

# What Every Business Needs to Know About Prop 65

*Buchalter and Exponent*

## Presenters



**Anne Marie Ellis**  
*Buchalter*  
aellis@buchalter.com  
(949) 224-6223



**Michael A. Preciado**  
*Buchalter*  
mpreciado@buchalter.com  
(949) 760-1121



**Renee Kalmes**  
*Exponent*  
rkalmes@exponent.com  
(510) 268-5007

## Agenda

- History of Prop. 65, scope, governing bodies
- How to determine chemicals of concern and conduct an exposure analysis; upcoming changes
- Brick and mortar exposure warnings
- How Prop. 65 is enforced, and what to do if you receive a Notice of Violation

## Important

Recent email from OEHHA

- *“The new regulations do not determine when a warning is required, they provide guidance for businesses when they have decided to provide a warning for a given exposure to a listed chemical!”*



# The History of Proposition 65

## Administered by OEHHA - part of CalEPA

Ballot initiative that was passed in 1986

Determines whether chemicals meet scientific and legal requirements for list

Enforced by California AG

The screenshot shows the top portion of the Proposition 65 website. At the top left is the CA.GOV logo. In the center is the Proposition 65 logo with the tagline "Your right to know!" and a warning triangle icon. At the top right is the OEHHA logo with the text "SCIENCE FOR A HEALTHY CALIFORNIA". Below these is a dark green navigation bar with a home icon and links for "About", "Listed Chemicals", "Fact Sheets", "Products & Places", "For Businesses", and "Contact Us". Underneath the navigation bar is a search bar with the placeholder text "Search for Chemicals, Types of Products, Places, Keywords" and a magnifying glass icon. Below the search bar are three dropdown menus labeled "Listed Chemicals", "Products", and "Places", each with a "- Choose -" option.

## The list of chemicals

🔍

**Listed Chemicals**

- Choose - ▼

**Products**

- Choose - ▼

**Places**

- Choose - ▼

STATE OF CALIFORNIA  
 ENVIRONMENTAL PROTECTION AGENCY  
 OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT  
 SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986

CHEMICALS KNOWN TO THE STATE TO CAUSE CANCER OR REPRODUCTIVE TOXICITY  
 May 25, 2018

The Safe Drinking Water and Toxic Enforcement Act of 1986 requires that the Governor revise and republish at least once per year the list of chemicals known to the State to cause cancer or reproductive toxicity. The identification number indicated in the following list is the Chemical Abstracts Service (CAS) Registry Number. No CAS number is given when several substances are presented as a single listing. The date refers to the initial appearance of the chemical on the list. For easy reference, chemicals which are shown underlined are newly added. Chemicals or endpoints shown in ~~strikeout~~ were placed on the Proposition 65 list on the date noted, and have subsequently been removed.

Chemical	Type of Toxicity	CAS No.	Date Listed
A-alpha-C (2-Amino-9H-pyrido [2,3-b]indole)	Cancer	26148-68-5	January 1, 1990
Abiraterone acetate	developmental, female, male	154229-18-2	April 8, 2016
Acetaldehyde	Cancer	75-07-0	April 1, 1988
Acetamide	cancer	60-35-5	January 1, 1990
Acetazolamide	Developmental	59-66-5	August 20, 1999
Acetochlor	Cancer	34256-82-1	January 1, 1989
Acetohydroxamic acid	Developmental	546-88-3	April 1, 1990
2-Acetylaminofluorene	Cancer	53-96-3	July 1, 1987
<del>Acetaminophen</del>	<del>Cancer</del>	<del>60-32-8</del>	<del>January 1, 1990</del>

## Wide range of chemicals

- Additives in pesticides;
- Household products, food, drugs, dyes, solvents, used in manufacturing and construction;
- Byproducts of chemical processes.
- Lead in surface coatings/paint and materials;
- Phthalates in soft plastics (BBP, DBP, DEhP, DIDP, DINP, DnHP);
- BPA in hard plastics.



## Products



Alcoholic Beverages



Diesel Engine Exhaust



Food



Furniture Products



Passenger and Off-Highway Vehicles



Petroleum Products



Recreational Vessel



Wood Dust

## Places



Amusement Parks



Dental Offices



Designated Smoking Areas



Enclosed Parking Facilities



Hotels



Restaurants



Service Stations



Vehicle Repair Facilities

**Does Prop. 65 apply to my  
products?**

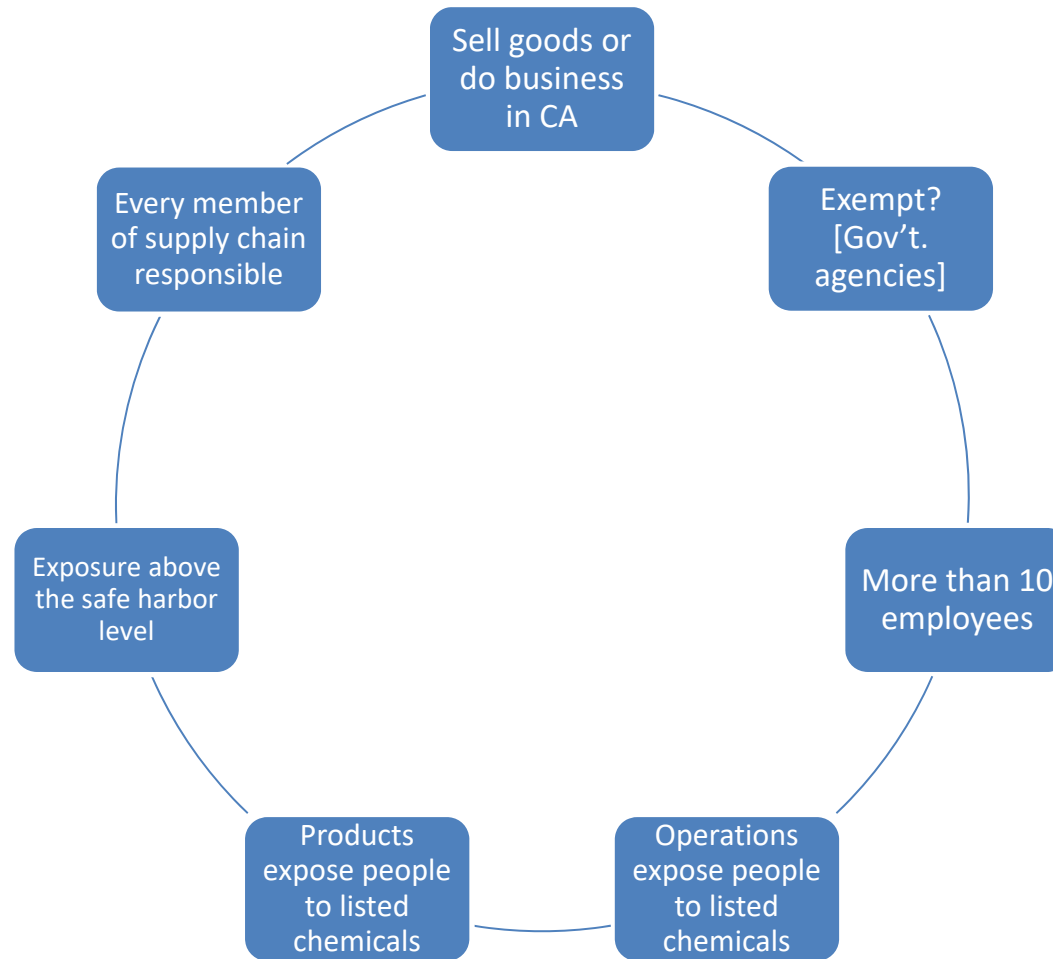
## Other issues

### **Business out of state?**

- As long as products cause exposure to people in CA;
- No facility warning signs if out of state.

### **Federal Regulations?**

- Independent of federal composition requirements- tied to exposure levels vs amount of chemical the product contains.



## How do I know if Prop. 65 applies?

- Do I have to test?
- No- neither Prop. 65 nor the changes *require* testing. But you should assess your products for high risk chemicals listed above;
- You must know what is in your products and potential exposure routes.



## Practical Advice

- Gather material data safety sheets / product information / common usage;
- Keep track of the amount of sales into CA;
- Document when products were manufactured (i.e. after 8/30/18);
- Accurately track your warnings to downstream retailers;
- Consider indemnification agreements.

# Safe Harbor Level Exemption from Warning

RENEE KALMES

## What is a Prop 65 Safe Harbor Level?

- A level of EXPOSURE to a listed chemical that does not require a warning
  - no significant risk level (NSRL) for carcinogens
  - maximum allowable dose level (MADL) for chemicals that cause reproductive toxicity
- OEHHA has established SHLs for approximately 300 chemicals
- SHLs are in units of micrograms/day (ug/day)
  - NOT Content such as parts per million (ppm) or %
    - parts per million ( ppm)



## But aren't there also existing composition limits?

- Yes. Many settlement reformulation limits have established de facto composition limits for ease of implementation
  - Only for a FEW chemicals and they are product specific
  - Laboratory testing cannot tell you if you are below a SHL – only if you are below a certain content concentration
- Lead-
  - SHL = 0.5 ug/day
  - Settlements values
    - surface coatings (90 parts per million)
    - Lead- substrates (300 parts per million)
- Phthalates-
  - SHL = range from 8 to 2200 ug/day
  - Default settlement value
    - 1,000 parts per million (0.1%)

## How can I evaluate if I have a chemical above a Safe Harbor Level

- Get as much information from supplier as you can
- Prioritize high risk chemicals and products
- Conduct targeted sampling of products
  - Is it there ? (i.e., useful for metals and phthalates)
  - Does its presence create an exposure to user ?
    - How much gets dislodged, emitted



# Is exposure testing useful?

- YES, it can be in certain instances.
- Requires evaluation of how your product is used, handled
  - But this does NOT need to be complicated and costly
  - Has been used by plaintiffs as well as defendants
- OEHHA has granted Safe Use Determinations for products based on exposure testing for several products
- Laboratories usually do not conduct this type of testing
- Requires toxicologist or exposure assessor to conduct and evaluate the data



## Proposition 65 Compliance Strategies

- **Demonstrate chemical is below Safe Harbor Level** – however...
  - Requires that you know your products/materials/suppliers
  - Requires well implemented supplier/vendor program
    - Chemical testing with supplier understood criteria
    - Documentation program
    - Internal checks/auditing – off the shelf testing
  - You may still be served with a 60-day notice but you will be prepared
  - Regardless of the potential for Prop 65 litigation, some just want to know the answer and have the documentation.

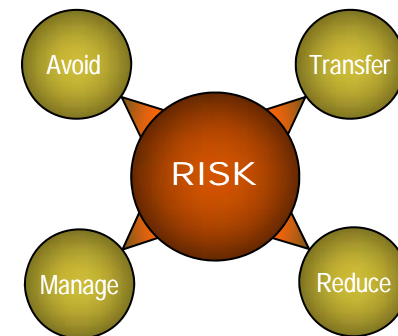
## Proposition 65 Compliance Strategies

- **WARN** – however....
  - Costly
  - Not reasonable in some situations
  - Branding issues/competitor products
  - Some retailers do not want Proposition 65 labeled products
  - Over- warning issue
  - Unlikely to be served with a 60-day notice but ...
    - Requires a well managed labeling program
    - Be ready for customers inquires/questions, aggressive public interest groups
    - Be ready for plaintiffs to look for inaccurate labels



# Case Study – Expanding Retail into California

- Identified **high priority** products and chemicals of interest
- Identified **gaps in knowledge** in chemical use for products
- Provided **supplier program guidance** to ensure they have the relevant Proposition 65 chemical specific compliance requirements
- Developed Proposition 65-appropriate **testing procedures** to supplement existing testing procedures
- Identified products that may be best handled through **labeling** of products or additional testing
- **In-store verification** of labels and testing



# August 2018 New Warnings

## Big Changes!

- Modified warnings;
- Assign primary responsibility to suppliers;
- Transmission of warnings;
- E-commerce warnings, catalogs.

Use OEHHA's safe harbor warnings- deemed "clear and reasonable"

Existing court-approved settlements/judgments are grandfathered in- must cover company and specific product

August 30, 2018

Applies to products manufactured *after* August 30, 2018

Yellow exclamation point, hyperlink to website and standard vs. short form warning, one chemical for each endpoint



The screenshot displays the website for Proposition 65 warnings. At the top, there are logos for CA.GOV, PROPOSITION 65 (with the tagline 'Your right to know!'), and OEHHA (Office of Environmental Health Hazard Assessment, 'SCIENCE FOR A HEALTHY CALIFORNIA'). Below the logos is a navigation menu with links: Home, About, Listed Chemicals, Fact Sheets, Products & Places, For Businesses, and Contact Us. The main content area is titled 'New Proposition 65 Warnings' and includes a breadcrumb trail: Home > For Businesses > New Proposition 65 Warnings. The page content is organized into sections: 'What is Proposition 65?' (explaining the 1986 initiative), 'What Are the Most Significant Changes to the Proposition 65 Warnings For Consumer Products?' (discussing 2016 and 2018 regulations), and a list of required warning elements. A sidebar on the right contains a search bar, 'Quick Links' (Frequently Asked Questions, Law & Regulations, Recent Amendments to the Warning Regulations, Fact Sheets, Glossary), 'Related Websites' (Office of Environmental Health Hazard Assessment, Proposition 65 Technical Pages), and 'Most Recent Fact Sheets'. Social media icons for Facebook, Twitter, YouTube, and Email are also present.

www.prop65.com

# Fact Sheets

**CA.GOV** **PROPOSITION 65** *Your right to know!* **OEHHHA** SCIENCE FOR A HEALTHY CALIFORNIA

Home | Fact Sheets | Lead and Lead Compounds

## Lead and Lead Compounds

**Why am I being warned about potential exposure to lead and lead compounds?**

- Lead is on the Proposition 65 list because it can cause birth defects or other reproductive harm. Exposure to lead during pregnancy can affect brain development and cause learning and behavior problems for the child. Exposure to lead can harm the reproductive system of men and women.
- Lead and lead compounds also are on the Proposition 65 list because they can cause cancer. Exposure to lead and lead compounds may increase cancer risk.
- Proposition 65 requires businesses to determine if they must provide a warning about exposures to listed chemicals.

**What is lead?**

Lead is a metal that is found in nature and used in many industries and products. Over the past 40 years, US laws and regulations have removed or limited the allowable level of lead in certain products, including gasoline, paint, and water pipes and plumbing fixtures.

**How does exposure to lead and lead compounds occur?**

Lead is found in:

**Search**  
Search for Chemicals, Types of Products, Places, Keywords

**Quick Links**

- Frequently Asked Questions
- Law & Regulations
- Recent Amendments to the Warning Regulations
- Fact Sheets
- Glossary

**Related Websites**

- Office of Environmental Health Hazard Assessment
- Proposition 65 Technical Pages

**Most Recent Fact Sheets**

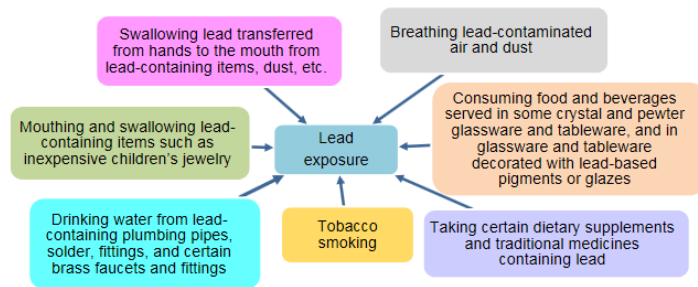
# Fact Sheets

## How does exposure to lead and lead compounds occur?

Lead is found in:

- Older interior and exterior house paint, paint chips, and paint dust, which can be present inside homes built before 1978, and in the soil surrounding the exteriors of homes. The US has banned the use of lead in house paint since 1978.
- Many consumer products, including:
  - ▶ Some ceramic dishes and pottery and some pewter and crystal glassware.
  - ▶ Some baby bibs, purses, garden hoses, and other products made of vinyl or imitation leather.
  - ▶ Some toys, white oil paints, costume jewelry, traditional cosmetics (such as kohl, kajal, al-kahal, or surma), and hair dyes.
  - ▶ Some brass faucets and fittings.
  - ▶ Lead-acid batteries used in motorized equipment and vehicles such as cars, trucks, motorcycles, and boats.
  - ▶ Lead fishing sinkers and curtain weights.
- Some candies and spices from Mexico and Asia, some balsamic vinegars, some brightly colored traditional remedies such as Azarcon and Greta, and some dietary supplements.
- Drinking water delivered through lead-containing plumbing pipes, solder, fittings, and certain brass faucets and fittings.
- Tobacco smoke.
- Certain job sites and hobby areas, such as some construction sites and metal-working areas.

## Some ways you can be exposed to lead and lead compounds:



- During pregnancy, lead can pass from the mother to the baby.

## How can I reduce my exposure to lead and lead compounds?

↑

☑

### Most Recent Fact Sheets

- [Foods](#)
- [Recreational Vessels](#)
- [Furniture Products](#)
- [Frequently Asked Questions Proposition 65 and Glyphosate](#)
- [Glyphosate](#)
- [Amusement Parks](#)
- [Enclosed Parking Facilities](#)
- [Dental Offices](#)
- [Hotels and Other Lodging Establishments](#)
- [Electronic Cigarettes \(E-Cigarettes\)](#)

✉

### Sign-up for Email Updates

**Email \***

OEHHA is subject to the California Public Records Act and other laws that require the release of certain information upon request. If you sign up for a listserve, please be aware that your name and e-mail may be provided to third parties. By signing up you are waiving any right to privacy you may have in the information you provide.

I understand \*

Signup

# Standard Warning

## Cancer and Reproductive Harm

- ✓ Fill in for a chemical known to be a carcinogen
- ✓ Fill in for a chemical known to be a reproductive toxin
- ✓ Delete one if inapplicable



**WARNING:** This product can expose you to chemicals including lead and DEHP, which are 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](http://www.P65Warnings.ca.gov).

# Short Form Warning

## Cancer and Reproductive Harm

- ✓ Fill in for a chemical known to be a carcinogen
- ✓ Fill in for a chemical known to be a reproductive toxin
- ✓ Delete one if inapplicable



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

## Specific Requirements

### **Standard Warning**

- At least *one* chemical for each toxicological endpoint.

### **Short Form Warning**

- Only need toxicological endpoint.

### **Yellow Warning Symbol**

- Must be printed in yellow if yellow used elsewhere, otherwise black and white.

## Specific Requirements, cont'd.

### **Other Languages**

- If product instructions / warnings in language other than English, Prop 65 warning must be in those languages.

### **Size**

- Short form - at least 6 pt. type,
- Standard - at least as large as other consumer warnings on label.

# Labels and In-Store Warnings

## Product Labels

- Either standard or short form.

## In-Store Point of Display Warnings or Shelf Tags

- Standard warning.





## Catalog

- Warning on product
- Provide warning in a manner that *clearly associates the* warning with the product being purchased
- Short form label = short form catalog warning

## Internet

- Warning on product
- Provide a warning or a clearly marked hyperlink using the word “**WARNING**” on product display page
- *Prior* to completing internet purchase
- Short form label = short form website warning

# Internet Warning, e.g. Target

## Warning in Online Product Description

**Material:** Nylon

**Dimensions (Overall):** 40 inches (L) x 5.25 inches (W)

**Weight:** 2 pounds

**Sporting Goods Item:** Fitness belts

**Targeted Muscle Area:** Back

**Product Size:** Medium

**TCIN:** 52481374

**UPC:** 009283588847

**Item Number (DPCI):** 082-02-2134

California Residents: [view Proposition 65 warning](#)

[Report incorrect product information](#)

show less

## Links to Prop 65 Warning Page

### California Proposition 65

[Target](#) / [California Proposition 65](#)

#### WARNING

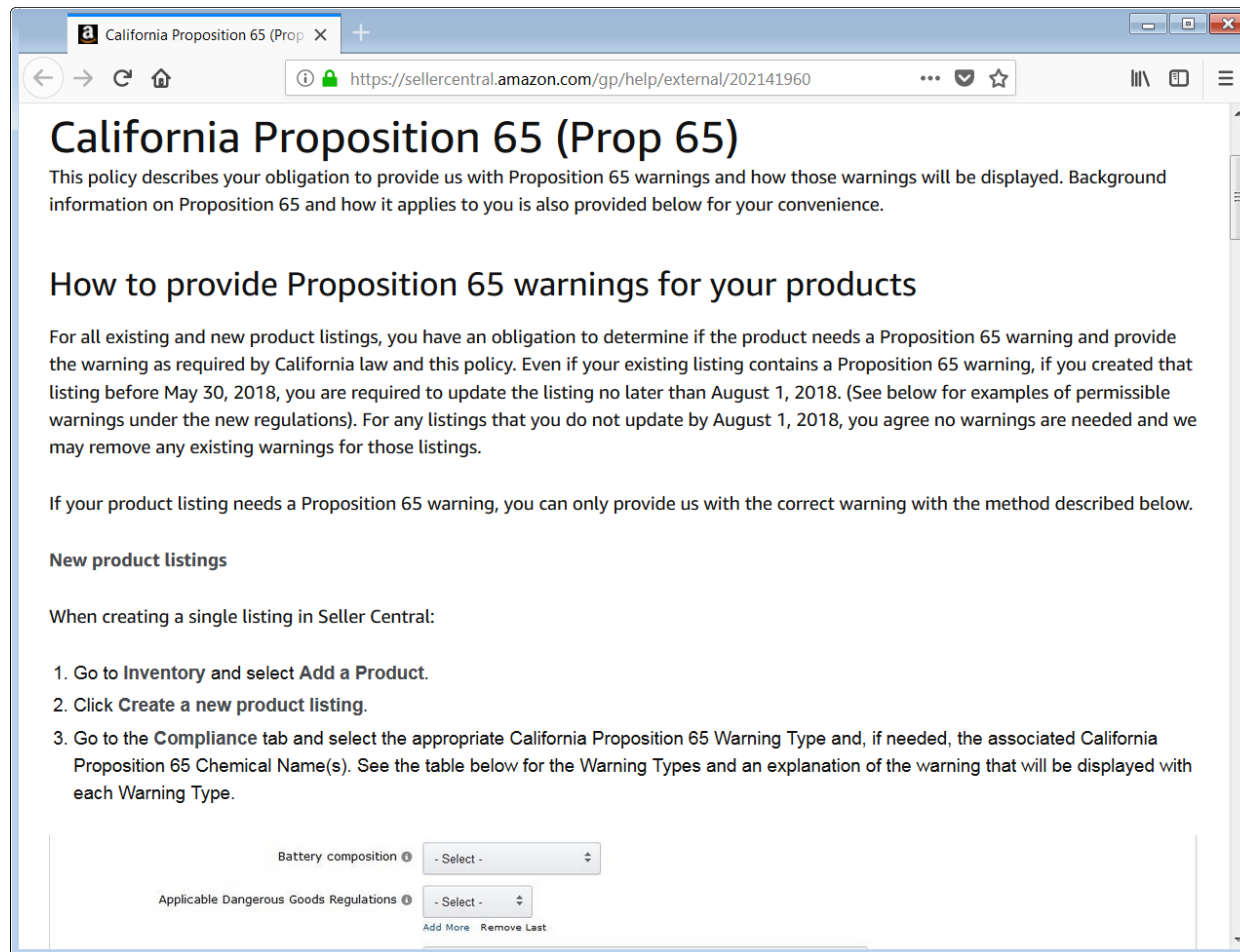
This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

Attention California residents: California's Proposition 65 entitles California consumers to special warnings for products that contain chemicals known to the State of California to cause cancer and birth defects or other reproductive harm if those products expose consumers to such chemicals above certain threshold levels. We know you're concerned about product safety, and Target takes all necessary steps to comply with all applicable safety and health requirements.

On Target.com, we provide a Prop 65 link under Other Info for each item that requires the Prop 65 warning. **If a Prop 65 link does not appear in the Other Info section for the product you wish to purchase, the supplier of the product has indicated that it does not require the Prop 65 warning.**

Note: This product is labeled in compliance with the prior regulations. This warning language will not meet the Safe Harbor warning standard come August 30.

# Internet Sales, e.g. Amazon



The screenshot shows a web browser window with the address bar displaying <https://sellercentral.amazon.com/gp/help/external/202141960>. The page title is "California Proposition 65 (Prop 65)".

## California Proposition 65 (Prop 65)

This policy describes your obligation to provide us with Proposition 65 warnings and how those warnings will be displayed. Background information on Proposition 65 and how it applies to you is also provided below for your convenience.

### How to provide Proposition 65 warnings for your products

For all existing and new product listings, you have an obligation to determine if the product needs a Proposition 65 warning and provide the warning as required by California law and this policy. Even if your existing listing contains a Proposition 65 warning, if you created that listing before May 30, 2018, you are required to update the listing no later than August 1, 2018. (See below for examples of permissible warnings under the new regulations). For any listings that you do not update by August 1, 2018, you agree no warnings are needed and we may remove any existing warnings for those listings.

If your product listing needs a Proposition 65 warning, you can only provide us with the correct warning with the method described below.

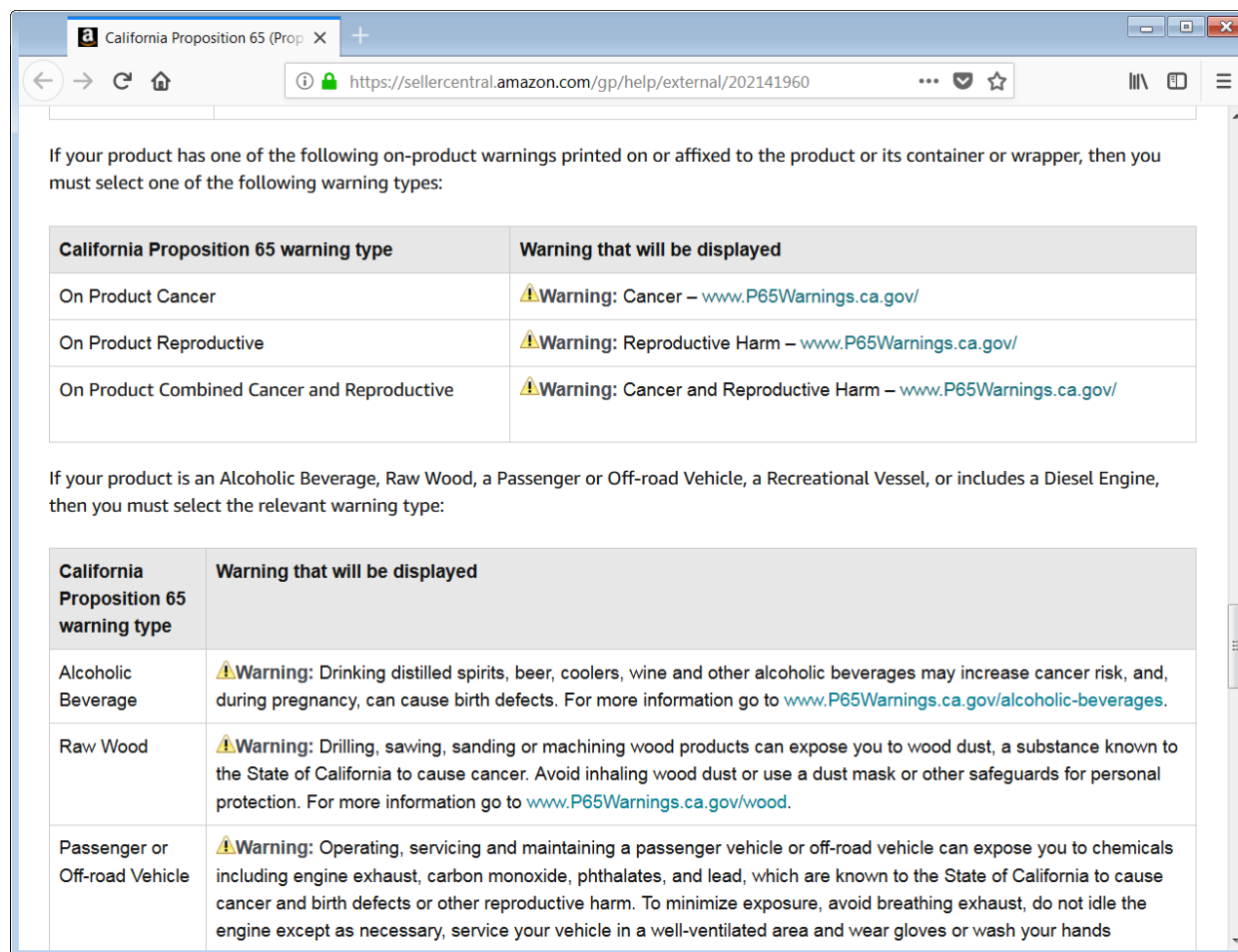
#### New product listings

When creating a single listing in Seller Central:

1. Go to **Inventory** and select **Add a Product**.
2. Click **Create a new product listing**.
3. Go to the **Compliance** tab and select the appropriate California Proposition 65 Warning Type and, if needed, the associated California Proposition 65 Chemical Name(s). See the table below for the Warning Types and an explanation of the warning that will be displayed with each Warning Type.

At the bottom of the page, there are two dropdown menus: "Battery composition" and "Applicable Dangerous Goods Regulations", both currently set to "- Select -". Below these are the links "Add More" and "Remove Last".

# Internet Sales, e.g. Amazon



California Proposition 65 (Prop X)

https://sellercentral.amazon.com/gp/help/external/202141960

If your product has one of the following on-product warnings printed on or affixed to the product or its container or wrapper, then you must select one of the following warning types:

California Proposition 65 warning type	Warning that will be displayed
On Product Cancer	⚠️Warning: Cancer – <a href="http://www.P65Warnings.ca.gov/">www.P65Warnings.ca.gov/</a>
On Product Reproductive	⚠️Warning: Reproductive Harm – <a href="http://www.P65Warnings.ca.gov/">www.P65Warnings.ca.gov/</a>
On Product Combined Cancer and Reproductive	⚠️Warning: Cancer and Reproductive Harm – <a href="http://www.P65Warnings.ca.gov/">www.P65Warnings.ca.gov/</a>

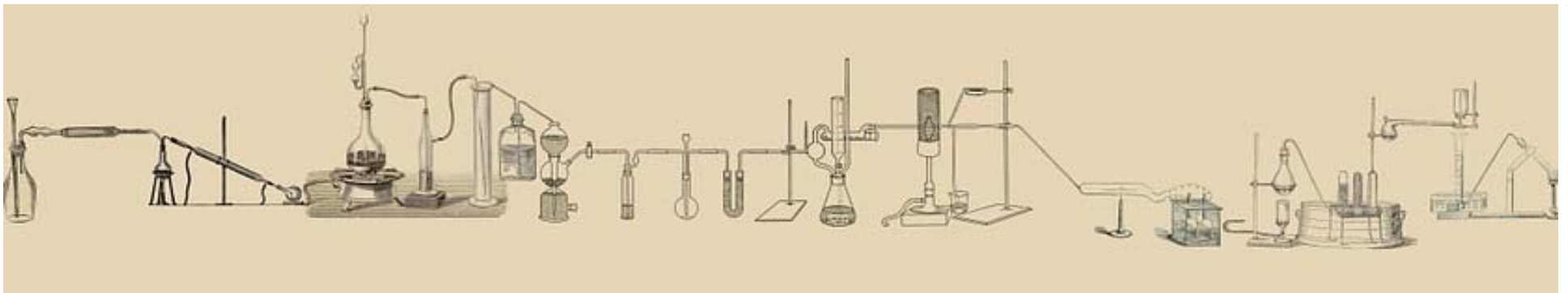
If your product is an Alcoholic Beverage, Raw Wood, a Passenger or Off-road Vehicle, a Recreational Vessel, or includes a Diesel Engine, then you must select the relevant warning type:

California Proposition 65 warning type	Warning that will be displayed
Alcoholic Beverage	⚠️Warning: Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy, can cause birth defects. For more information go to <a href="http://www.P65Warnings.ca.gov/alcoholic-beverages">www.P65Warnings.ca.gov/alcoholic-beverages</a> .
Raw Wood	⚠️Warning: Drilling, sawing, sanding or machining wood products can expose you to wood dust, a substance known to the State of California to cause cancer. Avoid inhaling wood dust or use a dust mask or other safeguards for personal protection. For more information go to <a href="http://www.P65Warnings.ca.gov/wood">www.P65Warnings.ca.gov/wood</a> .
Passenger or Off-road Vehicle	⚠️Warning: Operating, servicing and maintaining a passenger vehicle or off-road vehicle can expose you to chemicals including engine exhaust, carbon monoxide, phthalates, and lead, which are known to the State of California to cause cancer and birth defects or other reproductive harm. To minimize exposure, avoid breathing exhaust, do not idle the engine except as necessary, service your vehicle in a well-ventilated area and wear gloves or wash your hands

# Allocation of Responsibility

## Duty to provide warnings

- Manufacturer / producer
  - Packager
  - Importer
  - Supplier
  - Distributor
- Affix warning to the product or provide written notice to authorized agent for retailer



## Written notice

Must:

- State that a warning is required
- Include the name, description or identifying information for the product;
- Include all necessary warning materials

Business providing notice must obtain confirmation of receipt of notice, electronically or in writing. Set up an email address to track.



## Providing notice to retailers

- Within 6 months during the first year  
\*February 28, 2019\* and then annually;
- Additional notice within 90 days when a new or different chemical endpoint is included;
- Retailer must provide notice within 5 business days of when it has actual knowledge of potential exposure.

# Brick & Mortar Warnings

Michael Preciado

# Environmental Exposure

## Methods of Transmission

- Warning sign posted at all public entrances
  - minimum 73-point font
- Notice by mail or electronically
- Notice by publication

## Content

- WARNING
- Symbol
- Statutory Magic Words
  - “Entering this area can expose you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm, including [ X and X], from [source]. For more information go to [www.P65Warnings .ca.gov](http://www.P65Warnings.ca.gov).”



## Occupational Exposure

- Warning must comply with all information, training, and labeling requirements of the federal Hazard Communication Standard and California Hazard Communication Standard - or the Pesticides Worker Safety Requirements;
- Additional Safe Harbor warning may be provided.



# Restaurants

## Methods of Transmission    Content

### – Entrance Sign

- 8 ½ x 11 | 28-point font

### – POS Sign

- 5 x 5 | 20-point font

### – Menu

- consistent with font size of general menu items

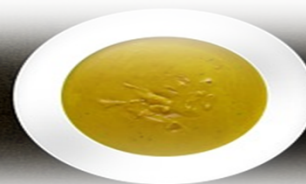
### – Language

- English + Additional

### – WARNING

### – Statutory Magic Words

- “Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which are 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/restaurant](http://www.P65Warnings.ca.gov/restaurant).”



# Dental Care

## Methods of Transmission    Content

- Warning sign posted at all public entrances
  - or within each office where exposure is likely to occur
  - 5 x 5 sign | 20-point font.
- Informed Consent.
  - WARNING
  - Statutory Magic Words
    - “Those procedures can include sedation with nitrous oxide, root canals, placement or removal of crowns, bridges, and restorations such as mercury-containing fillings and use of dental appliances. Consult your dental care provider about these exposures and which materials are appropriate for your treatment.”



# Parking Facilities

## Methods of Transmission

- Warning sign posted at all public entrances
  - 20 x 20 sign | 72-point font.
- Language
  - English + Additional

## Content

- WARNING
- New Symbol
- Statutory Magic Words
  - “Breathing the air in this parking garage can expose you to chemicals including carbon monoxide and gasoline or diesel engine exhaust...”



# Amusement Parks

## Methods of Transmission

- Warning sign posted at all public entrances:
  - 72-point font.
- Language:
  - English + Additional
- Must still comply with other warnings
  - re: consumer products, alcoholic beverages, food, and parking garages.

## Content

- WARNING
- New Symbol
- Statutory Magic Words
  - “Some areas or features in this amusement park can expose you to chemicals including [x], which [are/is] known to the State of California to caused cancer . . .”





# Petroleum Operations

## Methods of Transmission

- Must comply with Environmental Exposure Standard.

## Content

- WARNING
- New Symbol
- Statutory Magic Words
  - “Crude oil, gasoline, diesel fuel, and other petroleum products can expose you to chemicals including toluene and benzene, which are known. . .”



# Service Stations & Repair Facilities

## Methods of Transmission

- Service Station
  - Warning sign posted at each gas pump
  - 22-point font enclosed in a box.
- Repair Facility
  - Warning sign posted at all public entrances
  - 32-point font enclosed in a box.
- Language
  - English + Additional

## Content

- WARNING
- New Symbol
- Statutory Magic Words
  - “Breathing the air in this area or skin contact with petroleum products can expose you to chemicals including benzene, motor vehicle exhaust and carbon monoxide. . .”



# Designated Smoking Areas

## Methods of Transmission

- Warning sign posted at entrance to and within the smoking area
  - 22-point font enclosed in a box.



## Content

- WARNING
- New Symbol
- Statutory Magic Words
  - “Breathing the air in this smoking area can expose you to chemicals including tobacco smoke and nicotine. . .”

# Hotel Exposure

## Methods of Transmission

- Warning sign posted at registration desk
  - 22-point font
- Electronically | Hard Copy
- Language
  - English + Additional
- Must still comply with other warnings
  - re: designated smoking areas, consumer products, alcoholic beverages, food, and parking garages.

## Content

- WARNING
- New Symbol
- Statutory Magic Words?



# Cannabis Industry

## Prop 65 Chemicals

- “Marijuana smoke” has been listed as a Prop 65 chemical known to cause cancer since 2009.
- Edible items, as well as raw cannabis, may contain Prop-65 listed pesticides, fungicides, and insecticides such as myclobutanil, carbaryl, and malathion.

## Content

- Statutory Magic Words
  - “Entering this area can expose you to chemicals known to the State of California to cause cancer, including arsenic and benzene, from breathing in air contaminated with marijuana smoke. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”



# What To Expect If You Get A 60-Day Notice Of Violation

## 60 Day Notice

### Prop 65 Enforcers:

- Attorney General
- District Attorney
- City Attorney
- Citizens, groups or “bounty hunters”

### Private Party Enforcement

- 60 days notice of intent to sue
- If no enforcement- lawsuit can proceed

### Statute of Limitations

- 1 year for statutory penalty violations (1 year prior to date of notice or complaint)

## 60 DAY NOTICE OF VIOLATION

*SENT IN COMPLIANCE WITH CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)*

DATE: May 26, 2017

To: President or CEO – R.C. Bigelow, Inc.  
President or CEO – Bigelow Tea  
President or CEO – Amazon.com, Inc.  
California Attorney General’s Office;  
District Attorney’s Office for 58 counties;  
City Attorney’s for San Francisco, San Diego, San Jose, and Los Angeles.

From: Mr. Floyd Sherrod

- I. My name is Floyd Sherrod. I am a citizen of the State of California acting in the interest of the general public. I seek to promote awareness of exposures to toxic chemicals in products sold in California and, if possible, to improve human health by reducing hazardous substances contained in such items. This Notice is provided to the parties listed above pursuant to California Health & Safety Code §25249.6 et seq. (“Proposition 65”). The violations covered by this Notice consist of the product exposures, routes of exposures, and types of harm potentially resulting from exposure to the toxic chemical (“listed chemical”) identified below as follows:

<b>Product Exposure:</b>	<b>See Section VII. Exhibit A</b>
<b>Listed Chemical:</b>	<b>Lead</b>
<b>Routes of Exposure:</b>	<b>Ingestion</b>
<b>Types of Harm:</b>	<b>Birth Defects and Other Reproductive Harm</b>

### II. NATURE OF ALLEGED VIOLATION (PRODUCT EXPOSURE)

The specific type of product that is causing consumer exposures in violation of Proposition 65, and that is covered by this Notice, is listed under “Product Category/Type” in Exhibit A in Section VII below. All products within the type covered by this Notice shall be referred to hereinafter as the “products.”

The sale of these products in the state of California dating at least as far back as March 20, 2017 are subject to this notice. As a result, exposures to the listed chemical from the use of the products have been occurring without clear and reasonable warnings as required by Proposition 65. Without proper warnings regarding the toxic effects of



## Certificate of Merit

- Has been in effect since 2001
- Applies to private enforcers
- Attest that enforcer has consulted with someone with relevant expertise and there is a reasonable and meritorious basis for action
- Must attach “factual information” to back up certificate of merit-filed with Cal. AG

### CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7(d)

I, Parker A. Smith, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged that the party identified in the notice has violated Health and Safety Code §25249.6 by failing to provide clear and reasonable warnings;
2. I am the attorney for the noticing party;
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of this action;
4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute;
5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including information identified in Health and Safety Code §25249.7(h)(2) (i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons).

Dated: May 26, 2017



Parker A. Smith



## What do I do next?

- Consult with defense attorney / contact noticing party
- Insurance or indemnity
- Collect testing and data from plaintiff
- Collect internal testing and sales data
- Consider lab testing and exposure assessment
- Consider settlement / consent judgment
- Stop selling product / instruct retailers
- Reformulate or warn

## Settlements vs. Consent Judgment

### Settlement

- Settlement agreement must be submitted to AG's office
- Release on own behalf-not public
- Cannot prevent future suits
- Publicly available

### Court approval

- If filed in court, the court must approve the settlement – binding
- Served on AG
- Can prevent future suits
- Violation = contempt
- Publicly available

## Penalties and Fines

- \$2,500 per day, per violation
- Injunctive relief
- Public prosecutor- unfair business practice claim = more penalties!
- Legal fees
- Attorney's fees- 25% of penalty collected
- 2017 - court settlements totaled **\$25,767,500**
- Attorney's fees - **\$19,486,382**

**QUESTIONS/  
COMMENTS?**

Thank you for your time and attention today!



**Anne Marie Ellis**  
Buchalter

[aellis@buchalter.com](mailto:aellis@buchalter.com)

(949) 224-6223



**Michael A. Preciado**  
Buchalter

[mpreciado@buchalter.com](mailto:mpreciado@buchalter.com)

(949) 760-1121



**Renee Kalmes**  
Exponent

[rkalmes@exponent.com](mailto:rkalmes@exponent.com)

(510) 268-5007

thank you!