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Proposed Reform to California's Proposition 65 Warning Regulations Adds Complication for Most Companies but Some Relief for Small Retailers

By Renee D. Wasserman, and Walter S. Chen

In response to Governor Brown's proposal for California Proposition 65 ("Prop 65") reform in May 2013, California's Office of Environmental Health Hazard Assessment ("OEHHA") issued its notice of potential amendments to Prop 65 on March 7, 2014. ([Proposed Amendments](#)) A public workshop was held on April 14, 2014 for the purpose of discussing the amendments, with written comments to be received no later than June 13, 2014. OEHHA tentatively anticipates that the formal regulation will be proposed in early summer 2014 with adoption of the final regulation in early summer 2015.

There are four primary changes in the current proposed amendment that affect manufacturers, distributors and retailers – (1) requiring that specific information be provided in the Prop 65 warning, such as the nature of the exposure, the chemical consumers are exposed to, and the placement of the warning; (2) requiring companies that provide Prop 65 warnings to submit information to OEHHA about any listed chemical for which it provides a warning, for inclusion on a new web portal to be developed by OEHHA; (3) affirming the legislative intent that manufacturers are primarily responsible for Prop 65 warnings rather than retailers, but only so long as retailers post or maintain the warnings provided by the manufacturers; and (4) providing some relief in the form of notice and opportunity to cure minor violations for retailers with fewer than 25 employees.

Prop 65 Warning Requirements Would Become Mandatory

While the current regulations provide suggested language that meets the required "clear and reasonable" warning standard under Prop 65, the proposed amendment sets forth mandatory requirements for a "clear and reasonable" Prop 65 warning.

Specific Warning Language

Except for foods, prescription drugs and medical and dental devices, warnings for consumer products would require at a minimum, the following elements: (1) the international health hazard symbol; (2) the word "Warning" in all capital letters; (3) language that the product will expose the purchaser to chemicals known to the State of California to cause cancer/reproductive harm; (4) the name of the chemical, if one of twelve specified chemicals; and (5) a product or location-specific warning, if required under the amended regulation.

Alternatively, on-product labels can replace the language in element (3) with the terms “Cancer Hazard” or “Reproductive Hazard” in 8 point type, along with the Uniform Resource Locator (www.P65Warnings.ca.gov).

In addition to the general requirements above, further requirements for particular scenarios have also been added. Prop 65 warnings for products containing the following twelve specified chemicals must include the name of the chemical in the warning: acrylamide, arsenic, benzene, cadmium, chlorinated tris, 1,4-dioxane, formaldehyde, lead, mercury, phthalates, tobacco smoke, and toluene. In addition, where package labeling is in a different language, the warning must also be in that same language.

Flexible Warning Placement

Offsetting the additional burden caused by compliance with these new warning requirements, the proposed amendment provides that warnings in new methods beyond the traditional on-product or shelf warnings are considered “clear and reasonable.” The amendment provides that catalogs through which consumer products are purchased may contain Prop 65 warnings in a manner that makes clear that the warning applies to the item being purchased. Similarly, for consumer products purchased over the internet, the warning is to be provided on the internet prior to completion of the purchase. Finally, product-specific warnings may be provided via electronic devices or processes that automatically provide the warning to the purchaser while the purchase is being made. These options provide some flexibility for companies struggling to determine how best to incorporate Prop 65 warnings for their products.

Exceptions for Pre-existing Consent Judgments

The new requirements for Prop 65 warnings would be mandatory for all consumer products with one exception: parties to court-approved settlements prescribing warning content prior to January 1, 2015 may continue to comply with those pre-existing requirements and still be in compliance with the new law.

Companies Must Provide Notice to OEHHA Regarding Product Information Which Is to Be Incorporated in a New OEHHA Website for Consumers

Companies who provide Prop 65 warnings must also, within 30 days of providing a warning, provide OEHHA with information related to the warning, including contact information, type of exposure, and identification of the chemical and exposure route. OEHHA will develop and maintain a website providing all such information to the public. In doing so, OEHHA will be required to (1) review the information it receives to assure minimum standards of quality and accuracy, and (2) develop an interactive web-based portal that provides general information to the public concerning listed chemicals, common routes of exposure, and strategies for reducing exposure, as well as links to other governmental entities that can assist consumers obtain additional information about the listed chemicals.

The Proposed Amendment States that the Primary Responsibility for Prop 65 Warnings Lies with Manufacturers Rather than Retailers, Other than for Private Label Products

In addition to the changes in the warning requirements, the proposed amendments also reinforce the legislature's intent in Health & Safety Code Section 25249.11(f) to focus responsibility for warnings on manufacturers rather than retailers. Specifically, for most consumer goods products, including foods, the proposed amendment expressly provides that primary responsibility for providing clear and reasonable warnings, and any consequences for failure to do so, would fall not on the retailer, but on the manufacturer, producer, distributor or packager, provided that the retail seller make reasonable efforts to post or maintain any warning that is provided by the manufacturer/supplier. In addition, the retail seller will be required to disclose the manufacturer/supplier's contact information upon request. The sole stated exception to the intent to shift the responsibility for providing warnings from retailers to manufacturers/suppliers is for consumer products sold under in-house labels.

The current proposed regulations will not likely provide most retailers with any more protection from private enforcement than the current regulations, and could even prove more burdensome due to the express requirement that retailers make reasonable efforts to post warnings supplied by manufacturers or suppliers. Similar language regarding the "intent" that manufacturers/suppliers are primarily responsible for providing Prop 65 warnings is contained in the existing regulations. However, there is no limitation of liability for retailers in the relevant statute, Health & Safety Code 25249.6, and thus, any regulation purporting to so limit liability would be subject to legal challenge. Private plaintiffs will continue to argue that, while retailers do not have primary responsibility for providing clear and reasonable warnings, they remain liable for exposing consumers to products in violation of Prop 65. And, should retailers not wish to post and maintain warnings provided to them, they are not relieved of liability.

Small Retailers Would Obtain Relief for Minor Violations

Of note to smaller retailers, an additional provision allows those retailers that employ 25 or fewer employees to cure certain minor warning violations (such as the short-term absence of a sign or inadvertent obstruction of a warning) within 14 days to avoid *any* private enforcement.

Conclusion

While the proposed amendment to Prop 65 is far from being finalized, the burdens appear to outweigh the benefits to most companies selling consumer products in California. Only small retailers with fewer than 25 employees obtain any significant measure of relief from private enforcement if they take advantage of the opportunity to correct minor violations once they receive notice.

How We Can Help Your Company

Rogers Joseph O'Donnell specializes in Proposition 65 litigation and in helping its supplier and retailer clients comply with state and federal laws in the sale of food and consumer goods. If you have questions or issues related to compliance with Proposition 65, Renee D. Wasserman (rwasserman@rjo.com), James Robert Maxwell (jmaxwell@rjo.com), and Walter S. Chen (wchen@rjo.com) are available to assist with any such matters. Biographies and contact information are available at www.rjo.com.

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