

Drinker Biddle

Proposition 65: Amendments to the  
“Clear and Reasonable” Warning  
Regulations

Presented to:  
The California Furniture Manufacturers Association

February 23, 2017

Drinker Biddle

**OVERVIEW**

- **Introduction to Proposition 65**
- **New Warning Regulations, Operative August 30, 2018**
- **Furniture-Specific Warning Regulations**

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The California Furniture Manufacturers Association: February 23, 2017 | 2

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### INTRODUCTION TO PROPOSITION 65

- Enacted in 1986 as “The Safe Drinking Water and Toxic Enforcement Act of 1986.”
- Prohibits the knowing discharge or release of chemicals known to the State of California to cause cancer or reproductive toxicity into water or onto land where they probably will pass into any source of drinking water. Cal. Health and Safety Code § 25249.5.
- Requires the State of California to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm. There are currently over 850 chemicals on the list, with new chemicals being added each year.
- Requires businesses to provide warnings if their products or facilities can expose consumers or workers to a listed chemical above threshold levels.

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### INTRODUCTION TO PROPOSITION 65

#### Compliance

- Does the product or facility contain or release a listed chemical?
- If so, will the product or facility result in an exposure at a level that requires a warning?
- If so, determine the appropriate method and language for the warning.



## INTRODUCTION TO PROPOSITION 65

### Is a Warning Required?

- Cancer: A warning must be given for listed chemicals unless exposure is low enough to pose no significant risk of cancer (1 additional cancer in 100,000 cases).
  - This is known as the “No Significant Risk Level” (NSRL).
- Reproductive Toxins: A warning is required if exposure is more than 1/1000th of the lowest level observed not to cause birth defects or other reproductive harm.
  - This is known as the “No Observable Effect Level” (NOEL).
- OEHHA has published “safe harbor” NSRL and NOEL exposure levels. You need not provide a warning if your product or facility results in an exposure within the established “safe harbor” levels.

## INTRODUCTION TO PROPOSITION 65



**WARNING:** There are no truly objective (risk free) criteria for determining whether a warning is required!

- The “safe harbor” levels are based on exposure, not content.
- The fact and extent of exposure is a complex question about which experts can disagree.
  - How will exposure occur?
    - Inhalation
    - Dermal contact
    - Ingestion
    - A combination of pathways

## INTRODUCTION TO PROPOSITION 65

### Exposure Issues:

- How is product used?
- How frequently is it used?
- How can contact occur in facility?
- What is the duration of contact within the facility?
- What behaviors are associated with the use of the product or facility?
- What are the correct assumptions?
- What is the correct testing methodology?



## INTRODUCTION TO PROPOSITION 65

### Bottom Line:

- Exposure analysis necessarily requires judgment and assumptions.
- Plaintiffs' experts will tend to conclude that an exposure exists which will require a warning.
- When in doubt, provide a warning.

## INTRODUCTION TO PROPOSITION 65

### Strict Liability? NO!

- Proposition 65 only applies to knowing and intentional exposures.
- “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 giving clear and reasonable warning to such individual . . . .” (Health and Safety Code, Section 25249.6)

## INTRODUCTION TO PROPOSITION 65

### HOWEVER: Plaintiffs will argue that knowledge and intent should be implied by content and inaction.



- A Proposition 65 Notice will issue if plaintiff's expert finds an exposure.
- A Proposition 65 Notice will not likely issue if there is a compliant warning.
- When in doubt: Provide a compliant warning.

## INTRODUCTION TO PROPOSITION 65

### Exposure:

- Once a chemical is listed, businesses have 12 months to comply with the warning requirements. Failure of a business to provide such warning potentially can result in (i) civil penalties up to \$2,500 per day for each violation, (ii) injunctive relief, and (iii) attorney fees. Cal. Health and Safety Code § 25249.7(a), (b), (f).
- Method of calculating civil penalties:
  - Defendants argue that there is only one “violation” per product, or SKU.
  - Plaintiffs argue that each unit sale is a separate violation.
  - It is within the court’s discretion to set the amount of the penalty.
- California Code of Civil Procedure §§ 340(a) and (b) establish a one year statute of limitations for the statutory penalties available under Proposition 65. *See Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 976 (2003).

## INTRODUCTION TO PROPOSITION 65



### Summary:

- Proposition 65 provides no objective (risk free) standards for determining whether a warning is required.
- Exposure under Proposition 65 is potentially significant.
- Most cases settle.
- Warnings are prevalent (over-warning syndrome).
- Better to provide a compliant warning than risk litigation.

## WARNING REGULATIONS

- Promulgated by OEHHA.
- Provides “safe harbor” warnings for consumer product exposures, environmental exposures, and occupational exposures.
- Provides tailored “safe harbor” warnings for specific products and facilities.
- Clarifies responsibility of manufacturers, retailers and others in the supply chain to provide warnings.
- Adopted on August 30, 2016. Effective August 30, 2018.
- Businesses can choose to comply with either current regulations or new regulations between the adoption date and the effective date.
- Provides an unlimited sell-through period.

## WARNING REGULATIONS

What Changed?	
Current Safe Harbor	New Safe Harbor
“This product contains...”	“This product exposes you to...”
No requirement to specify the chemical for which the warning is being provided.	Must specify at least one chemical for which the warning is being provided. If warning for both carcinogenicity and reproductive toxicity, must specify at least one of each.
No requirement to include a pictogram.	 OR 

## WARNING REGULATIONS


### What Changed?

Current Safe Harbor	New Safe Harbor
No requirement to translate warnings.	Where a consumer product sign, label, or shelf tag used to provide a warning includes consumer information in a language other than English, the warning must also be provided in that language.
No requirement to specify the chemical for which the warning is being provided.	Must specify at least one chemical for which the warning is being provided. If warning for both carcinogenicity and reproductive toxicity, must specify at least one of each.
No requirement to specify a URL.	“For more information go to <a href="http://www.P65Warnings.ca.gov">www.P65Warnings.ca.gov</a> ”


## WARNING REGULATIONS

### Consumer Product Safe Harbor Warning Language:

*For exposures to carcinogens:*

 **WARNING:** This product can expose you to [chemical], which 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 exposures to reproductive toxicants:*

 **WARNING:** This product can expose you to [chemical], which 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).

NOTE: These can be combined.



## WARNING REGULATIONS

If the warning is provided on the product or its packaging, then the warning label can be truncated as follows:

⚠ “WARNING: Cancer - [www.p65warnings.ca.gov](http://www.p65warnings.ca.gov).”

⚠ “WARNING: Reproductive Harm –  
[www.p65warnings.ca.gov](http://www.p65warnings.ca.gov).”

⚠ “WARNING: Cancer and Reproductive Harm –  
[www.p65warnings.ca.gov](http://www.p65warnings.ca.gov).”

## WARNING REGULATIONS

### Consumer Product Safe Harbor Warning Methods (Brick & Mortar)

- A product-specific warning provided on a posted sign, shelf tag, or shelf sign for the product at each point of display.
- A product-specific warning provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during purchase.
- A product label.



## WARNING REGULATIONS

### Consumer Product Safe Harbor Warning Methods (Internet and Catalog)

For internet purchases: Include the warning:

- On the product display page,
- On a clearly marked hyperlink using the word “WARNING” on the product display page, or
- By prominently displaying the warning to the purchaser prior to completing the purchase.
- For catalog purchases: Must be provided in the catalog in a manner that clearly associates it with the item being purchased.

## WARNING REGULATIONS

If you have previously entered into a consent judgment settlement with a court-ordered warning, you may continue to use it.

### HOWEVER:

- The consent judgment must cover the specific product and company providing the warning. Other companies who sell similar products do not have the protection of the consent judgment.



## WARNING REGULATIONS

### Who Has to Provide Warnings?

Manufacturer/producer/packager/importer/supplier/distributor of a product may comply by either:

- Affixing a label to the product bearing a warning; or
- Providing written notice directly to the authorized agent for a retailer seller which:
  - States that a warning is required.
  - Includes the name or description of the product or specifies identifying information such as the UPC.
  - Includes all necessary warning materials.
  - Has been sent to the retailer, and the business providing notice has obtained confirmation of receipt of the notice electronically or in writing.

## WARNING REGULATIONS

### Who Has to Provide Warnings?

- Notice must be renewed within 6 months during the first year after the effective date of the regulation (by February 2019), then annually thereafter.
- Additional notice required within 90 days when a different or additional chemical name/endpoint is included in the warning.
- Retailer is responsible for providing the warning when it has “actual knowledge” of the potential exposure.

## WARNING REGULATIONS

### Who Has to Provide Warnings?

- Responsibility for providing warning can also be contractually allocated between manufacturer and retailer.
- Indemnification provisions may have the practical effect of allocating responsibility even if Proposition 65 is not mentioned.

## WARNING REGULATIONS

### Workplace/Facility Exposures:

- Follows same scheme as consumer product warnings.
- For exposures to carcinogens:
  - ⚠ **WARNING:** Entering this area can expose you to chemicals known to the State of California to cause cancer, including [chemical], from [name of one or more sources of exposure]. For more information go to [www.p65warnings.ca.gov](http://www.p65warnings.ca.gov).
- For exposures to reproductive toxins:
  - ⚠ **WARNING:** Entering this area can expose you to [chemical], which 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).

## WARNING REGULATIONS


### Furniture Specific Warning Regulations; Methods of Transmission:

- Affixed to product in the same manner as other consumer information or warning materials; AND
- Either:
  - Accompanied by an 8 1/2" x 11" sign at the public entrance or point of display in 28-point font; or
  - Printed or stamped in no smaller than 12-point type on each receipt.



## WARNING REGULATIONS

### Furniture Specific Warning Regulations; Content:

- Warning Label:
  - Must have the symbol: 
  - Must have the word “**WARNING**” in all caps and bold print.
  - Must have the words: “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).”



## WARNING REGULATIONS

### Furniture Specific Warning Regulations; Content:

- Warning Sign or Receipt:
  - Must have the word “**NOTICE**” in all caps and bold print.
  - Must have the words: “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.”
- NOTE: Both an on-product label warning and either a sign warning or a receipt warning are required.



## QUESTIONS

