

PROPOSITION 65 UPDATE

Déjà Vu All Over Again: Coming Changes For Prop 65 “Short-Form” Warnings

By Craig A. Livingston

On January 8, 2021, California’s Office of Environmental Health Hazard Assessment (OEHHA), the state agency charged with administering Proposition 65, issued a Notice of Proposed Rulemaking with the purpose of enacting amendments to the regulations governing the content and use of short-form warnings that went into effect in August 2018. If the proposed amendments are adopted, which appears likely, manufacturers will face new restrictions on the use of such warnings on products sold in California.

The “Problem” According to OEHHA: Widespread Improper Use of Short-Form Warnings

Short-form warnings came into existence with the “clear and reasonable warning” changes adopted in August 2016 and effective in August 2018. According to OEHHA, the “intent” for short-form warnings was to provide manufacturers with the option of using a shorter on-product warning on small products which did not have sufficient product or packaging space to accommodate the longer format warning. (Despite only passing reference to this purpose in OEHHA’s rulemaking documents, the actual regulations creating the short-form warning option had no such limitation.)

Since the adoption of short-form warnings, OEHHA has come to find that manufacturers are using them on large products that could easily accommodate the longer format Prop 65 warnings, for example large appliances, luggage, and vacuum cleaners. OEHHA has also determined that some manufacturers are using short-form warnings prophylactically, without having identified a specific exposure from a listed chemical, with the goal of avoiding Prop 65 enforcement actions. OEHHA therefore concluded the current version and usage of short-form warnings was at cross-purposes with the stated goals of Prop 65; that is, to provide consumers with information necessary to make “informed” product purchasing and use decisions.

Currently, short-form warnings include a warning symbol, the word “WARNING” in bold, the specific endpoint – cancer, reproductive harm or both – and reference to the Prop 65 website. For example, the current short-form warning for DINP is:

 **WARNING:** Cancer – www.P65Warnings.ca.gov

The “Solution” According to OEHHA: Amend The Short-Form Warning Regulations

To rein in the “misuse” of short-form warnings, OEHHA is proposing amendments to several sections to Article 6 of Title 27 of the California Code of Regulations which provide for the content and use of those warnings. If adopted, the changes would include:

1. Only allow short-form warnings to be used on products with 5 sq. inches or less of label space;
2. Eliminate use of short-form warnings in catalogs and on the internet;
3. Require the name of at least one chemical per exposure risk, and;


4. Require warning type size to be no smaller than other consumer information, but not less than 6-point type.

Thus, if cancer is the potential exposure for a listed chemical found in the product, the short-form warning will need to include “cancer.” The same is true for reproductive harm, or both cancer and reproductive harm for chemicals with both endpoints.

According to OEHHA, these amendments will improve short-form warnings and provide additional information about chemical exposures to consumers who can then seek more detailed information from the OEHHA website and thereby make more “informed” decisions on product purchases and uses. (The fallacy of this assumed result, of course, is that consumers faced with a short-form warning identifying DINP, for example, would need to know the level of DINP in a product, what the potential exposure is during use, and then extrapolate that information into a real life exposure analysis. OEHHA surely knows that this level of analysis is rarely – if ever – done by every day consumers.)

Under the new proposed format, a short-form warning would still include the warning symbol and “WARNING” wording, but would now include reference to the “risk” of “exposure” from a specific chemical.

For example, the proposed new warning for formaldehyde would read:

 **WARNING:** Cancer Risk From Formaldehyde Exposure – P65Warnings.ca.gov

Where We Go From Here:

OEHHA is accepting public comments until March 8, 2021 before considering whether to adopt the proposed amendments as they are currently written or with modifications. It is possible OEHHA could also hold public hearings to discuss the proposed amendments. It is therefore likely the new regulations will not be adopted before mid-2021.

Once adopted, there will be a one-year phase-in period for manufacturers to begin using the new short-form warning format. In addition, the new regulations will likely include an unlimited sell-through period for products manufactured before and during the phase-in period which use the “old” short-form warning format.

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