



9-1-2016

# Proposition 65: Carryout Bags. Charges

Maral Farsi

*University of the Pacific, McGeorge School of Law*

Justin Hansen

*University of the Pacific, McGeorge School of Law*

Follow this and additional works at: <http://scholarlycommons.pacific.edu/california-initiative-review>



Part of the [Legislation Commons](#)

### Recommended Citation

Farsi, Maral and Hansen, Justin (2016) "Proposition 65: Carryout Bags. Charges," *California Initiative Review (CIR)*: Vol. 2016 , Article 16.

Available at: <http://scholarlycommons.pacific.edu/california-initiative-review/vol2016/iss1/16>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in California Initiative Review (CIR) by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

**Proposition 65:**  
**Carryout Bags. Charges.**

Initiative Statute

Copyright © 2016 by the University of the Pacific,  
McGeorge School of Law

By

**Maral Farsi**

*M.S.L., University of the Pacific, McGeorge School of Law, to be conferred May 2017*  
*M.P.H., Health Policy and Management, University of California, Los Angeles, 2005*  
*B.S., Health Sciences, California State University, Northridge, 2003*

&

**Justin Hansen**

*J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2018*  
*A.A., French, College of the Canyons, 2013*  
*A.A., Paralegal Studies, College of the Canyons, 2011*  
*A.A., Spanish, College of the Canyons, 2010*  
*B.A., Political Science, University of California, Berkeley, 2007*

## I. EXECUTIVE SUMMARY

Proposition 65, “Carryout Bags: Charges,” will redirect the mandated fees collected by grocery stores and other specified retailers for the sale of carryout plastic bags under a statewide ban of single-use plastic bags to a new grant making agency. This measure would create the Environmental Protection and Enhancement Fund (EPEF) as a trust fund to be managed by the Wildlife Conservation Board (WCP). The EPEF would provide grants to support environmental protection and enhancement programs.

A **YES** vote would require any fees collected by stores for carryout bags under a state law prohibiting the use of single-use plastic bags to be directed toward a newly established environmental grant making agency.

A **NO** vote would not require fees collected by grocers and retailers under a state ban of single-use carryout plastic bags to be directed to the WCB and would not establish the EPEF.

## II. THE LAW

In 2014, the California State Legislature enacted SB 270 (Padilla, De Leon, Lara); however, SB 270 was placed on the November 8, 2016 ballot as a referendum titled Proposition 67 preventing it from going into effect. SB 270 would have prohibited stores that have a specified amount of sales in dollars or a specified amount of retail floor space from providing a single-use carryout bag to a customer, with some exceptions. The law would have also prohibited those stores from selling a reusable grocery bag or a recycled paper bag at the point of sale unless the store charges a fee of not less than \$0.10.<sup>1</sup> Under SB 270, the money collected for the purchase of a reusable grocery bag or a recyclable paper bag would be retained by the store and be used only for specified purposes, such as consumer education related to reusable bags and to subsidize the actual costs of providing the recycled paper or reusable grocery bags.<sup>2</sup>

On September 30, 2014, California’s Governor Jerry Brown signed the legislation and it was chaptered into law under the Public Resources Code as Chapter 5.3 §42280 –8. California’s State Constitution allows new state laws to be placed on a ballot as a referendum allowing the voters in the state to determine whether the law can go into effect.<sup>3</sup> The American Progressive Bag Alliance (APBA) gathered enough signatures placing the law on the ballot requiring voter approval. Therefore, while SB 270 was chaptered into law, it will not be effective unless it is passed by the voters. If the voters fail to pass it, SB 270 will be repealed.

### A. California: Local Laws

As of June 2016, over 150 cities and counties in California have local carryout bag laws.<sup>4</sup> These localities are home to about 40 percent of the California population.<sup>5</sup> Local laws banning or restricting single-use carryout bags have been enacted primarily due to environmental

---

<sup>1</sup> CAL. PUB. RES. CODE § 42280 (2014).

<sup>2</sup> *Id.*

<sup>3</sup> CAL. CONST., art. II, § 9.

<sup>4</sup> PLASTIC BAGS: LOCAL ORDINANCES, CALIFORNIANS AGAINST WASTE, <http://www.cawrecycles.org/list-of-local-bag-bans> (last visited Sept. 7, 2016) (on file with the *California Initiative Review*).

<sup>5</sup> LEGISLATIVE ANALYST’S OFFICE. PROPOSITION 65, CARRYOUT BAGS. CHARGES. INITIATIVE STATUTE (July 18, 2016), available at <http://www.lao.ca.gov/ballot/2016/Prop65-110816.pdf> (last visited Sept. 4, 2016) (on file with the *California Initiative Review*).

concerns, such as litter in waterways, parks, and natural habitats impacting wildlife.<sup>6</sup> For example, plastic bags have been named as a culprit in harming marine life when some animals mistake the bags for jellyfish and ingest them.<sup>7</sup>

Most of the local laws require stores to charge a fee for a paper carryout bag, and a few of these laws have banned both single-use plastic and paper carryout bags.<sup>8</sup> Most of the local ordinances allow the money generated by bag purchases to be retained by stores, and a small number of the local ordinances are silent as to whether a store can charge for a recyclable paper carryout bag or reusable bags.<sup>9</sup>

## **B. United States: State Laws**

California was the first state to enact a statewide ban of plastic bags in August 2014 (which has not yet gone into effect due to the referendum). In Hawaii, however, all five counties individually prohibit non-biodegradable plastic bags at checkout as well as paper bags made of less than 40 percent recycled material.<sup>10</sup> The District of Columbia also enacted a ban of disposable, non-recyclable single-use plastic carryout bags with a \$0.05 fee for distribution of all other disposable bags. While other states have laws related to the composition, labeling, recycling, and reuse of plastic bags, no other state has a ban of single-use plastic carryout bags comparable to California's SB 270.<sup>11</sup>

## **C. Proposed Law**

Proposition 65 was submitted by Doyle L. Johnson, who is identified only as "Proponent" and a registered voter.<sup>12</sup> However, the American Progressive Bag Alliance (APBA), which represents a number of major single-use plastic bag manufacturers, has claimed responsibility for the measure's placement on the November 2016 ballot. APBA is also the organization that placed Proposition 67 on the ballot.

The initiative is comprised of eight different sections with three of those comprising the majority of the substance:

- Section 4 revises the Public Resources Code to outline what would happen to money gathered by grocers and retailers in the event of a statewide ban,
- Section 6 addresses conflicting measures on the same ballot, in this case the competing referendum of Proposition 67, and
- Section 8 provides for a legal defense of the measure by the attorney general or independent counsel should it be enacted and subsequently challenged in court.

---

<sup>6</sup> GET THE FACTS, SAY YES ON 67, <http://www.cayeson67.com/get-the-facts> (last visited Sep. 4, 2016) (on file with the *California Initiative Review*).

<sup>7</sup> THE PROBLEM WITH MARINE DEBRIS, CALIFORNIA COASTAL COMMISSION (July 2016), <http://www.coastal.ca.gov/publiced/marinedebris.html> (last visited Sep. 13, 2016) (on file with the *California Initiative Review*).

<sup>8</sup> LIST OF LOCAL BAG BANS, CALIFORNIANS AGAINST WASTE, <http://www.cawrecycles.org/list-of-local-bag-bans> (last visited Sep. 7, 2016) (on file with the *California Initiative Review*).

<sup>9</sup> CALIFORNIA BAG LEGISLATION, BAGLAWS.COM, <http://www.baglaws.com/legislation.php?state=California> (last visited Oct. 1, 2016) (on file with the *California Initiative Review*).

<sup>10</sup> STATE PLASTIC AND PAPER BAG LEGISLATION, NATIONAL COUNCIL OF STATE LEGISLATURES (Jun. 29, 2016), <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx> (last visited Sep. 16, 2016) (on file with the *California Initiative Review*).

<sup>11</sup> *Id.*

<sup>12</sup> CAL. PROPOSITION 65 (2016).

## 1. Section 4: Amendments to the Public Resources Code

### a. Definitions

Proposition 65 defines three terms: “store”, “state law”, and “carryout bag.” The terms “store” and “carryout bag” are also defined under SB 270 (Proposition 67), but the two propositions take different approaches in defining these terms. For example, SB 270 individually defines “single-use carryout bags”, “recycled paper bags”, “reusable grocery bags”, and “reusable carryout bag”.<sup>13</sup> Proposition 65 offers a broad definition for “carryout bag” which includes single-use carryout bags, paper bags, recycled paper bags, plastic bags, recyclable plastic bags, reusable plastic bags, compostable bags, reusable grocery bags, and any other kind of bags used to carry purchased items away from a store. However, the initiative does not define any of those terms independently.<sup>14</sup> The discrepancies in the definitions in Proposition 65 and Proposition 67 will be explored more thoroughly under the Legal Analysis section of this report.

### b. Environmental Protection and Enhancement Fund and the Wildlife Conservation Board

Proposition 65 would establish the Environmental Protection and Enhancement Fund (EPEF), a grant-making trust fund to be administered by the California Wildlife Conservation Board (WCB).<sup>15</sup> The WCB, currently housed in the Department of Fish and Wildlife under the California Natural Resources Agency, functions primarily to acquire land, restore habitats and develop of wildlife oriented public access facilities.<sup>16</sup>

Proposition 65 would redirect \$500,000 in the form of a loan to the WCB to pay for costs associated with administration and implementation of the provisions of Proposition 65.<sup>17</sup> The provisions call for the creation of a grant-making program funded by a transfer of any fees collected by stores under a state law, assuming one takes effect, prohibiting single-use plastic bags. This loan would come from either the Safe Drinking Water, Water Quality and Supply, Flood Control, and Coastal Protection Fund of 2006 (Proposition 86) or, if funds are insufficient to make the loan, then from the Water Quality, Supply, and Infrastructure Improvement Fund of 2014 (Proposition 1).<sup>18</sup> The loan paid to the WCB would have to be paid back first before the money collected from the stores for fees related to carryout bags could be used in any other way.<sup>19</sup>

Under Proposition 65, the EPEF will fund environmental protection and enhancement grants in the following areas: drought mitigation projects; recycling; clean drinking water supplies; state, regional, and local parks; beach cleanup; litter removal; and wildlife habitat restoration.<sup>20</sup> The measure requires that no more than two percent of the money in the EPEF fund

---

<sup>13</sup> CAL. PROPOSITION 67, § 1, ch. 5.3, art. 1 (2016).

<sup>14</sup> *Id.* at § 4, ch. 5.2, § 42271(b).

<sup>15</sup> *Id.* at § 4, ch. 5.2, § 42271(a).

<sup>16</sup> *About the Wildlife Conservation Board*, CALIFORNIA WILDLIFE CONSERVATION BOARD, <https://wcb.ca.gov/Home/About> (last visited Sep. 18, 2016) (on file with the *California Initiative Review*).

<sup>17</sup> CAL. PROPOSITION 65, § 4, ch. 5.2, § 42271(c)(2) (2016).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at § 4, ch. 5.2, § 42271(c).

be used for administrative expenses. Similarly, a recipient of a grant under Proposition 65 would be limited to using five percent of the grant for their program’s administrative costs.<sup>21</sup>

The measure also delineates that the WCB must develop project solicitation and evaluation guidelines accompanied by public hearings to solicit comments regarding the evaluation guidelines.<sup>22</sup> The measure provides that there will be three hearings in various regions of the state (Northern California, Central Valley, and Southern California).<sup>23</sup> As the WCB is already an existing body and its organization consists of an Executive Director, approximately thirty staff members and their work is overseen by three Board Members, executing the provisions of Proposition 65 would likely necessitate a realignment of some of these staff from existing projects.<sup>24</sup>

*c. Audit*

The EPEF will be subject to biennial audits not to exceed \$400,000 for each audit (with the amount increasing by taking into account inflation).<sup>25</sup>

*d. Local Impact/Preemption*

Proposition 65 requires that any funds generated by state mandates on sales of carryout bags must be deposited into the EPEF. However, any local governing entities that have already adopted ordinances, resolutions, laws, regulations, or other legal authority would be permitted to “opt-in” to redirecting funds to the EPEF by amending their existing law.<sup>26</sup>

*2. Section 6: Directive on Other Measures Related to Carryout Bags*

Proposition 65 states that any other measures related to the use of money collected for the sale of carryout bags under a ban of free distribution will be viewed as conflicting. Moreover, the provision declares that if Proposition 65 receives more affirmative votes, “the provisions of the other measure shall be null and void.” This language indicates that the drafters of Proposition 65 intended to ensure that Proposition 65 would prevail solely and in its entirety, or Proposition 67 would prevail in its entirety, or neither would succeed. Supporters of the initiative reaffirmed this was their intention.<sup>27</sup>

*3. Section 8: Legal Defense of the Measure if Passed*

In the event of a legal challenge to Proposition 65 if it is passed by the voters, Section 8 of the initiative would require that if the State of California refuses to defend the provisions of the measure, the Attorney General must appoint independent counsel to defend it.<sup>28</sup> Further, the initiative would require the Attorney General to exercise “due diligence” in identifying and selecting the independent counsel who must provide a written affirmation to the state about his

---

<sup>21</sup> CAL. PROPOSITION 65 (2016) at Section 4, Chapter 5.2 § 42272(d).

<sup>22</sup> *Id.* at § 4, ch. 5.2, § 42272(e).

<sup>23</sup> *Id.*

<sup>24</sup> CALIFORNIA WILDLIFE CONSERVATION BOARD, <https://wcb.ca.gov/> (last visited Sept. 27, 2016) (on file with the *California Initiative Review*).

<sup>25</sup> CAL. PROPOSITION 65, § 4, ch. 5.2, § 42272(e) (2016).

<sup>26</sup> *Id.* at § 4, ch. 5.2, § 42273.

<sup>27</sup> Telephone Interview with Phil Rozenski, American Plastic Bag Alliance and Novolex (Sep. 8, 2016) (notes on file with the *California Initiative Review*). [“APBA Interview.”]

<sup>28</sup> CAL. PROPOSITION 65, § 8 (2016).

or her commitment to “faithfully and vigorously” defend this measure.<sup>29</sup> The legal challenge must also be funded by the state’s General Fund at any amount necessary for said counsel.<sup>30</sup>

### III. HISTORY

There is growing concern over the detrimental impact plastic pollution is having on the global environment. Lightweight plastic bags make up a significant portion of the plastic pollutants that make their way to California’s coastlines and waterways, as well as into the Pacific Ocean, namely the North Pacific Central Gyre.<sup>31</sup> Even when lightweight plastic is properly disposed of, it can end up as litter given its lightweight nature and the way it can be broken, separated or torn into smaller pieces that become increasingly difficult to manage.<sup>32</sup>

In response to these environmental concerns, many laws have been introduced both at the state level and locally to address the problem.<sup>33</sup> Attempts to address the environmental concerns have come mostly in two forms: (1) limit or deter sale of plastic bags, and; (2) direct money from sale of carryout bags to environmental projects. One bill introduced in 2013, SB 700, sought to direct money from the sale of single-use carryout bags to environmental projects.<sup>34</sup> Under SB 700, the consumer would have had to pay \$0.05 for each single-use bag.<sup>35</sup> In turn, the \$0.05 would have been made available for grants to cities and counties for parks, litter reduction, and clean-up programs.<sup>36</sup> SB 700 would have required a significant amount of money to go to the Board of Equalization to administer and implement the program through the Fee Collection Procedures Law.<sup>37</sup> SB 700 was not advanced due to being held by the Senate Appropriations Committee that year.<sup>38</sup>

During the same two-year legislative session, SB 270 was introduced and subsequently enacted. SB 270 was hailed as the culmination of a seven-year effort between environmental advocates and business stakeholders.<sup>39</sup> Distinguishing itself from SB 700, SB 270 allows “stores” to keep the money they charge for carryout bags, which was raised to a minimum of \$0.10 per bag, and no funds are required to be made available for environmental causes or programs. This was an interesting development because SB 270 only addressed one prong of the environmental concern: the point of sale. Also, SB 270 came in the wake of a voluminous Los Angeles County Economic Impact Report, which expressed that the bag fee program has only a small or negligible beneficial impact on the environment.<sup>40</sup> Some advocates of environmental

---

<sup>29</sup> *Id.* at § 8(b).

<sup>30</sup> *Id.* at § 8(c).

<sup>31</sup> JOINT INFORMATIONAL HEARING OF THE SENATE ENVIRONMENTAL QUALITY AND ASSEMBLY NATURAL RESOURCES COMMITTEES, JOINT COMMITTEE BACKGROUND & ANALYSIS, CARRYOUT BAGS. CHARGES. INITIATIVE STATUTE (#1734), at 6 (May 25, 2016) [“JOINT COMMITTEE REPORT – PROPOSITION 65 (2016)”].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 26–41.

<sup>34</sup> *Id.* at 27.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 700, at 1 (May 23, 2013).

<sup>38</sup> JOINT COMMITTEE REPORT – PROPOSITION 65 (2016), *supra* note 31, at 27.

<sup>39</sup> *Id.*

<sup>40</sup> SUMMARY OF LOS ANGELES COUNTY ENVIRONMENTAL IMPACT REPORT ON BANNING PLASTIC CARRYOUT BAGS, LOS ANGELES COUNTY, [http://www.dpw.co.santa-cruz.ca.us/www.santacruzcountyrecycles/Law/DocList/SC058-LA\\_County\\_EIR\\_summary.pdf](http://www.dpw.co.santa-cruz.ca.us/www.santacruzcountyrecycles/Law/DocList/SC058-LA_County_EIR_summary.pdf) (last visited Sep. 20, 2016) (on file with the *California Initiative Review*).

stewardship took this report to suggest that more needed to be done to protect the environment, such as putting money toward programs to help the environment.

After SB 270 passed both houses of the Legislature and was signed into law by Governor Brown, plastic manufacturers coalesced in an effort to put the new law to a vote of the people.<sup>41</sup> The plastic bag industry is opposed to bag bans in general, so it opposed SB 270 on those grounds. However, the manufacturers argued that the collection of the \$0.10 fee mandated by SB 270 would offer “no public benefit,” and that the revenues from an effort with its basis in environmental protection would not offer any benefit for environmental causes or programs. Rather, they pointed out that the grocery industry would be guaranteed a new revenue stream and profits.<sup>42</sup> This fight against SB 270 became the impetus for the plastic bag industry to qualify Proposition 67 as a referendum, and, subsequently, Proposition 65 as an initiative for the November 8, 2016 General Election.

#### **IV. LIKELY FISCAL EFFECTS**

The fiscal effect of Proposition 65 is highly nuanced and depends on whether Proposition 67 also passes. The fiscal effect to the State of California would likely be inversely related to the fiscal effect on stores because the funds in question will go to one or the other. The following outcomes do not assume combinations of whether Propositions 65 or 67 will fail, but rather which provisions will remain valid following legal examination. The possible outcomes include: (1) A state law banning single-use plastic bags, such as Proposition 67, goes into effect and is upheld and revenues from bag fees are directed to the EPEF, (2) a state law banning single-use plastic bags goes into effect and bag fees are kept by the stores, or (3) there is no state law banning single-use plastic bags in effect.

##### **A. Ban on Single-Use Bags; Fees are directed to EPEF**

If Proposition 67 passes and courts find that the provisions in Proposition 65 directing carryout bag fees to the WCB for purposes of the EPEF are valid, the amount that the WCB could receive would potentially be in the tens of millions of dollars annually to be spent almost exclusively on qualifying environmental programs.<sup>43</sup> However, the amount the WCB receives could vary over time depending on several factors that would be at play in the economy, such as future sales and future bag prices.<sup>44</sup> In addition, the EPEF could receive additional money from local governments that could volunteer their mandated bag funds to the EPEF/WCB.

Grocers and retailers could stand to lose revenues from lost sales both from bag sales and store items. Currently, merchants sell about 15 billion bags annually.<sup>45</sup> Consumers might purchase fewer items in order to avoid purchasing more bags. Merchants might experience cost savings from not having to provide single-use carryout plastic bags (approximately \$0.005 –

---

<sup>41</sup> Guy Marzorati and Katie Orr, *Study Up, California! You've Got 17 Statewide Measures to Vote On*, KQED PUBLIC MEDIA FOR NORTHERN CA (July 1, 2016), available at <https://ww2.kqed.org/news/2016/07/01/california-2016-statewide-ballot-measures/> (on file with the *California Initiative Review*).

<sup>42</sup> The American Progressive Bag Alliance, Handout during Senate Environmental Quality Committee hearing on Senate Bill 270 (Aug. 28, 2014) (on file with the *California Initiative Review*).

<sup>43</sup> LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 65, CARRYOUT BAGS. CHARGES. INITIATIVE STATUTE. (July 18, 2016), available at <http://www.lao.ca.gov/ballot/2016/Prop65-110816.pdf> (last visited Sep. 4, 2016) (on file with the *California Initiative Review*).

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 1–2.

\$0.01 each).<sup>46</sup> Merchants might experience unrealized potential revenues from not being able to retain the profits of selling reusable plastic bags, recyclable paper bags, and any other carryout bags whose sale is mandated by statewide law (estimated between \$0.06 –\$0.15 each).<sup>47</sup>

However, stores claim they are already providing some carryout bags at no charge for low-income shoppers who qualify for free bags and they also claim that revenues from carryout bag sales are small.<sup>48</sup> The grocers' industry representatives admit that some stores make slightly more profit per bag than others because they are able to buy in bulk, but generally speaking, the grocers claim stores are not collecting a large profit from the sale of reusable carryout bags.<sup>49</sup>

Some stores may also choose to not make bags available to customers at all. This could be an option stores use to avoid the administrative burden of directing the carryout bag fees to the EPEF.

### **B. Ban on Single-Use Bags; Fees can remain with stores**

If there is a statewide carryout bag law in effect and revenue from the sale of carryout bags is kept by stores, there would be no fiscal impact on the state related to Proposition 65 with respect to plastic bag revenues. As the Legislative Analyst's Office projects that Proposition 67 could result in potential state revenue increases of several tens of millions of dollars, should Proposition 67 not be enacted, stores subject to a statewide ban under Proposition 67 would most likely be able to keep those revenues which would have gone to the EPEF.<sup>50</sup>

### **C. No Ban on Single-Use Bags**

Under the scenario where Proposition 67 fails, (irrespective of whether Proposition 65 passes or fails), there would be no statewide ban on single-use carryout bags. If Proposition 65 passes, and a statewide bag ban law were to pass later on, then the provisions of Proposition 65 might go into effect depending on how that future statewide single-use plastic bag ban is drafted and the resulting fiscal impact would be comparable to that mentioned above under subsection A: "Ban on Single-Use Bags; Fees are directed to EPEF."<sup>51</sup>

### **D. Other considerations**

Proposition 65 mandates a loan in the amount of \$500,000 to be made from the Safe Drinking Water, Water Quality and Supply, Flood Control, and Coastal Protection Fund of 2006 or the Water Quality, Supply, and Infrastructure Improvement Fund of 2014 in order to pay for the costs associated with creating regulations to enforce Proposition 65's bag fee transfer program.<sup>52</sup> Should these provisions survive judicial scrutiny, the displacement of funds should

---

<sup>46</sup> ECONOMIC IMPACT ANALYSIS: PROPOSED BAN ON PLASTIC CARRYOUT BAGS IN LOS ANGELES COUNTY, AECOM TECHNICAL SERVICES, at 12, [http://ladpw.org/epd/aboutthebag/PDF/SocioEconomicImpactStudy\\_final.pdf](http://ladpw.org/epd/aboutthebag/PDF/SocioEconomicImpactStudy_final.pdf) (last visited October 17, 2016) (on file with the *California Initiative Review*).

<sup>47</sup> *Id.*

<sup>48</sup> LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 65, CARRYOUT BAGS. CHARGES. INITIATIVE STATUTE., at 1–2.

<sup>49</sup> Interview with Tim James and Aaron Moreno, Senior Manager of Local Government Relations and Senior Director of Government Relations (respectively), California Grocers Association, in Sacramento, Calif. (September 2, 2016) (notes on file with the *California Initiative Review*).

<sup>50</sup> LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 65, CARRYOUT BAGS. CHARGES. INITIATIVE STATUTE., at 1.

<sup>51</sup> *Id.* at 5.

<sup>52</sup> CAL. PROPOSITION 65, § 4, ch. 5.2, § 42271(c)(2) (2016).

only be temporary because all money deposited into the EPEF is directed to be used first to repay the aforementioned loan until it is completely paid off.<sup>53</sup>

Proposition 65 delineates a number of other costs, expenses, and cost-savings. For example, Proposition 65 calls for up to \$400,000 biennially, adjusted for inflation,<sup>54</sup> to be spent on the cost of an audit conducted by the nonpartisan California State Auditor for each of the programs receiving funds as a result of the bag fee transfer.<sup>55</sup> Up to two percent of funds received by EPEF can be used by WCB to pay for administrative expenses.<sup>56</sup>

The potential cost savings stemming from reduced pollution from single-use plastic bags is unknown. It is also unclear what the costs will be from the impact of added plastic to the environment (by way of thicker reusable bags) and paper bags (by way of greenhouse gas emissions during their production).

The potential cost to the State of California in defending Proposition 65 if it is embroiled in a legal challenge is also unknown and has no ceiling per the language of the measure.<sup>57</sup> In addition to the “continuous appropriation” of legal fees from the General Fund, these costs would include the search for the appointment of an attorney who will “faithfully and vigorously defend this Act on behalf of the State of California” and be willing to sign a written affirmation to be made publicly available as to this commitment.<sup>58</sup>

## V. LEGAL, CONSTITUTIONAL, AND DRAFTING ANALYSIS

### A. Legal Considerations

#### 1. Local Preemption

Under Section 4 of Proposition 65, Chapter 5.2 proposed Section 42273, local governments with laws that ban “free distribution of any type of carryout bag, and [mandate] the sale of any other type of carryout bag” may require money collected under the mandates to be deposited into the EPEF. In *California Grocers Association v. City of Los Angeles*,<sup>59</sup> the California Supreme Court explained that, “Insofar as a local regulation conflicts with state law, it is preempted and invalid. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.”<sup>60</sup> Therefore, had Section 42273 not been in Proposition 65, all stores in cities and counties in California with single-use plastic bag mandates would also have been required to send collected carryout bag fees to the EPEF. However, the inclusion of Section 42273 in the measure does not immediately preclude legal challenges to determine whether the state’s preemption can be overridden.

#### 2. Conflicting Measure; Revival Provision

Section 6(a) of Proposition 65 states that if there is another ballot measure related to the “use of moneys generated or collected by stores pursuant to laws that bans free distribution, and

---

<sup>53</sup> *Id.*

<sup>54</sup> As measured by Consumer Price Index for All Urban Consumers (CPI-U).

<sup>55</sup> CAL. PROPOSITION 65, § 4, ch. 5.2, § 42271(f) (2016).

<sup>56</sup> *Id.* at § 42271(d).

<sup>57</sup> *Id.* at § 8.

<sup>58</sup> *Id.*

<sup>59</sup> *California Grocers Assn. v. City of Los Angeles*, 52 Cal. 4th 177 (Cal. 2011).

<sup>60</sup> *Grocers*, 52 Cal. 4th at 188.

mandates the sale, of any or all types of carryout bags”, the measures will be considered to be in conflict with each other. Further, the measure states that if Proposition 65 receives a greater number of affirmative votes, then it will prevail in its entirety and the conflicting measure will be null and void (even if it is passed by the voters).

*a. Conflicting or Complementary*

Article II, section 10, subsection (b) of the California Constitution reads: “[I]f provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.”<sup>61</sup> The courts have interpreted section 10(b) to mean two things:

- (1) If two propositions are conflicting, and both pass, the measure receiving more votes will go into effect and the other will not.
- (2) If two propositions are complementary, and both pass, the measures will be compared provision by provision and the provisions of the proposition receiving less affirmative votes will go into effect if its provisions do not conflict with the proposition receiving more votes and if its provisions are severable from any that do conflict with the provisions of the proposition receiving more affirmative votes.<sup>62</sup>

Thus, courts must first decide if Propositions 65 and 67 are in conflict or complementary.

<b>Matrix of Possibilities: Proposition 65 and 67</b>		
<b>Vote Count</b>	<b>Conflicting</b>	<b>Complementary</b>
65 Passes 67 Passes 65 > 67	65 becomes law– No single-use plastic bag ban; EPEF is created but unfunded  67 Fails	Courts must decide which provisions conflict; those in 65 trump those in 67  Revenues from bag fees go to EPEF
65 Passes 67 Passes 67 > 65	67 becomes law. Note: 65 proponents may challenge this because Section 6 allows 65 to go into effect; this assumes a court has decided these measures are competing. However, a challenge would be unlikely to prevail because Proposition 65 would not preempt the state's Constitution.	Courts must decide which provisions conflict; those in 67 trump those in 65  Revenues from bag fees go to stores
65 Passes 67 Fails	65 becomes law – No single-use plastic bag ban; EPEF is created but unfunded  67 Fails	65 becomes law – No carryout bag ban; EPEF is created but unfunded;  67 Fails
65 Fails 67 Passes	67 becomes law – a statewide plastic bag ban goes into effect  65 Fails	67 becomes law – a statewide plastic bag ban goes into effect. Carryout bag revenues kept by stores.  65 Fails
65 Fails 67 Fails	No state law with respect to carryout bags	No carryout bag state law

The court considers a number of factors to determine whether measures are competing or complementary. In *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*,<sup>63</sup> the court noted that it makes this determination based on how the propositions are

<sup>61</sup> CAL. CONST., art. II, § 10(b).

<sup>62</sup> *Yoshisato v. Superior Court*, 2 Cal. 4th 978, 987–89 (Cal. 1992).

<sup>63</sup> *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.*, 51 Cal. 3d 744 (Cal. 1990).

presented to voters. To determine whether measures are conflicting, the courts have considered factors such as whether the measures are presented to the voters as conflicting and whether there are clues in the drafting that indicate a conflict, such as two measures modifying the same section of law.<sup>64</sup> In all cases, courts attempt to avoid conflict and reconcile provisions so as to give effect to every provision.<sup>65</sup>

*Yoshisato v. Superior Court* took a different approach to determine whether ballot measures are conflicting or complementary.<sup>66</sup> The court looked to how the measures were presented to the voters. With provisions that were in fundamental conflict, only the provision with the highest number of votes would prevail.<sup>67</sup> However, when the measures were presented as complementary, provisions were examined side-by-side and “the provisions of the measure receiving the lower number of affirmative votes are operative so long as they do not conflict with the provisions of the measure receiving the higher number of affirmative votes, and so long as those non-conflicting provisions are severable from any that do conflict.”<sup>68</sup>

The arguments for and against Propositions 65 and 67 in the Official Voter Guide make no direct mention of the propositions being in conflict with one another.<sup>69</sup> To the contrary, the argument against Proposition 65 suggests that if both pass, the money would go to the intended recipient outlined in Proposition 65: the EPEF.<sup>70</sup> This seems to suggest that the opponents of Proposition 65 also believe that both measures could be complementary propositions rather than competing ones. The Legislative Analyst’s Office, while noting a possibility of the measures being in conflict, issued their analysis assuming they are complementary.<sup>71</sup>

The courts will likely presume the measures are complementary when passed by the voters, and, as in *Yoshisato*, will proceed to analyze provisions between the two measures that will be in conflict.<sup>72</sup> The judicial review will decide that the provisions of the measure receiving the lower number of affirmative votes will be operative so long as they do not conflict with the provisions of the measure receiving the higher number of affirmative votes, and so long as those non-conflicting provisions are severable from any that do conflict. In *Yoshisato*, the court examined provisions in two ballot initiatives where there was one conflicting provision. The court found that Proposition 114 received more affirmative votes than Proposition 115, therefore, for the conflicting provision only, the language in Proposition 114 would be effective.<sup>73</sup> “In addition, each amendment enacted by Proposition 115 must be given effect so long as the amendment does not conflict with any amendment made to the same provision by Proposition 114, and so long as the amendment is severable from any other provision of Proposition 115 that cannot be given effect.”<sup>74</sup>

---

<sup>64</sup> Gerken v. Fair Political Practices Com., 6 Cal. 4th 707 (Cal. 1993).

<sup>65</sup> *Taxpayers*, 51 Cal. 3d 744 at 747.

<sup>66</sup> *Yoshisato*, 2 Cal. 4th 978.

<sup>67</sup> *Id.* at 987.

<sup>68</sup> *Id.* at 988.

<sup>69</sup> CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 8, 2016, at 100-03, available at <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> (on file with the *California Initiative Review*) [“NOVEMBER 2016 VOTER GUIDE”].

<sup>70</sup> *Id.* at 103.

<sup>71</sup> LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 65, CARRYOUT BAGS. CHARGES. INITIATIVE STATUTE., at 5.

<sup>72</sup> *Yoshisato v. Superior Court*, 2 Cal. 4th 978, 988 (Cal. 1992).

<sup>73</sup> *Id.* at 990–91.

<sup>74</sup> *Id.* at 991.

Applying *Yoshisato* to Propositions 65 and 67, assuming a court has decided the measures are complementary, the court would examine the following questions where there are conflicting provisions:

- Will grocers and retailers be the recipients of the fees charged for carryout bags if there is a statewide ban on any type of a carryout bag or will the WCB receive the funds?
  - Under *Yoshisato*, it is likely that if Proposition 65 gets more votes, the WCB receives the fees from carryout bags, and if Proposition 67 gets more votes, then the fees stay with the stores.
- If Proposition 65 receives more affirmative votes than Proposition 67:
  - Will the EPEF be created?
    - Likely yes, because Proposition 65 has received more votes and this provision would not be in conflict with Proposition 67.
  - Will there be a loan provided to the WCB?
    - Likely yes, because Proposition 65 has received more votes and this provision would not be in conflict with Proposition 67. However, the question of the legality of the loan would need to be examined in a different challenge.
  - Will there be a biennial audit of the WCB?
    - Likely yes, because Proposition 65 has received more votes and this provision would not be in conflict with Proposition 67.
- How will the definitions of carryout bag related terms be reconciled?
  - The courts will give weight to the measure with the greater number of votes. However, because the definitions are inherent to the underlying law and these definitions vary so greatly between the measures, the court may look to the definitions “in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent].”<sup>75</sup>

The LAO did not consider the initiative’s assertion that it would “prevail in its entirety” and suggests that if both measures pass, the revenues from mandated carryout bag fees would be kept either by the stores or sent to the WCB, depending on which measure receives the higher number of affirmative votes.<sup>76</sup> The report done by the Senate Environmental Quality and Assembly Natural Resources Committees (Joint Committee Report) analyzing this ballot measure found that the language in Section 6(a) is “not conclusive” and that a judicial review may be necessary to determine how the initiative and referendum coalesce.<sup>77</sup> This means the report from the California Legislature appreciates the possibility that a court could decide that, even if both measures pass, Proposition 65 would be the only one to go into effect if it receives more votes. The LAO’s report does not consider this as an option.

#### *b. Revival*

Section 6(b) describes a revival of the Proposition 65 provisions by stating that if any conflicting measure is approved by voters in the same election and supersedes Proposition 65 in whole or in part and “the initiative is later held to be invalid, this measure shall be self-executing

---

<sup>75</sup> Robert L. v. Superior Court, 30 Cal. 4th 894, 901 (2003).

<sup>76</sup> LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 65, CARRYOUT BAGS. CHARGES. INITIATIVE STATUTE., at 5.

<sup>77</sup> JOINT COMMITTEE REPORT – PROPOSITION 65 (2016), *supra* note 31, at 17.

and given full force and effect.”<sup>78</sup> In *Gerken v. Fair Political Practices Commission et al.*,<sup>79</sup> the court stated that despite the declaration of a retroactive revival in a measure, the revival should not necessarily prevail. While there was never a final ruling on the revival provision in *Gerken*, the guidance provided from the court was that a revival provision, such as that in Proposition 65, is not a guarantee that the revival should take effect.<sup>80</sup>

## B. Constitutional and Drafting Considerations

### 1. Legal Defense

Section 8 of Proposition 65 provides for the legal defense of the measure should it be approved by the voters. The State would already be required to defend the law, and as such, this provision is not particularly unique.<sup>81</sup> However, the drafters also required that the State use resources from the General Fund to appoint independent counsel if the Governor and Attorney General refuse to defend the measure.<sup>82</sup>

In *Perry v. Brown*, the court indicated that if the Governor and Attorney General refuse to defend an enacted ballot measure, “that there be someone to assert the state’s interest in an initiative’s validity on behalf of the people.”<sup>83</sup> Although in that case the court only suggested that the proponents could fill the role of the ballot measure’s advocate, it stayed silent on other alternatives and how the legal representation should be funded. Conversely in *Hollingsworth v. Perry*, the Supreme Court of the United States held that the party invoking jurisdiction in federal court must have standing and that “standing in federal court is a question of federal law, not state law.”<sup>84</sup> To demonstrate standing the litigant must have suffered an injury in a “personal and individual way” and “must possess a direct stake in the outcome of the case.”<sup>85</sup> The Court ruled that disagreement, no matter how sharp and acrimonious, is not enough to confer standing.<sup>86</sup> Based on the decision in *Hollingsworth*, the proponents would need to demonstrate a specific injury or a direct stake in the outcome of the case in order to be appointed the legal representatives. An independent counsel would also be held to the same standard. Essentially, the plastic bag industry or the independent counsel would have to demonstrate how, as a result of Proposition 65, they are being harmed in order to be appointed the legal representatives under *Hollingsworth* in federal court.

This section also requires that the funds to support the legal defense are to be appropriated continuously. In the Joint Committee Report, several issues are identified with the guarantee of appropriations for legal expenditures.<sup>87</sup> First, because the measure surpasses the Governor’s authority to execute the law, this measure may violate the separation of powers doctrine.<sup>88</sup> The California Constitution says that the meaning of “separation of powers” is that “the whole power of one of these departments [legislative, executive or judiciary] should not be

---

<sup>78</sup> CAL. PROPOSITION 65 § 6(b) (2016).

<sup>79</sup> *Gerken v. Fair Political Practices Com.*, 6 Cal. 4th 707 (Cal. 1993).

<sup>80</sup> *Id.*

<sup>81</sup> *Perry v. Brown*, 52 Cal. 4th 1116, 1126 (2011).

<sup>82</sup> CAL. PROPOSITION 65 § 8 (2016).

<sup>83</sup> *Perry*, 52 Cal. 4th 1116 at 1126.

<sup>84</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).

<sup>85</sup> *Id.* at 2661-62.

<sup>86</sup> *Id.* at 2661-63.

<sup>87</sup> JOINT COMMITTEE REPORT – PROPOSITION 65 (2016), *supra* note 31, at 13–14.

<sup>88</sup> JOINT COMMITTEE REPORT – PROPOSITION 65 (2016), *supra* note 31, at 13.

exercised by the same hands which exercise the whole power of either of the other departments.”<sup>89</sup>

The courts will need to examine this section to determine if it is a violation of the separation of powers doctrine and severable from the remainder of the measure. Courts may find the guaranteed expenditures for legal fees to be far too broad but permit the proponents of the measure, the American Plastic Bag Alliance, to defend the measure on behalf of the voters.

### 2. *Loan money from other bond acts*

The potential problem with the loans from Propositions 84 and Proposition 1 is that neither measure included language indicating that a grant program would be an appropriate use of the bond money. The appropriation of the loan begs the question of whether voters at the time of passage of the two prior measures intended to have funds from Proposition 84 or Proposition 1 be directed to the grant programs as outlined in Proposition 65. Article XVI of the California Constitution states that money from the general obligation fund must be maintained separately by the State Treasury to the credit of that fund and may be paid out “only in accordance with the law authorizing the issuance of the particular bonds from which the proceeds were derived.”<sup>90</sup> This provision would indicate that the appropriation of these funds may not be legal under this constitutional provision.

### 3. *Errors in Drafting*

The Joint Committee Report on this measure identified two technical errors in drafting.<sup>91</sup> First, the drafters twice establish the EPEF under proposed Section 42271(a) and once again under proposed Section 42272(b). The second error is in proposed Section 42271(c)(2) that establishes the secondary source of the WCB loan from the Water Quality, Supply and Infrastructure Improvement Fund of 2014. The measure cites this under Section 79715 of the Public Resources Code; however, this section does not exist and it is likely that the drafters intended to cite the same section number under the Water Code.<sup>92</sup>

### 4. *Definition Discrepancies with the Law*

Proposition 65 includes 3 defined terms: “State Law”, “Store”, and “Carryout Bag.” The latter two definitions vary from what was enacted in SB 270 (Proposition 67). “State Law” was not defined in SB 270.

---

<sup>89</sup> CAL. CONST., Art. III § 3.

<sup>90</sup> CAL. CONST., Art. XVI § 1.5.

<sup>91</sup> JOINT COMMITTEE REPORT – PROPOSITION 65 (2016), *supra* note 31, at 25.

<sup>92</sup> *Id.*

<b>Definition Discrepancies for “Store” (Any of the following)</b>	
<b>Proposition 65</b>	<b>SB 270/Proposition 67</b>
Same as SB 270	A full-line, self-service retail store with gross annual sales of two million dollars (\$2,000,000) or more that sells a line of dry groceries, canned goods, or nonfood items, and some perishable items.
Same as SB 270	Has at least 10,000 square feet of retail space that generates sales or use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5 (commencing with Section 7200) of Division 2 of the Revenue and Taxation Code) and has a pharmacy licensed pursuant to Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code.
Same as SB 270	Is a convenience food store, foodmart, or other entity that is engaged in the retail sale of a limited line of goods, generally including milk, bread, soda, and snack foods, and that holds a Type 20 or Type 21 license issued by the Department of Alcoholic Beverage Control.
Same as SB 270	Is a convenience food store, foodmart, or other entity that is engaged in the retail sale of goods intended to be consumed off the premises, and that holds a Type 20 or Type 21 license issued by the Department of Alcoholic Beverage Control.
<b><u>NOT in SB 270</u></b>	<i>Is not otherwise subject to paragraph (1), (2), (3), or (4), if the retail establishment voluntarily agrees to comply with the requirements imposed upon a store pursuant to this chapter, irrevocably notifies the department of its intent to comply with the requirements imposed upon a store pursuant to this chapter, and complies with the requirements established pursuant to Section 42284.</i>

Proposition 65 also offers a number of terms as definitions of a “carryout bag,” but provides no additional information about how these terms are defined. These terms are:<sup>93</sup>

- single-use carryout bags
- paper bags
- recycled paper bags
- plastic bags
- recyclable plastic bags
- reusable plastic bags
- compostable bags
- reusable grocery bags
- any other kind of bags used to carry purchased items away from a store

In contrast, SB 270 defined, including subsections with specific descriptions of design and use of, the following terms:

- Recycled paper bag<sup>94</sup>
- Reusable grocery bag<sup>95</sup>
- Single-use carryout bag<sup>96</sup>

There are some concerns with the definitions related to carryout bags in the two measures. While the two provisions do not define any of the same terms, the definitions and terms may overlap. For example, Proposition 67 defines “single-use carryout bag” but Proposition 65 defines “carryout bag,” so the intended use of the former term in Proposition 67 would become highly

<sup>93</sup> CAL. PROPOSITION 65 § 3, ch. 5.2, § 42271(b)(3).

<sup>94</sup> CAL. PUB. RES. CODE § 42280(c).

<sup>95</sup> *Id.* at § 42280(d).

<sup>96</sup> *Id.* at § 42280(f).

confusing if all these definitions were adopted as complementary. This reconciliation will likely rest with the courts that would look to the measure with the higher number of affirmative votes.<sup>97</sup>

## 5. *A Tax*

In 2013, Los Angeles County faced a legal challenge on its carryout bag ordinance which banned single-use plastic bags and placed a \$0.10 cent minimum fee on paper bags.<sup>98</sup> The suit challenged the law claiming that the \$0.10 fee for reusable carryout bags was a tax under Proposition 26 which was enacted in 2010.<sup>99</sup> Proposition 26 requires a two-thirds vote of the state legislature to approve laws that would increase taxes.<sup>100</sup> It also requires that local governments cannot impose a tax unless the tax proposal is voted on by the electorate.<sup>101</sup> In *Schmeer v. County of Los Angeles*,<sup>102</sup> the local reusable bag fee ordinance was found not to be a tax because the charge was payable to and retained by the store which provides the bags to consumers and uses the revenues to educate consumers and purchase the more expensive reusable products. Because the bag fee was not a revenue source for the county, the court concluded that the charge was not a tax.<sup>103</sup>

While SB 270 was modeled after the Los Angeles County ordinance, Proposition 67 would similarly not likely be a tax under Proposition 26 and it was not subject to a two-thirds vote of the legislature as SB 270. However, given that Proposition 65 directs the \$0.10 fee to the WCB, which is a government entity receiving revenues from the public for a public benefit, then Proposition 65 is highly likely a tax under *Schmeer*. In 2013, when SB 700 (Wolk) was introduced, that bill was subject to a two-thirds vote of the legislature because it would have put in place a ban on single-use plastic bags and mandate a fee to be collected by stores then sent to support the “Local Environmental Enhancement Fund” under the California Natural Resources Agency.<sup>104</sup>

A recent decision by California’s Fourth District Court of Appeal,<sup>105</sup> which is under review by the California Supreme Court,<sup>106</sup> clarified that initiatives are not subject to the two-thirds rule established by Proposition 26. The court stated, “Article 13C, section 2 is limited to taxes imposed by local government and is silent as to imposing a tax by initiative.”<sup>107</sup> The court interprets Proposition 26 language to be limited to taxes considered by the state legislature and “imposed by local government,”<sup>108</sup> not initiated by citizens. As this decision is still being considered, the declaration by the California Supreme Court may have implications for Proposition 65 as to whether it is a tax and whether it requires a two-thirds vote to be enacted.

---

<sup>97</sup> CAL. CONST., Art. II § 10(b).

<sup>98</sup> *Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310, (2d Dist. 2013).

<sup>99</sup> *Id.*

<sup>100</sup> CAL. CONST., Art. XIII A § 3.

<sup>101</sup> CAL. CONST., Art. XIII C § 3.

<sup>102</sup> *Schmeer*, 213 Cal. App. 4th 1310.

<sup>103</sup> *Id.* at 1329.

<sup>104</sup> 2013 Bill Text CA S.B. 700.

<sup>105</sup> *California Cannabis Coalition v. City of Upland*, 245 Cal. App. 4th 970 (4th Dist. 2016).

<sup>106</sup> *California Cannabis Coalition v. City of Upland*, 203 Cal. Rptr. 3d 516 (Cal. 2016).

<sup>107</sup> *California Cannabis Coalition*, 245 Cal. App. 4th 970, at 983.

<sup>108</sup> *Id.* at 984.

## 6. Severability

Section 7 of Proposition 65 states that its provisions are severable if any sections of the measure are found to be invalid by a court. This means that if for some reason one section of the measure is found to be invalid, the remainder of the measure can stand. In *Yoshisato*, the court said that in order for complementary measures to survive judicial scrutiny, they must be severable.<sup>109</sup> Without the severability clause in Proposition 65, the entire measure could be declared invalid.

California courts have considered three criteria to determine whether an invalid provision is severable.<sup>110</sup> The provision must be mechanically, functionally, and volitionally separable.<sup>111</sup> If the statute is mechanically severable, the remaining sections must be independently applicable and not vague in absence of those sections that have been removed.<sup>112</sup> The functional test considers whether the remaining sections can exist independent of the offending provision. The last test examines the question of whether the severed portions “would have been adopted by the legislative body had it foreseen the partial invalidation of the statute.”<sup>113</sup>

The sections of Proposition 65 that may result in judicial review due to potentially being invalid include the declaration of null and void conflicting measures, guaranteed legal defense, and loans from other bond acts.

- Conflicting Measures: This section could be severed if found invalid. Ultimately, the courts will make the determination as to whether the measures and their individual provisions are conflicting and determine how to resolve those differences. The highlighted purpose of Proposition 65 is the redirection of carryout bag fees going from the stores to the EPEF. Since Proposition 65 is only effective when a statewide single-use bag ban is in effect, it stands to reason that the court would see the voters’ intent as one that reflects an understanding that these measures were complementary.
- Guaranteed Legal Defense: This section also could be severed if it is found invalid. Excluding this section from the law would meet the severability criteria because the remaining provisions would still execute the intent of the law which is to direct fees from bags that are sold to the EPEF.
- Loans from Other Bond Acts: This section may be severable because its exclusion would likely not impact the mechanical or functional viability of the law. However, the volitional criteria may not be met. If the measure lacks funding to support its existence, it may not be possible to enact the remaining sections. Absent this initial \$500,000 loan, the WCB will lose funding to establish regulations for implementation and administration of directing revenues from carryout bag fees to the EPEF. If courts find that this section is invalid but that it cannot be severed because it is inherently crucial to the purpose of the measure, the entire initiative may be declared invalid.

---

<sup>109</sup> *Yoshisato v. Superior Court*, 2 Cal. 4th 978, 988 (Cal. 1992).

<sup>110</sup> *Gerken v. Fair Political Practices Com.*, 6 Cal. 4th 707 (Cal. 1993).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 726.

## VI. PUBLIC POLICY CONSIDERATIONS

### A. Supporting Arguments

Proponents of Proposition 65 argue that SB 270 was the result of special interests lobbying with the end result being increased profits for grocers rather than increased revenues to the state for environmental purposes.<sup>114</sup> They argue that placing the two issues on the ballot is the remedy to two problems: the lack of consumer engagement in the drafting of SB 270 and the lack of the consumer's input on the recipient of the \$0.10 fees they would have to remit to grocers for the purchase of a carryout bag.<sup>115</sup>

The proponents of Proposition 65 are also opposed to Proposition 67 and are funding both campaigns. Supporters of Proposition 65 have stated that retailers should not profit from the sales of reusable bags because they have always given these away at no cost.<sup>116</sup> They estimate the cost of carryout bag mandates will be \$300 million funded by consumers, based on a report the proponents commissioned from the Blue Sky Consulting Group.<sup>117</sup> Proponents further state that Proposition 67 was never motivated by environmental interests at all because plastic reusable bags create more waste and paper bags increase carbon emissions.<sup>118</sup>

The \$300 million estimate is a vague estimate and never specified in the Blue Sky report. The basis for the cost estimate in the report is the "relative cost" of disposable paper and plastic bags and what retailers are likely to purchase more of because of those prices. The cost estimates, according to the report, are more likely to range anywhere between \$57 million to \$442 million, with the higher end of the estimate coming from a result of reusable bags being substantially more expensive than paper bags yielding higher overall revenues.<sup>119</sup>

The proponents' assertion that reusable paper and plastic bags would create more environmental harm is based on data in an environmental impact report published by Clemson University.<sup>120</sup> The report examined four types of grocery bags for their environmental impact in twelve categories, including impact on global warming and human toxicity.<sup>121</sup> The study found that the global warming potential of paper bags is 3.3 to 5.4 times higher than single-use plastic carryout bags depending upon the recyclable content of the bag.<sup>122</sup> The study did not consider the impact of single-use plastic bags on landscape pollution and harm to wildlife which is the basis to support a ban on single-use carryout bags by many environmental groups.

The proponents willingly admit that they oppose any type of ban on single-use plastic bags and express how detrimental such a law would be for their industry, but express extreme

---

<sup>114</sup> NOVEMBER 2016 VOTER GUIDE, *supra* note 69, at 102.

<sup>115</sup> APBA Interview, *supra* note 27.

<sup>116</sup> NOVEMBER 2016 VOTER GUIDE, *supra* note 69, at 102.

<sup>117</sup> POTENTIAL REVENUE TO CALIFORNIA RETAILERS FROM A STATEWIDE MINIMUM CHARGE FOR DISPOSABLE PAPER AND REUSABLE CARRYOUT BAGS IN CALIFORNIA AS PROPOSED IN SB 270, BLUE SKY CONSULTING GROUP (Mar. 31, 2014). [“BLUE SKY REPORT”]

<sup>118</sup> Robert M. Kimmel, Kay D. Cooksey, Allison Littman, *Life Cycle Assessment of Grocery Bags in Common Use in the United States*, CLEMSON UNIVERSITY CENTER FOR FLEXIBLE PACKAGING, (Clemson, SC: Clemson University Digital Press, 2014). [“CLEMSON UNIVERSITY”]

<sup>119</sup> BLUE SKY REPORT, *supra* note 117, at 3.

<sup>120</sup> APBA Interview, *supra* note 27.

<sup>121</sup> CLEMSON UNIVERSITY, *supra* note 118.

<sup>122</sup> *Id.* at 8.

disappointment in a legislative process that permits a single industry to benefit financially from a levy on the public.<sup>123</sup>

The American Progressive Bag Alliance Political Action Committee (Yes on 65/No on 67) is leading the campaign in support of Proposition 65.<sup>124</sup> As of October 17, 2016, the Yes on 65 campaign had raised \$2,886,883.<sup>125</sup> The only contributors to the PAC are:

- Hilex Poly Co. LLC (\$1,082,239)
- Superbag Corp. (\$609,369.80)
- Formosa Plastics Corporation U.S.A. (\$748,441.50)
- Advance Polybag, Inc. (\$446,883)

The major funders of the Yes on 65 Campaign are notably absent from the Voter Guide arguments.<sup>126</sup> The arguments in support are provided by the California Taxpayer Protection Committee and the California Senior Advocates League.<sup>127</sup> The California Senior Advocates League's website makes no mention of Proposition 65, despite having information about another ballot initiative, and describes itself as a nonpartisan organization while highlighting four priority issues for their organization: financial security, health, housing, and veterans.<sup>128</sup> The California Taxpayer Protection Committee supports this initiative despite it very likely being a tax on carryout bags.<sup>129</sup> The organization does not have a web presence and no active business license in California, and has made no additional comments on Proposition 65 in any publicly available manner.<sup>130</sup>

Notably absent from the list of supporters is any environmental organization. Only one environmental organization has weighed in on this initiative and they are the opponents of the measure.<sup>131</sup>

## **B. Opposing Arguments**

The only opponent of Proposition 65, Californians Against Waste, states that the only purpose of Proposition 65 is “to confuse voters.”<sup>132</sup> The opponent points out that the initiative was placed on the ballot by four out-of-state plastic bag companies and redirects voters to focus on voting Yes on Proposition 67.<sup>133</sup>

---

<sup>123</sup> APBA Interview, *supra* note 27.

<sup>124</sup> CAL SEC'Y OF STATE, CAMPAIGN FINANCE AND LOBBYING ACTIVITIES, PROPOSITION 65: CARRY-OUT BAGS. CHARGES. INITIATIVE STATUTE, <http://www.sos.ca.gov/campaign-lobbying/cal-access-resources/measure-contributions/proposition-65-carry-out-bags-charges-initiative-statute/> (last visited Oct. 16, 2016) (on file with the *California Initiative Review*).

<sup>125</sup> CAL SEC'Y OF STATE, POWER SEARCH, <http://powersearch.sos.ca.gov/> (last visited Oct. 16, 2016) (on file with the *California Initiative Review*).

<sup>126</sup> NOVEMBER 2016 VOTER GUIDE, *supra* note 69, at 102-03.

<sup>127</sup> *Id.* at 102.

<sup>128</sup> CALIFORNIA SENIOR ADVOCATES LEAGUE, <http://calsal.org/calsal/issues/> (last visited Oct. 9, 2016) (on file with the *California Initiative Review*).

<sup>129</sup> NOVEMBER 2016 VOTER GUIDE, *supra* note 69, at 102.

<sup>130</sup> A business license search was completed through the California Secretary of State's website (<http://kepler.sos.ca.gov/>) for corporation or limited liability company licensures and through GuideStar (<https://www.guidestar.org/>) for non-profit classification. Neither search produced any results.

<sup>131</sup> NOVEMBER 2016 VOTER GUIDE, *supra* note 69, at 103.

<sup>132</sup> *Id.* at 102.

<sup>133</sup> *Id.* at 102-03.

Additionally, opponents claim that the American Plastic Bag Association's assertion about the environmental concerns over reusable plastic bags and paper bags is an overstatement. Californians Against Waste explains that there are very few single-use plastic bags, they are lightweight, and thus fly away when in landfills, which is what causes most of the landscape and marine pollution. Fewer people will use any of these options which will result in less plastic bag use overall.<sup>134</sup>

Californians Against Waste has expressed that the potential result of Proposition 65 could be that grant money would become available for environmental projects and that is, in and of itself, not of significant concern.<sup>135</sup> However, the used of initiative process as a tool to confuse voters and motivate potentially lengthy and complex legal challenges at a cost to the taxpayers is of greater concern.<sup>136</sup>

Notably absent from the list of opponents are grocers and retailers who would stand to lose the ability to collect fees for the cost of reusable plastic bags. Both the California Grocers Association and the California Retailers Association have no official position on Proposition 65.<sup>137</sup> Both organizations have put all of their efforts into ensuring that Proposition 67 passes, and theorize that the American Progressive Bag Alliance is investing significantly in the Yes on 65 campaign to create confusion and complexity.<sup>138</sup> Despite having no position, the California Grocers Association expressed a number of broad concerns about the legality of provisions in Proposition 65.<sup>139</sup> These included questions about the constitutionality of a tax as a ballot initiative (without it being identified as such), the legal authority for a loan to be taken from funds appropriated by voters for a specific purpose, and the lack of an enforcement mechanism.<sup>140</sup>

## V. CONCLUSION

Proposition 65 would redirect the mandated fees collected by grocery stores and other specified retailers for the sale of carryout plastic bags under a statewide ban of single-use plastic bags to a new grant making agency. A statewide ban of single-use plastic bags is also on the ballot as a referendum under Proposition 67. If both of these measures are enacted, it is highly likely that courts must intervene to determine the validity of the measure as a whole in addition to the individual and conflicting provisions with Proposition 67.

This measure, should it be passed by the voters and withstand legal challenges raised by Proposition 67 also passing, would create the Environmental Protection and Enhancement Fund

---

<sup>134</sup> Interview with Mark Murray, Executive Director, Californians Against Waste, in Sacramento, Calif. (Aug. 25, 2016) (notes on file with the *California Initiative Review*).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Interview with Tim James and Aaron Moreno, Senior Manager of Local Government Relations and Senior Director of Government Relations (respectively), California Grocers Association, in Sacramento, Calif. (Sept. 2, 2016) (notes on file with the *California Initiative Review*); Interview with Angela Manetti, Director of Government Affairs, California Retailers Association, in Sacramento, Calif. (Sept. 2, 2016) (notes on file with the *California Initiative Review*).

<sup>138</sup> *Id.*

<sup>139</sup> Interview with Tim James and Aaron Moreno, Senior Manager of Local Government Relations and Senior Director of Government Relations (respectively), California Grocers Association, in Sacramento, Calif. (Sept. 2, 2016) (notes on file with the *California Initiative Review*).

<sup>140</sup> *Id.*

as a trust fund to be managed by the Wildlife Conservation Board. The EPEF would provide grants to support environmental protection and enhancement programs.

To a great degree, the presence of Proposition 65 (and Proposition 67, for that matter) is a result of politics. For one set of stakeholders (the supporters), the initiative process is a valuable tool being used to empower voters about decisions made in Sacramento while serving a self-interest. For the other set of stakeholders (the opponents), the initiative process challenges the ability to ensure a fully informed electorate about the motives behind important public policy issues.

Unfortunately, the only two results with clear implications on the issue of single-use plastic bag bans will be if Proposition 67 passes and Proposition 65 does not, or if both initiatives do not pass. If Proposition 65 passes (irrespective of the outcome of Proposition 67), there will most likely be legal challenges to follow.