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California Proposes Significant Changes to Proposition 65 Safe Harbor Warnings for Products Sold to Consumers

Use of Short-Form Warnings Would be Restricted for Products and Eliminated for Websites and Catalogs

Manufacturers of products sold to consumers and packaging companies should take notice of important new developments in California's labeling and warning requirements. On January 8, 2021, California's Office of Environmental Health Hazard Assessment (OEHHA) released proposed amendments to the short-form warning requirements under Proposition 65. OEHHA issued the proposed amendments to address what it considers overuse of the short-form safe harbor warnings. Its proposed rule has far-reaching effects and will require rewriting or eliminating the use of the short-form warning.

Under Proposition 65, manufacturers, suppliers and retailers of consumer products and other products to which Californians may be exposed must provide a warning if the product contains a listed chemical that is "known to the State of California to cause cancer, birth defects or other reproductive harm." The law provides a safe harbor for warnings that contain certain language specified in the regulations.

The current rules implemented in 2018 provide two options for warnings that receive safe harbor status – (1) a "long-form" warning that identifies at least one chemical substance for each endpoint (cancer or reproductive harm) for which the warning is being provided; and (2) a "short-form" warning that does not name any chemical substance, but only provides the relevant endpoint.

OEHHA intended the short-form warning as a solution for product sizes that could not accommodate the long-form warning, but the final rules did not limit use to those narrow circumstances. As a result, many companies have used the short-form warnings on a wide range of products regardless



of product size. OEHHA's initial statement of reasons (ISOR) notes that the extensive use of the short-form warnings has inhibited its ability to respond to consumer inquiries about specific products. The agency is also concerned that unless the warning identifies at least one specific chemical of concern, companies will over-warn, providing warnings on all their products without any analysis of whether a relevant chemical is detected in the product. OEHHA intends to address this practice of using the short-form warning "even when the business has no knowledge of an exposure to a listed chemical."

In response to these concerns, the proposed amendments:

- Restrict the use of short-form warnings to products whose labels cannot be larger than five square inches;
- Prohibit use of short-form warnings for internet or catalog warnings;
- Modify the short-form warning to require naming of one chemical substance for each endpoint and by adding the terms "risk" and "exposure"; and
- Clarify that short-form warnings may be used on small-size food products.

Given the broad use of short-form warnings on products of all sizes, the proposed rules will require comprehensive warnings updates by many companies that will need to add long-form warnings to their products that will be too large for short-form warnings under the new rules. Any short-form warnings in catalogs or on websites must also be replaced with long-form warnings. Further, by requiring companies to identify at least one chemical substance by name in the short-form warnings, all companies will be forced to rewrite their short-form warnings. This proposed change takes away one of the major benefits of the short-form warning option.

The proposed rule includes a one-year delay to its "operative" date to allow companies to implement the amendments. Companies will have an unlimited sell-through period to deplete inventory of any products with the current labels that are manufactured prior to the effective date of the amended rules. And in one important benefit, the rule clarifies that the short-form warning can be used for food products, clarifying an ambiguity in the existing regulations.

OEHHA's proposal will impact a wide range of companies selling products in California. The agency has invited comments on the proposed rules by March 8, 2021. Affected consumer product companies, distributors and retailers should consider submitting comments regarding the scope and impact of these proposed rules on their businesses.

King & Spalding's national Environmental, Health & Safety practice includes attorneys experienced with Proposition 65 and its requirements. If you have questions about OEHHA's proposed amendments, please contact our lawyers noted in the contact section.



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