



Presented by



California Prop 65: What Do the Last 12 Months Tell Us?

PPAI – Product Responsibility
Summit

Alexandria, Virginia
September 16, 2019



1

Panelist



Daniel J. Herling
Co-Chair, Product Liability Practice
MINTZ LEVIN
44 Montgomery Street, 36th Floor
San Francisco, CA 94104
tel. 415.432.6103
djherling@mintz.com
www.mintz.com




2

What is Proposition 65?

- Proposition 65 requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer, birth defects or other reproductive harm.
- These chemicals can be in the products that Californians purchase, in their homes or workplaces, or that are released into the environment.
- Proposition 65 also prohibits California businesses from knowingly discharging significant amounts of listed chemicals into sources of drinking water.
- List of chemicals published by governor that are known to the State of California to cause cancer, birth defects or other reproductive harm.
 - 1986 list included 30 chemicals.
 - Today, over 900 chemicals

3

What Types of Chemicals Are on the Proposition 65 List?

- Wide range of naturally occurring and synthetic chemicals
- Includes additives or ingredients in pesticides, common household products, food, drugs, dyes, or solvents
- Chemicals used in manufacturing and construction
- Chemicals may be byproducts of chemical processes

PPAI CORPORATE RESPONSIBILITY ONLINE TRAINING

4

Prop 65 Requirements

- **Prop 65 applies to:**
 1. Any person in the course of doing business
 2. Business employs 10 or more employees
 3. Environments and products

PPAI CORPORATE RESPONSIBILITY ONLINE TRAINING

5

Prop 65 Requirements (con't)



- **Proposition 65 requires that you:**
 - Provide a clear and reasonable warning.
 - To customers and trade users.
 - For potential exposures.
 - Related to intended and foreseeable product use.
 - Prior to purchase.

PPAI CORPORATE RESPONSIBILITY ONLINE TRAINING

6

Who Administers and Enforces Prop 65?





- OEHHA (part of the California Environmental Protection Agency (CalEPA))
 - determines chemicals that meet scientific and legal requirements for placement on Proposition 65 list
 - administers regulations that govern warnings and other aspects of Proposition 65.
- The California Attorney General's Office enforces Proposition 65 (district attorney or city attorney)
- Lawsuits have been filed by the Attorney General's Office, district attorneys, consumer advocacy groups, and private citizens and law firms.
 - There is a big incentive for private citizens or "bounty hunters" because legal costs can be recovered from violators



7

Penalties


- Failure to comply is enforceable by penalties up to \$2500 per day per violation
- Injunctive relief
 - Product reformulation to remove/reduce offending chemicals
 - Warning not feasible
 - E.g., personal care products



8

Recommendations For Compliance

- Test for specific products in current product line prior to Prop 65 notice/litigation.
- Engage a certified toxicologist to review product to determine if an exposure exceeding safe harbor limits exists.
- Label with appropriate Prop 65 warning statement.





9

Changes in Enforcing Prop 65?

The main changes focus on:

- (1) the wording,
- (2) the application of the warning for internet sales, and
- (3) newly regulated products and classes of products.



10

Changes in Enforcing Proposition 65?

WARNING: This product contains a chemical known to the State of California to cause cancer.



Example 1: Old safe harbor warning

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

Example 2: New safe harbor warning

⚠ WARNING: Cancer and reproductive harm. For more information go to www.P65Warnings.ca.gov.



Example 3: New "short form" safe harbor warning



11

Top 5 Prop 65 Questions - 1


When can I use the new short-form warning?





12

Short-Form Warning

- The new regulations provide alternative safe-harbor language for warnings that are placed directly on a product or a product's immediate packaging. For an on-product warning, the new regulations shorten the previous warning to:

 "WARNING: Cancer - www.P65Warnings.ca.gov"

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

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

- Note: companies that use the so-called "on product" warning face different size requirements. The short-form, on-product warning "must be in a type size no smaller than the largest type size used for other consumer information on the product." It must appear in a minimum of 6-point type.

PPAI CORPORATE RESPONSIBILITY ONLINE Education

13

Top 5 Prop 65 Questions - 2

When should I include foreign language translation(s) of the Prop 65 warning?

PPAI CORPORATE RESPONSIBILITY ONLINE Education

14

Non-English Warnings

- Where a sign or label providing a warning also includes consumer information about the product in a language other than English, the warning must be provided in that language as well as in English (CCR 27 § 25602(d)) effective Aug. 30, 2018.

PPAI CORPORATE RESPONSIBILITY ONLINE Education

15

Non-English Warnings (con't)



Consumer Information:

Includes:

- Warnings
- Directions for use
- Ingredient lists
- Nutritional information

Excludes:



- The logo or brand name
- The product name
- The company name
- The location of manufacture
- The product advertising



16

Top 5 Prop 65 Questions - 3



How do I manage my company's website sales into California?



17

Internet Sales



- Warnings must be provided to consumers prior to or during *purchase*, as compared with the former regulation, which required warning prior to *exposure* or *use* of the product.
- Internet retailers required to provide separate warnings for products sold online, even if the products themselves contain a compliant Proposition 65 warning.
- Product-specific warnings may be provided via electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the product (i.e. pop-up based on zip code).



18

Top 5 Prop 65 Questions - 4



Do I need to add consumer warnings to my paper catalogs?



19

Catalog Sales



- 1st → The catalog must provide a compliant warning and warning must be clearly associated with product
- 2nd → A warning at the front or back of catalog only is NOT compliant
- 3rd → If seller uses a short-form warning on the product label, the catalog warning may have the same content



20

Top 5 Prop 65 Questions - 5

How can I transfer Prop 65 compliance responsibility to distributors, wholesalers, dealerships or other high-volume customers?



21

Warning Responsibilities Along Supply Chain

- Retailers have been frequent targets of claims by bounty hunters.
- Former regulations attempted to place the burden of providing warnings on the manufacturer, producer, or packager, but the new regulations go further.
 - 1) Unless they label their products, manufacturers, producers, and packagers must document that they have notified retailers of the need to provide warnings and provided all necessary warning materials.
 - 2) Retailers are only responsible for providing warnings if they have been notified but have failed to provide the warnings, if they are selling "house brands," or in other limited circumstances.

PPAI CORPORATE RESPONSIBILITY ONLINE **PPAI** ONLINE **PPAI**

22

27 CCR Section 25600.2

Notification:

- 27 CCR Section 25600.2 allows manufacturers, producers and packagers to:
 - provide a written notice directly to the authorized agent for a retail seller who is subject to Section 25249.6 of the Act

PPAI CORPORATE RESPONSIBILITY ONLINE **PPAI** ONLINE **PPAI**

23

27 CCR Section 25600.2 (con't)

i) Provided that the consumer receives a warning that meets the requirements of Section 25249.6 of the Act prior to exposure, the manufacturer, producer, packager, importer, supplier, or distributor of a product that may cause a consumer product exposure **may enter into a written agreement with the retail seller of the product to allocate legal responsibility among themselves for providing a warning for the product, which shall bind the parties to that agreement and which shall supersede the requirements of subsections (b), (c), (d), and (e).**

SIGNIFICANCE:



- Section (i) provides statutory protection to retailer if allocation agreement in place;
- Arguably goes beyond contractual obligations;
- **Needs to be tested as grounds for dismissal of claim against protected retailer.**

PPAI CORPORATE RESPONSIBILITY ONLINE **PPAI** ONLINE **PPAI**

24

OEHHA's Views on New Regulations



- Regulations not vague but interpretation tweaking may be ongoing
- Use of Short-Form/Over-warning
 - Original intent: more transparency and more information to consumers
 - Actual: over-warning

25

OEHHA's Views on New Regulations (con't)

- OEHHA to use 27 CCR 25205(b) authority to demand info regarding chemicals in product within 90 days
 - (3) Name of listed chemical(s)
 - (5) Location of chemical in product
 - (6) Concentration of chemical
 - (8) Routes/pathways of exposure
 - (9) Level of exposure
- 25205(c) trade secret protection



26

Trends

It is not necessary to evaluate products for every substance.

High-risk substances of concern ("dirty dozen"):

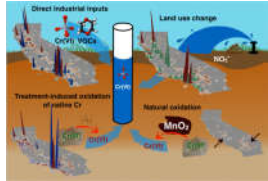
- Phthalate(s) – Plastics and vinyl material (50% of 2017 NOV's/ 58% of 2018 NOV's)
- Cadmium – Pigments: yellow, red, orange (6% of 2017 NOV's/ 7% of 2018 NOV's)
- Lead – Brass alloys (30% of 2017 NOV's/ 2% of 2018 NOV's)
- Hexavalent chromium – Metal passivation (0% of 2017 NOV's/ 1% of 2018-8/1/2019 NOV's)
- Acrylamide
- Arsenic
- Benzene
- Carbon monoxide
- Chlorinated tris
- Formaldehyde
- Mercury
- Methylene chloride

27

Trends – Hexavalent Chromium

- Hexavalent Chromium
 - Sources and distribution in California groundwater
 - European Union has adopted the regulation of limiting the amount of Hexavalent Chromium to 3 mg/kg



PPAI CORPORATE RESPONSIBILITY ONLINE Education

28

Trends – Hexavalent Chromium (con't)

- Center for Environmental Health (CEH) has issued numerous NOVs between April and August of 2019 (28 total)
 - Targets leather products – footwear and gloves (based on dermal and inhalation exposure)
 - “MO”:
 - Develops exposure standards they will accept
 - Develops reformulation
 - If no reformulation – more \$ for label-only settlement
 - Monitoring

PPAI CORPORATE RESPONSIBILITY ONLINE Education

29

Trends – Hexavalent Chromium (con't)



- Talcum Powder (aka Talc, talcum, cosmetic talc or magnesium silicate)
 - Allegedly contains arsenic, chromium, lead and lead compounds, asbestos, silica, and crystalline
 - 8 of the 28 NOVs filed 2018 to August 2019, which include Hexavalent Chromium, list Talc containing asbestiform fibers as a chemical known to cause cancer
 - All 8 NOVs were filed on behalf of Maria Elizabeth Romero by Benjamin D. Weston of Agency D&L

PPAI CORPORATE RESPONSIBILITY ONLINE Education

30

Trends – Plastic Packaging



- 257 NOVs filed since January 1, 2019
- Phthalates (DEHP)
- 153 NOVs filed on behalf of Anthony Ferriero by Brodsky & Smith
- 41 NOVs filed on behalf of Ecological Alliance, LLC by Custodio & Dubey, LLP
- Issue: Does "average daily exposure" result in exposure levels requiring a warning?
 - DEHP Safe Harbors
 - 310 ug/day- Cancer
 - 410 ug/day- Reproductive toxicity
- Exposure assessment considered
- Disposable packaging
- Reusable packaging
 - Frequency
 - Duration

31

Trends – Prop 65 Warnings Meet 1st Amendment Rights



- Commercial Speech – limited 1st Amendment protection
- Rational Basis Test:
 - Purely factual
 - Non-contentious
 - Not unjustified/not unduly burdensome
- Loser Argument
 - Acrylamide in coffee
- Some Traction
 - Sugary drinks warnings
 - Roundup (Glyphosate)

32

Trends – 2018 Summary



- 829 Prop 65 Settlements
 - \$35 million in total settlements [avg. \$42,220]
 - \$27 million in attorneys' fees and costs

33

Trends – 2018 Summary (con't)

- Firms
 - Brodsky & Smith
 - 147 settlements
 - \$2.5 million total [avg. \$17,687]
 - \$2.6 million in attorney's fees and costs
 - Chandler
 - 136 settlements
 - \$3.5 million total [avg. \$25,735]
 - \$3.09 million in attorney's fees and costs
 - CEH
 - 56 settlements
 - \$7.3 million total [avg. \$130,357]
 - \$5.1 million in attorney's fees and costs



34

Database

- <https://qima.com/ppai/landing>
- <https://qima.com/ppai/compliance>

Use of prior settlements/consent judgments



- Guidelines only - not binding (not res judicata)

35

Additional Proposition 65 Resources

- OEHHA website: <https://oehha.ca.gov>
 - Statute, regulations, listings, safe harbor numbers, fact sheets.
- Proposition 65 Warnings website: <https://www.p65warnings.ca.gov/>
 - Additional information on listed chemicals, exposure to listed chemicals from products and places, information for businesses.
- Attorney General website: <https://oag.ca.gov/prop65>
 - Enforcement actions, settlements.

36
