



## Authors



**Lauren A. Hopkins**  
Principal  
(415) 262-4013  
[lhopkins@bdlaw.com](mailto:lhopkins@bdlaw.com)



**Gary J. Smith**  
Principal  
(415) 262-4045  
[gsmith@bdlaw.com](mailto:gsmith@bdlaw.com)



**Meghan A. Quinn**  
Associate  
(415) 262-4035  
[mquinn@bdlaw.com](mailto:mquinn@bdlaw.com)

## OEHHA Attempts to Clarify New Proposition 65 Clear and Reasonable Warning Regulations by Issuing Guidance and Proposed Amendments

On August 30, 2016, the California Office of Environmental Health Hazard Assessment (“OEHHA”) repealed and readopted Article 6 of Title 27 of the California Code of Regulations, which sets forth the method and content deemed to be clear and reasonable for Proposition 65 warnings (“Article 6”). (For additional information on the content and scope of the amendments please see [New Proposition 65 Regulation Amendments Modify Clear and Reasonable Warning Requirements and Private Enforcement Settlement Provisions](#), September 19, 2016). The new Article 6 regulations become effective on August 30, 2018. Prior to this effective date, businesses may use the old or new clear and reasonable warning regulations to guide their compliance strategies.

Since adoption of the new Article 6 regulations, OEHHA determined that further clarification of the regulations would benefit the regulated community. Accordingly, OEHHA has issued a set of Questions and Answers for Businesses (last updated on August 1, 2017 and posted [here](#)), as well as [proposed amendments](#) to several sections of the new Article 6 [regulations](#). Written comments on the proposed amendments are due September 7, 2017. OEHHA also indicated that the agency will schedule a public hearing on the proposed amendments upon request.

### Questions and Answers for Businesses

In July 2017, OEHHA issued Questions and Answers for Businesses (“guidance”) to clarify the warning obligations of the regulated community under Proposition 65. Later, on August 1, 2017, OEHHA issued a revised version of the guidance document. The guidance seeks to resolve certain issues flagged by businesses developing compliance plans to address the new Article 6 regulations.

The Questions and Answers for Businesses guidance explains when the use of court-ordered settlement warning method and content is appropriate; clarifies the appropriate label use, color scheme for the warning symbol, and use of the short-form warning; and sets forth which sections of Article 6 are mandatory versus non-mandatory, among other topics. The regulated community tends to view compliance with the whole of Article 6 as mandatory given the insulation

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from litigation risk afforded by providing consumers a safe harbor warning which OEHHA has deemed to be clear and reasonable under the Proposition 65 statute. However, use of the safe harbor warning language is not compulsory and a business is not precluded from providing warnings that are otherwise clear and reasonable.

For the first time, OEHHA clarified responsibility for providing safe harbor warnings by businesses that manufacture component parts or ingredients sold in bulk and ultimately incorporated into consumer products in the guidance. The relative responsibilities of different entities in the production process and supply chain for consumer products have long been a source of confusion under Prop 65.

Several of the issues addressed in the guidance are being revisited in the proposed clarifying amendments. It is possible, therefore, that the guidance could be revised again based on the outcome of the proposed clarifying amendments described in greater detail below.

### Clarifying Amendments: Article 6 Clear and Reasonable Warning Regulations

On July 21, 2017, OEHHA proposed numerous minor modifications to sections of the new Article 6 clear and reasonable warning regulations. In all, the agency has proposed amendments to 16 different sections (see the [Notice of Proposed Rulemaking summary](#) for details).

Most of the proposed amendments would slightly modify the text of the regulations to ensure consistent use of terminology for clarity. However, in some instances, the amendments would codify OEHHA's existing interpretations of the Article 6 regulations. For example, the proposed amendments would modify the definition of "label" to clarify that a display of written, printed, or graphic material may be "printed" directly on a product or its immediate container or wrapper. Previously, this information was buried in the Final Statement of Reasons for the adoption of the Article 6 regulations. Codification of such information will likely help allay regulated community concerns about the appropriate use of the short-form warning label, as well as other warning language and methods.

OEHHA anticipates that these proposed modifications will facilitate businesses' compliance with Proposition 65 by clarifying several sections of Article 6 in advance of the upcoming August 30, 2018 effective date.

*Beveridge & Diamond's [Consumer Products Practice](#) advises clients in California and worldwide on [Proposition 65](#) issues, as well as a wide range of other product-related environmental issues. For more information about OEHHA's Proposition 65 Clear and Reasonable Warning requirements, Proposition 65 litigation, and how Proposition 65 relates to your business, please contact Gary J. Smith at [gsmith@bdlaw.com](mailto:gsmith@bdlaw.com), (415) 262-4045 or Lauren Hopkins at [lhopkins@bdlaw.com](mailto:lhopkins@bdlaw.com), (415) 262-4013.*