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PROPOSITION 37

THE CHALLENGES FACED BY THE FOOD SUPPLY CHAIN

by Greg Broderick, Dale Stern, & Stephen Meyer

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PROPOSITION 37, THE CHALLENGES FACED BY THE FOOD SUPPLY CHAIN

by Greg Broderick, Dale Stern, & Stephen Meyer[1]

I. Introduction

This Fall, California voters will vote decide whether to approve Proposition 37, the "The California Right to Know Genetically Engineered Food Act." The purpose of this memorandum is not to offer opinions on the merits of Proposition 37, but rather to answer the questions of how producers, packers, processors, grocery manufacturers, distributors, and retailers comply if the Proposition becomes law.

Complicating matters is that Proposition 37, like many voter initiatives, is not a model of clarity. And language that may appear clear on its face to lawyers or drafters is not always clear when it meets the practical realities and science of producing and processing food. And these realities will soon be upon all involved in food supply chain because this law takes effect on July 1, 2014, if approved.

II. An Overview of Proposition 37

Proposition 37 is structured around labeling requirements and advertising restrictions that apply to, (1) "genetically engineered foods," and (2) foods

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promoted as "natural," "naturally made," "naturally grown," "all natural" or any words of similar import.

The main thrust of the law is to require food with genetically engineered ingredients to be conspicuously labeled. But Proposition 37 also imposes severe penalties on retailers who sell food that is either "genetically engineered" or "processed" if the label, retail signs, or advertising materials state or imply that the food is "natural," "naturally made," "naturally grown," "all natural," or any similar words that would have any "tendency to mislead any consumer." The definition of "processed food" is extremely broad, covering food that is dehydrated, cooked, or even frozen. Under this expansive definition, it appears that only raw agricultural products grown from non-genetically modified materials may be labeled or promoted as natural.[2]

This provision creates significant problems for retailers who sell products with the words "nature" or "natural" in the title, such as Nature Valley Granola Bars and Dannon All Natural Yogurt. Manufacturers of such products will face the difficult choice of ceasing sales into California or re-branding their product line for California sale. And because Proposition 37 bars the use of the term "natural" or "words of similar import" from advertising or promotional materials and not just the label, other manufacturers and distributors will have to carefully review their materials to make sure they do not run afoul of Proposition 37's mandate.

[2] "Processed food" means any food other than a raw agricultural commodity and includes any food produced from a raw agricultural commodity that has been subject to processing such as canning, smoking, pressing, cooking, freezing, dehydration, fermentation or milling. Those who sell hulled raw almonds, sun-dried raisins, or olive oil may be surprised to learn that they can no longer market their products as natural.

Proposition 37 does include a set of specific exemptions that will protect some products, including alcohol, restaurant sales, medical food, and certified organic food products. But another exemption will likely complicate business for retailers, suppliers, and manufacturers. That exemption covers "raw agricultural commodities or food derived therefrom" so long as it "has been grown, raised or produced without the knowing and intentional use of genetically engineered seed or food." To meet this exemption, the retailer must obtain a written sworn statement from its supplier that the product has not been knowingly or intentionally genetically engineered and has been segregated from food that may have been genetically engineered.

This sworn statement exemption will set in motion a series of certifications and indemnity agreements that will stretch from the grocery stores all the way back down the chain of production to the nursery or seed company, and will require a sworn statement from the farmer, the trucker, the packer, the processor, the wholesaler/distributor, and finally the retailer. While this Proposition is directed at the retailer, this exemption will mean that everyone in the food supply chain will be responsible for compliance.

Also, everyone in the supply chain will need to completely segregate and carefully document the separation of production, supply, packing, processing, and manufacturing of non-labeled food from labeled food. Until 2019, processed foods must either be 99.5% free of genetically engineered ingredients or labeled as genetically engineered. After 2019, 100% purity is required. Without a completely separate production and supply chain, the risk of accidental cross-contamination is too high. Zero percent is a standard that even the most modern facilities cannot guarantee.

Proposition 37 also contains an exemption for "food that an independent organization has determined has not been knowingly and intentionally produced from or commingled with genetically engineered seed or genetically engineered food, provided that such determination has been made pursuant to a sampling and testing procedure approved in regulations adopted by the department."4 The timeframes to put third party organizations in place with approved sampling and testing procedures is quite short given the July 1, 2014 implementation date.

Fortunately, Proposition 37 permits regulation and legislative amendments, although only to "further the purpose" of the law. Within this limit, the Department of Public Health may adopt "any regulations that it determines are necessary for the enforcement and interpretation" of Proposition 37, although it may not "create new exemptions." No Proposition is without uncertainty and ambiguity, and Proposition 37 is no exception. Without clear regulations, there will be many disagreements over what this law requires.

Clarity is particularly important in light of Proposition 37's enforcement provisions, which allow private citizens to sue for violations without proving any specific damage. Proposition 37 also provides for attorneys' fees and automatic damages equal to the retail price of the product. That is, a plaintiff who never intended to purchase a product and never intended to buy a product can nevertheless obtain an injunction against a mislabeled product, and recover investigation costs, attorneys' fees, and automatic damages for each product

"offered for sale."[3]

III. Detailed Analysis of Proposition 37

A. Genetically Engineered Foods Must Be Clearly and Conspicuously Labeled.

At its most basic level, Proposition 37 imposes labeling requirements for foods that contain or may contain genetically modified material. The core of Proposition 37 is the addition of Section 110809 to the California Health and Safety Code, which declares "misbranded" any food that "is or may be entirely or partially produced with genetic engineering" unless the package discloses this fact.

For raw foods, the words "Genetically Engineered" must be clearly and conspicuously placed on each and every package. For processed foods, the words "Partially Produced with Genetic Engineering" or "May be Partially Produced with Genetic Engineering" must appear. Failure to do so renders a food "misbranded" and subject to enforcement and severe penalties.

The initiative requires the above label to appear on the front of packages for raw foods, but on either the front or back for processed foods. Foods that are not sold in packages (such as watermelons) must have the label on the shelf or bin where the product is sold. There are no rules for the size, style, or color of the label other than that it be "clear and conspicuous."

[3] As explained further below, this "automatic damages" provision is an area that requires clarification by regulation or legistlative amendment. It is important for businesses to understand whether a consumer's potential damages include the purchase price of one offending item, the total price of all offending items in one store, or the total price of all offending items sold by a chain in all of its stores.

B. Meaning of "Food"?

Section 11809's labeling requirements only apply to "food offered for retail sale in California, although the term "food" is not defined in Proposition 37. "Processed Food" is defined, but the definition focuses on what it means to be "Processed" rather than what "food" is covered. Similarly, Medical Food is declared exempted, bit there is not indication of what is covered by that term. There is also a list of exempt items, but it does not shed much light on the definition of "food."

According to the Oxford English Dictionary the term food means "any nutritious substance that people or animal eat or drink or that plants absorb in order to maintain life and growth." This expansive definition is also of little use. Perhaps this will be clarified in regulations, but there will be considerable uncertainty in the meantime about whether it applies to vitamins, laxatives, pharmaceuticals, or other things not typically considered to be food.

One possible solution to this problem is to look to the definition of "food" in Health & Safety Code § 109935, which defines "food" as:

> (a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal; or
>
> (b) Any article used or intended for use as a component of any article designated in subdivision (a).

This definition is unclear and troubling as applied to Proposition 37. As is plain from the text and an Attorney General's Opinion, both animal and human food are covered. *See* 36 Op.Atty.Gen. 134, 9-13-60. If this definition of food controls Proposition 37, then thousands of animal products are also covered.

C. Meaning of "Genetically Engineered."

Fortunately the term "genetically engineered" is defined by the Proposition, and it is "any food that is produced from an organism in which the genetic material has been changed through the application of

i) In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) techniques and the direct injection of nucleic acid into cells or organelles, or

(ii) Fusion of cells (including protoplast fusion) or hybridization techniques that overcome natural physiological, reproductive or recombination barriers, where the donor cells/protoplasts do not fall within the same taxonomic family, in a way that does not occur by natural multiplication or natural recombination.

The term "organism" is defined as "any biological entity capable of replication, reproduction, or transferring genetic material." The definition of "In vitro nucleic acid techniques" is more open ended and includes but is "not limited to recombinant DNA or RNA techniques that use vector systems and techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organisms such as micro-injection, macro-injection, chemoporation, electroporation, micro-encapsulation, and liposome fusion."[4]

[4] While the above definition may appear clear, it may only be so in the eyes of attorneys. It would not be surprising to find that scientists may find these words to be more uncertain than they may first appear to attorneys and the voters.

Complicating matters is the use of a genetically engineered "processing aid" in the processing of food that is otherwise not genetically engineered. The default for such a food is that it must be labeled as genetically engineered. Nevertheless, there is an exemption for such foods if:

- the processing substance is removed from the food before it is packaged;
- the processing substance "is converted into constituents normally present in the food" and does not significantly increase the amount of those constituents naturally found in the food; or
- The processing substance is added to a food for a technical or functional effect" and is present in the food in "insignificant levels" and has no technical or functional effect in the finished product.

The lack of clarity and potential for confusion in applying such a standard is apparent. Other exemptions are discussed in Section E below.

D. Misbranding and "Natural" Foods.

In addition to requiring the "Genetically Engineered" label, Proposition 37 also imposes restrictions on labeling, advertising, and promotional materials. Proposition 37 declares that a food is misbranded if it is genetically engineered or "processed," but where the label, the advertising, or promotions materials state **or imply** that the product is "natural," "naturally made," "naturally grown," or "all natural" on the label. *See* Section 110809.1. The "state or imply" ban also bars the use of "words of similar import that would have a tendency to mislead any consumer."

This provision creates a number of practical problems. First, the term "processed food" is so broad that it includes any food that is not raw. But the term "raw" is not defined anywhere in the statute. The definition is circular, in that it defines "processed food" as "any food that has been subject to processing." This includes, but is not limited to, any food that has been canned, smoked, frozen, pressed, cooked, dehydrated, fermented, or milled. It would appear that shelled nuts or sun-dried raisins are "processed" and cannot be marketed as "natural" even though they are not genetically engineered. It is unclear if cutting raw vegetables into pieces or removing the eyes from potatoes counts as "processing," although it probably does not given the other examples of the term "processing." Under the rule of statutory construction known as *ejusdem generis* (Latin for "of the same kind"), the meaning of ambiguous terms is informed by the words around it. *People v. Diaz*, 207 Cal.App.4th 396, 401 (2012).

Regardless of the outer limits of the "processed food" definition, it clearly reaches foods that many would consider natural. For example, baked potato chips are "processed foods" that cannot be labeled "natural" even if they are made up entirely of non-GMO potatoes, because they have been cooked. This reduces the word "natural" to raw foods that can be proven to be non-genetically modified. This will cause severe problems for companies who have "nature" or "natural" as part of their product or brand name. For example, Nature Valley Granola Bars[tm] may have to be sold under a different name in California or excluded from the market. The same is true of "All Natural Pop Chips[tm], which are marketed as "non-GMO" and contain no preservatives.

This provision of Proposition 37 is also vague and open-ended. Although it is clear that cooked or canned food cannot be called "natural" or "all natural," a company

is barred from using "words of similar import that would have a tendency to mislead a consumer." That is, a company is barred from making true statements that would imply that a cooked, canned, or frozen product is natural, even if it includes no genetically modified materials. For example, it is unclear whether "All Natural Pop Chips[tm] can continue to state that they contain "no preservatives," or have "nothing fake or phony" in them. While clearly not running afoul of the ban on calling the chips "all natural," these may be considered "words of similar import" that might "have a tendency to mislead a consumer." This may sound like a silly concern, but Proposition 37 contains crippling penalties for companies that guess wrong.

It is also important to note that the packaging is not the only basis for liability. The bar on the use of the word "natural" or "words of similar import" extends to advertising and promotional materials. The combination of the "state or imply" provision and the "words of similar import" language creates massive uncertainty for companies that make, distribute, and sell these foods at retail. Retailers, distributors, and producers will not only need to be careful about what they put on their own websites or in advertisements, but will need to know what others in the chain of commerce say about the product on websites or in promotional materials. It is clear that companies with "nature" or "natural" or "words of similar import" in their brand name or product title must either completely re-brand their products or withdraw from the California market.

E. Exemptions

While Proposition 37 contains many exemptions, they appear to lack a cohesive purpose and instead seem to deal with individual problems or particular industries.

For example, food from a non-genetically modified animal who eats genetically modified feed or is treated with genetically modified drugs is exempt. Alcoholic beverages regulated under the Alcohol Beverage Control Act are also exempt, as are foods that are deemed "organic" under the federal Organic Food Products Act. Proposition 37 also exempts for "medical food."

There are also exemptions for certain foods that become genetically engineered during processing. Food that would only be subjected to labeling because it contains "one or more genetically modified processing aids or enzymes" is exempt, although it is unclear why. Moreover, processed food that would be subject to labeling "solely because it includes one or more genetically engineered ingredients" is exempted until 2019, if it has less than 10 such ingredients, and no single ingredient makes up more than .5% of the food by weight. The rationale for this exemption is neither stated nor evident, although it appears aimed at particular products or classes of products.

Finally, there is a complex set of exemptions for compliance efforts.

The first exempts any "raw agricultural commodity or food derived therefrom" so long as it is "grown, raised or produced" without the "knowing and intentional use of genetically engineered seed or food." But ignorance is no excuse with this exemption. The retailer must obtain a "sworn statement" that the product was not genetically engineered and was segregated from food that "may have been genetically engineered" from the person who sold the good to the retailer. This requirement applies to any person who must comply with Proposition 37 and applies up the supply chain, such that the retailer obtains a sworn statement from

the distributer, who obtains a sworn statement from the processer or packer, and so on up the line to the producer.

A second "compliance" exemption applies to retailers with testing procedures in place. There are two requirements. First, such testing must be conducted by "an independent organization." The statute does not explain what an "independent organization" is, but it seems clear that it cannot be conducted by the company itself or by an organization controlled by the company. It is not clear whether a testing program set up by a trade group would be permissible.

The independent organization must determine that the food has "not been knowingly and intentionally produced from or commingled with genetically engineered seed or genetically engineered food." The determination must be "made pursuant to a sampling and testing procedure" to be approved by regulations. Proposition 37 leaves the testing procedures to future regulations, but provides minimum standards. Any sampling procedure adopted by regulations must use a "statistically valid sampling plan consistent with principles recommended by internationally recognized sources such as the International Standards Organization (ISO) and the Grain and Feed Trade Association (GAFTA)." In addition any approved testing procedure must be consistent with standards adopted by the Codex Alimentarius Commission, an international body made up of members of the World Health Organization and the UN Food and Agricultural Organization.

This provision is difficult to decipher. In addition, it may provide a moving target. If the regulations adopt a procedure that is consistent with the Codex Alimentarius standards, but those standards later change, it is unclear whether regulations would have to change the approved sampling procedures. This section will likely be the

subject of regulatory battles and legal challenges as regulators, who may have little experience in this area, must evaluate and approve testing standards in a highly specialized and technical field.

Proposition 37's supporters have repeatedly stated that food produced from genetically engineered seed or food is exempt so long as the use of genetically engineered material was unintentional. While such an interpretation is possible, it is unclear whether it will prevail. It seems apparent that the sampling requirements are meant to screen out foods thought to be free of genetic engineering. Otherwise, there would be no purpose to the sampling requirements. Courts "avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend." *People v. Mendoza* (2000) 23 Cal.4th 896, 907–908. There would be no purpose to instituting a testing process if the inquiry was into the intent or knowledge of the producer.

Whatever the merits of these exemptions, they result in some anomalies. For example, a can of soup or other packaged product sold in a grocery store is subject to labeling requirements, while the same product sold in a restaurant or from a food truck is not. And dog food may be covered, while a wide range of human food is not. But no regulatory scheme is perfect. They are almost always over-inclusive and under-inclusive. While opponents of Proposition 37 would argue that these anomalies show the problems in the scheme, supporters would argue that they are practical measures designed to deal with the real differences, such as between food sold at grocery stores and food sold at restaurants. Supporters would no doubt favor universal labeling and disclosure requirements, but they are not required to achieve all goals with every statute. Regardless, retailers and others required to

comply by law or by contract must be aware of these inconsistencies and must adjust their labeling practices and business activities accordingly.

F. Who Must Comply?

Because Proposition 37 deals only with food "offered for retail sale," it is apparent that grocers and other food retailers (such as convenience stores) are the primary subjects of Proposition 37. As discussed below, Section 110809.4 provides that any "consumer" may use the Consumer Legal Remedies Act to bring suits for violations of Proposition 37. Grocers will almost certainly be on the front lines in such lawsuits.

Regardless, a separate provision declares food "misbranded" if it is not properly labeled as genetically engineered, or if it is improperly labeled or promoted as natural as "misbranded." This would appear to expand compliance to everyone in the chain of supply because the Health and Safety Code makes it "unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded." *Id.* §§ 110760, 110765. This exposes the delivery truck driver, the warehouse owner, and the distributors in California to public enforcement for moving goods that "may be" genetically modified, or which have been "processed" but are the subject of ads stating or implying that the product is natural.

In addition, the misbranding provision appears to open up suppliers, producers, packers, and shippers to private enforcement actions. Proposition 37 allows any person to bring an action for injunction (and attorneys' fees) against anyone for violating Proposition 37, regardless of injury or relationship. But the interrelationship of the statutes is unclear, and it is not certain that the misbranding provisions allow for direct enforcement against "upstream" suppliers. Even if the

law itself restricts private enforcement to retailers, it is likely that retailers will seek to insulate themselves from this liability by shifting the burden up the supply chain through contractual indemnity. Depending on the relative bargaining power of grocers, suppliers, and producers, the burden of compliance will be shifted up the chain of supply, while the costs will be passed down that same chain. The net result would appear to be more exposure to producers, and more cost to consumers. This may be a valid policy choice—that is for the voters to decide—but food-oriented businesses must be prepared to deal with the contractual terms and pricing impacts of the likely shifts in cost and exposure throughout the supply chain.

IV. Proposition 37: Enforcement

Proposition 37 has direct enforcement provisions, and also piggy-backs on enforcement provisions from the Health and Safety and Civil Codes. As set forth below, enforcement actions may be brought by district attorneys or private parties. Remedies include fines and injunctive relief against selling products without the proper disclosures, or forcing removal of statements suggesting that products are "natural" if they are "processed" (cooked, canned, frozen, etc.). In addition, any private person may seek an injunction under the Health and Safety Code, and may also pursue damages under California's Consumer Legal Remedies Act.

A. <u>Persons Liable Under Proposition 37.</u>

At first blush, Proposition 37 appears to be directed only at the retail sale of food—that is, the point of compliance appears to be in the grocery store, and it does not seem to provide direct claims against manufacturers, processors, and distributors. But a closer examination reveals that Proposition 37 may apply much farther up the chain of production.

As explained above, Proposition 37 deems any food "misbranded" if it does not bear the necessary "Genetically Modified" label or if materials imply that a processed food is natural. This results in exposure further up the chain of production, because the Health and Safety Code makes it "unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded." *Id.* §§ 110760, 110765. In addition, "[i]t is unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer for delivery any such food." *Id.* § 110770. Thus, it appears that the retail store is exposed under Proposition 37, as is any person in the chain of distribution (manufacture, delivery, or sale).

B. Government Enforcement.

1. Warning & Civil Penalties

The California Department of Public Health (DPH) now oversees compliance with the Health and Safety Code.[5] In cases of minimal harm, the department may issue a written notice or warning, but it also has the discretion to impose civil penalties. *Id.* § 111845. Civil penalties range from $1,000 to $10,000 per day, with each day constituting a separate violation. *Id.* § 111855. Civil penalties may be assessed after an administrative hearing and are subject to judicial review. *Id.* §§ 111855, 100171. Enforcement can also be conducted by any authorized "health officer" of a local government. *Id*. at §§ 111015, 111020.

[5] The California Department of Health Services is currently listed by statute as being responsible for the Health and Safety Code (Health & Saf. Code § 109910), but that Department was recently reorganized and is now the Department of Public Health.

2. Seizure and Embargo

DPH also has the authority to seize and embargo food anytime it has probable cause to believe that a food is misbranded. *Id.* § 111860. The department may begin condemnation proceedings, which allow a court to order payment for relabeling the food or even destruction of food if the charge is upheld. Given Proposition 37's purposes, it would appear that most cases would result in payment of fees to relabel the food as genetically modified. It is unclear whether Proposition 37 would expand DPH's authority, although Proposition 37 does provide that a food is "misbranded" if it "may have been entirely or partially produced with genetic engineering and that fact is not disclosed." That is, DPH may be able to seize an unlabeled product if it has probable cause to believe the product ***may*** have been partially produced with genetic engineering.

3. Injunctions

The Health and Safety Code authorizes the Attorney General and district attorney to bring a suit for injunctive relief, restraining any person from violating any provision of California's food, drug, and cosmetic laws. *See* Health & Safety Code section 111900. California has 58 counties, each with elected district attorneys who would have independent authority to enforce Proposition 37 through an action under the Health and Safety Code.

4. Criminal Penalties

DPH may also refer enforcement matters to the Attorney General, any district attorney, or any city attorney for "appropriate proceedings," including civil or criminal enforcement. *Id.* § 111840. Criminal penalties include up to one year in

jail, a $1,000 fine, or both. Id. at 11825(a). If the offender sells embargoed items, has a prior conviction for selling misbranded food, or sells the goods with "intent to defraud or mislead, penalties increase to $10,000 per violation and a year in prison. *Id.* § 111825(b).

C. Private Enforcement.

Proposition 37 allows for private enforcement. This includes any genetically engineered food that is not properly labeled, as well as any foods whose label or promotional materials imply that they are natural but which are actually "processed" (i.e. cooked, canned, frozen, etc.). Private enforcement remedies injunctions against the sale of food, damages, and recovery of attorney's fees and costs. No proof of harm or traditional equitable showing of need for any injunction is required.

Proposition 37 also allows for suits under the California Consumer Legal Remedies Act (CLRA). *Id.* § 110809.4. Specifically, Proposition 37 provides that the failure to make a disclosure required by Proposition 37, or to imply that processed food is "natural," is a violation of Civil Code section 1770(a)(5), which makes it unlawful to "[r]epresent[] that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have." As set forth below, this can lead to substantial damages and severe penalties.

1. Damages

Proposition 37's damages provisions are vague and difficult to interpret. What is clear is that Proposition 37 provides for a minimum level of automatic damages. Under Proposition 37, a CLRA plaintiff is entitled to minimum damages in "the amount of the ***actual* or *offered retail price of each package or product*** alleged to be in violation." *Id.* § 111809.4 (emphasis added). That is, if the "misbranded" product is offered for sale at $3.49, then the minimum damages are $3.49.

What is unclear is the extent of damages. For example, a consumer may walk into the freezer aisle at a local grocery store, notice some misbranded "all-natural, trans-fat-free, premium frozen" Alexia Waffle Fries at the suggested retail price of $3.49, and sue for damages and injunctive relief without buying the product. But, it is unclear whether damages are limited at $3.49 (the price for the single package), or whether they include $3.49 for all Alexia Waffle Fries packages in the refrigerator at that store. After all, Proposition 37 sets damages at the "***actual* or *offered retail price of each package or product*** alleged to be in violation." If the latter reading is correct, then damages are $3.49 times the number of packages in the refrigerator. Indeed, it is just as plausible to read the statute to include all packages offered for sale at all of that grocer's stores in California. If damages are multiplied by the number of potentially misbranded products in a store, this becomes a real financial burden. Other large chains with multiple California locations could face increasingly exponential exposure.

2. Thirty-Day Notice Requirements

Although Proposition 37 modifies the elements necessary to bring suit under the CLRA, the proposed law does not appear to interfere with or alter the CLRA's

strict requirements related to pre-suit notice. The CLRA requires that the consumer notify a potential defendant of the alleged violation thirty days before filing suit. Civil Code section 1782. Failure to submit the proper 30-day notice will result in dismissal with prejudice. *See Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 40-41; *Cattie v. Wal-Mart Stores, Inc.*, 504 F.Supp.2d 939, 949 (S.D. Cal. 2007).

A CLRA 30-day notice must be in writing and sent via certified or registered mail to the place where the violation occurred or the person's principal place of business. Civil Code section 1782(a). The notice must provide notice of the "methods, acts, or practices declared unlawful by Section 1770," and it must "[d]emand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation." *Id.* at § 1782(a)(1). Assuming that such a notice is required, it could provide an opportunity to try to correct the alleged violations.

3. Attorneys Fees and Costs

The CLRA contains an attorneys' fee provision, which awards court costs and attorneys' fees to a parties "prevailing in litigation filed pursuant to this section." Civil Code section 1780(d). Proposition 37 awards the costs of investigation and attorneys fees for an injunction brought under the Healthy and Safety Code, but it does not make a similar provision regarding suits for damages under the CLRA. It seems likely that plaintiffs will file under both provisions, thus maximizing their chances of recovering both fees and pre-litigation costs. Such fees can range from several thousand dollars in a "drive by" case, to more than $1 million in bitterly fought actions. The plaintiff's bar has proved skillful at exploiting attorneys' fees

provisions in similar statutes such as the Americans with Disabilities Act, the Unruh Civil Rights Act, federal environmental statutes, and of course the CLRA itself. Facing the specter of paying hundreds of thousands of dollars and financing both sides of an unsuccessful legal dispute over what could be very minor technical violations is enough to incentivize even the largest and toughest companies to settle litigation.

4. Claims Under the California Unfair Competition Law (Bus. & Prof. Code § 17200)

The standing requirements of the California Unfair Competition Law (Bus. & Prof. Code § 17200) require a plaintiff to be "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Business and Professions Code section 17204. The Unfair Competition Law also requires that "any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204." *Id.* § 17203. Proposition 37 does not mention or abrogate the standing requirements of the Unfair Competition Law. Thus, any suit filed under section 17200, even one that claims the unlawfulness of misbranding genetically engineered food, is likely to require a showing of injury despite Proposition 37's express statement that no injury is required to sue for violations of Proposition 37 or the CLRA.

V. Proposition 37: Tools for Eliminating Uncertainty

A. <u>Tools for Interpreting Proposition 37.</u>

If passed, retailers must be in compliance with Proposition 37 by July 1, 2014. But, as noted above, there are many ambiguities in the law. Certainly, food suppliers

and retailers can support the passage of laws and regulations that clarify Proposition 37. Proposition 37 specifically allows the state legislature to amend the law "by a 2/3 vote in each house," but "only to further its intent. In addition, Proposition 37 permits DPH to adopt regulations to further and clarify some of its provisions.

In view of the loose structure of Proposition 37, significant regulatory and statutory clarification is both likely and necessary to occur. Grocers and others in the food industry should lead in these efforts. For example, the industry should create independent organizations and promote standards governing the tests used to determine whether foods are genetically engineered. Similarly, retailers may want to lobby for a law or regulation shielding them from liability for "over-labeling" foods where they have a good faith basis for believing that a product may be genetically engineered.

The key for the food and agriculture industries is to act quickly. Business will need to comply with Proposition 37 within 18 months if it passes, and regulations can take significantly longer to filter through the process. Industry representatives should begin working on draft regulations immediately, and should be ready to propose a regulatory package and participate in the process as soon as Proposition 37 passes. In addition, industry leaders should begin communicating with DPH personnel as to the details of Proposition 37 and the need to adopt clarifying regulations before it passes.

B. California Regulations.

DPH may issue regulations related to Proposition 37, but it is not required to do so. DPH is empowered to fill in much of the law around the framework of Proposition

37. But it is not entitled to undermine the law. Proposition 37 bars DPH from expanding the exemption provisions "beyond those specified in Section 110809.2." Health and Safety Code section 110809.3. Moreover, there is no provision for DPH to extend the deadline for compliance.

With respect to how to label processed foods, Proposition 37 merely requires that the words "Partially Produced with Genetic Engineering" be clearly and conspicuously placed on the package. DPH can and should issue regulations that provide clear guidance for the size, color, and location of such warnings to create a safe harbor for industry and to ensure a level playing field. Moreover, DPH should consider regulations that explain in clear terms which products are genetically modified and which are not, and to explain what "words of similar import" mean with respect to the prohibition against labeling or advertising processed foods as natural. Moreover, DPH should immediately begin adopting regulations for the testing procedures to make the testing exemption meaningful, and should consider form language for the "sworn statement" exemption. There are many other things DPH can begin doing to ease the transition into Proposition 37 labeling, but it will be up to industry and other stakeholders to prompt and guide that process.

C. California Statutes.

California's Constitution generally prohibits the Legislature from amending, or taking away from, voter initiatives. *See People v. Kelly* (2010) 47 Cal.4th 1008 (statute specifying amount of marijuana a medical patient may possess impermissibly amended voter initiative permitting patients to possess a reasonably necessary amount.) But Proposition 37 specifically provides that it "may be amended by the Legislature, but only to further its intent and purpose, by a statute

passed by a two-thirds vote in each house." Proposition 37, Section 10. Proposition 37's stated purpose "is to create and enforce the fundamental right of the people of California to be fully informed about whether the food they purchase and eat is genetically engineered and not misbranded as natural so that they can choose for themselves whether to purchase and eat such foods. It shall be liberally construed to fulfill this purpose." Proposition 37, Section 2.

While Proposition 37's "further its intent and purpose" language appears to restrict the Legislature's ability to modify the law, it is unclear how much force this restriction will have in reality. It seems clear that the Legislature cannot repeal the law or provide additional exemptions. *See Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366 (legislative amendment authorizing jail for drug offenders did not further purpose of voter initiative mandating drug testing and probation for nonviolent drug offenders). It is possible, however, the Legislature could change the labeling requirement from words to a recognizable symbol, which would further the initiative's purpose of keeping Californians informed since it could also be understood by non-English speaking consumers. And the Legislature may be able to change other substantive provisions which simply do not work in practice, so long as the legislature judges the replacement requirement to be more aimed at informing consumers. Industry and other interested stakeholders should begin studying Proposition 37's implementation and effectiveness so that they can understand what works and what does not, lobby legislators to adopt more workable rules, and defend those positions in court with evidence.

D. Federal Regulations and Statutes.

Proposition 37 regulates the labeling of all genetically engineered foods sold in California. The federal government has resisted labeling genetically modified foods, and may act to eliminate Proposition 37 or limit its reach. For example, Congress or even the FDA might act under the "Supremacy Clause" of the Constitution to stop California from regulating the labeling of genetically modified foods, thus wiping Proposition 37 off the books. Or the federal government may limit Proposition 37 by adopting laws that restrict its application to goods produced in California.

VI. Proposition 37: Validity

It seems likely that there will be challenges to the validity of Proposition 37, if it is passed by the voters. First, it may be challenged as being "void for vagueness" in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. It may also be challenged as being in violation of the Equal Protection Clause of the Constitution by irrationally discriminating against some products. Among the strongest apparent challenges is under the First Amendment, as it appears that Proposition 37 by compels speech with too thin a justification. Finally, Proposition 37 could be challenged as being preempted by federal law. Each of these potential challenges could result in the elimination of some or all of Proposition 37's requirements. Given the uncertainty of litigation, however, business would be well advised not to rely solely on such legal challenges, but to begin preparing to clarify and comply with Proposition 37's vague and elusive requirements.

VII. Conclusion

If approved by voters, Proposition 37 will significantly alter the landscape for the food industry, and for consumers. Grocers, producers, distributors, packers, processors, and other food-related industries should begin planning for compliance with Proposition 37 before it passes, and should be prepared to move forward under Proposition 37's mandates. There will certainly be campaign battles and legal challenges, but the time horizon for complying with Proposition 37 is short. Major institutions should begin making contingency plans and advocating for regulations so that business and consumer interest suffer as little disruption and exposure as possible during the next few years.