

MEMORANDUM

From: Martin J. Hahn
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Re: **California's OEHHA Proposes Additional Revisions to Prop 65 "Clear and Reasonable Warnings" Regulation**

We previously reported that on March 25, 2016, California's Office of Environmental Health Hazard Assessment (OEHHA) issued a revised proposed regulation to amend the requirements for "clear and reasonable warnings" under the Proposition 65. ^{1/} On May 18, 2016, OEHHA published a slightly revised version of the proposed regulation. ^{2/} This most recent version includes additional changes to the March 25 proposed regulation based on the additional comments the agency received. While most of these revisions made by OEHHA are non-substantive, we encourage food and beverage manufacturers, distributors, retailers, and restaurants to closely examine the proposal and assess how the new regulation will affect their compliance with the Prop 65 warning requirements. Comments specifically addressing the changes made by OEHHA are due on June 6, 2016.

This memorandum provides a brief overview of the new proposal and highlights a few changes subject to public comments.

I. Background of Proposition 65 "Clear and Reasonable Warnings" Regulation

By way of brief background, Proposition 65 requires businesses to provide "clear and reasonable warnings" when they knowingly and intentionally cause an exposure to a listed chemical to any individual in California. ^{3/} Under the current Article 6 to Title 27 of the California Code of Regulations, the "clear and reasonable warnings" must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure. ^{4/} The message must clearly communicate that the chemical in question is known to the state to cause cancer, birth defects, or other reproductive harm. ^{5/} The

^{1/} See Hogan Lovells Memorandum titled "California's OEHHA Proposes Revised BPA Warning Emergency Regulation and Revisions to Prop 65 "Clear and Reasonable Warning" Regulations" (April 4, 2016).

^{2/} See OEHHA "Notice of Modification to Text of Proposed Regulation, Proposed Repeal of Article 6 and Adoption of New Article 6 - Proposition 65 Clear and Reasonable Warnings" (*available at: <http://oehha.ca.gov/proposition-65/cnr/notice-modification-text-proposed-regulation-proposed-repeal-article-6-and>*).

^{3/} Section 25249.6 of the California Health and Safety Code.

^{4/} Section 25601 of Title 27, California Code of Regulations.

^{5/} See *id.*

existing regulation also provides a few “safe harbor” warning messages for businesses to adopt for compliance. For example, for food, other than alcoholic beverages, sold, served, or otherwise provided in food facilities (e.g., restaurants), a generic warning message such as “**WARNING:** Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here.” is deemed compliant. 6/

The OEHHA finds that the current regulation lacks the specificity necessary to ensure that the public receives useful information about potential exposures. OEHHA issued the proposal to provide more useful information to California consumers. One of the many notable changes is the proposed requirement that a warning needs to contain the name of one or more of the listed chemicals (e.g., acrylamide and BPA) in the consumer product or affected area for which the warning is being provided, unless the warning is an on-product warning. 7/ In particular, for food and non-alcoholic beverage exposure warnings for restaurants, OEHHA proposes the following warning message “**WARNING:** Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/restaurant.” 8/

The existing regulation also has been criticized by the industry for its failure in clearly allocating responsibility to warn among the manufacturers, producers, packagers, importers, suppliers, distributors, and retailers. As such, OEHHA also tries to clarify the relative responsibility of manufacturers and others in the supply chain. Under the proposal, the manufacturers, producers, packagers, importers, suppliers, and distributors of a consumer product would be able to comply with the warning requirements by either affixing a label to the product or by providing a written notice directly to the authorized agent for a retail seller who is subject to Proposition 65. 9/ Importantly, companies sending the notices to retailers must confirm the retailers received the notice and to renew the notice. 10/

II. Highlights of the Revised Prop 65 “Clear and Reasonable Warning” Regulation

OEHHA summarizes a few changes in their notice of modification. 11/ We highlighted a few that might be of interest to food and beverage manufacturers, distributors, retailers, and restaurants below:

- Section 25600(f) was moved from Section 25601(b) and slightly modified to clarify that businesses are free to provide a warning that is different from the safe harbor methods and content specified in Subarticle 2 as long as the warning complies with Section 25249.6 of the Act.
- Section 25600.1(c) was revised by removing the phrase, “but is not limited to” and adding the words, “company name, location of manufacturers” as additional exceptions to the definition of “consumer information”. Under the proposal, when a consumer product includes “consumer information” in a language other than English, the warning must also be provided that language in addition to English. Sections 25602(d) and 25607.1(c) were

6/ Section 25603.3 of Title 27, California Code of Regulations.

7/ Section 25601 (b) of the Proposed Regulation Text, *available at* http://oehha.ca.gov/media/downloads/cmr/051816art_6ndmodtextclean.pdf.

8/ Section 25607.5 of the Proposed Regulation Text.

9/ See Section 25600.2 of the Proposed Regulation Text.

10/ See *id.*

11/ See *supra* note 2.

also revised to better clarify the circumstances under which a warning must be provided in a language other than English.

- Section 25601(b) (formerly numbered as subsection (c)) was revised to remove, “for which the person has determined a warning is required” and replaced with, “in the consumer product or affected area for which the warning is being provided” to clarify that the regulation does not impose any new testing or burden of proof requirements for a business. This regulation only applies where a business has already decided to provide a warning; it does not determine when a warning is required.
- Section 25606(b) was added to clarify that occupational exposure warnings for chemicals that are not covered under subsection (a) can be provided using the methods and content requirements set out in the regulations for consumer product or environmental exposures.

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The comment period for the original proposal has closed and OEHHA has stated it only will accept comments on these minor changes that have been re-proposed. The proposal would provide increased flexibility but also leaves unanswered many important questions such as clarifying the food manufacturer’s responsibility when the retailer does not post the warning or if food is purchased at one retail location and re-sold at another location without the posted warning.

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.