

CLIENT ALERT

Proposition 65 – Warning Regulation Update

October 14, 2014

California is currently considering reforms to Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986. California's Office of Environmental Health Hazard Assessment (OEHHA) issued proposed amendments to the regulation on March 7, 2014. After considering substantial input offered by the public, OEHHA released a [revised draft warning regulation](#) and a separate [website regulation](#).

OEHHA's previous proposals were published online, and there was a pre-regulatory draft and comment period. This time around, the process has changed. The discussion draft proposals will not be posted online, and public comments are not being requested. Instead, the draft proposals are intended for stakeholders only. To this end, OEHHA expects to receive more informal input (via email or oral communications) on the drafts this week. OEHHA will consider those comments, make any revisions as they see fit, and proceed with formal rulemaking over the coming months.

Accordingly, to the extent any company has concerns with an industry-specific regulation, or would like OEHHA to adopt a specific regulation for their industry, we recommend that the company endeavor to initiate a meeting with OEHHA immediately.

Representatives of the California Chamber of Commerce (the Chamber) and several industry stakeholders met with OEHHA officials, on October 1st, to discuss the latest proposals. On October 10, 2014, the Chamber submitted the following comments limited to issues that impact industry more broadly:

- 1. Safe Harbor:** OEHHA will return to the "safe harbor" concept, allowing businesses to use the regulation's warning methods and content, or to use any warning method or message that is clear and reasonable. The Chamber proposes that a warning is "clear and reasonable" if: "(1) the method employed to transmit the warning is reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available prior to the exposure and (2) the message clearly communicates that the chemical in question is known to the state to cause cancer and/or reproductive harm."

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- 2.** **12 Specific Chemicals:** The regulation requires that there be a warning when any of 12 specified chemicals are present. The name of the chemical must be included in the warning. This requirement provides no "safe harbor" (i.e., litigation protection) to businesses which choose not to specify the chemical in the warning when only infinitesimal levels of the chemical are found in a product or facility.

The Chamber asserts that this requirement "needs further qualification to keep the warning succinct and avoid the requirement becoming unmanageable for a business, a source of more rather than less litigation and a lengthy list that will either turn consumers off or over-saturate them." As a result, the Chamber proposes: (1) there should be an exemption for levels determined by the lead agency or courts to not warrant Proposition 65 warnings; (2) a business should be exempt from including a warning if a toxicologist has evaluated the chemical and concluded and memorialized its findings that the exposure is below the warning level established for the chemical; and (3) where a warning is necessary, a business should not have to designate multiple chemicals; instead, a business may refer to one of the chemicals by including a statement such as: "can expose you to chemicals, such as X, known to the State . . . "

- 3.** **Grandfathering:** OEHHA has included a grandfathering proposal exempting parties to court-approved settlements prescribing warning content and methods, entered prior to January 1, 2015. The Chamber's position is that this proposal is crafted far too narrowly and does not extend the concept far enough. The Chamber proposes that a provision is added to recognize warnings approved by courts (i.e., in consent judgments). In addition, the Chamber suggests the following language to ensure that companies may follow the requirements of judgments to which they are not parties: "Any interested party may petition the lead agency to adopt into this Article as an alternative warning for specific exposures the warnings content and methods approved by a court for such exposures. In considering such a petition, the lead agency will weigh heavily the finding of the court that such specific warning content and method complies with the Act." Lastly, the Chamber proposes a transitional period of two years to provide businesses with time to revise their current signs and labels.

- 4.** **Cure for Retailer:** The proposal includes an "opportunity to cure" provision that would provide establishments with 25 or fewer employees an opportunity to correct certain minor violations. Under the preliminary draft, a retail seller is deemed to have knowledge of a potential exposure that occurs more than 48 hours after the notice of the exposure. The Chamber recognizes that establishing a right to cure is important, but argues that the 48-hour time period is too short for a retailer to take investigative action to determine the merits of the 60-day notice and to avoid being sued. As a result, the Chamber proposes that language be added to make it more clear that "potential exposure" occurs when the consumer receives the product and not at some later point. In addition, the Chamber proposes language that is more precise about how time is computed.

- 5.** **Pictogram:** OEHHA's latest draft abandons the previously proposed requirement to use the Globally Harmonized System (GHS) health hazard pictogram. Instead, an exclamation point enclosed within a triangle would be required. According to the Chamber, there are a number of issues with the requirements associated with the newly proposed pictogram. As a result, the Chamber proposes that (1) the Proposition 65 warning symbol be made

an alternative to providing the narrative part of the warnings; (2) to avoid consumer confusion, a symbol associated with Proposition 65 be used within the pictogram (i.e., P65 or 65); and (3) abandon the requirement to have a symbol appear in yellow if any other colors are used on the sign or label.

6. **Consumer Products:** The Chamber addresses several concerns related to consumer products:
 - a. **Box Enclosure:** The preliminary proposal requires that the warning message for consumer products be enclosed in a box. The Chamber finds this requirement problematic for the following reasons: (1) the requirement may confuse and mislead consumers by suggesting a more significant or acute level of risk than is actually presented; (2) consumers may think that other warnings that are not required to be boxed-in are less important; (3) the requirement may undermine or conflict with other federally mandated warnings; and (4) the boxed-in warning requirement should be clarified to exclude its application to foods, prescription drugs and dental services.
 - b. **Foreign Languages:** The preliminary draft requires that warnings be provided in English as well as other languages necessary to alert the public. According to the Chamber, there are a number of practical and compliance issues associated with foreign language requirements for consumer products. The Chamber proposes that the requirement be triggered if other health-related warnings for a product are given in multiple languages; the requirement be limited to the provision of one language, besides English, that is most likely to be understood by the consumer; and there should be an exemption for food labels.
 - c. **Receipts:** The Chamber supports and proposes using cash register receipts as a method for providing warnings for consumer products. To ensure notification of the warnings, consumers may be advised by a sign at the checkout point to examine the receipt for a possible Proposition 65 warning.

7. **Occupational Exposures:** The September draft contains seemingly innocuous changes to the definition of "occupational exposure." The Chamber predicts that changes will signal to the enforcement community that OEHHA intends to revisit well-established rules governing occupational exposure warnings. As such, the Chamber urges OEHHA to make no changes to the current definition of "occupational exposure."

8. **Website:** OEHHA's current draft does not contain provisions to protect confidential business secrets. The Chamber proposes language to address this limitation. In addition, under subsection (a)(2) of the draft regulation, OEHHA provides a process for a person to request a correction of information included on the website. The Chamber proposes that grounds for making a request be added to include the removal of information that is "misleading or otherwise contrary to public policy." Finally, the Chamber urges OEHHA to abandon the concept of providing

information on the website about "strategies for reducing or avoiding exposure to those chemicals . . ." as this function is more properly addressed by regulatory agencies.

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