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Review of Selected 1998 California Legislation Addendum - Consumer Protection

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Consumer Protection

Consumer Protection; Proposition 105—public's right to know act

Government Code §§ 12261, 12262, 12263, 12264, 12265, 12266, 12267, 12269, 66799, 66799.1, 66799.2, 66799.3, 66799.4, 84501, 84502, 84503, 84504, 84505, 84506, 84507, 84508, 84509, 84510, 84511, 84512, 84513, 84514 (new); Health and Safety Code §§ 1599.85, 1599.86, 1599.87, 1599.88, 1599.89 (new); Insurance Code §§ 10195.1, 10195.2, 10195.3, 10195.4, 10195.5, 10195.6, 10195.7, 10195.8 (new).

1988 CAL. STAT. PROP. 105

(Effective January 1, 1990)*

Invokes a right to accurate information; compels disclosure of information by household toxic product manufacturers, seniors health insurance and nursing home providers, initiative advertisers, and corporations conducting business in South Africa.

Proposition 105 declares that the public has a right to be told accurate information and that this right is inhibited by a lack of truth in advertising.¹ Proposition 105 further states that the right to accurate information will help consumers make good decisions on matters involving household toxic products, health insurance sales to senior citizens, nursing homes, initiative campaigns, and businesses dealing with South Africa.²

* Proposition 105 establishes an operative date of January 1, 1990. 1988 Cal. Stat. prop. 105, sec. 11, at _____. Administrative agencies are required to adopt Proposition 105 regulations as soon as reasonably possible, but in no event later than the operative date. *Id.*, sec. 11, at _____.

1. 1988 Cal. Stat. prop. 105, sec. 1, at _____. Without accurate information, the public's health and finances will be harmed. *Id.*

2. *Id.* This right to accurate information is designed to help consumers make informed decisions. *Id.* Proposition 105 allows invalid provisions to be severed without impact to valid provisions. *Id.*, sec. 8, at _____. In addition, Proposition 105 may be amended by a two-thirds vote of each house of the legislature. *Id.*, sec. 10, at _____.

Proposition 105 may be subject to challenges based upon the California Constitution's single-subject rule³ because on its face, Proposition 105 appears to address multiple subjects. The proposition, however, emphasizes the subject of consumer information disclosure and, therefore, will likely meet this possible constitutional requirement.⁴

HOUSEHOLD TOXIC PRODUCTS DISCLOSURE

Proposition 105 compels businesses advertising⁵ a household toxic product⁶ to provide a clear and reasonable warning⁷ that consumers should empty or pour the product down the drain prior to placing the product's container in the trash.⁸ The household toxic product warning may be specifically written for the product, or may be generically written to apply to all products.⁹

SENIORS' HEALTH INSURANCE DISCLOSURE

Proposition 105 requires insurance policies that supplement Medicare¹⁰ to include the following notice on the cover page of the outline of coverage: "Caution: This policy may include coverage that totally or

3. See CAL. CONST. art. II, § 8(d) (an initiative involving more than one subject may not have any effect).

4. See Comment, *The California Initiative Process: The Demise of the Single-Subject Rule*, 14 PAC. L.J. 1095 (1983) (permissive "reasonably germane" test adopted by the California Supreme Court destroys all constitutional limits on multiple subjects in initiatives). But see Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 937-38 (1983) (the court is closely split on the issue of the single-subject rule and a future review by the court might choose to abandon the permissive test).

5. "Advertises" means mass-media advertisements but does not include posters or displays in a retail store. CAL. GOV'T CODE § 66799(b).

6. Household pesticides regulated by the Food and Agriculture Code or the Federal Insecticide, Fungicide, and Rodenticide Act are not regulated by Proposition 105. *Id.* § 66799.1. See e.g. CAL. FOOD & AGRIC. CODE § 14562 (labeling regulations governing specialty fertilizer, agricultural, mineral, soil amendment, and auxiliary soil and plant substance); 7 U.S.C. § 136-136y (1982 & Supp. IV 1986) (Federal Insecticide, Fungicide, and Rodenticide Act storage and labeling requirements).

7. Clear and reasonable warnings may be provided by labeling products, posting notices, advertising, and other similar methods. CAL. GOV'T CODE § 66799(c).

8. *Id.* § 66799(a). The warning must include the toll-free number of the Department of Health Service and must indicate that additional information may be obtained by calling the Department. *Id.* § 66799(c).

9. *Id.* § 66799(c). The Department of Health Services will issue regulations to define and implement Proposition 105 household toxic products provisions. *Id.* § 66799.3. The Department may exempt small or incidental advertisers with annual California advertising budgets of less than \$50,000. *Id.* § 66799.2.

10. Disability insurance policies and nonprofit hospital service plan contracts issued on a group or individual basis are regulated under Proposition 105. CAL. INS. CODE § 10195.1.

partly duplicates your other Medicare supplemental insurance coverage.”¹¹ Additionally, the cover page must indicate if the coverage offered is extensive, moderate, or limited,¹² and the loss ratio of the policy during the prior year.¹³ Public advertisements for Medicare insurance supplements containing an organizational name that resembles a government agency, nonprofit or charitable institution, or seniors’ organization, must provide the following notice: “(name of organization) is or is associated with a business which sells insurance.”¹⁴

NURSING HOME DISCLOSURE

Proposition 105 mandates all long-term health care facilities display prominently and clearly the following notice on all contracts of admission¹⁵ and advertisements: “For more information about our facility, you may call the State Ombudsman’s Office at (insert toll-free number).”¹⁶ Facilities with the most serious record of law or regulation violations, as determined by the Department of Health Services, must give the following additional notice: “This facility’s record of citations is posted at the facility, and a copy may be obtained from the Department of Health Services.”¹⁷

TRUTH IN INITIATIVE ADVERTISING

Pursuant to Proposition 105, advertisements authorized by an initiative¹⁸ committee¹⁹ must include a statement²⁰ that each of the

11. *Id.* § 10195.3. See generally Charles, *Meeting the Challenge of Protecting the Elderly Consumer*, 50 TEX. B. J. 497, 498, 501 (1987) (elderly are subject to fraud and deception when buying Medicare insurance supplements); *GAO Study of Medigap Insurance*, [Sept. 1986-Apr. 1987 Transfer Binder] Medicare & Medicaid Guide (CCH) § 35,902 (Oct. 1986) (present federal and state policies sufficiently protect elderly from Medigap abuses).

12. The Insurance Commissioner will establish minimum standards for extensive, moderate, and limited policies. CAL. INS. CODE § 10195.4.

13. *Id.* §§ 10195.4, 10195.5. A clear statement that additional information about buying insurance is available from the Department of Insurance, along with the Department’s toll-free number, must be disclosed. *Id.* § 10195.6.

14. *Id.* § 10195.2.

15. Admission contracts include all documents signed as a condition of admission. CAL. HEALTH & SAFETY CODE § 1599.86.

16. *Id.* § 1599.85.

17. *Id.* § 1599.87. Proven and admitted Class AA and Class A citations will be used by the Department of Health Services to determine the list of approximately 25% of long-term health care facilities with the most serious records of violations. *Id.*

18. An initiative is a qualified statewide initiative or a qualified statewide referendum measure. CAL. GOV’T CODE § 84501.

19. A committee that has expended less than \$50,000 is not subject to Proposition 105

following applicable sources provides major funding: (1) Any industry²¹ that is either the largest industry contributor with combined contributions²² totaling \$500,000 or more, or any industry with combined contributions totaling \$50,000 or more and constituting 25% or more of all contributions;²³ (2) a person²⁴ who is the largest contributor and whose contributions total \$100,000 or more;²⁵ (3) a group of corporations, unions, or out-of-state contributors whose combined contributions total \$100,000 or more and constitute 50% or more of all contributions.²⁶ If there are more than two major funding sources, the committee is required only to disclose the first two applicable funding sources to comply with Proposition 105.²⁷

ANTI-APARTHEID DISCLOSURE

Proposition 105 directs any corporation selling stocks²⁸ in California to disclose in its prospectus if any of the following entities are doing business in South Africa: (1) The corporation; (2) one or more of the corporation's parent²⁹ or subsidiary³⁰ corporations; (3) one or

requirements. *Id.* § 84502. Proposition 105 is only applicable to advertisements which are more than 50% devoted to one initiative. *Id.* § 84512.

20. Printed statements must be clear, legible, and conspicuous while broadcast communications must be spoken. *Id.* § 84509.

21. "Industry" includes individuals who derive economic benefit from a product, commodity, or service. *Id.* § 84504.

22. Contributions are cumulative contributions of a committee measured from the first of January of the year prior to the initiative vote to the closing date for the campaign finance disclosure report which is filed seven days or more prior to the advertisement. *Id.* § 84506.

23. *Id.* § 84507(a).

24. "Person" includes an individual, business, organization, or group acting in concert. *Id.* § 84505.

25. *Id.* § 84507(b).

26. *Id.* § 84507(c)-(d). See generally Annotation, *Validity and Construction of State Statute Prohibiting Anonymous Political Advertising*, 4 A.L.R. 4th 741 (1981); Note, *Sponsorship Identification: When Must a Broadcaster Disclose Who Really Pays for Those Political Advertisements?*, 5 Loy. L.A. ENT. L.J. 211 (1985) (Federal Communication Commission advertisement sponsorship identification requirements discussed).

27. CAL. GOV'T CODE § 84508. Only one funding source need be disclosed on an electronic broadcast advertisement of less than 25 seconds, or a printed advertisement which is less than 25 square inches. *Id.* § 84510.

28. "Corporation selling stocks" is a corporation or financial institution required by law to issue a prospectus. *Id.* § 12261(b).

29. "Parent corporation" means a corporation that has the power to elect a majority of directors in another corporation. *Id.* § 12261(c).

30. "Subsidiary corporation" means a corporation subject to a parent corporation with the power to elect a majority of the subsidiary corporation's directors. *Id.* § 12261(d).

more of the corporation's commonly owned corporations.³¹ Additionally, Proposition 105 requires corporations subject to the above disclosure provisions to notify the Secretary of State.³²

ENFORCEMENT

The remedy for a violation of Proposition 105's initiative advertising provisions is a fine of treble the cost of the advertisement, including placement costs.³³ This action may be brought by any person or the Fair Political Practices Commission.³⁴

Proposition 105 provides that the remedy for a violation of provisions dealing with household toxic products, seniors' health insurance, nursing homes, and corporations doing business in South Africa, is a fine of \$10,000 for each advertisement, contract, or prospectus.³⁵ The use of any remedy provided by Proposition 105 does not preclude the use of any other existing remedies.³⁶

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31. *Id.* § 12262. Commonly owned corporation means a subsidiary corporation that is owned by the same parent corporation as another subsidiary corporation. *Id.* § 12261(a).

32. *Id.* § 12264. Californians have enacted other anti-apartheid measures. *See e.g.* 18 PAC. L.J. 543 (1987) (discussing anti-apartheid trust fund provisions).

33. CAL. GOV'T CODE § 84514.

34. *Id.* *See id.* § 83100 (establishment and membership of the Fair Political Practices Commission described). *See generally* 7 B. WITKIN, CALIFORNIA PROCEDURE, *Judgment* §§ 173-181 (3rd ed. 1985 & 1988 Supp.) (explanation of California private attorney general theory and possible recovery of attorney fees).

35. CAL. GOV'T CODE § 12269. Multiple copies of the same advertisement, contract, or prospectus count as one violation. *Id.*

36. 1988 Cal. Stat. prop. 105, sec. 9, at ____.

