



## **Prop 65 Guidance for Manufacturers Located Outside California**

*The Franklin Partnership, LLP is not a law firm and the below shall not be construed as legal advice. The intent is to provide initial guidance to downstream manufacturers not located in California receiving customer compliance requests about their Prop 65 liability for items available or goods sold via website or in physical catalogues. Please be advised California based manufacturers face additional requirements for the workplace. For more information, please contact Omar S. Nashashibi, Founding Partner, [Omar@franklinpartnership.com](mailto:Omar@franklinpartnership.com).*

Under California's Prop 65 law, businesses, including manufacturers, distributors, and retailers, must notify California residents if a listed harmful chemical appears in a product prior to that individual purchasing the item that would lead to potential exposure to that listed chemical. Since its passage in 1986, the list of chemicals covered by Prop 65 has grown to over 950 including lead, hexavalent chrome, certain chlorinated paraffins, soluble nickel, among many others. Businesses must warn California consumers and California employees about potential exposure, and identify whether any of the listed chemicals appear in their product. The state updates the list annually, and recently considered expanding they type of nickel covered under Prop 65 list, adding soluble nickel.

### **Who is covered?**

Prop 65 requires that companies with ten or more employees must provide a "clear and reasonable" warning to a resident of California before them being exposed to a manufactured containing a chemical listed under Prop 65 (<https://oehha.ca.gov/proposition-65/proposition-65-list>). This requirement does apply to virtually every manufacturer where a covered chemical is present at levels exceeding accepted amounts even to businesses not physically located in California or not currently shipping products directly to companies or consumers in the state. The law states that the risk warning must accompany that product containing the chemical throughout the supply chain and on to the consumer.

Out of state manufacturers who can provide an online quote, use physical catalogues at trade shows, or ship aftermarket replacement parts even to a consumer hobbyist in California could purchase online should provide a warning. The California government has ceded most enforcement to private attorneys, who actively search for non-compliant manufacturers and seek settlements typically starting at \$110,000.

### **Safe Harbor Levels**

Businesses are exempt from the warning requirement if the exposures they cause are so low as to create no significant risk of cancer or are significantly below levels observed to cause birth defects or other reproductive harm.

California's Office of Environmental Health Hazard Assessment (OEHHA) has developed safe harbor levels to determine if a business is required to provide a warning. A business has "safe harbor" from Prop 65 warning requirements or discharge prohibitions if exposure to a chemical occurs at or below these levels. Safe harbor levels, which include No Significant Risk Levels (NSRLs) for cancer-causing chemicals and Maximum Allowable Dose Levels (MADLs) for chemicals causing reproductive toxicity have been established by OEHHA for over 300 chemicals on the Prop 65 chemical list. For lead, the "safe harbor" NSRL and MADL is 15 µg/day and 0.1 µg/day, respectfully.

If there is no safe harbor level for a chemical, businesses would either have to provide a warning or show that the anticipated exposure level would not pose significant risk of cancer or reproductive harm. OEHHA has adopted regulations that provide guidance for calculating a level in the absence of a safe harbor level, however, it is advised that a company seek legal counsel before self-calculating due to the risks involved.

## Warnings

Business that are required to provide a “clear and reasonable” warning can do so in a variety of ways, such as by labeling a consumer product (the product, its packaging, catalogue, website, and other methods that could allow the consumer to purchase the item). For online purchases, businesses must provide a warning prior to completion of the transaction.

On November 16, 2018, California proposed an amendment formally allowing written notice letters from manufacturers to upstream customers and distributors by sending a letter “directly to the authorized agent for the business to which they are selling or transferring the product or to the authorized agent for a retail seller . . .” Especially for items for which the manufacturer may not know the final destination, the intent is to allow the manufacturer to provide a notice that will convey with the product throughout the supply and distribution chain and ultimately to the consumer.


New regulations effective August 30, 2018, updated the requirements for warnings that are deemed to comply with the law. Under the new regulations, businesses are not required to use the new warnings and have the option to provide different warning such as a letter if they believed they comply with the law and are “clear and reasonable.” However, manufacturers should do both, apply a warning label on the packaging and provide a written notice letter.

The updated Prop 65 regulations provide for two different types of “safe harbor” warnings, a long form warning and an abbreviated short-form warning.

### *Long Form Warning*


The long form warning, which may be placed on the product or its packaging, or on a sign or tag at the point of sale, must:

1. name at least one of the chemicals for which the warning is being provided;
2. specify whether the chemical(s) is known to cause cancer or reproductive harm, or both;
3. include a triangular symbol [available at <https://www.p65warnings.ca.gov/warning-symbol>] to the left of the warning and the word “**WARNING**” in all capital letters and bold type.
4. include a link to linking to the OEHHA lead agency website, [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

 **WARNING:** This product can expose you to chemicals including lead, which is 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](http://www.P65Warnings.ca.gov).

### *Short-Form Warning*

The abbreviated short-form warning, however, does not require that the seller include the name of a chemical. This type of warning must be placed directly on the product or its immediate container or wrapper. The short-form warning must contain the triangular warning symbol and the word “**WARNING,**” but the text need only state: “Cancer [and/or “Reproductive Harm”]—[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov),” depending on whether the use of the product may lead to exposure to a listed carcinogen, a reproductive toxicant, or both.

 **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).