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OEHHA Proposes Changes to Proposition 65's Short-form Warnings

PROPOSITION 65 Your right to know!

The California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) is currently in the process of developing and issuing regulations that would restrict the circumstances under which businesses would be permitted to use the short-form warning provisions of the State's Proposition 65 law. Proposition 65 requires businesses to provide a clear and reasonable warning to consumers of exposures to chemicals which have been identified by California as causing cancer or reproductive toxicity. In 2016, OEHHA overhauled the regulations implementing Proposition 65's clear and reasonable warning requirements. As part of this overhaul, OEHHA promulgated regulations that provided businesses with the option of using certain prescribed "short-form warnings."

OEHHA's effort to amend the short-form warning requirements were prompted by several concerns about how such warnings were actually being used. Chief among these concerns were the following: (i) Businesses were using short-form warning labels despite there being sufficient surface area on the product or product packaging to provide a longer, more detailed warning; (ii) Businesses that used short-form warnings did not provide any information as to which chemicals the consumer was being exposed; and (iii) Businesses were using the short-form warning as a protective measure in circumstances where they did not really know whether there was any exposure to a listed toxic chemical at all.

OEHHA's proposed regulatory changes to address these concerns include the following: (i) A requirement limiting the use of the short-form warning in situations where the available surface on the product or product packaging is less than twelve square inches; (ii) A requirement that a short-form warning include the identification of at least one of the listed toxic chemicals to which the consumer is being exposed. This second requirement is designed, at least in part, to act as a disincentive for businesses that might otherwise use the short-form warning strictly as a protective measure.

The comment period for these proposed regulations just closed on January 21, 2022. Currently, there is no precise timeline for the promulgation of final regulations. However, in the Initial Statement of Reasons that accompanied the original proposal back in January 2021, OEHHA indicated that businesses would have a one-year grace period to implement the new requirements after final regulations are promulgated. The proposed regulations would also provide for an unlimited "sell-through" period for products that had compliant warnings when they were manufactured.

The EHS Professional's Role in Advising the Finance & Accounting Function: A Year in the Life

Author's Note: *This is the prologue to a series of articles that will periodically appear in future editions of The Cubical. These articles focus on an in-house EHS lawyer's role in supporting the corporate finance & accounting function. Although the focus of these articles will be on an in-house lawyer, the reality is that a variety of different EHS professionals have important roles in supporting the finance & accounting function. I am calling this series "A Year in the Life."*

It's a typical Monday morning in mid-March. The clocks have just moved forward. While everyone is looking forward to the end of Winter, the sleet and snow that greeted the early morning commuters unfortunately tell a different story. The warm and sunny days of late Spring and Summer are not quite here just yet.

While the weather outside might be lousy, you arrive for your first day of work with nervous anticipation. After spending five years cutting your teeth as an environmental attorney in the private practice realm, you've made the leap to an in-house career as the EHS attorney for a relatively small, but growing publicly-traded manufacturing company. After spending most of your first day filling out forms and meeting new colleagues, you'll spend the next several weeks getting to know a wide variety of the officers, directors, managers, employees, consultants, and outside lawyers who work for your new corporate client. You will also travel to some of the company's manufacturing facilities to dive more deeply into the company's EHS issues and to get to know the company's operations and EHS managers.

As you begin your new in-house career, one thing that jumps out at you pretty early is the importance of your role in advising the company's finance and accounting function. As an experienced EHS attorney, you have become familiar with the rules relating to the accruals and disclosures associated with contingent environmental liabilities. However, now that you're working shoulder-to-shoulder with the Finance & Accounting Department, you're really in it "neck-deep."

Fortunately, you have several resources at your disposal to help you get up to speed on the company's financial reporting activities. You immediately go to the investor page of the company's website and access the annual 10-K report that was just filed a month ago. You pour through this document, paying particularly close attention to the various sections of the report that relate to the company's environmental liabilities. You also take note of the company presentations on the investor webpage. These presentations often provide lots of useful information regarding financial performance and strategic direction in a form that is easy to digest.

After spending the better part of the afternoon pouring through these documents, you feel as if you have a pretty good handle on the material environmental and legal issues associated with the company's financial performance. And, it's not a moment too soon. Before you know it, you'll be thrown into the lion's den. The month of March is the last month for the company's first quarter reporting period, and the Finance & Accounting Department is already working on the reporting and disclosure activities for this period. Even though you haven't yet been with the company for a month, the first series of e-mails, attachments, and requests associated with such reporting and disclosure activities are already showing up in your Inbox!

In the March edition of The Cubical, we'll find out what happens when you're asked by the Finance & Accounting Department to review the company's environmental remediation accruals for the First Quarter of the Fiscal Year.

EPCRA Section 312 Tier II Reports Due March 1st

Any EHS professional serving in a facility-level EHS management function quickly becomes accustomed to the rhythms of the environmental reporting calendar. One of the "red-circle" dates on that calendar is March 1st. This is because March 1st is the deadline for the submittal of the facility's Tier II inventory reporting form under Section 312 of the Emergency Planning and Community Right-to-Know Act, or EPCRA. Under EPCRA Section 312, a facility is required to report inventory ranges and certain other required information for all non-excluded hazardous chemicals present at the facility during the previous calendar in amounts exceeding their respective reporting thresholds. For most hazardous chemicals, the reporting threshold is 10,000 lbs. However, for chemicals considered to be "extremely hazardous substances" under EPCRA § 302, the reporting threshold is 500 lbs. In addition, certain fuels and petroleum products have their own special reporting thresholds.

A facility's Tier II report must be submitted to the State Emergency Response Commission (SERC), the Local Emergency Planning Committee (LEPC), and the local fire department. The agency, bureau, or office that serves the role of the SERC will vary from state to state. In a number of states, including Georgia, South Carolina, and Texas, the state's environmental agency serves as the SERC. However, in several states, the state-level emergency management agency serves as the SERC. These states include California, Illinois, and North Carolina. In Louisiana, the Louisiana State Police's Emergency Service Unit serves as the SERC. Finally, in Pennsylvania, the Department of Labor & Industry is the SERC. Most SERCs require the Tier II report to be submitted through E-plan - an emergency response information platform administered by the University of Texas at Dallas - or some other on-line platform.

The purpose of the Tier II reporting requirements under EPCRA § 312 is to provide first responders with critical information regarding the location and hazards associated with chemical stored at a facility. Such information enables such first responders to respond more effectively to emergency events, while protecting their own health and safety at the same time.

During the course of preparing its Tier II report for the 2021 reporting year, a facility may discover violations of Tier II reporting requirements for previous reporting years. If this should happen, the facility should consider whether it would be in its interest to disclose such violations under EPA's Audit Policy. Under EPA's Audit Policy, a facility may achieve up to a 100% reduction in the gravity-based component of a penalty if it discloses violations of regulatory requirements with in 21 days after it first knew, or should have known, of such violations, and if it meets certain other requirements under the Policy. EPA's Audit Policy can be particularly useful when a facility discovers past violations of the Tier II reporting requirements under EPCRA § 312, or the toxic release inventory (TRI) reporting requirements of EPCRA § 313. (For more information on the use of EPA's Audit Policy in the context of EPCRA § 313 violations, see EPA's Audit Policy: TRI Noncompliance as a Textbook Application in the June 2021 edition of The Cubical. This edition of the newsletter can be accessed by clicking here.)

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