



## SUBSTANTIAL HARM TO CONSUMER PRODUCT SECTOR UNDER PROPOSED PROP 65 'REFORMS'

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California is currently considering reforms to Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986. But many are concerned that consumer product suppliers do not appreciate the extraordinarily adverse impact that the proposal would have on the entire U.S. consumer products sector. Manufacturers, importers and retailers—who are already beholden to the warning requirements if there is a chance their products may enter California's stream of commerce—would incur potentially devastating costs and new resource burdens if the proposals are enacted. Yet these new impositions will result in minimal, if any, real benefits for California consumers.

The reforms proposed by California's Office of Environmental Health Hazard Assessment (OEHHA) will likely mislead consumers about actual exposure risks and punish manufacturers striving to reduce chemical content in their products. Consumers will be confused by the different warnings allowed under the grandfathering provisions, which will create the misimpression that some products contain fewer listed chemicals than products not subject to prior Prop 65 litigation and resulting court orders. The reseller market in California would be gutted by OEHHA's failure to carve out exceptions for resellers of consumer products. Resellers have no means of knowing the chemical content of the individual items they sell, absent testing every item. And the removal of flexibility regarding transmitting warnings down the supply chain will likely result in manufacturers adding warnings at the time of manufacture to all of the goods they supply globally, rather than the current practice of providing warnings only to their California distributors. Finally, when compared with the small profit margins on many low cost consumer products, these reforms will likely drive such goods out of California. All told, the reforms will escalate the already substantial burdens imposed on consumer product suppliers, and provide minimal or no

additional benefits to California consumers these products.

The reforms fail to make distinctions between products posing real exposure hazards and those that include miniscule amounts of the same chemical. Because businesses must warn of "exposure" due to the mere presence of these chemicals, there will be no incentive for manufacturers to reduce chemical levels in their products if it will not be possible to guarantee that the chemicals will be removed entirely. For many products, this guarantee is not possible due to normal fluctuations in manufacturing processes. And when combined with the continuing obligation to update testing and exposure data with any new information, manufacturers would only be guaranteed more costs if they change their formulations to reduce chemicals once they complete their submissions and labels.

Apparel and soft goods are prime examples. Apparel items frequently have very low levels of listed chemicals, such as phthalates, lead and cadmium. These include PVC items, vinyl, Screen prints, appliques, metallic coatings, metal and plastic zippers, snaps, buttons, and rivets. Certain prior Prop 65 settlements have set limits for lead and phthalate content in apparel items. Those settlements set forth the terms of the warnings that must be given for apparel containing lead and phthalates above a certain level. Because of these settlements, many apparel manufacturers have gone to great lengths to reduce the levels of these chemicals in their products so that they do not need to provide warnings. Similar settlements have been reached for a other consumer products, including bibs, bicycles, products containing brass, cookware, cosmetics, exercise mats, ceramic ware and glassware, fake leather upholstery, headphone cables, jewelry, lunchboxes, poker chips, luggage, and accessories.

Yet products that are not subject to court settlements, but contain similar levels of these chemicals, will be required to comply with the new warning regulations.

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The "exploding chest" pictogram and stronger "will expose" language will give the misimpression that other consumer products bearing the new label pose a greater risk of exposure or harm than those products subject to prior court orders. Consumers will not understand that a baby seat bearing the new warnings in the prescribed, large font with the "exploding chest" pictogram is addressing the same sort of chemicals—and at the same levels—than an item subject to a court order contains, even though that latter item does not bear a warning. The breadth of the court settlements that apply to certain categories of items, such as vinyl goods or ceramic dishware, will create an unfair marketplace and a misimpression of "safety" regarding which products do and do not contain listed chemicals.

The grandfathering provisions of the proposed reforms will also create additional confusion in the marketplace if these same items contain other listed chemicals. If similar products give different warnings under existing court settlements, consumers will believe that some products are more "safe" than others when they actually have the same or higher content of listed chemicals. Take for example an item subject to a court order warning limit if it contains lead above 300 ppm. Even if that item contained 299 ppm lead, and high levels of another listed chemical not subject to a court settlement, the manufacturer, under the current regulatory framework, would potentially only have to provide the current "safe harbor" warning. But OEHHA's proposal would require the manufacturer of a similar item with lower levels of both chemicals, but not covered by a court settlement, to provide the new warning language of "will expose" with the large font and "exploding chest" pictogram. Any reasonable consumer would believe the first product to be "safer" with less exposure risk, despite the actual chemical contents. OEHHA's disparate treatment of similar products with similar chemical content will only add to consumer confusion and warning fatigue.

Next, OEHHA's proposal would place resellers in an impossible position and threaten the viability of California's resale industry. Currently, OEHHA's proposal does not exempt consumer goods resellers, such as Goodwill, Once Upon a Child, Play it Again Sports or the Salvation Army. Although these businesses do not obtain their products directly from the manufacturer, they fall within the purview of proposed category of "Retail seller," defined as "a person or business that

sells consumer products...directly to consumers by any means...even if the business or facility is primarily devoted to non-retail activities." Section 25602(f). As such, resellers will be subject to the same legal obligations as traditional retailers.

But resellers do not have the benefit of receiving products directly from manufacturers that know the chemical content of the products they are making. And testing their inventory is not an option, as most resellers do not have more than one or two pieces of a certain item. Their stock and trade is a diverse inventory of whatever pre-owned items they can procure. Testing, reporting on, and labeling their complete, rotating stock would not be financially viable or feasible. So it is unreasonable to hold resellers to the same obligations as other regulated parties. Without an exemption, California's resale industry will be crushed between the choice of testing every item or litigating failure to warn claims.

Congress recognized the importance of providing such an exemption in the Consumer Product Safety Improvement Act (CPSIA). The statute made it unlawful to sell children's products with more than 600 parts per million (ppm) total lead. But in 2011, a bipartisan group of Congressional members voted to amend the CPSIA's chemical content testing and certification requirements for resellers. Section 1 of Public Law 112-28 made it explicit that the lead limits do not apply to used children's products, with limited exceptions. Congress understood that a reseller does not have sufficient information about its products to make safety certifications, nor was it sensible to require that resellers conduct product testing. Under the proposed reforms, OEHHA has not made similar exceptions for resellers. With the elimination of the safe harbor warning and the new requirements of the reforms, it will be virtually impossible for the resale industry to maintain its niche as a practical and affordable option for consumers of used products. Congress took measures to reflect this reality in its legislation. OEHHA should do the same.

Further, OEHHA's proposal fails to provide any flexibility in the manner in which entities may transmit warnings down the supply chain. Section 25603(c) of the current regulations requires an entity to "provide a warning to any person to whom the product is sold or transferred unless the product is packaged or labeled with a clear and reasonable warning." The Draft Initial Statement of Reasons for this section recognizes the difficulty—and, frequently, the impossibility—for an upstream manufacturer or supplier to know whether

any particular product actually may be offered for sale in California: "[W]here labels or labeling are not provided, once warning material or information clearly communicating the presence of a listed chemical has been passed on to the transferee, the transferor may have done all that it can to ensure that the warning will reach those who are subsequently exposed." (Draft Initial Statement of Reasons, pp.30-31, March 7, 2014 ["In this way it is ensured that the person who finally distributes the product to the consuming public will have knowledge of the need to warn, and will do so."].)

Supply chains are even more global and complex than in 1988 when Section 25603(c) was promulgated. Companies, especially out-of-state companies, rely on this provision and provide warnings to their distributors to discharge their warning obligations even if they may have no actual knowledge that their products ultimately are sold in California. Furthermore, this provision preserves the integrity of interstate commerce by giving entities the flexibility to lawfully provide warnings only for products destined for the California marketplace. In the absence of this provision, such entities remain vulnerable to Prop 65 lawsuits unless they label their products nationwide or globally. This provision must be retained in order to avoid unnecessary enforcement actions and disruptions in interstate commerce.

Finally, the cost of implementing these reforms cannot be ignored. While the expense of testing and the costs associated with data collection and submission may be more manageable for a trade association or a manufacturer of an expensive consumer good, most consumer product businesses will not be able to bear these costs and survive. To impose the same testing and data requirements on a \$2 pack of holiday ornaments as on a \$40,000 consumer product is not reasonable. And as there is no grandfathering provision based on the date of manufacture, businesses involved in seasonal goods, such as deck cushions and holiday decorations, will be forced to liquidate their stock or conduct post-manufacture testing and relabeling on all their products. These costs will either need to be passed onto California consumers, or these businesses will choose to leave the California market. Neither is a service to the California consumer.

The deadline for stakeholder public comments to OEHHA on the proposed reforms was June 13, 2014. OEHHA received numerous adverse comments, notably including detailed analyses from the California

Chamber of Commerce and its member companies (see the Chamber's detailed letter [here](#)). 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.

**UPDATE:** Recent reports are cause for cautious optimism. After advising that it spent significant time reviewing all comments in detail, OEHHA recently shared details about its revised proposal. On September 17, 2014, during the Proposition 65 Clearinghouse Conference held in San Francisco, the Director of OEHHA, George Alexeeff, shared 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 defend it 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. Submission 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.

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.

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 are due to OEHHA by 5:00 p.m. on Monday, November 17, 2014.** Emailed comments are preferred and should be addressed to [P65Public.Commentsa@oehha.ca.gov](mailto:P65Public.Commentsa@oehha.ca.gov).

Members of the consumer products sector should continue to track the next stages of these reforms as these substantial changes to the proposed Prop 65 reforms will likely leave open many issues of concern.