

# Memorandum

To: Proposition 65 Clients and Friends of Our Firm  
From: Bruce Nye, [bnye@adamsnye.com](mailto:bnye@adamsnye.com); 415-982-8955  
Date: September 14, 2016  
Re: New Proposition 65 Warning Regulations

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**CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION**

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## Introduction

On September 2, 2016, California's Office of Environmental Health Hazard Assessment announced its final revised warning regulations, after a process lasting nearly two years. These regulations will have an enormous impact on almost every company that sells a product in California, manufactures or distributes a product sold in California, owns or manages a public space or employs persons in California. Many of our clients who adopted warning programs in settlement of Proposition 65 enforcement actions, or who implemented company-wide product warning protocols to ensure Proposition 65 compliance, will have to substantially revise their compliance programs before the effective date of **August 30, 2018**. Companies can comply until then by following with the earlier regulations or the new ones, and need not replace compliant warnings for products manufactured before the effective date.

There is a great deal of substance in the new regulations. Different regulations affect many of our clients differently, and the result, unfortunately, is a very long memo. So we start with a Table of Contents, allowing clients to choose the subjects that matter most to them

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### **EXECUTIVE SUMMARY**

In the pages that follow, we will be giving you quite a bit of detail concerning the new regulations and what they mean. But as we see it, here are the changes going into effect August 30, 2018 that every company doing business in California needs to be aware of *immediately*.


- *The old “safe harbor” language won’t be safe anymore:*
- *The new “safe harbor” warning regulations require specific identification of at least one chemical, and sometimes more:*
- *Companies who have agreed to give warnings as part of a settlement agreement may have to revise their warnings (but companies bound by a consent judgment signed by a judge will not).*
- *Warnings in owners’ manuals no longer qualify as safe harbor warnings.*
- *On-line warnings will now be required for internet purchases.*
- *There is now a way for importers, distributors and manufacturers to sometimes pass the warning obligations down to retailers.*
- *As a practical matter, for consumer goods and environmental exposures, the new regulations establish what may be the only permissible way to warn.*
- *In some instances, warnings must be provided in languages other than English.*


## **Safe-Harbor Warnings for Consumer Products**


### **The Required Content**

The warning requirements for consumer products generally include an icon/graphic, specific language and a website url:


For exposures to a single carcinogen, reproductive toxicant or a single chemical listed as both:


 **WARNING:** This product can expose you to [name of chemical], a chemical known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product).


 **WARNING:** This product can expose you to [name of chemical], a chemical known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product).


 **WARNING:** This product can expose you to [name of chemical], a chemical known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.65Warnings.ca.gov/product](http://www.65Warnings.ca.gov/product).

For exposures to multiple (or potentially multiple) chemicals:

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


 **WARNING:** This product can expose you to chemicals including [name of one or more chemical or 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/product](http://www.P65Warnings.ca.gov/product).


 **WARNING:** This product can expose you to chemicals including [name of one or more chemical or chemicals], which is [are] known to the State of California to cause cancer and [name of one or more chemical or 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/product](http://www.P65Warnings.ca.gov/product).


 **WARNING:** This product can expose you to chemicals including [name of one or more chemical or 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/product](http://www.P65Warnings.ca.gov/product).

Despite the bracketed language about “one or more chemical or chemicals,” our reading of the regulations is that when there are multiple chemicals and a single end-point, the warning only has to list one of the chemicals. If there are two or more chemicals with different end-points (i.e., cancer and birth defects), at least one chemical has to be identified for each end point.

The new regulations also contain “truncated” warnings for consumer products. While these were designed for product / packaging so small there is no room for the full warning, the regulations allow their use on any products. The truncated warnings are these:

 **WARNING:** Cancer -- [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)

 **WARNING:** Reproductive Harm -- [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)

 **WARNING:** Cancer and Reproductive Harm-- [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)

These warnings need not identify a particular chemical, but must be placed on the product itself.

In all instances where the regulations require the icon, if product labels are printed without color, the exclamation point in the triangle can be printed in black and white.

### **Warning Location**

Consumer product warnings must be “prominently displayed . . . and must be displayed with such conspicuousness as compared with other words, statements, designs or devices . . . as to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use.” Warnings can be provided in the following ways:

- A product-specific warning on a sign or shelf-tag at each point of display of the product;

- 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 . . . without requiring the purchaser to seek out the warning;
- A label;
- An on-product truncated warning, in a type size “no smaller than the largest type size used for other consumer information on the product” and not smaller than 6-point type.

For the first time, the regulation seems to be requiring specific types of warnings, rather than creating safe harbors. For Internet purchases, the new regulations require that “a warning . . . must be provided by including either the warning or a clearly marked hyperlink using the word “WARNING” on the product display site, “or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase.” And the regulations provide that a warning is not “prominently displayed” if the purchaser has to search for it. For catalog sales, the warning must be provided in a manner that clearly associates the warning with the product. For either Internet sales warnings or catalog sales warnings, if the company uses one of the truncated warnings, it can use the truncated warning on the web site or in the catalog.

### **Product-Specific Warning Regulations**

The current regulations have product-specific warning provisions for food, alcoholic beverages, prescription drugs and BPA in canned and bottled foods and beverages (a temporary BPA interim regulation issued in April, 2016). The new regulations add product-specific warnings for dental care exposure, raw wood products, furniture, non-passenger diesel engines, vehicles, recreational vessels and amusement parks. Below, we summarize the requirements for food, beverages, furniture, vehicles and BPA.

**Food and Dietary Supplements:** The content of the safe harbor warnings are nearly identical to the full general consumer product warnings, except there is no exclamation point in the triangle, and the warnings begin “Consuming this product can expose you to . . . . “

The warning is to be contained in a box.

**Alcoholic Beverages:** For alcoholic beverages, there is one content provision and there are four possible means of transmission. The content is this:

**WARNING:** Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy can cause birth defects. For more information go to [www.P65Warnings.ca.gov/alcohol](http://www.P65Warnings.ca.gov/alcohol).

These are the authorized means of transmission:

- An 8 ½ by 11 inch sign in no smaller than 22-point type, at eye level so it is readable and conspicuous to customers as they enter the area or areas where alcoholic beverages are sold.
- A notice or sign at least 5 by 5 inches with font at least 20 point and text enclosed in a box, placed at each retail point of sale or display so as to assure that it is readable and conspicuous.
- For beverages served by “food or beverage persons” or at a counter, on a menu or list identifying food or beverages sold at the facility.
- For package deliveries, the warning on or in the shipping container or delivery package, with type no less than 8 point font, and readable and conspicuous to the recipient prior to consumption.

## Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants

Here is the safe harbor language:

**WARNING:** Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which 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/restuarant](http://www.P65Warnings.ca.gov/restuarant).

In other words, even though acrylamide in cooked meats and mercury in seafood are, according to many food scientists, naturally occurring (and under other Proposition 65 regulations, unwarned exposures to naturally occurring chemicals are deemed not to violate the statute), a restaurant wanting to claim safe harbor status for its warning must include both of these chemicals.

The three authorized means of transmission are similar to some for alcoholic beverages:


- An 8 ½ by 11 inch sign in no smaller than 28-point type, placed so that it is readable and conspicuous to customers as they enter each public entrance to the restaurant or facility where food or beverages may be consumed.
- A notice or sign at least 5 by 5 inches with font at least 20 point and text enclosed in a box, placed at each point of sale so as to assure that it is readable and conspicuous.
- A warning on any menu or list describing food or non-alcoholic beverage offerings, in a type size no smaller than the largest type size used for the names of general menu items.

## Furniture

This regulation has two components, one for “warnings,” and one for “notices.” The warning must be “affixed to the furniture product in the same manner as other consumer



information or warning materials . . . “ and provide as follows:

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

In addition, there must be a “notice,” either placed at each public entrance or point of display, or “printed or stamped” on each receipt. Signs must be no smaller than 8 ½ by 11 inches with at least 28-point type, and receipt notices must be no smaller than 12-point type.


Either must state the following:

**NOTICE:** Some furniture products can expose you to chemicals known to the State of California to cause cancer or birth defects or other reproductive harm. Please check on-product label for warning information.


## **Motor Vehicles**

There are a variety of new warning regulations for vehicles, vehicle exhaust, and chemicals related to vehicles. The retail sale for motor vehicle provisions are these:

Passenger vehicles and Off-road vehicles: For some years, manufacturers of new vehicles have generally included Proposition 65 warnings in their vehicle manuals. Under the new regulations, vehicles and vessels seem to be the only products for which the use of manuals is sanctioned. But the warning must appear in both the manual and on a non-permanent label or hangtag on the car. In the manual, the warning must be in no smaller than 12-point type enclosed in a box printed or affixed to the inside or outside of the front or back cover or on the first page of text. In addition, the warning must be provided on a non-permanent label attached to the front window on the driver’s side, or if there is no driver’s side window, on a hang tag hung from the rear view mirror, or, if there is also not a rear view mirror, “in another prominent location.” The following warning is required in both places:

 **WARNING:** Operating, servicing and maintaining a passenger vehicle or off-road vehicle can expose you to chemicals including engine exhaust, carbon monoxide, phthalates, and lead, which are known to the State of California to cause cancer and birth defects or other reproductive harm. To minimize exposure, avoid breathing exhaust, do not idle the engine except as necessary, service your vehicle in a well-ventilated area and wear gloves or wash your hands frequently when servicing your vehicle. For more information go to [www/65Warnings/ca/gov/passenger-vehicle](http://www/65Warnings/ca/gov/passenger-vehicle).

Non-passenger diesel engine exhaust: For exposure to non-passenger diesel engine exhaust, the regulations require a warning in the manual, similarly placed to the warning for passenger and off-road vehicles, and on a label permanently attached to the product in an easily visible location or an on-screen display if this is used to provide the operator with other warnings and instructions. The content prescribed is as follows:

 **WARNING:** Breathing diesel engine exhaust exposes you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

- Always start and operate the engine in a well-ventilated area.
- If in an enclosed area, vent the exhaust to the outside.
- Do not modify or tamper with the exhaust system.
- Do not idle the engine except as necessary.

For more information go to [www.P65warnings.ca.gov/diesel](http://www.P65warnings.ca.gov/diesel).

### **Bisphenol A (“BPA”) from Canned and Bottled Foods and Beverages**

The addition of BPA to the Proposition 65 reproductive toxicant list in May, 2015 (with warnings required beginning May, 2016) was an exceedingly volatile subject. BPA is very common in containers, and also the key component in many hard plastic products. OEHHA adopted a temporary emergency safe harbor warning regulation, which remains in effect for another year unless renewed. The interim regulation requires a conspicuous 5 X 5 inch at points

of sale, or on sale web sites, with the following content:

**WARNING:** Many food and beverage cans have linings containing bisphenol A (BPA), a chemical known to the State of California to cause harm to the female reproductive system. Jar lids and bottle caps may also contain BPA. You can be exposed to BPA when you consume foods or beverages packaged in these containers. For more information go to: [www.P65Warnings.ca.gov/BPA](http://www.P65Warnings.ca.gov/BPA).

### **Warnings in Manuals Are No Longer Sufficient**

The current regulations provide that a product warning can appear on the “label or labeling.” The regulations define “labeling” very broadly as “any label or other written, printed or graphic matter affixed to or accompanying a product or its container or wrapper.” Based on this, it has been completely appropriate, and lawful, to place the warning in the manual or use and care guide.

However, the new regulations, while retaining the “labeling” definition for other purposes, eliminate “labeling” as a location for warnings, requiring either a label with one of the long warnings or an “on-product” label with one of the truncated warnings. The regulations also permit product-specific shelf signs or tags at each point of display of the product.

### **New Rules Affecting Retailers**

Generally speaking, Proposition 65 and the regulations are designed to send the warning requirements as far up the distribution chain as possible, casting heavier burdens on manufacturers and distributors than on retail sellers. However, the new regulations contain a number of changes that potentially place much more burden on retailers, and potentially provide a way for manufacturers and distributors to shift the burden of warning from themselves to retailers. But there are also new provisions that insulate retailers from liability.

As discussed above concerning product warnings, generally speaking, when a product is sold on line, the new regulations require on-line warnings. Since it is mostly retailers who sell on line, this warning requirement by necessity falls on retailers. And yet, while in most instances only a retailer can provide an on-line warnings, other new provisions, discussed below, seem to

insulate retailers from liability in many instances; this begs a question: if a retailer does not provide an on-line warning, can the manufacturer or distributor be held responsible? We think not.

There is another and more novel twist, however. Under the new regulations, a manufacturer or distributor can meet its warning obligations “by providing a written notice directly to the authorized agent (specifically defined by the regulations) for a retail seller having ten or more employees. The 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, such as a UPC 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. The manufacturer or distributor must receive electronic or written confirmation of receipt of the notice sent to the retailer.

The notice has to be renewed (and confirmation received) within six months during the first year after August, 2018, and annually thereafter. An additional notice is required within 90 days if warning of a different chemical or disease endpoint (e.g., cancer or reproductive toxicity) is included.

A retailer with ten or more employees is to be held responsible for failure to give product warnings only under the following circumstances:

- The retailer owns or licenses the brand or trademark for the product;
- The retailer has knowingly introduced the chemical into the product, or caused it “to be created in the product;”
- The retailer has covered, obscured or altered a warning label;
- The retailer has received a notice and warning materials from someone upstream (e.g., manufacturer, distributor, etc.) and has failed to provide warning.

- In addition, a retailer is responsible if it has “actual knowledge” of the potential consumer exposure and there is no upstream source having ten or more employees and an agent for service or place of business in California.

A retailer has “actual knowledge” if it receives a sixty day notice and is selling the product five business days later.

Manufacturers and distributors can enter into a written agreement with retailers as to who provides the warning, which will supersede the regulations, but only if the consumer receives a warning, so this is fairly meaningless.

### **Safe Harbor Environmental Exposure Warnings**

Californians are used to seeing Proposition 65 warning signs at the doorway of every building, warning them about potential exposures to chemicals. Under the new regulations, however, the building warning requirement becomes much tougher. Signage can be used, posted at all public entrances to the affected area in no smaller than 72-point type. The warning sign must clearly identify one or more sources of exposure, containing the following content:

For listed carcinogens:

- ⚠ **WARNING:** Entering this area can expose you to chemicals known to the State of California to cause cancer, including [name of one or more chemicals] from [name one or more sources of exposure]. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

For a single carcinogen

- ⚠ **WARNING:** Entering this area can expose you to [name of chemical] from [name one or more sources of exposure]. [Name of chemical] is known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

For listed reproductive toxicants:

- ⚠ **WARNING:** Entering this area can expose you to chemicals known to the State of California to cause birth defects or other reproductive harm, including [name of one or more chemicals] from [name one or more sources of exposure]. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

For a single reproductive toxicant:

- ⚠ **WARNING:** Entering this area can expose you to [name of chemical] from [name one or more sources of exposure]. [Name of chemical] is known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

For exposures to both cancer and reproductive toxicity:

- ⚠ **WARNING:** Entering this area can expose you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm, including [name of one or more listed carcinogens and name of one or more listed reproductive toxicants] from [name one or more sources of exposure]. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

And finally, for exposure to a single chemical that is both:

- ⚠ **WARNING:** Entering this area can expose you to [named chemical] from [name one or more sources of exposure]. [Name of chemical 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](http://www.P65Warnings.ca.gov).

As an alternative to signage, the warning can be provided in a notice mailed, sent electronically or otherwise delivered to each occupant in the affected area. The notice must include a map clearly identifying the affected area, must clearly identify one or more sources of exposure, and must be provided every three months.

As another alternative, the company can publish the warning in a quarter-page or larger advertisement in the main or local news section of a newspaper with the largest circulation in the area, at least once every three months. The publication must also be made in any electronic version of the newspaper.

### **Enclosed Parking Facilities**

For parking garages, a warning is deemed compliant if it is on a 20 by 20 inch sign with at least 72 point type posted at each public entrance and reading as follows:

- **WARNING:** Breathing the air in this parking garage can expose you to chemicals including carbon monoxide and gasoline or diesel engine exhaust, which are known to the State of California to cause cancer and birth defects or other

reproductive harm. Do not stay in this area longer than necessary. For more information go to [www.P65Warnings.ca.gov/parking](http://www.P65Warnings.ca.gov/parking).

### **Service Station and Vehicle Repair Facilities**

For service stations, a warning deemed compliant must be in at least 22 point type, enclosed in a box and posted on each gas pump. For vehicle repair facilities, it must be at least 32 point type, enclosed in a box and posted at each public entrance. The content is as follows:

- **WARNING:** Crude oil, gasoline, diesel fuel, and other petroleum products can expose you to chemicals including toluene and benzene, which are known to the State of California to cause cancer and birth defects or other reproductive harm. These exposures can occur in and around oil fields, refineries, chemical plants, transport and storage operations, such as pipelines, marine terminals, tank trucks and other facilities and equipment. For more information go to: [www.P65Warnings.ca.gov/petroleum](http://www.P65Warnings.ca.gov/petroleum).

### **Non-English Language Warnings**

Proposition 65 contains no requirement of non-English language warnings, and until now, neither did the regulations. In California, forty percent of people speak languages at home other than English, so not surprisingly, the new regulations reflect this. The exact requirements vary for different kinds of exposures, but generally speaking, if the company creating an exposure is providing other information to persons who will be exposed in languages other than English (e.g., product manuals, labels in Spanish, Mandarin or other languages) the warning must be provided in both English and that language.

### **Non-Safe Harbor Warnings**

The new regulations, like the old ones, provide that other means of warning can also be “clear and reasonable” as required by Proposition 65. We expect, however, that private enforcers will be claiming that any warnings that don’t match the regulations are inadequate, and we will, for the first time, be seeing much litigation over the adequacy of warnings. So companies will have to strive to bring their warnings into compliance with the new regulations.