

Client Alert

November 2014

Shifting Obligations – Developments in California Products and Chemical Law

With sweeping changes to California's Proposition 65 warning regulations on the horizon and the identification of potential products that will be subject to California's Safer Consumer Products (SCP) regulations, commercial enterprises and industries of all stripes should closely monitor their shifting obligations and liabilities when doing business in the Golden State. These recent developments could create the risk of more litigation, additional costly compliance requirements and erosion of a business's bottom line.

Proposition 65's Warning Regulations

The Office of Environmental Health Hazard Assessment (OEHHA) recently released a new draft of proposed revisions to its "clear and reasonable" warning requirements under Proposition 65. The draft revises OEHHA's March 7, 2014, proposal, which was met with substantial opposition from stakeholders. Nonetheless, if adopted, the proposed regulations still substantially increase the burden on businesses to ensure that Proposition 65 warnings comply with the increasingly detailed and complex requirements.

While some of the more onerous proposals of the March draft have been removed or augmented, the new draft will still give plenty of fodder to "bounty hunters" seeking targets for litigation.

Unlike the March draft, the most recent proposal partially retains the "safe harbor" warning provision, which allows businesses to display warnings that don't fully comply with all proposed requirements, so long as they are "clear and reasonable." However, as drafted, the "safe harbor" provision is unduly vague and circular, defining a "clear and reasonable" warning as one that complies with the stated requirements, while also maintaining that warnings other than those specified are not precluded, so long as they satisfy the requirements. This circular logic results in a more ambiguous "safe harbor" provision and gives little guidance to businesses on how to comply.

The content and display requirements still vary depending upon whether the method of exposure is via consumer product, environmental or occupational, and new subcategories have been added with their own unique requirements. For example, wood, furniture and diesel engines all have different standards. Such variances could require a business to employ a "patchwork" approach where several different warnings are necessary.

All warnings would be required to include a graphic of a black exclamation point within a yellow triangle, and must display the address of a website, maintained by OEHHA, providing further information regarding the exposure. If any associated labeling or signage is in a language other than English, the warning must also be given in that language.

In addition, the draft lists 12 specific chemicals¹ that trigger additional warning requirements. If the chemical being warned for appears on the list, it must be identified by name. Even if only infinitesimal

¹ Acrylamide, Arsenic, Benzene, Cadmium, Chlorinated Tris, 1,4-Dioxane, Formaldehyde, Lead, Mercury, Phthalates, Tobacco Smoke and Toluene.

levels of the chemical are present in a product or at a facility, business owners could find themselves subject to litigation for failure to include the chemical name on a warning that is otherwise compliant.

The proposed regulations allow for the “grandfathering” of warning requirements prescribed by court-approved settlements prior to 2015. However, nonparties to such settlements who may have adopted similar warnings would not automatically be afforded this protection, and would be required to either alter their warnings or undergo an undetermined and uncertain process of petitioning OEHHA to allow it to adopt the court-approved warning scheme.

OEHHA is expected to publish a formal rulemaking later in the year.

More Proposition 65 Changes Ahead?

In September, OEHHA revealed the areas of Proposition 65 that may be ripe for future regulatory action. Potential revisions to the following may be forthcoming:

- Alternative risk levels for chemicals in food products
- The “Naturally Occurring” regulation
- Clarifying the regulatory provisions on averaging exposures
- Prioritizing chemicals for the development of Safe Harbor levels
- Inclusion of postnatal developmental exposure data
- Updates to the Safe Use Determination process; and
- Where Interpretive Guidance is needed.

Check OEHHA’s website at www.oehha.ca.gov for more information on these topics.

Safer Consumer Products

Priority Products Under the SCP Regulations

In March 2014, the Department of Toxic Substances Control (DTSC) identified the first three “priority products” that will be subject to SCP regulations. Over the next year, DTSC will undergo formal rulemaking subjecting the following products to the SCP regulations:

- Children’s foam-padded sleeping products containing the flame retardant TDCPP, also known as chlorinated tris.
- Paint and varnish strippers, and surface cleaners containing methylene chloride.
- Two-component pressurized spray polyurethane foam (SPF) systems containing methylene diphenyl diisocyanates.

Upon completion of the formal rulemaking process, manufacturers, importers, distributors and even retailers of these priority products will find themselves subject to the SCP process and required to take action. All entities in the chain of commerce should keep abreast of future developments and understand the steps required to be in compliance.

For Hunton & Williams’ earlier client alert explaining the SCP regulations’ four-step process, please click [here](#).

DTSC's Priority Product Work Plan

As required by the SCP regulations, DTSC recently issued a draft Priority Products Work Plan that highlights the product categories and associated candidate chemicals that will be evaluated in order to select future additions to the priority products list. The draft work plan, which may be found [here](#), lists the following product categories:

- Beauty, Personal Care and Hygiene Products
- Building Products (Paints, Adhesives, Sealants and Flooring)
- Household, Office Furniture and Furnishings
- Cleaning Products
- Clothing
- Fishing and Angling Equipment
- Office Machinery (Consumables)

Following a public comment period, DTSC will finalize the work plan and begin the process of evaluating product and chemical combinations to identify the next priority products. The factors influencing DTSC's selection include the potential for widespread exposure, significant adverse impacts, potential impacts on sensitive populations and the availability of safer chemical alternatives.

For more information, please feel free to contact us or visit our [California Proposition 65 site](#).

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