

AMENDMENTS TO CALIFORNIA’S PROPOSITION 65: CLARITY FOR CONSUMERS, LESS CONFUSION FOR BUSINESSES

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INTRODUCTION

In November 1986, over half of California voters chose to enact the Safe Drinking Water and Toxic Enforcement Act of 1986

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(Act),¹ also known as Proposition 65, thereby enacting a massive overhaul of the previous state program to better protect citizens and water supplies from toxic materials.² In doing so, “voters declared their rights to safe drinking water, to information about chemical exposures, and to strict enforcement of toxics laws.”³ The original Act prohibited the release of toxic chemicals into drinking water supplies, and established that persons or corporations who intentionally expose others to toxic chemicals must provide clear and reasonable warning of that exposure.⁴ While the Act has been in place since 1986, California voters adopted a new set of amendments in 2016 that went into effect on August 30, 2018. These amendments significantly modified the original safe harbor warnings under the 1986 Act⁵

When the Act was introduced in the 1980s, California residents were interested in legislation that actually protected human health, as demonstrated by section one of the Act:

The people of California find that hazardous chemicals pose a serious potential threat to their health and well-being, that state government agencies have failed to provide them with adequate protection, and that these failures have been serious enough to lead to investigations by federal agencies of the administration of California's toxic protection programs.⁶

Consumers were interested in clear labeling of products so that they are better able to understand risks and how to avoid them. At the same time, after years of litigation on the definition of “clear and reasonable,” businesses were interested in a clarification of what exactly is required as warnings.

Part I of this article examines the creation and history of the

¹ Richard Simon, *Bradley Handed Only L.A.-Area Defeat in Valley*, L.A. TIMES, Nov. 6, 1986, at B8.

² James Dragna, *Problems with Prop. 65: Will California's Toxics Initiative Hold Water*, 10 L.A. LAW. 18 (1987).

³ Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings under California's Proposition 65*, 23 ECOLOGY L.Q. 303, 305 (1996)(citing Safe Drinking Water and Toxic Enforcement Act of 1986, Proposition 65, section 1, 1986 Cal. Stat. A-219).

⁴ See Dragna, *supra* note 2.

⁵ OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, NEW PROPOSITION 65 WARNINGS, <http://www.p65warnings.ca.gov/new-proposition-65-warnings>.

⁶ Safe Drinking Water and Toxic Enforcement Act, Section 1, CAL. HEALTH & SAFETY CODE §§ 25249-25249.13 (1986).

Office of Environmental Health Hazard Assessment, explaining the agency's duties, and its goals and effectiveness as an administrative agency. Part II will give the reader background information regarding Proposition 65, delving into its various parts and reviewing its many criticisms and compliments. Part III outlines and analyzes the recent amendment, what the changes means for both consumers and businesses, and whether or not these changes will effectively accomplish the stated goals of the Safe Drinking Water and Toxic Enforcement Act. The main focus of this section will be the on the changes to the safe harbor warning and the "clear and reasonable" standard. Finally, Part IV will assess the future of Proposition 65 for consumers and businesses, and its effects on consumers nationwide. Part V offers a brief conclusion.

I. THE OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT AS AN ADMINISTRATIVE AGENCY

A. Duties of OEHHA

The Office of Environmental Health Hazard Assessment (OEHHA), a California state agency housed within the California Environmental Protection Agency (CalEPA), evaluates health risks posed by environmental contaminants.⁷ Its stated mission is "to protect and enhance the health of Californians and the state's environment through scientific evaluations that inform, support and guide regulatory and other actions."⁸ In addition to implementing and enforcing Proposition 65, OEHHA analyzes climate change, and develops tools and programs that measure levels of chemicals found in state residents' bodies. The agency also develops health screening tools to better comprehend how environmental pollutants and health and economic impacts have on the burdens that California communities face.⁹

Within OEHHA there are a number of departments, including the Air, Community, and Environmental Research Branch (ACERB), the Reproductive and Cancer Hazard Assessment Branch (RCHAB), and the Pesticide and Environmental Toxicology Branch (PETB).¹⁰ Proposition 65

⁷ ABOUT OEHHA, <http://oehha.ca.gov/about>.

⁸ *Id.*

⁹ *Id.*

¹⁰ OEHHA PROGRAM DESCRIPTIONS, <https://oehha.ca.gov/public-information/oehha-program-descriptions>.

Scientific Activities are conducted through the RCHAB, where employees compile and appraise scientific information to create hazard identification materials and develop information on methods for the public to reduce exposure to Proposition 65 listed chemicals.¹¹

OEHHA and RCHAB additionally maintain a list of chemicals subject to Proposition 65 regulation.¹² Proposition 65 requires that the state publishes a list of known cancer-causing chemicals. There are four ways a chemical can be added to the Proposition 65 list.¹³ The first is through the Labor Code: Labor Code section 6382(b)(1) includes chemicals known to the International Agency for Research on Cancer within the World Health Organization as cancer-causing.¹⁴ Section 6382(d) expands the list to substances within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200).¹⁵ Second, a chemical may be added to the Proposition 65 chemical list through two independent committees of scientific and health experts that find that a chemical has been shown to cause cancer or birth defects.¹⁶ The two committees include the Carcinogen Identification Committee (CIC) and the Developmental and Reproductive Toxicant Identification Committee (DARTIC), which constitute the State's Qualified Experts.¹⁷ Third, the CIC and DARTIC have deemed certain organizations as "authoritative bodies," which have the power to place a chemical on the Proposition 65 list.¹⁸ These authoritative bodies consist of the U.S. Environmental Protection Agency, Food and Drug Administration, National Institute for Occupational Safety and Health, and the National Toxicology Program of the U.S. Department of Health and Human Services.¹⁹ Any chemical that is identified as causing birth defects or cancer under those authorities, that chemical can be added to the Proposition 65 list.²⁰

¹¹ *Id.*

¹² HOW CHEMICALS ARE ADDED TO THE PROPOSITION 65 LIST, <http://oehha.ca.gov/proposition-65/how-chemicals-are-added-proposition-65-list>.

¹³ *Id.*

¹⁴ *Id.*; CAL. LAB. CODE § 6382(b) (West 1991).

¹⁵ LAB. § 6382(d) (West 1991).

¹⁶ HOW CHEMICALS ARE ADDED TO THE PROPOSITION 65 LIST, *supra* note 12.

¹⁷ *Id.*; see HEALTH & SAFETY § 25249.8 (West 1987).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Finally, a chemical can be added to the list if an agency of the state or federal government requires a chemical be identified as cancer causing.²¹

B. Goals of the OEHHA

The OEHHA's stated vision is to be "California's leading scientific organization for evaluating environmental risks to health, and to provide scientific tools to ensure a California where people of all races, cultures, and incomes are protected from undue chemical exposures."²² Their goals include improving the quality of public health and the environment, to advance the science for the evaluation of risks posed to the public health, and provide risk assessment leadership and high quality information about environmental health hazards.²³ Aside from acting as the lead agency in the implementation and regulation of Proposition 65, the OEHHA is imperative in assisting other California agencies in cleaning up oil spills and is instrumental in providing expertise and recommendations during emergency management situations.²⁴ For example, the OEHHA works with the California Department of Fish and Wildlife's (CDFW) Office of Spill Prevention and Response (OSPR) to determine if there is likely to be a public health threat or if there are potential health impacts due to emissions from gas leaks.²⁵

II. BACKGROUND OF PROPOSITION 65

A. Objectives

Proposition 65 is based on four rights and interests that the California public proclaims to possess.²⁶ The interests and rights include:

²¹ *Id.*

²² OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT CAL. ENVTL. PROT. AGENCY, STRATEGIC PLAN: 2018 UPDATE, <https://oehha.ca.gov/media/strategicplan2018.pdf>.

²³ *Id.*

²⁴ 2016 ERMAC ACCOMPLISHMENT REPORT, <https://calepa.ca.gov/wp-content/uploads/sites/6/2017/05/Final-2016-ERMaC-AccomplishmentReport.pdf>.

²⁵ *Id.*

²⁶ Julie Anne Ross, *Citizen Suit: California's Proposition 65 and the Lawyer's Ethical Duty to the Public Interest*, 29 U.S.F. L. REV. 809, 812 (1995).

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(a) To protect ourselves and the water we drink against chemicals that cause cancer, birth defects or other reproductive harm;

(b) To be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm;

(c) To secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public health and safety; and

(d) To shift the cost of hazardous waste cleanups more onto offenders and less onto law-abiding taxpayers.²⁷

Under the Act, the Governor of California is required to publish the Proposition 65 list of chemicals known to cause cancer or reproductive problems.²⁸ If a chemical is on the list, two prohibitions are triggered.²⁹ First, businesses may not discharge any listed chemicals into sources of drinking water or land, and second, California businesses must notify California residents about the existence of certain chemicals in their products.³⁰

B. Discharge Prohibitions

The 'knowingly and intentionally' element is defined by statute as,

"knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring. No knowledge that the discharge, release or exposure is unlawful is required. However, a person in the course of doing business who, through misfortune or accident and without evil design, intention, or negligence, commits an act or omits to do something which results in a discharge, release, or exposure has not

²⁷ HEALTH & SAFETY § 25249.5 (West 1986).

²⁸ Jerome H. Heckman, *California's Proposition 65: A Federal Supremacy and States' Rights Conflict in the Health and Safety Arena*, 43 FOOD DRUG COSM. L.J. 269, 272 (West 1988).

²⁹ HEALTH & SAFETY §§ 25249.5 and 25249.6 (West 1986).

³⁰ Jennifer Yu Sacro, *Proposition 65 and Food*, 18 BUS. L. TODAY 1, 39 (2009).

violated Section 25249.5 or 25249.6 of the Act.”³¹

The statute states that businesses are prohibited from knowingly and intentionally discharging listed chemicals “where such chemical passes or probably will pass into any source of drinking water.”³² An exemption to the discharge prohibition exists when the chemical was not included on the list for the preceding twenty months, and when the discharge did not have an effect on the land or products.³³ In order to fall under this exemption, the defendant must first show that the discharge is in compliance with all regulations, permits, requirements, and orders that apply to the discharge.³⁴ Additionally, the defendant must prove that the discharge does not cause a “significant amount” of a listed chemical to enter a source of drinking water or product.³⁵ A second exemption exists for all businesses that have less than ten employees, operators of public water systems, and all government departments.³⁶

C. Safe Harbor Warning Regulations—Clear and Reasonable Standard

The original regulation required any product containing any cancer or reproductive harm-causing chemical to include on its label the following statement: “WARNING: This product contains a chemical known to the State of California to cause cancer.”³⁷ A product similarly containing a known reproductive toxin required a label stating: “WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.”³⁸ The statute essentially provides that warnings do not need to be given separately to each individual, but general methods such as labels on products, inclusion of notices in mailings, posting of notices, placing notices in public media are typically sufficient.³⁹ Following the structure of the discharge

³¹ CAL. CODE OF REGULATIONS § 25102(n) (West 2018), *see also* Initial Statement of Reasons: Title 27, CAL. CODE OF REGULATIONS, Section 6, page 23, <https://oehha.ca.gov/media/downloads/cnr/112715warningreg20isor.pdf>.

³² HEALTH & SAFETY § 25249.8(b) (West 1987).

³³ *Id.* at 24294.9.

³⁴ Dragna, *supra* note 2.

³⁵ *Id.*; CAL. HEALTH & SAFETY CODE § 25249.9(b)(1) and (2) (West 1987).

³⁶ *Id.*

³⁷ Heckman, *supra* note 28, at 273.

³⁸ *Id.*

³⁹ CAL. HEALTH & SAFETY CODE § 25249.11(f) (West 1996).

prohibition, exemptions exist for the warning requirement. Warnings are not required on products in three situations: (1) when federal law governs the warnings, preempting state authority, (2) when an exposure takes place less than one year after the listing of the chemical, or (3) when lifetime exposure to the chemical does not pose a significant risk.⁴⁰ Prior to the 2016 amendments, the Act defined a warning as ‘clear’ if the warning clearly communicates that the chemical in question is known to the State of California to cause cancer, birth defects or other reproductive harm.”⁴¹ Additionally, the “reasonable” standard was satisfied “if the method employed to transmit the message is reasonably calculated to make the warning message available to the individual prior to exposure.”⁴²

The clear and reasonable standard for safe harbor warnings has not been expressly clear, and California courts have wrestled over the subject for years. One concern was the potential varying interpretation of these provisions, which could still result in liability for a corporation, even if relying on the safe harbor warnings.⁴³ For instance, the California Court of Appeals found certain methods for providing clear and reasonable warnings as unacceptable in *Ingredient Communication Council (ICC) v. Lungren*.⁴⁴ A consumer product and food company created a method for providing warnings which consisted of a general in-store sign and newspaper ads that directed customers to a toll-free number to call for information on products requiring a Proposition

⁴⁰ *Id.*; HEALTH & SAFETY § 25249.10 (West 1987).

⁴¹ OFF. OF ENVTL HEALTH HAZARD ASSESSMENT, FINAL STATEMENT OF REASONS, TITLE 27, CALIFORNIA CODE OF REGULATIONS: PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6 REGULATIONS FOR CLEAR AND REASONABLE WARNINGS [hereinafter FINAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS], <https://oehha.ca.gov/media/downloads/crn/rt6fsor090116.pdf>.

⁴² *Id.*

⁴³ Charlotte Uram, *Proposition 65: No Safe Harbor*, 4 NAT. RESOURCES & ENV'T. 16 (1990)(noting that the safe harbor warnings may solely be an illusion of safety).

⁴⁴ *Ingredient Communications Council (ICC) v. Lungren*, 2 Cal. App. 4th 1480 (1998); see also OFF. OF ENVTL HEALTH HAZARD ASSESSMENT, INITIAL STATEMENT OF REASONS: TITLE 27, CALIFORNIA CODE OF REGULATIONS PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6, REGULATIONS FOR CLEAR AND REASONABLE WARNINGS NOVEMBER 27, 2015 (2015) [hereinafter 2015 INITIAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS], <https://oehha.ca.gov/media/downloads/crn/112715warningreg20isor.pdf>.

65 warning.⁴⁵ The court held that this methodology did not meet the clear and reasonable standard, stating “an invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning about a specific product.”⁴⁶

Adding to the confusion, while the safe harbor numbers and warnings are not mandatory as long as the labeling is clear and reasonable, the OEHHA has stated that “reasonable men can differ on what is clear, and what is reasonable.”⁴⁷ The OEHHA further prevented businesses from adding language to the warnings with more information so as not to confuse or mislead the recipients of the warnings.⁴⁸

D. Legal Framework and Enforcement of the Act

When discussing Proposition 65, it is important to discuss the legal framework that was created with the Act. Proposition 65 fully shifted the burden of proof onto the defendant corporations to prove that levels of chemicals they were including in their products were safe, effectively abandoning the legal framework of most environmental laws.⁴⁹ This placed a high burden on manufacturers and sellers due to the scientific difficulty of proving that a chemical is safe.⁵⁰ However, this framework can encourage

⁴⁵ INITIAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, <https://oehha.ca.gov/media/downloads/crn/112715warningreg20isor.pdf>.

⁴⁶ *Id.* The court further explained that an effective toll free number system would require more complete in-store notification providing product-specific warnings, as experts identified that at least two-thirds of products are purchased on impulse. Uram, *supra* note 43 notes that the court’s holding that the system was not clear and reasonable under Proposition 65 was despite the fact that the California Health and Welfare Agency regulations allowed this toll-free information method.

⁴⁷ David Fischer, *Proposition 65 Warnings at 30 – Time for a Different Approach*, 11 J. BUS. & TECH. L. 131, 147 (2016) (citing FINAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, *supra* note 41).

⁴⁸ *Id.*; Fischer states that this places businesses between a rock and a hard place: between providing “meaningless” safe harbor warnings that alarm, or embellish the warnings and risk litigation. The November 2015 proposal from the OEHHA stated that warnings may not include any information that would contradict the warning message.

⁴⁹ Uram, *supra* note 43 (explaining Proposition 65’s “radical departure” from existing law due to their distrust and dissatisfaction with the government’s enforcement of regulations). *See also* Heckman, *supra* note 28 (discussing the law’s burden of proof requiring defendants to bear the responsibility of proving that there is no significant risk posed by the chemical exposure at issue).

⁵⁰ Melinda Haag, *Proposition 65’s Right-to-Know Provision: Can It Keep*

substitution of safer substances, as well as provide an incentive to support the promulgation of regulations.⁵¹ Additionally, the corporation in a specific industry is generally in the best situation to be informed regarding the chemicals it utilizes, and what levels are used.⁵² Another purpose for such framework is that the industry, more so than the public, should bear the risk of harm from chemicals about which the public has very limited knowledge.⁵³

A Proposition 65 claim can be brought by public prosecutors, including the California Attorney General, district attorneys, city attorneys, or by “any person in the public interest.”⁵⁴ “Person” for purposes of this section means any individual, trust, firm, joint stock company, company, corporation, partnership, limited liability company, and association.⁵⁵ As mentioned above, the burden is on the defendant corporation to prove that the exposure is at a safe level, or is exempt from the statute. The various remedies for a violation of Proposition 65 include civil penalties of up to \$2,500 per day, and injunctive relief.⁵⁶ The purpose of these citizen suits are to support government enforcement endeavors, and can be necessary where the government has limited resources.⁵⁷ Industries’ poor environmental compliance record was a significant reason in the addition of the citizen suits under Proposition 65.⁵⁸ What

Its Promise to California Voters, 14 *ECOLOGY L. Q.* 685, 706 (1987).

⁵¹ *Id.*

⁵² Rechtschaffen, *supra* note 3, at 312; see John Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 *COLUM. L. REV.* 261, 298-99 (1991) (“Industries that produce and use chemicals ordinarily are in the best position to provide or obtain toxicity and exposure data more cheaply and accurately. They have the greatest familiarity with their products’ characteristics and the occasions for exposure to them, and they have the most opportunities to learn about the chemicals.”).

⁵³ *Id.*

⁵⁴ CAL. HEALTH & SAFETY CODE § 25249.7(c), (d) (2018)(stating that a private party can act in the public interest and bring suit under Proposition 65 if either 60 days’ notice is provided to defendant, Attorney General, district attorney, city attorney in the relevant jurisdiction, and if no other public prosecutors have commenced prosecuting the same case).

⁵⁵ CAL. HEALTH & SAFETY CODE § 25249.11(a) (1996).

⁵⁶ *Id.* § 24259.7(a).

⁵⁷ Julie Anne Ross, *Citizen Suit: California's Proposition 65 and the Lawyer's Ethical Duty to the Public Interest*, 29 *U.S.F. L. REV.* 809, 812 (1995). See generally, Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503 (3d Cir. 1993).

⁵⁸ *Id.* Environmental legislation was generally voluntary before 1970, and was largely ignored by American businesses.

distinguishes Proposition 65 from many federal regulations is that citizen enforcers are entitled to twenty-five percent of all civil penalties collected from the suit.⁵⁹

E. Effectiveness and Criticisms of the Former Proposition 65

For this reason, the individuals and lawyers who bring these suits are referred to as “bounty hunters,” and there have been numerous complaints from attorneys and businesses alike.⁶⁰ In terms of the legal framework, authors such as Jerome Heckman have referred to these enforcement provisions as “bounty hunter provisions,” and stated that the burden on the manufacturers, suppliers, and distributors is too high and encourages litigation.⁶¹ Another complaint of this framework is that these safety warnings are so common, and due to businesses’ fear of bounty hunting lawyers sometimes they apply Proposition 65 labels to all products, even if they do not fall under Proposition 65 requirements.⁶²

From the view of businesses, the post-2016 Proposition 65 amendments are “uninformative” and “alarmist.”⁶³ Michael Barsa, Professor and Co-Director of the Environmental Law Concentration at Northwestern University Pritzker School of Law, argued from the viewpoint of an information economics paradigm, that the safe harbor warning requirements under Proposition 65 do not provide consumers with the actual risk of a product.⁶⁴ The effectiveness of the safe harbor warnings have been analyzed from a cognitive psychology framework as to determine how and what the warnings are communicated to the public and their effectiveness.⁶⁵ This analysis determines whether California

⁵⁹ *Id.* In effect, the legislation does create a “bounty” for the citizen.

⁶⁰ *Id.*

⁶¹ Heckman, *supra* note 28, at 276 (arguing that litigation will ensue continually until consumers seek unlimited assurances from suppliers that no cancer-causing chemicals are present in any products, whether they would cause harm or not). *See also* Mark Snyder, *Proposition 65 Can Spell Bankruptcy for Many California Small Businesses*, Sacramento Bee (2014) (“The law allows “concerned” citizens to file lawsuits and extract penalties from noncompliant businesses. Trial lawyers have pounced at the chance to cash in.”).

⁶² David W. Bertoni & Daniel A. Nuzzi, *Are You Ready for the Fast-Approaching Prop 65 Amendments?*, REGULATORY DEVELOPMENTS, EHS Daily Advisor (Jul, 12, 2018), <https://ehsdailyadvisor.blr.com/2018/07/ready-fast-approaching-prop-65-amendments/>.

⁶³ Michael Barsa, *California’s Proposition 65 and the Limits of Information Economics*, 49 STAN. L. REV. 1223, 1224 (1997).

⁶⁴ *Id.*

⁶⁵ Rechtschaffen, *supra* note 3, at 321.

residents actually notice the warnings, whether they attract their attention, and whether adequate and useful information is thus communicated.⁶⁶ The results of such an analysis demonstrated that companies were not placing warnings in conspicuous locations, that the information provided in the warnings failed to provide adequate information that would allow for informed decision making, and the “one-size-fits-all” safe harbor warning did not allow individuals to understand the actual level of risk.⁶⁷

This causes confusion for both consumers, who do not know whether to take the warning seriously or understand what it means, and businesses, who run the risk of over warning consumers.⁶⁸ The OEHHA addressed the language of the safe harbor warnings in its 1991 Initial Statement of Reasons.⁶⁹ The state regulators had acknowledged that the wording, “contains,” does not provide the information that a concerned individual expects to receive, and leaves them without knowledge of whether there is exposure to a chemical, what the source of the exposure is, or of the identity of the chemical.⁷⁰ Warnings are not necessarily required under Proposition 65 if a listed chemical is contained within the product, but will not cause an exposure.⁷¹ The wording could also overstate the risk associated with the product.⁷² As the statute does not require inclusion of a numerical risk rating system, individuals are unable to differentiate between insignificant risks and significant risks.⁷³ The issue lies in attempting to differentiate between products that contain chemicals that may pose a lifetime cancer risk of one in ten from those where the risk is one in 10,000.⁷⁴

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ CALIFORNIA HEALTH AND WELFARE AGENCY, INITIAL STATEMENT OF REASONS, NOTICE OF PROPOSED RULEMAKING, AMENDMENTS TO § 12601 (2001), <https://oehha.ca.gov/media/downloads/crn/12601initialsor.pdf>. The Office of Environmental Health Hazard Assessment was formerly known as the California Health and Welfare Agency.

⁷⁰ *Id.*

⁷¹ FINAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, *supra* note 41. For instance, a chemical can be bound in a matrix or sealed inside the product but is not accessible to most users of the product. In that case, a warning would not be required.

⁷² W. Kip Viscusi, PRODUCT-RISK LABELING: A FEDERAL RESPONSIBILITY 61, 69 (1993).

⁷³ *Id.*

⁷⁴ Barsa, *supra* note 63, at 1229. “Because the Act requires only a warning of the presence of a carcinogen, not the magnitude of the risk, people are unable to differentiate between small and large risks. As a result, serious dangers may

Following from that, there may be a clear overstatement with including a “WARNING” symbol when there is no substantial risk involved with the chemicals contained within the product.⁷⁵

The effectiveness of the statute lies in the incentives it gives businesses in order to provide consumers with information regarding their purchases. While Michael Barsa argues that the law, in its original form, has a weak impact on consumers while a powerful one on businesses,⁷⁶ it appears as though the regulation is extremely impactful on both sides. While there are stringent burdens on businesses, Barsa himself stated that businesses have been forced to reformulate products to figure out a way to avoid incorporating cancer-causing chemicals, rather than display a “WARNING” alerting consumers to the fact that there are chemicals in their products.⁷⁷ This sentiment was echoed by Melinda Haag, former U.S. Attorney for the Northern District of California, who stated that the substitution of safer materials in consumer products is forced on businesses who do not want to convey to consumers that there are chemicals in their products.⁷⁸

III. PROPOSITION 65 AS OF AUGUST 30, 2018

A. Safe Harbor Warnings/Numbers

In June 2016, California residents voted to amend Proposition 65, to go into effect on August 30, 2018.⁷⁹ Safe harbor warnings, or safe harbor numbers, in the context of Proposition 65 are identified exposure levels of a chemical that are exempt from a Proposition 65 warning label.⁸⁰ Meaning, the amount of chemical exposure in the product does not rise to the classification of a significant risk.⁸¹ These levels for chemicals causing cancer are

be unnoticed or ignored.”

⁷⁵ *Id.* See also VISCUSI, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ *Id.* “Manufacturers, faced with the prospect of having to provide highly inflammatory warnings to consumers, have increasingly reformulated their products to avoid that unpleasant task. Consequently, they often attempt to make their products safer even before they reach the market.”

⁷⁸ Haag, *supra* note 50.

⁷⁹ NOTICE OF ADOPTION ARTICLE 6: CLEAR AND REASONABLE WARNINGS, <https://oehha.ca.gov/proposition-65/cnrn/notice-adoption-article-6-clear-and-reasonable-warnings>.

⁸⁰ WHAT ARE SAFE HARBOR NUMBERS?, <https://p65warnings.ca.gov/faq/businesses/what-are-safe-harbor-numbers>.

⁸¹ *Id.*

referred to as NSRLs, No Significant Risk Levels, and for reproductive toxicity causing chemicals, MADLs, Maximum Allowable Dose Levels.⁸² “Warning” as defined by chapter 6 of Act, “need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable.”⁸³

The purpose of this warning policy is to provide consumers with easily understandable and accurate information in order to make informed decisions about risk.⁸⁴ Professor W. Kip Viscusi, Professor of Law focusing on health, safety and environmental risks and regulations at Vanderbilt Law School, explains:

The task of a hazard-warning policy is to promote informed choice. In the case of product purchase, the objective is to provide individuals with sufficient information regarding the risk they can balance the costs imposed by the risk against benefits they derive from the product. When judging an informational effort, the reference point should be whether it promotes individual understanding of the risks and subsequent rational decisions with respect to them.⁸⁵

Consumers and businesses alike have been interested in seeing safe harbor warning regulations that are more clear and understandable under the amendments.⁸⁶

B. Repeal of Article 6

The 2016 amendments’ stated goals include structuring warnings to be more understandable and useful to the public, reducing unnecessary warnings, and providing manufacturers

⁸² CURRENT PROPOSITION 65 NO SIGNIFICANT RISK LEVELS (NSRLS) MAXIMUM ALLOWABLE DOSE LEVELS (MADLs), <https://oehha.ca.gov/proposition-65/general-info/current-proposition-65-no-significant-risk-levels-nsrls-maximum>.

⁸³ CAL. HEALTH & SAFETY CODE § 25249.11.

⁸⁴ Barsa, *supra* note 63, at 1227.

⁸⁵ VISCUSI, *supra* note 72.

⁸⁶ INITIAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE, *supra* note 43.

with more clear guidelines on how and when to issue such warnings.⁸⁷ The results of the UC Davis study were convincing in updating the law, as 77% of people surveyed said that the new warnings would be more helpful to them as consumers than the current method of warning.⁸⁸

The major changes are the following: changing the former Act's lack of specificity requirement, to now requiring businesses to specify which chemical is in the product, and of ways that a consumer could reduce or eliminate exposure to it. The language used in the warnings is also one of the changes.⁸⁹ Instead of labeling using the word "contains" as the old regulation requires: "WARNING: This product contains a chemical known to the State of California to cause cancer," the new warnings will use the phrasing "can expose you to."⁹⁰ Thus, the new warnings will look more like this: "WARNING: This product can expose you to [name of chemical] that is known to the State of California as a cancer-causing chemical." OEHHA states that this phrase is more clear and more consistent with the requirements of Proposition 65 than the word "contains."⁹¹

Another addition to the warning labels is a yellow triangular warning symbol.⁹² The amendment adapts the short-form, on-product warning, stating that manufacturers and distributors may place shorter warning containing the word "WARNING" in bold capital letters, with the aforementioned triangular symbol.⁹³ The font size of the warning cannot be smaller than the font of other consumer information on the label, not including brand or company name.⁹⁴

In a sigh of relief for retailers, the new amendment shifts the allocation of responsibilities away from retailers.⁹⁵ The original

⁸⁷ NEW PROPOSITION 65 WARNINGS, <https://www.p65warnings.ca.gov/new-proposition-warnings>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ FINAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, *supra* note 41.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Julie R. Domike et al., *Are You Ready for Proposition 65 Changes? Three Immediate Steps to Take*, HAYNESBOONE, NEWS (Jul. 9, 2018), www.haynesboone.com/Alerts/are-you-ready-for-proposition-65-changes.

⁹⁴ *Id.* The type size should be no smaller than six-point font, according to the new regulation, and these short-form warnings can be printed on a product or its container or wrapper.

⁹⁵ David W. Bertoni & Daniel A. Nuzzi, *supra* note 62.

Safe Drinking Water and Toxic Enforcement Act of 1986 equally designates fault to the manufacturers to distributors to retailers for failing to provide clear and reasonable warnings.⁹⁶ The new Article 6 of the Act will allocate this responsibility to the upstream entities, the packagers, importers, suppliers, manufacturers, etc. to issue adequate clear and reasonable warnings.⁹⁷ The only way in which retailers could possibly incur liability is if their retailer either knowingly causes a listed chemical to be created in the product, it covers or hides a warning, avoids posting the warning provided by the manufacturer, or has actual knowledge of the exposure that would require a warning under Proposition 65, but there is no other business that is subject to Proposition 65.⁹⁸ The new regime requires one of two compliance options from these upstream entities.⁹⁹

Finally, the OEHHA has included updated rules for internet and catalog sales to Proposition 65. In providing a safe harbor warning for catalog purchases, the warning must be compliant with any method supplied under Section 25602 subsections (a)(1)-(4). But, warnings for catalogs also must be provided in a way that clearly associates it with the product being purchased.¹⁰⁰ As for internet purchases, the warnings must comply with the specifications in Title 27, Cal. Code of Regs., Section

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Merritt M. Jones et al., *WARNING: New Proposition 65 "Clear and Reasonable Warning" Requirements Effective August 30, 2018*, <https://www.bryancave.com/en/thought-leadership/warning-new-proposition-65-clear-and-reasonable-warning.html>. For example, if the other upstream entity has less than ten employees.

⁹⁹ David W. Bertoni & Daniel A. Nuzzi, *supra* note 62.

¹⁰⁰ PROPOSITION 65 CLEAR AND REASONABLE WARNINGS QUESTIONS AND ANSWERS FOR BUSINESSES: INTERNET AND CATALOG WARNINGS, Revised March 2018, https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa_internet_warnings.pdf. See 27 CAL. HEALTH & SAFETY CODE § 25602(a)(1)-(4)(year). A warning meets the requirement of the sub-article if it complies with the content requirements in § 25603 and is provided using one or more of the following methods: (1) a product-specific warning provided on a posted sign, shelf tag, or shelf sign, for the consumer product at each point of display of the product; (2) a product-specific warning provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the consumer product, without requiring the purchaser to seek out the warning; (3) a warning on the label that complies with the content requirements in Section 25603(a); (4) a short-form warning on the label that complies with the content requirements in Section 25603(b).

25602(a) and (b).¹⁰¹ Section (b) of the statute outlines the requirements for internet purchases which include a hyperlink to the warning or a picture of the warning label on the physical product.¹⁰² The hyperlink or picture of a warning must be *in addition* to one of the specifications in Section 25602(a); a hyperlink alone is not enough.¹⁰³ Additionally, the warning must be prominently displayed, and is not considered to be prominently displayed if a purchaser must search for it within the website.¹⁰⁴

Remarkably, the new safe harbor regulations are not mandatory for manufacturers or retailers.¹⁰⁵ Technically, manufacturers can use any label, as long as it is both clear and reasonable.¹⁰⁶ The clear and reasonable standards used prior to the new amendment were noted as being too vague, according to various commenters, especially in regards to inclusion of chemical names.¹⁰⁷ In preparing the recommended amendment, OEHHA conducted a Warning Regulations Study in conjunction with researchers at the University of California at Davis, to study the effects of including the chemical name versus generally stating that a product contains chemicals.¹⁰⁸ The individuals involved in the study reported that 66% felt that including the chemical name in the label was more helpful, and made them feel better to make more informed choices.¹⁰⁹

The need for these new regulations arise from changing technology and shifting demographics, according to OEHHA.¹¹⁰ Proposition 65 was enacted over 25 years ago. The communication technology has progressed and there is a higher portion of the population of the State of California who does not speak English.¹¹¹ The new amendment provides for labeling of warnings in Spanish

¹⁰¹ *Id.*, HEALTH & SAFETY § 25602(a) and (b).

¹⁰² *Id.*, HEALTH & SAFETY § 25602(b). *See also* FINAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, *supra* note 41.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Merritt M. Jones, et al., *WARNING: New Proposition 65 “Clear and Reasonable Warning” Requirements Effective August 30, 2018*, <http://www.bryancave.com/en/thought-leadership/warning-new-proposition-65-clear-and-reasonable-warning.html>.

¹⁰⁶ INITIAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, *supra* note 44.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ FINAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, *supra* note 41.

¹¹¹ *Id.*

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and Mandarin, among other languages.¹¹² as well as requiring the link printed on labels that take consumers to www.P65Warnings.ca.gov, if they are interested in learning more about the chemicals within the product.¹¹³

C. Effectiveness of the New Proposition 65

The objectives the new regulation strives to achieve, as stated above, include making safe harbor warnings more helpful for the public in their ability to be informed about the products they choose to purchase, reducing “over-warning” on the part of businesses, and providing businesses with more clear guidance on how and where to implement warnings.¹¹⁴ One of the main changes as detailed above is the language of the warnings is now “can expose you to” rather than “contains.”¹¹⁵ Studies showed that the word “contain” did not adequately communicate that individuals can be exposed to a chemical if they use a certain product or enter a certain area.¹¹⁶ This, with the other changes such as inclusion of the name of the chemical, a bright yellow warning triangle, and information about how to reduce exposure, it seems that the new Proposition 65 will make the safe harbor warnings more useful for consumers. Businesses, on the other hand, may retain their confusion on the clear and reasonable standard.

The requirements of names of the chemicals plus information about exposure risks changes the safe harbor warnings from being a “one-size-fits-all” regulation,¹¹⁷ to one that is more personalized to each product. Ideally, this will allow consumers to better understand the risks of each product and will not force businesses to over-warn consumers.

IV. FUTURE OF PROPOSITION 65 LITIGATION

A. Consumer Reactions

The Center for Environmental Health’s President, Caroline Cox, noted that the most significant portion of the

¹¹² Julie R. Domike et al., *supra* note 93.

¹¹³ WHAT IS PROPOSITION 65?, www.P65Warnings.ca.gov.

¹¹⁴ NEW PROPOSITION 65 WARNINGS, *supra* note 5.

¹¹⁵ Heckman, *supra* note 28, at 273.

¹¹⁶ FINAL STATEMENT OF REASONS ARTICLE 6: CLEAR AND REASONABLE WARNINGS, *supra* note 41.

¹¹⁷ Rechtschaffen, *supra* note 3.

amendment is the language component, allowing all residents of California to understand the risks of what they purchase.¹¹⁸ While there has not been significant indication one way or the other how consumer watchdogs believe the regulation is affecting consumers, it is likely we will hear more within the next few months.¹¹⁹ Due to the significant changes, however, there will likely be a rise in Proposition 65 claims filed as corporations shift warnings on products to match the new requirements.

B. Manufacturer/Distributor Reactions

While consumers may benefit from clarification, businesses may face the same issues of confusion and attempting to avoid bounty hunters. Some attorneys are predicting that the new amendments will result in even more litigation as companies try to adjust to new labeling.¹²⁰ One of the main adjustments in the law is that of the online and catalog requirements, which some predict is where lawyers looking for a case will look first.¹²¹ There are, of course, various issues with the Act that businesses are not pleased with or remain confused about. While businesses have been required to place the warnings in more conspicuous places, there is still the question of whether consumers will notice, or pay attention to, the updated warnings.

Some corporations, however, may have begun to benefit from recent regulations from the OEHHA after the 2016 amendments to Proposition 65.¹²² The OEHHA announced a proposed regulation on June 15, 2018, which would end the requirement that coffee must have Proposition 65 cancer warnings.¹²³ And, the California Appellate Court held that

¹¹⁸ Frank Zaworski, *California Hopeful on Amendment Prop 65 Warning Compliance*, CENTER FOR ENVIRONMENTAL HEALTH: CHEMICAL WATCH (August 8, 2018), <https://www.ceh.org/news-events/press-coverage/content/california-hopeful-amended-prop-65-warning-compliance/>.

¹¹⁹ PROPOSITION 65: BIG CHANGES FOR DIRECT MARKETERS, <https://www.brannlaw.com/bertoni-david/proposition-65-big-changes>.

¹²⁰ Elaine Watson, *Amended Prop 65 Regulations Likely to Prompt a Significant Uptick in Litigation, Predict Attorneys*, FOOD NAVIGATOR USA (August 31, 2018), <https://www.foodnavigator-usa.com/Article/2018/09/01/Amended-Prop-65-regulations-likely-to-prompt-a-significant-uptick-in-litigation-predict-attorneys#>.

¹²¹ PROPOSITION 65: BIG CHANGES FOR DIRECT MARKETERS, <https://www.brannlaw.com/bertoni-david/proposition-65-big-changes>.

¹²² *Recent California Proposition 65 Developments Go Business's Way for a Change*, Morrison & Foerster Proposition 65 + Chemicals Team, Jun. 28, 2018.

¹²³ *Proposed Adoption of New Section 25704 (Title 27, California Code of*

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defendants in Proposition 65 related cases have the right to a jury trial, contrary to common practice.¹²⁴

C. Effects on Other State Regulations

After Proposition 65 was initially adopted into California law, federal, state, and local governments began to consider adopting legislation similar to that of Proposition 65, instead of limiting exposure levels, by establishing a warning system.¹²⁵ States with similar state-run regulations may look to Proposition 65 as an example in improving warnings to individuals.

V. CONCLUSION

The effects on consumers remains unknown, but the adjustments in the statute appear to be significant in clarifying the risks posed by products that can expose individuals to cancer-causing chemicals. The language is more indicative of risk, the warnings are more eye-catching, and are available to residents of California who speak different languages. These warnings certainly correct various issues that consumers and businesses alike had with Proposition 65. We can be sure that the effects of Proposition 65 amendments on consumers and businesses will continue to be evaluated in the future.

Regulations): Exposures to Listed Chemicals in Coffee Posing No Significant Risk, Public Hearing on Rulemaking, Office of Environmental Health Hazard Assessment, Sacramento, California, Aug. 16, 2018.

¹²⁴ Morrison & Foerster; *Nationwide Biweekly Administration, Inc. v. Superior Court*, 24 Cal. App. 5th 438, 475 (2018).

¹²⁵ Barsa, *supra* note 63.