

## Proposition 65 2.0: Where It Is and Where It's Going



Proposition 65 is a California warning requirement of concern for companies throughout the U.S. It has recently undergone remarkable changes, taking on new life and creating new challenges for suppliers everywhere. This alert brings you up to date with the recent changes and what to expect.

### WARNING: New Safe-Harbor Regulation Takes Effect

The new Article 6, Clear and Reasonable Warning (safe-harbor) [regulation](#) took effect on August 30, 2018. This is clearly the most important recent development in Proposition 65 compliance. In 2016, the Office of Environmental Health Hazard Assessment (OEHHA) completely overhauled the decades-old warning rules. Those rules finally took effect on August 30, 2018. Now, compliance with the old Article 6 regulation will no longer afford companies clear protection from Proposition 65 enforcement actions. While companies may continue to craft their self-customized Proposition 65 warnings (at their own risks), complying with the warning methods and language requirements in the new Article 6 rules should provide them with protection from enforcement actions.

As we [previously reported](#), since the new Article 6 regulation took effect, OEHHA has further revised the regulation. We continue seeing such efforts in 2018.

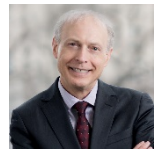
In November 2018, OEHHA proposed amending Section 25600.2, which provides the rules on how to allocate the Proposition 65

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warning responsibilities for consumer warning exposures among the various entities along the supply chain. OEHHA's proposal would clarify in the regulatory language that manufacturers may provide warning information and other materials to their immediate customers. It would also clarify several logistical requirements for information transmission, such as the service and confirmation of notices. Finally, it would clarify what "actual knowledge" means for retailers.

The proposed regulatory text and the supporting rulemaking documents are available [here](#).

In December 2018, OEHHA amended the Article 6 regulation on the signal word to be used for Proposition 65 warnings for pesticide products.

Under the amended regulation, pesticide products regulated under the labeling regulation of the U.S. Environmental Protection Agency or the California Department of Pesticide Regulation may use the words "ATTENTION" or "NOTICE," in lieu of the word "WARNING." Federal pesticide law and current EPA regulation assign a special meaning to the word "WARNING" as a signal word on pesticide labels and prohibit mislabeling.

The final regulatory text and the supporting rulemaking documents are available [here](#).

In February 2018, OEHHA also proposed tailored Article 6 rules for residential rental property warnings. The proposed residential rental property warning regulation would provide special rules for warning exposures from properties such as apartments, houses, duplexes, triplexes, condominiums, and other rented dwellings. OEHHA further modified its proposal in October 2018. This proposal is now before California's Office of Administrative Law (OAL), which has until March 15, 2019, to finish its review.

The proposed regulatory text and the supporting rulemaking documents are available [here](#).

## Watch Out for Regulatory Changes for These Chemicals

There are also a number of chemicals worth particular attention because of new listings, safety thresholds, or warning rules taking effect in 2018. Below is a non-exclusive list of some chemicals subject to recent regulatory changes under Proposition 65.

On October 26, 2018, OEHHA [listed](#) "nickel (soluble compounds)" as a reproductive toxin (male developmental). Under Proposition 65, companies have one year to comply with Proposition 65 requirements as applicable to nickel (soluble compounds). Therefore, warnings for nickel (soluble compounds) must be in place by October 26, 2019. Note that "nickel compounds" have been separately listed as carcinogens in 2004, and are already subject to Proposition 65 warnings.

OEHHA [established](#) a no-significant risk level (NSRL) of 1,100 micrograms per day for glyphosate, an herbicide, on April 6, 2018, which took effect on July 1, 2018. In addition, the listing of glyphosate in 2017 and the accompanying warning requirements under Proposition 65 led to extensive litigation in both state and federal courts in 2018. In August 2018, California's Supreme Court refused to hear any further challenges of OEHHA's listing of glyphosate, leaving intact an April 2018 decision by a California appellate court upholding the listing of glyphosate as a Proposition 65 chemical. A second case before the federal court is still pending, where the court is asked to decide whether the Proposition 65 warning language would be appropriate with regard to glyphosate.

In March 2018, a California judge proposed to hold that companies failed to meet their burden not to warn acrylamide in coffee under Proposition 65. Acrylamide is a chemical generated during the baking, frying, and roasting of certain plant-based foods and the news attracted media attention nationwide.

In June 2018, OEHHA proposed a new regulation, which would state that “[e]xposures to listed chemicals in coffee created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer.” Public hearing and comments followed. The docket for the coffee rulemaking is [here](#).

A California appellate court in July 2018 [held](#) that manufacturers do not have to place warnings for acrylamide contained in breakfast cereal, citing federal preemption. California’s Supreme Court refused to disturb that ruling in October 2018, yet [decertified](#) the appellate court’s order, making it no longer precedential.

OEHHA [listed](#) PFOA and PFOS as reproductive toxins (developmental) on November 10, 2017. This listing took effect on November 10, 2018.

## Enforcement Activities Continue

California’s Office of Attorney General (OAG) has not yet published its annual report on Proposition 65 settlements by private enforcers for 2018. But the information available on OAG’s website ([court-approved judgments for 2018](#) and [out-of-court settlements for 2018](#)) can shed light upon what happened on the enforcement front last year.

The most notable chemicals in 2018 subject to Proposition 65 enforcement actions were lead and phthalates, especially di(2-ethylhexyl)phthalate (DEHP). Lead cases initiated and settled in 2018 covered a variety of products, from toolkits, mugs, glassware, to dietary supplements. Dietary supplements seemed to be a particular target for private enforcers, which contributed to several lead and heavy metal cases that topped the leaderboard in 2018 by total amount (including several court-approved judgments at or above \$100,000). Meanwhile, DEHP cases covered an even broader scope of products, ranging from apparel, bags, and other consumer products to safety glasses, cables, and cords. Besides lead and phthalates, other chemicals were also featured in the settlements as well as in the [60-day notice records](#).

## What’s Ahead

In recent months, OEHHA has developed other approaches in Proposition 65 regulation, including requesting information from entities on why the warnings are provided, promulgating more Safe Use Determinations, and crafting industry-specific tailored warnings. We expect these approaches to continue.

And of course, Proposition 65 enforcement cases are expected to continue unabated.

These developments suggest that companies should keep checking and identifying Proposition 65 compliance risks in their products and supply chains. The enforcement risk is real. They should be taking concrete steps to protect themselves and their products from enforcement actions.

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