

Proposition 65 “Reform”: Consumer Protection or Litigation Stimulation?

Proposed new regulations may have unintended consequences.

Despite the California governor’s call for meaningful Proposition 65 reform and a reduction in frivolous enforcement lawsuits, the California Office of Environmental Health Hazard Assessment (OEHHA) is proposing new Proposition 65 warning requirements that could substantially increase Proposition 65 litigation risks to businesses operating or selling products in California. OEHHA, the agency charged with implementing and enforcing Proposition 65, is proposing substantial changes to the regulations governing the content of warnings that must be provided to consumers regarding products that contain chemicals listed as “known” to cause cancer or reproductive toxicity. The most significant of these proposed regulatory changes include onerous new warning label language and a requirement that businesses submit to OEHHA very burdensome information concerning the chemicals in products that require Proposition 65 warnings, even when the business would not typically be expected to have such information. OEHHA recently held its first public workshop to discuss its initial draft of the proposed regulations, and will accept written comments until May 14, 2014. OEHHA plans to initiate the formal rulemaking process this summer, with the goal to adopt final regulations in 2015.

Proposition 65 in a Nutshell

Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986,¹ prohibits certain businesses from exposing the public to chemicals “known to the state to cause cancer or reproductive toxicity” without prior warning.² Proposition 65’s stated intent is to protect California citizens and the state’s drinking water sources from chemicals known to cause cancer, birth defects or other reproductive harm, and to inform citizens about products that contain such chemicals, and occupational or environmental exposures to such chemicals. OEHHA maintains the list of chemicals that are subject to Proposition 65’s warning requirements, which is regularly updated and which is often criticized for including substances that many other government agencies do not consider to be harmful.³

Proposition 65 contains a “bounty hunter” provision that allows for aggressive enforcement.⁴ While the California Attorney General or local prosecutors may bring civil actions to enforce Proposition 65, the law also allows private parties — who were not themselves exposed — to sue, so long as they provide notice to the California Attorney General or local prosecutors.⁵ In such actions, plaintiffs are entitled to 25 percent of civil penalties,⁶ as well as reimbursement of attorneys’ fees and costs, which often exceeds any other part of the plaintiff’s recovery. As the costs of defending a failure to warn action can be steep, the law has had the unintended consequence of creating a cottage industry of private enforcers and plaintiffs’ attorneys that annually file hundreds of lawsuits seeking settlements from defendant product manufacturers, suppliers, and/or retailers.

Governor's Call for Reform and OEHHA's Proposed Rulemaking

On May 7, 2013, Governor Brown proposed reforming Proposition 65. The governor stated that reform is necessary to “revamp Proposition 65 by ending frivolous ‘shake-down’ lawsuits.” According to Governor Brown, “Proposition 65 is a good law that’s helped many people, but [is] being abused by unscrupulous lawyers.”⁷ On October 5, 2013, Governor Brown signed into law Assembly Bill (AB) 227⁸ which amended Proposition 65 by providing certain businesses a 14-day opportunity to cure specified violations of the law’s existing warning requirements.⁹ The California Legislature passed the bill as “urgency” legislation in order to avoid unnecessary litigation and to facilitate compliance with Proposition 65. Despite the governor’s desire to end “shake-down” lawsuits, the California Legislature did not enact any other substantial Proposition 65 reforms during the 2013 legislative session.

In response to the governor’s call to action, OEHHA held a pre-regulatory workshop on July 30, 2013, to gather public input on potential changes to the Proposition 65 warning regulations. OEHHA then developed “potential draft” regulations and a “potential draft” Initial Statement of Reasons, and released those for public review on March 7, 2014.¹⁰

OEHHA’s potential draft regulations contain numerous changes to the Proposition 65 warning regime, some of which are very troubling and could harm unsuspecting businesses that are doing nothing wrong. OEHHA asserts that the changes are “intended to implement the Administration’s vision concerning improving the quality of the warnings being given and providing certainty for businesses subject to the Act.”¹¹ OEHHA also states that the proposed revisions will accomplish this, in part, by providing “more clarity to the Proposition 65 warning requirements and more specificity regarding the minimum elements for providing a ‘clear and reasonable’ warning for exposures that occur from a consumer product, including foods and exposures that occur in occupational or environmental settings.”¹² However, the proposed revisions to the Proposition 65 regulations could undermine Governor Brown’s desire to reduce frivolous litigation because the proposed revisions could provide plaintiffs new grounds to challenge businesses’ efforts to comply with Proposition 65.

Summary of Key Proposed Regulatory Changes and Their Potential Effects

The proposed Proposition 65 regulations substantially change the content of the warning language that businesses must provide to consumers for products sold in California that contain Proposition 65-regulated chemicals.¹³ The proposed regulations also require businesses to submit extensive product and chemical information to OEHHA “so that interested individuals are adequately informed of the chemicals involved in the exposure, how they may be exposed to those chemicals, and any steps they may be able to take to reduce or eliminate the exposure.”¹⁴ These changes, discussed further below, appear to contradict Governor Brown’s goal of reducing frivolous Proposition 65 lawsuits. Rather, the proposed regulations could cause unnecessary consumer anxiety over negligible perceived health risks, while subjecting businesses to burdensome new requirements and substantial new “shake-down” litigation risks.

Proposed Section 25604: New Reporting Requirements for Businesses

Proposed Section 25604(a) of the potential draft regulations would require businesses that sell products in California requiring a Proposition 65 warning to submit 10 categories of information regarding consumer exposure to the listed chemical to OEHHA within 30 days of providing the warning.¹⁵ This submission would be a new and extremely burdensome regulation for many businesses. The relevant information would include, but would not be limited to, “[t]he type of environmental exposures the warning is intended to cover, if any, and the affected area”; “[t]he anticipated route, routes, or pathways of exposure to the listed chemical for which the warning is being provided”; “[r]easonably available

information concerning the anticipated level of human exposure to the listed chemical, if known”; and “[i]nformation concerning actions a person can take to minimize or eliminate exposure to the listed chemical, if any.”¹⁶ Very few businesses have this information or conduct tests of every product they sell, and developing this type of information could be extremely costly, especially for retail businesses that merely sell products made by others. For example, companies often rely on vendors and manufacturers, many of which are located overseas, to conduct product testing. Because Proposition 65 applies to “any person in the course of doing business” in California, the proposed regulations would require the companies that merely sell the products in California either to obtain testing data from foreign manufacturers/suppliers, which often does not exist, or to conduct their own costly tests for each product they sell. Further, information concerning “routes, or pathways of exposure” and actions to “minimize or eliminate exposure” goes far beyond the content of a test to determine the presence of a particular chemical in a product, and would likely require costly scientific expertise and opinion far beyond that which most retailers would be expected to have in any other jurisdiction.

Gathering and providing this type of information could greatly increase Proposition 65 litigation risks to businesses, as plaintiffs might be able to sue businesses over the type and adequacy of the information provided to OEHHA, though whether such a lawsuit might arise under Proposition 65’s “failure to warn” standard remains unclear. Such suits could expose businesses to additional liability under Proposition 65, particularly because the standards for providing the information to OEHHA are extremely vague. Precisely what information is “reasonably available” or concerns “actions a person can take to minimize or eliminate exposure to the listed chemical” is open to interpretation, and could provide new grounds for litigation. Moreover, whether these requirements would apply only to new warnings provided on new products introduced to the stream of commerce after the adoption date of the new regulations, or to *all* product warnings, including warnings that may have already been provided on certain existing products for many years remains unclear.

In addition, proposed section 25604(c) of the potential draft regulations would require that “[u]pdates to the information submitted under subsection (a) must be provided within 30 days after the person providing a warning becomes aware that...any other updates to information required by subsections 1 to 11 [which list the information businesses must submit to OEHHA] are needed.”¹⁷ This requirement would create a perpetual monitoring and reporting obligation that does not otherwise exist and that would far exceed requirements in other jurisdictions, further subjecting businesses to additional litigation risk. For instance, would a business need to update the information submitted to OEHHA every time new “[i]nformation concerning actions a person can take to minimize or eliminate exposure to the listed chemical” is discovered? If so, numerous questions arise as to what constitutes new information and at what point this information rises to a level requiring disclosure to OEHHA. This provision could force businesses to defend themselves against countless new claims that they have provided inadequate disclosures.

Proposed Section 25607.2: Content for Consumer Products Exposure Warnings for Consumer Products Other than Foods, Prescription Drugs, Medical Devices and Dental Care

Existing Proposition 65 regulations state that if a product contains the following warning language, the message is deemed to be “clear and reasonable” and in compliance with Proposition 65: “WARNING: This product contains a chemical known to the State of California to cause cancer [and/or] reproductive toxicity.”¹⁸ OEHHA’s proposed changes would no longer permit businesses only to warn of the presence of a chemical known to cause cancer and/or reproductive toxicity. According to OEHHA, “it has become clear that using the word ‘contains’ does not communicate the fact that individuals will actually be exposed to a chemical if they use a given consumer product.”¹⁹ OEHHA’s potential draft regulations

provide two alternative warning options for businesses, both of which would require including much more detailed information in Proposition 65 warnings, thereby substantially increasing the law's warning requirements.

The first option would require businesses to use a product warning label that contains (1) the international health hazard symbol ; (2) the word **"WARNING"** in all capital letters and bold print; (3) a statement that "[t]his product will expose you to a chemical [or chemicals] known to the State of California" to cause cancer and/or birth defects or other reproductive harm; and (4) a citation to the website www.P65Warnings.ca.gov.²⁰ Stating that a product "exposes" an individual to a Proposition 65-listed chemical is often not accurate for products that may contain a listed chemical but may present no route of easy exposure to that chemical. The new required warning language in the potential draft regulations implies that a product has a greater likelihood of exposure than may actually exist.²¹

The second option, permitted except where prohibited by federal law, allows for a more simple warning that includes (1) the international health hazard symbol ; (2) the word **"WARNING"** in all capital letters and bold print no smaller than 10 point type; (3) the words "Cancer Hazard" or "Reproductive Hazard" in no smaller than 8 point type; and (4) a citation to the website www.P65Warnings.ca.gov.²²

Regardless of the warning option a business would select, this regulatory change will require businesses to spend resources to change their existing warning labels and update their labeling procedures, unless a product is subject to a court-approved settlement prescribing warning content and methods entered prior to January 1, 2015.²³ Any errors that occur in revising existing Proposition 65 warnings could subject businesses to additional litigation risks.

Proposed Section 25605: Chemicals, Substances or Mixtures That Must be Disclosed in Warnings

Proposed Section 25605 of the potential draft regulations would also require that, in addition to the above-described warnings, the warning must state the name of certain specified chemicals if they are present in the product.²⁴ The draft regulation lists the following 12 chemicals that must be identified if they are present: (1) acrylamide; (2) arsenic; (3) benzene; (4) cadmium; (5) chlorinated tris; (6) 1,4-dioxane; (7) formaldehyde; (8) lead; (9) mercury; (10) phthalates; (11) tobacco smoke; and (12) toluene. OEHHA considers these chemicals commonly found in consumer products, including foods, and commonly involved in occupational or environmental exposures.²⁵

While in the past a single Proposition 65 warning could cover multiple chemicals without further specificity, that option may no longer be available if a product contains one or more of the 12 chemicals OEHHA identified. Under the potential draft regulations, if a product with a standard Proposition 65 warning contains one of those 12 chemicals, the failure to identify the specific chemical could render the warning ineffective — regardless of whether the seller knows the chemical is in the product. This requirement also would expose businesses to substantial new litigation risks, and likely additional testing costs to determine whether any of the 12 specified chemicals are contained in the products.

Future Rulemaking Process

OEHHA's potential draft regulations are a "pre-regulatory proposal," and OEHHA has noted the draft may change substantially before OEHHA eventually initiates a formal regulatory proceeding.²⁶ As such, the regulations have not yet been published for official public review and comment under the Administrative Procedure Act. OEHHA held a pre-regulatory workshop on April 14, 2014, regarding the potential draft regulations, during which OEHHA conducted a question-and-answer session and opened the discussion

for public questions and comments. OEHHA's timeline for revising and adopting the final regulations is as follows:

- The public may provide written comments to OEHHA regarding the potential draft regulations prior to May 14, 2014.
- OEHHA plans to propose formal regulations in early summer 2014.
- OEHHA plans to adopt final regulations in early summer 2015.

Given the early release of the potential regulations, the business community should take advantage of the significant opportunity to participate in the rulemaking process. Whether or not the California Legislature will attempt to enact more meaningful statutory reforms to Proposition 65 pursuant to Governor Brown's call for reform remains unclear. Any additional reforms also could substantially impact OEHHA's potential draft regulations.

Businesses selling products in California that may be subject to Proposition 65 should seek advice from experienced counsel to understand the full implications of the regulatory process and any efforts such businesses might undertake to affect the outcome. If OEHHA's potential draft regulations remain substantially unchanged during the rulemaking process, businesses in California will likely face significant additional Proposition 65-related costs and litigation, even for inadvertent issues that cause no public harm. Such effects would contradict the governor's call to curtail Proposition 65 abuses. Attorneys in Latham & Watkins LLP's Environmental, Land and Resources Department have significant experience in Proposition 65 matters and can assist businesses in the rulemaking process as well as with developing strategies to comply with Proposition 65.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Michael Feeley

michael.feeley@lw.com
+1.213.891.7895
Los Angeles

DJ Moore

dj.moore@lw.com
+1.213.891.7758
Los Angeles

Winston P. Stromberg

winston.stromberg@lw.com
+1.213.891.8983
Los Angeles

Michele L. Leonelli

michele.leonelli@lw.com
+1.213.891.8903
Los Angeles

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <http://events.lw.com/reaction/subscriptionpage.html> to subscribe to the firm's global client mailings program.

Endnotes

- ¹ Cal. Health & Safety Code § 25249.5 *et seq.* The people of the State of California enacted Proposition 65 as a ballot initiative in 1986. The law also bars businesses from discharging such chemicals into drinking water. Cal. Health & Safety Code § 25249.5.
- ² Cal. Health & Safety Code § 25249.6.
- ³ Cal. Health & Safety Code § 25249.8(a).
- ⁴ Cal. Health & Safety Code § 25249.7.
- ⁵ *Id.*
- ⁶ Cal. Health & Safety Code § 25249.12(d).
- ⁷ Press Release, Office of Governor Edmund G. Brown, Jr., "Governor Brown Proposes to Reform Proposition 65." (May 7, 2013), available at <http://gov.ca.gov/news.php?id=18026>.
- ⁸ AB 227 (Gatto), Chapter 581, Stat. of 2013. Codified at Cal. Health & Safety Code § 25249.7.
- ⁹ These businesses include businesses that sell alcoholic beverages, restaurants that sell foods and beverages that contain chemicals formed during preparation of the food and beverages on the premises, and certain businesses that cause exposures to environmental tobacco smoke and vehicle exhaust.
- ¹⁰ The "potential draft" regulation is available on the OEHHA's website at <http://www.oehha.ca.gov/prop65/warnings/pdf/DraftWarningRegs030714.pdf>.
- ¹¹ Initial Statement of Reasons Accompanying Pre-Regulatory Draft of Potential Amendments to Cal. Code Regs., tit. 27, art. 6, p. 4 ("Draft Initial Statement of Reasons"), available at <http://www.oehha.ca.gov/prop65/warnings/pdf/ISORWarningreg030714.pdf>.
- ¹² *Id.* at p. 2.
- ¹³ Proposition 65 contains various exemptions from warning requirements. Businesses are not required to provide a warning on a consumer product if an exposure to a chemical in that product occurs below "safe harbor" levels established by the OEHHA. Cal. Health & Safety Code § 25249.10, subd. (c).
- ¹⁴ *Id.* at p. 9.
- ¹⁵ Proposed Cal. Code Regs., tit. 27, § 25604, subd. (a) (March 7, 2014).
- ¹⁶ *Id.*
- ¹⁷ *Id.* at subd. (c).
- ¹⁸ Cal. Code Regs., tit. 27, §§ 25603, subd. (a), 25603.2.
- ¹⁹ Draft Initial Statement of Reasons, p. 19, emphasis added.
- ²¹ Proposed Cal. Code Regs., tit. 27, § 25607.2, subd. (a) (March 7, 2014), emphasis added.
- ²¹ In addition, the potential draft regulation contains proposed new warning requirements for food products that (at section 25607.4) are similar to the requirements for non-food consumer products. Proposed Cal. Code Regs., tit. 27, § 25607.4 (March 7, 2014). The requirements warn consumers that "[c]onsuming this product will expose you to a chemical known to the State of California" to cause cancer and/or birth defects or other reproductive harm." It is conceivable that consumers could interpret this as a declaration that they will, or are likely to suffer from cancer or reproductive harm as a result of coming into contact with, or eating the food containing the warning.
- ²² Proposed Cal. Code Regs., tit. 27, § 25607.2, subd. (b) (March 7, 2014).
- ²³ Proposed Cal. Code Regs., tit. 27, § 25603 (March 7, 2014).
- ²⁴ Proposed Cal. Code Regs., tit. 27, § 25605 (March 7, 2014).
- ²⁵ Draft Initial Statement of Reasons, p. 12.
- ²⁶ Draft Initial Statement of Reasons, p. 1.