An Orientation to California’s Proposition 65

Also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, the initial purpose of California Proposition 65 was to protect California citizens and the state’s drinking water sources from chemicals known to cause cancer, birth defects or other reproductive harm, and to inform citizens about exposures to such chemicals.

However, the “significant risk level” as determined by the state of California is often so low the effects of Prop 65 are significantly more far-reaching than most Californians likely imagined at the time of passage.

Prop 65 requires businesses to notify Californians via warning labels about significant amounts of chemicals – specified in a list of more than 700, such as lead and cadmium– contained in a company’s products. More importantly, many of the compounds identified on the Prop 65 list are permissible under federal regulations.

Even though the same product can be shipped and received in other states, doing so in California without the proper warnings can expose a company to the assessment of significant penalties. Failing to provide warning notices violates Prop 65 and can result in penalties as high as $2,500 per violation per day. And if the shipped products violate the law, all involved—suppliers, distributors and end buyers—are potentially liable depending on the circumstances.

Even when the entire distribution chain is based outside of California, if even one promotional item failing to meet the restrictions imposed by the law ships to California, all involved—suppliers, promotional consultants and end buyers—are potentially liable under the terms of Prop 65 depending on the circumstances.

While this law has been around for 20 years, private sector enforcement has become more aggressive. Private enforcement is entitled to reasonable attorneys’ fees and up to 25 percent of civil penalties. Since the penalties are per violation per day, there is a significant incentive for private enforcers to find multiple violations over a long period of time. As the history of enforcement demonstrates, it is possible for private enforcers to secure some sizable payments, based solely on attorneys’ fees and the percentage of penalties.

Distributors conducting business in California (even if they are headquartered outside of California) have been threatened with penalties, forced to refuse shipments of products and lost business because their clients refuse to accept products that may be in violation of the law. Additionally, suppliers, particularly those that manufacture ceramic and glassware products, have forfeited thousands of dollars in lost business and have been forced to comply with state guidelines and specifications much more restrictive than other states or those of the Federal government.

What can you do?
Warning labels, properly worded, do work. Changes in the composition of decorating inks to avoid the offending chemicals may be the better choice, however, as no one wants to “brand” products as being potentially hazardous to the end user. Changes to the manufacturing process—i.e. removing lead from lead crystal products—are clearly less realistic.

Frequently Asked Questions

What is Proposition 65?
Also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, California Proposition 65 is a law that imposes requirements for goods made, distributed or sold in the State of California.

Why was it passed?
The initial purpose of Prop 65 was to protect
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California citizens and the state’s drinking water sources from chemicals known to cause cancer, birth defects or other reproductive harm, and to inform citizens about exposures to such chemicals.

The initial purpose of the law seems good for everyone.

Why would I oppose it?
The “significant risk level” as determined by the state of California is often so low, the effects of Prop 65 are significantly more far-reaching than most Californians likely imagined at the time of passage.

Distributors conducting business in California (even if they are headquartered outside of California) have been threatened with penalties, forced to refuse shipments of products and lost business because their clients refuse to accept products that may be in violation of the law. Additionally, suppliers, particularly those that manufacture ceramic and glassware products, have forfeited thousands of dollars in lost business and have been forced to comply with state guidelines and specifications much more restrictive than other states or those of the Federal government.

Why is Prop 65 such a problem?
Prop 65 requires businesses to notify Californians via warning labels about significant amounts of chemicals—specified in a list of more than 700, such as lead and cadmium—contained in a company’s products. More importantly, many of the compounds identified on the Prop 65 list are permissible under federal regulations. Even though the same product can be shipped and received in other states, doing so in California without the proper warnings can expose a company to the assessment of significant penalties. Failing to provide warning notices violates Prop 65 and can result in penalties as high as $2,500 per violation per day. And if the shipped products violate the law, all involved—suppliers, distributors and end users—are potentially liable depending on the circumstances.

What is the best way to handle the warning requirements of Prop 65?
According to the state of California you must provide a warning that appears on a product’s label or other labeling. The term “label” means a display of written, printed or graphic matter upon a product or its immediate container. The term “labeling” means any label or other written, printed or graphic matter affixed to or accompanying a product or its container or wrapper. You should consult legal counsel for specific guidance.

Are any businesses exempt from Proposition 65?
Small businesses with less than 10 employees, governmental agencies and public water systems are exempt from the warning requirement and discharge prohibition of Proposition 65.

How can I find the list of prohibited chemicals under Prop 65?
For information on the Proposition 65 issue, including the list of prohibited chemicals, visit www.oehha.ca.gov/prop65.html.

Is there a specific test lab you would recommend that has experience testing products for Prop 65?
PPAI cannot recommend a specific laboratory but we encourage you to contact the Society of Glass and Ceramic Decorators for a list of member-testing laboratories. Visit www.sgcd.org.

If it was passed in 1986, why did it take 20 years for us to hear about Prop 65?
While this law has been around for 20 years, private sector enforcement has become more aggressive. Individuals in the private sector are attacking mid- and small-sized companies in our industry. There apparently is enough of a financial incentive in just recovering a portion of
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the penalties and attorneys’ fees that some of these private sector “enforcers” feel it is worth their while to pursue these actions.

Private enforcement is entitled to reasonable attorneys’ fees and up to 25 percent of civil penalties. Since the penalties are per violation per day, there is a significant incentive for private enforcers to find multiple violations over a long period of time. As the history of enforcement demonstrates, it is possible for private enforcers to secure some sizable payments, based solely on attorneys’ fees and the percentage of penalties.

I don’t live in California. Why should I care? Prop 65 is a national issue. Even when the entire distribution chain is based outside of California, if even one promotional item failing to meet the restrictions imposed by the law ships to California, all involved—suppliers, promotional consultants and end buyers—are potentially liable under the terms of Prop 65 depending on the circumstances.

Distributors throughout the country have been notified of potential violations, and several have been threatened with penalties or had to settle disputes in court.

What can I do now to protect myself from penalties?
When properly worded, warning labels do work. Changes in the composition of decorating inks to avoid the offending chemicals may be the better choice, however, as no one wants to “brand” products as being potentially hazardous to the end user. Changes to the manufacturing process—i.e. removing lead from lead crystal products—are clearly less realistic.

How can I learn more about Prop 65?
PPAI has made a free presentation available on its website. All industry practitioners are encouraged to view the presentation on-line. Become familiar with case law settlements, judgments and consent decrees.

OEHHA Prop 65 FAQs

Enforcement Reporting
"California state law requires any person suing 'in the public interest' to enforce Proposition 65, 'The Safe Drinking Water and Toxic Enforcement Act of 1986', to notify the Attorney General of the lawsuit and outcome of the case."

- 60 Day Notice List
- Enforcement Reporting

Chemical List

- Current Proposition 65 Chemical List
- Chemicals Under Consideration Listing
- Notices of Intent to List Chemicals

The OEHHA website provides "Notices of Intent to List for chemicals under consideration..."

- Prop 65 List Change Documents

Case Law

- Glassware Food/Beverage Products ("Category A Products")
- Ceramicware Food/Beverage Products ("Category B Products")

Boelter Decision Case No. CGC-05-440811

- Stipulation for Entry of Judgment
- Stipulation and [Proposed] Order RE: Consent Judgment

Prop 65 Abuse

- California’s Attorney General Acknowledges Prop 65 Abuse