



Business Groups Question Latest OEHHA Proposal to Change Warning Regulation

PROPOSITION 65, OEHHA, WARNINGS

By FIONA SMITH, May 2, 2020

A **coalition of 26 business groups has lodged a strong objection¹⁾** to a recent move by the Office of Environmental Health Hazard Assessment (OEHHA) to amend its warning regulations under Proposition 65.

In January, OEHHA **released a series of proposed amendments²⁾** to its safe harbor regulations—which set out how businesses can ensure they are providing a legally adequate Prop. 65 warning. The specific amendments cover warnings when selling products over the internet or via catalog. They also deal with sales of alcohol [see **OEHHA Proposes New Changes to Proposition 65 Warning Regulations³⁾**, February 16, 2020].

The business coalition's letter takes aim at OEHHA's proposed changes to warnings for internet and catalog sales, as laid out in Article 6 of Title 27 California Code of Regulations - Clear and Reasonable Warnings, **Section 25602 Consumer Product Exposure Warnings - Methods of Transmission⁴⁾**.

According to OEHHA, its proposal would "clarify that the product-specific warning provided by electronic device or process is intended to apply to products purchased at the retail location and is separate from those provided online for internet purchases."

In a letter to OEHHA, business groups such as the Consumer Brands Association and California Chamber of Commerce see it differently, calling the amendment an "extreme change" that will upend businesses' existing Prop. 65 compliance plans and require duplicative warnings. It is the only public comment that OEHHA received on the proposal.

"If the proposed amendments are adopted, online warnings via a website or mobile application will no longer be safe harbor warnings because the proposed amendments will limit electronic device warnings to warnings provided by an electronic device or process 'at the physical retail location,'" according to the letter.

Since OEHHA approved its major overhaul of the warning regulations in 2016 "thousands of companies have relied upon the plain language of the regulations for creating and implementing their Prop. 65 warning programs," according to the letter. "The proposed change will cause businesses to have to invest significant time and resources into changing their Prop. 65 warning programs again."

"Furthermore, it will spur frivolous litigation with respect to warnings that are 'clear and reasonable' under the statute and therefore compliant with the law, but that nevertheless do not comport with the proposed amendments' two-warning approach for online sales," according to the letter.

The coalition letter goes on to attack the legality of a previous amendment OEHHA made to the warning regulations in 2017, arguing that it cleared the way for this most recent proposed change. OEHHA deemed the changes in 2017 minor and non-substantive.

"The proposed amendments are tainted by a clear violation of the Administrative Procedures Act," according to the letter. "In 2017, OEHHA filed with the Office of Administrative Law 'non-substantive changes' to the safe harbor warning regulations pursuant to section 100 of Title 1, which allows for grammar and punctuation errors in a regulation to be corrected without notice and comment by the regulated community."

But "one of those changes was decidedly substantive because it has been used by OEHHA to interpret the safe harbor regulations to require a label warning when the retailer already provided an online warning for the product," according to the letter.

That change was the addition of the **word "also" in Section 25602 subsection (b)⁵** , which reads:

"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."

Other groups that signed onto the letter include: California Farm Bureau Federation, American Beverage Association, National Association of Music Merchants, Personal Care Products Council, American Chemistry Council and the California Building Industry Association.

Resources for this article

1. coalition of 26 business groups has lodged a strong objection

<https://prop65clearinghouse.com/documents/62229>

2. released a series of proposed amendments

<https://oehha.ca.gov/proposition-65/crn/notice-augmentation-record-and-extension-public-comment-period-proposed>

3. OEHHA Proposes New Changes to Proposition 65 Warning Regulations

<https://prop65clearinghouse.com/articles/14116>

4. Section 25602 Consumer Product Exposure Warnings - Methods of Transmission

<https://prop65clearinghouse.com/documents/62236>

5. word "also" in Section 25602 subsection (b)

<https://prop65clearinghouse.com/documents/62237>