

<b>Product Responsibility Best Practices</b>	<b>SUBJECT</b> California Proposition 65- New Warning Requirements	<b>LAST UPDATE</b> July 2018
	<b>APPLIES TO</b> <ul style="list-style-type: none"> <li>Suppliers</li> <li>Distributors</li> </ul> • Decorators	<b>FOCUS ON</b> Prop 65 Warning Label Requirements
	<b>QUICK LINKS</b> <ul style="list-style-type: none"> <li>PPAI Corporate Responsibility: <a href="http://www.ppai.org/inside-ppai/corporate-responsibility/">www.ppai.org/inside-ppai/corporate-responsibility/</a></li> <li>Consumer Product Safety Commission: <a href="http://www.cpsc.gov">www.cpsc.gov</a></li> </ul>	

**Intended for beginner compliance programs**

*Italic grey text indicates a hyperlink listed in the Online Resources section of this document.*

Also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, **California Proposition 65** requires businesses to notify Californians via warning labels about significant amounts of chemicals known to the State of California to **cause cancer, birth defects or other reproductive harm** contained in the products they purchase, in their homes or workplaces, or that are released into the environment.

### Prop 65 Reform

Prop 65 requires businesses to provide a “clear and reasonable warning” before knowingly or intentionally exposing anyone to a listed chemical.

In May 2013, California Governor Jerry Brown issued principles for reform of Proposition 65. These new regulations will become effective on August 30, 2018 and will not apply to existing inventory. The primary burden under these new regulations will fall on suppliers and distributors alike. The main changes focus on:

- The wording
- Timing of the warning
- The application of the warning for internet and catalog sales.

#### Warning Label Wording

- The new warnings must contain the use of the phrase “This product can expose you to...” AND specifically name the chemical that triggers the warning.
  - This must be the full name of the chemical
- The warning must include the corresponding risk of harm
  - Cancer
  - Birth defects and/or reproductive harm
  - Cancer and reproductive harm
- Include a triangular yellow warning symbol with an exclamation point and must be as large as the “Warning”
- Directions to the OEHHA Prop 65 warning website [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)
- The warning must be in languages other than English if those languages are used on the product or packaging.

Warning prior to August 2018:

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

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

Warning Required After August 2018:

**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](http://www.P65Warnings.ca.gov)

**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](http://www.P65Warnings.ca.gov)

**WARNING:** Cancer- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

**WARNING:** Cancer or birth defects - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

Suppliers and distributors can use either the long form or short form warning. If you use the short form warning:

- Eliminates the need to identify the specific chemical that triggers the warning.
- The short form warning must be in a type size no smaller than the largest type size used for other consumer information and in no case in a type size smaller than 6-point type
- If you use the short form warning on the website, you must use the short form warning on the product

#### Internet Warnings

- After August 2018, warnings must be provided to consumers prior to or during purchase
- Internet sellers will be required to provide separate warnings for products sold online, even if the products themselves contain a Prop 65 warning
  - These warnings may be provided via a process that automatically provides the warning to the purchaser prior to or during the purchase of the product

- The warning must be prominently displayed prior to the completion of purchase

### Catalog Warnings

- Warnings must be provided to consumers prior to or during purchase
- Catalog sellers will be required to provide warnings for products sold in a catalog
  - If you use the short form warning on the product, you must use the short form warning on the internet
  - Consider using the new warning now

## Exposure Warning, Not Ban

**A “Warning” Reg.** Proposition 65 applies only to exposures to listed chemicals. It does not ban or restrict the use of any given chemical.

**Safe Harbor Thresholds.** OEHHA has established “safe harbor levels” or levels that trigger the warning label for some, but not all, listed chemicals. Exposures below those levels do not require a warning.

**Exposure Methods.** Exposure is based on average use and can be oral, inhalation, transdermal (through the skin), and/or hand-to-mouth.

**Label Lets Consumers Decide.** The purpose of the warning label is to notify consumers that they are being exposed to chemicals that are known to cause cancer and/or reproductive harm. Consumers can decide on their own if they want to purchase or use the product, but consumers must receive the warning information before making the decision to purchase.

## Environmental Warnings

- If workers or visitors to your California facilities will be exposed to Prop 65 listed chemicals, consider posting a Prop 65 warning in your facility
- You will also want to create a “map”—a floor plan delineating the affected area of the facility.
- The warning should be provided close enough to the source of exposure for the person seeing the warning to determine where and how they may be exposed

## Penalties for Non-Compliance

**Significant Fine Potential.** While a specific product might be shipped to other states without issue, delivery and use in California without the proper warnings can expose a company to the assessment of significant fines and penalties as high as \$2,500 per violation per day.

**Everyone Liable.** All involved—suppliers, distributors, and end buyers—are potentially financially liable depending on the circumstances. This warning applies to downstream customers as well—anyone with an e-commerce portal doing business with California residents is required to provide this warning to them.

**Private “Enforcers.”** While this law has existed for 30-plus years, in the past few years enforcement has become more aggressive. Private enforcers are entitled to receive reasonable attorneys’ fees and up to 25 percent of civil penalties, plus “contributions” to the enforcers’ not-for-profit foundations established for environmental or health awareness.

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 substantial payments, based solely on attorneys’ fees and the percentage of penalties.

We can expect the new warning style to raise questions and concerns. We can expect private enforcers to carefully scrutinize products—particularly e-commerce portals.

## Promotional Products Most Affected

- Drinkware and glassware
- Food products, including alcohol
- Tableware, picnic products
- Costume or children’s jewelry
- Lead crystal awards, vases
- Anything with an electrical cord
- PVC or soft plastic
- Toluene markers
- Carbonless copy paper
- Brass products
- Phthalates, particularly DEHP

Monitor Prop 65 filings for trends and products under scrutiny at [www.oehha.ca.gov/prop65.html](http://www.oehha.ca.gov/prop65.html).

## Options For Dealing With Prop 65

- Provide a “clear and reasonable” warning
  - If products contain listed chemicals, provide a warning:
    - That one or more listed chemicals is present in the product, identifying both the chemical and the exposure risk (cancer and/or reproductive harm)
    - That you have evaluated the exposure and concluded that it exceeds the “no significant risk” level, or
- Don’t sell products that contain chemicals listed by the State of California to be hazardous
- Seek alternative manufacturing and/or decorating methods
- Don’t sell products in California
- Consider arranging indemnities with suppliers
- Seek knowledgeable legal counsel

### Distributor Best Practices:

Become consultants. Work with clients to determine the suitability of a product or service, including where the product will be used and distributed.

Do your homework.

- Ask the customer if the product will or could be distributed in California and tell the supplier
- Ask if the product would be displayed or sold at retail
- Check chemical list published and updated by the OEHHA and can be found at [www.oehha.ca.gov](http://www.oehha.ca.gov)
- Confirm with the supplier that none of the 900+ chemicals are in the product
- Ask for test reports
- LABEL with appropriate Prop 65 warning statement
- Update all catalogs and ecommerce sites to include warnings
- Communicate warning requirements to customers
- Train the team

#### Supplier Best Practices:

- Inventory your products and identify all products that trigger the obligation to warn
  - Check Chemical List published and updated by the OEHHA and can be found at [www.oehha.ca.gov](http://www.oehha.ca.gov)
- Review the testing process
- Test for all 900+ chemicals? Not reasonable
  - Know what chemicals are in the product and test the product if it contains chemicals noted on the OEHHA list
  - Engage a certified toxicologist to review the product to determine appropriate warning language
- LABEL with appropriate Prop 65 warning statement
- Update all catalogs and ecommerce sites to include warnings
- Communicate warning requirements to distributors
- Train the team

#### Record keeping:

- Establish document retention policies
- Organize contracts and test reports by supplier
- Include document destruction policies as well

## No Filing Reports Required

### Online Resources

**PPAI Prop 65 & State Regs Presentation:** <https://onlineeducation.ppai.org/products/psa-required-prop-65-and-state-regulations>

**PPAI Orientation To Prop 65:** <http://www.ppai.org/media/1814/pr-bp-proposition-65.pdf>

**PPAI Responsible Sourcing Frequently Asked Questions:** <http://ppai.org/corporate-responsibility/product-responsibility/product-responsibility-faqs/>

**California Prop 65 Webpage:** [oehha.ca.gov/prop65.html](http://oehha.ca.gov/prop65.html)

After determining whether or not a product requires a warning label, businesses are not required to submit any information about the label, the product or product testing to the State of California. The business issuing the warning is the party to contact for more information about the warning, chemicals involved and the manner the chemicals are present and how exposure may occur.

### **Exemptions**

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

### **List of Chemicals**

The California Office of Environmental Health Hazard Assessment (OEHHA) maintains a list of more than 900 chemicals considered to cause harm, including cadmium, lead, mercury and polychlorinated biphenyls (PCBs). The list can be found online at [www.oehha.ca.gov/prop65.html](http://www.oehha.ca.gov/prop65.html).

Proposition 65 requires the governor to publish the list of chemicals at least annually. Once a new chemical is listed, businesses have **12 months to comply with warning requirements**.

Many of the compounds identified on the Prop 65 list, while permissible under federal regulations, are prohibited or are restricted to lower levels than those imposed by the federal government. So while the same products may be safely shipped and received in other states, doing so in California without the proper warnings carry significant penalties for the “violators.” Where products violate the regulation, all parties involved in the chain of distribution—suppliers, distributors, and end buyers—are potentially financially liable.

Knowledge of these requirements and effective supply chain communication are key to meeting the challenges of Prop 65.

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