

## California Regulators Propose New Regulations to Limit Use of “Short Form” Proposition 65 Warnings

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Proposition 65 is the California law that requires warning labels on products sold to California customers that potentially expose users to certain chemicals which may cause a risk of cancer or reproductive harm. The state maintains a list of approximately 900 chemicals that fall within Prop 65, and the statute provides detailed guidance on what the warning label must contain. Because of the steep penalties that can be imposed under Prop 65 litigation, compliance with the warning requirements is vital for any company selling products into California. Recently, the California Office of Environmental Health Hazard Assessment (OEHHA) has proposed amendments to the format requirements for Proposition 65 warnings that will require companies to re-assess the sufficiency of their current warnings.

Prop 65 provides two forms of “safe harbor” warnings. If a warning label conforms to the statutory specifics, it is deemed to shield the company from liability.

1. The first safe harbor form (known as the long form) requires: a warning symbol, the word “warning” in bold capital letters, detailed warning language explaining the potential exposure to listed chemicals, and the name of at least one listed chemical present in the product.
2. The second safe harbor form (known as the short form) also requires the warning symbol and the word “warning” in bold capital letters, but it uses substantially briefer warning language (consisting primarily of a web link). Furthermore, under current law, the short form does not require listing the name of any listed chemical present in the product. Needless to say, the short form has been a very popular choice.

On January 8, 2021, however, OEHHA proposed amendments that would limit the use of short form warnings significantly, which appear to be driven by the government’s perception that the short form warning is being used too often on products that easily accommodate the more informative longer form warning. In short, the amendments provide, in pertinent part, that:

- Short form warnings will only be permitted on products where the labeling area is five square

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inches or less and the package shape and size does not permit use of long form.

- Short form warnings will no longer be permitted on websites or in catalogs. (Under current law, short form warnings can be used on these media for products that contain a short form warning on the packaging).
- Short form warnings will now be required to list the name of at least one listed chemical present in the product.

As public comment period expired on March 29, 2021, it is expected that OEHHA will issue a notice of adoption for the new amendments in the coming weeks or months, and that the amendments will become operative a year later. During this one-year period, companies can comply with the safe harbor requirements by complying with either the current or new requirements. Additionally, warnings placed on products manufactured prior to the effective date of the amendments will be deemed compliant if they meet the current requirements, even if they are sold at some time after the proposed amendments become operative.

Although the proposed changes will not become operative until sometime in 2022, it is not too early for companies to begin analyzing the impact of the new regulations on their operations. Companies currently relying on short form warnings will need to analyze whether they must switch to long form warnings under the new regulations. Furthermore, companies that have placed short form warnings on their products without naming a listed chemical may need to conduct product testing to determine what chemicals must be listed on the warning labels. In addition, retailers and other downstream entities that rely on warning materials from manufacturers and suppliers will need to develop and implement a plan for obtaining updated warning materials from those upstream entities. Companies may wish to consider developing a compliance plan to ensure that any changes can be made prior to the date the amendments become operative.

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