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ENVIRONMENT

Proposition 65 changes could make matters worse

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In March, the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA), the agency that implements Proposition 65, released in draft form significant proposed changes to the Prop. 65 warning scheme. According to the OEHHA, it is considering new regulations aimed to provide the public with consistent, understandable information concerning exposures to listed chemicals. However, these proposed changes impose additional burdens on, and compliance costs to, businesses and could increase or prolong litigation. Above all, they may exacerbate consumer confusion over Prop. 65 warnings.

While the OEHHA proposes numerous changes to regulations, arguably the most significant changes impact food and other consumer products subject to Prop. 65 warnings. First, the model warning language in the existing regulations would no longer be an optional "safe harbor," but instead would become mandatory to satisfy the "clear and reasonable" requirement for Prop. 65 warnings. As a result, companies would lose the flexibility they now have to craft clear and reasonable warnings using alternative language. That flexibility can be important for conveying clearer warnings in a given context.

Second, the required warning language for food and consumer products would include a statement that the user will be exposed to a listed chemical. This is a significant departure from the current model warning language, which states only that the product contains a listed chemical, and does not require an exposure assessment. Whether a product causes an exposure is often a complex legal and technical question. The issue is often hotly disputed in litigation and this proposal could chill settlements that are in the public interest.

Third, products that cause an exposure to certain specific chemicals would be required to identify the specific chemical(s) to which the user is exposed in the warning. Those specific chemicals are acrylamide, arsenic, benzene, cadmium, chlorinated tris, 1,4-dioxane, formaldehyde, lead, mercury, phthalates, tobacco smoke and tolune. This imposes rigidity, which may not be appropriate. One question arises as to whether an exposure to multiple chemicals requires multiple warnings, which could be impractical.

Fourth, within 30 days of first providing a warning to the public, a company would have to provide a detailed report to the OEHHA, which the agency would in turn publish on its website. The reporting obligation includes potentially sensitive information, such as contact information for private label manufacturers, the anticipated route of exposure to the listed chemical, the anticipated level of human exposure, and actions to minimize or eliminate exposure. The OEHHA's pre-regulatory proposal also includes a continuing obligation to update this report as information becomes available about exposures to additional chemicals.

Not only would this reporting requirement place a significant burden on businesses to prepare and potentially compromise their proprietary information, it would likely create more legal disputes over what constitutes compliance and lead to more litigation rather than less. In this context, consumer confusion is likely to increase not decrease. Many settlements include "no admission of liability" clauses where defendants expressly deny an exposure has occurred. It will be difficult to reconcile such court approved settlement terms with the OEHHA's website reporting program.

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Fifth, the OEHHA's draft proposed regulations would exempt parties to settlements approved by a court prior to Jan. 1, 2015. Acknowledging the precedential effect of court-approved settlements is a positive step. However, this exemption does not apply to other companies in the same industry who sell the same product covered by a court-approved settlement. The legitimate efforts of those companies to conform their warnings for similar products to the court approved settlements in an effort to minimize consumer confusion will be thwarted. Inconsistent warning regimes are likely to persist for a long time.

This exemption also fails to address the plight of persons who implemented the safe harbor warning language in a good faith effort to comply with Prop. 65, and thus avoided Prop. 65 litigation in the first instance. Penalizing those companies seems particularly unjust.

It is important to emphasize that the draft proposed regulations are a "pre-regulatory proposal," and therefore no changes have yet been formally proposed or adopted. Moreover, substantial changes to the draft proposed regulations may still occur prior to the eventual initiation of a formal regulatory proceeding.

The OEHHA held a pre-regulatory public workshop on April 14, at which comments were aired by industry and advocacy groups, including the California Chamber of Commerce, Environmental Law Foundation, the American Beverage Association, and others. Many comments focused on the perceived impact (rise or decline) these pre-regulatory proposals will have on litigation. Feedback also was solicited on the costs of implementing these changes and less-expensive alternatives.

The OEHHA is accepting public comments through June 13. After receiving public input, the OEHHA has signaled it will propose formal regulations by early summer 2014, which will be subjected to the required notice and comment rulemaking procedures.

All persons subject to Prop. 65 may participate in the regulatory process to address potential burdens and concerns these new regulations would create. The agency has indicated that it hopes the final regulations will be adopted by summer 2015.

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