

WARNING: The Prop 65 Transition Period is Over!

by Mark R. Kaster, Kent J. Schmidt, and Kirk Schuler

On August 30, 2018, new “Proposition 65” regulations went into effect drastically changing the way businesses must operate in California to comply with the state’s Safe Drinking Water and Toxic Enforcement Act of 1986. Under the Act, companies doing business in California are generally required to provide a “clear and reasonable” warning before exposing consumers to a chemical known to cause cancer or reproductive harm. The new regulations appear in Title 27 of the California Code of Regulations, Article 6, and impose new “methods of transmission” and “content” requirements for the “safe harbor” warnings authorized by California’s law. These safe harbor warnings are important to understand because they are deemed by California to be “clear and reasonable” under the Act, and therefore provide a “safe harbor” against enforcement actions for businesses that choose to use them. While the new regulations have just recently gone into effect, they were adopted two years ago in order to provide businesses with a transition period to fall into compliance. With the transition period now over, it is critical that your business understand the basic “methods of transmission” and “content” requirements for the safe harbor warnings, as well as the regulations’ impact on internet and catalog sales, and fall into compliance immediately.

Content:

The new regulations allow and describe the content required for two types of safe harbor warnings: the long-form and short-form.¹ The content required for either form is composed of four parts, in this order: a) the familiar exclamation-point-within-the-triangle symbol; b) the word, “warning” in bold and all caps; c) certain specified text; and d) a URL. The difference in content between long-form and short-form is the specified text. In the long-form, the text must identify at least one chemical (among hundreds listed) and the known harm (either cancer or reproductive harm), whereas the short-form only requires the harm to be identified. In addition, the long-form text is less definite than the short-form text. For example, below are the two forms of “safe harbor” warnings for the chemical Di (2-ethylhexyl)phthalate (DEHP), a commonly used plasticizer, which is listed as both a carcinogen and a reproductive toxicant under California law:

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WARNING: This product can expose you to chemicals including DEHP which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov

WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov

Although the short form is more convenient because it is less onerous in length and specificity, the trade-off for businesses is that it directly informs the consumer that using the product will cause the specified harm. In addition, and as further explained below, the short-form may only be used on the product's "label."

Methods of Transmission

A business meets the "methods of transmission" requirements under the new regulations by transmitting such warnings in one of the following three ways:²

1. Point-of-display warnings: a business may post signs at each point of display to provide a product-specific warning.
2. Electronic device warnings: a business may use an electronic device or process that automatically provides a product-specific warning prior to or during the purchase.
3. Product label warnings: a business may place the warning on the product's "label," which generally means the product itself or its "container or wrapper."³

Notably, the content required by the long-form must be used for either of the first two methods of transmission. The product label warnings, however, allow a business to use either the long-form or the short-form content to qualify as permissible safe-harbor warnings.

Internet and Catalog Sales

The new regulations, unlike the old regulations, also address the method for warning consumers in internet and catalog purchases.⁴ For catalog purchases, a business must provide a permissible warning (the long-form or short-form) in the catalog and in a manner that clearly associates the warning with the item being purchased. For internet purchases, a business must provide permissible product-specific warnings (the long-form or short-form) on its website to the purchaser prior to completing the purchase. But note the short-form warning for either catalog or internet warnings may only be used if the short-form warning is already provided on the product's label. If not, the catalog and internet warnings must be in the long-form.⁵

Conclusion

Time is up! The content and methods for safe harbor warnings have changed, and there is no longer any transition period to bring your business into compliance. It is especially important that businesses follow the safe harbor warning requirements for internet purchases because not only do your customers enjoy shopping online, but "bounty hunters" undoubtedly prefer shopping online for potential lawsuits against your company, too. Protect your business from these lawsuits by complying with the new regulations

immediately.

This eUpdate is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. Members of Dorsey & Whitney will be pleased to provide further information regarding the matters discussed in this eUpdate.

¹ The “content” requirements are contained in Cal. Code Reg. tit. 27, § 25603.

² The “methods of transmission” requirements are contained in Cal. Code Reg. tit. 27, § 25602.

³ “Label” is defined by the new regulations as “a display of written, printed or graphic material that is printed on or affixed to a product or its immediate container or wrapper.” Cal. Code Reg. tit. 27, § 25600.1(i).

⁴ The new regulations addressing internet and catalog warnings are contained in Cal. Code Reg. tit. 27, § 25602(b) and (c).

⁵ California’s Office of Environmental Health Hazard Assessment (OEHHA), which administers the state’s proposition 65 program, provided additional guidance on internet and catalog warnings in March 2018. *See Proposition 65 Clear & Reasonable Warnings Questions & Answers for Businesses: Internet and Catalog Warnings*, available at https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa_internet_warnings.pdf (last visited August 30, 2018). The guidance addresses the requirements for “prominently displaying” online warnings, either on the product display page or via a “clearly marked hyperlink.” Cal. Code Reg. tit. 27, § 25602(b).