



Education • Networking
SCHC
Stewardship

Society for Chemical Hazard Communication





McKenna Long
& Aldridge^{LLP}



PROPOSITION 65 UPDATE 2015

Stanley W. Landfair
McKenna Long & Aldridge LLP
San Francisco

mckennalong.com




PROPOSITION 65 UPDATE
THE LAW AND WHERE TO FIND IT; GETTING ON THE SAME PAGE

THE ACT
Safe Drinking Water & Toxic Enforcement Act of 1986
Cal. Health & Safety Code §§ 25249.5 *et seq.*

IMPLEMENTING REGULATIONS
Cal. Code Regs., Title 27, §§ 25102, 25903
Cal. Code Regs., Title 11, §§ 3000-3204

OTHER RESOURCES
<http://www.oehha.ca.gov/prop65.html> (OEHHA Website)
<http://oag.ca.gov/prop65> (Attorney General Website)

2



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
THE LAW AND WHERE TO FIND IT; GETTING ON THE SAME PAGE

The List: chemicals “known to the state” to cause cancer or reproductive toxicity; ≈ 900 chemicals.
Cal. Health & Safety Code §§ 25249.8

The Warning Requirement: makes it unlawful to “expose” a person “knowingly and willfully” to a substance on the list without first providing a “clear and reasonable” warning
Cal. Health & Safety Code §§ 25249.6

The Discharge Prohibition: makes it unlawful to discharge a chemical on the list into a “source of drinking” water or into or onto land that may pass into drinking water”
Cal. Health & Safety Code §§ 25249.5

3




McKenna Long
& Aldridge^{LLP}

PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

SUMMARY OF SIGNIFICANT DEVELOPMENTS

1. **PROPOSAL OF NEW REGULATIONS FOR “CLEAR AND REASONABLE WARNINGS”**
2. **LISTING OF NEW CHEMICALS UNDER THE STATE’S QUALIFIED EXPERT LISTING MECHANISM**
3. **SIGNIFICANT COURT DECISIONS REGARDING LISTINGS AND WARNING REQUIREMENTS**
4. **STATUS OF SAFE USE DETERMINATIONS**

4



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

1. PROPOSAL OF NEW REGULATIONS FOR “CLEAR AND REASONABLE WARNINGS”

BACKGROUND

- ❖ Part of Gov. Brown’s 3-Point Proposition 65 “Reform Program”
- ❖ May 7, 2013
- ❖ Eliminate Shakedown Lawsuits with Controls on Attorney’s Fees and Penalties
- ❖ Eliminate Over-Warning for Reproductive Toxicity
- ❖ Eliminate Meaningless Warnings

5



McKenna Long
& Aldridge^{LLP}



PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

1. PROPOSAL OF NEW REGULATIONS FOR “CLEAR AND REASONABLE WARNINGS”

IMPLEMENTATION

- ❖ July 30, 2013 Public Workshop (10)
- ❖ April 14, 2014 Pre-Regulatory Workshop (55)
- ❖ January 16, 2015 Repeal and Adoption of Regulations

6





PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

1. PROPOSAL OF NEW REGULATIONS FOR “CLEAR AND REASONABLE WARNINGS”

RESULT

- ❖ Eliminate Shakedown Lawsuits with Controls on Attorney’s Fees and Penalties for Alleged Failure to Warn
- ❖ Eliminate Over-Warning for Reproductive Toxicity
- ❖ Eliminate Meaningless Warnings

7



PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014


1. PROPOSAL OF NEW REGULATIONS FOR “CLEAR AND REASONABLE WARNINGS”

RESULT

Complete Re-Write of Regulations for “Safe Harbor Warnings”

- ❖ Establish new warning content for “safe harbor” warnings
- ❖ Detail methods by which new warnings must be provided
- ❖ Further shift burden from retailers to manufacturers to provide California warnings for products distributed in commerce

8



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

1. PROPOSAL OF NEW REGULATIONS FOR “CLEAR AND REASONABLE WARNINGS”

PROPOSED LANGUAGE

- ❖ Abandon old “safe harbor” warning [WARNING: This product contains a chemical known to the state] and establish new language
- ❖ Require pictograms in some circumstances
- ❖ Identify chemicals in products to which an individual is “exposed” where chemical includes any of twelve designated chemicals
- ❖ Cross-reference warnings to information on OEHHA website

9



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

1. PROPOSAL OF NEW REGULATIONS FOR “CLEAR AND REASONABLE WARNINGS”

COMPLETING THE CONVERSION

- ❖ March 25, 2015 – Public hearing takes place
- ❖ April 8, 2015 – Public comment period closes
- ❖ Summer 2015 –FINAL regulation adopted
- ❖ Ongoing – OEHHA warning website being developed

10



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

2. LISTING OF NEW CHEMICALS UNDER THE STATE’S QUALIFIED EXPERT LISTING MECHANISM

GETTING ON THE SAME PAGE – FOUR LISTING MECHANISMS

- ❖ Labor Code Listing Mechanism
- ❖ State’s Qualified Experts Mechanism
- ❖ Authoritative Bodies Mechanism
- ❖ Formally Required by State or Federal Government To Be Labeled

11



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

2. LISTING OF NEW CHEMICALS UNDER THE STATE’S QUALIFIED EXPERT LISTING MECHANISM

NATURE OF STATE’S QUALIFIED EXPERT LISTING MECHANISM

- ❖ Mechanism of Last Resort
- ❖ Carcinogen Identification Committee (“CIC”)
- ❖ Developmental and Reproductive Toxicant Identification Committee (“DARTIC”)
- ❖ CIC and DARTIC “prioritize” chemicals for consideration and make listing decisions

12



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

2. LISTING OF NEW CHEMICALS UNDER THE STATE'S QUALIFIED EXPERT LISTING MECHANISM

CHEMICALS ASSIGNED LOW PRIORITY OR DETERMINED NOT TO BE "KNOWN TO THE STATE" TO BE CARCINOGENS OR REPRODUCTIVE TOXICANTS

PFOA (2006)	Chlorpyrifos (2007)
PFOA (2007)	Dimethyl formamide (2008)
Permethrin (2009)	PFOS (2010)
Bisphenol A (2009)	Deltamethrin (2013)

13



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

2. LISTING OF NEW CHEMICALS UNDER THE STATE'S QUALIFIED EXPERT LISTING MECHANISM

DECEMBER 5, 2013 CIC MEETING

- ❖ Consideration of 2 chemicals as "known to the state" to cause cancer:
 1. diisononyl phthalate (DINP) (listed)
 2. butyl benzyl phthalate (not listed)

14




McKenna Long
& Aldridge^{LLP}

PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

3. SIGNIFICANT COURT DECISIONS REGARDING LISTINGS AND WARNING REQUIREMENTS

- ❖ *American Chemistry Council v. OEHHA* (Bisphenol A)
 - Preliminary injunction against listing (April 2013)
 - Listing upheld (December 2014)
- ❖ *ACC v. OEHHA* (DINP)
 - Tentative ruling upholding listing (January 2015)
- ❖ *Syngenta v. OEHHA* (Atrazine)
 - Suit filed to enjoin listing of Triazines under Authoritative Body Mechanism (May 2014)

15



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

4. SAFE USE DETERMINATIONS

GETTING ON THE SAME PAGE

Businesses do *not* need to provide a Prop 65 warning on their products that contain Prop 65 chemicals if the exposures caused by these products are so low as to create “no significant risk of cancer or birth defects or other reproductive harm.

16



McKenna Long
& Aldridge^{LLP}

PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

4. SAFE USE DETERMINATIONS


NATURE OF A “SUD”

A written statement issued by OEHHA determining whether an exposure to a listed chemical resulting from the average use of a specific product is subject to the Prop 65 warning requirement.

Specifically, a SUD determines if the exposure is at or below the Safe Harbor number:

- ❖ cancer → NSRL
- ❖ repro → NOEL

17



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

4. SAFE USE DETERMINATIONS

SUDs ISSUED BY OEHHA IN THE PAST

- ❖ Sorptive Mineral Institute for crystalline silica in pet litter
- ❖ National Paint & Coatings Ass’n for crystalline silica in latex paints

18



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

4. SAFE USE DETERMINATIONS

CHANGES TO SAFE USE DETERMINATION REGULATIONS

- ❖ In 2003, the regulations [then titled 22 CCR § 12204] were amended to designate a request for a SUD as “Official Information Pursuant to Evid. C. § 1040” that would not be disclosed until a written acceptance of the request was issued.
- ❖ In 2009, OEHHA tried to have the phrase “advisory only” removed from the language of the regulations (27 CCR § 25204), but the change was not made.
- ❖ Currently, no other proposed changes to the SUD regulations are pending.

19



McKenna Long
& Aldridge^{LLP}


PROPOSITION 65 UPDATE
SIGNIFICANT DEVELOPMENTS - 2014

4. SAFE USE DETERMINATIONS

PENDING REQUESTS FOR SAFE USE DETERMINATIONS

- ❖ diisononyl phthalate (DINP - cancer) in modular vinyl carpet tiles
- ❖ diisononyl phthalate (DINP - cancer) in floor coverings
- ❖ diisononyl phthalate (DINP - cancer) in vinyl materials used in patio furniture

20

	<p>Mckenna Long & Aldridge LLP</p>
<p>PROPOSITION 65 UPDATE SIGNIFICANT DEVELOPMENTS - 2014</p>	
<p>CONCLUSION</p> <p>Q & A</p> <p>21</p>	