

**ATTORNEY-CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT**

**MEMORANDUM**

**By Email**

TO: Bill Perdue  
FROM: Amy P. Lally  
RE: New Prop 65 Warning Regulations – Updated  
DATE: March 27, 2018

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California Health & Safety Code § 25249.5 *et seq.*, better known as Proposition 65 (“Prop 65”), requires companies doing business in California to provide a clear and reasonable warning before causing an exposure to a chemical known to the state of California to cause cancer, birth defects, or other reproductive harm. Prop 65 places the warning obligation for consumer product exposures on everyone in the chain of commerce doing business in California, including manufacturers, distributors, suppliers, and retailers.

On August 30, 2016, California’s Office of Administrative Law approved new Prop 65 warning regulations promulgated by California’s Office of Environmental Health Hazard Assessments (“OEHHA”). The new warning regulations do not change the fundamental legal principle that all companies in the chain of commerce that are subject to California’s jurisdiction are liable for Prop 65 violations, but they do change who in the chain of commerce should have primary responsibility for the implementation of Prop 65 warnings.

The new warning regulations also set forth safe harbor warning content and methods of transmission for furniture products. Compliance with the safe harbor warning regime is deemed to be compliance with Prop 65. (Tit. 27, Cal. Code Regs., § 25600(f)).<sup>1</sup>

The new warning regulations take effect on August 30, 2018, and apply to products manufactured on or after that date. Since adopted on August 30, 2016, the new warning regulations have been further amended several times and OEHHA is expected to promulgate additional “clarifications” shortly. This memorandum summarizes the portions of the new

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<sup>1</sup> Unless otherwise stated, all section references in this memorandum are to Title 27 of the California Code of Regulations operative August 30, 2018.

warning regulations that relate to furniture<sup>2</sup> and the allocation of warning responsibilities between furniture suppliers<sup>3</sup> and furniture retailers.

Furniture suppliers may provide a Prop 65 warning using different content and/or methods of transmission but the new warning regulations do not provide any guidance to a company as to what constitutes a clear and reasonable warning other than the safe harbor regime. Accordingly, this memorandum assumes that furniture suppliers will use the safe harbor warning content and methods of transmission and all references herein to “requirements” are requirements for meeting the safe harbor standards.<sup>4</sup>

### **The Safe Harbor Warning for Furniture Products Requires Retail Warnings**

A Prop 65 warning for an exposure caused by furniture products is deemed to comply with the law if (1) the safe harbor warning language is used, (2) the warning is on “a label<sup>5</sup> affixed to the furniture product in the same manner as other consumer information or warning materials that are provided on the product” (e.g., on the law label for upholstery), and (3) a

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<sup>2</sup> The existing Prop 65 safe harbor warning regulations set forth one set of safe harbor warnings for all consumer products (i.e., “**WARNING:** This product contains a chemical known to the State of California to cause cancer.” or “**WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.”). The new Prop 65 safe harbor warning regulations change that warning language for consumer products generally and also set forth unique warning rules for certain subsets of consumer products including, but not limited to, furniture, alcoholic beverages, and food. Where a product falls within a subgroup for which specific rules have been adopted (like furniture) then only compliance with the specific rules for the subgroup is deemed to be compliance with Prop 65. *See* Section 25607(a). Accordingly, this memo addresses only the furniture warnings. For clarity, non-furniture home furnishings would be covered by the new consumer products safe harbor warning regime and not the furniture safe harbor.

<sup>3</sup> A furniture supplier may or may not be furniture manufacturer. As used herein, a “furniture supplier” refers to a company that introduces a furniture product, as a finished good, into commerce.

<sup>4</sup> Notably, under the new regulations, a company does not need to make any changes to Prop 65 warnings for products covered by a consent judgment it entered into. “A person that is a party to a court-ordered settlement or final judgment establishing a warning method or content is deemed to be providing a “clear and reasonable” warning for that exposure for purposes of this article, if the warning complies with the order or judgment.” Section 25600(e). This grandfathering applies only to consent judgments approved by a court and not to out of court settlements.

<sup>5</sup> “‘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.” (Section 25600.1(i)). “‘Labeling’ means any written, printed, graphic, or electronically provided communication that accompanies a product, such as a package insert.” (Section 25600.1(j)).

notice or sign<sup>6</sup> is displayed at each retail public entrance or point of display, or a notice is printed or stamped on each receipt. (Section 25607.12(a)). Furniture suppliers that are not vertically integrated will need to give notice to their retailers<sup>7</sup> or other downstream resellers of any required warning materials.<sup>8</sup>

The safe harbor warning regulations refer to upstream entities including the “manufacturer, producer, packager, importer, supplier, or distributor” on the one hand, and the “retail seller” on the other hand. (Section 25600.2(b)). The regulations do not speak directly to circumstances when an upstream entity is not in privity with a retailer. For example, the regulations do not address the circumstance when a manufacturer sells product to a distributor who, in turn, resells product to a variety of retailers whose identity is not known to the manufacturer. OEHHA addressed this in its FSOR, explaining: “The regulations are intended to ensure that each business, beginning with the product manufacturer, passes along information concerning the need for a warning to the businesses to which it sells the product so that ultimately, the consumer receives a compliant warning” (FSOR ¶ 50) and “Each party has the responsibility to either pass on the warning it receives or to provide a legally adequate warning of its own.” (FSOR ¶ 54).

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<sup>6</sup> “‘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.” (Section 25600.1(m)).

<sup>7</sup> “‘Retail seller’ means a person or business that sells or otherwise provides consumer products directly to consumers by any means, including via the internet ... a retail seller includes those functions of a business involved in the sale of consumer products, including foods, directly to consumers, even if the business or facility is primarily devoted to non-retail activities.” (Section 25600.1(l)).

<sup>8</sup> Many retailers will reject any effort by suppliers to shift Prop 65 warning obligations downstream. Retailers can restrict a supplier’s ability to do this through contractual terms and conditions. A contract requiring the furniture supplier to take responsibility for all necessary “on product” Prop 65 warnings and restricting the supplier’s option to give notice to the retailer to add on product warnings (i.e. via a sticker) is permissible under the new warning regulations. “Provided that the consumer receives a warning that meets the requirements of Section 25249.6 of the Act prior to exposure, the manufacturer, producer, packager, importer, supplier, or distributor of a product that may cause a consumer product exposure may enter into a written agreement with the retail seller of the product to allocate legal responsibility among themselves for providing a warning for the product.” (Section 25600.2 (i)). A contract that purported to obviate the retailer’s duty to provide in-store, internet or catalog warnings would likely be invalid since it would frustrate the consumer receiving a warning that meets the requirements of the new warning regulations. See Appendix B for model terms and conditions on the allocation of Proposition 65 responsibilities.

Accordingly, while not specifically called for in the regulations, when a furniture supplier sells furniture to an intermediary that is not the retail seller, the supplier's notice to such intermediary should include directions that the intermediary (i) relay the notice to any reseller(s) to whom the intermediary sells the furniture, and (ii) instruct said reseller(s) to further convey the notice to any other reseller(s) to whom the furniture is resold.

Prop 65 applies to all companies with ten or more employees doing business in the State of California. Cal. Health & Safety Code § 25249.11(b). In today's mobile and internet economy, resellers (including retailers) do not need to have a physical presence in the state to do business in California. Non-retail resellers outside of California may resell to retailers in California. Retailers outside of California may sell products to consumers in California through the retailer's website or may redirect merchandise to California retail locations (e.g. re-selling overstock to discount stores in California). To ensure that it is discharging its warning obligations, a furniture supplier should consider giving notice to every retailer/reseller.

### **Three Steps Must be Followed to Give Proper Notice to Retailers Under Prop 65**

To give a proper and effective notice to retailers that a Prop 65 warning is required, each of the following steps must be followed.

1. Notice must be given to each retailer's authorized agent.

An "authorized agent" is defined as the person or entity designated by the retailer to receive Prop 65 notices from suppliers. (Section 25600.2(b)) The new regulations assume that retailers will designate an authorized agent in contract negotiations with suppliers.<sup>9</sup> Retailers may also do so for their own convenience (e.g., to avoid having multiple people within the retail organization receiving Prop 65 communications). However, the new amendments do not require the retailer to designate an authorized agent.<sup>10</sup>

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<sup>9</sup> In its FSOR, OEHHA stated "The regulations place the responsibility on the retail seller to designate a person to receive warning information from product manufacturers, distributors, packagers, importers, and suppliers. Each of the entities in the chain of commerce will likely do this through contractual language." (FSOR ¶ 33).

<sup>10</sup> Some retailers may take the position that they have "no authorized agent for Prop 65 purposes" as a means of avoiding the transfer of any Prop 65 warning obligations. This is not likely to accomplish the retailer's goal. As OEHHA noted in its FSOR: "Although the primary responsibility for providing the warning for products, including foods, is with the manufacturer, producer, packager, importer, or distributor of those products, any entity within the chain of distribution shares in the responsibility for providing a warning." (FSOR ¶ 54). Because the furniture supplier cannot control the placement of warnings in a retailer location or on a retailer's website or catalog, and the Prop 65 safe harbor regulations require such placement even if a product bears a warning label, the retailer cannot avoid carrying any Prop 65 warning duties whatsoever.

In its FSOR, OEHHA suggested that when a retailer has not designated an authorized agent, the supplier can provide notice to the person the supplier “normally communicate[s] with at the retail seller regarding their products” or “provide the materials with the product when it is delivered to the retail seller.” (FSOR at ¶ 33) It is not clear, though, that the new regulations are broad enough to allow for these alternatives.

Section 25600.1(b) defines the “authorized agent” as the person “designated by a retail seller to receive notices.” This is a specific definition. It does not state that the person designated by the retail seller “among others” is an authorized agent nor indicate that the definition “includes but is not limited to” the person designated by the retail seller.

Likewise, Section 25600.2(b) states that the supplier must provide “written notice directly to the authorized agent for a retail seller.” It does not state that the supplier may provide written notice to an alternate agent or other employee if the retail seller has not designated an “authorized agent.”

The term “designated” may be the key to reconciling the plain text of the new regulations and the suggestions in OEHHA’s FSOR. Using broad dictionary definitions, anyone who is signified to be the retailer’s person to receive Prop 65 notices may be considered an “authorized agent.” Where a retailer fails to explicitly designate an authorized agent, suppliers may argue that the retail employee with whom they regularly communicate was signified (by words or deeds) to be the retailer’s authorized agent. It is likely that this issue will ultimately be litigated to obtain clarification.

Because of this uncertainty, it would behoove furniture suppliers to request a written representation from each retailer of its authorized agent for Prop 65 notices.

## 2. The notice must contain all required elements.

There are three requirements that must be included in the notice given to the retailer’s authorized agent. First, the notice must identify the product(s) for which a warning is required by “[i]nclud[ing] 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.” (Section 25600.2(b)(2)). Second, the notice must state that the product(s) identified in the notice “may result in an exposure to one or more Prop 65 listed chemicals.” Third, the notice must include all necessary warning materials and warning language for products sold on the internet.

### (a) *Retail Warning materials*

For furniture products, there are three different types of warning materials that may need to be included.

(i) Signs no smaller than 8 ½ by 11 inches and printed in no smaller than 28-point type that state: “**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.” The retailer should receive enough signs to post at each point of entry or each point of display.

Furniture suppliers should ask retailers how many notices are needed at the same time they request a written representation from each retailer of its authorized agent for Prop 65 notices. In the absence of specific guidance (or where a supplier is selling to a non-retail reseller who will, in turn, resell the products to multiple retailers) a good faith reasonable estimate should be made of the likely number of signs that will ultimately be needed at each retail establishment and additional signs should be provided to any retailer as needed upon request.

The new regulations do not dictate the material from which the sign should be made or any other design elements. As a best practice, furniture suppliers should discuss this with their retailers along with the identification of the authorized agent and the number of signs needed. In the absence of any other guidance, the signs should be made durable enough to be used for the expected lifetime of the furniture products at issue.

(ii) A self-inking stamp that would mark on each receipt in no smaller than 12 point type the language: “**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.” Unless instructed otherwise by the retailer, at least one stamp must be provided to each retailer and additional stamps should be provided to any retailer as needed upon request.

(iii) The software needed to cause the POS system to print, in no smaller than 12-point type, the following statement on each receipt: “**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.”

Section 25607.12 requires the retailer to either post the sign described in (i), or stamp the receipt as described in (ii), or print the notice on the receipt per subsection (iii) above. Where furniture suppliers and retailers communicate about Prop 65 in advance of notices being provided, the retailer can (and should be asked to) elect one of the three retail methods of transmission. In that event, the furniture supplier will not have to include the sign, the stamp, and the POS software with each notice but will only have to include the method of transmission selected by the retailer.

If the absence of advance communications (e.g., where a furniture supplier sells to a distributor who will resell to numerous retailers unknown to the furniture supplier), the most conservative approach is to include all three methods of transmission. Section 25607.12 is silent as to who has the right to select the in store method of transmission but the retailer likely has the ability to control this.

(b) *Internet and Catalog warnings*

Under the plain language of the regulations, it is not clear that furniture products must include internet and catalog warnings. Sections 25607.12 and 25607.13 state that “[a] warning

for consumer product exposures from furniture meets the requirements of this subarticle [the safe harbor methods and content] if it complies with the content requirements in Section 25607.13” and “if it is provided using the combination of methods required in Section 25607.12.” Nothing in Sections 25607.12 or Section 25607.13 refers to an internet warning.

Internet and catalog warnings are listed in Section 25602, which is the safe harbor warning requirements for consumer products generally. Section 25602 does not apply directly to furniture products. The new regulations state: “where warning methods or content are included in 25607.1 et seq. [which includes Sections 25607.12 and 25607.13], a person must use the specified warnings in order to satisfy the requirements of this subarticle.” (Section 25607(a)). OEHHA noted in its FSOR that “[a]s stated in subsection 25607(a), a business that wishes to obtain safe harbor protection for its warning must comply with the specific requirements of the regulations that apply to that exposure. It follows that an alternative warning need not also be provided. The language in subsection 25607(a) is clear in this regard ... .” (FSOR ¶ 228).<sup>11</sup>

However, in a guidance document for businesses issued in August 2017 OEHHA stated, without qualification, “under the safe harbor provisions of the regulations, warnings are required for purchased made over the internet ...” and “purchases made through catalogs prior to completing the purchase.”<sup>12</sup> OEHHA repeated these statements in a second guidance document released in December 2017, which focused specifically on internet and catalog warnings.<sup>13</sup>

In light of the foregoing, litigation for failure to provide an internet or catalog warning as to furniture products is possible. To mitigate this risk, furniture suppliers may choose to provide retailers with the following safe harbor warning language for furniture products sold via the internet or catalogs:<sup>14</sup> “**⚠ 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

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<sup>11</sup> In this paragraph of the FSOR, OEHHA is specifically responding to a comment by the Auto Alliance that if their products are subject to a product specific warning regime they should not also have to apply on-product labels under Section 25602. While the Auto Alliance was referring to Section 25602(a), the same logic arguably applies equally to Section 25602(b) regarding internet warnings. But nothing in the FSOR indicates that OEHHA expressly intended this reasoning to apply to Section 25602(b) and this may be a function of imprecise drafting.

<sup>12</sup> Available at [https://www.p65warnings.ca.gov/sites/default/files/art\\_6\\_business\\_qa.pdf](https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf) (See p. 7)

<sup>13</sup> Available at [https://www.p65warnings.ca.gov/sites/default/files/art\\_6\\_business\\_qa\\_internet\\_warnings.pdf](https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa_internet_warnings.pdf) (See p. 2).

<sup>14</sup> Even if internet warnings are not required for furniture under Section 25602(b), Section 25607.12(a)(1)(B) could be read to require that the safe harbor furniture “NOTICE” be printed or stamped on all receipts for internet purchases being shipped to California. This is another reason for furniture suppliers to give notice to all of their retailers.

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).” This is the same safe harbor warning language as for the on-product warning.

Note that the below safe harbor methods for transmitting internet and catalog warnings apply equally to both the furniture suppliers’ websites and catalogs as well as to the retailers’ websites and catalogs.

(i) Under Section 25602(b), warnings for internet purchases must “be provided by including either the warning or a clearly marked hyperlink using the word ‘WARNING’ on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase.” During the regulatory rulemaking, OEHHA specifically noted “a retail seller may comply with the regulation by providing the warning only to individuals who reside in California. For example, OEHHA is aware that some online retail sellers do this by providing the warning as a pop-up when the purchaser enters a California zip code.”<sup>15</sup> (FSOR ¶ 139). In addition to the product display page and pop-up window, other options for providing a Prop 65 warning on-line include the shopping cart page and checkout page. Under the regulations, “a warning is not prominently displayed if the purchaser must search for it in the general content of the website.” (Section 25602(b)).

(ii) Under Section 25602(c), for catalog purchases, “a warning ... must also be provided in the catalog in a manner that clearly associates it with the item being purchased.” The regulations do not define the term “catalog.” In its Final Statement of Reasons for the regulations, OEHHA stated: “The term ‘catalog’ is not a term of art for purposes of Proposition 65. It has the same meaning as common usage. For example the dictionary defines catalog as ‘a list or record, as of items for sale or courses at a university, systematically arranged and often including descriptive material’ [citing dictionary.com] A catalog may be provided electronically via the internet or in hardcopy form as in a mail-order catalog.” (FSOR ¶ 144).

3. The supplier must confirm that the retailer received the notice and must update the notice when required.

Under the new regulations, the supplier must obtain confirmation (electronically or in writing) that the notice was received by the retailer. (Section 25600.2(b)(4)). This can be accomplished by sending the notice through a third-party carrier that provides delivery receipts

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<sup>15</sup> OEHHA has not addressed which zip code should be used to trigger a pop-up warning when the billing and shipping zip codes differ and only one of the two zip codes is in California. On the one hand, the safe harbor warning regulations require the warning to be provided “to the purchaser prior to completing the purchase,” which might suggest using the billing zip code. On the other hand, a Prop 65 warning is only required in the first instance if an exposure will occur in the State of California. The most conservative approach is to provide a pop-up warning whenever a California billing or shipping zip code is entered. If a pop-up warning is tied to only one zip code, using either the billing or shipping zip codes is defensible but using the shipping zip code more closely ties the warning to exposures that may occur in California.



(e.g. FedEx). The notice must be renewed periodically. The frequency with which the notice must be renewed depends on when the original notice is issued for the product(s).

If the original notice is sent between August 30, 2018 (the date the new regulations take effect)<sup>16</sup> and February 28, 2019, the first renewal notice must be sent by February 28, 2019.<sup>17</sup> (Section 25600.2(c)(1)). Thereafter, the notice must be renewed annually until the product(s) at issue is no longer sold in California by the retailer. (Section 25600.2(c)(1)). Neither the new regulations nor the FSOR indicate whether the annual renewal runs from the date of the original notice or the first renewal. The former would be more consistent with the regulation as a whole but, under some circumstances, could require two renewal notices to be sent within the first year of the original notice.<sup>18</sup> The more conservative approach is to renew notice on the anniversary of the original notice. If the original notice is sent on or after February 28, 2019, the first renewal (and every renewal thereafter) is due annually on the anniversary of the original notice until the product(s) at issue is no longer sold in California by the retailer. (Section 25600.2(c)(1)).

In addition to the (roughly) annual renewal notices described above, an additional notice is required if the supplier changes the chemical to be disclosed in the warning for the product(s) at issue or adds an additional chemical to be disclosed in the warning. (Section 25600.2(c)(2)).

With respect to any renewal of notice, the supplier must obtain written confirmation of receipt by the retailer. (Section 25600.2(c)(1)). As a best practice, the supplier should also obtain written confirmation of receipt by the retailer of any additional notice.

### **A Retailer Will Not be Indemnified if it Does Not Comply With the Notice**

The existing Prop 65 warning regulations (Tit. 27 Cal. Code Regs. § 25603, effective only until 8/30/18) state that the supplier, and not the retailer, should be primarily responsible for providing warnings. Retail agreements often include a representation and warranty by the supplier that the products supplied comply with all U.S. state and federal laws. As a result, retailers generally tender their defense and indemnification under Prop 65 to suppliers.

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<sup>16</sup> Section 25600(b) states “A person may provide a warning that complies with this article prior to August 30, 2018; such warning will be deemed to be clear and reasonable. A warning for a consumer product manufactured prior to August 30, 2018 is deemed to be clear and reasonable if it complies with the September 2008 revision of this article.” In its August 2017 guidance document, OEHHA clarified that this “early compliance” option did not apply to Section 25600.2, which governs the provision of notice to retailers and is not operative until August 30, 2018. See [https://www.p65warnings.ca.gov/sites/default/files/art\\_6\\_business\\_qa.pdf](https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf) at p. 4.

<sup>17</sup> This could result in the first renewal notice being sent proximate in time to the original notice. For example, if the original notice is sent on February 1, 2019 the first renewal notice will be due just 4 weeks later.

<sup>18</sup> For example, if the original notice was sent on August 30, 2018, the first renewal would be due six months thereafter on February 28, 2019, and the next renewal on the anniversary of the original notice would be due on August 30, 2019.

Under the new regulations, “[t]he retail seller is responsible for the placement and maintenance of warning materials, including warnings for products sold over the internet, that the retail seller receives pursuant to subsections (b) and (c).” (Section 25600.2(d)) Where a supplier has given proper notice (as described above), the products supplied to the retailer will be in compliance with Prop 65 at the time they reach the retailer. As a result, a retailer that fails to comply with a furniture supplier’s notice to place and maintain in store warnings will not have grounds to tender its defense and indemnification to the supplier, in the absence of other contractual terms.

It is not clear, though, what other contractual terms would permit the retailer to seek indemnification from the furniture supplier for the retailer’s failure to comply with a properly provided notice. The new regulations permit retailers and manufacturers to enter into a written contract that provides for an alternate way “to allocate legal responsibility among themselves for providing a warning for the product” but only if “the consumer receives a warning that meets the requirements of [Prop 65] prior to exposure.” (Section 25600.2(i)) As a result, any contract that would purport to absolve the retailer of its obligation to provide in store warnings for furniture products after receiving proper notice likely would be invalid. A contract that simply required the furniture supplier to indemnify the retailer for all Prop 65 liability, even liability incurred as a result of the retailer’s own actions or inactions, probably would not be invalid under the new regulations.

### **The Prop 65 Safe Harbor Warning for Furniture Products**

The on-product safe harbor warning language for furniture products is: “This product can expose you to chemicals including [insert name of 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.P65Warnings.ca.gov/furniture](http://www.P65Warnings.ca.gov/furniture).” Unlike the content of other Prop 65 safe harbor warnings, the furniture safe harbor warning only requires one listed chemical<sup>19</sup> to be named in the warning.<sup>20</sup>

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<sup>19</sup> The current list of Prop 65 chemicals may be found at <https://govt.westlaw.com/calregs/Document/I54B9D2B0D45011DEA95CA4428EC25FA0?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Default%29>. OEHHA also has a searchable database on its website at <https://oehha.ca.gov/proposition-65/proposition-65-list>.

<sup>20</sup> OEHHA’s use of the disjunctive term “or” (as in “cancer or birth defects or other reproductive harm”) reinforces the plain reading of the furniture product safe harbor warning as requiring only one chemical to be listed by name. In contrast, the general consumer product safe harbor warning uses the conjunctive term “and” to show that, in some instances, two chemicals must be listed. To wit, “... cancer, and ... birth defects or other reproductive harm.” (Section 25603(a)(2)(C)). This distinction may have been inadvertent in light of Section 25601(b) which states: “Where a warning is being provided for more than one endpoint (cancer and reproductive toxicity) the warning must include the name of one or more chemicals for each endpoint, unless the named chemical is listed as known to cause both cancer and reproductive toxicity and has

OEHHA provided no guidance to industry on how to select the chemical to be listed but did note that the chemical should be one “for which a warning is being provided.” (FSOR ¶ 389).<sup>21</sup> OEHHA also noted that: “If the warning is being provided with no knowledge of exposure to a listed chemical, then no warning is required and “over-warning” is occurring.” *Id.* While there is no specific law prohibiting over-warning, California’s unfair business practices law (Cal. Business & Professions Code § 17200) is broad and may encompass such claims. Accordingly, the chemical listed in the Prop 65 warning should be one for which the company has knowledge that an exposure may<sup>22</sup> occur.

The safe harbor warning language must be preceded by the word “**WARNING:**” in bold font and all capital letters. (Section 25607.13(a)(1)(B)). The word “**WARNING:**” must be preceded by a black exclamation point in an equilateral triangle with a bold black outline and in a size no smaller than the word “**WARNING:**”. (Sections 25603(a)(1), 25607.13(a)(1)(A)).<sup>23</sup>

The warning must be “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...” (Section 25607.12(a)(1)) If such label contains information printed using the color yellow, then the equilateral triangle must also appear in yellow. If not, the equilateral triangle may be printed in black and white. (Section 25603(a)(1)).

#### *Sizing of the Prop 65 Safe Harbor Warning for Furniture*

The new regulations do not dictate the size of the safe harbor warning text but, under Section 25601(c), “[c]onsumer product exposure warnings must be prominently displayed on a label, labeling, or sign, and must be displayed with such conspicuousness as compared with other

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been so identified in the warning.” But, a drafting error on OEHHA’s part would have to be corrected with an amendment to the new regulations, following notice and comment.

<sup>21</sup> OEHHA’s statements in FSOR ¶ 389 are in reference to Section 25601(b) which provides that: “a warning meets the requirements of this subarticle if the name of one or more of the listed chemicals in the consumer product or affected area for which the warning is being provided is included in the text of the warning.”

<sup>22</sup> In response to criticism that the new warning regulations required companies to perform exposure assessments to be able to satisfy the safe harbor, OEHHA stated: “OEHHA disagrees that an exposure assessment is required to achieve the protections of the safe harbor methods and content. A business should be aware of the name of at least one listed chemical for which it is providing a warning.” (FSOR ¶ 391). During the rulemaking process, OEHHA changed the safe harbor warning language to the phrase “can expose” from the phrase “will expose” but rejected efforts to maintain only the word “contains.” In the FSOR, OEHHA explained: “Warnings are not required where a product simply “contains” a listed chemical but may not actually have the potential to cause an exposure.” Thus, a company should be able to defend its selection of a chemical for the safe harbor warning if the chemical is contained on or in the product and an exposure to the chemical may occur.

<sup>23</sup> To view the hazard warning triangle, visit <https://www.p65warnings.ca.gov/warning-symbol>.

words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use.” Thus, in selecting font size, the surrounding text should be considered. The new warning regulations require certain types of non-food consumer product warnings to be displayed on product labels in at least 6 pt. font. While that requirement is not directly applicable to food warnings, it provides one useful benchmark. Another best practice is for the font size of the Prop 65 warning to match the font size of other health and safety warnings on the product.

*Restriction on Supplemental Information in Safe Harbor Warning for Food*

OEHHA wanted to curb industry’s ability to “distract from or convert”<sup>24</sup> Prop 65 warnings and under the new warning regulations: “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. Such supplemental information is not a substitute for the warning content required by this subarticle.” (Section 25601(e)). In other words, any language added to the Prop 65 warning other than the specific language noted above, must be related to the source of exposure or ways to reduce exposure. If the supplemental language *in the warning* goes beyond these two areas the warning will no longer be deemed to comply with Prop 65. Notably, this restriction is limited to “the content of the safe harbor warning.” (FSOR ¶ 407). Supplemental information posted on the company website away from the Prop 65 warnings or on package inserts and leaflets away from the Prop 65 warnings are not subject to this restriction.

*Foreign Language Requirement for Safe Harbor Warning for Food*

Under the new safe harbor warning regulations for consumer products (Section 25602(d)), if a sign or label used to provide a Prop 65 warning contains “consumer information” (as that term is defined in the regulations)<sup>25</sup> in a language other than English, then the Prop 65 warning also must be provided in that other language. As with the internet and catalog warning provisions, this requirement is found in the section address consumer products generally and is not found in Sections 25607.12 or 25607.13, which are the regulatory provisions that set forth the Prop 65 safe harbor warning content and methods of transmission for furniture. Interesting, the foreign language requirement does appear in Section 25607.1, which is the “tailored” safe harbor warning for food. So, OEHHA purposefully added the foreign language requirement to one tailored safe harbor warning and not to another.

Nonetheless, in its August 2017 guidance document, OEHHA stated “tailored warnings (Section 25607.1 et seq.) require warning content to be provided in other languages.”<sup>26</sup> OEHHA

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<sup>24</sup> FSOR ¶ 408.

<sup>25</sup> “‘Consumer information’ includes warnings, directions for use, ingredient lists, and nutritional information. ‘Consumer information’ does not include the brand name, product name, company name, location of manufacture, or product advertising.” Section 25600.1(c).

<sup>26</sup> See [https://www.p65warnings.ca.gov/sites/default/files/art\\_6\\_business\\_qa.pdf](https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf) at p. 10.

did not limit this remark to the tailored warning for food and, indeed, implied that it was not limited. Litigation may be needed to resolve this ambiguity. Warning labels that contain consumer information in a language other than English but that do not bear the Prop 65 warning in that other language may be targets of litigation. Providing a Prop 65 warning in a language other than English under the circumstances noted above would mitigate litigation risk. OEHHA has posted some foreign language translations of the furniture safe harbor warning at <https://www.p65warnings.ca.gov/sample-warnings-and-translations-businesses>.

## **PRACTICAL CHECKLIST**

Below is a check-list of topics that furniture suppliers should consider discussing with furniture retailers in light of the new Prop 65 regulatory amendments:

- Identify the retailer's authorized agent for Prop 65 notices from suppliers
- Determine the retailer's preference for in store warnings as between store signs, receipt stamps, and POS software for receipts
- If the retailer prefers store signs, request the number of signs needed and confer on materials and other design elements
- Review contract terms, including representations, warranties, and indemnifications, in light of the new warning regulations.

Please let me know if you have any questions.

**APPENDIX A – Analysis of a Sample Prop 65 On-Product Warning for Furniture**

**To California Consumers**



**WARNING:** This product can expose you to chemicals including wood dust, which is 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).

Notes:

- This sample warning assumes that the furniture product causes an exposure to wood dust.
- This sample warning also assumes that the color yellow is not used on the label where the warning is being provided.
- During the rulemaking process, OEHHA was asked to confirm that a prefatory statement such as “For California Residents” was acceptable, and OEHHA declined to do so. (FSOR ¶ 576)<sup>27</sup> To the extent such language is used notwithstanding the lack of clarity, consideration should be given to referencing “California Consumers” instead of “California Residents,” since Prop 65 focuses on the site of the exposure instead of the residency of the consumer. Where the Prop 65 warning is so qualified, it is a best practice to post this qualification outside the warning text.
- Prop 65 regulations only require the hazard warning triangle to be as large as the word “WARNING.” There is no prohibition on making the triangle larger (as was done in this sample) but that is not required.

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<sup>27</sup> OEHHA was not asked this question in the context of Section 25601(e)’s prohibition on “supplemental information” (nor Section 25607.13’s furniture safe harbor warning) but, rather, in the context of Section 25607.1’s methods of transmission for food exposure warnings.

## **APPENDIX B – Model Prop 65 Terms and Conditions for Agreements with Retailers**

### Proposition 65 Representations

[Supplier] represents, warrants and agrees that (i) the products sold, supplied or delivered to [retailer] by [upstream entity] are labeled in compliance with California Health & Safety Code § 25249.5 *et seq.* (also known as Proposition 65) and its implementing regulations; (ii) [supplier] will provide notice to [retailer] of any Proposition 65 warning language required for internet and catalog sales (if any); (iii) [supplier] will provide any other warning materials to [retailer] promptly upon request; (iv) [supplier] will provide the above referenced notice and warning materials to [retailer] by contacting [insert contact information]; (v) [supplier] will indemnify, defend and hold harmless [retailer] from any demands, claims, causes or action, damages, penalties, or costs (including attorneys' fees) of any kind arising out of a breach by [supplier] of these Proposition 65 Representations.

[Retailer] represents, warrants and agrees that (i) [retailer] will post and maintain Proposition 65 warning sign(s) at each retail public entrance or point of display for furniture products, or will provide a Proposition 65 notice on each receipt for furniture products, which election shall be made by [retailer] in its sole discretion, in accordance with California Code of Regulations, Title 17, Sections 25607.12 and 25607.13; (ii) [retailer] will post and maintain any required Proposition 65 warnings on its website(s) and in its catalogs (if any); (iii) [retailer] will promptly advise [supplier] if any additional Proposition 65 warning materials are needed; (iv) [retailer] will promptly advise [supplier] if the contact information for [retailer] set forth above changes; and (v) [retailer] will indemnify, defend and hold harmless [supplier] from any demands, claims, causes or action, damages, penalties, or costs (including attorneys' fees) of any kind arising out of a breach by [retailer] of these Proposition 65 Representations.



**APPENDIX C – Sample Notice Letter to Retailers re Safe Harbor Furniture Warnings**

[Date]

Via [Method that results in written confirmation of receipt]

Dear [Insert Name of Retailer’s Authorized Agent]:

This is a written notice from [Supplier Name] to [Retailer Name] pursuant to California’s law known as Proposition 65 (“Prop 65”) regarding the following products: [insert exact names or descriptions of the products or specific identifying information for the products such as Universal Product Codes or other identifying designations].

The products listed above may result in an exposure to one or more Prop 65 listed chemicals. Recently, California adopted new safe harbor warning regulations for furniture. *See* Tit. 27, Cal. Code Regs., §§25607.12 and 25607.13. Compliance with the new safe harbor warning regulations for furniture requires both a warning label on furniture products and a notice posted in retail stores in California. The new Prop 65 safe harbor warning regulations also contain requirements for internet and catalog warnings. *See* Tit. 27, Cal. Code Regs., §§25602(b) and (c).

This notice letter includes all necessary in-store warning materials and warning language for products sold on the internet and through catalogs in California.

Enclosed are [insert #] signs no smaller than 8 ½ by 11 inches and printed in no smaller than 28-point type that state: “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.” One of these signs should be posted at each point of entry for each of your retail stores in California or each point of display where you sell the products listed above. Please do not hesitate to contact [insert the name of an employee for Supplier] at [insert employee’s contact information] if you need any additional signs.

Below is a chart listing the warning language to be used for each of the above referenced products sold on the internet and through catalogs in California:

<p>[insert exact name or description of first product or specific identifying information for first product such as a Universal Product Code or other identifying designation]</p>	<p><b>⚠ WARNING:</b> 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],</p>
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	<p>which are known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to <a href="http://www.P65Warnings.ca.gov/furniture">www.P65Warnings.ca.gov/furniture</a>.</p>
<p>[insert exact name or description of second product or specific identifying information for second product such as a Universal Product Code or other identifying designation]</p>	<p><b>⚠ WARNING:</b> 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 are known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to <a href="http://www.P65Warnings.ca.gov/furniture">www.P65Warnings.ca.gov/furniture</a>.</p>
<p>[insert exact name or description of third product or specific identifying information for third product such as a Universal Product Code or other identifying designation]</p>	<p><b>⚠ WARNING:</b> 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 are known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to <a href="http://www.P65Warnings.ca.gov/furniture">www.P65Warnings.ca.gov/furniture</a>.</p>
<p>[insert exact name or description of fourth product or specific identifying information for fourth product such as a Universal Product Code or other identifying designation]</p>	<p><b>⚠ WARNING:</b> 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 are known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to <a href="http://www.P65Warnings.ca.gov/furniture">www.P65Warnings.ca.gov/furniture</a>.</p>

Please do not hesitate to contact the undersigned if you have any questions.