

ARTICLE: ⚠ WARNING: NON-COMPLIANCE WITH CALIFORNIA'S NEW PROPOSITION 65 SAFE HARBOR RULES MAY EXPOSE YOU TO LIABILITY. FOR MORE INFORMATION, READ THIS ARTICLE.

by Star Lightner and Tori Gyulassy***

I. Introduction

The Safe Drinking Water and Toxic Enforcement Act, popularly known as “Proposition 65” (or “Prop. 65”), requires businesses to warn California residents before exposing them to specified chemicals. Due to its breadth and general terms, extensive regulations have been implemented to facilitate enforcement, as well as to reign in perceived abuses of the law by private enforcers. Given the low bar for bringing an action, and steep potential penalties for violations, anyone in a real estate-related industry should be aware of these regulations, and recent changes thereto, to make sure they are in full compliance with Proposition 65’s mandates.

II. General History, Overview, and Information about Proposition 65, the “Safe Drinking Water and Toxic Enforcement Act of 1986”

Proposition 65 is a ballot initiative that was passed by California voters in 1986 and was designed to protect Californians from, as well as inform Californians about, exposures to toxic chemicals.¹ The two seemingly straightforward tenets of the law are that businesses must warn people before exposing them to harmful chemicals, and that they must not discharge such chemicals into sources of drinking water.² Proposition 65 has impacted, or has the potential to impact, the vast majority of businesses located or operating in California (including manufacturers located outside of the state who sell products to consumers located in California) due to the broad language of the statute and the large number of chemicals to which it applies.

The dual focus of the statute is characterized by the names of two of its two

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primary provisions: 1) “Prohibition on Contaminating Drinking Water with Chemicals Known to Cause Cancer or Reproductive Toxicity;”³ and 2) “Required Warning Before Exposure to Chemicals Known to Cause Cancer or Reproductive Toxicity.”⁴ The text of the statute relating to these prohibited activities appears to be exceedingly simple. The first prong states:

No person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, notwithstanding any other provision or authorization of law except as provided in Section 25249.9.⁵

The second prong states:

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, except as provided in Section 25249.10.⁶

1. Requirement of “clear and reasonable” warnings

As stated in section 25249.6, businesses must give a “clear and reasonable” warning before knowingly exposing anyone to a listed chemical above a specified level.⁷ The meaning of the term “clear and reasonable” has led to extensive regulations promulgated under Prop. 65 by the Attorney General’s office, which require warnings for consumer products, environmental exposures, and occupational exposures.⁸ Until the most recent amendment of Prop. 65 in 2016 (which took effect August 31, 2018, as discussed at length in Section 2 of this article), the statute stated:

Whenever a clear and reasonable warning is required under Section 25249.6 of the Act, the method employed to transmit the warning must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure. The message must clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm.⁹

This language came to be known as the “safe harbor” warning option and resulted in the ubiquitous signs throughout California that stated “This product contains chemicals known to the State of California to cause cancer” or “This product contains chemicals known to the State of California to cause birth defects or other reproductive harm,” or some combination thereof.

2. Consumer, environmental, and occupational exposures

Warnings have been divided in the regulations into three categories based on the type of exposure: consumer, environmental, and occupational.¹⁰ Consumer product warnings are typically placed on the product or on the shelf of a retail location and have traditionally been the responsibility of the manufacturer, distributor, or retailer, depending on agreements between those entities. Environmental and occupational exposure warnings are typically posted in a prominent location at the workplace or public area where there could be potential exposure. Because the “exposure warning” prong applies to consumer products, workplaces, and public spaces, it has garnered far more attention from Prop. 65 private enforcers and has resulted in far more litigation than the “discharge to water” prong of the statute. For that reason, and because warning of exposures is more likely to arise in the real property context, the “exposure warning” prong of the statute, section 25249.6 of the California Health and Safety Code, is the focus of this article.

3. List of chemicals

To help businesses determine when warnings are required, Proposition 65 requires the state to publish, and annually update, a list of chemicals “known to cause cancer or birth defects or reproductive harm” (referred to herein as the “OEHHA list”).¹¹ The list of chemicals for which warnings must be provided currently stands at approximately 900 additives or ingredients in consumer products ranging from pesticides to household products to drugs, but also includes chemicals produced in processes such as cooking food, manufacturing construction components, or running a motor vehicle.¹² The Office of Environmental Health Hazard Assessment (“OEHHA”), which is part of the California Environmental Protection Agency, publishes “safe harbor” levels of chemicals, below which a warning is not required.¹³ While no warning is required for a product where an exposure poses no significant risk assuming lifetime exposure at the level in question,¹⁴ a business must either perform testing to determine whether the level of exposure is below or exceeds such safe harbor levels,¹⁵ or if it does not perform such testing, it may issue warnings based on a business’ knowledge of the chemicals present.¹⁶

Consequently, a significant criticism of the statute is that the high expense of testing required to establish whether an exposure exceeds safe harbor levels causes many businesses to forego testing and to warn without even knowing

whether exposure levels warrant it. Some believe this has led to “over warning,” which has the potential to desensitize the public to the risks of exposure.¹⁷ However, there have also been reformulations of products and materials,¹⁸ and evidence that air quality has improved as a result of Prop. 65.¹⁹

4. Exemptions

The Act does contain some exemptions. Business employing 10 or fewer people as well as government agencies are exempt from the warning requirement of Prop. 65,²⁰ as is any business that can show that any exposure poses no significant risk of cancer or a “no observable effect” level for those chemicals listed as causing birth defects or reproductive harm.²¹

5. Enforcement

Like the language of the §§ 25249.5 and 25249.6, the original enforcement provision was originally relatively straightforward, making a person in violation of either section subject to a civil penalty of \$2,500 per day per violation in an action that may be brought by the Attorney General, a city attorney, a city prosecutor, or in a private action “brought by a person in the public interest.”²² The vast majority of cases have been brought by these private enforcers,²³ who have helped facilitate reformulation of products, but who have also been accused of turning Prop. 65 into a cottage industry for extorted settlements with disproportionate attorney’s fees.²⁴

6. Amendments to Prop. 65

Multiple amendments have been enacted aimed at reigning in perceived abuses by private litigants, with the goal of both affirming “a reasonable and meritorious case for the private action,” and requiring that a “ ‘significant benefit’ has been conferred on the general public or a large class of persons.”²⁵ One such amendment allows private actions to be brought only if the private enforcer has given at least 60 days’ notice of the alleged violation “to the Attorney General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred” before commencing suit, and as long as those public prosecutors are not also prosecuting the same violation.²⁶ In addition, for alleged violations of section 25249.6, a private enforcer must include with the notice of violation a “certificate of merit” confirming that he or she “has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the

exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action.”²⁷

Another amendment provides that once an action has been resolved by either settlement or judgment, including a settlement of noticed violations without the filing of a complaint, the private enforcer must notify the Attorney General of the terms of the settlement, including penalties and attorney’s fees.²⁸ Due to perceived abuse of the law by private enforcers, this amendment was designed to ensure that civil penalties not be “traded” for payments of attorney’s fees.²⁹ Certain types of exposures have also been classified as appropriate for a “fix-it ticket,” whereby the alleged violator is allowed 14 days after a notice of violation to correct the violation, the penalty is capped at \$500, and the alleged violator must notify the enforcer within 30 days that the violation has been corrected.³⁰ These exposures include alcoholic beverages, chemicals produced by the preparation of food, tobacco smoke, and engine exhaust, as specified.³¹

7. Litigation and settlements

Litigation and pre-litigation activity relating to Prop. 65 has been staggering. Between 1998 and 2018, there were 25,813 notices of violation filed as reported by the Attorney General,³² and there have been hundreds of court cases involving Prop. 65. The Attorney General tracks all settlements and in 2000, for example, there were 57 settlements (both litigated and not) with a total value of \$11,257,271.36, while, by contrast, in 2017 there were almost 700 settlements with a total value of more than \$26 million.³³ Notices of violation that led to settlement agreements without litigation have only been tracked since 2017, but of the total 2017 settlements, 348 were out-of-court settlements totaling \$7,759,072, while 345 were court-approved judgments totaling \$18,848,428.³⁴ The majority of these settlements likely involve consumer products, which are easier for a private enforcer to identify; however, there have also been cases involving second-hand smoke,³⁵ parking garages,³⁶ and new construction activities or materials, all of which could be relevant in the context of commercial or residential leases.³⁷ While not all of these cases have resulted in settlements, litigation can be at least as costly.

III. 2018 Revision of “Clear and Reasonable” Warnings, and Allocation of Responsibility for Required Warnings

In response to Governor Jerry Brown’s desire to reform Prop. 65 to better

meet the original objective of informing the public about the existence of chemicals known to cause cancer or reproductive harm, the Attorney General's office proposed, and OEHAA adopted, a new regulation in August 2016, which became effective August 30, 2018 (this new regulation and the language and requirements therein are referred to herein as the "2018 Changes"). Goals of the 2018 Changes included: "making warnings more meaningful and useful for the public, reducing 'over-warning' in which businesses provide unnecessary warnings, [and] giving businesses clearer guidelines on how and where to provide warnings."³⁸ References to the regulation prior to the 2018 Changes are sometimes referred to herein as the "Original Language."

1. What remains the same with the 2018 Changes?

With some exceptions (some of which are described below in the discussion of tailored warnings), there have not been significant changes to *when* a warning is required by Prop 65. Like the Original Language, the 2018 Changes do not require that the listed chemicals actually be removed from the environment or product. Similarly, businesses are still required to comply with the Prop. 65 requirement to provide "clear and reasonable" warnings regarding exposure to certain listed chemicals, but (subject to some exceptions, some of which are described below) are still generally not required to provide any specific warning. Additionally, using the specific safe harbor language continues to provide protection in that such usage constitutes compliance with the warning requirements.

2. What is new about the 2018 Changes to Prop. 65?

Among other things, the 2018 Changes create a new website to provide information on chemicals and exposures to consumers (reference to which is required by the safe harbor language), change the method and content of the "safe harbor" warnings, better define the allocation of responsibility for providing warnings (as between manufacturers and retailers), and provide some new tailored safe harbor warnings for particular products and exposures.³⁹ The following discussion addresses these significant changes and, in some instances, identifies particular new language required by the 2018 Changes. Non-compliance with Prop. 65 warning requirements can still lead to a penalty of up to \$2,500 per violation per day, so there is good reason to comply with the warning requirements. Although this article tries to provide helpful guidance regarding certain required uses of warnings, it does not cover every possible

requirement. Readers should still confirm compliance with the exact requirements for their particular use.

3. Creation of New Website.

One new addition to the 2018 Changes was the creation of a website that provides additional information on specific chemicals appearing the OEHHA list, as well as information on exposure to chemicals known to cause cancer, or birth defects or other reproductive harm, and ways to limit such exposure.⁴⁰ This website, which is maintained at <https://www.p65warnings.ca.gov>, includes the official OEHHA list of the hundreds of chemicals exposures for which a warning is required, as well as fact sheets about each chemical, information about Prop. 65, and frequently asked questions for business owners. The safe harbor warnings (discussed in detail below) also require language referencing this website.

4. Changes to Method and Content of Safe Harbor Warnings.


Like the Original Language of Prop. 65, specific language is not required to comply with the law, but there is safe harbor language that, when used, will be deemed to constitute compliance with Prop. 65 disclosure requirements. The new regulation replaces the old safe harbor warnings, and as of August 2018, subject to some minor exceptions, the old safe harbor language will not be sufficient to obtain such deemed compliance with the law.

5. Content changes of safe harbor warnings generally.


In general, the new safe harbor warnings now require a triangular yellow warning symbol, \triangle , to the left of the warning text, and the word “**WARNING:**” in all capital letters and bold print. Neither of these was required by the Original Language. Additionally, whereas the Original Language required a statement that certain chemicals known to the State of California are present in the product or environment, the 2018 Changes instead require a statement that you *may be exposed* to at least one specifically named chemical from the OEHHA list in the product or environment which is known to cause cancer or reproductive harm (or both); and where such product or environment is known to contain chemicals, at least one of which is known to cause cancer and at least another one of which is known to cause birth defects or reproductive harm (sometimes referred to as two different “end points”), then at least one chemical must be specifically referenced for each endpoint. Note that the 2018 Changes,

despite requiring at least one chemical to be listed, do not provide guidance on how to choose which chemical to list (if, for example, there are exposures to multiple chemicals from the OEHHA list).⁴¹ Finally, as mentioned above, the safe harbor warnings also require specific reference to the new OEHHA Prop. 65 warning website (<https://www.p65warnings.ca.gov>) discussed above.

6. 2018 Changes Regarding Consumer Product Warnings.

If a particular product was manufactured prior to August 30, 2018, then the 2018 Changes provide that such products may continue to use the product warnings that complied with the Original Language.⁴² However, for products manufactured on or after August 30, 2018, the new safe harbor warning for consumer products requires the triangular yellow warning symbol, , left of the warning text, the word “**WARNING:**” in all capital letters and bold print, and the actual content of the warning, to be tailored depending on whether the exposure is to (a) listed carcinogens, (b) reproductive toxicants, (c) both listed carcinogens and reproductive toxicants, or (d) a chemical that is listed as both a listed carcinogen and reproductive toxicant (note that the brackets denote choices in language depending on exposures (a)-(d) in the previous sentence).

The following is a specific example of a Proposition 65 warning for a product with a possible chemical exposure from arsenic (which is listed on the OEHHA list as a chemical known to cause cancer) and which product does not contain a possible chemical exposure known to cause reproductive harm.

 **WARNING:** This product can expose you to chemicals including arsenic, which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.⁴³

Alternatively, there a short form version of the warning may be used, provided it complies with certain other requirements.⁴⁴ The following is an example of a short form product warning:

 **WARNING:**

Cancer and Reproductive Harm—

For more information, visit www.P65Warnings.ca.gov

The 2018 Changes dictate methods of conveying consumer product warnings.⁴⁵ Such warnings may be included on a posted sign or shelf tag where

the product is displayed, may be made available on an electronic device that provides the warning prior to a consumer's purchase of the product, and/or via a warning on the label of the product itself. For purchases made available for sale online, a warning or a clearly marked and prominently displayed hyperlink using the word "WARNING" on the product display page must be visible prior to purchase of the product. In addition to displaying such warning in English, the applicable warning must also be displayed in any other language that is also used on the product to provide consumer information about the product.⁴⁶

7. 2018 Changes Regarding Environmental Exposure Warnings.

Like the content of the 2018 Changes to the safe harbor warnings for products, environmental exposure safe harbor warnings also require the same symbol and capitalized "WARNING" at the start of the warning message; however, the warning language is slightly different. Following is the new safe harbor language for warnings to environmental exposures:

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

The method of warning for environmental exposures is also different than for products.⁴⁷ Warning signs for spaces (whether indoor or outdoor) with clearly defined entrances, must have the warning conspicuously displayed at any and all public entrances in at least 72-point font and the sign must specify the source or sources of the exposure within such area.⁴⁸ Such warnings must be located in areas reasonably associated with the source of the exposure.⁴⁹ Like the warnings for consumer products, the warning must be in English and also in any other language that is also used on any signage in the area in question. As an alternative to physically displaying the warning in the impacted area (or in addition to such physical display, as applicable), an environmental exposure warning may be provided by mail or newspaper at least every three months, either (a) by mail to each occupant in the applicable area in English and any other language typically used by the person to communicate with the public, and/or (b) by at least a quarter-page publication in at least one English newspaper and "if a newspaper published in a language other than English is circulated in the affected area, the warning must be published in that newspaper and in that language" as well as such electronic version of the same (if ap-

plicable), and in either case (a) or (b), such notice must identify the source(s) of the exposure and a map identifying such area.⁵⁰

OEHHA offers various guidance on implementation of safe harbor warnings, including the following, which addresses the potential for multiple environmental warnings: “[M]ore than one warning may be provided for exposures to listed chemicals in a given location. As an example, the regulations for amusement park warnings require a warning to be posted at each public entrance, but also require warnings to be provided separately for consumer products, alcoholic beverages, food, and enclosed parking facilities where such exposures occur on the premises in order for the amusement park to receive safe harbor protection.”⁵¹

8. Tailored Warnings for Particular Products and Environments.

The 2018 Changes also include a number of tailored warnings for particular scenarios, some of which are just changes to old tailored warnings and some of which are entirely new tailored warnings. Unlike the safe harbor warnings, which may be used to obtain deemed compliance with the warning requirements, if there is a tailored warning for a particular product or environmental exposure, then such tailored warning *must* be used to satisfy the Prop. 65 warning requirements in those particular circumstances.⁵² New tailored warnings have already been developed and new ones will continue to be promulgated from time to time by OEHHA. As of the date of this publication, specific tailored warnings have already been developed to warn about possible chemical exposures from food and alcoholic beverages, medical and dental care facilities, vehicles and recreational vessels, enclosed parking garages, amusement parks, petroleum, designated smoking areas, and hotels.⁵³ Most of the tailored warnings follow roughly the same format and content specified above, but have some slight differences that are tailored to the particular scenario addressed. The following are some examples of requirements for specific tailored warnings as compared to the method and content requirements for standard safe harbor warnings discussed above:

Restaurants:

The specific language for restaurants that sell food or beverages for on-site consumption has also changed. Where the old tailored warning said “WARNING: Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here,” the new language must say that “[c]ertain 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/restaurant.”⁵⁴

Hotels:

A new provision tailored specifically for hotels (which explicitly includes motels, condominiums, timeshares, resorts and spas) requires that the warning is provided as either (a) a sign displayed on the hotel registration desk, in at least 22-point font “where it is likely to be seen, read, and understood,” or (b) an electronic or hard copy form in the same size font as other consumer information, in either case provided before a guest checks in to the hotel.⁵⁵

Parking Garages:

A new tailored warning for enclosed parking garages requires language stating that “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.”⁵⁶

Petroleum:

A new tailored warning for exposure to petroleum requires the following specific language: “Breathing the air in this area or skin contact with petroleum products can expose you to chemicals including benzene, motor vehicle exhaust and carbon monoxide, 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/service-station.”⁵⁷

Designated Smoking Areas:

Designated smoking areas must contain the following Prop 65 warning: “Breathing the air in this smoking area can expose you to chemicals including tobacco smoke and nicotine, 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/smoking-areas.”⁵⁸

Alcohol:

Among other 2018 Changes with respect to alcoholic beverages, there are new requirements regarding the sizes of the required warnings in places alcohol is sold as well as the added requirement to reference the OEHHA website.⁵⁹ One or more of the following methods must be used with respect to sale of alcoholic beverages: a conspicuous eye-level sign at least 8 1/2” x 11” with at least 22-point type in an

areas that alcohol is served, a 5" x 5" label with 20-point type enclosed in a box placed at retail points of sale or display, a warning on the menu listing alcoholic beverages, and/or a warning included in packaging of shipping containers for distribution to purchases in California.⁶⁰ The warning must also be in both English and any other language used for labeling or advertising such product within such premises.⁶¹

Food:

The most significant difference in the language for warnings related to food is that the language requires specifying that "consuming" such food may cause cancer or birth defects or reproductive harm, instead of just saying that the food item may "expose" you to a chemical which may cause the same.⁶²

9. Clarification regarding allocation of responsibility between manufacturer and retailer.⁶³

The 2018 Changes provide additional guidance regarding responsibility for making "clear and reasonable" warnings for products.⁶⁴ By default (and unless contracted around), as between a retail seller and a manufacturer or producer, the new guidance puts initial responsibility to warn on the manufacturer, and makes clear that OEHHA must work to minimize the burden on retail sellers who are not introducing the applicable listed chemical themselves.⁶⁵ The manufacturer may comply with its responsibility to warn by either including the required warning (which may be the safe harbor warning) directly on the product or by sending a written notice to the retail business.⁶⁶ If complying by written notice to a retailer, the manufacturer must give notice to the retailer annually, which notice must name the product, state that such product may cause exposure to one or more of the chemicals listed by OEHHA, and include labels for products or shelf tags, and the manufacturer must receive written or email confirmation of receipt of such notice from the retailer.⁶⁷ In such case, retailers are then responsible for using the labels or other materials provided by the manufacturer.⁶⁸ In addition to these default requirements, the 2018 Changes explicitly provide that manufacturers and retailers may specifically allocate such warning responsibility between themselves by a written agreement (which will be binding on such parties), as long as the actual warning in compliance with the 2018 Changes is actually delivered to the end customer.⁶⁹

10. How do I comply with Prop. 65 in a real estate context?

The potentially high penalty (\$2,500 per violation per day) for non-compliance with Prop. 65 warning requirements presents a strong argument for

warning if there is any potential for exposures, getting these warnings right (and/or making sure the warnings have been updated), and allocating responsibility for making the necessary warnings. California property and business owners, retailers, and property managers should review and be aware of the new Prop. 65 requirements and update their warnings as necessary to comply with the new regulations. Readers should review and confirm that their real property related contracts (such as leases, licenses, and easement agreements), if applicable, adequately allocate responsibility for compliance with the Prop. 65 warning requirements (whether through reliance on a catch-all “compliance with laws” provision or otherwise).

In determining whether to provide or update Prop 65 warnings, readers should first consider whether the applicable real property includes any of the specific tailored warning scenarios discussed above, for which specific tailored warning language or method might be required (such as an enclosed parking garage or designated smoking areas), and if so, consider utilizing the safe harbor method for these environmental exposures by, for example, posting a warning at a public entrance. Also consider what building materials were used in development or construction, since chemicals from the OEHHA list can appear in materials such as wood products, drywall, ceiling products, steel, and insulation. Interior furnishings can also contain chemicals, such as formaldehyde or lead, known to cause cancer or birth defects or other reproductive harm. In addition, it is important to consider the historical uses (such as a dry-cleaner or gas station) of a site and whether the property contains known contaminants, or has been remediated or redeveloped, and assess whether such uses may result in current exposures. Although compliance with other laws may be required in each such scenario, these conditions might also trigger the requirement to comply with Prop. 65 warning requirements, and may warrant the posting or delivery of “generic” safe harbor warnings as well as any of the newer specifically tailored warnings.

IV. Conclusion

The beginning of Section 2, above, listed some of the motivating goals for the recent changes to Prop 65. Certainly adding more specificity should result in adding some additional meaning and giving additional information to the public who can evaluate the information they are reading and make more informed decisions as a result. As well, the additional instruction regarding responsibility for warnings does help clarify such guidelines on how and where

businesses need to provide warnings. However, since the guidelines are limited regarding which specific chemical or chemicals to list, how to describe the source of the exposure, and the placement of such warnings, it is probable that an attempt to provide a compliant warning may still be misleading or cause confusion. For instance, the public might interpret the listing of one such chemical to mean that that is the most prevalent or most dangerous chemical they might be exposed to by using a particular product or entering a certain area, where in reality, a strategic approach might be to list the most benign chemical that meets the safe harbor language, inevitably having the counterintuitive effect of misleading the public into believing a product or area provides less exposure to toxic chemicals than in reality. It is unlikely that ‘over-warning’ will be reduced as a result of the 2018 Changes.

ENDNOTES:

¹Health & Saf. Code, §§ 25249.5 et seq. (Added November 4, 1986, by initiative Proposition 65. Operative January 1, 1987).

²Ballot Pamp., Primary Elec. (Nov. 4, 1986) text of Prop. 65, p. 52 et seq. (https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1969&context=c_a_ballot_props).

³Health & Saf. Code, § 25249.5.

⁴Health & Saf. Code, § 25249.6.

⁵Health & Saf. Code, § 25249.5.

⁶Health & Saf. Code, § 25249.6.

⁷Health & Saf. Code, § 25249.6; <https://oehha.ca.gov/media/downloads/faqs/prop65tenants.pdf>.

⁸Cal. Code Regs., tit. 27, §§ 25601 to 25606.

⁹Cal. Code Regs., tit. 27, § 25601.

¹⁰Cal. Code Regs., tit. 27, §§ 25601 to 25606.

¹¹Health & Saf. Code, § 25249.8; <https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>.

¹² <https://oehha.ca.gov/proposition-65/about-proposition-65>; <https://oehha.ca.gov/media/downloads/proposition-65/p65122917.pdf>.

¹³ <https://oehha.ca.gov/media/downloads/proposition-65/general-info/safe-harborlist100418.pdf>.

¹⁴Health & Saf. Code, § 25249.10.

¹⁵Cal. Code Regs., tit. 27, § 25705.

¹⁶ <https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>.

¹⁷ <https://www.latimes.com/health/la-he-pro-con2-2009nov02-story.html>.

¹⁸ <https://oag.ca.gov/environment/prop65>.

¹⁹ <https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>.

²⁰ Health & Saf. Code, § 25249.11.

²¹ Health & Saf. Code, § 25249.10.

²² Health & Saf. Code, § 25249.7, subds. (b), (c).

²³ <https://oag.ca.gov/prop65/60-day-notice-search>.

²⁴ <https://www.latimes.com/health/la-he-pro-con2-2009nov02-story.html>; Cal. Code Regs., tit. 11, § 3203 (“Civil penalties . . . should not be ‘traded’ for payments of attorney’s fees.”).

²⁵ <https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/final-statement-reasons.pdf> (amendment designed to “reduce the financial incentives for private plaintiffs to bring and settle Proposition 65 cases that do not confer substantial public benefit”).

²⁶ Health & Saf. Code, § 25249.7, subd. (d)(1), (2); also cite SB 1269 (1999).

²⁷ Health & Saf. Code, § 25249.7, subd. (d)(1); Cal. Code Regs., tit. 11, §§ 3100 to 3003.

²⁸ Cal. Code Regs., tit. 11, §§ 3003, 3201.

²⁹ Cal. Code Regs., tit. 11, § 3203 (“Civil penalties . . . should not be ‘traded’ for payments of attorney’s fees.”).

³⁰ Health & Saf. Code, § 25249.7, subd. (k); SB 1269 (1999).

³¹ Health & Saf. Code, § 25249.7, subd. (k)(1)(A)-(D).

³² <https://oag.ca.gov/prop65/60-day-notice-search>.

³³ <https://oag.ca.gov/prop65/annual-settlement-reports>.

³⁴ <https://oag.ca.gov/prop65/report/out-of-court-settlements>.

³⁵ See *Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185, 40 Cal. Rptr. 3d 832 (4th Dist. 2006); *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 106 Cal. Rptr. 2d 332 (2d Dist. 2001); *Coordination Proceeding Special Title (Rule 1550(b)) Secondhand Smoke Cases*, 2002 WL 34405414 (Cal. Super. Ct. Trial Div. 2002) (Trial Order).

³⁶ See *Consumer Defense Group v. Rental Housing Industry Members*, 137 Cal. App. 4th 1185, 40 Cal. Rptr. 3d 832 (4th Dist. 2006).

³⁷ See *The McKenzie Group & Consumer Defense Group v. The California Hotel & Lodging Association*, no. BC290647 (L.A. Sup. Ct.); *Center for Self-Improvement & Community Development v. Lennar Corp.*, 173 Cal. App. 4th 1543, 94 Cal. Rptr. 3d 74 (1st Dist. 2009).

³⁸ <https://www.p65warnings.ca.gov/new-proposition-65-warnings>.

³⁹Cal. Code Regs. tit. 27, Article 6.

⁴⁰<https://www.p65warnings.ca.gov/new-proposition-65-warnings>.

⁴¹Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses, prepared by the Office of Environmental Health Hazard Assessment (Revised July 2018).

⁴²Cal. Code Regs. tit. 27, § 25600(b).

⁴³<https://www.p65warnings.ca.gov/new-proposition-65-warnings>.

⁴⁴Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses, prepared by the Office of Environmental Health Hazard Assessment (Revised July 2018); Cal. Code Regs., tit. 27, § 25602 Consumer Product Exposure Warnings - Methods of Transmission.

⁴⁵Unless otherwise specified in Section 25607.1 et seq (Cal. Code Regs., tit. 27, § 25602 Consumer Product Exposure Warnings - Methods of Transmission).

⁴⁶Cal. Code Regs., tit. 27, § 25602 Consumer Product Exposure Warnings - Methods of Transmission.

⁴⁷Unless otherwise specified in Section 25607.1 et seq. (Cal. Code Regs. tit. 27 § 25604 Environmental Exposure Warnings - Methods of Transmission).

⁴⁸Cal. Code Regs., tit. 27, § 25604 Environmental Exposure Warnings - Methods of Transmission.

⁴⁹Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses, prepared by the Office of Environmental Health Hazard Assessment (Revised July 2018).

⁵⁰Cal. Code Regs., tit. 27, § 25604 Environmental Exposure Warnings - Methods of Transmission.

⁵¹https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf, citing Health & Saf. Code, § 25607.22, subd. (d).

⁵²Cal. Code Regs., tit. 27, § 25607.

⁵³Cal. Code Regs., tit. 27, § 25607; <https://www.p65warnings.ca.gov/new-proposition-65-warnings>; however “[i]f a person does not cause an exposure to a listed chemical required to be identified in a warning set out in Section 25607.1 et seq., the name of that listed chemical need not be included in the warning in order to meet the requirements of this subarticle. The name of at least one listed chemical for which the warning is being provided must be included in all warnings.” 27 Cal. Code Regs., § 25607.

⁵⁴Cal. Code Regs., tit. 27, § 25607.6.

⁵⁵Cal. Code Regs., tit. 27, § 25607.32.

⁵⁶Cal. Code Regs., tit. 27, § 25607.21.

⁵⁷Cal. Code Regs., tit. 27, § 25607.27.

⁵⁸Cal. Code Regs., tit. 27, § 25607.29.

⁵⁹Cal. Code Regs., tit. 27, §§ 25607.1 to 25607.2.

⁶⁰Cal. Code Regs., tit. 27, §§ 25607.1 to 25607.2.

⁶¹Cal. Code Regs., tit. 27, §§ 25607.1 to 25607.2.

⁶²Cal. Code Regs., tit. 27, §§ 25607.1 to 25607.2.

⁶³Cal. Code Regs., tit. 27, § 25600.2. Responsibility to Provide Consumer Product Exposure Warnings ([https://govt.westlaw.com/calregs/Document/I2AF83014BD5F499C95602F1CCB008B6B?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I2AF83014BD5F499C95602F1CCB008B6B?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))).

⁶⁴Cal. Code Regs., tit. 27, § 25600.2. Responsibility to Provide Consumer Product Exposure Warnings.

⁶⁵These 2018 Changes apply to manufacturers, producers, packagers, importers, suppliers, or distributors of a product. Cal. Code Regs., tit. 27, § 25600.2; but see Cal. Code Regs., tit. 27 § 25600.2(e) for specific instances that require a retailer to provide a warning.

⁶⁶Cal. Code Regs., tit. 27, § 25600.2(b).

⁶⁷“The notice must be renewed, and receipt of the renewed notice confirmed electronically or in writing by the retail seller’s authorized agent no later than February 28, 2019, then annually thereafter during the period in which the product is sold in California by the retail seller.” Cal. Code Regs. tit. 27, § 25600.2 Responsibility to Provide Consumer Product Exposure Warnings.

⁶⁸Cal. Code Regs. tit. 27, § 25600.2(d).

⁶⁹Cal. Code Regs. tit. 27, § 25600.2 Responsibility to Provide Consumer Product Exposure Warnings.