

California Proposes to Significantly Limit the Use of Proposition 65 Short-Form Warning

WRITTEN BY

[Jeffrey M. Goldman](#) | [AnnMarie Sanford](#) | [Angela Levin](#)

On January 8, the California Office of Environmental Health Hazard Assessment (OEHHA) proposed to amend the short-form warning regulations under the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65. In August 2018, new Proposition 65 warning regulations became effective that significantly changed the required language and manner in which Proposition 65 warnings should be provided. Most significant was the new requirement to specifically list at least one chemical that a consumer could be exposed to in the warning. These regulations, however, provided an alternative warning option — dubbed the “short-form” warning — which does not require the identification of any chemicals in the warning. While OEHHA originally may have intended the use of the short-form warning only on products where space was limited, the actual terms of the regulation do not prohibit the use on products where space is not an issue.

When the 2018 regulations became effective, many companies were scrambling to properly label their products, especially companies that have thousands of different SKUs. Consequently, many companies elected to use the short-form warning because the same label could be used for all of their different products. If the short-form warning was not an available option, companies might have to manage hundreds or even thousands of warning variations to address the numerous chemical/product combinations across their product portfolio.

After more than two years of implementing the 2018 warning regulations, OEHHA now believes that limits should be placed on the use of short-form warnings. OEHHA cites the wide-spread use of these warnings on products of all sizes, and the resultant lack of information regarding specific chemical exposures, as the basis for proposing new limitations. OEHHA also is concerned that the short-form warning is allowing “over-warning” to occur by being placed on some products as a means to avoid a Proposition 65 claim even when a business has no knowledge of any unacceptable chemical exposure that might require a warning. Because of the significant effort required to conduct a chemical exposure risk assessment, and the fact that a favorable risk assessment would not prevent a frivolous Proposition 65 claim, some companies opt to include Proposition 65 warnings for products that contain one or more Proposition 65 chemicals out of an abundance of caution,

The proposed amendments significantly limit the use and the advantage of short-form warnings. Under the proposal, the name of at least one chemical would need to be included in the short-form warning. Moreover, these warnings could be used only on products with five (5) square inches or less of label space and where the total size of the package could not accommodate the full-length warning. Short-form warnings could no longer be used for internet and catalog sales. Finally, because OEHHA has received numerous inquiries regarding whether the short-form warning can be used for food products, the proposal clarifies that indeed it can be used for food products. The proposed regulations provide a one-year, phase-in period for companies to adopt the modified short-form

warning and an unlimited sell-through period for products manufactured prior to the effective date of this proposed regulatory change (proposed to be one year after the regulation is finalized).

The proposed amendments would make it more costly and difficult for companies to provide Proposition 65 warnings, especially companies that have numerous SKUs or multicomponent products from numerous suppliers. Companies would be required to identify at least one chemical in the warning, which many have been hesitant to do because of potential negative reactions from customers. Further, companies that are able to use the amended short-form warning on products would nevertheless be required to provide the full warning on internet and catalog listings.

OEHHA is accepting comments on this proposal until March 8, 2021. Please contact AnnMarie Sanford, Jeff Goldman, or Angela Levin if you would like to discuss the proposed amendments or if you are interested in submitting comments.

RELATED INDUSTRIES + PRACTICES

- [Environmental + Natural Resources](#)