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Major Changes Coming to Prop 65 “Short-Form” Warnings

By: [Anne Marie Ellis](#), [John Epperson](#), and [Peter McGaw](#)

California’s Office of Environmental Health Hazard Assessment (OEHHA) has proposed sweeping changes to the popular “short-form” Proposition 65 warning. On January 8, 2021, OEHHA issued a proposal to amend [Article 6 “Clear and Reasonable Warnings” Section 25601](#). This Article sets forth “safe harbor” warning methods, including warnings for consumer product exposures. While the “safe harbor” warnings are not mandatory, any manufacturer, distributor or retailer that varies from these approved warning methods invites a private enforcement action.

Article 6 recognizes a “long form” and a “short-form” warning for consumer products. The short-form warning currently allows businesses to omit the name of the chemical “known to the State of California to cause cancer, birth defects or other reproductive harm,” whereas the long form warning must include the name of one or more chemicals on the Proposition 65 list for which the warning is being given.

According to OEHHA, “[t]here has been widespread use of short-form warnings in ways that were not intended and do not further the purposes of Proposition 65. OEHHA has also received numerous inquiries from businesses seeking clarification as to whether the short-form warning could be used to provide safe harbor warnings for food products....”

In a 2017 question and answer document, OEHHA advised that while the intent of the short-form label was for use on small products where space was limited, there was no express prohibition on using the label on larger products. However, over the past two years, there has been increased scrutiny of the short-form label by OEHHA. The short-form warning initially served as a stop-gap solution for many companies struggling to comply with the sweeping changes to the Prop 65 warning regulations that took effect on August 30, 2018. Since then, however, as the versatility of the short-form warning became apparent, there have been rumblings that OEHHA felt the short-form warning was being overused.

The proposal changes the current short-form warning in several significant ways. For example, the product must be small enough that the long form of the warning will not fit on it or its packaging. In addition, the short-form label may only be used on product labels. It will no longer

suffice as a “safe harbor” warning for internet or catalog sales. The most significant change, however, is that the short-form warning will now be required to identify one or more of the chemicals known to cause cancer and/or reproductive harm for which the warning is being given. This will eliminate one of the reasons the short-form warning is favored by many as a prophylactic warning.

Although Prop 65 does not explicitly require manufacturers to test their products for chemicals on the Prop 65 list, private enforcers routinely argue that a manufacturer knew or should have known a Prop 65 chemical was present. Many manufacturers added a short-form warning so they would not be required to undertake expensive and time-consuming testing of every product batch or lot to identify a specific chemical among the 900+ chemicals on the Prop 65 list.

Among the new requirements proposed are:

1. *The total surface area of the product label available for consumer information is 5 square inches or less, and;*
2. *The package shape or size cannot accommodate the full-length warning described in Section 25603(a), and;*
3. *The entire warning is printed 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.*
4. *The short-form warning contains the name of one or more chemicals known to cause cancer and/or reproductive toxicity. (This information will no longer be allowed to be omitted from the product Prop 65 warning.)*

As for website and catalog warnings, where use of the short-form is currently permitted OEHHA reasons that because there are fewer space limitations in these media, the short-form warning is not appropriate. Once the changes take effect, a business that provides a short-form on product label nonetheless would be required to provide a long-form warning on a website or in a catalog with the product. This requirement could prove to be problematic for downstream distributors and retailers, who may now be required to generate their own warning rather than simply passing on the manufacturer’s warning.

OEHHA is accepting public comments until March 8th. Once the proposal is approved, it will take effect one year later.

What does this mean for your business? You will need to take a critical look at your product labels currently using the short-form warning. You will no longer be allowed to use the short-form warning out of an abundance of caution. You will need to know what specific Prop 65 chemicals are in your product so that you can identify at least one appropriate chemical in the warning. This does not necessarily require you to test all of your products, but you will need to collect the information in some fashion – either through your suppliers or by testing – and update your packaging and labeling. If you are selling your products online and/or in catalogs,

you will need to update these to use the long-form warning, and you may need to advise your downstream distributors and retailers to do the same.

It seems likely these amendments will be adopted and they will take effect one year later. The current short-form warning can continue to be used on products manufactured prior to the effective date, but proving that a product purchased after the effective date was properly carrying the short-form warning will be yet another compliance and enforcement defense headache. Given the lead time required to develop the necessary information and design and print new packaging or labeling, it would be prudent to begin that process now.



Anne Marie Ellis
Senior Counsel
(949) 224-6223
aellis@buchalter.com



John Epperson
Of Counsel
(415) 227-3549
jepperson@buchalter.com



Peter McGaw
Of Counsel
(415) 227-3568
pmcgaw@buchalter.com

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