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PROP 65: REVISIONS TO PROPOSED REGULATIONS

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By: Lee N. Smith

California's Office of Environmental Health Hazard Assessment ("OEHHA") has released a new, revised version of the proposed Proposition 65 warning regulations apparently because they could not finish their rule making within one year, as required by law. The delay was caused reportedly by problems that the Agency was having in reconciling the diverse views demonstrated by the public comments and surveys generated by the last round of regulations. The Agency announced over the 2015 Thanksgiving holiday weekend that it was withdrawing the January 2015 proposal for the warning regulations and replacing it with this alternate proposal. Although the new regulations attempt to address some of the more controversial issues that were contained in the earlier versions there are still some portions of the revised regulations that will continue to trouble industry. Comments are due on January 22, 2016. The Notice can be found here:

http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/2NPRArticle112715.html

The new regulations revise the proposed safe harbor warning language to include the statement that the chemical "can" expose a person to proposition 65 chemicals and substances as opposed to the "will" expose language that had been suggested earlier. They also eliminated the regulation that would have required that the 12 most common Proposition 65 chemicals and the related compounds to be set out in the warning. The proposal provides little guidance or definition of what constitutes a clear and reasonable warning but does suggest that manufacturers and retailers name one of the chemicals subject to the warning and potential liability for failing to identify other chemicals that may be present.

The generic safe harbor warning has the following elements:

- 1.A symbol consisting of a black exclamation point in a yellow equilateral triangle. Where the sign, label or labeling for the product is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word "WARNING".



2. The word “WARNING” in all capital letters and bold print, and

(A) For exposures to listed carcinogens, the words, “This product can expose you to [name of one or more chemicals], a chemical [or chemicals] known to the State of California to cause For more information go to www.P65Warnings.ca.gov/product.”

(B) For exposures to listed reproductive toxicants, the words, “This product can expose you to [name of one or more chemicals], a chemical [or chemicals] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/product.”

(C) For exposures to listed carcinogens and reproductive toxicants, the words, “This product can expose you to [name of one or more chemicals] a chemical [or chemicals] 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/product.”

The Agency set forth an example in its Power Points for a January meeting:

Warnings provided pursuant to a court approved settlement or by a filed consent judgment are presumed to be “clear and reasonable” This provision does not apply to out-of-court settlements making that avenue of settlement even less attractive than before.

Another change in the proposal would prevent unnecessary labeling of mandatory inventory by dropping the sell through limitations. This was an issue because parts manufactured before the adoption would have to be relabeled if they were manufactured two years after adoption of these regulations. The November draft fixes this problem by providing that products manufactured prior to the deadline considered clear and reasonable if it is in compliance with the prior 2008 regulations.

The following is a summary of the significant revised regulations:

- 1) Two Years before it becomes effective;
- 2) An interested party can request approval of a warning method or content specific to a content area pursuant to Section 25607;
- 3) Supplemental information from the labeling can be provide to consumers, but it cannot contradict the warning;
- 4) A person is not required to provide separate warnings to each exposed individual;
- 5) A person that is a party to a court order settlement of final judgment establishing a method or content for a consumer product of environmental warning is deemed to be clear and reasonable;

- 6) Provides a method for the manufacturers to provide warning and instructions to retailers;
- 7) The regulation provides circumstances under which retailer is required to provide their own labels;
- 8) Retail seller is required to provide information to various parties as to the identity of manufacturers;
- 9) Parties can enter into agreements allocating liability for warnings;
- 10) Except as provided in Section 25603(c), a warning meets the requirements of this article if the name of one or more of the listed chemicals for which the warning is being provided is included in the text of the warning, to the extent that an exposure to that chemical or chemicals is at a level that requires a warning;
- 11) The regulations contain specific requirements for the new labels, including point type;
- 12) There are requirements for sales over the internet and catalog purchases;
- 13) If any label, labeling or sign that provides consumer information about a product is provided in a language or languages other than or in addition to English, then a warning for that product meets the requirements of this article only if the warning is also provided in the same language or languages on that label, labeling or sign.

Section 25607 provides warning methods and content for specific types of exposures that are subject to the warning requirements of Section 25249.6 of the Act, and must be used for the indicated products in order to meet the safe harbor requirement. These products include:

1. Food
2. Alcohol Specific warning requirements for alcohol products,
3. Wood Dust
4. Raw wood products
5. Furniture

The specific warnings for these products can be found in the direct regulations at Section 25607. Initial public comments are due on January 22, 2016.