

UPDATES TO CALIFORNIA PROPOSITION 65 GUIDELINES

Compliance with California's Proposition 65 is a longstanding issue for fishing tackle manufacturers, distributors and retailers. However, 2016 regulatory changes will require further action by industry members, even those in compliance today. The American Sportfishing Association is dedicated to helping keep our members informed.

IMPORTANT INFORMATION

This document provides some basic information, but you must consult legal counsel to confirm your own compliance and be prepared to respond to any complaints or contact from individuals seeking to file lawsuits (bounty hunters).

OVERVIEW

Proposition 65 requires any person "in the course of doing business" who exposes an individual in California to any *detectible* amount of a chemical "known to the state" to cause cancer or reproductive toxicity to give a "clear and reasonable" warning.

The state currently maintains a list¹ of about 950 chemicals and chemical families that are subject to the provisions of Proposition 65. Under this unique law, if a warning has not been given, the defendant can avoid liability if at trial *the defendant proves* that the exposure is below certain risk-based exposure levels.

Anyone may sue to enforce Proposition 65, as long as the putative plaintiff first gives written notice to the alleged violator and designated public prosecutors, and the public prosecutors fail to commence a civil action within 60 days. Plaintiffs must also execute a "certificate of merit" stating that they have consulted with experts and have a reasonable belief that their claims have merit.

Under Proposition 65, the Attorney General cannot stop a private plaintiff from filing a lawsuit, so there is little to prevent a private plaintiff from forming "a reasonable belief" on the slimmest of evidence.

You must update your warning language and be aware of placement requirements.

NEW WARNING REQUIREMENTS EFFECTIVE AUGUST 30, 2018

Proposition 65 offers a "safe harbor" from liability for products carrying an effective warning. Nearly all Proposition 65 disputes entangling manufacturers and retailers concerns the adequacy of safe harbor warnings. Until recently, an adequate warning could be stated generally. For example:

WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

As explained below, this warning language becomes obsolete on August 30, 2018. Products manufactured on or after that date and sold in California must carry more specific warning language. Technically, this new warning is not required on products manufactured before August 30, 2018, but this distinction may be lost on individuals filing lawsuits (bounty hunters) if they encounter older product on store shelves.

The new warning requirements create additional burdens, although there are alternative methods of compliance. In some cases a full warning is required. In other cases an abbreviated warning is allowed.

With the exception of "on-product" warnings, discussed below, full warnings are required. Warning language on a posted sign, shelf tag or shelf sign, for the consumer product at each point of display of the

¹ Chemicals subject to Proposition 65 warning requirements are listed at <http://oehha.ca.gov/media/downloads/proposition-65//p65single10212016.pdf>

This communication is not legal advice. You should consult legal counsel concerning your compliance, particularly if you have received any notices concerning non-compliance.

product, has three new requirements:

1. You must list the name of one or more of the specific Proposition 65 chemicals that trigger the warning label.
2. You must provide the internet address of the State of California's Proposition 65 website.
3. You must include pictogram to accompany the warning in the form of a black exclamation point in a yellow triangle with a black outline. (Yellow not required if the label does not otherwise include the color yellow.)

RESPONSIBILITIES OF MANUFACTURERS AND RETAILERS

The new regulations potentially provide some relief for retailers by clarifying that the manufacturer, producer, packager, importer, supplier or distributor has the primary responsibility for providing a compliant product warning.

Nevertheless, a retailer can still be held responsible for failure to provide a required warning where the retailer is, or where the retailer has:

- (a) knowingly introduced a listed chemical into the product, or knowingly caused a listed chemical to be created in the product;
- (b) covered, obscured or altered a warning label;
- (c) received a warning notice and materials from the manufacturer or supplier, but sold the product without supplying the warning; or
- (d) has actual knowledge of the potential consumer product exposure requiring the warning, and there is no manufacturer, producer, packager, importer, supplier or distributor of the product who is subject to Proposition 65.

Moreover, a retailer selling a product under its own brand or trademark bears primary responsibility for compliance.

PLACEMENT OF WARNINGS

California has provided some measure of guidance on the placement of warnings. In choosing where to place warnings, manufacturers (or retailers, where appropriate) should assure that warning placement unambiguously provides notice to consumers prior to or at the time of purchase.

Changes to Proposition 65 regulations add specificity to current regulations.

As noted above, while the new regulations do not take effect until August 30, 2018, they will apply to all goods manufactured on or after that date and sold in California.

An effective warning must be provided in one or more of the following places:

1. On a posted sign, shelf tag or shelf sign, for the consumer product, at each point of display of the product.
2. A product label.
3. On the product.

The forgoing requirements are primarily tailored to "brick and mortar" sales. Online sales present a somewhat different situation because the purchase is made remote from the physical product, its packaging or physical display.

For products sold over the internet, manufacturers and retailers will need to prominently display either the full text of the applicable warning or a hyperlink to the full text with the word "WARNING" on the product display page.

THE NEW WARNINGS

Companies should switch to the new warning language as soon as possible.

While new warnings are not required for products manufactured prior to August 30, 2018, bounty hunters are likely to move against all products with "old" warnings once August 30, 2018 comes around.

Therefore, some aggravation may be avoided by affixing new warning labels to old product before August 30, 2018.

Full warnings for exposures to listed carcinogens must contain the words:



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. For more information go to www.P65Warnings.ca.gov

Full warnings for exposures to listed reproductive toxicants must contain the words:



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 birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov

Full warnings for exposure to both listed carcinogen and listed reproductive toxicants must contain the words:



WARNING: This product can expose you to chemicals including [*name of one or more listed 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

Where a consumer product sign, label or shelf tag used to provide a warning includes consumer information, such as directions or ingredient list, in a language other than English, the warning must also be provided in that language in addition to English.

ON PRODUCT ABBREVIATED WARNINGS

An alternative to the full warning language is available for "on-product" warnings, as might be applied on the product or its packaging. The warning must be written in at least 6-point font and be no smaller than the largest font size used for other consumer information provided on the product.



Cancer – www.P65Warnings.ca.gov



Reproductive Harm – www.P65Warnings.ca.gov



Cancer and Reproductive Harm – www.P65Warnings.ca.gov

EXAMPLES

Manufacturer or importer

In order to apply the correct warning, you need to know: (1) which listed chemicals your product or packaging contains; and (2) whether those chemicals present a risk of reproductive toxicity or cancer or both.

Reproductive Harm: Let's say that a product contains chemicals which the State of California only requires a warning for reproductive exposure and one of those chemicals, by way of example, is di-isodecyl phthalate (DIDP). A full text warning would read:



WARNING: This product can expose you to chemicals including di-isodecyl phthalate which are known to the State of California to cause reproductive harm. For more information go to www.P65Warnings.ca.gov

An abbreviated on-product warning would read:



Reproductive Harm—www.P65Warnings.ca.gov

Carcinogenic Harm: If a product contains chemicals which the State of California only requires a warning for carcinogenic exposure and one of those chemicals, by way of example, is di-isononyl phthalate (DINP). A full text warning would read:



WARNING: This product can expose you to chemicals including di-isononyl phthalate which are known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov

An abbreviated on-product warning would read:



Cancer—www.P65Warnings.ca.gov

Reproductive and Carcinogenic Harm: If a product contains chemicals which the State of California requires warnings for both reproductive and carcinogenic exposure, then the warning must identify at least one chemical for each harm unless one chemical presents both types of exposure. For example, if a product contains both di-isodecyl phthalate (DIDP), a reproductive toxicant only, and di-isononyl phthalate (DINP), a cancer toxicant only, a full text warning would read:



WARNING: This product can expose you to chemicals including di-isononyl phthalate, which is known to the State of California to cause cancer, and di-isodecyl phthalate, which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov

Some chemicals, such as di(2-ethylhexyl)phthalate (DEHP), are both a reproductive and cancer toxicant. A product containing such "dual-toxicant" chemicals need not identify other chemicals. A full text warning would read:



WARNING: This product can expose you to chemicals including di(2-ethylhexyl)phthalate, which is 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

Regardless of whether one or multiple chemicals present both types of toxicant exposure, an abbreviated on-product warning would read:



Cancer and Reproductive Harm—www.P65Warnings.ca.gov

Finally, ASA strongly advises that manufacturers and importers should incorporate new warning language as soon as practicable to minimize the risk of future disputes. Goods manufactured on or after the August 30, 2018 effective date as well as online or catalog offers for sale as of the effective date must contain the new warning language.

Retailers:

Even though the new regulations present a liability safe harbor for retailers under certain circumstances, retailers should keep the following in mind:

- Retailers bear primary responsibility if they are the importer or if the goods are sold under the retailer's brand.
- Retailers are responsible if they cover, obscure or alter a warning or if they receive a warning notice and materials from the manufacturer or supplier, but sell the product without supplying the warning.
- Retailers are responsible if they have actual knowledge of the potential consumer product exposure requiring the warning, and there is no manufacturer, producer, packager, importer, supplier or distributor of the product who is subject to Proposition 65.

CONCLUSION

Proposition 65 regulations are complex and the risks of liability are significant. The purpose of this alert is to make ASA members aware of these issues and to encourage members to consult the legal counsel of their choice. This alert is not legal advice, not a compliance guide and not a comprehensive review of Proposition 65 requirements.

For more information, contact ASA President [Mike Nussman](#), 703-519-9691, x252, or Government Affairs Vice President [Scott Gudes](#), x222.