

Client Alert

Environmental, Health & Safety Practice Group

December 3, 2015

California Issues New Draft of Proposition 65 Warnings Overhaul

Significant Changes Respond to Public Comment

In January 2015, California's Office of Environmental Health Hazard Assessment (OEHHA) proposed the most significant revisions to the Proposition 65 warning regulations since the 1980s. Not surprisingly, OEHHA received numerous comments and feedback in response to the proposed changes. On November 27, 2015, OEHHA responded to those comments by withdrawing the January 16 proposal and issuing an updated proposal with several key changes.¹

Background

California's Proposition 65 requires OEHHA to publish a list of chemicals known to the State to cause cancer or developmental or reproductive toxicity. The law requires businesses offering products or services in California that expose any person to a listed chemical above a threshold level to provide a "clear and reasonable" warning prior to such exposure. OEHHA's current regulations provide "safe harbor" warnings that businesses can rely upon to comply with the statute.

Key Changes in the Proposal:

- *Warnings Must Specify At Least One Chemical on Which the Warning is Based:* The January proposal included a requirement to explicitly list in the warning the name(s) of any of twelve chemicals present above the applicable threshold. The revised proposal no longer includes this so-called "dirty dozen" provision; instead, it requires the warning to include the name of at least one chemical at a level requiring a warning.
- *New Requirements Will Not Apply to Existing Inventories:* The updated proposal retains the two-year delay before the new warning requirements will be effective. However, the revised proposal excludes products manufactured before the effective date of the new regulations from the new warning requirements if they bear a warning compliant with the existing rules. This significant change will save manufacturers and distributors the financial burden of relabeling their existing inventories.
- *New Requirements Will Not Apply to Court-Ordered Settlements and Judgments:* The updated proposal clarifies that parties to court-ordered settlements or final judgments are deemed to have provided clear and

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reasonable warnings if their warnings fully comply with the order or judgment. Manufacturers who were not party to such settlements or judgments but modified their warnings to copy the court-approved warnings must petition the Agency to adopt the court-approved warnings if they want to use them.

- *Prohibition on Supplemental Information “Diluting or Diminishing” the Warning Removed:* The revised proposal limits the prohibition to information that “contradicts” the safe harbor language. In the Initial Statement of Reasons (ISOR),² OEHHA also provides examples of such contradicting information.
- *Direct Responsibilities to Product Manufacturers:* The updated proposal retains the goal of minimizing the burden on retail sellers and clarifies the placement of responsibility on manufacturers, distributors, and producers for providing warnings. It further limits the circumstances under which a retailer will be required to create warnings. OEHHA has also adjusted the frequency for obtaining confirmation of receipt of warning notices from the retail seller – every 180 days during the first year a product is sold; annually thereafter; and within 90 days of a new listed chemical or endpoint.

The revised proposal further explains the safe harbor warning technical requirements, including scope of mandatory use of languages other than English, minimum type sizes, use of color for the warning symbol, and differences between on-product and off-product warnings. Other adjustments apply to safe harbor warnings for specific industries, including the addition of specific language for recreational vessels.

In some aspects, OEHHA declined to make requested changes. The Agency retained:

- Changing the safe harbor language from “contains” to “can expose” and adding the exclamation point-within-a-triangle warning symbol, based on a UC Davis study concluding that the changes would not confuse or alarm consumers.
- A two-day deadline for compliance when a retail seller with no actual knowledge of an exposure receives a 60-day notice, reasoning that this is consistent with federal recall policies.

King & Spalding is assisting businesses selling products or operating in California in reviewing closely these and other changes and retentions in the proposed rule. OEHHA is accepting written comments on the new proposal until January 22, 2016 and will hold a public hearing in Sacramento on January 13, 2016.

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¹ The revised language is available at http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715WarningRegText.pdf.

² The ISOR is available at http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715WarningReg%20ISOR.pdf.