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AMENDED NOTICE REGULATIONS FOR PROP 65

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OEHHA, the Office of Environmental Health Hazard Assessment, has released yet another iteration of the “fair and reasonable” standard for Prop 65 warnings. This March draft contains numerous changes mostly minor changes to try to increase the clarity of the language. Originally in March of 2014, OEHHA

issued a “pre-regulatory draft” of the regulations, and after several iterations OEHHA issued a revised formal proposal in January of 2016. These changes are a result of comments on that version. The Website called for in the original revision of the regulations to clarify warnings is already online see:

Among the more substantive changes are the following:

The last version allowed supplemental language in the warning as long as it does not contradict the language in the warning. However, with these changes the Supplemental information can be used as part of a warning only to the extent that it explains the source of the exposure or provides information on how to avoid or reduce the exposure.

The new draft eliminates the option that was previously provided that would allow a manufacturer to meet its labeling requirements by providing labeling materials and/or signs to downstream suppliers, now however the responsible party (manufacturer, importer, supplier, etc.) must actually provide those materials unless there is an agreement otherwise.

Retail seller is responsible for internet warnings.

The November draft imposed the warning obligation on the retailer where it has “actual knowledge” of the potential consumer product exposure and where there is no manufacturer or other responsible party available to provide the warning. The draft defined “actual knowledge” as occurring within two days after the retailer receives a Prop. 65 notice intent-to-sue notice, this period has been extended to five days. A retailer may label during that period and avoid liability.

A business may satisfy its warning obligation by including by name only one of the chemicals for which the business has determined that a warning is required.

Where there are chemicals in the product with different warning requirements (i.e., a carcinogen and a reproductive toxicant) then the warning must include one chemical from each group. OEHHA has also dropped language requiring that the named chemical actually be present in levels above the safe harbor level for that chemical.

A warning provided before the two year effective date will be deemed to be clear and reasonable.

OEHHA has also added new sections defining “consumer product exposure” and “environmental exposure” and the requisite warnings that must be displayed. They also eliminated any requirement for type size beyond requiring the warnings to be “conspicuous” in relation to other product label or sign language.

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