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## Chemicals

# Practitioner Insights: California Crowdsources Chemical Rules: What Could Go Wrong?

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**E**nvironmental and product regulations, traditionally a science-obsessed and labyrinthine area of the law dominated by experts in administrative agencies, will receive an internet-age overhaul to make them more accessible to the masses as new California laws take shape.

The internet became a ubiquitous part of our lives in 1994. Now nearly 25 years later, we are watching long-standing and seemingly immutable institutions disappear and be replaced with internet-based tools and forums (e.g., newspapers replaced by social media, taxicabs replaced by Uber, retail stores replaced by Amazon.com, political parties replaced by crowd-sourced candidates).

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Regulation, particularly environmental and product regulation, will soon follow this de-institutionalizing and decentralizing trend and move from the province of experts in administrative agencies to crowdsourcing and apps such as Yelp as new regulations in California and the federal government take shape in 2017.

These new regulations will have far-reaching consequences for businesses that sell products in California—a vital market for most every company with a nationwide reach.

Specifically, California's plaintiff-friendly Prop 65 regulations, which require businesses with 10 or more employees to provide warnings before exposing individuals to any chemical the state has determined may cause cancer or reproductive harm (also called chemicals of concern) will become more arduous in 2018 and open the door for yet more litigation. In 2015 alone, businesses paid more than \$26 million to settle Prop 65 cases and an additional \$17.8 million in attorneys' fees.

The Prop 65 overhaul dovetails with updated regulations under California's Safer Consumer Products law, which regulates how products are made and what choices manufacturers make along the entire global supply chain, and a major update to the federal Toxic Substances Control Act (TSCA), which will give the Environmental Protection Agency sweeping powers to identify and regulate harmful chemicals contained within products. Neither California regulatory disclosure scheme will be pre-empted by TSCA.

Yet both will bring a new level of web-based disclosure of information about products sold in California

that heretofore had been private information or information shared only with regulators, not the general public.

**California Prop 65 Goes Online** Prop 65, officially called the Safe Drinking Water and Toxic Enforcement Act of 1986 but more commonly known by the number of the ballot initiative that made it law, requires businesses to provide warnings before exposing individuals to any chemical the state has determined may cause cancer or reproductive harm unless the business can show that the exposure poses no significant health risk. The state maintains a list of more than 900 chemicals that, as of January 2017, includes chemicals present in everything from household goods to building materials to alcoholic beverages.

Prop 65 does not restrict the use of harmful chemicals; it merely requires businesses to provide warnings. Businesses that fail to provide adequate warnings can be sued by either the state attorney general, city or district attorneys in cities with more than 750,000 people, or as is most likely, private individuals, who can get 25 percent of any settlement in addition to attorneys' fees. As a result, Prop 65 warnings are ubiquitous throughout the state—appearing on products and buildings alike—as businesses attempt to shield themselves from expensive and time-consuming lawsuits.

**New Prop 65 Website** At the beginning of 2016, the State of California's Office of Environmental Health Hazard Assessment (OEHHA) adopted a new regulation to give itself authority to create and operate a website to provide information about the Prop 65 labels the public sees on everyday products and in everyday locations such as restaurants, gas stations and airports. Section 25205 allows OEHHA to post information about pathways of exposure to chemicals in products and strategies to avoid exposure, while also providing a disclaimer that OEHHA cannot ensure the accuracy of anything it posts. It creates a petition process for manufacturers, sellers and the public to seek correction of misinformation posted by the state.

On Friday, April 1, 2016, the website went live.

The first set of chemicals and products included in this initial website are:

Benzene

Chlorinated Tris

Chlorinated Tris in Furniture Products

Formaldehyde

Formaldehyde in Furniture Products

Mercury and Mercury Compounds

Mercury in Dental Amalgam Fillings

Nitrous Oxide Use in Dental Care

In future, products that carry a Prop 65 warning label can expect to receive requests from the state for additional information to post on this website. Among the data that OEHHA can request from the manufacturer are the concentrations of chemicals in components, anticipated routes of exposure, estimated levels of exposure and testing and analysis.

The Prop 65 warnings website provides plenty of background information both on harmful chemicals and some of the products that contain them. Under the

new regulations, any consumer who sees a Prop 65 warning on a product will be directed to a website that outlines all the harmful effects of that product.

Here's one example related to alcoholic beverages: "Alcoholic beverages (when associated with alcohol abuse) and ethanol in alcoholic beverages are on the Proposition 65 list because they can cause cancer. Consuming alcoholic beverages increases the risk of cancers of the mouth, throat, voice box, esophagus, liver, breast, colon and rectum."

In addition to this graphic language, the website provides information on recommended alcohol consumption—up to one drink a day for women and up to two drinks a day for men—and says reducing drinking reduces your risk of cancer.

**Calculus of Providing a Prop 65 Warning** Starting Aug. 30, 2018, the content of the Prop 65 warning will change in two key ways: (1) Businesses will have to identify at least one potentially harmful substance that the product contains; and (2) The warning must include a reference to California's Prop 65 Warnings website: [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

The current Prop 65 warnings allow businesses to provide a general notice warning of exposure to a harmful chemical. The new warnings must be more specific, and the corresponding website will provide detailed information on the many chemicals the state of California deems harmful.

Here is a comparison of the current and new warnings:

**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.

Current warnings:

New warnings:

 **WARNING:** This product can expose you to arsenic, a chemical known to the State of California to cause cancer. For more information go to: [www.P65Warnings.ca.gov/](http://www.P65Warnings.ca.gov/)

Besides language or content changes, the business calculus of when to provide a warning will change in the post-2018 world. Under the current rules, even if your product did not contain a Prop 65-listed chemical or there was no risk of exposure requiring the place-

ment of a Prop 65 warning on the product, many companies would place the warning on the product since it was the only 100 percent foolproof prophylactic to being on the receiving end of a bounty-hunting plaintiff's attorney's 60-day notice to sue—euphemistically known as the shakedown notice.

Even if you have analytical chemistry tests and toxicologist assessments that show no risk of exposure, the shakedown notice starts a game of chicken with the plaintiff. Even if you have tests that show no risk of exposure, and are confident that you will win in court, the choice to the manufacturer becomes one of paying your defense counsel to prove it or paying off the plaintiff to avoid paying your defense counsel to prove it.

Since “proving it” costs can quickly escalate into the six figures, business decisions—not legal decisions—are made and settlements are reached quickly and typically in the range of \$20,000 to \$40,000, since this represents a fraction of the cost to defend yourself in court.

This entire calculation is now upended. In the post-2018 world, placing the warning is no longer 100 percent foolproof or risk free. Subjective decisions will have to be made about which chemical to name in the warning—opening up a new area of potential litigation and bounty-hunting opportunities.

Also, placing a warning will now put your product on a website where all sorts of negative information about its potential toxicity may be placed, opening the manufacturer up to data requests from the government to supply information for this website and perhaps putting an onus on the manufacturer to monitor and hire experts to correct any misinformation that others post.

For many manufacturers, doing the upfront work of testing and analyzing whether their products sold in California exceed the exposure threshold requiring a warning label will make more sense now that the warning label is no longer risk free.

**Safer State Consumer Products Regulations** In 2017, the Department of Toxic Substance Control has finally begun to identify the “priority products” that contain potentially harmful chemicals that it will regu-

late under its vast new authority to examine product design and the global supply chain of products sold in the state of California. The first two selected are (1) children's foam-padded sleeping products containing tris(1,3-dichloro-2-propyl) phosphate or TDCPP; and (2) spray polyurethane foam (SPF) systems containing unreacted diisocyanates. But the following categories of products are next in line for selection:

Beauty, personal care and hygiene products

Building products, including painting products, adhesives, sealants and flooring

Household, office furniture and furnishings

Cleaning products

Clothing

Fishing and angling equipment

Office machinery

Once selected, the manufacturer or seller of the priority product must prepare an “alternatives analysis” or “AA.” An AA is a brand-new paperwork beast. It is part large California Environmental Quality Act/National Environmental Policy Act-type document, part hazard assessment, part life-cycle assessment and more. It has the potential to make a CEQA document look like a haiku in comparison.

But more critically, it takes a heretofore entirely private process of product development, design and global supply chain relationships and brings it into the open, asking the online public to comment and provide suggestions on the material selection and manufacturing processes, and requires manufacturers to analyze those suggestions in a public forum. Nongovernmental organizations, plaintiffs' attorneys and competitors, as well as the general public will have equal access and input.

Together, these two California regulations mark a new era in environmental and product regulation. And their websites will be a new social media playground for crowdsourcing regulations and battles of plaintiffs and defense counsel alike.