

Attorney General Amends Settlement Guidelines in Proposition 65 Regulations

The California Attorney General has adopted [amendments](#) to the regulations implementing the State's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") that affect settlement terms, penalty amounts, and attorney's fees in private, plaintiff-initiated civil actions under the law. The amendments are designed to curb abuse of the private enforcement provisions of Proposition 65 by plaintiffs who seek to divert penalty funds away from the State and to themselves through private settlements without any judicial oversight to ensure a public benefit is being conferred.

The amendments, first proposed in September 2015, took effect on October 1, 2016. Among the most noteworthy changes in the amended regulations is elimination of provisions authorizing "in lieu of penalty" payments, which have long been popular with private plaintiffs as a way to divert settlement funds to the plaintiffs, rather than to the State's Office of Environmental Health Hazard Assessment ("OEHHA").

The new regulations do permit Proposition 65 settlements to include "Additional Settlement Payments," which are any settlement payment that is not a civil penalty, reimbursement of costs, or payment of attorney's fees. However, the regulations state that Additional Settlement Payments "should not" be included in private, out-of-court settlements, cannot exceed the amount of any non-contingent civil penalty, and must fund activities with a "clear and substantial nexus" to the violation alleged. Recipients of Additional Settlement Payments must document how those funds are spent and provide such documentation to the Attorney General upon request.

Moreover, the regulation now expressly prohibits "trading" civil penalties – at least 75% of which must be paid to OEHHA – for payments of attorney's fees. Also, private plaintiffs are now required to complete a form Settlement Report to the Attorney General for settlements not subject to court approval.

Although the new regulations are intended to impose greater accountability on private Proposition 65 plaintiffs, it is unlikely that businesses facing Proposition 65 litigation will see settlement demands decrease in value. The regulations do not contain any meaningful limitation on attorney fee demands made by private



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plaintiffs. Also, until a court rules on how much effect the words “should not” have in seeking to exclude Additional Settlement Payments from private Proposition 65 settlements, plaintiffs may continue to seek such non-penalty payments to divert to themselves, even in settlements without court approval of judicial oversight.

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