

# Client Alert.

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## An Introduction to Proposition 37: California's Genetically Engineered Foods Labeling Initiative

By Michael Steel and Alejandro Bras

On November 6, 2012, California voters will decide the fate of Proposition 37, the Genetically Engineered Foods Labeling Initiative. If the initiative passes, genetically engineered foods sold in California will have to be conspicuously labeled with the words "Genetically Engineered" or, in the case of processed foods, with the words "Partially Produced with Genetic Engineering." It would be the first law in the United States to require any sort of labeling of genetically modified foods.

### WHO IS BEHIND THE INITIATIVE?

Proponents of the initiative call Proposition 37 "The California Right to Know Genetically Engineered Food Act." The initiative was drafted by attorney James Wheaton, president and legal director of the Environmental Law Foundation, a group whose mission includes legal enforcement of a similar "right-to-know" law: California's Proposition 65. Funding to support the initiative is provided in large part by various osteopathic and organic food groups, including Mercola Health Resources, Organic Consumers Fund, and Nature's Path Foods.

### WHAT WOULD PROPOSITION 37 DO?

There are three main parts of the proposed law:

- (1) the requirement to label genetically engineered foods as such;
- (2) a prohibition from labeling foods that have genetically engineered ingredients with such terms as "natural" or "naturally grown;" and
- (3) an enforcement provision that allows any person, regardless of whether the person has suffered an injury or monetary loss, to sue for injunctive relief and potentially monetary relief under the law.

### Required labeling of genetically engineered foods

Proposition 37 defines "genetically engineered" to mean "any food that is produced from an organism or organisms in which the genetic material has been changed through the application" of various in vitro nucleic acid techniques or by the fusion of cells in a manner that "overcome[s] natural physiological, reproductive, or recombination barriers." Foods that may fall under this broad definition include many common crops, as well as processed foods made with corn, soybeans, tomatoes, sugar beets, and canola or rapeseed oil. Some estimates suggest that 70 to 80 percent of all processed foods sold in the United States are made with genetically engineered ingredients.

Any processed food that is or may be produced with genetically engineered ingredients must have a clear and conspicuous label that identifies the food as "Partially Produced with Genetic Engineering" or "May Be Partially Produced with Genetic Engineering." Similarly, if raw produce is sold in California and it qualifies as genetically engineered under the proposed law, it must be labeled with the words "Genetically Engineered."

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The initiative has several notable exemptions from the labeling requirement. One exemption seems to exclude genetically engineered food if it has been grown or produced “without the knowing and intentional use” of genetically engineered seed or ingredients. This exemption may create a need for sworn statements from suppliers guaranteeing that ingredients are not knowingly or intentionally genetically engineered. Other exemptions to the labeling requirement include:

- meat products made from animals fed or injected with genetically engineered foods or drugs;
- alcoholic beverages subject to the Alcoholic Beverage Control Act;
- processed foods made with genetically engineered processing aids or enzymes;
- foods labeled “organic” pursuant to the federal Organic Food Products Act of 1990; and
- foods served at restaurants for immediate human consumption.

### **Prohibition from marketing genetically engineered foods as “natural”**

In addition to requiring labeling of all genetically engineered foods, Proposition 37 would also prohibit companies from describing their genetically engineered products as “natural” or “all natural.” This prohibition might apply not only to labels and signage, but also to any advertising or promotional materials. The initiative suggests that to label a genetically engineered food “natural” would mislead consumers. In this manner, Proposition 37 seeks to define both what is genetically engineered and what can be considered “natural” in California.

### **Enforcement of Proposition 37**

We expect that, should Proposition 37 go into effect this November, the law will provoke a significant amount of litigation. Proposition 37 would allow any person to bring suit under the law, regardless of whether that person has suffered any specific damages or injuries from alleged violations. In addition, the proposed law would not require plaintiffs to give any notification to the targets of their lawsuits prior to commencing legal actions. Similarly, persons seeking to sue under Proposition 37 will not need to inform the attorney general’s office of potential violations before bringing suit. These enforcement provisions allow potential plaintiffs easier access to the courts than is currently allowed under California’s Proposition 65, the law that requires notice to consumers of products that contain substances known to cause cancer or birth defects. Proposition 65 has provoked an enormous amount of litigation since its passage in 1986.

Significantly, Proposition 37 is drafted to allow for prosecution of violations under both the enforcement provisions of the initiative itself and those of California’s Consumers Legal Remedies Act. Under the Consumers Legal Remedies Act, plaintiffs may not only recover actual damages, calculated to be at least the retail price of the food products at issue, but also punitive damages. Suing under either law, plaintiffs may also be able to collect attorney’s fees.

### **WHAT’S NEXT?**

Proposition 37 will be on California’s November 6, 2012 ballot. If enacted, it will become effective immediately, but the provision requiring labeling of genetically engineered foods will not take effect until July 1, 2014. We are preparing now.

Proposition 37 has the potential to be a game-changer for many of our clients, both large and small. If you are interested

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in learning more, we will be providing continuous coverage of Proposition 37 through our website over the next few months. On our [Proposition 37 homepage](#) you will be able to find our most up-to-date client alerts, recent news, links to important materials and websites, and contact information for our attorneys, who are monitoring the initiative on a daily basis.

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