

Proposition 45:

Insurance Rate Public Justification and Accountability Act.

Initiative Statute

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I. EXECUTIVE SUMMARY

Proposition 45, the Insurance Rate Public Justification and Accountability Act,¹ is a California initiative statute concerning the regulation of health insurance premiums in the “individual” and “small group” markets.²

Structurally, Proposition 45 is modeled on Proposition 103, a 1988 ballot initiative that regulated home and auto insurance.³ Proposition 45 seeks to extend the Proposition 103 regulatory scheme to health insurance.⁴ Under the Proposition 103 framework, individual and small group insurers would be required to file with and justify their premium rates to the California Department of Insurance under penalty of perjury, the Insurance Commissioner would have veto power over proposed rate changes, and Proposition 45 would also add an “intervenor” process by which members of the public can challenge rate proposals.⁵

The measure, proposed by Jamie Court and Consumer Watchdog, was written in 2011 and initially advanced for the November 2012 ballot; however, when the measure failed to qualify in time for the 2012 election, it was placed on the 2014 ballot with the language as approved in 2012.⁶ The plain text of the measure provides an effective date of November 6, 2012, which, if the measure is approved, will have a retroactive effect on rates in effect on, or approved after, that date.⁷

To further complicate the issue, from the time the measure was drafted, the petitions were circulated, and signatures were gathered, to the time when California voters will actually cast their ballots, three years will have passed. Within those three years, the major provisions of the federal Patient Protection and Affordable Care Act (the “ACA” or “Obamacare”) will have been implemented,⁸ drastically changing the health insurance marketplace.⁹

¹ Cal. Proposition 45 at § 1 (2014).

² CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2014, at 20, available at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> [“NOVEMBER 2014 VOTER GUIDE”].

Individual coverage is a form of health insurance designed to cover just one person (and often immediate family members), as opposed to someone covered by a group plan. Group health coverage is when small and large employers, unions, and retirees cover their employees and members under one insurance contract. “Small group” policies are for employers with less than 50 employees. *Common Health Insurance Terms*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/110-health/10-basics/terms.cfm> (last visited Oct. 9, 2014).

³ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 22.

⁴ Cal. Proposition 45 at § 2 (2014).

⁵ *Id.*

⁶ *California Proposition 45, Public Notice Required for Insurance Company Rates Initiative (2014)*, BALLOTPEdia, [http://ballotpedia.org/California_Proposition_45_Public_Notice_Required_for_Insurance_Company_Rates_Initiative_\(2014\)](http://ballotpedia.org/California_Proposition_45_Public_Notice_Required_for_Insurance_Company_Rates_Initiative_(2014)) (last visited Oct. 9, 2014) [“Prop 45 Ballotpedia”].

⁷ Cal. Proposition 45 at § 2 (2014).

⁸ *Key Features of the Affordable Care Act By Year*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES, <http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html> (last visited Oct. 9, 2014) [“DHHS Key Features”].

II. BACKGROUND

In order to place Proposition 45 in its proper context, the story must begin with Harvey Rosenfield, Consumer Watchdog, and Proposition 103.

A. Harvey Rosenfield and Consumer Watchdog

In the early 1980's, after working for Ralph Nader at a Washington D.C. citizen advocacy group, Harvey Rosenfield moved to California to organize and direct the California Public Interest Research Group (CalPIRG).¹⁰ In 1985, Rosenfield resigned from CalPIRG and founded the Foundation for Taxpayer and Consumer Rights (now known as "Consumer Watchdog").¹¹ In 1987, Rosenfield began to write a ballot measure initiative regarding the home and auto insurance markets and formed a campaign to sponsor it called "Voter Revolt."¹² The proposal turned into what was Proposition 103 on California's November 1988 ballot, and was narrowly approved by voters 51% to 49%.¹³ Jamie Court took over as Consumer Watchdog's President and Chairman of the Board in 1994.¹⁴

B. Proposition 103

The passing of Proposition 103 and its subsequent regulations imposed three overarching and enduring changes to the home and auto insurance markets. First, Proposition 103 made the California Insurance Commissioner an elected, rather than appointed, official who has the sole responsibility to approve or reject changes to home or auto insurance premiums before they take effect. Second, it requires insurance rates to be determined based on a number of factors including those that have a substantial relationship to the risk of loss and generally requires that rates not be excessive, inadequate, or unfairly discriminatory. Finally, Proposition 103 established a complex system of public participation and judicial review, within which interested

⁹ *Health Reform Implementation Timeline*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/interactive/implementation-timeline/> (last visited Oct. 9, 2014) ["Kaiser Timeline"].

¹⁰ *Home*, HARVEY ROSENFIELD CONSUMER ADVOCATE, <http://www.harveyrosenfield.com/wp/> (last visited Oct. 9, 2014); *About*, HARVEY ROSENFIELD CONSUMER ADVOCATE, <http://www.harveyrosenfield.com/wp/current-work/> (last visited Oct. 9, 2014); *Our Team*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about/our-team> (last visited Oct. 9, 2014); *About*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about> (last visited Oct. 9, 2014).

¹¹ CAL. SEC'Y OF STATE, *Consumer Watchdog Business Filings*, <https://businessfilings.sos.ca.gov/frmDetail.asp?CorpID=01349849&qrystring=CONSUMER+WATCHDOG&qrynumber=NULL> (last visited Oct. 9, 2014).

¹² Harvey Rosenfield, *Proposition 103: The Consumer's Viewpoint*, SOCIETY OF CPCU at 109, available at <http://www.harveyrosenfield.com/uploads/pdfs/opeds/CPCU%20article.pdf>.

¹³ *California Proposition 103 (1988)*, BALLOTEDIA, [http://ballotpedia.org/California Proposition 103. Insurance Rates and Regulation \(1988\)](http://ballotpedia.org/California_Proposition_103_Insurance_Rates_and_Regulation_(1988)) (last visited Oct. 9, 2014).

¹⁴ *Our Team*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about/our-team> (last visited Oct. 9, 2014).

parties can intervene in proceedings conducted by the Department of Insurance in order to challenge a proposed or existing rate and collect fees in connection with their efforts.¹⁵

The impacts of Proposition 103, like all reform, are speculative and subject to debate. However, according to a November 2013 study published by the Consumer Federation of America, in consultation with the former Executive Director of Consumer Watchdog, Proposition 103 saved consumers upwards of \$90 billion through 2010.¹⁶ It should also be noted that, pursuant to the intervenor fee provisions, Consumer Watchdog has collected over \$14 million in fees in connection with their efforts.¹⁷

C. From 2011 to Present

1. Proposition 45's Path to the Ballot

In California, Proponents of ballot measure initiative statutes have to write out the text of the proposed law and then submit a draft to the Attorney General for her official title and summary.¹⁸ From the official summary date, Proponents are allowed a maximum of 150 days to circulate petitions and collect the signatures of at least 504,760 registered voters.¹⁹ Once the requisite number of signatures has been collected, they must be filed with the appropriate county elections officials for the signatures to be counted and verified. A random sample is taken of 500 signatures or 3% of the total, whichever is greater.²⁰ If the total number of signatures is less than 95% of the required amount, the initiative does not qualify for the ballot;²¹ if the total is more than 110% of the required amount the initiative is deemed qualified for the ballot.²² Where the total number of signatures is between 95% and 110%, a “full check” on every signature must be conducted.²³ This process must be completed at least 131 days before the election at which it is to be submitted to the voters.²⁴

¹⁵ CAL. SEC'Y OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, TUESDAY, NOVEMBER 8, 1988 at 98–101, available at http://librarysource.uchastings.edu/ballot_pdf/1988g.pdf.

¹⁶ J. ROBERT HUNTER, TOM FELTNER & DOUGLAS HELLER, CONSUMER FED'N OF CAL., WHAT WORKS: A REVIEW OF AUTO INSURANCE RATE REGULATION IN AMERICA AND HOW BEST PRACTICES SAVE BILLIONS OF DOLLARS (November 2013), available at http://www.consumerfed.org/pdfs/whatworks-report_nov2013_hunter-feltner-heller.pdf.

¹⁷, *Proposition 103 Consumer Intervenor Process*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/index.cfm> (last visited Oct. 9, 2014); *Informational Report on the CDI Intervenor Program*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/report-on-intervenor-program.cfm#2014> (last visited Oct. 9, 2014).

¹⁸ CAL. ELEC. CODE § 9001(a).

¹⁹ CAL. ELEC. CODE § 9014; CAL. CONST. art. II § 8(b); CAL. ELEC. CODE § 9035.

²⁰ CAL. ELEC. CODE § 9030(d).

²¹ CAL. ELEC. CODE § 9030(f).

²² CAL. ELEC. CODE § 9030(g).

²³ CAL. ELEC. CODE § 9031(a).

²⁴ CAL. ELEC. CODE § 9016; CAL. CONST. art. II § 8(c).

In late 2011, Jamie Court and Consumer Watchdog first drafted this initiative in an attempt to get it on the November 2012 ballot.²⁵ The Attorney General issued the official title and summary and approved the measure for circulation in January of 2012.²⁶ Consumer Watchdog sponsored the signature gathering effort with major funding from the Consumer Attorneys of California.²⁷ In May 2012, 800,000 voter signatures were submitted;²⁸ however, when Los Angeles County reported that only 66.6% of the signatures from the county were valid (69% of the collected signatures were needed to reach the 110% threshold), the initiative was forced in to a full check which prevented it from being able to qualify in time for the November 2012 election. As such, it was held over for the November 2014 ballot.²⁹

2. *Intervening Changes in the Health Insurance Marketplace*

The three year time frame between the drafting and signature-gathering of the initiative and its appearance on the ballot holds significant relevance. During those three years, major provisions of the Affordable Care Act were implemented,³⁰ and on October 1, 2013, Covered California opened to begin carrying out the State's responsibilities under the Act.³¹

a. The Affordable Care Act

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (the "Affordable Care Act" or ACA) into law.³² The ACA established a series of uniform requirements and regulations, imposing new duties on the individual consumer, the health insurance industry, and state governments.³³

²⁵ Prop 45 Ballotpedia, *supra* note 6.

²⁶ *Id.*

²⁷ *Cal Access: Late and \$5,000+ Contributions Received by Consumer Watchdog*, CAL. SECRETARY ST., <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1343944&session=2011&view=late1> (last visited Oct. 9, 2014).

²⁸ Deborah Crowe, *Signatures Submitted for Health Insurance Rate Initiative*, L.A. BUS. J., May 18, 2012, <http://www.labusinessjournal.com/news/2012/may/18/signatures-submitted-health-insurance-rate-initiat/>.

²⁹ Laurel Rosenhall, *Initiative on Health Insurance Rates Won't Make November Ballot*, SACRAMENTO BEE, June 28, 2012, <http://blogs.sacbee.com/capitolalert/latest/2012/06/california-initiative-to-limit-health-insurance-rates-doesnt-make-nov-ballot.html>.

³⁰ CTR. FOR HEALTH POLICY STUDIES & VIVEK RAJASEKHAR, HERITAGE FOUND. YOUNG LEADERS PROGRAM, IMPLEMENTATION OF THE MAJOR PROVISIONS OF OBAMACARE: THE TIMELINE, *available at* http://fleming.house.gov/uploadedfiles/hc_timeline.pdf.

³¹ JOHN KINGSDALE, WAKELY CONSULTING GROUP, POTENTIAL IMPACT OF A 2014 BALLOT INITIATIVE ON IMPLEMENTATION OF COVERED CALIFORNIA AND HEALTH INSURANCE REFORM IN CALIFORNIA, at 14 (May 2014), *available at* <http://stophighercosts.org/wp-content/uploads/2014/05/Kingsdale-Report-May-2014.pdf> ["Kingsdale Report"].

³² Although the ACA was effective in 2010, it was written so that most major provisions were to be phased in by January 2014. DHHS Key Features, *supra* note 8; Kaiser Timeline, *supra* note 9; Public Law 111-114: *Patient Protection and Affordable Care Act*, U.S. GOV'T PRINTING OFF., <http://www.gpo.gov/fdsys/granule/PLAW-111publ148/PLAW-111publ148/content-detail.html> (last visited Oct. 9, 2014).

³³ *New Health Reform Database*, NAT'L CONF. ST. LEGIS., <http://www.ncsl.org/research/health/new-health-reform-database.aspx> (last visited Oct. 9, 2014).

Relevant to the consumer, most all U.S. citizens must now be insured or pay a penalty (also known as the “Individual Mandate”).³⁴ In order to help offset the cost of coverage, lower-income families and individuals, and small group employers (small businesses with up to 50 employees), are eligible to receive premium credits, cost-sharing subsidies, or tax credits.³⁵

As to the industry, insurance companies must now provide a comprehensive set of covered services (known as the “essential benefits package”) while standardizing prices and extending coverage to all applicants despite preexisting conditions.³⁶ Further, they are now required to disclose information relevant to their premium rates and are required to report the proportion of premium dollars spent on patient services in comparison to the amount retained for administrative costs or company profits.³⁷ This “medical-loss ratio” must be at least 85% for plans in the large group market and 80% for plans in the individual and small group markets, subject to rebate to the consumers.³⁸

Finally, among other things, the government is required to expand their oversight of the health care industry by (i) annually reviewing health insurance premiums for unreasonable increases³⁹ and (ii) maintaining health benefit exchanges (“Exchange” or “Exchanges”).⁴⁰

i. Annual Review of Premiums

Pursuant to the annual review requirement, health insurers have to submit to the State, and “prominently post” on their website, information justifying a premium increase prior to its implementation.⁴¹ With this information, States are to monitor premium increases of health insurance coverage offered both on and outside of their Exchange, provide the federal government with information about trends in premium increases in health insurance coverage, and make recommendations about whether particular health insurance issuers should be excluded from participation in the Exchange based on a pattern or practice of excessive or unjustified premium increases.

³⁴ The Henry J. Kaiser Family Foundation, *The Requirement to Buy Coverage Under the Affordable Care Act*, <http://kff.org/infographic/the-requirement-to-buy-coverage-under-the-affordable-care-act/> (last visited Oct. 9, 2014).

³⁵ *Summary of the Affordable Care Act*, HENRY J. KAISER FAMILY FOUND, <http://kff.org/health-reform/fact-sheet/summary-of-the-affordable-care-act/> (last visited Oct. 9, 2014) [“Kaiser Summary”].

³⁶ *Id.*

³⁷ *Id.*

³⁸ Ctr. for Consumer Info. & Ins. Oversight, *Medical Loss Ratio*, CENTERS FOR MEDICARE & MEDICAID SERVICES, http://www.cms.gov/apps/mlr/mlr-search.aspx#/?state=CA&reporting_year=2011 (last visited Oct. 9, 2014)

³⁹ 42 U.S.C. § 300gg-94.

⁴⁰ 42 U.S.C. § 18031 et seq.

⁴¹ 42 U.S.C. § 300gg-94.

ii. *Health Benefit Exchanges*

An Exchange is a marketplace through which individuals, families, and small-business owners (“Enrollees”) can purchase health care coverage and use their subsidies.⁴² Under the ACA, an Exchange must provide certain minimum services to enrollees and prospective enrollees, including certifying health plans as “qualified health plans” (or “QHPs”).⁴³ All health plans seeking certification as a QHP must submit to the Exchange, and make the following available to the public:

- Claims payment policies and practices;
- Periodic financial disclosures; and
- Data on enrollment, rating practices, cost-sharing premiums, and out-of-pocket expenses to consumers.⁴⁴

The Exchange takes the information submitted for certification and annual reviews into consideration when determining whether to make a health plan available through the Exchange. The Exchange must take into account any excess of premium growth outside the Exchange as compared to the rate of growth inside the Exchange.⁴⁵

b. Covered California

In 2010, California was the first state in the nation to enact legislation to implement the provisions of the ACA by creating an Exchange, now known as “Covered California.”⁴⁶ Covered California is, by statute, an independent state agency with a five-member governing board including the Secretary of the California Department of Health and Human Services, two gubernatorial appointees, and one appointee each by the Speaker of the Assembly and the Chairman of the Committee on Senate Rules.⁴⁷ All of the members must be California residents with a demonstrated expertise in health care, and all are subject to strict conflict of interest guidelines.⁴⁸

Covered California was created as an “active purchaser,” responsible for negotiating with health plans to achieve a triple aim of lowering costs, improving quality, and improving health

⁴² Kaiser Summary, *supra* note 35.

⁴³ 42 U.S.C. § 18031.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Assembly Bill No. 1602, California Health Benefit Exchange, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100AB1602 (last visited Oct. 9, 2014); Senate Bill No. 900 California Health Benefit Exchange, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB900 (last visited Oct. 9, 2014).

⁴⁷ NAT’L CONF. LEGISLATURES, HEALTH INSURANCES EXCHANGES OR MARKETPLACES: STATE PROFILES AND ACTIONS (Oct. 22, 2014), *available at* http://www.ncsl.org/Portals/1/Documents/Health/Health_Insurance_Exchanges_State_Profiles.pdf; CAL. GOV’T CODE § 100500.

⁴⁸ NAT’L CONF. LEGISLATURES, ESTABLISHING THE CALIFORNIA HEALTH BENEFITS EXCHANGE: AB 1602 AND SB 900, *available at* <http://www.ncsl.org/portals/1/documents/health/CAHBE.pdf>.

outcomes, while assuring a good choice of plans for consumers in compliance with the provisions of the ACA as described above.⁴⁹ In October 2013, after three years of planning and negotiating, Covered California began California’s first open enrollment period under the ACA, enrolling 1.3 million citizens for coverage in 2014.⁵⁰



Because of the nature of ballot measure initiatives, Proposition 45’s three-year path to the ballot, and all of the intervening changes in the health care marketplace, the language of Proposition 45 does not account for the state of California health care law today.

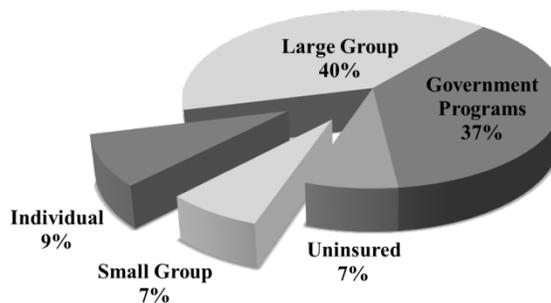
III. HEALTH COVERAGE IN CALIFORNIA

A. Types of Health Coverage

There are two separate and relatively distinct types of health coverage in California – indemnity health *insurance*, based on fee-for-service provider payments, and prepaid *managed health care* plans, providing specific services for a fixed monthly fee.⁵¹ From this distinction, California law makers gave rise to two Departments charged with the regulation and oversight of their respective type of health coverage: the California Department of Insurance (CDI) and the California Department of Managed Health Care (DMHC).⁵² CDI’s jurisdiction is limited by statute to traditional indemnity health insurance plans while DMHC oversees most all managed health care plans including all Health Maintenance Organizations (HMOs) and non-indemnity based Preferred Provider Organizations (PPOs) and Exclusive Provides Organizations (EPOs).⁵³

B. Sources of Health Coverage⁵⁴

Californians obtain health coverage from four main sources: through their “large group” employer, from a government program, through



⁴⁹ PETER V. LEE, COVERED CALIFORNIA, EXECUTIVE DIRECTOR’S REPORT (Aug. 21, 2014), *available at* http://board.coveredca.com/meetings/2014/8-21/PDFs/PPT%20-%20Executive%20Director's%20Report_August%202014.pdf.

⁵⁰ *About*, COVERED CAL., <https://www.coveredca.com/about/> (last visited Oct. 9, 2014).

⁵¹ DEBRA L. ROTH & DEBORAH REIDY KELCH, CAL. HEALTHCARE FOUND., MAKING SENSE OF MANAGED CARE REGULATION IN CALIFORNIA 6 (November 2001), *available at* <http://www.chcf.org/~media/MEDIA%20LIBRARY%20Files/PDF/M/PDF%20MakingSenseManagedCareRegulation.pdf>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 21.

their “small group” employer, or on their own via individual insurance.⁵⁵ While the majority of the population is insured by way of a large group or governmentally provided plan, Proposition 45 only applies to small group or individually acquired coverage – which includes approximately six million Californians, or 16% of the population.⁵⁶

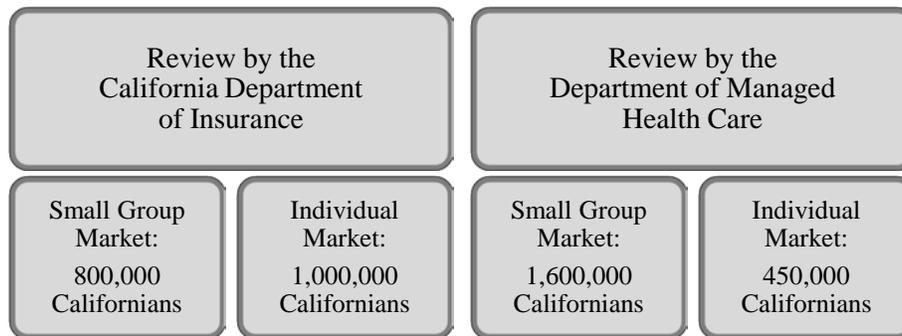
As individual and small group coverage can come in the form of indemnity or non-indemnity HMOs, PPOs, and EPOs, both CDI and DMHC split jurisdiction over licensure, oversight, and ongoing monitoring of carriers providing individual and small group health coverage in California – and both would be affected by Proposition 45.⁵⁷

Individuals, families, and small-business owners can purchase individual or small group coverage on the Exchange, through Covered California, or off of the Exchange, directly through the insurer or from a licensed insurance agent.

C. Current Regulation and Oversight

Currently, all health coverage products sold in California must be approved by their applicable regulatory body, either CDI or DMHC, before being offered to the public.⁵⁸ This includes products certified and sold by Covered California.⁵⁹ Both regulators must ensure the products meet state and federal requirements (including the ACA) by providing basic benefits to enrollees – such as physician visits, hospitalizations, and prescription drugs – and both review a health plan’s rates, policy forms, financial adequacy, network adequacy (number of physicians available), and timely access standards.

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⁵⁵ LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 45 APPROVAL OF HEALTHCARE INSURANCE RATE CHANGES (July 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-45-110414.pdf>.

⁵⁶ *Id.*

⁵⁷ *Id.*

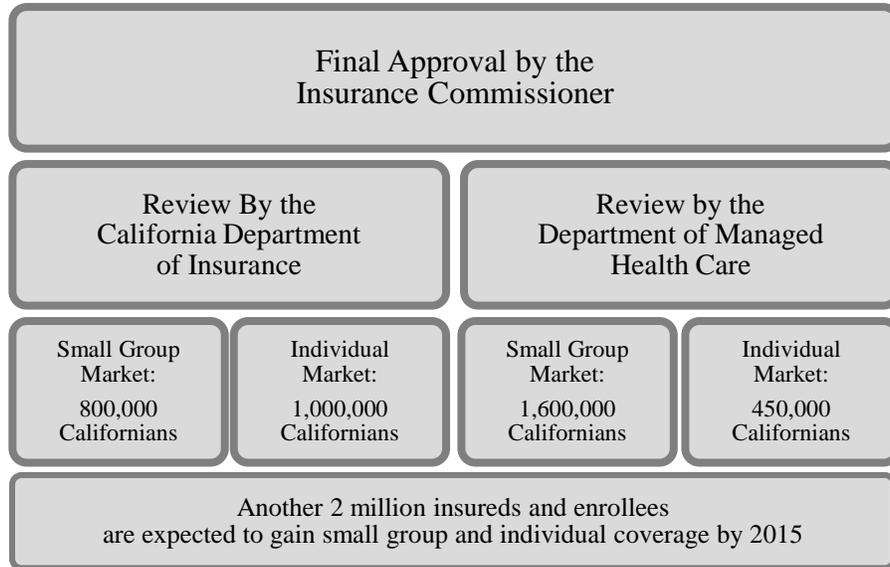
⁵⁸ *Id.*

⁵⁹ Kingsdale Report, *supra* note 31, at 14-15.

⁶⁰ CAL. LEGISLATURE (SENATE HEALTH COMMITTEE & ASSEMBLY HEALTH COMMITTEE), JOINT HEARING ON PROPOSITION 45 (July 2, 2014), available at <http://ahea.assembly.ca.gov/sites/ahea.assembly.ca.gov/files/Joint%20background%20revised.pdf> [Joint Hearing Analysis”].

D. How Proposition 45 Would Change the System

Under Proposition 45, the Commissioner is granted the powers necessary to carry out the provisions of this section, including any and all authority for health care service plan rate review previously granted to the Department of Managed Health Care.⁶¹ While the bifurcated system would essentially remain the same and the DMHC would retain all of their previously granted powers to review the products under their purview, the initiative would grant the Commissioner authority to approve or reject products already reviewed by DMHC thus creating a duplicative layer of review on upwards of 4 million plans beginning in 2015.⁶²



IV. PROPOSITION 45

A. The Elements of the Proposition

From a plain reading of the initiative, Proposition 45 involves four predominant elements: (1) the powers and duties granted to the Commissioner in connection with health insurance rate regulation; (2) the contents of each rate change application; (3) the various methods of review for each application; and (4) the penalties and fees each regulated company would be required to pay.⁶³

1. Powers and Duties of the Commissioner

Proposition 45 would grant the Commissioner the power to review and approve or reject all rates and charges associated with individual and small group health coverage, including benefits, premiums, copayments, and deductibles that were in effect on, or proposed after,

⁶¹ *Id.*

⁶² *Id.*

⁶³ Cal. Proposition 45 at §§ 1, 2 (2014).

November 6, 2012.⁶⁴ With that, the Commissioner would have the power to audit rates that were in effect between November 6, 2012, and November 4, 2014. If, in the process of this audit, the Commissioner found any of the rates to be excessive, he would require the insurers to issue rebates to their consumers.⁶⁵

2. *Contents of the Rate Change Application*

Under Proposition 45, when a health insurer desires to change a rate, they must file an application with the Commissioner,⁶⁶ under penalty of perjury.⁶⁷ This application would include data on premiums, claims, expenses, net losses and investment gains,⁶⁸ as well as complaints filed by consumers against the company.⁶⁹

3. *Reviewing the Rates*

In addition to the review by the Commissioner and his authority to reject rates, the initiative would make health care insurance rate actions subject to the intervenor provisions of Proposition 103 as follows:

a. Hearings

Under the Proposition 103 framework, the Commissioner may elect to hold a hearing within the 60 day period following the rate filing, or an intervenor may request a hearing to challenge a rate action within 45 days of the rate filing.⁷⁰ Proposition 45 incorporates Insurance Code section 1861.08, which states that public hearings held under Proposition 45 shall be conducted pursuant to the guidelines and requirements of the Administrative Procedures Act (APA⁷¹). The APA prescribes fundamental due process and public policy protections for all parties involved in formal administrative hearings.⁷² These requirements – including adequate notice and the right to pre-hearing discovery of evidence – further extend the time it would take to review and finalize any plan for which there was a public hearing.⁷³

⁶⁴ Cal. Proposition 45 at § 2 (2014).

⁶⁵ *Id.*

⁶⁶ Cal. Proposition 45 at § 2 (2014); Cal. Ins. Code § 1861.05(b).

⁶⁷ Cal. Proposition 45 at § 2 (2014).

⁶⁸ *Id.*; CAL. INS. CODE § 1857.7.

⁶⁹ Cal. Proposition 45 at § 2 (2014).

⁷⁰ CAL. HEALTH BENEFIT EXCHANGE, INSURANCE RATE PUBLIC JUSTIFICATION AND ACCOUNTABILITY ACT: POTENTIAL OPERATIONAL ISSUES AND QUESTIONS 2 (June 17, 2014), *available at* <http://board.coveredca.com/meetings/2014/6-19/PDFs/Insurance%20Rate%20Public%20Justification%20and%20Accountability%20Act%20-%20Operational%20Questions%20Outline.pdf>

⁷¹ The Administrative Procedure Act is contained in California Government Code sections 11370 through 11529.

⁷² CAL. GOV. CODE § 11500, *et seq.*

⁷³ Kingsdale Report, *supra* note 31, at 14.

b. Consumer Participation (Intervenors)

Proposition 45 would also expand the intervenor process, as established in Proposition 103, to include health insurance rate changes. This means that, in addition to requesting a rate review hearing, members of the public can challenge any rates that have been proposed. If the intervention is successful, the Department of Insurance can “award reasonable advocacy and witness fees and expenses to any person who demonstrates (1) the person represents the interests of the consumers, and, (2) he or she has made a substantial contribution to the adoption of any order, regulation, or decision by the Commissioner or a court.”⁷⁴ By its language, there is an ambiguity over when a contribution can be reimbursed through an award, and what is a “substantial contribution.”

In 2006, the Department of Insurance made amendments to the regulations responsible for the implementation of Proposition 103 that permitted awards to be paid out even when there was no formal rate hearing.⁷⁵ The amendment was challenged by insurance companies, who fought all the way to the California Court of Appeals.⁷⁶ The Second District upheld the amendment, holding that the amended regulation were consistent with Proposition 103 and valid, and that consumer participation could begin starting with “the submission of a petition for a hearing or the Commissioner’s notice of a hearing, even if there is no public rate hearing.” Based on the Second District’s decision, and since the language of Proposition 45 specifically incorporates the intervenor section of Proposition 103, any participation in the rate-challenging process is eligible for an award from the Department of Insurance.⁷⁷

As for what constitutes a “substantial contribution,” the Department of Insurance requires the information contributed be not already provided, specifically, “substantially contributing to the proceedings in presenting relevant issues, evidence or arguments which are separate and distinct from those of the California Department of Insurance.”⁷⁸

c. Judicial Review

Finally, under Proposition 45, final decisions reached by the Commissioner would be subject to review by the courts of the State.⁷⁹ In such proceedings on review, the court is authorized and directed to exercise its independent judgment on the evidence and unless the weight of the evidence supports the findings, determination, rule, ruling or order of the

⁷⁴ CAL. INS. CODE § 1861.10.

⁷⁵ *Association of California Insurance Companies v. Poizner*, 180 Cal. App. 4th 1029, 1034 (2d Dist. 2009).

⁷⁶ *Id.* at 1034.

⁷⁷ Cal. Proposition 45 § 2 (2014).

⁷⁸ *How to Participate in the Intervenor Compensation Program*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/participate.cfm> (last visited Oct. 9, 2014) [“CDI How to Participate”].

⁷⁹ *Id.*

Commissioner, the same shall be annulled.⁸⁰ Final decisions include the decision to not hold a hearing.⁸¹

4. *Penalties and Fees*

Every regulated company will be required to pay fees, according to a schedule established by the Commissioner, to offset the administrative and operational costs arising out of these rate regulation provisions.⁸² If, however, the Commissioner finds a company's rate to be excessive, that company will also be required to issue refunds to the consumer, with interest.⁸³ And, if a company fails to comply with these provisions, it is liable to the State for up to \$50,000; \$250,000 if the failure is willful.⁸⁴

B. Current Law, Potential Changes, and Public Policy Considerations

From a substantive point of view, there are three main categories for comparison between the law as it is currently written and the potential changes if Proposition 45 is enacted: (1) governmental review of rate changes; (2) transparency provided in the rate review process; and (3) public participation in rate regulation.

1. *Governmental Review of Rate Changes*

a. Current Law

Currently, California has what is called a "file-and-use" rate review process that was established by statute in 2010.⁸⁵ All health plans and insurance companies must file information on proposed rates for all individual and small group health insurance with either CDI or DMHC before those rates can go into effect.⁸⁶ Both CDI and DMHC review the rate information and say whether the rate increases are reasonable or not. When evaluating the reasonableness of health insurance rates, CDI and DMHC may consider a variety of factors, such as: (1) which medical benefits are covered, (2) what portion of the costs enrollees pay through copayments and deductibles, and (3) whether a company's administrative costs are reasonable.⁸⁷ If the data submitted by the health plan does not support the proposed rate change, the regulator may request additional information or request that the health plan modify the proposed rate.⁸⁸

If the regulator has found the rate filing unreasonable or unjustified, and the health plan has not agreed to a rate reduction, the regulator will publicly declare the rate unreasonable or

⁸⁰ CAL. INS. CODE § 1858.6.

⁸¹ CDI How to Participate, *supra* note 78.

⁸² Cal. Proposition 45 at § 2 (2014).

⁸³ *Id.*

⁸⁴ *Id.*; CAL. INS. CODE § 1861.14; CAL. INS. CODE § 1859.1.

⁸⁵ Joint Hearing Analysis, *supra* note 60.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

unjustified, as appropriate.⁸⁹ If the health plan agrees to a reduction in the proposed rate, the health plan must notify policyholders of the new rate. If the new rate has already taken effect, the regulator may require the health plan to send a refund to affected policyholders or issue a credit toward future premiums.⁹⁰ While the regulators can request that the insurer amend the rate change or make an official determination that the proposed rate change is unreasonable, they do not have the authority to reject or approve the rates before they take effect.⁹¹

b. Potential Changes

Under Proposition 45, both CDI and DMHC would continue to regulate their separate types of health insurance. CDI and DMHC would continue to have the authority to *review* certain health insurance rates. However, the Commissioner would have the new, and sole, authority to *approve* the rates.

c. Public Policy Considerations

The Proponents of this measure allege health insurance premiums for California families rose 185% between 2002 and 2013, more than five times the rate of inflation, and Proposition 45 could “put the brakes on rates” and provide potential cost savings of up to \$1 billion per year to Californians.⁹² However, the arguments in opposition to this element of the initiative are threefold: (1) this measure puts too much power in the hands of an elected Commissioner who can take campaign donations from special interests; (2) the definition of rates is overly broad and allows the Commissioner regulatory power over what benefits could be covered by a health care plan;⁹³ and (3) there is uncertainty as to how the law can and will be retroactively applied.⁹⁴

2. *Transparency in Rate Review*

a. Current Law

Due in large part to California’s implementation of the Affordable Care Act, several of the provisions in Proposition 45 regarding the contents, disclosure, and transparency of the Rate Change Application are already established in California law. Health plans and insurers are required by law to provide significant financial disclosures and actuarial justifications for any proposed rate changes, including 25 specified types of rate information, at least 60 days prior to

⁸⁹ *Review of Premium Rates*, CAL. DEPARTMENT OF MANAGED HEALTH CARE, <http://www.dmhc.ca.gov/HealthCareLawsRights/ReviewofPremiumRates.aspx#.VDNJGvldWS> (last visited Oct. 9, 2014); *Rate Filings and Review*, CAL. DEPARTMENT INS., <http://www.insurance.ca.gov/01-consumers/110-health/70-rates/index.cfm> (last visited Oct. 9, 2014) [“DMHC and CDI Rate Review”].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Issues: Rate Regulation*, YES ON 45, <http://www.yeson45.org/rate-regulation> (last visited Oct. 9, 2014); Press Release, Yes on 45, Prop 45 Could Save Californians As Much As \$1 Billion Annually On Health Insurance (Aug. 6, 2014), available at <http://www.yeson45.org/newsrelease/prop-45-could-save-californians-much-1-billion-annually-health-insurance>.

⁹³ Kingsdale Report, *supra* note 31, at 11.

⁹⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24–25.

implementing any rate change with the relevant State regulator. They are also required to notify their policyholders.⁹⁵ The disclosures must include a detailed certification by an independent actuary or actuarial firm that the rate increase is reasonable and that the justification for the increase is based on accurate and sound actuarial assumptions and methodologies.⁹⁶

CDI and DMHC, in turn, are required to make all rate filing information, other than contracted rates between a health plan/insurer and a provider, readily available to the public on their websites, in plain language and in a manner and format specified by the regulators.⁹⁷ Consumers and interested parties may review the information and submit comments to the regulator regarding the proposed rate changes, and the comments are then posted to the regulator's website for public viewing.⁹⁸

b. Potential Changes

The Proposition, like current law, also incorporates 60 day public notice but instead of notice through the departmental websites, notification is required by way of distribution to the news media and to any member of the public who requests placement on a mailing list for that purpose.⁹⁹ Further, the proposition reiterates the agencies' obligation to make this kind of information available to the public without necessarily invoking the California Public Records Act.¹⁰⁰ Finally, the proposition provides that all applications for health insurance rates shall be accompanied by a statement, sworn under penalty of perjury by the chief executive of the company, declaring that the contents are accurate and comply in all respects with California law.¹⁰¹ This sworn statement is substantially similar to the certification that is already required, as noted above.

All things considered, there is little to no substantive change toward the aim of public disclosure and justification that would come from the proposition.

3. *Public Participation in Rate Regulation*

a. Current Law

Under the statutes and regulations governing CDI and DMHC, the public is entitled to general "notice and comment" provisions regarding rate changes.¹⁰² Notice and comment generally consists of the relevant State regulator posting the health plan's proposed rate change to its website and allowing for the public to submit comments regarding the proposed rate changes. The regulator then posts the comments to its website for public viewing.¹⁰³

⁹⁵ DMHC and CDI Rate Review, *supra* note 89.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ CAL. INS. CODE § 1861.06.

¹⁰⁰ CAL. INS. CODE § 1861.07.

¹⁰¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24-25.

¹⁰² DMHC and CDI Rate Review, *supra* note 89.

¹⁰³ *Id.*

b. Potential Changes

In addition to the standard notice and comment provisions, Proposition 45 would provide consumers and the public in general with the right to intervene in the rate review process as described in detail in Part IV., A., 3., above.

c. Public Policy Considerations

Proponents advance the intervenor process as the public's right to participate and as a check on the power of the Commissioner.¹⁰⁴ Proponents argue that by allowing the public the ability to make challenges to rates, health insurance companies will be deterred from even proposing rates that would be deemed excessive.¹⁰⁵

Opponents claim the intervenor process is nothing more than the proponent's inserting an opportunity to bring frivolous lawsuits in their own self-interest, citing the \$14 million Consumer Watchdog has been paid from their Proposition 103 based intervenor suits.¹⁰⁶

4. *Covered California*

a. Current Law

As discussed above, Covered California certifies new QHPs based on a broad set of criteria, including network adequacy, rates, coverage of essential health benefits, compliance with cost-sharing formulae, and standards for reporting, transparency, and quality improvement. Under the current framework, after Covered California completes its review, the QHPs file their benefits, cost-sharing, premiums, and provider networks with DMHC (or CDI for the QHPs that it licenses). DMHC (or CDI) then has 60 days to review these filings, and find the rates reasonable or not.¹⁰⁷

b. Potential Changes

Under the Proposition 45 framework, Covered California would continue to negotiate with the QHPs and submit the finalized rate information to their relevant State regulator. Proposition 45 would add the additional review from CDI, and the option to reject the agreed upon rates and benefit packages.¹⁰⁸ Should the Commissioner reject a QHPs proposal, Covered California would have to either eliminate the plan from the Exchange or attempt to renegotiate within strict time frames before open enrollment.¹⁰⁹

¹⁰⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24, 25.

¹⁰⁵ *Public Participation*, YES ON 45, <http://www.yeson45.org/public-participation-transparency> (last visited Oct. 9, 2014).

¹⁰⁶, *Get the Facts*, CALIFORNIANS AGAINST HIGHER HEALTH CARE COSTS, <http://stophighercosts.org/get-the-facts/#specialinterests> (last visited Oct. 9, 2014).

¹⁰⁷ Kingsdale Report, *supra* note 31, at 15–16.

¹⁰⁸ *Id.* at 14–15.

¹⁰⁹ *Id.*

c. Public Policy Considerations

According to a report commissioned by the Opponents, Proposition 45 would bring regulatory and judicial delays in approving premiums as well as conflicting strategies between CDI's price setting and Covered California's managed competition. It would reduce competition among health plans and might even drive some out of the market.¹¹⁰ In response to these concerns, Harvey Rosenfield scoffed "the more likely threat to the Exchange is an asteroid hitting their building rather than these conspiracy theories."¹¹¹ Insurance Commissioner Dave Jones said the concerns are exaggerated and that big insurers hold too much market power for Covered California alone to protect consumers from excessive premiums.¹¹²

V. CONCLUSION

Due to the complex nature of health care and the inherent differences between health insurance and home and auto insurance, it is impossible to directly translate the benefits or shortcomings felt by consumers from Proposition 103 to Proposition 45.

What is certain is that the passing of Proposition 45 would give the Commissioner the power of "prior approval" over any changes to the charges assessed for health insurance in the State of California, including benefit options, retroactive to November 6, 2012. The "prior approval" system would require health insurance companies to submit documents and information substantiating their proposed rate changes, in addition to the reporting requirements and transparency efforts currently established under California law and the Affordable Care Act. For purposes of this review and approval, the Commissioner would have authority over both the California Department of Insurance and the Department of Managed Health Care creating another layer of review over what was an intentionally bifurcated system.

Additionally, Proposition 45 would expand the intervenor process, as set forth in Proposition 103, to allow members of the public to challenge proposed health insurance rate changes and collect a fee for their efforts. While rate regulation may have been anticipated by the ACA and 35 other states have implemented some variation thereof, none of the states have an intervenor process in place and the potential effects that Proposition 45 would have on the ACA and Covered California are uncertain.

Finally, there are still uncertainties as to how, if passed, Proposition 45 would be implemented. However, once it is passed, the only way to make any changes would be through the voter initiative process or a legislative amendment that is "in furtherance of the purposes of Proposition 45" and passed by a two-thirds vote of the Legislature.

¹¹⁰ Kingsdale Report, *supra* note 31, at 28.

¹¹¹ Chad Terhune, *Regulating state's health premiums could hurt exchange, report says*, L.A. TIMES, May 8, 2014, <http://www.latimes.com/business/la-fi-insurance-rate-fight-20140508-story.html>.

¹¹² *Id.*