

## **Déjà Vu All Over Again: Prop 65 “Short-Form” Warning Changes**

In August 2018, California’s Office of Environmental Health Hazard Assessment (OEHHA), the agency that administers Proposition 65, overhauled the required warnings on products subject to Prop 65. Among the changes was an option to use a “short-form” warning on certain products. This new type of warning included less language and different symbol conventions. OEHHA believed the short-form warnings would allow manufacturers to provide useful information to consumers even on products in small packages. Now, OEHHA has proposed another round of modifications to the short-form warnings. While the final rule has not yet been issued, the new version will surely require manufacturers to make some changes to the short-form warnings that have been in use for the last five years. The following summarizes the proposed changes and provides manufacturers with a preview of what the new short-form warnings might look like.

### **A. The “Problem” According to OEHHA: Improper Use of Short-Form Warnings**

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. Since the adoption of short-form warnings, OEHHA claims to have found that some manufacturers are using the short-form warning on large products that could easily accommodate the longer format Prop 65 warnings, such as large appliances, luggage, vacuum cleaners and the like. OEHHA also determined that some manufacturers are using short-form warnings prophylactically, without having identified a specific exposure from a listed chemical, and thereby seek to reduce the risk of falling prey to Prop 65 enforcement litigation. OEHHA therefore concluded the 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 purchase 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](http://www.P65Warnings.ca.gov)

### **B. The 2021 “Solution” According to OEHHA: New Short-Form Warning Regulations**

To reign in the “misuse” of short-form warnings, OEHHA proposed 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. Those changes included:

1. Only allow short-form warnings to be used on products with 5 sq. in. 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 endpoint in the short-form warning;
4. Require warning type size to be no smaller than other consumer information, but not less than 6-point type, and;
5. 1-year phase-in period after enactment.

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


According to OEHHA, these amendments would have improved short-form warnings and provide additional information about chemical exposures to consumers who can then seek more information from the OEHHA website and thereby make more “informed” decisions on product purchases and uses.<sup>1</sup>

Under the 2021 proposed format, a short-form warning would still have included the warning symbol and word “WARNING,” but it would also include reference to the “risk” of “exposure” from a specific chemical.

### C. The 2023 “Solution” According to OEHHA

1. Maximum label size amendment from 2021 removed;
2. Prohibition on use of short-form warnings in catalogs and on the internet removed;
3. Require the name of at least one chemical per endpoint in the short-form warning;
4. 2021 amendment requiring minimum short-form warning type size in relation to type size of other consumer information removed, but minimum type size for short-form warnings of not less than 6-point remains.
5. Alternatives to the use of the word “**WARNING**,” include “**CA WARNING**” or “**CALIFORNIA WARNING**.”
6. Require on-product or on-label P65 warnings even for products sold over the internet or through catalogs.
7. Internet warnings can include warnings on the product display page, hyperlinks using “**WARNING**,” “**CA WARNING**” or “**CALIFORNIA WARNING**” or “otherwise prominently display warning to purchaser prior to completing the purchase.” (Warning is *not* prominently displayed “if the purchaser must search for it in the general content of the website.”)
8. 2-year phase-in period after enactment.
9. Unlimited sell-through for products manufactured before adoption of new regulations.

For example, the proposed version of the short-form warning for formaldehyde would read:

 **WARNING:** Can expose you to formaldehyde, a carcinogen. See [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

or

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

The proposed amendments require similar warning conventions for reproductive toxicants (e.g., BPA), products with chemicals that are carcinogens *and* chemicals that are reproductive

---

<sup>1</sup> Many dispute OEHHA’s assumption that consumers faced with a short-form warning will somehow learn the actual amount of the identified chemical in a product, understand how that product could result in actual exposure and, finally, extrapolate that information into a real-life exposure analysis. OEHHA must know this type of complex exposure analysis is rarely – if ever – done by regular consumers faced with a Prop 65 warning – whether a short-form warning or the standard long-form warning.

toxicants, as well as products with a chemical or chemicals that are *both* carcinogens and reproductive toxicants (e.g., lead and lead compounds).

#### **D. Proposed Amendment Revisions Urged by The Business Community**

In the public comment letter of January 3, 2024 submitted by the Consumer Brands Association, California Chamber of Commerce, and many other business organizations, a number of revisions to the proposed amendments were requested, including:

1. Withdraw the proposed amendments entirely because they are (1) unnecessary; (2) rely on faulty assumptions; (3) are unsupported by valid research; (4) will create further consumer confusion, and; (5) create an unreasonable burden on businesses who sell goods in California.
2. Withdraw the proposed amendment requiring double warnings (internet/catalog *and* on product or on label).
3. Clarify that only *one* chemical per endpoint is required to be included.
4. Allow for a 3-year phase in period after adoption instead of 2-years.
5. Clarify that the unlimited sell-through include not only product that are manufactured before and during the phase-in period, but also to *labels* that were printed before [and during] the phase-in period.
6. Clarify that any short-form warnings provided pursuant to a prior consent judgment are protected.

#### **E. Where do we go from here?**

There are a number of open questions pending adoption of final amendments:

1. Will only one chemical per endpoint be required and, if so, which one?
2. Will the phase-in period be 2 years or some other period (e.g., 3 years)?
3. Will there be a requirement for double warnings for products sold over the internet or through catalogs?
4. What does “prominently display” mean vis-à-vis internet purchases?
5. Will the sell-through include only products manufactured before adoption of new regulations or also include labels printed before that date?

For further information or assistance with Prop 65 compliance:

Craig A. Livingston  
Livingston Law Firm  
1600 South Main Street, Suite 280  
Walnut Creek, CA 94596  
(925) 952-9880  
clivingston@livingstonlawyers.com

The information provided on this article does not, and is not intended to, constitute legal advice; instead, all information in this article is for general informational purposes only.