
REPOSITRAK PROPOSITION 65 OVERVIEW MEMORANDUM

A. Background:

Proposition 65, also known as the “Safe Drinking Water and Toxic Enforcement Act,” was enacted in November 1986, when California voters approved the referendum by a 63-37 percent margin.

In turn, proposition 65 requires businesses to provide warnings to California consumers about exposures to chemicals that cause cancer or birth defects and reproductive harm. These exposures can come from buildings, facilities, equipment, and/or consumer goods. The underlying policy is that, by requiring warnings of any such exposures, California consumers will be better equipped to make informed decisions about the places they visit and the products they buy. Proposition 65 is administered by the Office of Environmental Health Hazard Assessment (“OEHHA”), a part of the California Environmental Protection Agency.

The discussion below will focus on Proposition 65’s application to consumer food products.

B. Proposition 65 Chemicals:

In most cases, OEHHA determines which chemicals meet the scientific and legal requirements for placement on the Proposition 65 list. This list, which must be updated at least once a year, has grown to include approximately 900 chemicals since it was first published in 1987. The current version of the list of regulated chemicals is available at the following link: www.oehha.ca.gov/proposition-65/proposition-65-list.

In addition to maintaining the list of regulated chemicals, OEHHA also publishes maximum permissible exposure levels above which written warnings are required. These include No Significant Risk Levels (“NSRLs”) for Carcinogens, and Maximum Allowable Dose Levels (“MADLs”) for Chemicals Causing Reproductive Toxicity. The Proposition 65 NSRLs and MADLs can be found at the following link: www.oehha.ca.gov/media/downloads/proposition-65/chemicals/safeharbor081513_0.pdf

In cases where companies are sued for failing to provide the required warnings, the Courts are permitted to alter an established NSRL or MADL for the parties to the litigation, provided that sound considerations of public health support the finding of an alternative level. In these cases, the issue is most often litigated extensively with multiple experts opining on both sides before an acceptable alternative is agreed to.

C. Proposition 65 Warnings (Current Law, operative until August 30, 2018):

Under the current law, if the use of a food product sold to California consumers will expose them a Proposition 65 chemical at levels exceeding the NSRLs and/or MADLs, then the food product label must contain the following warning:

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

See [27 CCR § 25603.3](#). As an alternative to requiring a warning on the product label, the regulations also permit the warning to be communicated “through shelf labeling, signs, menus, or a combination thereof.” See [27 CCR § 25603.1](#). Whether on a product label or a shelf tag, the warnings must be “prominently placed upon a product's label or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.” *Id.* The regulations also create provisions for providing warnings for internet sales to California consumers.

D. Proposition 65 Warnings (Revised Law, effective August 30, 2018):

Here too, under the upcoming revisions to Proposition 65, effective August 30, 2018, if the use of a food product sold to California consumers will expose them a Proposition 65 chemical at levels exceeding the NSRLs and/or MADLs, then the food product label must contain the following warning:

WARNING: Consuming 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 and/or (as appropriate) [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/food.

See [27 CCR § 25607.2](#). As an alternative to requiring a warning on the product label, the regulations also permit the warning to be communicated “on a posted sign, shelf tag, or shelf sign, for the consumer product **at each point of display of the product.**” See [27 CCR § 25602](#) (emphasis supplied). Here too, whether on a product label or a shelf tag, the warnings “must be prominently displayed on a label, labeling, or sign, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use. See [27 CCR § 25601](#). The regulations also create provisions for providing warnings for internet sales to California consumers.

Notably, the revised warnings do not say that the product actually “contains” a chemical. Rather, the revised warnings clarify that “Consuming 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 or reproductive harm.”

Under the regulations, a “Consumer product exposure” is defined as “an exposure that results from a person's acquisition, purchase, storage, consumption, **or any reasonably foreseeable use of a consumer product**, including consumption of a food.” See [27 CCR § 25600.1](#) (emphasis supplied).

Thus, a Proposition 65 lawyer would likely argue, under the existing and revised regulation, that if it is reasonably foreseeable that a food (such as hash browns) will be fried by consumers prior to consumption, and the act of frying can actually create a Proposition 65 chemical at levels which exceed the applicable NSRLs and/or MADLs, then a warning should be required.

E. Failure to provide Proposition 65 Warnings:

Proposition 65 was designed, initially, to be enforced by the California Attorney General Office and/or any district attorney or city attorney for cities whose population exceeds 750,000. Thus, in the event a consumer food product is discovered to contain chemicals at levels which exceed the permissible NSRLs and/or MADLs, and the consumer product does not have a warning, then these attorneys could bring a lawsuit against the offending companies. Penalties for violating Proposition 65 can be as high as \$2,500 per violation per day.

Because of the vast number of potential exposures and violations, however, it is unreasonable to expect that government attorneys would have the resources or time to adequately enforce Proposition 65. As a result, consumer advocacy groups, private citizens and law firms are allowed to enforce Proposition 65 on the government's behalf.

Thus, these groups are constantly assessing consumer food products without Proposition 65 warnings to see if they contain Proposition 65 chemicals which exceed the permissible NSRLs and/or MADLs. In the event any such consumer food products are discovered to contain chemicals at levels which exceed the permissible NSRLs and/or MADLs, then these groups will often initiate proceedings against the company that manufactured the product, or retailer which is selling the product, or both.

F. 60-Day Notices and Litigation:

In the circumstance detailed above, where a food product without a warning is discovered to contain a chemical above the applicable NSRL and/or MADL, the entity (*i.e.*, a private citizen, consumer advocacy group or law firm) enforcing Proposition 65 will serve a 60-Day Notice on the alleged violator. This entity will also contemporaneously serve a notice of the violation on the State Attorney General, and all district and city attorneys capable of enforcing Proposition 65. In the event none of the governmental attorneys initiate enforcement proceedings against the alleged violator within 60-days, then the entity that provided the notice of alleged violation will be permitted to file a private lawsuit against the alleged violator.

Although, once a lawsuit is filed, the alleged violator will typically have multiple defenses that are available, because of the complexity of the scientific issues underlying Proposition 65 litigation, most parties will settle, and agree to alternative levels and/or providing warnings, and to pay civil penalties and attorneys' fees. The civil penalties and attorneys' fees can be substantial. In 2016, for instance, the total amount of all proposition 65 settlements was \$30,150,111.

G. Recommended Actions:

Proposition 65 60-Day notices have recently been filed for a wide-range of food products including gingerbread cookies (acrylamide), nutrition bars and shakes (lead and cadmium), baby food (acrylamide), potato chips (acrylamide), black olives (acrylamide), natural juices (lead), seasoning

(lead), chocolate (lead and cadmium) bagels (acrylamide), and clams (lead). What this means is that there are likely very few food products that are likely immune from receiving a 60-Day notice.

Suppliers:

As a result, food manufacturers should continuously stay abreast of new Proposition 65 notices to ensure that the types of food products they are manufacturing are not being targeted. Manufacturers should also consider testing their products against the standards established under proposition 65 to ensure they are compliant. If not, they will require a warning.

Retailers:

In turn, food retailers should also continuously stay abreast of new Proposition 65 notices to ensure that the types of food products they are selling are not being targeted. Retailers should also send notices to their suppliers inquiring about whether the products they are purchasing may contain Proposition 65 chemicals about the established NSRLs and/or MADLs and, if so, whether they require warnings. Each of these inquiries and responses should, of course, be appropriately and carefully managed and documented.