

OEHHA'S REVISED PROPOSED PROP 65 REGULATIONS OFFER ONLY SLIGHT IMPROVEMENTS; NEW COMMENT PERIOD STARTED

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In response to stakeholder comments, on November 27, 2015, California's Office of Environmental Health Hazard Assessment (OEHHA) withdrew proposed regulations to amend Proposition 65 safe harbor warning requirements and issued a new, revised set of proposed regulations. While the new proposal addresses some of the many concerns expressed by stakeholders, it still falls far short of reducing the uncertainty and burdens businesses face when attempting to comply with Proposition 65's warning requirements.

As with the prior version, the proposed regulations retain the "safe harbor" concept, which provides for non-mandatory guidance on warning content and methods deemed "clear and reasonable" under the law, and seek to provide more specific criteria for such warnings. OEHHA's purported intent of revising the existing regulations is to ensure the public receives useful information about potential exposures to certain chemicals. Unfortunately, even the new version of the proposed regulations fails to address adequately the Governor's previously announced goal of revamping Prop 65 to end frivolous "shake-down" lawsuits. If anything, the proposed regulations impose more burdens on businesses and create additional exposure to litigation due to ambiguous and conflicting language.

For example, the new regulation proposal provides that if a label is used to provide a warning, the warning language must be in a type no smaller than the largest type size used for other consumer information on the product, but in no case smaller than 8-point type. However, the proposed regulations do not define "consumer information." Does consumer information simply include other warnings? Or could it include directions for product use? Or even the product name? By way of another example, the proposed regulations distinguish between a warning label and an on-product warning label, and allow for different criteria for each. However, the term "label" is defined specifically under the proposed regulations as "a display of written, printed or graphic material that is affixed to a product or its immediate container or wrapper." So, the distinction between a "label" and "on-product label" likely lies in the use of the term "affixed" but it is not entirely clear, and it is an important distinction given that users of on-product labels may use different warning language.

There are some improvements over the old iteration of the proposed regulations. The new version expressly provides that warnings provided pursuant to a court-approved settlement or final judgment are "clear and reasonable" as a matter of law. While it is likely that court-approved warnings would be considered "clear and reasonable" without this addition, it previously was unclear whether a business subject to such a court order would need to figure out a way to comply both with the order and the new regulations. Another improvement is the addition of a sell-through provision, which allows for a warning for a product manufactured prior to the effective date of these new regulations to be deemed clear and reasonable if it complies with the September 2008 warning regulations, allowing products remaining in the stream of commerce to be sold through.

Ultimately, this regulatory proposal fails to address all the concerns previously expressed by shareholders and does not appear to produce the beneficial regulatory reform envisioned by the Governor. OEHHA is accepting comments on the new proposal until January 22, 2016, and a public hearing is scheduled in Sacramento for January 13, 2016.

BLG will monitor this situation closely and provide relevant updates here.

For more information on the proposed Prop 65 regulations, please visit

http://www.oehha.ca.gov/Prop65/CRNR_notices/WarningWeb/2NPRArticle112715.html.