

California's Prop. 65 – Unwinding the Riddle

Association of Food Industries

Overview

- What is Prop. 65?
- Overview of Common Claims (foods & chemicals)
- How do you (technically) comply with Prop. 65?
- How can you manage relationships with suppliers and retailers to limit Prop. 65 claims?

What is CA's Proposition 65?

- A law in California that requires all products sold in the State (including food) to have a warning label if:
 - Use/consumption of the products
 - Causes an exposure to chemicals on a list maintained by the State.
- Prop. 65 List contains 900 + chemicals, and includes lead, acrylamide, mercury, cadmium and arsenic.

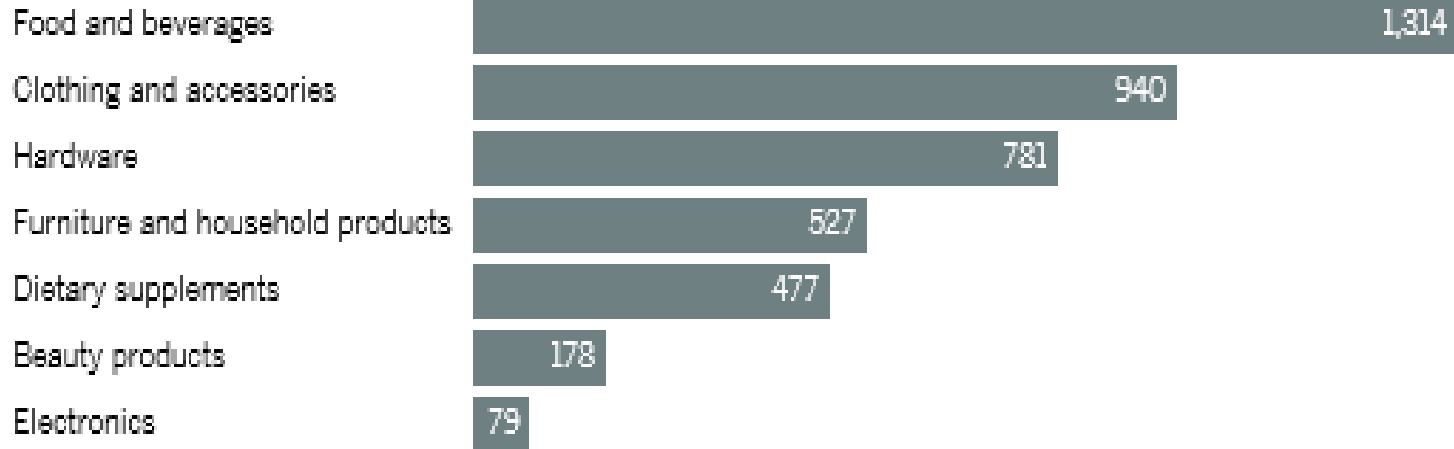
Example of Warning Label for Food

WARNING : Consuming this product can expose you to chemical[s] including [name one or more chemicals] which is [are] known to the State of California to cause [cancer and/or birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov/food

Proposition 65 Is Costly

- Citizen prosecutors have filed more than 30,000 violation notices since Prop 65 went into effect in 1988.
- Labeling requirements expected to cost companies between \$410 million and \$818 million over the next decade.
- Average settlement roughly around \$30,000; goes up every year.
- Majority of settlement amount is attorneys' fees.

Proposition 65 Claims: 2012 to 2016



Some cases involved multiple types of products

California Office of the Attorney General, Times research

Proposition 65 In Practice for Foods

➤ Certain Chemicals Targeted:

- Acrylamide
- Lead
- Mercury
- Cadmium
- Arsenic

Proposition 65 In Practice for Foods

- Certain foods targeted that contain those chemicals:
 - Crispy browned snack foods (chips, cookies, crackers, tortillas, nut products, olives)
 - Fruits and Vegetables (fresh, dried and canned)
 - Seaweed
 - Seafood
 - Chocolate
 - Pretzels

Proposition 65 In Practice for Foods

› How to Comply with Prop. 65:

- Test Product: Is chemical in product?
- Consumption: How much of this food is typically consumed?
- Get food science expert if necessary for above.
- Use warning label if chemical is high enough, in light of typical consumption, to exceed published threshold value by State of California.
- *This is a technical science exercise driven by testing of product and analyzing typical consumption of product.*

Practical Side of Compliance

- It can be hard to undertake this exercise for EVERY product you have.
- Monitor Prop. 65 claims for “hot products” and cross-reference with your products that have high sales volume in CA.
- Becomes a task of managing your risk and deciding where you want to spend the \$\$\$.

Proposition 65 In Practice for Foods

- Prop. 65 Claims Challenge Lack of Warning Label:
 1. Plaintiffs test “typical” foods that contain common chemicals (with NO warning labels)
 2. If foods contain chemical(s), Plaintiffs initiate law suit process by sending “60 Day Notice of Intent to Sue”
 3. Companies respond by negotiating settlement or “pushing back” (i.e. my food product does not contain enough of the chemical to require a warning)

Managing Relationships

- Retailers are requiring Prop. 65 certifications from their suppliers, and indemnification from/defense of claims.
- This liability typically flows up the supply chain and stops at the top, often with importers.
- It is difficult to get foreign companies to indemnify you for Prop. 65 claims – issue of business relationships.

Managing Relationships

› What to do?

- Require testing of “common Prop. 65 products” from your foreign suppliers (lead, cadmium, acrylamide).
- Conduct “spot testing” yourself if you sell products in CA that are being targeted by Prop. 65 plaintiffs.
- Consider a warning label if your products have high levels of common chemicals.
- Consider a “deeper dive” on a consumption analysis if you don’t want to warn and your products have higher levels of common Prop. 65 chemicals.

In Conclusion

- Competitive advantage in CA for having a Prop. 65 strategy.
- Retailers are requiring Prop. 65 compliance.
- Strategy = Understanding whether your products are common targets, test/warn if necessary, and have a plan if you receive a claim.

QUESTIONS?