

MEMORANDUM

From: Martin J. Hahn
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Date: August 1, 2016

Re: **California's OEHHA Proposes Interim BPA Warning Regulation**

We previously reported that California's Office of Environmental Health Hazard Assessment (OEHHA) issued an emergency regulation to allow the temporary use of standard point-of-sale warnings for BPA exposures from canned and bottled foods and beverages. ^{1/} The emergency regulation is scheduled to expire on October 17, 2016. Recognizing food companies will need additional time to phase out the use of BPA and sell through the BPA-containing foods and beverages with a shelf life of up to three years, OEHHA is initiating a rulemaking process to maintain the point-of-sale warnings until December 30, 2017. ^{2/} Notably, the proposed new regulation would require food companies to provide OEHHA with a list of all products in which BPA is intentionally used in the manufacturing. ^{3/} OEHHA then plans to publish the list in a searchable, electronic format on its website. ^{4/} When the regulation expires on December 30, 2017, the state and the private "bounty hunters" likely would use that list as their roadmap of each of the foods that contain BPA in their packaging. Food companies should reevaluate their BPA compliance strategy in light of the new regulation. Comments on the interim regulation are due on September 26, 2016.

Background and the Proposed BPA Regulation

By way of background, BPA is an industrial chemical that has been widely used in the manufacturing of food packaging materials such as epoxy resins on metal cans and polycarbonate containers. Effective May 11, 2016, OEHHA started requiring warnings for consumer products containing BPA under the Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as Proposition 65 or Prop 65). ^{5/} Under Prop 65, businesses are required to provide a "clear and reasonable" warning

^{1/} See Hogan Lovells Memorandum titled "California's OEHHA Proposed Dermal Safe Harbor Level for BPA and a Temporary Point-of-Sale Warning Message for Canned and Bottled Foods and Beverages" (March 21, 2016).

^{2/} See OEHHA "Initial Statement of Reasons - Warnings for Exposures to Bisphenol A from Canned and Bottled Foods and Beverages" (*available at*: <http://oehha.ca.gov/media/downloads/cnr/bpawarningsregisor072916.pdf>).

^{3/} See OEHHA "Proposed Regulatory Text - - Warnings for Exposures to Bisphenol A from Canned and Bottled Foods and Beverages" (*available at*: <http://oehha.ca.gov/media/downloads/cnr/07192016bparegs.pdf>).

^{4/} See *id.*

^{5/} OEHHA, "Notice of Emergency Action to Amend Section 25603.3 Title 27, California Code of Regulations Warnings for Exposures to Bisphenol A From Canned and Bottled Foods and

before knowingly and intentionally exposing anyone in California to a listed chemical. 6/ To avoid consumer confusion from BPA warnings given the high percentage of the canned and bottled food and beverages that contain BPA in California, OEHHA adopted an emergency regulation that allows the temporary use of a standard point-of-sale warning message for BPA.

Specifically, under the emergency regulation Prop 65 warning requirements are deemed to be met if the “manufacturer, producer, packager, importer or distributor of the canned and bottled food or beverage either affixes a label to the product bearing a warning” or “[p]rovides written notice directly or through an authorized agent or trade association to the retailer or its authorized agent.”7 The Warning Sign shall contain the following: 8/

“**WARNING.** Many cans containing foods and beverages sold here have epoxy linings used to avoid microbial contamination and extend shelf life. Lids on jars and caps on bottles may also have epoxy linings. Some of these linings can leach small amounts of bisphenol A (BPA) into the food or beverage. BPA is a chemical known to the State of California to cause harm to the female reproductive system. For more information go to: www.P65Warnings.ca.gov/BPA.”

The proposed BPA regulation continues to provide the option for food manufacturers to establish compliance by either affixing a warning label to the products or providing written notice to retailers. 9/ Unlike the emergency regulation, however, to be able to rely on these point-of-sale warning statements for compliance, companies would be required to provide OEHHA with a list of all food products in which BPA was intentionally used in the manufacture of the can lining or jar or bottle seals. 10/ The proposed regulation would also require the food products be identified by very specific information including: 11/

- Brand name;
- Product description, including the federal Food and Drug Administration product category for the food;
- Universal Product Code or other specific identifying designation; and
- Where Bisphenol A is no longer used in the manufacture of the product packaging but the product is still available in commerce, the last expiration or “use by” date for the product where BPA was intentionally used in the can linings or seals.

Moreover, the proposed regulation states that the above product information needs to be provided in a searchable, electronic format to facilitate posting information on OEHHA’s website. 12/

It is important to note the regulation will expire on December 30, 2017. After that, OEHHA is likely to require product-specific BPA shelf warning signs or on-product warning labels. While OEHHA believes the interim period is sufficient to ensure an orderly transition for food companies to phase out the use of BPA, it remains to be seen whether the discontinuance of BPA is feasible by the end of 2017. As such, we are particularly concerned with OEHHA’s plan of publishing the list of products containing intentionally-added BPA. After December 30, 2017, the state and “bounty hunters” likely

Beverages,” available at: <http://oehha.ca.gov/proposition-65/cnrn/notice-emergency-action-amend-section-256033-title-27-california-code>.

6/ Cal. Health & Safety Code § 25249.6.

7/ 27 CCR § 25603.3(f),

8/ *Id.* § 25603.3(g).

9/ *See supra* note 3.

10/ *See id.*

11/ *See id.*

12/ *See id.*

will use the list as a roadmap to target products that still use food packaging manufactured with BPA and do not bear a BPA warning label on the products.

BPA Compliance Strategy

We recommend companies reevaluate their BPA compliance strategy in light of the new regulation. Importantly, in addition to relying on the emergency regulation and the interim BPA regulation, products can be considered exempt from the Prop 65 warning requirements if the exposure to a listed chemical is below the safe harbor level (for reproductive toxicants, also known as a Maximum Allowable Dose Level or MADL). ^{13/} As of today, OEHHA has not developed a MADL for oral BPA exposure. In the absence of an OEHHA oral safe harbor, a company can self-determine whether it is appropriate to develop its own safe harbor level based on sound toxicology principles. A company that takes such a position, however, does so with the risk bounty hunters, OEHHA, or district attorneys in California could disagree with a self-determined MADL.

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We will continue to closely monitor all developments related to California's Prop 65 requirements. If you have any questions, or if we can be of any assistance, please do not hesitate to contact us.

^{13/} 27 CCR § 25801.