

# Colorado's Outdoor Industry Products

## What are the Warning Labels All About?

BY MICHAEL HAZEL, HEIDI RUCKRIEGLE, AND ZACH LASS

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*On August 30, 2018, new regulations took effect implementing California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). This article addresses these changes and their impacts on Colorado's outdoor industry.*

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California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) is a California law that has significant legal and financial implications for every industry doing business in California, even those not physically located there. The law requires that businesses provide individuals purchasing goods in California with a "clear and reasonable warning" before exposing them to chemicals in products or places that could cause cancer or reproductive toxicity.<sup>1</sup>

Colorado has a booming outdoor industry,<sup>2</sup> with companies big and small moving their headquarters to the state—all of which likely fall

under the purview of Proposition 65 because they conduct business (both brick and mortar and online sales) in California.<sup>3</sup> Failure to comply can result in significant penalties.<sup>4</sup> Thus every Colorado outdoor industry manufacturer, producer, packager, importer, supplier, distributor, and retailer that conducts business in California should comply with Proposition 65.

This article provides an overview of Proposition 65 and its recent regulatory changes, with an emphasis on the law's relevance to Colorado and the outdoor industry and its impacts on businesses throughout the supply chain. It includes recommendations on best

business practices for the outdoor industry in light of the new regulations.

### **What is Proposition 65?**

Proposition 65 created a complex regulatory regime that touches a wide range of businesses. Multiple components of the law apply to those in the outdoor industry. The consequences for noncompliance are significant and extend beyond the physical state of California to impact the legal obligations of Colorado companies.

Proposition 65<sup>5</sup> is a California law passed by direct voter initiative.<sup>6</sup> This means that the citizens of California successfully proposed

the law without support from California's governor or legislature, and a majority voted the proposal into law. Proposition 65 stemmed from growing concern about exposures to toxic chemicals in water, places, and products.<sup>7</sup> While California already had a number of programs in place designed to protect people against harmful chemical exposures, many residents believed the state was not doing enough.<sup>8</sup> Declaring that "state government agencies have failed to provide [the people of California] with adequate protection" from "hazardous chemicals [that] pose a serious threat to their health and well-being,"<sup>9</sup> Proposition 65 aimed to address this problem.

The primary goals of Proposition 65 are to protect California drinking water sources from toxic chemicals that may cause cancer or birth defects, and more broadly to reduce or eliminate people's exposures to those chemicals, for example in consumer products, by requiring warning labels.<sup>10</sup> The labeling requirement is designed to help Californians make informed decisions about potential exposure to chemicals from the products they use and the places they go, but it impacts every state with industry doing business in California.<sup>11</sup>

The law aims to achieve these goals in two ways. First, it generally prohibits businesses from knowingly discharging or releasing into water or onto land chemicals that are known to cause cancer or birth defects.<sup>12</sup> Second, it requires businesses with 10 or more employees to provide a "clear and reasonable" warning before exposing people to such chemicals in products or places.<sup>13</sup> This requirement extends beyond California businesses and impacts Colorado manufacturers and retailers selling in California or online to Californians. Although the law does not ban or restrict the sale of products containing these listed chemicals, its significance lies in its warning-label requirement, which applies to many common outdoor products.<sup>14</sup>

Notably, just because a product bears a Proposition 65 warning does not mean, by itself, that the product is unsafe. The government has explained that "[y]ou could think of Proposition 65 more as a 'right to know' law than a pure product safety law."<sup>15</sup> This



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means that, at its core, the law is focused on providing consumer information rather than attempting to deter purchases.

### *Enforcement and Consequences of Noncompliance*

To promote compliance with these two statutory mandates, Proposition 65 contains comprehensive enforcement mechanisms and establishes significant penalties for businesses that violate the law.<sup>16</sup> The Office of Environmental Health Hazard Assessment (OEHHA), part of the California Environmental Protection Agency, administers Proposition 65.<sup>17</sup> The state government and private parties can enforce Proposition 65—even against defendants that are outside California or the United States.<sup>18</sup>

Proposition 65 applies to any entity in the outdoor industry with more than 10 employees doing business in California, including manufacturers, suppliers, importers, distributors, or retailers selling products to California customers, regardless of whether they have a physical presence in California. This is because California courts and other authorities interpret the phrase "in the course of doing business" broadly to include "any act or omission, whether or not for profit, or any act or omission of any employee which furthers the operation of the business."<sup>19</sup> While this statutory definition may lack precision, OEHHA intended for it to broadly encompass most "activities of persons who have ten or more employees. . . ."<sup>20</sup> In other words, almost every business activity that potentially exposes consumers to products containing Proposition 65 chemicals will likely qualify as "business" under the law. This broadly defined mandate encompasses many Colorado-based outdoor industry companies.

And the consequences for noncompliance are significant. Businesses violating Proposition 65 can face penalties up to \$2,500 per day for each violation.<sup>21</sup> Because of this high risk, it is critical that businesses in the outdoor industry understand Proposition 65 and take active measures to ensure compliance.<sup>22</sup>

The California Attorney General's Office has primary enforcement power, but in larger cities (with populations exceeding 750,000) the district attorney or city attorney may also

enforce Proposition 65.<sup>23</sup> Significantly, a private individual acting in the public interest can file a lawsuit against a business alleged to be in violation of this law.<sup>24</sup> The importance of these “public interest” lawsuits cannot be overstated. It is estimated that private parties bring over 85% of Proposition 65 actions.<sup>25</sup> This is largely due to the financial incentive embedded in the law: successful private parties are guaranteed 25% of any civil penalty awarded.<sup>26</sup> As a result, private parties may actively seek out instances of noncompliance. Indeed, Proposition 65 actions have become popular with California plaintiffs’ attorneys, who have recovered nearly \$200 million on Proposition 65 lawsuits since 2000.<sup>27</sup> No business is immune from a Proposition 65 enforcement action, and noteworthy outdoor industry businesses like Marmot, Orvis, Yeti, and Kelty have all been involved in Proposition 65 settlements or judgments in the last four years.<sup>28</sup>

#### *The Proposition 65 List*

To further its goal to protect and inform consumers regarding exposures to potentially hazardous chemicals, Proposition 65 regulates two specific categories of chemicals: those determined to have a “one in 100,000” chance of causing cancer over a 70-year period, or those with the potential to cause birth defects or other reproductive harm.<sup>29</sup> These two categories of chemicals make up the Proposition 65 list. The list is updated at least once every year<sup>30</sup> and includes an extensive range of “naturally occurring and synthetic chemicals” that are “known to cause cancer or birth defects or other reproductive harm.”<sup>31</sup> Notably, the list has expanded from only 30 chemicals when the law was passed in 1986 to more than 950 chemicals today.<sup>32</sup>

Chemicals may be added to the Proposition 65 list if they are determined to cause cancer, birth defects, or other reproductive harm by any of the following authorities: (1) an independent committee of scientists and health professionals, based on a review of the most current scientific information and considering public comments;<sup>33</sup> (2) an organization designated as an “authoritative body”;<sup>34</sup> or (3) the California Labor Code.<sup>35</sup> In addition, a chemical can be added to the list if a state agency or the federal

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Using a SUD,  
an outdoor  
industry business  
entity can seek  
an OEHHA  
determination  
whether exposure  
to certain  
chemicals  
resulting from  
‘specific business  
actions or the  
average use of a  
specific product  
is subject to  
the warning  
requirement.’

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government requires that the chemical be labeled or identified as causing cancer, birth defects, or reproductive harm.<sup>36</sup>

Generally, unless subject to the limited exceptions described below, if a chemical is on the list, the law requires businesses to provide a clear and reasonable warning informing the consumer of the presence of that chemical in a specific product or location.<sup>37</sup> Once a chemical is listed, businesses have 12 months to comply with warning requirements.<sup>38</sup>

The list contains many chemicals that are common in the outdoor industry. For example, lead is still used in the fishing industry for sinkers, weights, and tackle, and can also be found in paints used for boats and canoes.<sup>39</sup> A family of chemicals called phthalates is commonly used to make plastics more flexible, and may be found in rainwear, dry bags, backpacks, shoes, plastic straps, artificial leather, and vinyl clothing.<sup>40</sup> Notably, most enforcement actions against outdoor industry businesses involved DEPH, a type of phthalate. Similarly, bisphenol A, more commonly known as BPA, is still present in some polycarbonate plastics like water bottles, coolers, and cookware.<sup>41</sup> These examples are not exhaustive, but they illustrate that the Proposition 65 list is expansive and includes many chemicals that are not only common but may be considered essential elements in a range of outdoor gear and apparel. Those in the outdoor industry should therefore familiarize themselves with the chemicals on the list and determine which, if any, of their products contains them.

#### *Safe Harbor Levels and Safe Use Determinations*

To assist businesses with compliance, OEHHA has developed safe harbor levels.<sup>42</sup> A safe harbor level “identifies a level of exposure to a listed chemical that does not require a Proposition 65 warning.”<sup>43</sup> Businesses have safe harbor from warning requirements if exposure occurs at or below the specified levels.<sup>44</sup> While OEHHA has developed safe harbor levels for certain chemicals,<sup>45</sup> businesses must self-determine whether their products containing these chemicals cause exposures at or below these safe harbor levels.<sup>46</sup> Fewer than half of the chemicals on the Proposition 65 list have established safe harbor levels.<sup>47</sup>

If a chemical does not have a safe harbor level, businesses are required to provide a warning “unless the business can show that the anticipated exposure level will not pose a significant risk of cancer or reproductive harm.”<sup>48</sup> Businesses can make this showing in several ways, and OEHHA has adopted regulations and guidance for businesses to calculate their own levels if no safe harbor level exists.<sup>49</sup> However, calculating and determining anticipated

exposure levels to listed chemicals is complex and costly.<sup>50</sup>

Additionally, businesses can request that OEHHA issue a safe use determination (SUD).<sup>51</sup> Using a SUD, an outdoor industry business entity can seek an OEHHA determination whether exposure to certain chemicals resulting from “specific business actions or the average use of a specific product is subject to the warning requirement.”<sup>52</sup> While the SUD process can be rigorous and time consuming, it can help clarify whether products are subject to Proposition 65 requirements.<sup>53</sup> Because it can be a challenging process, OEHHA provides businesses with a considerable amount of guidance on how to effectively navigate the SUD process.<sup>54</sup>

### *Safe Harbor Labels*

Under the previous version of the law, businesses were required to provide “clear and reasonable warnings” before knowingly and intentionally exposing individuals to chemicals known to cause cancer or reproductive toxicity.<sup>55</sup> Clear and reasonable warnings were provided in the form of a label. The labeling requirement was intended to further the law’s “right to know” premise by informing consumers of potential exposures. Labeling was required even if the harm would be caused by an unintended use,<sup>56</sup> such as eating a backpack’s plastic buckles.

The regulations did not prescribe a specific warning so long as the warning was clear and reasonable.<sup>57</sup> However, the regulations did provide examples of acceptable safe harbor message content and warning methods,<sup>58</sup> and businesses that used “the safe harbor warnings are deemed compliant with the law’s requirement for clear and reasonable warnings.”<sup>59</sup> Warnings were considered “clear” if they effectively communicated that a chemical in the product was known to the State of California to cause cancer, birth defects, or reproductive harm.<sup>60</sup> Warnings were “reasonable” if they were transmitted in a way that made the warning “available to the individual prior to exposure,”<sup>61</sup> whether by a label on the product itself, on the product’s packaging, or in retail displays at the point of purchase.<sup>62</sup>

The historic safe harbor label from 1986 was simple and lacked specificity. It read: “WARNING:

This product contains a chemical known to the State of California to cause cancer.”<sup>63</sup> Historically, this label automatically qualified as a clear and reasonable warning, which provided businesses using this label safe harbor from prosecution. However, the new regulations effective August 30, 2018<sup>64</sup> render the historically valid safe harbor label insufficient to meet the safe harbor requirements, and businesses using that label must change it to fall within the law’s safe harbor, as discussed below.

### **New Regulations**

The amended regulations repeal and replace all existing regulatory provisions.<sup>65</sup> The changes are designed to “improve the law” by providing “more useful information to the public on what they are being exposed to and how they can protect themselves.”<sup>66</sup>

The new regulations consist of mandatory requirements and non-mandatory guidance. The new mandatory regulations address “relative responsibility of product manufacturers and others in the chain of distribution, versus the product retail seller.”<sup>67</sup> These regulations clarify that the manufacturers, producers, packagers, importers, suppliers, or distributors have the primary responsibility to provide warning labels.<sup>68</sup> The new nonbinding regulations provide guidance on the content and placement of compliant warning labels—that is, how to take advantage of the law’s safe harbor provisions. While the labeling guidance is not strictly mandatory, adopting the new safe harbor labels will help Colorado businesses in the outdoor industry reduce the risk of government enforcement actions or other involvement in Proposition 65 lawsuits.

### *Goals of the New Regulations*

One primary goal of the new regulations is to make warnings more meaningful and useful to the public by providing more detailed information on the warning label.<sup>69</sup> Additionally, OEHHA wants to provide businesses with clearer and more specific guidance on the content and placement of warnings to assist with compliance;<sup>70</sup> clarify warning responsibilities for parties in the supply chain; and reduce the burden on retailers.<sup>71</sup> The OEHHA created the

new regulations to counteract mass labeling by directing that warning labels should specify the chemical in the product that requires the warning.<sup>72</sup> In sum, the new regulations are designed to further the “right-to-know” purposes of the original law by clarifying and correcting certain parts to better inform Californians about their exposures to listed chemicals.<sup>73</sup>

### *Changes to the “Safe Harbor” Label for Consumer Products*







The new Proposition 65 safe harbor labels for consumer products include various updates to the old labels. While businesses are not required to use the new safe harbor labels, doing so is the most effective (and easiest) way to protect themselves from Proposition 65 enforcement actions.<sup>74</sup>

Overall, the most significant change is that the new safe harbor labels contain more detailed information than the old labels. For example, the new labels

- identify the specific chemical (or chemicals) that the product contains, rather than referring generically to “chemicals”;<sup>75</sup>
- specify the type of harm the listed chemical can cause—cancer, birth defects, reproductive harm, or a combination of the three;<sup>76</sup>
- state that the product “can expose you to chemicals including [name of one or more chemicals],” instead of just saying this product “contains” chemicals;<sup>77</sup>
- include a yellow, equilateral triangle with a black exclamation point inside it;<sup>78</sup>
- provide a link to the Proposition 65 website where the consumer can learn more about the warning; and<sup>79</sup>
- display the word “WARNING” in all capital letters and bold font.<sup>80</sup>

The new regulations provide specific guidance on font size for certain types of warning labels, but where no font requirements exist, the font should generally be prominent and similar to other words or statements on the product so that it can be easily read and understood.<sup>81</sup> A good general rule is that the font size should not be smaller than 6-point type and should be the same size as other consumer information presented on the package.<sup>82</sup>

Businesses in the outdoor industry also have the option of using a “truncated” or “short-form” label if they opt for an on-product warning.<sup>83</sup> Short-form labels must be on the product and cannot be used on a sign. Examples of the new safe harbor warning labels are below.

Cancer	Birth Defect
 <b>WARNING:</b> This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to <a href="http://www.P65Warnings.ca.gov">www.P65Warnings.ca.gov</a> .	 <b>WARNING:</b> This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to <a href="http://www.P65Warnings.ca.gov">www.P65Warnings.ca.gov</a> .
Combined Cancer/Birth Defect	Short Forms
 <b>WARNING:</b> This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to <a href="http://www.P65Warnings.ca.gov">www.P65Warnings.ca.gov</a> .	 <b>WARNING:</b> Cancer— <a href="http://www.P65Warnings.ca.gov">www.P65Warnings.ca.gov</a> .  <b>WARNING:</b> Reproductive Harm— <a href="http://www.P65Warnings.ca.gov">www.P65Warnings.ca.gov</a> .  <b>WARNING:</b> Cancer and Reproductive Harm— <a href="http://www.P65Warnings.ca.gov">www.P65Warnings.ca.gov</a> .

Though these new safe harbor labels went into effect on August 30, 2018,<sup>84</sup> products manufactured before that date will not need the new warnings if “they meet the requirements that were in effect at the time of their production.”<sup>85</sup> However, the burden may be on the business to prove the manufacture date, which could be difficult.<sup>86</sup>

In addition to the updated general product warnings, there is new guidance for online retailers,<sup>87</sup> catalog sales,<sup>88</sup> and non-English warnings.<sup>89</sup>

For online retailers, the new regulations outline previously unstated labeling responsibilities.<sup>90</sup> Online retailers should now provide a separate warning on the product display page—even if the product package has a warning—so the customer has an opportunity to view the warning before completing the purchase.<sup>91</sup> An online warning is not compliant with the

regulations if a buyer has to search for the warning on the product’s webpage.<sup>92</sup> This update is particularly significant for Colorado businesses selling products online to California customers.

Similarly, the new regulations provide specific labeling guidance for catalog purchases,

specify that an effective warning must be “prominently displayed on a label, labeling, or sign.”<sup>98</sup> The warning should be displayed so that it is visible and evident as compared to the other labeling or signage surrounding it.<sup>99</sup> Warnings on posted signs, shelf tags, or shelf signs should be product-specific and found at each point of display of that product.<sup>100</sup> As previously discussed, short-form warnings can be placed directly on the product or on the product label.<sup>101</sup> In other words, consistent with the idea that the consumer has the right to know about exposures before they occur, warning labels should be prominently displayed, clearly associated with the product that causes the warning, and easy to read.

The above guidelines are primarily tailored to “brick and mortar” retailers. Online sales are different in that the purchase is made remotely, away from the physical product, its packaging, or its physical display. For online sales, businesses should place either the full text of the applicable warning or a hyperlink to the full text with the word “WARNING” on the product display page.<sup>102</sup> In addition, online warnings should be automatically provided before the purchase so that the purchaser does not have to seek out the warning.<sup>103</sup>

**Supply Chain Responsibilities**

Colorado businesses should take particular note that the new regulations set forth mandatory requirements addressing the “responsibility of product manufacturers and others in the chain of distribution versus the product retail seller.”<sup>104</sup> This change is designed to impose accountability on all parties in the supply chain, while clarifying that manufacturers and others in the chain of distribution (as opposed to retailers) will bear ultimate responsibility for properly warning consumers of exposures.<sup>105</sup> Others in the chain of distribution include producers, packagers, importers, suppliers, or distributors of a product.<sup>106</sup> Generally, businesses upstream in the chain of distribution are in the best position to know which chemicals a product contains (and therefore that a warning is required), and thus should bear the cost of the warning labels.<sup>107</sup> These businesses then pass the warning materials downstream.<sup>108</sup>

which are still a popular sales medium for the outdoor industry, dictating that the warning label in the catalog should be clearly associated with the item being purchased.<sup>93</sup>

For non-English warnings, if a product contains “consumer information about a product in a language other than English, the warning must also be provided in that language in addition to English.”<sup>94</sup> OEHHA has created a warnings translation page for businesses that may need to provide warnings in languages other than English.<sup>95</sup>

**Placement of Warnings**

The new regulations provide additional guidance on the placement of warning labels.<sup>96</sup> For example, the definition of “label” was modified to clarify that a warning may be printed directly on a product or its immediate container, label, or wrapper.<sup>97</sup> Further, the new regulations

Manufacturers and others in the chain of distribution (even outside California) have the primary responsibility for providing Proposition 65 warnings and can comply with the law either by providing warning labels on their products directly or by notifying their distributors, importers, or retailers that their product requires warning labels.<sup>109</sup> If they choose to provide notice, that notice must (1) state that the product may result in exposure to one or more listed chemicals; (2) identify the specific chemical; (3) include all necessary warning materials; and (4) be sent to an authorized agent for the retail seller.<sup>110</sup> This notice must be renewed annually.<sup>111</sup> If notice is provided, the retail seller is then “responsible for the placement and maintenance of warning materials,” but the entities in the chain of distribution are still responsible for ensuring that the warnings are ultimately provided to the consumer.<sup>112</sup> Retail sellers are only responsible for providing warnings in limited circumstances: when they are selling their own branded product; when they have introduced a listed chemical into the product themselves; when they have covered, obscured, or altered the warning label; or when they have failed to post or display the provided warning.<sup>113</sup>

Parties can also enter into a written agreement changing who bears the primary responsibility for warning labels.<sup>114</sup> This opt-out provision was inserted to help “ensure that [the warning label process] works in the most efficient and effective manner possible that meets the needs of the businesses involved to the extent possible.”<sup>115</sup> This provision simply allows parties to enter into their own agreements to best fit their particular business models. No guidance is given by OEHHA as to the content of the written agreements.

### Best Business Practices

To comply with these new regulations, there are several best practices outdoor industry companies in Colorado can implement to avoid potentially expensive penalties.

#### Communicate Clearly

Clear communications throughout the supply chain, particularly where suppliers and man-

ufacturers are not located in California and may be unfamiliar with the law, are critically important to avoid the risk of penalties, private lawsuits, and potential recalls. Outdoor industry businesses should communicate with all entities in their supply chains to understand their products’ contents and possible exposures. Additionally, instituting efficient programs for collecting and exchanging supply chain data will help facilitate compliance. Outdoor industry retailers should also ask their manufacturers and producers to notify them of any changes in materials or factories that could trigger the warning requirements. Similarly, retailers should check with manufacturers to see if they are testing for Proposition 65 chemicals in their products. Finally, businesses in the outdoor industry should clearly convey expectations of Proposition 65 compliance in contracts and business arrangements and specify that they require adherence to the regulations.

#### Update Labels


Because changes to the Proposition 65 safe harbor labels are in effect now, Colorado businesses in the outdoor industry should implement the new labels as soon as practicable. While the safe harbor label is not strictly mandatory, it constitutes clear guidance on what is considered a clear and reasonable warning under the law.<sup>116</sup> Businesses in the outdoor industry could eliminate significant risk by adopting the updated safe harbor labels.

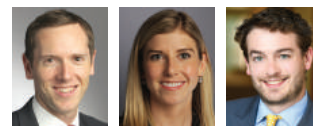
Colorado manufacturers and retailers with physical space or online sales in California still have the option of creating their own labels, but they do so at their own risk: using a self-created label places the burden on the business of demonstrating that the label is a clear and reasonable warning. The regulations permit businesses to request tailored warnings, so businesses considering creating and using their own labels should seek an advance OEHHA “clear and reasonable” determination and approval from OEHHA, and court approval if necessary, to avoid having to defend their label in a lawsuit. Further, OEHHA will continue to recognize court-ordered settlements and judgments that imposed specific Proposition 65 warnings.<sup>117</sup>

#### Operate Proactively

Business should periodically check the Proposition 65 list to help ensure they do not miss additions to the list of chemicals found in their products and comply with applicable requirements for new chemicals within the 12-month period. Businesses should also sign up for email updates to stay informed of new developments, guidance documents, and news releases.<sup>118</sup> Proposition 65 should be on every business’s radar and should be incorporated into business compliance checklists.

#### Conclusion

Proposition 65 has serious implications for every industry doing business in California, and Colorado’s outdoor industry is no exception. Because of the potential for significant monetary penalties for noncompliance, as well as the costs of defending Proposition 65-related lawsuits, the best course of action is to adopt the new safe harbor warnings. While the new labels are not strictly mandatory, using them will help businesses in the outdoor industry avoid the risk of being forced into court. Compliance with Proposition 65 is not straightforward, but the OEHHA website has a number of useful resources to help businesses learn more about Proposition 65 and ensure that their labeling is in accordance with the law.<sup>119</sup> 



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NOTES

1. Cal. Health and Safety Code § 25249.6.
2. Colorado's outdoor industry generates \$28 billion annually in consumer spending. Where Trail Meets Trade, <https://choosecolorado.com/key-industries/outdoor-recreation>.
3. See, e.g., Boyd and Lopez, "Mystery revealed: Company behind The North Face chooses Denver for global headquarters," (Aug. 13, 2018), [www.thedenverchannel.com/news/local-news/mystery-revealed-company-behind-the-north-face-chooses-denver-for-global-headquarters](http://www.thedenverchannel.com/news/local-news/mystery-revealed-company-behind-the-north-face-chooses-denver-for-global-headquarters).
4. Cal. Health and Safety Code § 25249.7.
5. Cal. Health and Safety Code § 25249.5 to 25249.14.
6. Office of Environmental Health Hazard Assessment (OEHHA), About Proposition 65, <https://oehha.ca.gov/proposition-65/about-proposition-65>.
7. Restrictions on Toxic Discharges into Drinking Water; Requirement of Notice of Persons' Exposure to Toxics. Initiative Statute at 53 (1986), <https://oehha.ca.gov/media/downloads/proposition-65/general-info/prop65ballot1986.pdf>.
8. *Id.*
9. *Id.*
10. *Id.* at 54.
11. OEHHA, New Proposition 65 Warnings, [www.p65warnings.ca.gov/new-proposition-65-warnings](http://www.p65warnings.ca.gov/new-proposition-65-warnings).
12. Cal. Health and Safety Code § 25249.5.
13. Cal. Health and Safety Code § 25249.6.
14. New Proposition 65 Warnings, *supra* note 11.
15. Teleflex, Frequently Asked Questions Regarding the New Warning Labels on Teleflex Products, [www.teleflex.com/usa/legal/ca-proposition-65](http://www.teleflex.com/usa/legal/ca-proposition-65).
16. Cal. Health and Safety Code § 25249.7.
17. Cal Code Regs. tit. 27, Preamble (explaining that OEHHA administers the Act).
18. Cal Code Regs. tit. 27, § 25249.7(d).
19. Cal. Code Regs. tit. 27, § 25102. See also OEHHA, Final Statement of Reasons, Safe Drinking Water and Toxic Enforcement Act of 1986 at 16 (1988) <https://oehha.ca.gov/media/downloads/cnrn/art13fsorjan1988.pdf>.
20. *Id.* at 16.
21. Cal. Health and Safety Code § 25249.7(b)(1).

22. For additional enforcement information, visit the Attorney General's website, <https://oag.ca.gov/prop65>.
23. Cal. Health and Safety Code § 25249.7(c).
24. Cal. Health and Safety Code § 25249.7(d).
25. See, e.g., Alliance for Natural Health USA, Proposition 65: Evaluating Effectiveness and a Call for Reform at 9, [www.anh-usa.org/wp-content/uploads/2015/09/Prop-65.pdf](http://www.anh-usa.org/wp-content/uploads/2015/09/Prop-65.pdf).
26. *Id.* at 9.
27. Mad City Outdoor Gear, California Proposition 65 and the Tactical & Outdoor Industry (June 28, 2017), [www.madcityoutdoor.com/blogs/news/california-proposition-65-and-the-tactical-outdoor-industry](http://www.madcityoutdoor.com/blogs/news/california-proposition-65-and-the-tactical-outdoor-industry).
28. Compiled from the Annual Report of Settlements, <https://oag.ca.gov/prop65/annual-settlement-reports>.
29. OEHHA, Proposition 65 in Plain Language, <https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>.
30. Cal. Health and Safety Code § 25249.8(c) (explaining the yearly updating requirement).
31. About Proposition 65, *supra* note 6.
32. Chemicals subject to the Proposition 65 warning requirement are listed at <https://oehha.ca.gov/media/downloads/proposition-65/p65single10212016.pdf>.
33. OEHHA, How chemicals are added to the Proposition 65 list, <https://oehha.ca.gov/proposition-65/how-chemicals-are-added-proposition-65-list>. These two committees—the Carcinogen Identification Committee and the Developmental and Reproductive Toxicant Identification Committee—are part of OEHHA's Science Advisory Board. Cal. Health and Safety Code § 25102(c).
34. *Id.* Organizations designed as "authoritative bodies" include the U.S. Environmental Protection Agency, U.S. Food and Drug Administration, National Institute for Occupational Safety and Health, National Toxicology Program, and International Agency for Research on Cancer.
35. Cal. Health and Safety Code § 25249.8(a).
36. Cal. Health and Safety Code § 25249.8(b). Most chemicals added this way are prescription drugs that the FDA requires to contain warnings.
37. OEHHA, Businesses and Proposition 65, <https://oehha.ca.gov/proposition-65/businesses-and-proposition-65>.
38. Cal. Health and Safety Code § 25249.10(b).
39. OEHHA, Fact Sheets: Lead & Lead Compounds, [www.p65warnings.ca.gov/fact-sheets/lead-and-lead-compounds](http://www.p65warnings.ca.gov/fact-sheets/lead-and-lead-compounds).
40. OEHHA, Fact Sheets: Phthalates, [www.p65warnings.ca.gov/fact-sheets/phthalates](http://www.p65warnings.ca.gov/fact-sheets/phthalates).
41. OEHHA, Fact Sheets: Bisphenol A (BPA), [www.p65warnings.ca.gov/fact-sheets/bisphenol-bpa](http://www.p65warnings.ca.gov/fact-sheets/bisphenol-bpa).
42. Proposition 65 in Plain Language, *supra* note 29.
43. OEHHA, Frequently Asked Questions



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for Businesses, [www.p65warnings.ca.gov/frequently-asked-questions-businesses](http://www.p65warnings.ca.gov/frequently-asked-questions-businesses).

44. Proposition 65 in Plain Language, *supra* note 29.

45. The list of safe harbor levels is at <https://oehha.ca.gov/media/downloads/proposition-65/general-info/safeharborlist041218.pdf>.

46. OEHHA, Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses, [www.p65warnings.ca.gov/sites/default/files/art\\_6\\_business\\_qa.pdf](http://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf).

47. Proposition 65 in Plain Language, *supra* note 29.

48. Frequently Asked Questions for Businesses, *supra* note 43.

49. *Id.*

50. *Id.*

51. OEHHA, Proposition 65 Safe Use Determinations (SUDs), <https://oehha.ca.gov/proposition-65/proposition-65-safe-use-determinations-suds>.

52. *Id.*

53. *Id.*

54. A detailed description of the SUD process is beyond the scope of this article, but a useful roadmap is available at <https://oehha.ca.gov/proposition-65/proposition-65-safe-use-determination-sud-process>.

55. Cal. Code Regs. tit. 27, § 25601 (operative until Aug. 30, 2018).

56. OEHHA, Proposition 65 in Plain Language, *supra* note 29.

57. New Proposition 65 Warnings, *supra* note 11.

58. OEHHA, Final Statement of Reasons Title 27, California Code of Regulations at 8 (2016), <https://oehha.ca.gov/media/downloads/crnrr/art6fsor090116.pdf>.

59. New Proposition 65 Warnings, *supra* note 11.

60. 2016 Final Statement of Reasons, *supra* note 58 at 8.

61. *Id.*

62. Cal. Code Regs. tit. 27, § 25603.1(a) to (d) (effective until Aug. 30, 2018).

63. New Proposition 65 Warnings, *supra* note 11.

64. *Id.*

65. OEHHA, Notice of Adoption of Article 6: Clear and Reasonable Warnings, <https://oehha.ca.gov/proposition-65/crnrr/notice-adoption-article-6-clear-and-reasonable-warnings>.

66. New Proposition 65 Warnings, *supra* note 11.

67. 2016 Final Statement of Reasons, *supra* note 58 at 9.

68. Cal. Code Regs. tit. 27, § 25600.2.

69. 2016 Final Statement of Reasons, *supra* note 58 at 8–9.

70. *Id.*

71. *Id.*

72. New Proposition 65 Warnings, *supra* note 11.

73. 2016 Final Statement of Reasons, *supra* note 58 at 8–9.

74. New Proposition 65 Warnings, *supra* note 11.

75. Cal. Code Regs. tit. 27 § 25601(b).

76. Cal. Code Regs. tit. 27, § 25603(a)(2)(A) to (E).

77. Cal. Code Regs. tit. 27, § 25603(a)(2)(A).

78. Cal. Code Regs. tit. 27, § 25603(a)(1).

79. Cal. Code Regs. tit. 27, § 25603(a)(2)(A) to (E).

80. Cal. Code Regs. tit. 27, § 25603(a)(2).

81. 2016 Final Statement of Reasons, *supra* note 58 at 79.

82. Cal. Code Regs. tit. 27, § 25603(a)(2).

83. Cal. Code Regs. tit. 27, § 25603(b).

84. New Proposition 65 Warnings, *supra* note 11.

85. *Id.*

86. *Id.*

87. Cal. Code Regs. tit. 27, § 25602(b).

88. Cal. Code Regs. tit. 27, § 25602(c).

89. Cal. Code Regs. tit. 27, § 25607.1 to 25607.6.

90. Cal. Code Regs. tit. 27, § 25602(b).

91. *Id.*

92. *Id.*

93. Cal. Code Regs. tit. 27, § 25602(c).

94. Cal. Code Regs. tit. 27, § 25602(d).

95. The warning translations page is at [www.p65warnings.ca.gov/warning-translations-businesses/listed-carcinogens](http://www.p65warnings.ca.gov/warning-translations-businesses/listed-carcinogens).

96. Cal. Code Regs. tit. 27, § 25602.

97. Cal. Code Regs. tit. 27, § 25600.1(i).

98. Cal. Code Regs. tit. 27, § 25601(c).

99. *Id.*

100. Cal. Code Regs. tit. 27, § 25602(a)(1).

101. Cal. Code Regs. tit. 27, § 25602(a)(4).

102. Cal. Code Regs. tit. 27, § 25602(b).

103. *Id.*

104. 2016 Final Statement of Reasons, *supra* note 58 at 9.

105. New Proposition 65 Warnings, *supra* note 11.

106. Cal. Code Regs. tit. 27, § 25600.2(b).

107. 2016 Final Statement of Reasons, *supra* note 58 at 38–39.

108. *Id.*

109. Cal. Code Regs. tit. 27, § 25600.2(b).

110. Cal. Code Regs. tit. 27, § 25600.2(b)(1) to (4).

111. Cal. Code Regs. tit. 27, § 25600.2(c).

112. Cal. Code Regs. tit. 27, § 25600.2(d).

113. Cal. Code Regs. tit. 27, § 25600.2(e)(1) to (4). The retailer is also responsible for providing the label if there is “no manufacturer, producer, packager, importer, supplier, or distributor of the product who: (A) Is a ‘person in the course of doing business . . . and (B) Has designated an agent for service

of process in California or has a place of business in California.” Cal. Code Regs. tit. 27, § 25600.2(e)(5).

114. Cal. Code Regs. tit. 27, § 25600.2(i)).

115. 2016 Final Statement of Reasons, *supra* note 58 at 30–31.

116. *Id.* at 30.

117. New Proposition 65 Warnings, *supra* note 11.

118. Sign up for email updates at [www.p65warnings.ca.gov/sign-email-updates](http://www.p65warnings.ca.gov/sign-email-updates).

119. The Proposition 65 law and its accompanying regulations can be found at <https://oehha.ca.gov/proposition-65/law/proposition-65-law-and-regulations>. A side-by-side comparison of the old and new regulations is at <https://oehha.ca.gov/proposition-65/law/proposition-65-law-and-regulations>. For additional assistance, contact the Proposition 65 office at P65.Questions@oehha.ca.gov.