERTAIN PRODUCTS

i Alcohol

Alcoholic Beverage Control Act

The Alcoholic Beverage Control Act (ABC Act) is a comprehensive set of laws regulating the manufacture and sale of alcoholic beverages in the state of California.¹⁵² Enacted following the repeal of Prohibition in 1933, the ABC Act amended the California Constitution to empower the state with 'the exclusive right and power to license and regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages within the State'.¹⁵³ Today, the ABC Act is voluminous and amends a multitude of sections of the Business and Professions Code, Civil Code, Penal Code and Vehicle Code, among other codes.¹⁵⁴

¹⁴⁸ Cal. Civ. Code § 1798.125(b).

¹⁴⁹ Cal. Civ. Code §§ 1798.150, 1798.155, and 1798.199.190.

¹⁵⁰ *People of the State of California v. Sephora USA, Inc*, San Francisco Superior Court Case No. CGC-22-601380 (Aug. 23, 2022).

¹⁵¹ Cal. Civ. Code § 1798.99.28.

¹⁵² See 2023 California Alcoholic Beverage Control Act, available at <https://www.abc.ca.gov/wp-content/uploads/2023-CA-ABC-Act.pdf>.

¹⁵³ Cal. Const. Article XX § 22.

¹⁵⁴ For the full list of sections of code that the ABC Act amends, see 2023 California Alcoholic Beverage Control Act pp. ix-x, available at <https://www.abc.ca.gov/wp-content/uploads/2023-CA-ABC-Act.pdf>.

Proposition 65

Alcoholic beverages are on California's list of substances known to the state to cause cancer or reproductive toxicity.¹⁵⁵ The safe harbour warning for alcoholic beverages is:

*WARNING: Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy, can cause birth defects. For more information go to www.P65Warnings.ca.gov/alcohol.*¹⁵⁶

OEHHA amended the safe harbour methods of transmission for Proposition 65 warnings on alcoholic beverages, effective 1 April 2021.¹⁵⁷ Safe harbour warning methods vary depending on whether the alcoholic beverages are sold at a physical location,¹⁵⁸ delivered to consumers in California at a location other than the point of sale¹⁵⁹ or sold via the internet.¹⁶⁰

ii CBD

In 2016, Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act, legalised the use of cannabis and cannabis-related products in California for non-medical use by people aged 21 years or older.¹⁶¹ The California Health and Safety Code was amended in 2021 to permit CBD to be added to dietary supplements, food, beverages and pet food.¹⁶² However, manufacturers of dietary supplements and foods containing hemp must be able to demonstrate that all parts of the plant used to grow the hemp came from a state or country with an established and approved industrial hemp programme.¹⁶³ The law also imposes a minimum US\$300 fee on manufacturers to be used to create an Industrial Hemp Research Program at the University of California.¹⁶⁴ Nonetheless, the US Food and Drug Administration takes the position that CBD products violate the Federal Food Drug and Cosmetic Act.¹⁶⁵

XI OUTLOOK AND CONCLUSIONS

For years, California has actively legislated and regulated the food, beverage and cosmetic industries to protect and inform consumers. State agencies will continue to evolve their regulatory purview to match changes in the market and consumers' concerns. The state legislature's focus on consumer notification statutes signals a trend that is likely to continue.

¹⁵⁵ See Cal. Code Regs., Tit. 27, § 27001(b).

¹⁵⁶ Cal. Code Regs., Tit. 27, § 25607.4.

¹⁵⁷ Cal. Code Regs., Tit. 27, § 25607.4.

¹⁵⁸ See Cal. Code Regs., Tit. 27, § 25607.3.

¹⁵⁹ Cal. Code Regs., Tit. 27 § 25067.3(a)(1)(A)–(C).

¹⁶⁰ Cal. Code Regs., Tit. 27 § 25067.3(a)(2).

¹⁶¹ Cal. Code Regs., Tit. 27 § 25067.3(a)(3).

¹⁶² Cal. Health & Safety Code §§ 11018, 11362.1.

¹⁶³ Cal. Health & Safety Code §§ 110611, 113091.

¹⁶⁴ Cal. Health & Safety Code § 110469.

¹⁶⁵ Cal. Health & Safety Code § 110470.

