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In Formal Comments, WLF Criticizes Proposed Changes to California's Prop 65 Warnings

(In Re: Proposed Amendments to Prop 65 "Clear and Reasonable" Warnings)

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—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged California’s Office of Environmental Health Hazard Assessment (OEHHA) to scrap proposed amendments to regulations implementing California’s controversial Proposition 65 (Prop 65). In formal comments filed earlier today, WLF argues that, unless the proposed regulations are withdrawn, California businesses (and all companies doing business in California) will face a substantial increase in litigation exposure.

Adopted as an initiative measure by California voters in 1985, Prop 65 requires every business whose products contain any detectable amount of one of more than 900 chemicals to provide consumers with “clear and reasonable warnings” of exposure to chemicals “known to cause cancer or reproductive toxicity.” The law provides for enforcement lawsuits to be brought by for-profit “bounty hunter” plaintiffs. Although the revisions have been styled by OEHHA as much needed “reforms,” WLF’s comments detail why the proposed amendments will do *nothing* to address the chief regulatory burdens and abuses arising from Prop 65.

For example, WLF argues that OEHHA’s new requirement that up to 12 specific chemicals be listed on all “clear and reasonable” warnings is not only unsupported by any scientific basis, but represents a significant departure from Prop 65’s longstanding policy of providing a generic safe harbor for the business community. If implemented, the detailed warning requirement would not only burden businesses with the need to identify consumers’ potential exposure to *each* specific chemical found in the company’s products, but it would markedly increase the risk of frivolous litigation for failing to do so.

WLF also noted that OEHHA’s failure to take into account the Supreme Court’s perennial scrutiny of government efforts to compel speech might make the entire Prop 65 regulatory regime ripe for First Amendment challenge.

Upon filing its comments, WLF issued a statement by Senior Litigation Counsel Cory Andrews: “OEHHA’s proposed amendments would exacerbate an already complicated, controversial, and burdensome warning requirement without offering any scientific basis for doing so. By inviting an avalanche of new litigation over the content of warnings, OEHHA would radically transform Prop 65 from merely a deeply flawed regulatory regime into a legal game of ‘gotcha’ to benefit plaintiffs’ lawyers.”

WLF is a public interest law firm and policy center that regularly advocates in defense of free enterprise and against regulatory regimes that threaten to raise costs for all consumers.