

**MEMORANDUM**

**From:** Martin J. Hahn  
Xin Tao

**Date:** November 30, 2017

**Re: Sunset of the Proposition 65 Interim BPA Warning Regulation**

The Proposition 65 Interim BPA warning regulation that allows companies to rely on a generic warning posted in California retail establishments will sunset on December 30, 2017. Food and beverage companies that have BPA containing packages in California and that have been relying on the interim BPA warning regulation for compliance should reassess their Proposition 65 warning obligations prior to December 31, 2017.

By way of brief background, effective May 11, 2016, OEHHA started requiring warnings for consumer products containing BPA under the Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as Proposition 65 or Prop 65). Due to the high percentage of the canned and bottled food and beverages that were packaged with BPA-containing materials in California at that time, OEHHA adopted an emergency regulation that allowed the temporary use of a standard point-of-sale warning message (e.g., posting of warnings at checkout stands in retail stores) for BPA. <sup>1/</sup> In July 2016, OEHHA proposed an interim rule that essentially extended the temporary regulation through December 30, 2017. The interim regulation also required food companies that exercised this option to provide OEHHA with a list of all food products in which BPA was intentionally used in the manufacture of the can lining or jar or bottle seals. <sup>2/</sup>

As of today, there are a total of over 23,000 entries of canned or bottled food products listed in the publicly-accessible OEHHA database for products packaged with BPA-containing materials. <sup>3/</sup> The sheer number of listed products in the database suggests that many food and beverage companies have been relying on the interim BPA warning regulation for compliance. On December 31, 2017, those food and beverage companies with products listed in the OEHHA database that have not phased out the use of BPA in their packaging should assess their options for compliance with Proposition 65. Companies should consult with legal counsel when assessing whether they will

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<sup>1/</sup> OEHHA, "Notice of Emergency Action to Amend Section 25603.3 Title 27, California Code of Regulations Warnings for Exposures to Bisphenol A From Canned and Bottled Foods and Beverages," available at: <http://oehha.ca.gov/proposition-65/cnr/notice-emergency-action-amend-section-256033-title-27-california-code>.

<sup>2/</sup> OEHHA, "Proposed Regulatory Text – Warnings for Exposures to Bisphenol A from Canned and Bottled Foods and Beverages," available at: <http://oehha.ca.gov/media/downloads/cnr/07192016bpregs.pdf>.

<sup>3/</sup> OEHHA's BPA list: <https://www.p65warnings.ca.gov/bpalist> (available until December 30, 2017).

have an obligation to provide a Prop 65 warning and if so, the type of warning that should be required.

### **Exemption for Low Levels of BPA**

Products can be considered exempt from the Prop 65 warning requirements if the exposure to a listed chemical is below the safe harbor level (for reproductive toxicants, also known as a Maximum Allowable Dose Level or MADL). <sup>4/</sup> As of today, OEHHA has developed an MADL of 3 micrograms per day for dermal exposures from solid materials but has not established an MADL for oral BPA exposure. In the absence of an OEHHA oral safe harbor, a company can self-determine whether it is appropriate to develop its own safe harbor level based on sound toxicology principles. However, a self-determined safe harbor can be challenged by bounty hunters, OEHHA, or district attorneys in California. Further, under Section 25900 of the Proposition 65 regulations, “no knowing and intentional exposure occurs” if a company can show that based on testing conducted by a laboratory with a properly validated method, all the reported results show that the chemical in question was not detected. <sup>5/</sup> To the extent testing of products and packaging reveals there are no detectable levels of BPA migrating into the food or migrating to the consumer via dermal exposure from handling the packaging, a company could conclude it is not subject to the Prop 65 warning requirements.

### **Product-Specific Prop 65 Warning**

In its Q&A on the reporting requirements for BPA, OEHHA listed the following two examples as compliant BPA Prop 65 warnings: <sup>6/</sup>

- The business can provide a warning on the product label that says, “WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.” or
- The business may provide a warning on the product that says “WARNING: Consuming this product can expose you to chemicals including bisphenol A (BPA), which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food) (link is external)”;

Compliance also could be achieved by placing the warning on the retail shelf at the point of display that discloses the presence of the listed substance in the product. Unlike the interim warning that could be generic to canned and bottled foods in the retail store, the warning must be specific to the product that is exposing the consumer to the BPA.

Moreover, under the newly adopted Article 6 Clear and Reasonable Warnings of the OEHHA Proposition 65 regulations, there are three options for warning consumers about products purchased at retail that contain a significant level of BPA (1) on the label, (2) at the retail shelf, or (3) an electronic disclosure that is activated prior to the selection and purchase of the product (the consumer cannot be forced to seek the disclosure). While the new Article 6 does not become fully operative until August 30, 2018, it does entitle a person to comply with its warning requirements prior to that time. Below, we identify the warning content requirement in the said Article 6 for food products:

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<sup>4/</sup> 27 CCR § 25801.

<sup>5/</sup> 27 CCR § 25900.

<sup>6/</sup> OEHHA “Q&A on New Reporting Requirements for Businesses Using the Point of Sale Safe Harbor Warning for BPA Exposures from Canned and Bottled Foods,” *available at*: <http://oehha.ca.gov/proposition-65/qa-new-reporting-requirements-businesses-using-point-sale-safe-harbor-warning-bpa>.

***“WARNING: Consuming this product can expose you to chemicals including BPA which is known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).”***

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We will continue to closely monitor all developments related to California’s Prop 65 requirements. If you have any questions, or if we can be of any assistance, please do not hesitate to contact us.