



Industries Urge California To Scrap Plan Expanding Prop. 65 Warning Rules

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Multiple state and national industry groups are urging California regulators to shelve or entirely rescind a proposal to expand requirements for Proposition 65 “short form” warning requirements on myriad products containing toxic chemicals, claiming the process of reconfiguring existing labels would overwhelm thousands of companies.

“These proposed revisions to the short-form warning are inappropriately timed, as these changes would be extraordinarily difficult, expensive and burdensome, after companies just went through and spent significant resources to implement changes in 2018” to the warning rules, Laurie Holmes, representing the Motor & Equipment Manufacturers Association, said during a March 11 virtual public hearing on the proposal held by California’s Office of Environmental Health Hazard Assessment (OEHHA).

The regulatory amendments “would pose significant challenges for motor vehicle suppliers, as many members manufacture, package and sell as many as 80,000 consumer products and [stock keeping units (SKUs)],” she added. “As a result, this proposal could cost as much as \$12 million per company to relabel the tens of thousands of products our members manufacture and sell.”

At issue is OEHHA’s [Jan. 8 proposal](#) to amend regulations that took effect in 2018 governing short-form “clear and reasonable” warnings for chemicals in products that are known to the state to cause cancer or reproductive toxicity. OEHHA is accepting written comments on the proposal through March 29.

“Implementation of the warning regulations has revealed the need for express limits on the use of the short-form warning for consumer products,” reads the office’s Initial Statement of Reasons for the amendments.

“The regulation did not limit application of the short-form warning to a maximum label surface area. While OEHHA intended for this warning option to only be used for small products or containers with insufficient space for the longer warning, businesses have used the short form warning on a wide range of consumer products that have more than enough label space for the longer warning.”

The proposal would “improve the short-form warnings by communicating additional information about chemical exposures to consumers including the chemical name, so the consumer can obtain more specific information about it on the OEHHA website.”

Specifically, the rulemaking would: “only allow use of the short-form warning on products with 5 square inches or less of label space”; eliminate use of short-form warnings for internet and catalog warnings; clarify how short-form warnings can be used for food products; and require that the name of at least one chemical be included in the short-form warning.

As proposed, the rule would provide a one-year phase-in period for existing products if their makers choose to use the modified short-form warning. OEHHA is also proposing to allow an “unlimited sell-through period for products that had compliant warnings when they were manufactured, thus allowing businesses to avoid recalling items in the stream of commerce to apply the modified short-form warning.”

Litigation Fears

But during the March 11 hearing, representatives of many of the industry groups, led by the California Chamber of Commerce and Washington, D.C.-based Consumer Brands Association (CBA), argued that the one-year phase-in period is unworkable.

Kevin Washington, representing Illinois Tool Works, Inc., which he said makes a variety of commercial and industrial components and finished goods, said the company opposes the regulatory amendments “because of the recentness of the changes effective in 2018, the one-year transition called for under the current proposal -- not to say anything of the proposal and its timing being introduced in the middle of a pandemic and our struggles of the country to recover.”

Adam Regele, policy advocate for the California Chamber of Commerce and a lead figure in the industry coalition, said during the meeting that “contrary to OEHHA’s characterization that the amendments are merely ‘clarifying guidance,’ the proposed changes to the short-form warning requirements are so extensive it would require every single business currently utilizing short-form warnings to overhaul their entire program in order to comply.”

This will “impact hundreds and thousands of businesses selling into California, including food and ag products, among many others,” he said.

Both Regele and John Hewitt, CBA’s senior director of state affairs, also said that the OEHHA proposal, if implemented, will only exacerbate what industry officials claim are the hundreds of frivolous Prop. 65 lawsuits and legal notices against companies filed every year.

“In the midst of a global pandemic, we saw a significant rise -- from 2019 to 2020 -- in levels [of] 60-day notices” to sue companies filed by private law firms that serve as Prop. 65 enforcers, “and just in the period of 2015 to 2020, an over 250-percent increase in notices issued by private enforcers,” Hewitt said.

Other companies and industry groups whose representatives objected to the OEHHA proposal during the meeting include the American Supply Association, American Coatings Association, American Herbal Products Association, Auto Care Association, the Air-Conditioning, Heating, and Refrigeration Institute, Rheem Manufacturing Co., Association of Home Appliance Manufacturers, and the California Restaurant Association.

No speaker on the March 11 hearing supported the proposal.

Earlier this year, attorneys representing many of the affected industries and companies warned stakeholders that the OEHHA proposal threatened to significantly drive up various costs and complicate production processes.

“The proposed amendments would make it more costly and difficult for companies to provide Proposition 65 warnings, especially companies that have numerous SKUs or multicomponent products from numerous suppliers,” said [a Jan. 11 blog post](#) by three Troutman Pepper lawyers -- AnnMarie Sanford, Angela Levin, and Jeff Goldman.

“Companies would be required to identify at least one chemical in the warning, which many have been hesitant to do because of potential negative reactions from customers. Further, companies that are able to use the amended short-form warning on products would nevertheless be required to provide the full warning on internet and catalog listings,” added the attorneys. -- *Curt Barry* (cbarry@iwppnews.com)

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