



Environment, Land Use & Natural Resources ADVISORY ■

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New Changes to Proposition 65's Warning Requirements Are on the Horizon

by [Greg Berlin](#)

On October 27, 2023, the California Office of Environmental Health Hazard Assessment (OEHHA) issued a notice of proposed rulemaking and announcement of public hearing on proposed amendments to Proposition 65's safe harbor warning requirements for consumer products, food products, internet sales, and passenger or off-highway motor vehicle parts and recreational marine vessel parts. If adopted, the proposed amendments will impact businesses that manufacture, package, distribute, or sell consumer products, including food products, in California that may result in an exposure to any of the 900+ chemicals on the Proposition 65 list.

OEHHA has scheduled a public hearing both remotely and in person on December 13, 2023 to receive comments about this action. OEHHA is also accepting public comments until December 20, 2023.

Background on Proposition 65

OEHHA is the lead agency that implements Proposition 65 and has the authority to promulgate and amend regulations to further the purposes of the law.

Proposition 65 requires businesses with 10 or more employees to provide a "clear and reasonable" warning before they cause an exposure to any of the 900+ chemicals listed as known to the state to cause cancer or reproductive toxicity. Proposition 65 also prohibits the discharge of listed chemicals to sources of drinking water.

OEHHA's regulations include safe harbor warning methods and content that businesses can use to comply with Proposition 65. OEHHA's safe harbor warning regulations are nonmandatory guidance. However, businesses that display the safe harbor warnings are presumptively in compliance with Proposition 65, so displaying the safe harbor warnings would protect against potential litigation. Businesses that do not display safe harbor warnings will have the burden to prove their warnings are "clear and reasonable" under the law.

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Proposition 65 imposes civil penalties of up to \$2,500 per violation. The statute also provides that any company that “threatens to violate” the warning requirement may be “enjoined in any court of competent jurisdiction.”

The California attorney general, any district attorney, and certain city attorneys are authorized to enforce Proposition 65. In addition, any individual (even someone who has not suffered harm or ever consumed the product at issue) may bring a private enforcement action. The private enforcer must first serve a 60-day notice of violation on the alleged violator before proceeding to file a lawsuit. These private enforcers take home 25% of all civil penalties imposed as a “bounty” for their efforts, and their attorneys routinely recover their fees.

Alleged Problems to Be Addressed by OEHHA’s Proposal

OEHHA’s regulations include safe harbor warning methods and content that businesses can use to warn about consumer product exposures to listed chemicals. Existing “long-form” safe harbor warnings require businesses to identify at least one chemical for which the warning is being provided, identify the specific endpoint (e.g., cancer or reproductive harm), include a warning symbol on most warnings, and provide the internet address for OEHHA’s Proposition 65 warnings website. For example, a long-form warning for listed carcinogens would appear as:

⚠ WARNING: This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

However, OEHHA also allows businesses to provide “short-form” warnings under certain circumstances in response to stakeholder concerns that the long-form warning language would not fit on small products without crowding out other necessary information. The existing optional “short-form” warnings can be placed directly on a product, its label, or its immediate container or wrapper, and do not require businesses to identify a chemical in the warning. For example, a short-form warning for a listed carcinogen would appear as:

⚠ WARNING: Cancer – www.P65Warnings.ca.gov.

According to OEHHA, not requiring a specific chemical to be included in the short-form warning has caused its overuse. OEHHA believes many businesses are using the short-form warning prophylactically because it protects from potential litigation and does not require identification of a specific chemical exposure. OEHHA contends some businesses are using short-form warnings as a litigation avoidance strategy.

Notably absent from OEHHA’s analysis is that Proposition 65’s short-form warnings are likely “overused” due to the law’s aggressive private enforcement regime, which allows bounty hunters to seek significant sums of money based on bare allegations. Specifically, the law only requires private enforcers to prove the mere presence of a chemical in a product before shifting the burden to a business to prove an affirmative

defense – for example, that the product does not result in an “exposure,” the chemical is naturally occurring in a food product, the business is exempt from Proposition 65, or a constitutional defense. As the court of appeal explained in *Consumer Defense Group v. Rental Housing Industry Members*, “these provisions make the instigation of Proposition 65 litigation easy – and almost absurdly easy at the pleading stage and pretrial stages.”


OEHHA could likely address alleged concerns of “overwarning” by amending its regulation for notices of violation to require private enforcers to provide more detailed information in their notices of violation about the specific products at issue and requiring private enforcers to produce to the attorney general and the alleged violator specific categories of evidence supporting the allegations in the notice of violation, including laboratory results from an accredited laboratory and an exposure assessment. Instead, OEHHA has attempted to address the alleged issue of overwarning and fear of litigation by amending its safe harbor warning regulations to place more burdens on businesses.

Changes to Short-Form Warning Content for Consumer Products


OEHHA’s proposed amendments to short-form warnings for consumer products would require identification of a specific chemical exposure the warning is being given for. OEHHA believes that if a business must identify a chemical exposure, the business will be less likely to use the warning prophylactically and more likely to warn only when Proposition 65 requires it. OEHHA’s proposal would make the following changes to the short-form warning content for consumer products:

- Give businesses the option to include the signal words “**CA WARNING**” or “**CALIFORNIA WARNING**” instead of “**WARNING**” to allow businesses to target warnings to California consumers and to clarify that the warning is being given pursuant to California law. The proposed amendments also allow businesses to use these signal words for long-form warnings.
- Include the specific name of the chemical for which the warning is being provided.
- Require additional words such as “Cancer risk from exposure to [chemical]” or “Can expose you to [chemical], a carcinogen,” and similar language for reproductive toxicants.
- Clarify that short-form warnings must be “prominently displayed.” Short-form warnings still must appear no smaller than 6-point type.
- Provide that the existing short-form warnings may be displayed for a product manufactured and labeled before the amended regulations become effective.

As an example, a short-form warning for a consumer product exposure to the carcinogen formaldehyde would state:

 **CA WARNING:** Cancer risk from exposure to formaldehyde. See www.P65Warnings.ca.gov.

or

 **WARNING:** Can expose you to formaldehyde, a carcinogen. See www.P65Warnings.ca.gov.

Changes to Short-Form Warning Content for Food Products

The proposed amendments would also add additional signal-word options and a short-form warning option to the tailored warning content provisions for food exposures. Specifically, as with consumer product exposures, businesses can use the words "**CA WARNING**" or "**CALIFORNIA WARNING**" instead of "**WARNING**" for food exposures.

In addition, the proposed rulemaking explicitly provides that short-form warnings may be used to provide safe harbor warnings for food products using the same content as short-form warnings for consumer products. However, use of the short-form warning for food products would also require the addition of a box around the warning. As with the full-length warning for food, the proposed short-form warning for food omits the warning symbol.

The following is an example of a short-form warning for a food product exposure to lead, a carcinogen and reproductive toxicant:

CA WARNING: Can expose you to lead, a carcinogen and reproductive toxicant.
See www.P65Warnings.ca.gov/food.

Internet Purchases

- OEHHA proposes the following amendments to its regulation governing internet warnings:
- Clarify that businesses have the option of using either full-length or short-form warnings for internet sales.
- Clarify that businesses have the option to place the entire warning on the webpage where the product is displayed (i.e., the product display page).
- A warning can be provided via hyperlink using signal words. The proposed amendment provides the additional signal words "**CA WARNING**" or "**CALIFORNIA WARNING**" as alternatives to the existing signal word "**WARNING**."
- In addition to displaying the warning online, the warning must also be included with the product when delivered to the consumer, on labeling accompanying the product, or a product-specific warning (e.g., for alcoholic beverages sold on the internet). This is a critical change that will particularly impact products sold exclusively online.

Catalogue Purchases

The amendments provide the option of using either full-length or short-form warnings for catalogue purchases. As with internet purchases, the warning must also be included with the product when delivered to the consumer or on labeling accompanying the product or include a product-specific warning.

Passenger or Off-Highway Motor Vehicle Parts Exposures

According to OEHHA, warnings for exposures to listed chemicals from passenger or off-highway motor vehicle and recreational marine vessel parts carry unique challenges for parts manufacturing and retail entities. For example, passenger or off-highway motor vehicle and recreational marine vessel replacement parts number in the tens of thousands and are manufactured all over the world. A retail seller may carry hundreds of individual parts, and a large number of them may require a Proposition 65 warning.

Therefore, OEHHA is proposing a general warning for potential exposure to listed chemicals, combined with a recommendation that the consumer practice good industrial hygiene. The new regulations would cover exposures from parts sold at retail establishments, on the internet, and through electronic or printed catalogues.

For off-highway motor vehicle parts, the warning must:

- Include the warning symbol.
- Include the signal words "**CA WARNING**," "**CALIFORNIA WARNING**," or "**WARNING**."
- Include the words: "Handling passenger or off-highway motor vehicle parts can expose you to chemicals such as phthalates and lead, which can cause cancer and reproductive harm. To minimize exposure, service the vehicle in a well-ventilated area, wear gloves, and wash your hands. For more information see www.P65Warnings.ca.gov/motor-vehicle-parts."
- Be provided on a sign no smaller than 5 inches by 5 inches in no smaller than 20-point type, placed at each retail point of sale or display of the passenger or off-highway motor vehicle.

Recreational Marine Vessel Parts Exposures

OEHHA is proposing new regulations to provide optional warnings for exposure to individual replacement parts for recreational marine vessels. The new sections cover exposure from parts sold at retail establishments, on the internet, and through electronic or printed catalogues.

The new regulations would allow businesses to display general consumer product safe harbor warnings for these products, while adding an additional option to provide a tailored warning on a sign posted at the point of sale or display of the recreational marine vessel parts. For the tailored warning, the warning must:

- Include the warning symbol.
- Include the signal words "**CA WARNING**," "**CALIFORNIA WARNING**," or "**WARNING**."
- Include the words: "Handling recreational marine vessel parts can expose you to chemicals such as phthalates and lead, which can cause cancer and reproductive harm. To minimize exposure, service the vessel outdoors or in a well-ventilated area, wear gloves, and wash your hands. For more information see www.P65Warnings.ca.gov/marine-vessel-parts."

- Be provided on a sign no smaller than 5 inches by 5 inches in no smaller than 20-point type, placed at each retail point of sale or display of recreational marine vessel parts.

Concluding Thoughts

If adopted, OEHHA's proposed amendments to safe harbor warning language will affect businesses throughout the supply chain that manufacture, package, distribute, or sell consumer products, food products, and passenger or off-highway motor vehicle and recreational marine vessel parts in California that may result in exposures to listed chemicals. Businesses that want to protect themselves from potential Proposition 65 litigation by displaying safe harbor warnings will need to update the content of their warnings, and potentially the method of transmission, including for products sold online.

OEHHA has scheduled a public hearing both remotely and in person on December 13, 2023 to receive comments about this action. OEHHA is also accepting public comments until December 20, 2023. Many businesses will be impacted by OEHHA's proposal and should consider submitting comments either individually or through a trade or industry organization.

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