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Client Alert

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Latest Proposed Prop. 65 Warning Regulations: OEHHA Still Misses the Mark

On Friday, November 27, 2015, California's Office of Environmental Health Hazard Assessment (OEHHA) formally withdrew its controversial proposed Proposition 65 warning regulations and issued a new, separate proposal, thus, restarting the rulemaking process. The withdrawn regulations[1], originally issued in January 2015, met with considerable pushback from stakeholders who viewed them as ill-conceived , vague, and difficult to implement. Furthermore, the proposed text undercut the Governor's announced goal of reducing Prop 65 lawsuits.[2]

Meanwhile, the language in OEHHA's newest proposal does little to address the most serious stakeholder concerns. If adopted, the new proposal would continue certain major aspects of Prop. 65's legacy – that of substantially burdening businesses in and out of California by providing plaintiff's with new ways to bring frivolous lawsuits and force settlement of dubious claims. The newest proposal will do little if anything to better inform Californians. Below we highlight some of the more alarming provisions, as well as several key differences between the new and withdrawn proposals.

Provision	New Proposal	Withdrawn Proposal
Identification of Specific Chemicals	Warnings must name one or more of the chemicals for which the warning is being provided. For example, if a warning is required for exposures to lead and DEHP, a warning must identify at least one of these chemicals. This provision expands upon the withdrawn proposal by widening the universe of chemicals that might need to be identified on a warning. However, because the warning only needs to identify *one* chemical (rather than all chemicals that may be at level requiring a warning), the risk of lawsuits alleging a failure to identify all listed chemicals is reduced.	If the warning was being provided for a product with one or more of the twelve chemicals chosen by OEHHA, the warning would have had to identify each chemical by name.

[1] As discussed in our prior client alert: OEHHA Misses the Mark on Prop. 65 Reform, January 2015.

[2] Office of Governor Edmund G. Brown Jr., Governor Brown Proposes to Reform Proposition 65 (May, 2013)

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Provision	New Proposal	Withdrawn Proposal
Environmental Exposure Warnings	Environmental exposure warnings must be provided in a minimum 72-point font and must clearly describe the area for which the warning is being provided, potentially requiring businesses to perform difficult exposure assessments to adequately delineate the area.	Same as the new proposal.
Pictogram	Warnings must include a graphic of a black exclamation point within a yellow triangle. However, where a sign, label, or labeling is not printed using the color yellow, the graphic may be in black and white.	Mostly the same as the new proposal, but the graphic would have only been permitted to be in black and white if the sign, label, or labeling was not printed in color.
Multiple Languages	If a product label or sign includes languages other than English, the warning must also be in that language.	Same as new proposal.
Safe Harbor	Allows businesses to provide warnings using any content or method they please, so long as the warning is "clear and reasonable". However, the proposal does not include any guidance or definition regarding what is "clear and reasonable" [3], creating significant uncertainty for businesses trying to comply.	Same as new proposal.
Retailer Grace Period	For purposes of allocating responsibility for providing a consumer product warning, a retail seller will be deemed to have actual knowledge of an exposure two days after receiving a 60-day notice. If no upstream entity is subject to Proposition 65, the retail seller will need to implement warnings or pull the product in this short time-frame, or face a possible lawsuit.	Same as new proposal.
Grandfathering of Court-Approved Warnings	Explicitly states that warnings provided pursuant to a court-approved settlement or final judgment are "clear and reasonable". This is an improvement over the withdrawn proposal. Though it is likely that court-approved warnings would be considered	No explicit allowance for court-approved settlements or final judgments.

[3] A "clear and reasonable" warning under the proposed regulations would read:

"**WARNING:** This product can expose you to [name of one or more chemicals], a chemical[s] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65warnings.ca.gov/product"

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Provision	New Proposal	Withdrawn Proposal
	"clear and reasonable" without this addition, it will nonetheless give some comfort and certainty to those businesses who have implemented warning schemes per a settlement or judgment.	
Sell-Through	The proposed regulations would become effective two years after adoption. Any warning for a product manufactured prior to the effective date shall be deemed to be clear and reasonable if it complies with the September 2008 warning regulations, allowing products in the market to be sold through. This is the most promising aspect of the proposed regulations, as some products may stay in the stream of commerce for several years.	No sell-through date.

Further, as part of the new rulemaking and at the request of business stakeholders, OEHHA finally conducted an economic impact assessment on the proposed regulations and consequently recognized the substantial financial burden that implementation of the proposal would impose on businesses, estimating a statewide financial impact of between $33.9 to $54.4 million dollars. This estimate does not include the more substantial costs to businesses associated with Proposition 65, including conducting exposure assessments, product testing, product reformulation, defending against a citizen suit, or paying attorneys' fees and penalties, nor does it account for impacts to businesses located outside of California.

Stakeholders' comments on the initial regulatory proposal caused OEHHA to pause and develop a new warning regulation proposal. Unfortunately, this latest iteration still misses the mark -- producing little beneficial regulatory reform for Californians and entities doing business in California. Like the one before it, this proposal enhances the opportunities for plaintiffs' lawyers to allege violations (real or illusory) and initiate lawsuits, and continuing to make it a challenge to do business in the Golden State.

OEHHA is accepting comments on these proposed changes until January 22, 2016, with a public hearing scheduled for January 13, 2016. Please let us know if you have questions or concerns about this latest OEHHA proposal.

For more information on the proposed regulations or Proposition 65 in general, please feel free to contact us or visit our California's Proposition 65 site.

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