



## MEMORANDUM

### New California Proposition 65 Warnings

May 25, 2018

California Proposition 65 requires businesses<sup>1</sup> to provide *clear and reasonable* warnings to Californians about significant **exposures to chemicals that cause cancer, birth defects or other reproductive harm**. By law, a **warning must be given** for listed chemicals<sup>2</sup> unless the exposure is low enough to pose no significant risk of cancer or is significantly below levels observed to cause birth defects or other reproductive harm.

California's *Office of Environmental Health Hazard Assessment (OEHHA)* has promulgated changes to *California's Proposition 65* regulations (*Prop 65*) that go into effect this August. The [regulatory amendment](#),<sup>3</sup> makes significant changes to the decades old *safe harbor warnings* that business have relied on and which have been incorporated in thousands of Prop 65 settlement agreements.

The amendments significantly change what companies are required to put on their warnings **if** they want safe harbor protection from potential legal challenges under the regulations. The safe-harbor warnings are not a requirement but they are intended to provide a safe harbor.<sup>4</sup> Utilizing them is probably the most effective method of avoiding litigation, but companies can comply with Prop 65 by using any warning that is *clear and reasonable*.

### Sample Comparison of New Warnings to Current Warnings

A typical current Proposition 65 warning states,

“WARNING: This product contains a chemical known to the State of California to cause cancer.”

A sample new warning could look like this:

“**⚠ WARNING: This product can expose you to chemicals including arsenic, which is known to the State of California to cause cancer. For more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).**”

### DETAILS OF CHANGES

Several important ways in which the regulations change as of August 30, 2018, are:

#### **Consumer products warnings will have to:**

- Include the word "**WARNING**" in all capital letters and bold print;
- Include the statement that the product “**can expose you to**” a Proposition 65 chemical, (*instead of saying that the product “contains” the chemical*);
- include **the name of at least one listed chemical that prompted the warning;**

<sup>1</sup> Businesses with fewer than 10 employees and government agencies are exempt from Proposition 65’s warning requirements and prohibition on discharges into drinking water sources.

<sup>2</sup> **List Updated today: [May 25, 2018 Proposition 65 List](#) \*\***

<sup>3</sup> The OEHHC provides a link to the final regulations [here](#).

<sup>4</sup> A *safe harbor* is a provision of a statute or a regulation that specifies that certain conduct will be deemed not to violate a given rule.

- Include the Internet address for OEHHA’s new Proposition 65 warnings website, [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov), which includes additional information on the health effects of listed chemicals and ways to reduce or eliminate exposure to them;
- Include a **triangular yellow warning symbol** on most warnings (*it can be white and black only if the label for the product does not use the color yellow*).



The new regulations further specify different safe-harbor warnings for products that contain only carcinogens, only reproductive toxicants, both listed carcinogens and listed reproductive toxicants, or a listed chemical that is both a carcinogen and reproductive toxicant.

For example, the new safe-harbor warning for exposure to a chemical that is listed as **both** a carcinogen **and** a reproductive toxicant will have to state:



**WARNING:** This product can expose you to chemicals including [*the name of one or more chemicals*], which is [*are*] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

Accordingly, the new regulations will ultimately require companies to review the listed chemicals present in a product and provide a particular warning based on the listed chemicals and the method of transmission in order to comply with the safe-harbor provisions.

### **Short Form Warnings**

The new regulations provide alternative safe-harbor language for warnings that are placed directly on a product or a product’s immediate packaging. For an on-product warning, the new regulations shorten the above warning to, e.g.:



**WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

The *short-form* allows companies to shorten their warnings on products, catalogs and web sites to just a few words, in addition to the symbol: “**WARNING:** Cancer,” or “**WARNING:** Reproductive Harm,” or “**WARNING:** Cancer and Reproductive Harm,” followed by the url [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov). However, companies using a *short-form* warning face different size requirements: it “must be in a type size no smaller than the largest type size used for other consumer information on the product. **In no case shall the warning appear in a type size smaller than 6-point type.**” Accordingly, short form warnings can only be used on products with very small labels.

A *Short-Form Warning* must be in compliance **with:** Section 25602(a)(4), which provides:

a warning meets the requirements of this subarticle if it complies with the content requirements in Section 25603 and is provided using one or more of the following methods:

...

(4) A short-form warning on the label that complies with the content requirements in **Section 25603(b)**. The entire warning must be in a type size no smaller than the largest type size used for other consumer information on the product. In no case shall the warning appear in a type size smaller than 6-point type; **and**

**with** Section 25603(b), which reads:

(b) A short-form warning may be provided on the product label using all the following elements:

(1) The **symbol** required in subsection (a)(1).

(2) The word **“WARNING:”** in all capital letters, in bold print.

(A) For exposures to listed carcinogens, the words, **“Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”**

(B) For exposures to listed reproductive toxicants, the words, **“Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”**

(C) For exposures to both listed carcinogens and reproductive toxicants, the words, **“Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”**

**The new warning regulations also:**

**Provide for website warnings for products purchased over the Internet;**

**Provide for warnings in languages<sup>5</sup> other than English in some cases;**

**Clarify the roles and responsibilities of manufacturers and retailers in providing warnings;**  
and,

**Add new “tailored” warnings** that provide more specific information for certain kinds of exposures, products, and places, such as for *alcoholic and nonalcoholic beverages, food, prescription drugs, dental care, vehicles, enclosed parking garages, amusement parks, service stations, and designated smoking areas.*

For example, the regulations provide that safe harbor warnings for **furniture** must include both a warning on the product, its package or its labeling **and** a notice on **either a sign in the store or the printed receipt**. Under the revisions to section 25607.13, subpart (a)(2), the language for the signage or the receipt has been changed as follows:



**NOTICE:** Some furniture products can expose you to chemicals known to the State of California to cause cancer and/or birth defects or other reproductive harm. Please check the on-product label for warning information.

### **The safe harbor font size requirements have changed.**

The regulations prescribe that on-product warnings for consumer products must be in a **type size no smaller than the largest type size used for other "consumer information" on the product, but the font must be at least 6-point type**. OEHHA defines consumer information as "Warnings, directions for use, ingredient lists, and nutritional information." Many of the specific tailored warnings have other font size requirements. For example, for environmental exposure warnings, the warning signs posted at public entrances in affected areas must be at least 72-point font.

Businesses should consult the regulations to see what font size is required for a given product or area warning. *See, 27 CCR § 25607 Specific Product, Chemical and Area Exposure Warnings, et seq.*<sup>6</sup>

<sup>5</sup> When a consumer product sign, label or shelf tag used to provide a warning includes consumer information in a language other than English, the warning must also be provided in that language in addition to English. Facilities that provide signage in non-English languages would also have to provide any required warnings in those languages, in addition to English.

## Internet Warnings

The new regulations now address Internet warnings. To comply with the safe-harbor provisions for Internet purchases, the new regulations require companies to include the safe-harbor warnings on the product display page, with a clearly marked hyperlink using the word “**WARNING**” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. - A small and uninformative link at the bottom of a webpage will no longer suffice; requiring the purchaser to search for the warning in the general content of the website is not considered prominently displayed.

## Warning Responsibilities for Retailers

Unless they label their products, manufacturers, producers, and packagers must document that they have notified retailers of the need to provide warnings and provided all necessary warning materials. Retailers are only responsible for providing warnings if they have been notified but have failed to provide the warnings, if they are selling “house brands,” or in other limited circumstances. However, another change allows a manufacturer, producer, packager, importer, supplier or distributor to shift warning responsibility to retailers by providing specified information and warning labels to the “authorized agent” of the retailer. The shift is accomplished by “providing a **written notice** directly to the **authorized agent** for a retail seller who is subject to Section 25249.6 of the Act, which:

- (1) States that the product may result in an exposure to one or more listed chemicals;
  - (2) Includes the exact name or description of the product or specific identifying information for the product such as a Universal Product Code or other identifying designation;
  - (3) Includes all necessary warning materials such as labels, labeling, shelf signs or tags, and warning language for products sold on the internet, that satisfies Section 25249.6 of the Act;
  - (4) Has been sent to the authorized agent for the retail seller, **and** the manufacturer, producer, packager, importer, supplier, or distributor has obtained confirmation electronically or in writing of receipt of the notice.
- (c) If the manufacturer, producer, packager, importer, supplier, or distributor of a product is complying with this section by providing a written notice directly to the authorized agent for the retail seller:
- 1) The **notice must be renewed, and receipt of the renewed notice confirmed electronically or in writing by the retail seller’s authorized agent within six months during the first year after the effective date of this section by no later than February 28, 2019, then annually** thereafter during the period in which the product is sold in California by the retail seller.

In that regard, the new regulation revises the definition of “Authorized agent,” to now include a monitored electronic mailbox or post office box, designated by a retail seller to receive notices from product manufacturers, producers, packagers, importers, suppliers, and distributors under this article. *(the original regulations defined “authorized agent” as the person “designated by a retail seller to receive notices,” which, the retailer may or may not have.)*

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<sup>6</sup> Westlaw provides the new regulations at [25607. Specific Product, Chemical and Area Exposure Warnings](#) – scroll down to the bottom of the page and click on the arrow after *Documents In Sequence*. However, may be easier to access via the link at the end of this document to the side-by-side comparison of new and old regulations.

### **Products Manufactured Before August 2018 / Unlimited sell-through period**

Products manufactured before August 30, 2018 will not need new warnings **if** they meet the requirements that were in effect at the time of their production.

This sell through period provides a respite from companies having to track down and pull products from retailers' shelves and re-label products with the new Prop 65 warnings. OEHHA has provided an unlimited sell-through period for products manufactured prior to the August 30, 2018, effective date that are compliant with the previous Article 6 safe harbor provisions.

However, all products manufactured after August 30th need to comply with the new Prop 65 requirements.

Manufacturers should clearly identify the date of manufacture so that retailers and customers will know that they are receiving Prop 65 compliant products.

### **Special Warnings Approved by Courts in Previous Legal Settlements Remain in Effect**

The regulation states that OEHHA recognizes court-ordered settlements and judgments that impose specific Proposition 65 warnings.

**The OEHHA has prepared a document to assist businesses with the new warnings:**

[\*Clear And Reasonable Warnings Questions And Answers For Businesses\*](#)

**For a side-by-side comparison of the current and new warning regulations, see**

<https://oehha.ca.gov/media/downloads/crn/side-sidearticle6.pdf>.

[\*California's Proposition 65 Website addressing new regulations\*](#)