

December 1, 2015

California OEHHA Proposes New Amendments for Prop 65 Warning Requirement

Alert Summary

On 24 November 2015, the California Office of Environmental Health Hazard Assessment (OEHHA) repealed its rulemaking action published on 16 January 2015 amending Article 6 on "Clear and Reasonable Warnings" under Proposition 65. OEHHA at the same time published another proposal for a new Article 6 dated 27 November 2015, which now replaces the previous version of the proposed amendments. A public meeting on the new proposed regulatory action will be held on 13 January 2016, and written comments to OEHHA must be received by 22 January 2016. OEHHA now has until 27 November 2016 to adopt a final amendment.

3E Analysis - Overview

On 16 January 2015, OEHHA proposed to repeal the existing Article 6, and to simultaneously adopt a new Article 6, of Title 27 of the California Code of Regulations (CRR) on "Clear and Reasonable Warnings" required under Proposition 65. This proposal was withdrawn effective 27 November 2015. OEHHA has now issued a new proposal for the same, dated 27 November 2015. Because of this action, OEHHA now has until 27 November 2016 (one year) to adopt a final amendment (as required by the California Administrative Procedure Act).

Reasons

OEHHA stated in its withdrawal notice on 24 November 2015 that because a number of substantive and clarifying changes were added to the proposed regulatory language and the Initial Statement of Reasons after reviewing oral and written comments from the public, the repeal of the original proposal was necessary. The point is to allow more time for sufficient public comment regarding the modifications to the regulatory language.

What is affected?

Article 6 of the CRR on "Clear and Reasonable Warnings" applies when a warning is required under Proposition 65. Article 6 includes "safe harbor" definitions and establishes specific ways to provide a "clear and reasonable" warning. The new proposal is intended to further the "right-to-know" purposes of the regulation and provide more specific guidance on the "safe harbor" provision, as well as to provide updated methods and specifications for providing required warnings.

What is changed in the new proposal?

The new (November 2015) proposal makes a number of changes to the January 2015 proposal. The new proposal eliminates the list of 12 chemicals which were proposed to be required to be disclosed in the associated warning. However, the new proposed Article 6 text includes the requirement that all warnings contain the name of "one or more of the listed chemicals for which the warning is being provided." It also specifies, however, that an on-product warning label is not required to include the name of a listed chemical, unless otherwise specified in Section 25607 which sets out requirements for specific product, chemical and area exposure warnings.

The new proposed amendments provide more clarity on the division of responsibility between upstream entities and retail sellers, and also adds the requirement for the manufacturer, producer, packager, importer or distributor of a product to notify the retail seller with an additional notice within 90 days if a new chemical name or endpoint (i.e. cancer or reproductive toxicity) is required to be included in the warning on a product. There is also a new provision allowing the upstream entities to enter into an agreement with the retail seller that allocates legal responsibility for the warning between them in a way that is different from how responsibility is allocated by the regulation.

The new proposed amendments also include updated specifications for warning label visibility, font size, and content. This list of changes is not intended to be exhaustive.

Business Impact

These proposed changes will impose additional compliance requirements on business (e.g. more detailed warning label requirements, including the specific chemical/s in many cases) but also have the potential to alleviate some burdens (e.g. by reducing the liability on retailers, and by allowing upstream entities to come to their own agreements with retailers on the legal responsibility for warnings).

With the repeal of the January 2015 proposal and the simultaneous issuance of the November 2015 proposed amendments, companies and other stakeholders now have more time to make public comments and provide input on OEHHA's proposal to amend Proposition 65. A public hearing is scheduled for 13 January 2016. Written comments are due by 5 P.M. on 22 January 2016. Through the new proposal, OEHHA will have until 27 November 2016 to adopt a final regulation.

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