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## Prop 65 Alert: Brace Yourselves for the Latest Wave of CA Prop 65 Short-Form Warning Updates

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OEHHA is proposing amendments to the safe harbor warning regulations, including a significant change to the Proposition 65 “short-form warning” to require that this warning identify a specific Proposition 65 (“Prop. 65”) chemical. Currently the short-form warning only requires identification of a toxicological endpoint (i.e. Cancer or Reproductive Harm) but not the chemical that has triggered the warning requirement. For both the short-form and the full-length warning, signal words such as “CA WARNING” or “CALIFORNIA WARNING” will be permitted. The proposed amendments also introduce new passenger or off-highway motor vehicle and marine vessel parts tailored warnings, which should streamline compliance for these industries. The proposed changes will also affect warnings on food. If the proposed regulations are adopted, manufacturers will need to reconsider their strategies for avoiding “bounty-hunter” shakedown lawsuits.

This may seem like déjà vu, since OEHHA attempted to pass amendments to the short-form warning in 2022. Facing considerable opposition from the regulated industry, OEHHA declared on May 20, 2022, that it could not conclude the rulemaking process within the stipulated one-year period. It seems likely these changes will take effect this time around. These regulations could take effect by mid-2024.

### Current Short-Form Warning Landscape

At this time, companies can utilize the “short-form” consumer product warning, which is a succinct script requiring only the hazard symbol, the word WARNING, a reference to a state-maintained website, and the toxicological endpoint (i.e., Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).) Crucially, the current framework does not mandate the identification of a specific chemical, and there are no restrictions on the frequency of short-form warning usage.

OEHHA has identified multiple concerns with the current short-form warnings: (1) unintended use of the warning and overall lack of information, (2) confusion about whether products purchased on the internet or through a catalog also require an on-product warning, (3) the font size requirement is impractical, (4) there is uncertainty on the use for food products and (5) challenges for the passenger and off-highway motor vehicle and recreational marine vessel replacement-part industry due to the number of products, size of products and unique exposure issues.

## Proposed Revisions

1. The proposed changes will mandate the identification of a specific chemical.
2. Short-form warnings are required to be conspicuous and prominently displayed in relation to the product and other information provided on the label, but cannot be less than 6-point type.
3. Both the full-length and short-form will allow for signal words “CA WARNING” or “CALIFORNIA WARNING” as an alternative to “WARNING.”
4. Both full-length and short-form warnings are permissible for internet and catalog transactions.
5. There are options for warnings on product display pages or via hyperlinks using designated signal words to indicate the warning is for CA consumers (i.e. “CA WARNING” OR “CALIFORNIA “WARNING”).
6. The warning must be included with the product when delivered to the consumer if the product is sold online or in a catalog.
7. Pre-purchase warnings, including pop-up notifications during the online purchasing process, are recommended.
8. Delivery warnings offer a spectrum of options, from full packaging warnings to tailored warnings for specific products.
9. If other consumer information provided about a product is in a language other than English, the Prop 65 warning must match.
10. New sections covering exposures from motor vehicle parts and marine vessel parts sold at retail establishments, on the internet, and through catalogs for parts purchased and installed by consumers.

## Operative Date and Sell-Through Period

In response to industry concerns, OEHHA proposes extending the operative date of the regulation to two years from the effective date, addressing the previously perceived impracticality of a one-year compliance period. Notably, the proposed regulations currently include an unlimited sell-through period for products manufactured and labeled prior to the effective date of the amendments and labeled up to two years after the regulation is adopted.

## Clarifications and Additional Sections

OEHHA affirms the permissibility of short-form warnings for food products and introduces new sections tailored to warnings for passenger or off-highway motor vehicle parts and marine vessel parts.

## Food Warnings

In response to confusion about whether the short-form warning may be used on food products, the proposed changes explicitly allows such use. The basic versions are:

**WARNING:** Cancer risk from exposure to [name of chemical]. See [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

Or

**WARNING:** Risk of reproductive harm from exposure to [name of chemical]. See [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

For food exposures to acrylamide, OEHHA proposes a modified warning:


**CALIFORNIA WARNING:** Consuming this product can expose you to acrylamide, a probable human carcinogen. For more information, see [www.P65Warnings.ca.gov/acrylamide](http://www.P65Warnings.ca.gov/acrylamide).

For food labels, the warning must be set off from surrounding information, enclosed in a box around the warning and do not require a warning symbol.

### **Passenger or Off-Highway Motor Vehicle and Marine Vessel Parts Warnings**

In addition to modifying the short-form warning, the proposed regulations create two new full-length warnings applicable to replacement parts for passenger or off-highway motor vehicles and marine vessels purchased or installed by consumers. These new warnings would be in addition to the existing long form warning presently applicable to motor vehicles, which would remain unchanged.

The two new proposed warnings are similar. For motor vehicle parts, it would read:

 **CALIFORNIA WARNING:** 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](http://www.P65Warnings.ca.gov/motor-vehicle-parts).

The warning for marine vessel parts would be identical but with the phrase “recreational marine vessel parts” replacing “passenger or off-highway motor vehicle parts.” “Passenger and off-road motor vehicle parts” and “recreational marine vessel parts” include any part offered for sale or transferred to a consumer for installation in or service on a motor vehicle or recreational marine vessel. These include but are not limited to replacement parts such as plastic and metal fittings and housings, bulbs, nuts, bolts, belts, and filters, which are typically purchased at dealerships, auto parts stores, from catalogs and through the internet. They do not include packaged service chemicals, tires, parts containing asbestos, carpeting, upholstery, including fillings and coverings, textiles or fabrics.

In the case of either of the new warnings:

1. The warning may be tailored, but if so, it cannot be used with the short-form warning;
2. Businesses may substitute the chemical names; and
3. The new form of the warning may be displayed at a point of sale (i.e. cash register) or at each display of parts on a sign no smaller than 5 inches by 5 inches with no smaller than 20 point type.

Businesses may continue to use the general consumer product warning rather than switching to the new version. There would be no sell-through period or phase in since products that have compliant warnings would not need to be changed.

### **Financial Implications**

OEHHA estimates the cost associated with changing existing short-form warnings and internet/catalog warnings at \$14,538,327.67, equating to \$4,237.46 per business. From the perspective of the businesses needing to meet the new requirements, this figure seems grossly underestimated as it ignores the significant costs of compliance, including the additional cost of testing to determine exactly which of the over 1,000 chemicals on the Proposition 65 list warrant the warning, the disruption to business, and the supply chain confusion that would be caused by these amendments.

### **In Sum**

Companies are urged to conduct a thorough analysis of their current labeling regime, supply chain obligations and anticipate these changes in the new year.

The rulemaking materials, including the proposed text, comments submitted, and methods for submitting comments are on OEHHA's website at: <https://oehha.ca.gov/proposition-65/cnr/notice-proposed-rulemaking-and-announcement-public-hearing-amendments-article-6>. A public hearing is scheduled for December 13, 2023 and comments are due by December 20, 2023.

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