

CALIFORNIA PROPOSITION 65 AND CHEMICAL WARNINGS FOR FURNITURE AND BEDDING PRODUCTS

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California Proposition 65 and Chemical Warnings for Furniture and Bedding Products

In the U.S. today, there are a wide range of federal and state regulations intended to reduce consumer exposure to potentially carcinogenic chemicals. But regulations implemented under California's Safe Drinking Water and Toxic Enforcement Act of 1986 (generally referred to as Proposition 65 regulations) are perhaps the most extensive and far reaching of any currently in effect in the U.S. under California's Proposition 65 regulations, almost every business operating within the state is required to warn buyers of the presence of any of nearly 900 chemical substances contained in or emitted by the products that they sell.

The state, as well as a number of consumer advocacy groups, has claimed that posted warnings about chemical content required under Proposition 65 have led to significant reductions in toxic air pollution as well as an increased demand for less-toxic products. However, Proposition 65 allows any private party acting "in the public interest" to take legal action against a business believed to be in violation of the regulations. As a result, companies have paid an estimated \$180 million over the past decade to settle private litigation initiated in connection with purported violations of Proposition 65. Indeed, legal action brought by private parties has become the primary enforcement mechanism for compliance with Proposition 65 regulations.

This article discusses the challenges facing manufacturers, distributors and retailers of furniture products and mattresses in meeting the warning requirements mandated under Proposition 65. The article begins with a brief history of Proposition 65, a summary of the requirements under California law, and a review of public and private enforcement actions undertaken in connection with Proposition

65 regulations. The article then offers a structured approach for assessing the applicability of Proposition 65 warning requirements to a specific product, and presents the key tasks in conducting a thorough Proposition 65 evaluation in such cases.

An Overview of California's Proposition 65

California's Safe Drinking Water and Toxic Enforcement Act was enacted in late 1986 following a direct ballot initiative (Proposition 65) approved by 63 percent of California voters. The overall goals of the Act are to protect drinking water sources from contamination by toxic substances that are linked to cancer, birth defects and other reproductive harms, and to reduce or eliminate consumer exposure to such substances. The Act requires the Governor of the state to publish a list of chemicals that are known to cause cancer or pose other potential health risks to consumers.

The list of chemicals that fall under the provisions of the Act is maintained by the California Office of Environmental Health Hazard Assessment (OEHHA). The list currently has almost 900 individual chemicals, including naturally-occurring chemicals such as lead, nickel and cadmium, as well as synthetic chemicals like phthalates and azo dyes. The list is required to be reviewed and updated at least once a year, and new chemicals can be added to the list as they are identified as potentially carcinogenic or mutagenic. Accordingly, the number of listed chemicals continues to increase.

As enacted into California law, Proposition 65 regulations impose two specific restrictions on businesses relative to listed chemicals. First, it prohibits businesses from knowingly discharging or releasing a listed chemical into drinking water sources, or onto land where such chemicals could pass into a drinking water source. Second, it prohibits businesses from knowingly exposing individuals to



any listed chemicals without first providing a clear and reasonable warning regarding the presence of those chemicals.

Exemptions from Proposition 65 Regulations

Proposition 65 includes a number of exemptions from these restrictions. Businesses with nine or fewer employees are exempt from Proposition regulations, as are federal, state and local government agencies and public water utilities. In addition, Proposition 65 exempts exposure to listed chemicals in the following circumstances:

- *Exposure to listed chemicals that occur naturally in foods*—The regulations exempt exposure to listed chemicals in foods that are “naturally occurring” and that have been reduced to the “lowest level currently feasible.”
- *Exposure that poses “no significant risk” of cancer*—A warning in connection with listed chemicals is not required when a business can demonstrate that exposure results in not more than one excess case of cancer in 100,000 individual exposed over a 70-year lifetime, known as the “no significant risk level” (NSRL).
- *Exposure that produces “no observable reproductive effect” at 1000 times the use level*—A warning regarding listed chemicals is also not required in cases where a business can demonstrate that exposure will be a factor of 1000 less than the level that will produce no observable adverse reproductive effect, known as the “maximum allowable dose level” (MADL).
- *Discharges that do not result in a “significant amount” of a listed chemical entering into a drinking water source*—A warning is not required when a business can demonstrate that a discharge will not

cause a “significant amount” of a listed chemical to enter a drinking water source. A “significant amount” is defined as any detectable amount, unless a business can prove that the discharge does not exceed the NSRL or the MADL for the listed chemical.

Approximately 300 of the nearly 900 listed chemicals have established NSRLs, MADLs, or both. Chemical exposure and discharges to sources of drinking water that are below these so-called “safe harbor” levels are exempt from Proposition 65 regulations. Businesses whose products result in chemical exposure or discharges in excess of safe harbor levels, as well as businesses whose products result in exposure or discharge of listed chemicals without safe harbor limits, must comply with the warning requirement of Proposition 65 regulations.

It is important to note that Proposition 65 regulations regarding exposure or discharge of listed chemicals apply to any business whose products cause exposure to individuals within California. Any business that sells its products in California, even if located outside the state, is subject to Proposition 65 regulations.

Finally, Proposition 65 regulations are independent of other applicable requirements, and compliance with federal chemical use or composition regulations and standards does not automatically result in compliance with Proposition 65 regulations. Therefore, an independent product assessment is required to determine whether exposure or discharge levels of a listed chemical mandate a Proposition 65 warning.

Enforcement of Proposition 65 Regulations

The enforcement of Proposition 65 relies almost entirely on civil litigation brought against businesses



found in violation of its regulations. Lawsuits can be filed by the California Attorney General, by any district attorney in the state, or by city attorneys in cities with a population exceeding 750,000.

Importantly, Proposition 65 also allows private parties “acting in the public interest” to file civil litigation in connection with violations of the regulations. To do so, the party must provide written Notice of Violation to the Attorney General, the district attorney or the city attorney, as well as the business accused of the alleged violation. To reduce the potential for frivolous enforcement actions, private parties must also submit a certificate of merit that substantiates the merits of their claim of violation.

Upon receipt of the Notice, public prosecutors have 60 days in which to initiate their own litigation. Private parties can then proceed with civil litigation only in cases where public prosecutors fail to take action within the 60 day time limit. Businesses which are found by the courts to be in violation of Proposition 65 regulations are subject to civil penalties of up to \$2,500 per violation per day, and may also be ordered to cease those activities leading to the violation.

The California Office of the Attorney General compiles annual summaries of private settlements of Proposition 65 violations. Over the last decade, nearly 2000 settlements and more than \$144.6 million in damages have been paid by California businesses as the result of litigation from aggressive plaintiff’s attorneys against products that have the potential to contain any of the listed chemicals .

Indeed, part of the explanation for the disproportionate number of private actions may be found in the allocation of civil penalties and the potential financial gain for plaintiffs and their attorneys. Under Proposition 65 regulations, 25 percent of any civil penalties paid by businesses for violations are allocated to the party initiating the

litigation. In addition, plaintiffs who bring a successful action are entitled to reimbursement of legal fees and other litigation costs. In a number of instances, plaintiffs threatening Proposition 65 litigation are reportedly demanding and winning settlements from businesses before trial, bypassing altogether the allocation formula established for civil penalties.

California has recently taken steps to reduce the adverse financial impact on businesses from unsubstantiated legal action under Proposition 65 regulations. In October 2013, California Governor Edmund G. Brown Jr. signed into law changes that provide businesses in receipt of a written Notice of Violation for failing to post required warnings up to 14 days to comply before being subject to civil litigation and penalties. Separately, in an effort to better protect the financial and environmental interest of the state and its citizens, California now requires all pre-trial Proposition 65 litigation settlements to be approved by the state’s Office of the Attorney General. Further reforms to curb litigation abuses related to Proposition 65 regulations are anticipated.

Proposition 65-Listed Chemicals Found in Furniture Products

Furniture products today generally contain a number of different chemicals, including heavy metals, biocidal agents, phthalates and flame retardants. In addition, some chemical substances found in furniture products, such as volatile organic compounds (VOCs) and formaldehyde, can be released from furniture products over time.

A significant number of chemicals used in furniture are regulated in jurisdictions around the world, including the European Union and the U.S., and are also listed as chemicals of concern under California’s Proposition 65 regulations.

Although furniture products are not expressly singled out in Proposition 65 regulations, UL’s research of Proposition 65 private settlements has identified



a number of furniture product types and listed chemicals that have been previously subject to civil litigation in California (see Table 1).

Table 1: Examples of furniture products and listed chemicals subject to previous Proposition 65 settlements

Furniture Product Type	Listed Chemical
Vinyl furniture	Di(2-ethylhexyl)phthalate
Vinyl/pool and beach furniture	Di(2-ethylhexyl)phthalate
Vinyl covered seats	Di(2-ethylhexyl)phthalate
Vinyl/PVC chairs	Di(2-ethylhexyl)phthalate
Storage furniture	Di(2-ethylhexyl)phthalate
Storage furniture	Lead
Seat coverings	Lead
Folding chairs	Lead
Shelving	Lead
Picture frames	Lead
Faux leather furniture	Lead and lead compounds
Upholstered chairs with foam pads	Tris(1,3-dichloro-2-propyl) phosphate (TDCPP)
Foam-cushioned pads for infants and children to lie on	Tris(1,3-dichloro-2-propyl) phosphate (TDCPP)
Upholstered furniture including benches	Tris(1,3-dichloro-2-propyl) phosphate (TDCPP)

While not exhaustive, these examples illustrate the extent of enforcement actions brought against furniture manufacturers for violations of Proposition 65 regulations, as well as potential legal exposure facing furniture manufacturers.

Conducting an Assessment of Compliance with Proposition 65 Regulations

Because of the relative complexity of Proposition 65 regulations, assessing their applicability to specific furniture products is equally complex. Such an assessment requires in-depth knowledge of chemistry and the toxicology of specific chemicals. In instances where the use of listed chemicals is essential for a given product, consulting a lawyer may also help to evaluate options for minimizing a manufacturer's exposure to litigation.

At a minimum, a thorough evaluation of a furniture product for compliance with Proposition 65 regulations includes the following steps:

1. **Develop a list of chemicals found in the product or created through the use of the product**—This step involves a review of material safety data sheets (MSDSs) provided by suppliers to identify listed chemicals that may be associated with a specific product or material. Requiring suppliers to disclose listed chemicals under Proposition 65 may help to reduce the time required for this review. It is also advisable to identify chemicals that have been the targets of prior Proposition 65 litigation.
2. **Conduct testing to measure potential individual exposure to listed chemicals**—In cases where Proposition 65-listed chemicals have been identified in a product, an exposure assessment is essential to determine the total extent of the chemical exposure. However, chemical exposure can result from ingestion, absorption through the skin, or inhalation. Therefore, the specific test or test required to measure exposure will depend on how a furniture product is used and the anticipated routes of chemical exposure.



3. *Compare exposure to safe harbor limits, if they exist*—Exposure testing data should then be compared with Proposition 65 NSRL and MADL safe harbor limits, if such limits exist for the chemical in question. If testing results fall below safe harbor limits for all identified chemicals, then labeling and/or warnings are generally not required. However, consultation with qualified legal counsel is still advised.

In cases where testing of identified chemicals has demonstrated exposure levels above Proposition 65 safe harbor limits, or where safe harbor limits for chemicals have not been identified, a manufacturer must generally provide the required Proposition 65 warning. Alternatively, in cases where safe harbor chemical exposure limits have not been established, a manufacturer may elect to conduct further testing to determine a level of exposure that complies with the essential safety requirements of Proposition 65 regulations. However, conducting a so-called “safe use determination” can be costly and time-consuming.

Conclusion

California Proposition 65 chemical exposure regulations impose a complex set of compliance requirements on most businesses, including furniture product and bedding manufacturers. Further, private civil litigation has dramatically increased the possible cost of non-compliance with Proposition 65 regulations. Although some regulatory reforms are being considered, the potential impact of Proposition 65 litigation requires manufacturers to assess the chemical content and emissions from their products, and actively evaluate options for product reformulation whenever practical.

UL is a global independent safety science company offering a comprehensive suite of testing and certification services for manufacturers of commercial and residential furniture products. UL experts are knowledgeable about California

Proposition 65 regulations, as well as every aspect of furniture and furnishings safety and performance, including performance and mechanical safety, electrical safety, chemical emissions, fire safety and environmental considerations. This broad capability makes UL a single source for all furniture testing and certification needs, and a trusted resource for furniture manufacturers around the world.

For additional information about California Proposition 65 requirements and UL's furniture testing and certification services, visit www.ul.com/furniture.

References:

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- “Naturally occurring” is defined in the CA Code of Regulations, Title 27, Section 25501.
- “Proposition 65 No Significant Risk Levels (NSRLs) for Carcinogens and Maximum Allowable Dose Levels (MADLs) for Chemicals Causing Reproductive Toxicity,” California Office of Environmental Health Hazard Assessment. Web. 25 February 2014. <http://www.oehha.ca.gov/prop65/pdf/safeharboro81513.pdf>.
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