

**Proposition 65
New 2018 “Clear and Reasonable”
Warnings**

American Home Furnishings Alliance

Amy P. Lally

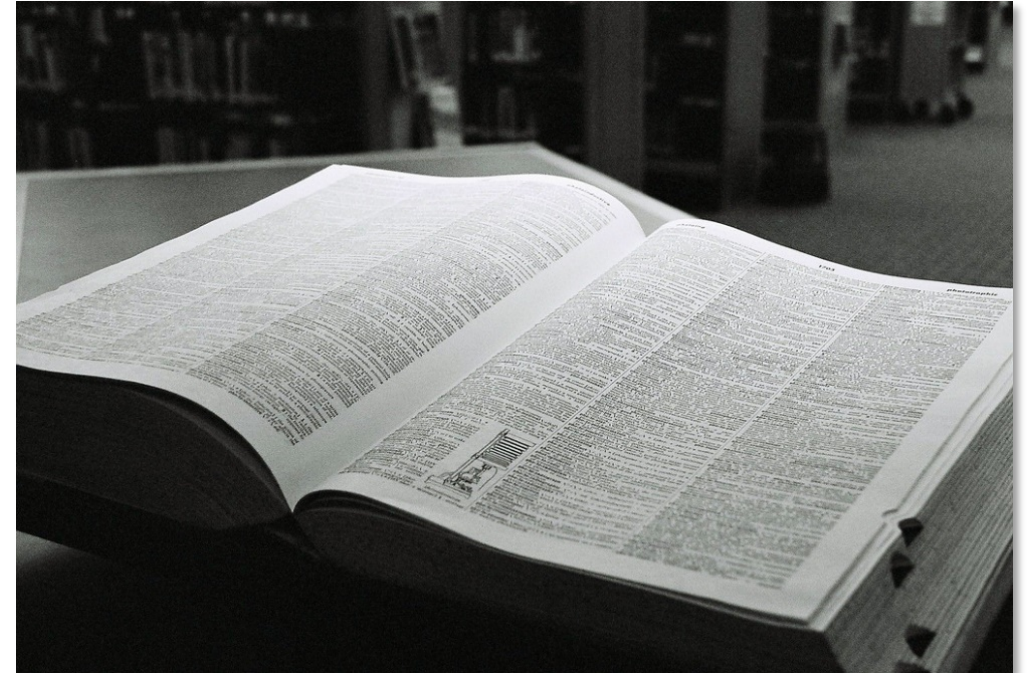
Judith M. Praitis

March 21, 2018

SIDLEY

New Proposition 65 Warning Regulations – The Tinkering Continues

- **New Regulations** – The regulations approved in August 2016 which apply to consumer products manufactured on and after August 30, 2018
- **Amendments** – “Clarifications” to the new regulations were approved on November 20, 2017 and take effect with the new regulations
- **New Amendments** – A second round of “clarifications” is **expected shortly** and also is intended to take effect with the new regulations
- **Other Edits** – Non-substantive changes (January 2017), hotels (July 2017), residential rentals (February 2018)



Key Date

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
AUGUST 2018						
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

- August 30, 2018 – New safe harbor warning regulations apply to furniture (and other consumer products) manufactured on and after this date.
- A method of **verifying the manufacture date** is not legally mandated, but in practice is necessary to manage or rebuff litigation claims.

What Is a “Safe Harbor Warning” and Why Does It Matter?

- Terminology can be confusing. There are two types of “safe harbors” under Proposition 65.
- OEHHA publishes “safe harbor exposure levels” for 300+ listed chemicals to help determine whether a warning is required. Two types of numerical safe harbors exist: a “No Significant Risk Level” (**NSRL**) for listed carcinogens, and a “Maximum Allowable Dose Level” (**MADL**) for reproductive toxicants.
- OEHHA uses the term “safe harbor” to refer *both* to the NSRLs and MADLs and to the 2008 and 2018 warning regulations. So, we employ the same terminology.
- But these are different types of “safe harbors”: one type is a numerical exposure level, while the second governs how to warn after one determines a warning is required.
- Safe harbor warnings are *not* mandatory.
- Yet deviation carries legal risk.
- Warning text mandated in court-approved consent judgments supersedes the safe harbor regulatory text.



Subarticle 2. Safe Harbor Methods and Content

- § 25601. Safe Harbor Clear and Reasonable Warnings – Methods and Content.
- § 25602. Consumer Product Exposure Warnings – Methods of Transmission.
- § 25603. Consumer Product Exposure Warnings – Content.
- § 25604. Environmental Exposure Warnings – Methods of Transmission.
- § 25605. Environmental Exposure Warnings – Content.
- § 25606. Occupational Exposure Warnings.
- § 25607. Specific Product, Chemical and Area Exposure Warnings.
- § 25607.1. Food Exposure Warnings – Methods of Transmission.
- § 25607.2. Food Exposure Warnings – Content.
- § 25607.3. Alcoholic Beverage Exposure Warnings – Methods of Transmission.
- § 25607.4. Alcoholic Beverage Exposure Warnings – Content.
- § 25607.5. Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Methods of Transmission.
- § 25607.6. Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Content.
- § 25607.7. Prescription Drug Exposure and Emergency Medical or Dental Care Exposure Warnings.
- § 25607.8. Dental Care Exposure Warnings – Methods of Transmission.
- § 25607.9. Dental Care Exposure Warnings – Content.
- § 25607.10. Wood Dust Exposure Warnings – Methods of Transmission.
- § 25607.11. Wood Dust Exposure Warnings – Content.
- § 25607.12. Furniture Product Exposure Warnings – Methods of Transmission.
- § 25607.13. Furniture Product Exposure Warnings – Content.
- § 25607.14. Diesel Engine Exposure Warnings (Except Passenger Vehicle Engines) – Methods of Transmission.
- § 25607.15. Diesel Engine Exposure Warnings (Except Passenger Vehicle Engines) – Content.
- § 25607.16. Vehicle Exposure Warnings – Methods of Transmission.
- § 25607.17. Vehicle Exposure Warnings – Content.
- § 25607.18. Recreational Vessel Exposure Warnings – Method of Transmission.
- § 25607.19. Recreational Vessel Exposure Warnings – Content.
- § 25607.20. Enclosed Parking Facility Exposure Warnings – Method of Transmission.
- § 25607.21. Enclosed Parking Facility Exposure Warnings – Content.
- § 25607.22. Amusement Park Exposure Warnings – Method of Transmission.
- § 25607.23. Amusement Park Exposure Warnings – Content.
- § 25607.24. Petroleum Products Warnings (Environmental Exposures) – Methods of Transmission.
- § 25607.25. Petroleum Products Warnings (Environmental Exposures) – Content.
- And more

The 2018 Regulations Do Not Define “Furniture”

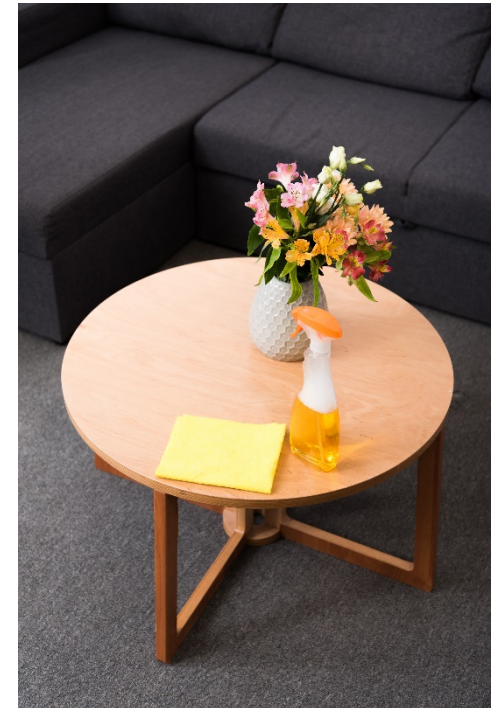
CASE GOODS



UPHOLSTERY



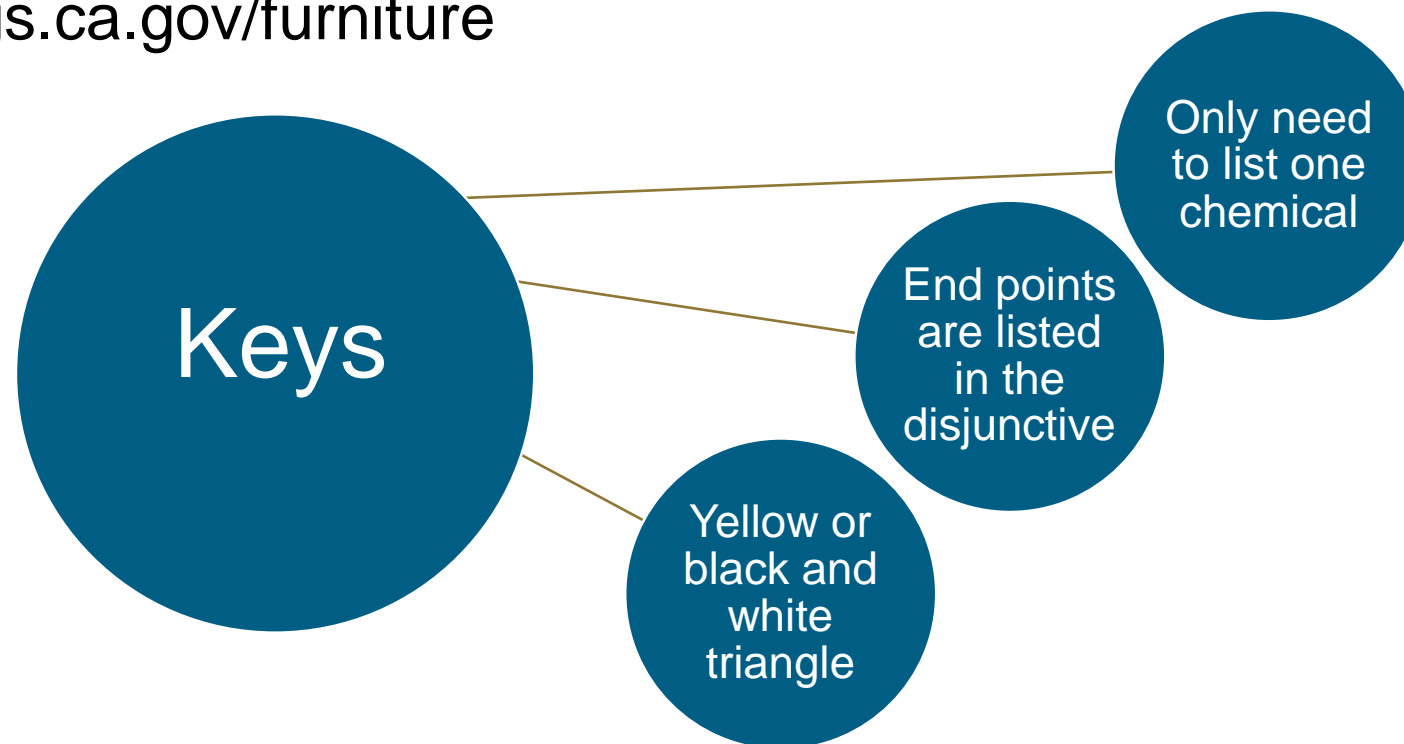
OCCASIONAL



2018 On-Product Warning Text for Furniture



WARNING: This product can expose you to chemicals including [name any one chemical], which are known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to [www.P65 Warnings.ca.gov/furniture](http://www.P65Warnings.ca.gov/furniture)



Other Considerations for On-Product Warning Text

- **SUPPLEMENTAL INFORMATION:** “The **warning content** may contain information that is supplemental to the content required by this subarticle only to the extent that it identifies the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals.”
- **FOREIGN LANGUAGES:** “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 in addition to English.”
- “Safe harbor consumer product warnings (Section 25602), environmental warnings (Section 25604), and **‘tailored’ warnings** (Section 25607.1, et seq.) require warning content to be provided in other languages under certain circumstances. Specifically, if a consumer product label or packaging contains consumer information in a language other than English, the warning must be provided in that language in addition to English.”

On-Product Warning Placement for Furniture

WHERE?

- On a label affixed to the furniture product in the same manner as other consumer information or warning materials that are provided on the product
 - Label – a display of written, printed or graphic material that is printed on or affixed to a product or its immediate container or wrapper
 - Consumer information – warnings, directions for use, contents

WHAT SIZE?

- “Consumer product exposure warnings must be prominently displayed ... with such conspicuousness as compared with other words, statements, designs or devices ... as to render the warning likely to be seen, read and understood by an ordinary individual under customary conditions or purchase or use.”

In-Store Furniture Warnings

CONTENT

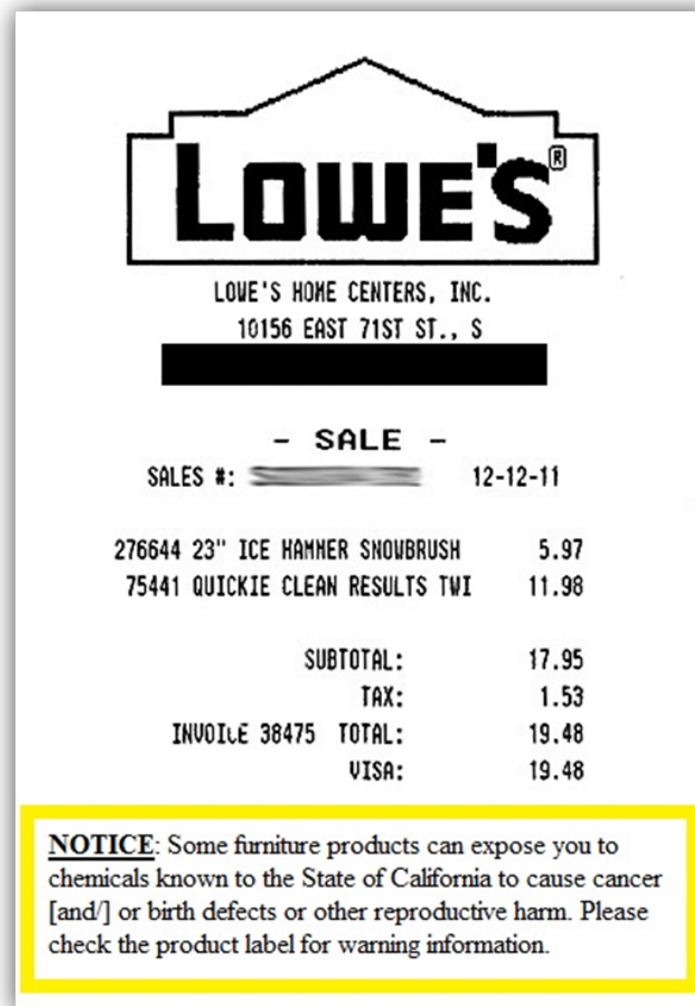
NOTICE: Some furniture products can expose you to chemicals known to the State of California to cause cancer and/or birth defects or other reproductive harm. Please check the product label for warning information.

PLACEMENT

OPTION 1: Printed or stamped on each receipt in no smaller than 12 point type

OPTION 2: A sign no smaller than 8.5 x 11 inches displayed at each public entrance OR point of display and printed in no smaller than 28 point type

In-Store Warning Option 1



In-Store Warning Option 2

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

Internet Warnings for Furniture

“For internet purchases, a warning that complies with the **content requirements of Section 25603(a)** must also 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.”

Q1: Must warnings be provided for internet purchases? Must a product sold over the internet also have a warning on the product to meet the safe harbor requirements?

A1: If the business wishes to provide a “safe harbor” warning that is deemed to comply with Proposition 65, the business would have to provide warnings for purchases made over the internet following the methods in Title 27, Cal. Code of Regs., [section 25602\(b\)](#).² Warnings would have to be provided to the purchaser prior to completing the internet purchase, and a warning would also have to be provided on or with the product via any one of the four methods for consumer products warnings in [Section 25602](#), subsections (a)(1)-(4).

“For purposes of this subarticle, a warning is not prominently displayed if the purchaser must search for it in the general content of the website.”

Catalog Warnings for Consumer Products

“For catalog purchases, the warning must also be provided in the catalog in a manner that clearly associates it with the item being purchased.”

Q22: Must warnings be provided for catalog purchases? Must a product sold through a catalog also have a warning in order to meet the safe harbor requirements?

Yes, under the safe harbor provisions of the regulations, warnings meeting the requirements of Section 25602(c) are required to be provided for purchases made through catalogs prior to completing the purchase, *and* a warning must be provided via any one of the four methods for consumer products in Section 25602...

Other Home Furnishings Do Not Follow The Prop 65 Safe Harbor Warning For Furniture





- Home furnishings other than furniture are subject to the new Prop 65 safe harbor warning regime for consumer products and not the safe harbor warning regime for furniture
- In addition, keep in mind that some of these consumer products may have unique warning programs or warning trigger levels agreed upon in prior consent judgments (such as for grills, glassware, leaded crystal and electrical cords)


Consumer Product Warnings – Long Form

What do the new “safe harbor” warnings look like?

 **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.

 **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.

 **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.

 **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.


Consumer Product Warnings – Truncated Form



But what about furniture?

What Does “Label” and “On Product” or “Labeling” Mean?

27 CCR § 25600.1 provides the following definitions:

- 
- “**Label**” means a display of written, printed or graphic material that is printed on or affixed to a product or its immediate container or wrapper.
 - “**Labeling**” means any written, printed, graphic or electronically provided communication that accompanies a product, such as a package insert.
 - “**Sign**” means a physical presentation of written, printed, graphic or electronically provided communication, including shelf signs, other than a label or labeling, posted in a conspicuous manner that is associated with the exposure for which the warning is being provided under the Act and is clearly visible under all lighting conditions normally encountered during business hours and under such conditions as to make it likely to be seen, read, and understood by an ordinary person.
 - “OEHHA considers **shelf tags** to be a form of signage, not labeling.” Final Statement of Reasons, p. 6 (December 2017).

On-Product Warning Language

WHERE?

- On the label.
- “Consumer product exposure warnings must be prominently displayed ... with such **conspicuousness** as compared with other words, statements, designs or devices ... **as to render the warning likely to be seen, read and understood** by an ordinary individual under customary conditions or purchase or use.”
- Bottom or underside of products generally is not “conspicuous.”

WHAT SIZE?

- For the short form warning: 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.
- There is no specific font size requirement for the other types of warnings.
- “Consumer product exposure warnings must be prominently displayed ... with such conspicuousness as compared with other words, statements, designs or devices ... as to render the warning likely to be seen, read and understood by an ordinary individual under customary conditions or purchase or use.”

In-Store Warnings for Consumer Products

If a long form or short form warning is not provided on the product label, a consumer product warning must be provided:

- On a posted sign, shelf tag or shelf sign, for the consumer product at each point of display of the product.



- 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.



Beware of “Swag” Sold or Given Away With Furniture and Other Home Furnishings



- Promotional items, freebies and other “swag” are all subject to Prop 65
- Prop 65 applies even if an item is not “sold” but given away and even if it is only seasonal
- Many companies have received notice letters for non-core products
- Remember that some subsets of consumer products other than furniture also have unique Prop 65 warning terms
- For example:
 - Food has a safe harbor warning regime that is different from the general consumer product warning regime
 - A recent consent judgment set forth new complex warning trigger levels for chocolate
 - Lack of clarity around the applicable BPA safe harbor warning

Internet and Catalog Warnings for Other Home Furnishings and Consumer Products

Generally the same rules of the road as for furniture but:

“If an on-product warning is provided pursuant to Section 25602(a)(4), the warning provided on the website may use the same content as the on-product warning.”

Final Thoughts on Internet and Catalog Warnings:

Details of implementation can be complicated, and time should be allotted to allow for trial and error and troubleshooting.

Given catalogue runs often require substantial lead time, efforts to identify products which require warnings should commence well before August 2018.

Notice to Retailers and Other Downstream Entities

Required

- Furniture

Optional

- Other Home Furnishings
- Consumer Products

“Each business in the chain of commerce who receives such materials is required to pass along the warning information to the business to which it sells the product, so that ultimately the consumer receives a compliant warning.”

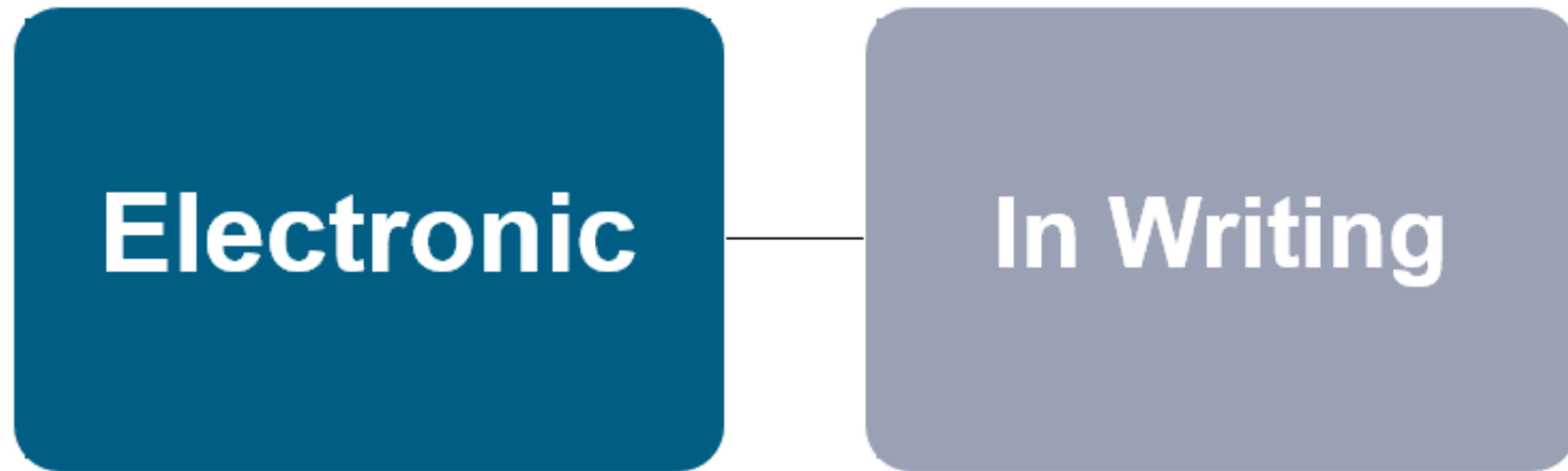
STEP 1 – Give Notice to the Retailer’s Authorized Agent

- “Authorized agent” means the person or entity including a monitored electronic mailbox or post office box, designated by a retail seller to receive notices from product manufacturers, producers, packagers, importers, suppliers and distributors under this article.
- “[W]here a given retail seller has not designated such an 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. They may also wish to provide the materials with the product when it is delivered to the retail seller.”

STEP 2 – Include All Three Required Elements in the Notice

- First, identify the products for which a warning is required by including “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.”
- Second, state that the products identified in the notice “may result in an exposure to one or more Prop 65 listed chemicals.”
- Third, include all necessary warning materials and warning language for products sold on the internet.

STEP 3 – Confirm Receipt of Notice and Warning Materials



STEP 4 – Update Notice When Required

Original New Prop 65 Regulations:

- “The notice must be renewed, and receipt of the renewed notice confirmed electronically or in writing by the retail seller’s authorized agent 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.”

Amendment to New Prop 65 Regulations:

- “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.”

And:

- “An additional notice is required within 90 days when a different or additional chemical name or endpoint (cancer or reproductive toxicity) is included in the warning.”

Action Items and Issues

1. Identify the authorized agents for your downstream customers and discuss in-store warnings;
2. Consider a policy mandating only safe harbor or consent judgment approved warning text on furniture;
3. For non-furniture, consider a policy as to whether only on-label warnings will be used, at least for third-party products;
4. Review existing Proposition 65 warnings and determine which ones are based on court-approved consent judgments and which ones are not and begin updating the warning text to satisfy the 2018 Regulations;
5. Review standard contract terms to expressly allocate liability and indemnification under the new 2018 Regulations;

Action Items and Issues (continued)

6. Review the mechanics of the internet warning process, to ensure software updates are timely implemented;
7. Review the timing of catalogue print runs and determine how to ensure warnings are printed in the catalogue;
8. Review and/or enhance Company testing obligations and /or certifications and/or the technical information required to be supplied by vendors or which the Company develops for its own product stewardship purposes;
9. After the 2018 Regulations are in effect, consider a process for annual re-certifications of warnings;
10. Review any Company “Questions and Answers” or other consumer information text to ensure the information is up to date.

Citizen Suits – a Major Enforcement Trend

Record numbers of Proposition 65 notice letters (2,710 in 2017 versus 1,582 in 2016).

Citizen enforcers are more often “rookies,” for good or ill.

Established enforcers in California are energized and funded.

Government review by the Attorney General’s Office in California has lightened, but enforcers are very active.

Fundamental changes to Proposition 65 cannot be expected.

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