



ACA Guidance on OEHHA's
Amendments to Article 6:

Clear and Reasonable Warnings under Proposition 65



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ACA Guidance on California's Office of Environmental Health Hazard Assessment Amendments to Article 6: Clear and Reasonable Warnings under Proposition 65

The purpose of this document is to provide guidance for American Coatings Association (ACA) members on the recent amendments to Article 6: Clear and Reasonable Warnings regulations under the Safe Drinking Water and Toxic Enforcement Act of 1986, more commonly referred to as Proposition 65 (Prop 65).

On Aug. 29, 2016, California's Office of Environmental Health Hazard Assessment (OEHHA), which administers the Prop 65 program, released the final regulations amending Article 6. The final amendments to Article 6 do not change the requirements for when a warning is required under Prop 65; rather, the amendments change the methods of transmission and warning content businesses must use if they want to take advantage of the safe harbor provisions under the law for consumer product, occupational and environmental exposures. The amendments also clarify the responsibility of the retailer to provide a Prop 65 warning, and establish tailored warnings for certain industries.

OEHHA's safe harbor regulations for consumer product exposure warnings and occupational exposure warnings are most relevant for ACA members who decide to provide Prop 65 warnings on paint and coatings products. ACA discusses the new safe harbor requirements for these warnings in detail in this guidance document. ACA recommends members read the regulations and OEHHA's Final Statement of Reasons (FSOR), regarding the Article 6: Clear and Reasonable Warnings, which can be found at www.oehha.ca.gov/proposition-65.

DISCLAIMER

This guidance document is intended to assist members to understand OEHHA's changes to Article 6, Clear and Reasonable Warnings regulations of Prop 65. This information is not intended to represent an interpretation of California laws and regulations or constitute compliance advice. The information contained in this document has been compiled from sources believed to be reliable and represent the best information on the subject as of Jan. 16, 2017. The American Coatings Association, Inc., makes no warranty, guarantee, or representation as to the completeness or sufficiency of any information herein, and the Association assumes no responsibility in connection therewith; nor can it be assumed that all necessary measures are contained in these documents, or that other or additional information or measures may not be required or desirable because of particular or exceptional conditions or circumstances, or because of applicable federal, state, or local law.

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Background on Prop 65

The Safe Drinking Water and Toxic Enforcement Act of 1986 was passed into law as a ballot initiative, Proposition 65. Under Prop 65, the State of California is required to maintain a list of chemicals that are known to the State to cause cancer, birth defects or other reproductive harm, or both. The list includes over 800 chemicals since it was published in 1987. The State can add chemicals to the Prop 65 list using four mechanisms: 1) the State's qualified experts mechanism; 2) formally required to label mechanism; 3) labor code listing mechanism; and 4) authoritative body mechanism.

State's Qualified Experts Mechanism

The State's Science Advisory Board (SAB) reviews existing toxicological information to determine if a chemical has been shown to cause cancer or reproductive toxicity. The board is divided into the Carcinogen Identification Committee (CIC) and the Developmental and Reproductive Toxicant Identification Committee (DARTIC). The SAB also determines which regulatory bodies can be used to list chemicals under the Authoritative Body Mechanism.

Formally Required to Label Mechanism

If the State or Federal government determine a chemical is a carcinogen or reproductive toxicant, it will be listed under Prop 65.

Labor Code Listing Mechanism

Chemicals listed as carcinogens or reproductive toxicants under the California Labor Code are listed under Prop 65. The California Labor Code, at a minimum, is required to mirror the federal standard. Therefore, chemicals listed as carcinogens or reproductive toxicants by the federal Occupational Safety and Health Administration (OSHA) are also subject to listing under Prop 65.

Authoritative Body Mechanism

Chemicals cited as carcinogens or reproductive toxicants by an Authoritative Body by the SAB may be listed under Prop 65. Authoritative bodies include:

- National Toxicological Program (NTP)
- International Agency on Cancer Research (IARC)
- U.S. Food and Drug Administration (FDA)
- U.S. Environmental Protection Agency (EPA)

It is worth noting that with enactment of the Frank L. Lautenberg Chemical Safety for the 21st Century Act, the U.S. Environmental Protection Agency (EPA) is now required to conduct risk evaluations on chemicals it prioritizes under the Toxic Substances Control Act (TSCA). OEHHA could use the decisions made under TSCA Section 6 to list additional chemicals under Prop 65.

Duty to Warn

Prop 65 states that, "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first

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giving clear and reasonable warning to such individual.”¹ Companies that operate in California or sell products in California are subject to the law. Prop 65 is enforced by the California Attorney General, any district attorney, and city attorneys with a population exceeding 750,000. Significantly, the law allows for lawsuits to be initiated by private parties acting in the public interest (referred to as “bounty hunter” litigation). A business found guilty of violating Prop 65 may face penalties of up to \$2,500 per day for each violation.

Prop 65 requires persons doing business in the State of California to provide a warning if they are exposing an individual to a listed chemical. Businesses must review potential exposures caused by the products they manufacture and potential exposures in the workplace from chemicals used in manufacturing or processing. Prop 65 contains no blanket exceptions from the warning requirement for certain kinds of products, nor for certain kinds of businesses other than businesses with fewer than 10 employees,² so the statute can apply to a wide range of products, both industrial and consumer. OEHHA has stated that the Prop 65 warning requirement is intended to be applied broadly.³

Therefore, a business’s decision to provide a Prop 65 warning should consider the following:

- 1) Will the exposure to the Prop 65-listed chemical occur in the state of California?
- 2) What is the likelihood that an “individual” will be exposed to the listed chemical, or an employee in the workplace⁴?
- 3) What is the potential level of exposure to the listed chemical(s) given how the product is handled, used, stored or displayed?

Each company must analyze the potential costs and liability for providing Prop 65 warnings. Regardless, the only way to guarantee protection from potential litigation, no matter how unlikely, is to provide a Prop 65 warning compliant with the safe harbor requirements under Article 6.

There are three exemptions from the Prop 65 warning requirement: 1) businesses with less than 10 employees; 2) if a federal law governing an exposure preempts Prop 65; and 3) if the exposure is below the statutory threshold.⁵ If challenged in court, companies that choose not to provide a warning have the burden of demonstrating that the exposure is below the threshold, which would require an exposure assessment. To determine if a product causes an exposure that requires a warning, businesses can conduct an exposure assessment to determine if the exposure is *significantly below* the warning threshold.

¹ Cal. Health and Safety Code § 25249.6.

² See Cal. Health and Safety Code § 25249.10 for exemptions from the warning requirement.

³ In OEHHA’s Final Statement of Reasons (FSOR) for the original Article 6: Clear and Reasonable Warning regulations (1988), OEHHA responds to a comment where a commentator recommended that the safe harbor warnings apply to industrial and commercial products as well as consumer products. OEHHA responded that the term “consumer product exposure” was intended to have broad application, and that the term applies to exposures resulting from any person’s acquisition, purchase, storage, consumption, or use of a consumer good, and the term “person” includes businesses as well as individuals.

⁴ Under the Occupational Exposures safe harbor provisions, § 25606(a), a warning to an exposed employee about a listed chemical that is compliant with the federal Hazard Communication Standard (HCS) is a “clear and reasonable warning” under the Prop 65 regulations. So, if an employer is providing a warning to its employees for the Prop 65-listed chemical that is compliant with the HCS, that is a “clear and reasonable warning” so an additional Prop 65 warning is not required. This is distinguished from a warning being provided to individuals who are not employees under § 25606(b), in which case, Prop 65 warnings may be provided consistent with the consumer product safe harbor warning provisions.

⁵ The statutory threshold for chemical exposures to Prop 65 listed chemicals is the following: “an exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at a level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for listing of such chemical pursuant to subdivision (a) of Section 25249.8.” Cal. Health and Safety Code §25249.10.

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Statutory Thresholds

Carcinogens: The exposure poses no significant risk assuming lifetime exposure at the level in question. This is referred to as the no significant risk level (NSRL). Significantly below the NSRL is defined as an exposure that would result in not more than one excess case of cancer in 100,000 individuals exposed to the chemical over a 70-year lifetime.

Reproductive Toxicants: The exposure will have no observable effect assuming exposure 1000 times the level in question. This is referred to as the no observable effect level (NOEL). Significantly below the NOEL is referred to as the Maximum Allowable Dose Level (MADL). MADLs are defined as 1/1000th of the NOEL.

During the listing process, OEHHA can develop safe harbor levels, which serve as an official determination that exposure below the specified level will not cause a “significant exposure.” Currently, OEHHA has developed approximately 300 chemical specific safe harbor levels. Companies that do not know whether or not a listed chemical in their product is above the NSRL or NOEL have a number of options: 1) providing a warning regardless of the exposure level (Prop 65 does not prohibit “overwarning”); 2) performing an exposure assessment; or 3) seeking a safe use determination from OEHHA.⁶

ARTICLE 6: CLEAR AND REASONABLE WARNING AMENDMENTS

After a business determines that a Prop 65 warning is required on a product, it must determine how to provide a clear and reasonable warning. On Aug. 29, 2016, OEHHA released the final regulations amending Article 6 of the Prop 65 regulations. The key aspects of the amended regulations are outlined in this section.

Effective Date and Transition Period

The regulations become effective on August 29, 2018, which is two years from the date of enactment. Companies have a two-year period to transition from the old Prop 65 warnings to the new warnings. During the transition period, coatings companies can comply with either version of Article 6. However, beginning on Aug. 29, 2018, all warnings must be compliant with the amended Article 6.

Sell-through Period

OEHHA has provided an unlimited sell-through period for products *manufactured prior* to Aug. 29, 2018, that are compliant with the previous Article 6 safe harbor provisions (September 2008). Manufacturers and consumers should be able to clearly identify the date a product was manufactured to protect themselves against potential enforcement after Aug. 29, 2018.

Court-Ordered Settlements

The final regulations indicate that companies party to a court-ordered settlement or final judgment establishing a warning method or content are still deemed compliant with Prop 65 so long as they are complying with the settlement or final judgment. Even if warning contains the old Prop 65 warning language, it is still “clear and reasonable” if it is prescribed in the court-ordered settlement or final

⁶ OEHHA made a safe use determination for crystalline silica in interior flat latex paint at the request of ACA and the California Paint Council (March 28, 2003).

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judgment, and the company was a party to that judgment or settlement. A court-ordered settlement warning is not considered safe harbor under Article 6 for non-parties to the settlement.

The Responsibility to Warn – Distribution Chain Communication

The easiest method to comply with Prop 65 and send appropriate notice to downstream distributors and retailers is to affix a label⁷ containing the warning to the product. The regulations require business to provide sufficient notice to retailers by either:

- 1) Affixing a label to the product bearing a clear and reasonable warning, or
- 2) Providing written notice to the retailer and satisfy a number of additional requirements.⁸

If a coatings company chooses to provide written notice to the retailer rather than providing the warning on the product label, the written notice must:

1. State that the product may result in an exposure to one or more listed chemicals;
2. Include the exact name or description of the product or specific identifying information for the product such as a Universal Product Code or other identifying designation;
3. Include all necessary warning materials such as labels, labeling, shelf signs or tags, and warning language for products sold on the Internet, that satisfies Section 25249.6 of the Act;
4. Be sent to the retail seller, and the manufacturer, producer, packager, importer, supplier, or distributor must obtain confirmation electronically or in writing of receipt of the notice;
5. Be renewed, and receipt of the renewed notice confirmed electronically or in writing by the retail seller's authorized agent⁹ within six months during the first year after the effective date of this section, then annually thereafter during the period in which the product is sold in California by the retail seller;¹⁰ and
6. Include additional notice within 90 days when a different or additional chemical name or endpoint (cancer or reproductive toxicity) is included in the warning.

Once a retailer receives a product with a compliant Prop 65 warning affixed to the label, or receives proper written notice and warning materials, the retailer is then responsible for the placement and maintenance of the warnings.

Safe Harbor Warning Methods and Content

Under the regulations, OEHHA has developed safe harbor language which will always be considered clear and reasonable under Prop 65. Businesses in California are not required to follow the safe harbor provisions so long as they provide a warning that is “clear and reasonable.” However, warnings that differ in any way from the established safe harbor provisions are likely to face legal challenges, and it is the burden of the company providing a warning to demonstrate that the warning is in fact clear and reasonable. It is therefore advisable to follow the safe harbor warning requirements. Complying with the

⁷ A “label” is defined in the regulations to be “a display of written, printed or graphic material that is affixed to a product or its immediate container or wrapper.” § Cal. Health and Safety Code 25600.1(i).

⁸ Cal. Health and Safety Code § 25600.2(b).

⁹ “Authorized agent” is defined in the new Article 6 under § 25600.1 to mean “the person or entity designated by a retail seller to receive notices from product manufacturers, producers, packagers, importers, suppliers, and distributors under this article.” OEHHA states in the FSOR that if a retail seller has not designated an authorized agent, the manufacturers, producers, packagers, importers, suppliers, and distributors can provide the notice and warning materials to the person they normally communicate with at the retail seller regarding their products.

¹⁰ In the FSOR, OEHHA clarifies that such confirmation of receipt can be given via e-mail or other electronic method to the entity that provides the notice. It need not be in hard-copy form.

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safe harbor warning regulations will ensure that a warning is clear and reasonable and protect businesses from potential litigation.

Consumer Product¹¹ Exposure Warnings — Methods of Transmission

OEHHA states that consumer product warnings must be prominently displayed, conspicuous, and likely to be understood by an ordinary individual under customary conditions of purchase or use. OEHHA also clarifies that warnings may contain supplemental information in the warning, but only to the extent that the supplemental information identifies the sources of exposure or information on how to avoid or reduce the exposure to the listed chemical.

In order to take advantage of the safe harbor under Prop 65, OEHHA prescribes the methods of providing a warning, known as “methods of transmission.” The safe harbor methods of transmission for consumer product exposure warnings are posted signs, shelf tags, shelf signs, electronic devices or processes that automatically provide the warning to the purchaser prior to or during purchase, labels and on product warnings.

In the Final Statement of Reasons (FSOR), OEHHA states that it does not view owner’s manuals as a safe harbor method of transmitting a Prop 65 warning.¹² Specific to exterior packaging, such as blister packages, OEHHA stated that a warning should be placed on the product in a manner that ensures it can be viewed by the consumer prior to purchase, “which may be on the box, wrapper, or other immediate container or packaging. However, for products that are commonly resold, passed on, or used by multiple people in addition to the original purchaser, a warning on the product itself may be appropriate.”¹³

Also, for the first time, OEHHA is requiring businesses to provide internet and catalog warnings for products sold online or in catalogs. For internet purchases, a warning must be provided by including either the warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. If the product label has a Prop 65 warning on it, the internet warning for that product can use the same warning language. Online retailers can look at the product label and either copy the warning language onto the website or replicate an image of the warning. For catalog purchases, the warning must be provided in the catalog in a manner that clearly associates it with the item being purchased. If the product label has a Prop 65 warning on it, the catalog warning can use the same language.

It is worth noting that “general advertising” or only *displaying* products either online or in a product catalog does not trigger the need for a Prop 65 warning on the website or catalog. A warning would need to be provided online or in the catalog if the website has an e-commerce function, or if there is a method to purchase the product.

SDS Warnings

Safety Data Sheets (SDS) were not a safe harbor method of transmission under the previous Article 6, but they are a common way for companies to communicate that certain chemicals are Prop 65-listed chemicals down the supply chain. In the final regulations, OEHHA still does not include SDS warnings as

¹¹ Consumer Product: “any article, or component part thereof, including food, that is produced, distributed, or sold for personal use, consumption or enjoyment of the consumer.” Cal. Health and Safety Code § 25600.1(d).

¹² Note: OEHHA discusses at length how owner’s manuals are not a safe harbor method of transmission for a Prop 65 warning. OEHHA discourages the use of owner’s manuals for Prop 65 warnings since it is “unlikely that a consumer will read the manual prior to most types of exposures that commonly occur via consumer products.” However, an owner’s manual can serve as an adjunct to another safe harbor warning method. FSOR at p. 76.

¹³ FSOR at p. 87.

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a safe harbor method of transmission. Further, Cal OSHA does not require Prop 65 warnings on SDSs.¹⁴ Therefore, companies that want to take advantage of the safe harbor warning provisions under Article 6 of Prop 65 cannot use SDS warnings alone. Rather, an SDS warning can serve as an adjunct to another safe harbor warning method, so an SDS warning would be voluntary. Companies have the flexibility to adopt SDS warnings that best fit their business's needs, or remove a warning from the SDS altogether because an SDS is not a safe harbor warning method.

If a company is considering removing a Prop 65 warning on the SDS altogether, please note that it has been a longstanding practice to provide notice to downstream customers that a product contains Prop 65 listed chemicals on SDSs in Section 15. Additionally, upstream suppliers have used the "MSDS defense": when challenged by bounty hunter lawsuits, the supplier can document that it communicated to its supply chain that substances sold are Prop 65 listed chemicals. While an SDS warning is not a safe harbor method of warning, SDS warnings are legally recognized defenses to litigation and are therefore recommended.

Consumer Product Exposures – Safe Harbor Warnings

OEHHA has made major changes to the warning language and structure of safe harbor warnings under Prop 65 for consumer product exposures.

Pictogram

The amended safe harbor provisions require the use of a pictogram. The pictogram must be "a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline."¹⁵ OEHHA has provided images of the pictogram for businesses to download on its website, www.P65warnings.ca.gov. The pictogram must be in yellow unless the sign, label or shelf tag for the product is not printed in yellow, in which case, the pictogram may be in black and white. Further, the pictogram can be no smaller than the word **WARNING**. The word **WARNING** is required to be in bold and all capital letters.

ACA members asked for clarification regarding when to put the pictogram in yellow or in black and white. OEHHA has stated that it interprets the word "label" to include the entire label associated with the product. If a product has a label with two different panels — one for marketing and branding information that uses colors including yellow, and a back panel that has warning information and is in black and white (or red for GHS warnings) — that is still considered one label. Therefore, if the product has yellow on the front panel, it would trigger the color pictogram requirement even if the warning content is on the back panel or on a separate panel on the label. OEHHA expects if yellow is used on *any part* of the label, the pictogram must be in yellow. OEHHA declined to specify a particular pantone color of yellow that would trigger the obligation to make the pictogram in yellow. ACA recommends members use the image of the pictogram OEHHA provides on its website that companies can use on their new warnings: <https://www.p65warnings.ca.gov/warning-symbol>.

Font Size and Formatting

OEHHA now requires particular font sizes for Prop 65 safe harbor language. The Prop 65 warning must be no smaller than the other "consumer information" information provided on the label, but can be no smaller than type size 6. For reference, OEHHA defines consumer information as "Warnings, directions for use, ingredient lists, and nutritional information. 'Consumer information' does not include the brand

¹⁴ Cal. Code of Regulations § 5194(b)(6)(A).

¹⁵ Cal. Health and Safety Code § 25603(a)(1).

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name, product name, company name, location of manufacture, or product advertising.”¹⁶ OEHHA does not indicate a preference on text formatting other than font size.

Lead Agency Website

Additionally, all safe harbor warnings must include the URL for the lead agency website: www.P65Warnings.ca.gov. This website is newly created by OEHHA to provide consumers with additional information about products containing Prop 65 chemicals and exposure information.

Foreign Language Requirement

Article 6 was amended so that if the consumer information for the product is provided in a foreign language, then Prop 65 warnings must be provided in the foreign language in addition to English. If the English and foreign language warnings are close in proximity, only one pictogram needs to be provided. However, where the English and alternative language warnings are not co-located, it would be appropriate to include pictograms for both the English and alternative language warning.¹⁷ The URL must also be included in each translation.

OEHHA also plans to provide safe harbor foreign language warnings in the following languages on its Lead Agency Website in order to assist with compliance:

- Spanish
- Cambodian
- Chinese
- French
- Hmong
- Korean
- Tagalog
- Vietnamese

Chemicals in the Text of the Warnings

Companies are now required to name at least one chemical for *each endpoint* (cancer and reproductive toxicity) in the text of their Prop 65 warnings. Companies can choose to list multiple or all Prop 65 listed chemicals in the text of the warning, although they are only required to list one. OEHHA allows businesses to determine which chemical to disclose and makes no recommendations regarding concentration or levels of exposure.¹⁸ The warning language required is included below in the “Safe Harbor Warning Language” section.

Safe Harbor Warning Language

Businesses that do not choose to use the truncated warning (discussed in the next section) for a product warning must use the full safe harbor warning content prescribed below. This content is also the safe harbor content for all other safe harbor methods of warning.


¹⁶ Cal. Health and Safety Code § 25600.1(c).

¹⁷ FSOR p. 99.


¹⁸ OEHHA states in the FSOR that, “the choice of which chemical to name is up to the business, and the safe harbor protection will apply, even if there are other chemicals that affect the same endpoint that can result in exposures.” FSOR at p. 69.

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For Carcinogens:


 **WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

For Reproductive Toxicants:


 **WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

For Exposures to a Carcinogen and a Reproductive Toxicant:

If a product causes an exposure to a chemical(s) that is both a carcinogen and reproductive toxicant, the warning must disclose both endpoints:

 **WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] 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.

If a product causes an exposure to a chemical(s) that is a carcinogen and a chemical(s) that is a reproductive toxicant, the warning must disclose at least one chemical for each endpoint:

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

NOTE: The phrase “chemicals including” can be deleted if a warning is provided for an exposure to a single chemical.

On-Product Warnings: Truncated Warnings Permitted

One significant amendment to the safe harbor warning content requirements for consumer product exposures is that the regulations permit, but do not require, companies to use a shorter form of the Prop 65 warning if they provide an “on-product” warning. This shorter form warning, also termed a “truncated” warning, allows companies to eliminate much of the terminology contained in the longer form warnings, including the need to specify a chemical or chemicals for which the warning is being provided. Although OEHHA noted that truncated warnings were incorporated into the regulation for companies with limited label/product space, truncated warning may be used regardless of label or product size. Examples of various truncated warnings are provided below.

During the regulatory process, several commenters requested that OEHHA provide clarification on the intended meaning of “on product,” as that term is not defined in the regulations. Pertinent to ACA membership, commenters asked OEHHA whether “on product” includes the product label such that truncated warning can be provided on the product label. The regulations define a “label” as “a display of

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written, printed or graphic material that is *affixed* to a product or its immediate container or wrapper.”¹⁹ Notably, regulations distinguish a product “label” from product “labeling.” The regulations define “labeling” as “any written, printed, graphic, or electronically provided communication that *accompanies* a product including tags at the point of sale or display of a product.”²⁰

In response to requests for clarification on the meaning of “on product,” OEHHA clarified that in order to be deemed “on product,” the warning must be provided on the product itself, or on the “*immediate container (box, packaging) or wrapper for the product . . .*”²¹ Although OEHHA did not specifically state that “on product” includes a product “label,” OEHHA’s response uses the precise terminology from the regulatory definition of “label” above and thus OEHHA clearly opined that truncated warnings may be provided on product labels. Importantly, OEHHA further noted that “on product” does not extend to product *labeling*, such as instruction manuals or other materials that *accompany*, as opposed to those that are *affixed* to, the product at issue.

Notwithstanding OEHHA’s relatively straightforward statements indicating that truncated “on product” warnings may be provided on the product label, some have questioned whether truncated warnings may be provided on the product label because of the way in which the regulatory language itself is drafted. Specifically, the regulations, at Section 25602 subsection (a), provide that warnings may be provided using one or more of the following four methods (the relevant methods for purposes of this discussion are in bold):

(1) A product-specific warning provided on a posted sign, shelf tag, or shelf sign, for the consumer product at each point of display of the product.

(2) A product-specific warning provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the consumer product, without requiring the purchaser to seek out the warning.

(3) A label that complies with the [long-form warning content requirements]. A product-specific warning provided on a posted sign, shelf tag, or shelf sign, for the consumer product at each point of display of the product.

(4) An on-product warning that complies with the [short-form warning content requirements]. The entire warning must be 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.

Some have interpreted section (3) above to mean that if a business elects to provide a warning on a product label, it must do so using the long-form warning. Our review of the regulations, however, suggest that section (3) and section (4), when read together, give businesses the *option* to provide either long-form or short-form warnings on product labels. Specifically, we view section (3) as providing the option for businesses to provide a long-form warning on a product label. Alternatively, at the election of the business, section (4) gives businesses the option to provide a short-form warning on a product label. Our interpretation of these sections has recently been confirmed verbally by OEHHA. Although ACA is confident with its interpretation of the regulations on this issue, as noted above the regulations do contain some ambiguities, and thus, it is possible that some within the private enforcement community may seek to challenge companies on the adequacy of their truncated warnings.

¹⁹ Cal. Health and Safety Code § 25600.1(i) (emphasis added).

²⁰ Cal. Health and Safety Code § 25600.1(j).

²¹ FSOR at p.86-87 (emphasis added).

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The safe harbor language for the truncated warnings includes: the pictogram; the word “WARNING” in bold font and all capital letters; the appropriate endpoint (Cancer, or Reproductive Harm, or both); and the Lead Agency Website URL.

On-product Warnings (Truncated Warning)

Coatings companies providing warnings on the product label can take advantage of the shorter truncated warning, which does not require chemical specific disclosure or the longer warning content.

The truncated safe harbor language states:

For Carcinogens:

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

For Reproductive Toxicity:

 **WARNING:** Reproductive Harm – www.P65Warnings.ca.gov.

For consumer products that cause exposures to both a listed carcinogen and a reproductive toxicant:

 **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

Coatings companies will have to select one of these three warning statements to take advantage of the safe harbor warning protections. Companies should note that to provide a warning that states “Cancer *and/or* Reproductive Harm” is not compliant with the safe harbor warning content requirements.

Occupational Exposure Warnings and Industrial Product Warnings

To address exposures to Prop 65 listed chemicals to employees at their place of employment, OEHHA provides an occupational exposure safe harbor section. Section 25606(a) states that a warning provided to an exposed employee about a Prop 65 listed chemical that is fully compliant with all warning information, training and labeling requirements of the federal Hazard Communication Standard (or the California Hazard Communication Standard)²² is “clear and reasonable” under the law. So, a Prop 65 warning in this context would not be required since the compliant OSHA warning would satisfy the clear and reasonable warning requirement. OSHA reasons that this is clear and reasonable because employees are receiving training, information and warnings from their employer in compliance with OSHA regulations.

However, the occupational exposure safe harbor only covers warnings for exposures to *employees*, and not consumers or “individuals” that could be exposed in the workplace but are not employees. If an industrial product manufacturer chooses to provide a Prop 65 warning for exposures to “individuals,” or if the employer is not providing a warning to employees for an exposure to the Prop 65 listed chemical pursuant to subsection (a), then OEHHA allows them to follow the consumer product or environmental

²² Or for pesticides, the Pesticides and Worker Safety requirements.

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exposure safe harbor warning provisions.²³ That way, companies will have a safe harbor option to take advantage of.²⁴

For More Information

For more information about the amendments to Article 6: Clear and Reasonable Warnings under Prop 65 please visit www.oehha.ca.gov/proposition-65.

²³ Cal. Health and Safety Code § 25606(b).

²⁴ “A product that is used exclusively in an occupational setting would be deemed compliant if a warning for an exposure to a listed chemical from that product is provided under the Hazard Communication Standard, or Pesticides and Worker Safety requirements. Based on this and other comments, the regulations were modified to add subsection (b) to clarify that where a warning is *not already being provided* (emphasis added) for an exposure pursuant to subsection (a), warnings may be provided pursuant to the general provisions for consumer product and environmental warnings. These changes should address the issue of product exposures that occur in the industrial or occupational setting where an OSHA standard does not apply.” FSOR p. 131. In response to a commenter that asked for clarification for products that contain a Prop 65 listed chemical that does NOT meet an OSHA warning cut-off or is not a chemical considered under the HCS, OEHHA responded that in those cases, subsection 25606 (b) was added to address occupational exposures to a product used in an occupational setting that requires a Prop 65 warning and is not subject to the HCS and therefore not covered under subsection (a).

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