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RECENT CHANGES TO CALIFORNIA PROPOSITION 65

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In August 2018 important changes will come into effect in California with respect to the so-called “Proposition 65”, i.e. the California Safe Drinking Water and Toxic Enforcement Act of 1986 (the “Act”)². The Act, among other things, prohibits businesses from exposing individuals to carcinogens and reproductive toxins without first giving them clear and reasonable warning of such toxic hazards. Proposition 65 was introduced in California in 1986, and has since constituted a nuisance for many business selling their products in California. The law requires companies that expose the public to hazardous chemicals to provide warnings about such exposure and possible risks connected with such exposure. Note that Prop. 65 does not prohibit the use of harmful substances, but only requires that the warning be provided.

The idea underlying Prop. 65 is that the consumer must be informed and placed in a position to decide independently whether to avoid exposure to hazardous substances. Proposition 65 requires companies to provide “clear and reasonable” warning before exposing any person in California to chemicals identified by the state as carcinogenic or causing reproductive harm. The new rules, promulgated by the Office of Environmental Health Hazard Assessment (OEHHA) on August 30, 2016, significantly modify the way companies need to provide the warnings. Until the new rules come into effect in August 2018 warnings can either follow the previous or the new criteria. Companies that have already been subject to law suits and have adapted to the requirements imposed by settlement agreements may continue to apply the measures in the form dictated by the settlements themselves.

The changes introduced by the new regulations among others regard the following topics:

- **The chemicals involved must be specifically identified.** If the

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² See a description in our Newsletter, <http://vallalaw.com/va-articles/2015/7/24/california-proposition-65-a-reminder-for-foreign-manufacturers>

notice is not affixed to the product, but for example on shelves or in stores, at least one of the substances must be identified by name. The type of damage that this substance may cause (cancer, reproductive toxicity, or both) must also be specified. In addition, a link to the California website, www.P65Warnings.ca.gov, must be posted on the warning.

- **Warning Symbol:** The warnings, with the exception of food alerts, must have a triangular graphic sign with an exclamation point, if possible in yellow, according to the standard dictated by the OEHHA. An example of warning is as follows:



WARNING: This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer, and [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

- **Abbreviated warning:** If the warning is reported on the product with the above symbol, the new regulation allows an abbreviated form where the space is inadequate, such as: “WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov .”
- **Warnings must be provided before or during the sale:** It will not be enough to provide the warning inside the product’s box or in the operating instructions; it must be visible before the purchase decision is made. If the product is sold on the Internet, the warning must be provided on the website and be easily identifiable.
- **Link to the OEHHA Web site:** All warnings must include a link to OEHHA Proposition 65, www.P65Warnings.ca.gov
- **Other languages:** The warning must be provided in English but, if the product contains consumer information in other languages, the warning must be translated into those other languages as well.
- **Responsibility:** The new regulation clarifies the responsibilities of the participants in the distribution chain.
- **Specific Fields:** The new regulation provides details on how the warning must be provided in specific sectors, such as food, restaurants, dental products, furniture, wood, closed parking areas, etc., and contains specific provisions for environmental or workplace exposure.

Therefore, companies that already provide Prop 65 warnings will need to adopt the new formats, revise the substance, and ensure that the warnings are posted in the manner required by the new regulations. Companies that have not yet adapted will have to adjust as soon as possible to avoid the risk of being sued before California courts.

The penalties in case of non-compliance with the requirement to affix the notice may reach \$2,500 per day for each violation, in addition to any other applicable penalties depending on the severity and extent of the exposure or the intent, in addition to legal fees. On average, a company involved in these actions incurs costs of around \$ 50-70,000, or in rare, more serious cases, of millions of dollars.

One of the most controversial aspects of the law concerns the possibility for any subject, acting in the public interest, to take the role of prosecutor. Any private citizen can file a lawsuit against any business that fails to post adequate warnings about the presence of chemicals known to cause cancer or reproductive harm. The private enforcer may seek an injunction, penalties of up to \$2500 per violation, per day, and an award of attorneys' fees. The majority of the cases are settled and the defendant undertakes to reformulate the product in order to eliminate or reduce harmful substances to agreed limits, provide the warning to consumers, or withdraw the product from the California market. Often, third-party companies that sell similar products can participate in the settlement through an opt-in agreement, and share in the substance of the settlement, against payment of penalties, legal fees and financial support for environmental organizations.

Note that manufacturers who provide components or raw materials upstream of the production chain are also required to comply with Proposition 65 and provide the warning, if the end-products are expected to be destined for California. Notably, the new rules clarify the allocation of responsibilities among the participants in the distribution chain.

We must not underestimate the scope of these rules, which only exempt companies with fewer than 10 employees. Many foreign manufacturers exporting their products to the United States have already been involved, including balsamic vinegar, coffee, leather and vinyl products, ceramic products, crystal, potato chips, espresso machines, food supplements, costume jewelry, clothing accessories, fruit juices, bicycle accessories, gym accessories, hydraulic components, bronze or brass accessories, and cosmetics.

While preserving the environment and limiting exposure to harmful products is of the utmost importance, this law has been criticized for being a tool in the hands of "bounty hunters" most concerned about their fees that protecting the environment. Still, it is important to be familiar with its provisions before entering the Californian market.

Requests for information or insights on the issue discussed in this article may be addressed to majda.barazzutti@vallalaw.com. This article is for information purposes only and does not constitute legal advice. The information contained herein may be outdated or incomplete, and shall in no way be taken as an indication of future results. The transmission of this article is not intended to create, nor does its receipt constitute, an attorney-client relationship between preparer and reader. You should not act on the information contained in this article without first seeking the advice of an attorney.