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New California Proposition 65 Warning Requirements Apply to the Outdoor Recreation Industry

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New Proposition 65 regulations take effect on August 30, 2018. We invite you to take a deeper dive into what the Proposition 65 changes mean for your outdoor recreation company and learn what you can do to implement and bolster your compliance plan.

BACKGROUND: Approved by California voters in 1986, Proposition 65 ("**Prop 65**") is a right to know initiative that provides information to the public about potential exposure to toxic chemicals. Prop 65 requires businesses with 10 or more employees that do business in California, including out-of-state businesses that sell products in California, to include a warning message on their products when they contain chemicals known to cause cancer, birth defects, or other reproductive harm. There are nearly 900 chemicals identified as causing such harm by California's Office of Environmental Health Hazard Assessment ("**OEHHA**"), which maintains a list of such chemicals that is available at: <https://oehha.ca.gov/proposition-65/proposition-65-list>. Under Prop 65's existing "safe harbor" provision, a chemical that exists at an exposure level below the safe harbor level is exempt from the Prop 65 warning requirements.

NEW REGULATIONS: The OEHHA adopted new regulations that will take effect on August 30, 2018. The new regulations revamp the current warning system by changing the manner in which the safe harbor warnings operate. The new regulations provide more explicit guidelines for businesses concerning the types of warnings that their products must contain. The guidelines are designed to limit "over-warning," while also making the warnings more useful for the public. The new regulations include several new requirements for product warnings, including:

PRODUCT WARNING REQUIREMENTS:

- A triangular yellow warning symbol;
- The word **WARNING** in bold capital letters;
- Language stating that the product "can expose you to" a Prop 65 chemical rather than it "contains" such a chemical;
- The internet address for OEHHA's new Prop 65 regulations, www.p65warnings.ca.gov;
- "Tailored" language specifying the type of harm that one may be exposed to (e.g., cancer, reproductive harm or both); and

- The name of at least one of the chemicals necessitating the inclusion of a Prop 65 warning (from the OEHHA list).

The following are examples of the new warning in both long-form and the permitted short-form:

 **WARNING:** This product can expose you to chemicals including Acetaldehyde, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

OR

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

Additionally:

- Where the sign, label, or shelf tag for the product is not printed in yellow, the symbol may be printed in black and white; for example:
 **WARNING:** This product can expose you to chemicals including Acetaldehyde, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.
- In some cases, the Prop 65 warning must also be provided in a language other than English (see www.P65Warnings.ca.gov for more information);
- For products purchased over the internet, the website must, prior to the purchase of a product, provide a warning itself or a hyperlink to the warning clearly marked with the word "WARNING" on the product display page; and
- The warning must be "prominently displayed" and "must be displayed with such conspicuousness as compared with other words" on the product.

IMPORTANT CHEMICALS: Prop 65 applies to all types of industries. Take a look at this list of main chemicals used in the Outdoor Industry, that can be subject to Prop 65 regulation.

EFFECTIVENESS: Businesses are not required to update their warnings for products manufactured before August 30, 2018, as long as the warnings on these products comply with the previous regulations.

ENFORCEMENT: The primary enforcement agency for violations of Prop 65 is the California Attorney General's Office, however enforcement actions may also be initiated by public officials from California cities whose population exceeds 750,000. Additionally, private actions may be brought by any individual for violations of Prop 65. A company in violation of Prop 65 can be subject to penalties of up to \$2,500 per violation, per day.

WHAT'S YOUR PROP 65 IQ?: How does your knowledge of Prop 65 stack up? Take our interactive Q&A session.

ADDITIONAL QUESTIONS: If you have questions about Prop 65, or how the new warning guidelines may apply to your outdoor recreation product, contact Michael Dill, Sam Edwards or the appropriate member of your Holland & Hart LLP team.

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