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Proposition 65 Labeling Obligations Anticipated for CBD Products Containing THC

California's Office of Environmental Health Hazard Assessment (OEHHA) added tetrahydrocannabinol, better known as "THC," to the list of chemicals requiring specific labeling for retail sale in California. Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act of 1986, mandates that businesses that sell consumer products—including food—notify Californians about certain chemicals that are in those products. THC is the cannabinoid, one of the diverse chemical compounds in cannabis plants, responsible for the psychoactive effect produced by marijuana commonly associated with a "high."

What Happened?

OEHHA [added](#) "cannabis (marijuana) smoke" and THC to the Proposition 65 list of chemicals requiring a warning (Prop. 65 List) effective January 3, 2020. The agency determined that both cannabis smoke and THC "were shown to cause reproductive toxicity." OEHHA will begin enforcement of these required warnings in January 2021.

As marijuana smoke was originally listed as a carcinogen in 2009, the requirement to add Proposition 65 warning language is not new for those products meant to be smoked or vaporized. Warnings related to marijuana smoke must now include both warnings for reproductive harm and cancer. The addition of THC to the Prop. 65 List, however, represents a notable change and will trigger warning requirements for a wider range of cannabis products, including those that are not smoked.

Importantly, OEHHA has imposed warning requirements for THC without providing any safe harbor levels. According to [OEHHA](#), safe harbor levels identify "a level of exposure to a listed chemical that does not require a Proposition 65 warning," meaning that businesses do not need to provide a warning if exposure to a chemical occurs at or below these levels. Without a safe harbor level for THC, any detectable amount of THC in a product would trigger a Proposition 65 warning obligation, unless the business can demonstrate to OEHHA that the anticipated exposure level will not pose a significant risk of reproductive harm.

What About CBD?

Under the 2018 Farm Bill, hemp may only contain as much as 0.3% THC on a dry weight basis. The Farm Bill's definition of hemp has encouraged a proliferation of new products of consumer goods containing cannabidiol (CBD), a cannabinoid that may be derived from hemp. CBD-containing products come in a variety of forms, such as tinctures, food products, and lotions.

Given that CBD products may contain as much as 0.3% THC, they may also contain THC in amounts sufficient to trigger Proposition 65 warnings. Failure to comply with Proposition 65 warning requirements can result in statutory violations of \$2,500 per violation per day. Proposition 65 contains a private right of action, and allegations of non-compliance can be brought by private parties and/or the California Attorney General. Because violations of Proposition 65 may pose significant litigation risks, manufacturers of CBD-containing products should take steps now to implement stringent new labeling requirements and evaluate necessary steps towards compliance, such as using CBD isolate, which eliminates THC, in consumer products.

Authors

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