

# **New Proposition 65 Regulation Amendments Modify Clear and Reasonable Warning Requirements and Private Enforcement Settlement Provisions**

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The California Office of Environmental Health Hazard Assessment (OEHHA) and the California Attorney General each adopted regulatory amendments to the Proposition 65 regulations at the close of August 2016. The OEHHA amendments modify Article 6 of Title 27 of the California Code of Regulations, which sets forth the method and content deemed to be clear and reasonable for Proposition 65 warnings. The California Attorney General amendments (AG Amendments) modify the Proposition 65 private enforcement regulations and affect settlement terms, penalty amounts and attorney's fees in actions brought by private plaintiffs.

Together these amendments further Governor Brown's proposed Proposition 65 reform tenets, set out in 2013. The Article 6 amendments are the first comprehensive modifications to the Clear and Reasonable Warning requirements since the original regulations were adopted. Given the significant differences between the old and new safe harbor content and method, we expect companies to take a fresh look at their Proposition 65 compliance program. The AG Amendments are intended to reduce the Proposition 65 litigation abuse that has discredited the statute. We expect companies that have received a recent Proposition 65 60-day notice letter to incorporate the guidelines into their settlement negotiations to reduce the amount and misuse Additional Settlement Payments and attorney's fees.

## **Article 6 Modifications**

### ***Background***

On January 16, 2015, OEHHA first proposed amendments to repeal and replace the Article 6 Clear and Reasonable Warning regulations. The regulations primarily set forth the method and content deemed by OEHHA to be clear and reasonable for providing a warning prior to exposure. In response to the proposed amendments, OEHHA received numerous comments, which led the agency withdraw its first proposal and to issue a new set of amendments on November 24, 2015. According to OEHHA, the November 24, 2015 proposal took into account the comments received on the first regulatory package.

On March 25, 2016, and again on May 18, 2016, OEHHA issued further modifications to its proposal, which addressed comments received from the public. The May 18, 2016 proposal was adopted without modification on August 30, 2016. The Article 6 amendments include clarifying changes to the definitions provided, the method and content for consumer product exposures, environmental exposures and other product specific exposures, and clarification of the entity having responsibility for providing a consumer product warning. For a full discussion of the history of the Article 6 Amendment Process see [OEHHA Issues Additional Modifications to Proposition 65 Article 6: Clear and Reasonable Warning Requirements](#); and [Prop 65 Regulatory Activity Raises New Compliance Questions for Industry](#).

## ***Summary of the Article 6 Amendments***

### **Definitions**

The amendments to Article 6 modify the definitions provided in the California Code of Regulations by:

- Adding a definition for consumer product, which means "any article, or component part thereof, including, food, that is produced, distributed, or sold for the personal use, consumption or enjoyment of a consumer";
- Modifying the definition of label, to include printed or graphic material affixed to a product's wrapper;
- Modifying the definition of labeling to include "tags at the point of sale or display of a product";
- Adding a definition for the term retail seller, which means "a person or business that sells or otherwise provides consumer products, directly to consumers by any means, including via the Internet"; and
- Modifying the definition of sign to include electronically provided materials, and shelf signs that are conspicuously posted, and clearly visible.

### **Method and Content of the Warnings**

The Article 6 amendments also set forth the safe harbor method and content deemed by OEHHA to be clear and reasonable. Although some in industry may think of these regulations as requirements, use of alternative methods is permissible. The regulations will take effect on August 30, 2018. In the interim, businesses may either provide a warning that uses the new safe harbor method and content warning language contained in the Article 6 amendments, or warnings that comply with the regulations currently in effect. Products manufactured prior to August 30, 2018, need not comply with the amendments.

Pursuant to the regulations, a consumer product warning that includes the following content is considered to be clear and reasonable:

- The name of at least one chemical in the consumer product for which the warning is being provided (and where a warning is being provided for more than one endpoint, i.e., cancer and reproductive toxicity, the warning is to include the name of one or more chemicals for each endpoint);
- The warning symbol, which consists of a black exclamation point in a white or yellow equilateral triangle;
- The word "WARNING" in all capital letters and bold print; and
- The following language:
  - For carcinogens: "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

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more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."

- For reproductive toxicants: "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 birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."
- For exposures to both carcinogens and reproductive toxicants: "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, and [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)." or
- For on-product warnings, a truncated warning that includes the following elements is permissible:
  - A warning symbol, as described above;
  - The word "WARNING" in all capital letters and bold print; and
    - For carcinogens: "Cancer – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."
    - For reproductive toxicants: "Reproductive Harm – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."
    - For carcinogens and reproductive toxicants: "Cancer and Reproductive Harm – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."

The warning may also contain information that is supplemental to the content set forth above, but only to the extent that the supplemental information either (1) identifies the source of the exposure; or (2) provides information regarding how to avoid or reduce exposure to the identified substance(s). Further, if a consumer product bears consumer information in a language other than English, the warning provided must also be provided in that language.

The regulations further provide that the following methods for providing a warning are considered to be clear and reasonable:

- A product-specific warning on a posted sign, shelf tag or shelf sign, if the warning is provided at each point of display for the product;
- A product-specific warning provided via electronic means, where the warning is provided to the purchaser either prior to, or during the purchase of the product, without requiring the purchaser to seek out the warning;
- A label that includes the content set forth above;
- For an on-product warning, a warning that bears the required content in a type size no smaller than the largest font size used for other consumer product information affixed to the product and that is at least a 6-point font;
- For Internet purchases, a warning on the product display page containing the content set forth above, or a clearly marked hyperlink that reads "WARNING" and links to the full warning (except that if an on-product warning is provided, the warning provided on the website may use the same truncated content as the on-product warning); or
- For catalog purchases, a warning provided in a manner that clearly associates the warning with the item for which the warning is provided (except that if an on-product warning is provided, the warning provided in the catalog may use the same truncated content as the on-product warning).

The above method and content generally apply to consumer products. However, the regulations also set forth product-specific safe harbor warning method and content. Where the product-specific provisions apply, the content and method listed above should not be used when providing a warning. The following products are subject to differing safe harbor provisions:

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- Food,
  - Alcoholic beverages,
  - Prescription drugs,
  - Dental care,
  - Raw wood products,
  - Furniture,
  - Diesel engines,
  - Vehicles,
  - Recreational vessels,
  - Petroleum products, and
  - Bisphenol A exposures from canned and bottled food and beverages.

### **Responsibility for Providing a Warning**

The regulations also clarify which entities have responsibility for providing a warning. According to the regulations, the manufacturer, producer, packager, importer, supplier, or distributor has primary responsibility for providing a consumer product warning. However, these entities may shift warning responsibility to the retail seller by furnishing notice and warning materials, in accordance with the regulations. Retail sellers are also responsible for providing a warning in the following scenarios:

- The retail seller is selling the product under a brand or trademark that is owned or licensed by the retail seller or an affiliated entity;
- The retail seller has knowingly introduced a listed chemical into the product, or knowingly caused a listed chemical to be created in the product;
- The retail seller has covered, obscured or altered a warning label that has been affixed to the product; or
- The retail seller has actual knowledge of a potential consumer product exposure requiring a warning and there is no manufacturer, producer, packager, importer supplier or distributor who (1) meets the definition of a person in the course of doing business, and (2) has a designated an agent for service of process in California or has a place of business in California.

### **Private Enforcement Amendments**

On August 31, 2016, the Attorney General amended the Proposition 65 regulations related to enforcement actions brought by private parties (Private Enforcers). The regulations were first proposed on September 25, 2015, and were modified in response to comments on February 4, 2016. For a discussion of the original proposal for the AG Amendments see [California Attorney General Proposes Proposition 65 Amendments To Address Litigation Abuse](#).

### ***Summary of the Attorney General Amendments***

#### **Recovery of Plaintiffs' Attorney's Fees**

The AG Amendments make three modifications to the guidelines that address recovery of a plaintiff's attorney's fees as part of the settlement of a Proposition 65 action. First, the amendments call for a showing that the public benefits derived from the settlement are "significant." Second, the presumption that a public benefit is conferred by reformulation of a product is rebuttable and proponents of such settlements are expected to submit evidence demonstrating that at least some of the products in controversy were above any agreed-upon reformulation standard set forth in a settlement. Finally, the AG Amendments require contemporaneous record-keeping for investigation

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costs sought to be recouped in a settlement.

### **Civil Penalties**

The Proposition 65 regulations related to civil penalties have also been amended. The AG Amendments create new requirements where the terms of a settlement waive civil penalties in favor of conduct by the defendant (*i.e.*, reformulation of a product). Specifically, the regulations require that a defendant's conduct be related to the purpose of the litigation and provide environmental and public health benefits to California; the settlement agreement must include a mechanism designed to verify that the agreed upon conduct has been performed. The AG Amendments also require plaintiffs to demonstrate that any Additional Settlement Payments made as an "offset" to civil penalties, such as payments to health organizations or NGOs in lieu of penalties, are in the public interest.

### **Settlements and Additional Settlement Payments**

The AG Amendments aim to increase oversight of and transparency in the settlement process. Under the amended regulations, if a Private Enforcer enters into a settlement in the absence of a filed complaint, it will be required to serve the Attorney General with the settlement and a Report of Settlement. The AG Amendments also encourage parties to submit all settlements that include Additional Settlement Payments for judicial approval.

The Attorney General includes a list of criteria it will employ to determine whether it will object to the inclusion of Additional Settlement Payments. The criteria include the following elements:

- Additional Settlement Payments should not exceed the amount of non-contingent civil penalties;
- Activities funded by Additional Settlement Payments should have a clear and substantial nexus to the alleged violation;
- Additional Settlement Payment recipients should be able to account for any expenditure of the funds as well as the relationship between the expenditure and the terms of the settlement agreement;
- The settlement should specifically describe the activities that will be funded by the Additional Settlement Payments and the amount of funding for each activity;
- The settlement should require plaintiffs to maintain records documenting expenditure of the Additional Settlement Payments; and
- Settlements should include the following information for the purposes of Attorney General and Court evaluation:
  - Identity of the entity receiving the payments,
  - Disclosure of the receiving party's and counsel's economic interest,
  - Disclosure of the mechanism by which the plaintiff will track settlement payment expenditures,
  - If the settlement provides that the recipient will make grants to other entities, the method of selection of the grantee.

The private enforcement amendments become effective on October 1, 2016.

### **Implications**

Over the course of the next two years businesses required to provide a Proposition 65 warning will need to revisit and revise their warnings to comply with the new regulations and may choose to

arrange for retailer sellers to provide warnings. The on-product warning may provide some relief to industry given the lack of obligation to identify a chemical for which the warning is being provided. However, the decision to use the more compact warning should take into account consumer reactions to the warning symbol, and words "cancer" or "reproductive harm" absent clarification or qualification.

Though, at first glance, the truncated warning may be useful to side-step the requirement to identify the chemicals necessitating the warnings, OEHHA, pursuant to its authority under the Lead Agency Website regulations, can request additional information about the product, the substance for which the warning is provided and the location of that substance in the consumer product. For a full discussion of the website regulations see [OEHHA Issues Further Modification of Warning Website Regulations](#) and [Prop 65 Regulatory Activity Raises New Compliance Questions for Industry](#).

Further, those businesses manufacturing products for which a product-specific safe harbor warning has been adopted should be careful to ensure that the appropriate elements from the general warnings for consumer products are incorporated into any warning system adopted (i.e., Internet and catalog sales).

Finally, manufacturers must choose the best way to reach California consumers with a Proposition 65 warning, while, considering potentially negative reactions to the warnings from consumers outside the state. Though the regulations permit manufacturers to transfer responsibility for providing a warning to the retail seller, manufacturers should be cautious when using these alternative arrangements, given the issues they may pose for litigation risk exposure to entities in the supply chain.

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