As we reported earlier this summer, California is currently considering reforms to Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986. In response to the first reform proposal, many manufacturers, importers and retailers loudly voiced concerns about grave adverse impacts on the entire U.S. consumer products sector.

It appears the regulators are listening. California’s Office of Environmental Health Hazard Assessment (OEHHA), which is responsible for Prop 65 and the proposed reforms, recently announced pending revisions to the reform proposal. These changes are cause for cautious optimism.

On September 17, during the Proposition 65 Clearinghouse Conference held in San Francisco, the Director of OEHHA, George Alexeeff, reported that a new reform proposal is forthcoming. The changes in this next draft stem from public comments submitted to OEHHA during the comment period that ended June 13, 2014. OEHHA received numerous adverse comments, notably including detailed analyses from the California Chamber of Commerce and its member companies. Because OEHHA initially stated that it planned to move to final rulemaking in early-July 2014, many questioned whether these comments would be given appropriate consideration.

After advising that it spent significant time reviewing all comments in detail, and meeting with various stakeholders, OEHHA has now shared details about its revised proposal. Director Alexeeff detailed five changes likely to be included in the next draft:

- **Return to Safe Harbor Approach:** OEHHA will return to a "safe harbor" approach that allows businesses to use the warning methods and content if they choose to take advantage of the safe harbor, or use another method or content they think is "clear and reasonable," and can be defended if challenged.

- **Eliminate Mandatory Reporting Requirements and Private Right of Action for OEHHA Website:** OEHHA is moving the requirement to provide information for its website to an entirely separate section, which is not enforceable by
private plaintiffs. Submissions would not be mandatory, but considered supplemental and not essential to the "clear and reasonable" warning requirements. OEHHA will develop information using existing data and provide links to other authorities where appropriate, and could still request certain information in a "data call-in" type process.

- Eliminate GHS Pictogram / Addition of New Symbol: OEHHA will change the form of the warning symbol to the more recognizable yellow triangle with an exclamation point, rather than the GHS toxic hazard symbol.

- Eliminate "Will Expose": The phrase "will expose" is being replaced with the phrase "can expose."

- Add Tailored Warnings: There will be several more "tailored" provisions for certain types of consumer product and environmental exposures. OEHHA remains open to additional ideas about these and others, particularly those currently being provided.

While these changes sound promising, stakeholders must remain engaged. These five changes would not address fully all of the significant problems identified with the initial reforms, including issues regarding resellers and seasonal goods. Careful analysis of the wording of these changes will be critical to determining whether the industry's concerns are alleviated. It is presently unknown whether the next version will be another "pre-regulatory" draft or a "formal rulemaking" draft, but it is expected before the end of 2014.

More areas for reform

Director Alexeeff also announced that OEHHA will be seeking stakeholder input regarding whether to pursue one or more of the following areas for regulatory improvement:

- Developing alternative risk levels for chemicals
- Updating the natural occurring regulation
- Updating/Streamlining Safe Use Determinations
- Clarifying regulatory provisions on averaging exposures to Prop 65 chemicals
- Identify where additional interpretive guidance may be needed
- Clarifying when post-natal exposures should be considered for developmental toxicity

Although it is in the early stages of planning a workshop, OEHHA is now seeking public input on possible agenda items on these potential regulatory actions. Parties have 60 days to submit public comments. Comments on these topics are due to OEHHA by 5:00 p.m. on Monday, November 17, 2014. Emailed comments are preferred and should be addressed to P65Public.Comments@oehha.ca.gov. Comments submitted in paper form may be mailed or faxed to the addresses below:
Ms. Monet Vela  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010, MS-58D  
Sacramento, California 95812-4010  
Fax: (916) 323-2265

Attorneys from Crowell & Moring are working to provide input from consumer products sector stakeholders on these changes. Stakeholders should continue to track the next stages of these reforms as they will likely leave open many issues of concern requiring formal comments to and discussion with OEHHA.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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