

California OEHHA Explains Decision to Rescind Proposed "Clarifications" to Prop 65 Rules for Internet Sales; Finalizes Changes to Alcohol Sale Warnings

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The California Office of Environmental Health Hazard Assessment (OEHHA) yesterday released its explanation for withdrawing proposed "clarifications" to the Proposition 65 regulations governing internet sales. [Last January, OEHHA proposed](#) what it considered to be modest clarifications to the safe harbor warning regulations, including provisions that would:

- Specify that "internet sales" include purchases through mobile device applications;
- Clarify that the option to provide a warning "by electronic device or process" is intended to apply to in-store product purchases at a physical retail location, and that this provision is unrelated to the requirements for warnings provided online for internet purchases;
- Make clear that the tailored warnings provided in the regulations for specific products (such as for food, alcoholic beverages, and furniture) apply to internet and catalog sales; and
- Expressly state that the requirement to provide warnings in alternate/foreign languages applies to the tailored product-specific warnings.

In September 2020, after reviewing feedback on the rulemaking, OEHHA announced that it intended to withdraw the proposed clarifications. Now, the agency has released its final determination and response to comments document in which it explains that the withdrawal was precipitated by stakeholder comments that the supposed "clarifications" in fact represented a "wholesale change" to "the existing safe harbor warning for almost every consumer product." OEHHA objected to commenters' characterization of the proposed revisions, particularly the contention that the "current safe harbor regulations do not require businesses selling online to provide both a website warning and a warning on or with the same product." In OEHHA's view:

Websites and smart phones can be a part of a safe harbor warning method, but neither are a standalone safe harbor warning method.

While disagreeing with the comments, the agency opted to withdraw the proposed changes and said it will consider proposing similar amendments in the future.

With regard to alcohol sales, OEHHA finalized a series of changes intended to codify the terms of a settlement stemming from the California Attorney General's enforcement action against online

sellers of alcoholic beverages. The new provisions include a requirement that Prop 65 warnings provided on-line or in catalogs also must be “provided to the purchaser or delivery recipient prior to or contemporaneously with the delivery of the product.” Such warnings “must be readable and conspicuous to the recipient prior to consumption of the alcoholic beverages,” and must be provided (1) on or in the shipping container or delivery package, or (2) delivered by email or text message as part of the electronic receipt or confirmation of the purchase. These regulations go into effect April 1, 2021.

It is important to remember that the “safe harbor” warning regulations are not mandatory, but, rather, prescribe warning text and methods that are considered *de facto* compliant. Businesses can use other means of communicating a warning, or different text, but, if so, they run the risk of a plaintiff challenging the sufficiency of the warning as “clear and reasonable.”

Further information is [available at OEHHA's website](#).