

ARTICLE

News from California: Labels Are About to Get Longer

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Providing ingredient information to consumers continues to be a regulatory priority in the Golden State. In the last few weeks, a proposed update to California's Proposition 65 (Prop 65) and the January 2021 implementation date for the labeling requirements under the California Cleaning Product Right to Know Act of 2017 promise to expand the ingredient information that manufacturers must include on certain product labels.

Prop 65 - Time Running Short for Short Form Warnings?

To comply with Prop 65, which requires warnings for the presence of listed carcinogens and reproductive toxicants, many businesses currently provide a "short form warning" on labels. The short form warning was authorized by the Office of Environmental Health Hazard Assessment (OEHHA) in regulations adopted in August of 2016 and looks like this:

Unlike a long form warning, it does not list any of the substances that necessitated the warning and does not include the familiar language "This product can expose you to ____." and the affirmation of the State's knowledge "which is known to the State of California to cause ____."

OEHHA is now proposing to significantly restrict use of the short form warning to products with labels that are 5 square inches or less. For reference, the front face of a box of playing cards is almost 9 inches

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square. Additionally, the proposed updated short form warning would have to specify at least one of the chemicals present and the associated harm(s). The proposed regulations also include modifications to the allowable short form warning for food products.

One might argue that instead of eliminating any meaningful daylight between the long and short form warnings while retaining both, OEHHA should propose a single warning—along the lines of the modified short form warning that it now proposes—that would be acceptable on all consumer products not otherwise subject to a customized warning (e.g., alcoholic beverages, furniture products, etc.). Anyone wishing to make that argument to OEHHA— or any argument concerning the proposed updated warning regulations – has until March 8, 2021 to do so.

The California Cleaning Product Right to Know Act – So Many Ingredients, So Little Space

Effective January 1, 2021, the California Cleaning Product Right to Know Act requires manufacturers and suppliers of cleaning products to disclose detailed ingredient information on product labels over-and-above what is required by the Federal Hazardous Substances Act (FHSA) or the Occupational Safety and Health Administration’s Hazard Communication Standard (OSHA HazCom).

The Act, which was signed into law by California Governor Jerry Brown in October 2017, imposes both **online** and **on-label** ingredient disclosure requirements for a wide variety of “designated” cleaning products—including, air care products, automotive cleaning products, general cleaning products, or a polish or floor maintenance products.

The Act's **online** ingredient disclosure requirements have been in effect since January 1, 2020. The Act’s **on-label** ingredient disclosure requirements became effective on January 1, 2021. Among other things, the Act’s **on-label** ingredient disclosure requirements mandate that labels list:

- Each intentionally added ingredient contained in the product that is included on one of 22 designated lists of concern (e.g. California’s Prop 65 list and the European Union Candidate List of Substances of Very High Concern) and each fragrance allergen included on Annex III of the EU Cosmetics Regulation No. 1223/2009 when present in the product at a concentration at or above 0.01 percent.

OR

- Each intentionally added ingredient contained in the product that is not claimed as Confidential Business Information (CBI) and to the extent that there are fragrance allergens in the product, the statement “Contains fragrance allergen(s).”

Notably, the Act defines CBI to exclude intentionally added ingredients that appear on one of the 22 designated lists and offers no exemption for intentionally added ingredients present in *de minimis* amounts. Effectively, this means that all intentionally added ingredients that appear on a designated list must be disclosed on product labels. This includes ingredients that are not required to appear on labels by the FHSA or on labels or Safety Data Sheets (SDSs) by OSHA HazCom. Thus, to comply with the Act, companies that

formulate regulated products need to have wholistic lists of the ingredients in their products from their suppliers. Noncompliant products risk prosecution under California's Unfair Competition Law (UCL), which provides for monetary penalties of up to \$2,500 per violation.