Prop 65 Warnings for Benzophenone to be Required Beginning June 22, 2013

Effective June 22, 2013, California’s Office of Environmental Health Hazard Assessment (OEHHA) will require warnings for products containing benzophenone identifying the chemical as a known carcinogen to the State of California under the Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as Proposition 65). See Cal. Health & Safety Code §§ 25249 et seq. Benzophenone is a chemical frequently used in food packaging materials including inks and dyes.

Proposition 65 requires the governor of California to publish, at least annually, a list of chemicals known to the State to cause cancer or reproductive toxicity. Among other things, the law prohibits the knowing exposure of any individual to a significant amount of a listed chemical without first providing a “clear and reasonable warning” to such individual. Cal. Health & Safety Code § 25249.6. The law requires these warnings to be provided for consumer product, workplace, and environmental exposures unless “the person responsible can show that the exposure [to a listed carcinogen] poses no significant risk assuming lifetime exposure at the level in question,” or, for a listed reproductive toxin, that the substance “will have no observable effect assuming exposure at 1,000 times the level in question.” Cal. Health & Safety Code § 25249.10(c).

These no significant risk levels (NSRLs) for carcinogens and maximum allowable dose levels (MADLs) for reproductive toxins provide safe harbors from the need to issue a warning. That is, warnings are not required where the use of a listed substance results in exposures that are below the respective NSRLs and MADLs.

Warning requirements go into effect for a designated chemical one year after OEHHA officially lists a chemical, and violators currently are subject to hefty civil penalties of up to $2,500 per day for each exposure. Injunctive relief is also available. The law may be enforced by the California Attorney General, local district and city attorneys or, so-called “bounty hunters” — private citizens permitted to bring enforcement actions if the State declines to do so or does not act within 60 days after it is notified of an alleged violation.

Proposition 65 authorizes OEHHA to list chemicals identified in California’s Labor Code as carcinogens. Cal. Health & Safety Code § 25249.8(a). The Labor Code in turn considers substances that have been identified as carcinogens by the International Agency for Research on Cancer (IARC) as substances known to the State to cause cancer for Proposition 65 listing purposes. Cal. Lab. Code § 6382(d). OEHHA justified the listing of benzophenone under Proposition 65 based on the classification by IARC for benzophenone as a Group 2B substance, defined as being “possibly carcinogenic to humans.”

OEHHA issued a Notice of Intent to list benzophenone as a substance known to the State to cause cancer on January 20, 2012. After the comment period ended on April 6, 2012, OEHHA officially proceeded with listing benzophenone under Proposition 65 on June 22, 2012. IARC designated benzophenone as a Group 2B substance in 2011, but the formal monograph was not published until after January of 2012. Thus, OEHHA initiated proceedings to list benzophenone under Proposition 65 before IARC released the monograph containing the data and analysis supporting the classification.
Although OEHHA has not yet established an NSRL for benzophenone that would provide an exemption from the warning requirements of Proposition 65 for exposures below this threshold, OEHHA has identified benzophenone as a first priority chemical for development of an NSRL. In the meantime, companies are responsible for determining whether their use of the chemical is likely to result in significant exposures thereby prompting the need for a warning. Cal. Code Regs. tit. XXVII §§ 25701 -25703.