

RetailLawBCLP

WARNING: NEW PROPOSITION 65 WARNING REQUIREMENTS TAKE EFFECT AUGUST 30, 2018

Jun 14, 2018

Retailers and manufacturers should take steps now to ensure they are compliant with the new California Proposition 65 warning regulations that take effect on August 30, 2018.

Proposition 65 prohibits retailers and manufacturers from knowingly and intentionally exposing California consumers to a chemical known to the State of California to cause cancer or developmental or reproductive harm without first providing a “clear and reasonable warning.” (Cal. Health & Safety Code § 25249.6.) The regulations provide examples of “safe harbor” warnings that are deemed to be clear and reasonable under the new amendments. Notably, the use of the specific “safe harbor” warnings included in the regulations is not actually required. Retailers and manufacturers can use any clear and reasonable warning; however, using the examples provided ensures that the warning is sufficient.

As we previously [reported](#), amendments to the warning regulations were issued in August 2016. The 2016 and the more recent November 2017 amendments change the form and content of the “safe harbor” warnings. The amendments also clarify who has responsibility for providing warnings.

For products manufactured before August 30, 2018, retailers and manufacturers can choose whether to rely on the current or new safe harbor warnings, as both are deemed sufficient under the regulations. Products manufactured after August 30, 2018, however, should include the new warning in order to ensure compliance. Parties to existing court-approved consent judgments can continue to provide warnings that comply with those orders.

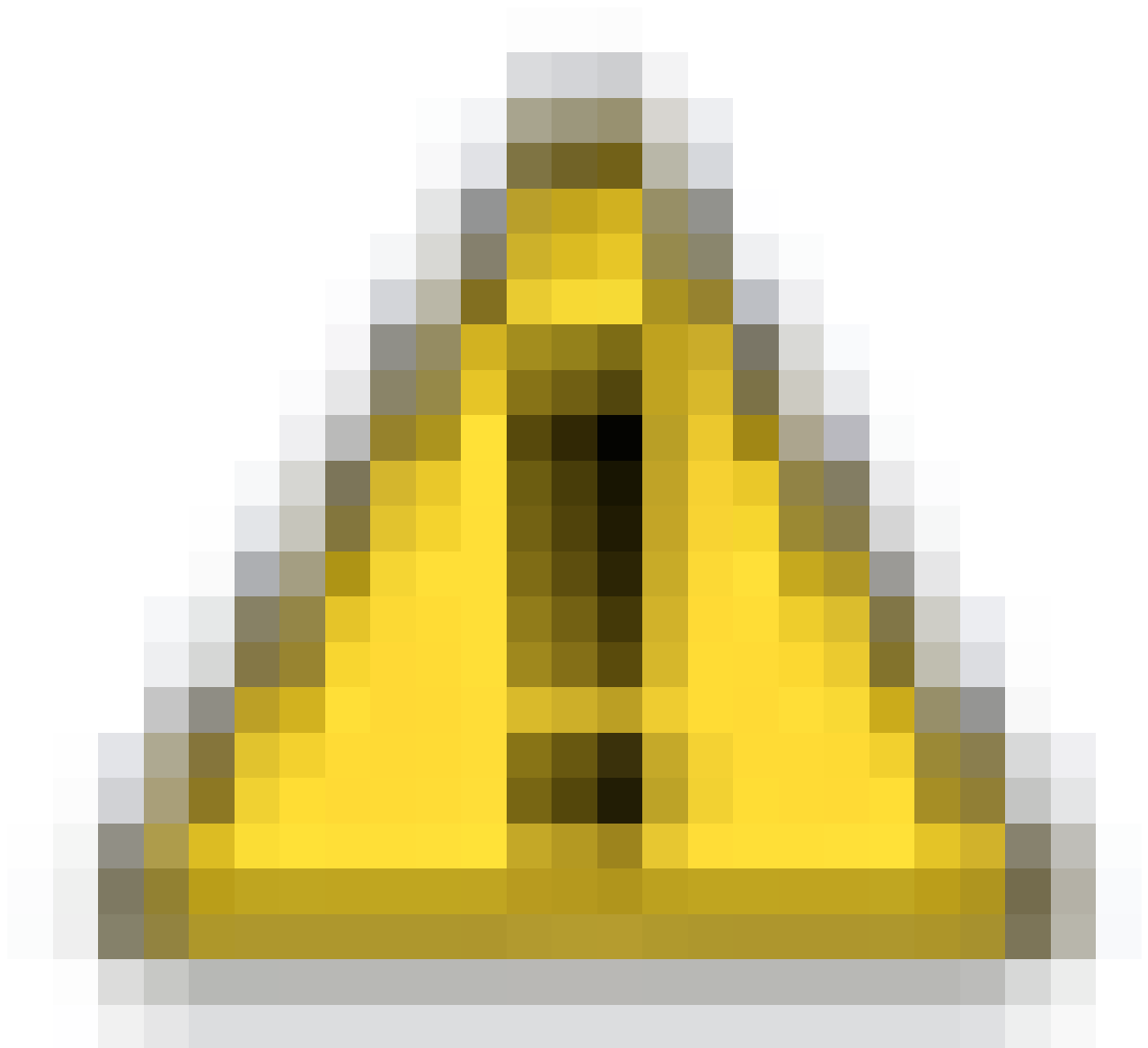
NEW CONTENT

The new regulations specify that safe harbor warnings for consumer products are required to say the product “can expose you to” a Proposition 65 chemical rather than saying the product “contains” the chemical.

The warnings must also include:

- The name of at least one listed chemical that prompted the warning. If the product can cause exposure both to carcinogens and to reproductive toxicants, the warning should list at least one

example of each. Importantly, the warning does not have to list all chemicals to which a product can cause exposure.



Most warnings must have a yellow triangular warning symbol. However, where the product label or shelf sign does not use the color yellow, the symbol may then be printed in black and white.

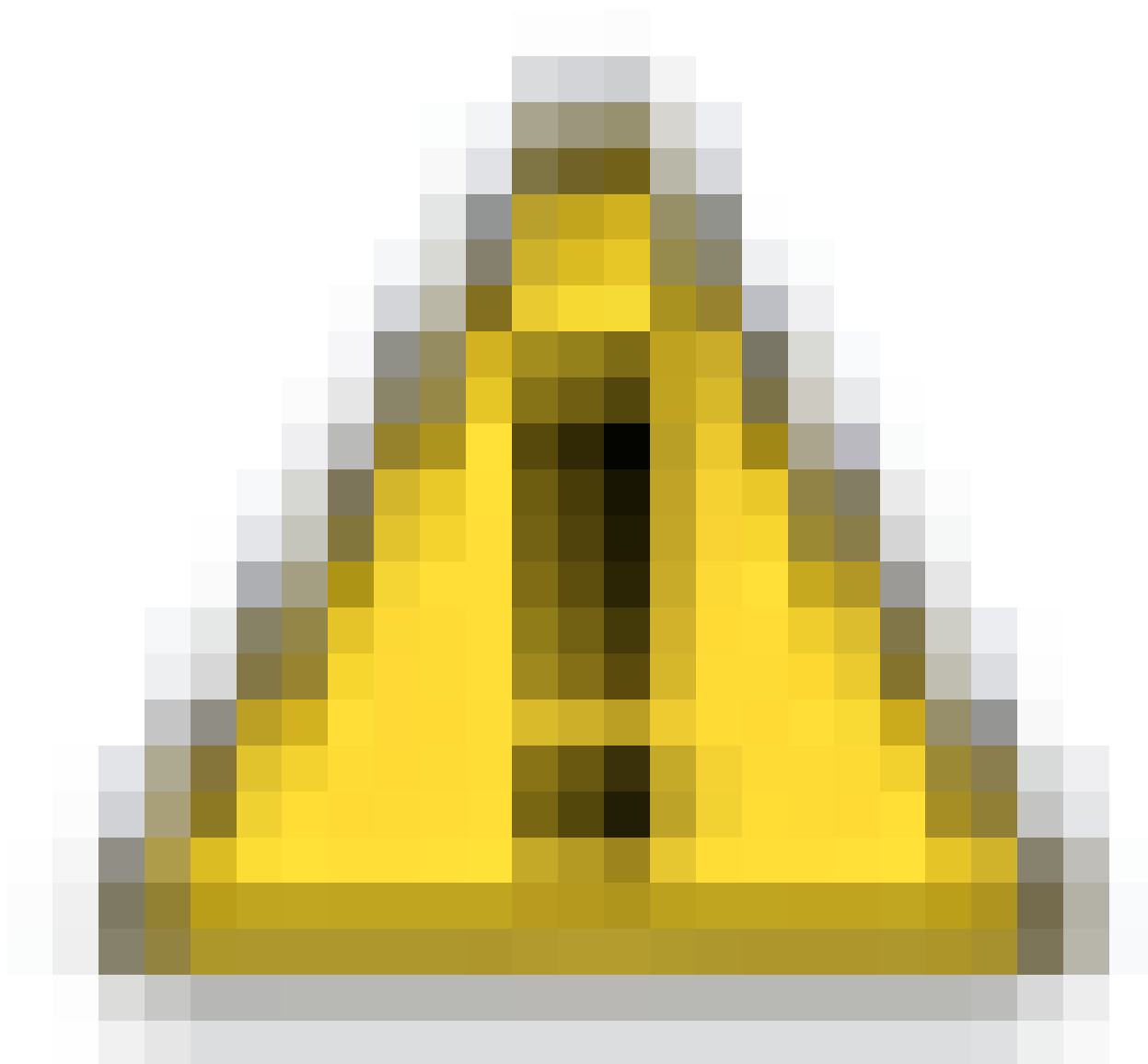
- The word “**WARNING**” in bold capital letters.
- The address for OEHHA’s new Proposition 65 warnings website, P65Warnings.ca.gov.
- For certain warnings, where other consumer information is provided in a language other than English, the warning must also be provided in that language.

Warnings can still be provided on product labels, shelf tags, and shelf signs. Shelf signs should be product specific and posted at each point of display. For the first time, the regulation provides that warnings can also be received prior to purchase via electronic devices.

On-product warnings can use either the long or short versions discussed below.

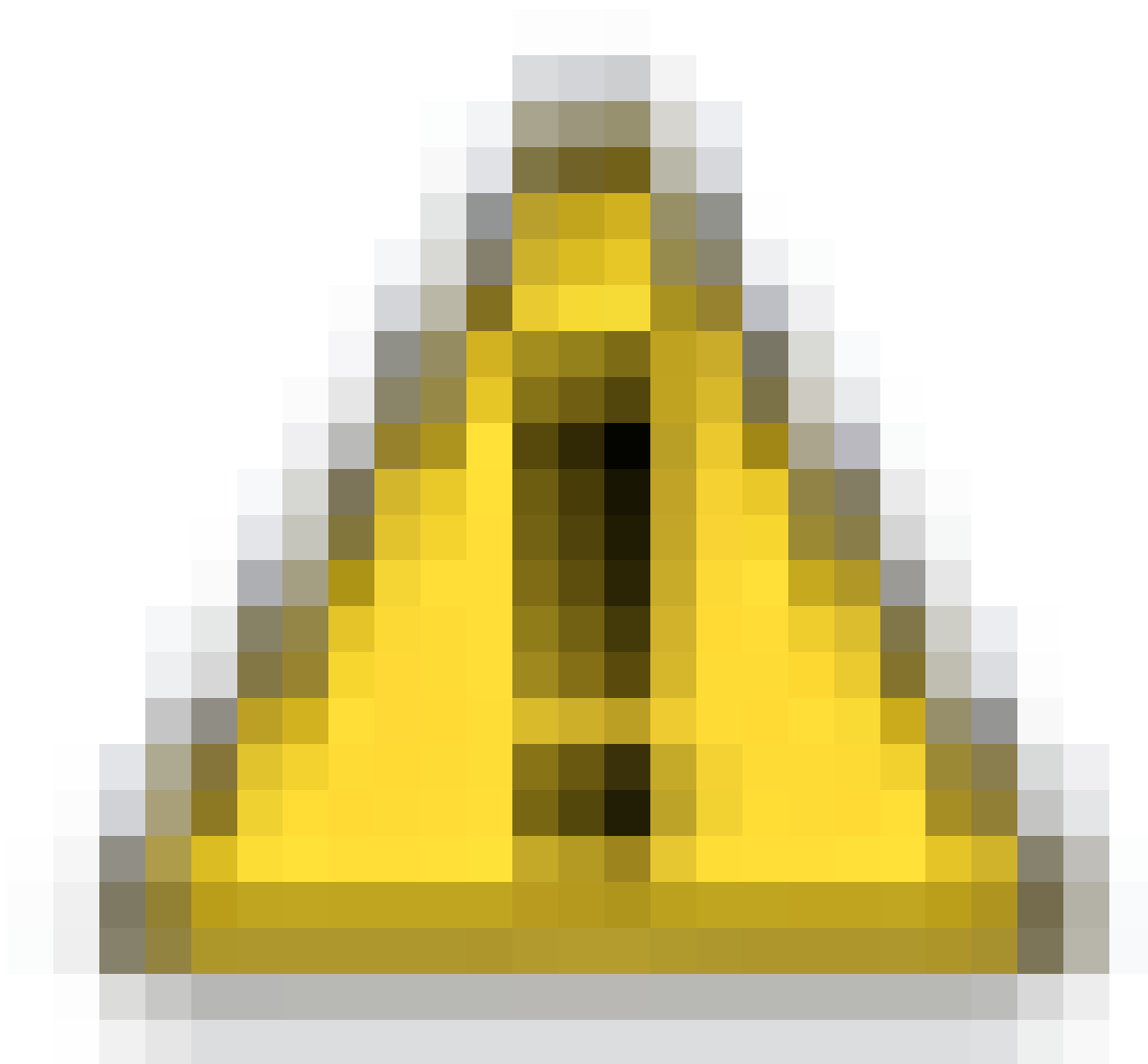
LONG FORM WARNINGS

The regulations provide the following example of a safe harbor warning for an exposure to one or more chemicals that are either carcinogens or reproductive toxicants:



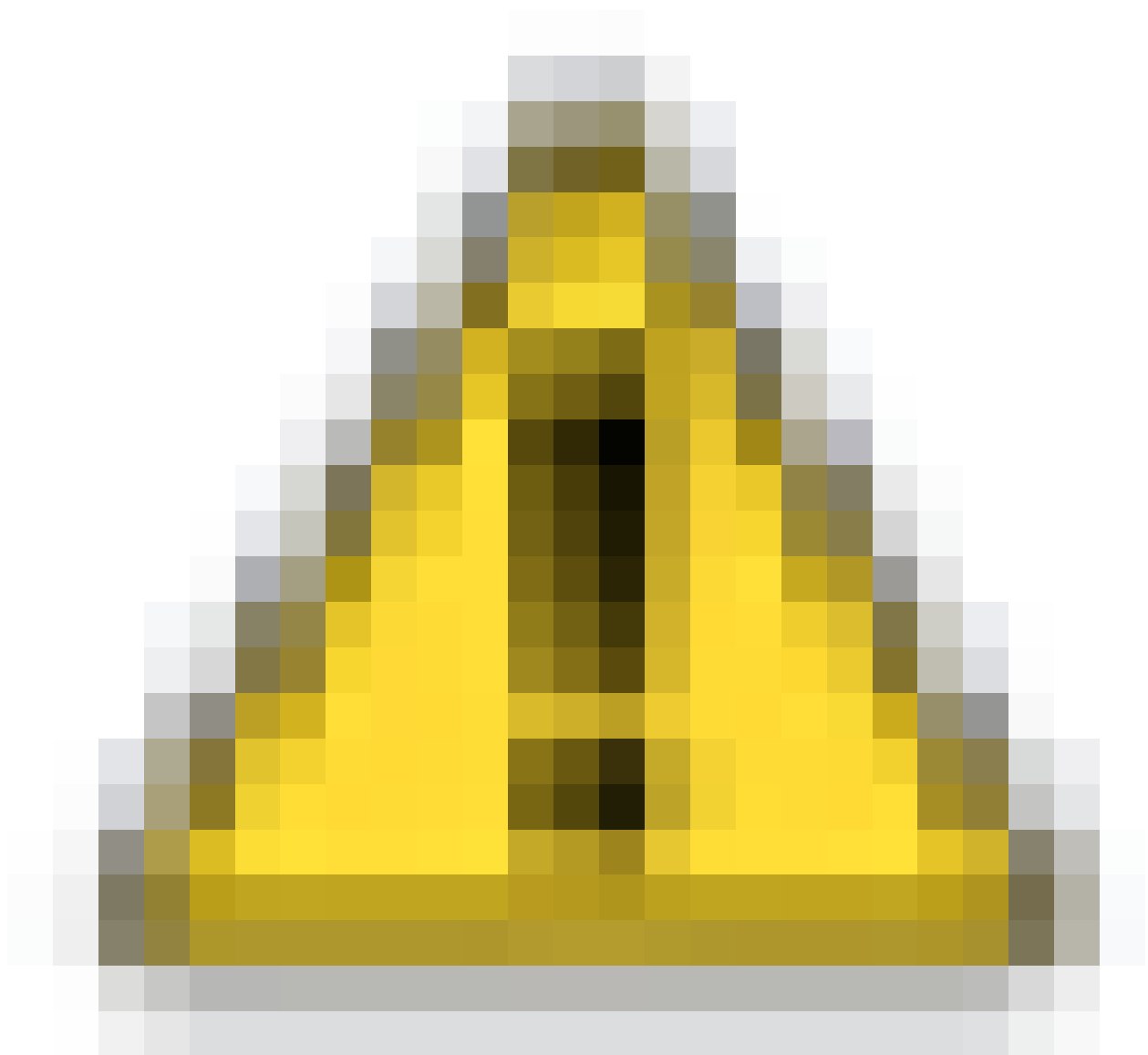
WARNING: This product can expose you to chemicals including [one or more listed chemical] which is [are] known to the State of California to cause cancer [or birth defects or other reproductive harm]. For more information, go to www.P65Warnings.ca.gov.

The regulations provide the following example of a safe harbor warning for exposures to one or more chemicals that are listed as *both* a carcinogen and a reproductive toxicant:



WARNING: 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 www.P65Warnings.ca.gov.

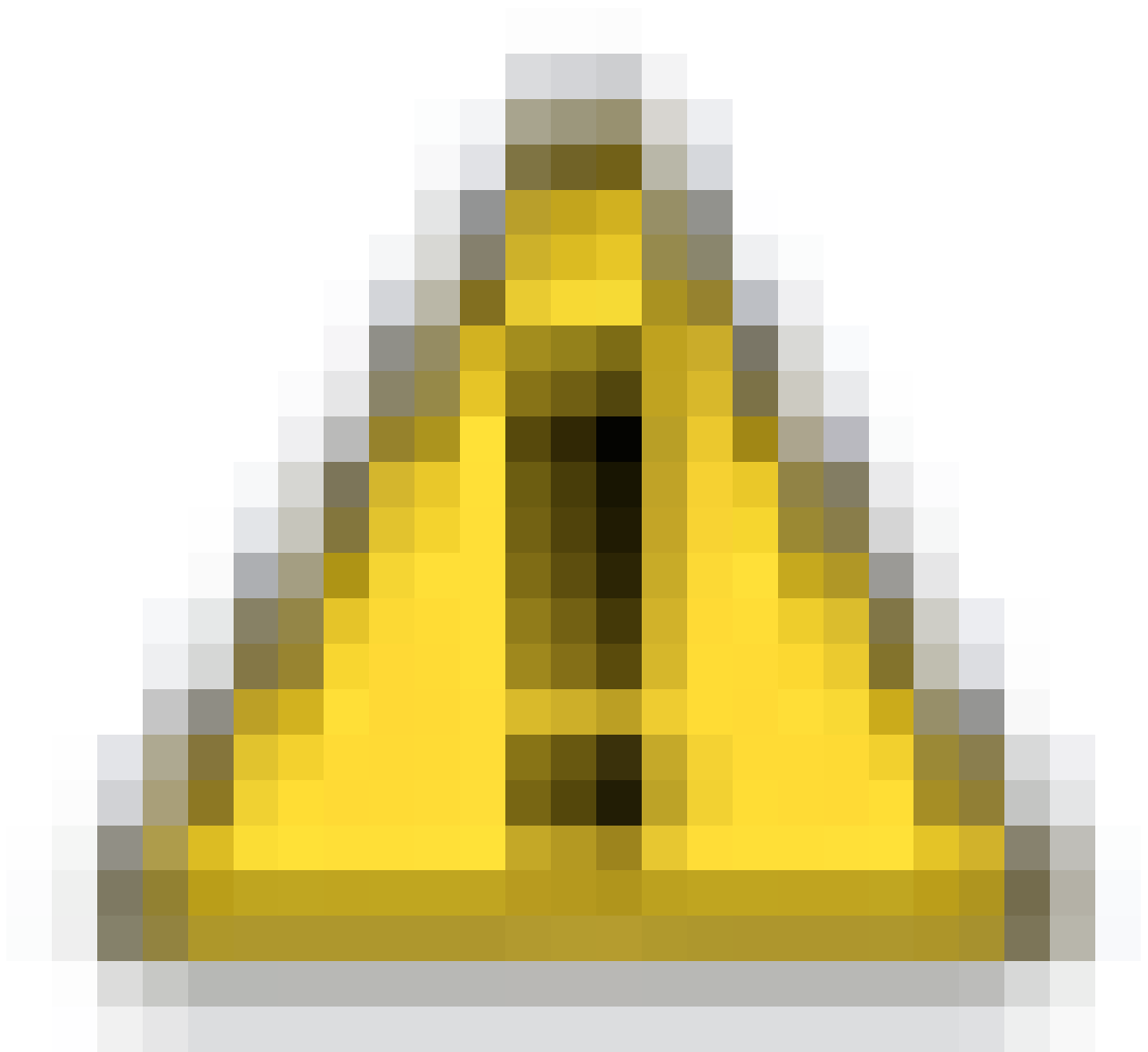
The regulations provide the following example of a safe harbor warning for products that contain multiple listed chemicals, some of which are carcinogens and some of which are reproductive toxicants:



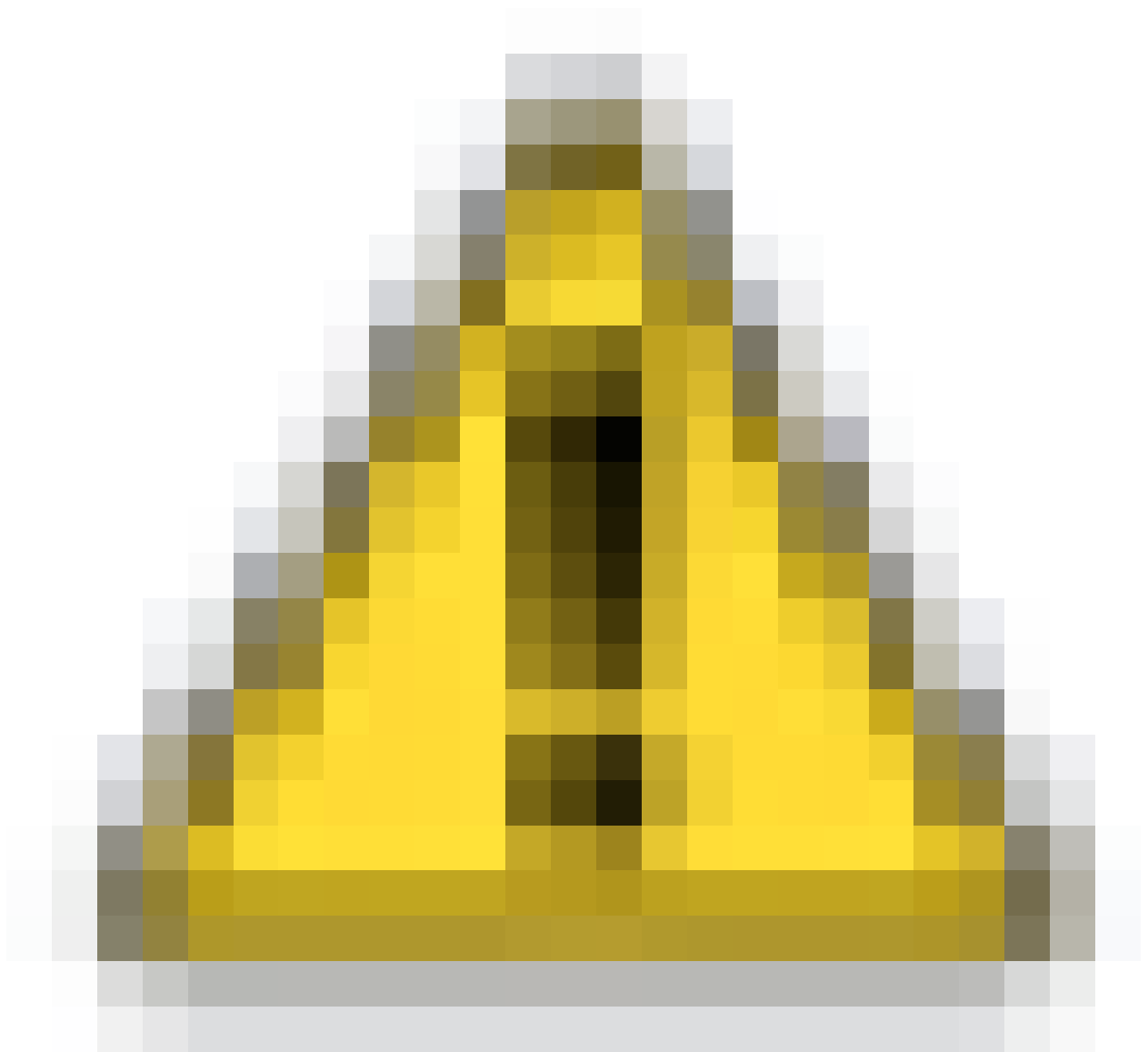
WARNING: This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer, and [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

SHORT FORM WARNINGS

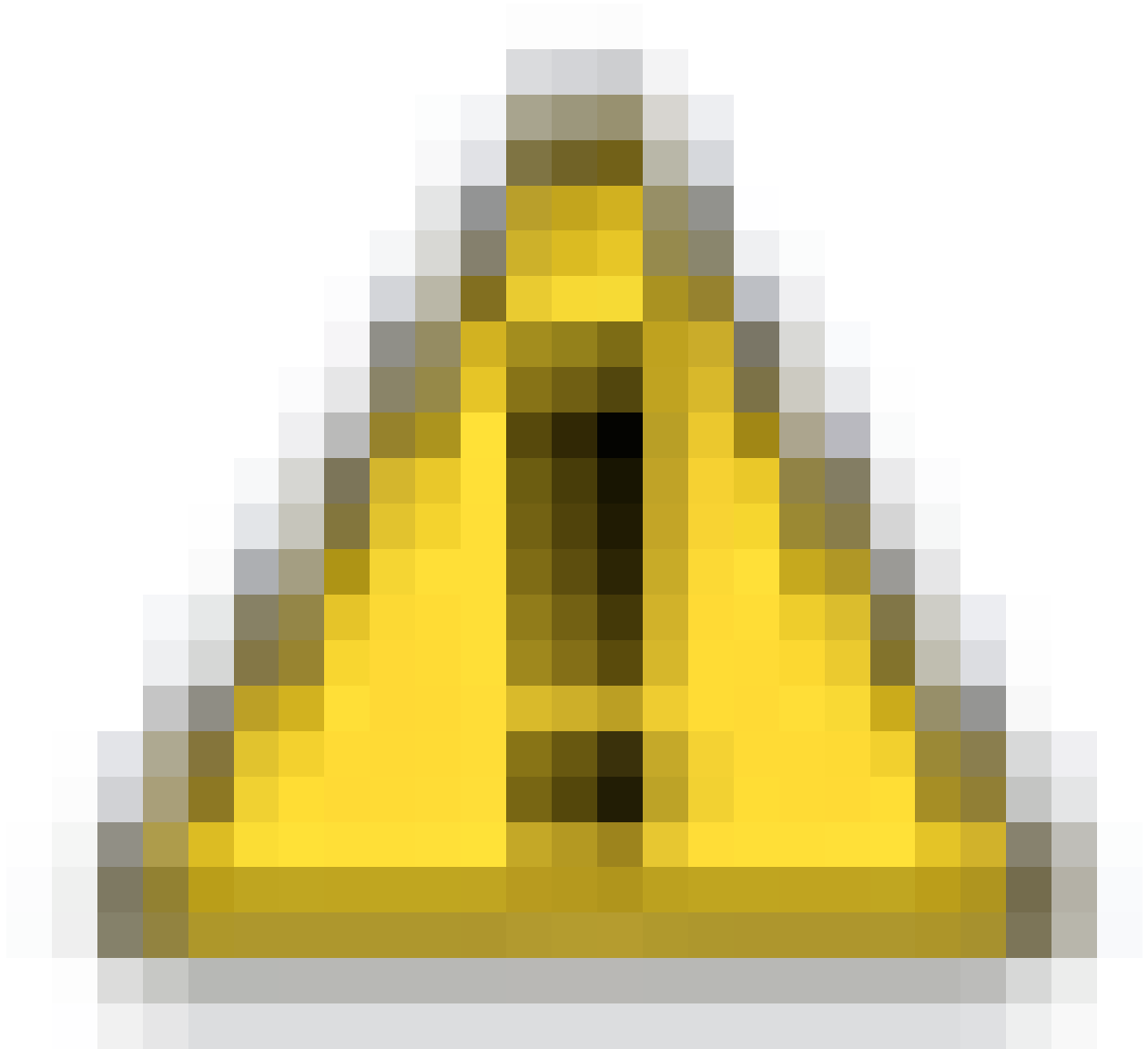
Warnings on product labels can be shortened as follows, and do not require that a specific chemical be listed. For example:



WARNING: Cancer – www.P65Warnings.ca.gov.



WARNING: Reproductive Harm - www.P65Warnings.ca.gov.



WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov

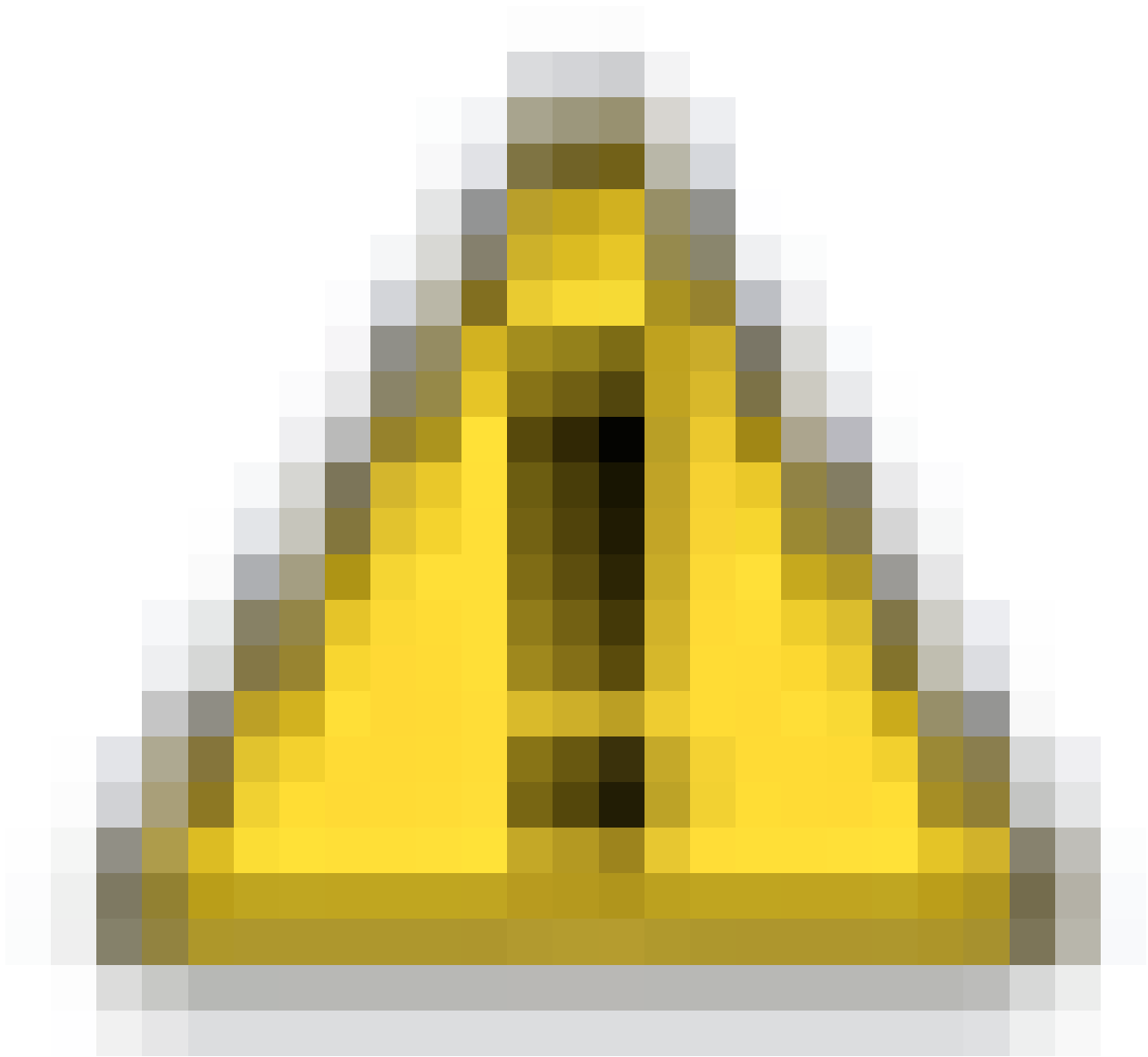
Short-form warnings must be in a type size no smaller than other consumer information, and no smaller than 6-point type.

FOOD WARNINGS

For food products, the following warning must be set apart from other consumer information in a box on the product label. The regulations provide the example below:

WARNING: Consuming 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/or birth defects or other reproductive harm]. For more information, go to www.P65Warnings.ca.gov/food.

Note that the



is not required for food warnings.

INTERNET SALES

For online sales, the new regulations require for the first time that a warning appear on the product display page, or through a clearly marked hyperlink using the word **“WARNING,”** or otherwise be provided prior to purchase – such as in a pop-up window triggered by entry of a California address. If a short-form warning is provided on the product, the same warning can be used online.

WARNING RESPONSIBILITIES CLARIFIED FOR MANUFACTURERS AND RETAILERS

The new regulations seek to “minimize the burden” on retailers by putting the primary responsibility for providing warnings on manufacturers. Manufacturers can comply by labeling the product with a warning, or providing notice to retailers that specifically identifies the product that requires a warning and provides all warning materials. For the notice to be effective, receipt must be confirmed by the retailer electronically or in writing. The notice and confirmation must be renewed within six months after the regulations take effect, and annually thereafter.

Unless a manufacturer provides the notice described above, a retailer’s liability under the new regulations is limited to exposure from private label products, or where the retailer:

- (1) knowingly introduced or caused a listed chemical to be created in the product,
- (2) covered or obscured a warning,
- (3) failed to post a warning provided by the manufacturer, or
- (4) has actual knowledge of potential exposure requiring a warning, and there is no other entity in the chain of distribution who is subject to Prop. 65 (has more than 10 employees and is located in the U.S.) Actual knowledge will be presumed within 5 days of receipt of a 60-day notice.

Retailers can still be held liable where the vendor is not subject to Prop. 65 and the retailer had actual knowledge of exposure. To address these concerns, we recommend that retailers:

- Monitor on a daily basis any 60-day notices naming the retailer. Notices are in a searchable database available by [clicking here](#).
- Designate an email address, which employees will monitor daily, specifically for Prop. 65 communications and notices. An email address, such as [CalProp65@yoururl.com](#), set up to receive both internal and external communications, i.e., from suppliers or enforcement agencies, will enable you to better monitor Prop. 65 notices.
- Find out beforehand or have a plan in place to quickly identify, in response to a 60-day notice, vendors not subject to Prop. 65.
- Have a plan in place to quickly decide whether to tender, warn, and or remove the product from sale. There will not be enough time to submit the product for testing and evaluate it for potential exposure within the 5 days after receipt of the notice.

The parties can still contractually allocate responsibility for providing a warning. Many retailers have revised their terms and conditions to state that they will not accept notice and warning materials from manufacturers, who will continue to have responsibility to label their products with any required warnings. Many retailers are also requiring vendors to provide an image of the warning suitable for posting online.

The new regulations impose additional specific requirements for certain products and industries, including restaurants, alcohol and furniture manufacturers.

RESTAURANTS

The new regulations provide that the following warning be displayed in restaurants and other facilities that sell food and beverages for immediate consumption if the business determines that consumption of its food or beverage products will expose consumers to listed chemicals at levels above the safe harbor limits.

WARNING: Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which are 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/restaurant

The warning must be provided using at least one of the following methods:

- An 8 ½ by 11 inch sign, printed in no smaller than 28-point type, at each public entrance so that it is readable and conspicuous to customers;
- A notice no smaller than 5 by 5 inches, printed in no smaller than 20-point type, placed at each point of sale so as to assure that it is readable and conspicuous; or
- A warning on any menu or list describing food or beverages, in a type size no smaller than the largest type size used for the names of general menu items.

ALCOHOLIC BEVERAGES

The November 2017 amendments to the regulations require for the first time that restaurants that serve or sell alcoholic beverages post the following warning, which also must be posted where alcohol is sold at retail.

WARNING: Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy, can cause birth defects. For more information to go www.P65Warnings.ca.gov/alcohol

The warning must be provided using at least one of the following methods:

- An 8½ by 11 inch sign in no smaller than 22-point type, placed at eye level so that it is readable and conspicuous to customers as they enter the area where alcoholic beverages are served;
- A notice or sign no smaller than 5 by 5 inches, in no smaller than 20-point type and enclosed in a box, placed at each retail point of sale or display so as to assure that it is readable and conspicuous.

- On a menu or list of alcoholic beverages, or food or other beverages, served on the premises.
- For alcoholic beverages sold or distributed through delivery services, the warning should be on the shipping container or package in a type size no smaller than the largest type size used for other consumer information on the product, and in no less than 8-point type.

FURNITURE WARNINGS

The new regulations also specify that in addition to a label warning on furniture products, a notice must be provided at each public entrance or display, or printed on each receipt stating:

NOTICE: Some furniture products can expose you to chemicals known to the State of California to cause cancer or birth defects or other reproductive harm. Please check on-product label for warning information.

- If posted at each public entrance or point of display, the notice should be no smaller than 8 ½ by 11 inches and in no smaller than 28-point type.
- If printed on each receipt, the notice should be printed in no smaller than 12-point type.

PREPARE FOR THE NEW REQUIREMENTS

All retailers and manufacturers who sell products in California should review their Proposition 65 compliance protocols to ensure that they continue to comply once the regulations go into effect. This includes ensuring that warnings meet the new safe harbor requirements, and that all webpages accessible by California consumers contain the required warnings.

More information on our Proposition 65 Team and our relevant experience is available by clicking [here](#). Please reach out to us for any advice or assistance in evaluating your company's strategy for complying with the new warning requirements.

RELATED PRACTICE AREAS

- Retail & Consumer Products

MEET THE TEAM



Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

+1 415 675 3435

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.