



Insights: Perspectives

5 Key Takeaways | California Proposition 65 & Other Hazards in the Stream of Commerce

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Written by **Alexander M. Bullock** and **Laura C. Miller**

5 KEY TAKEAWAYS

California Proposition 65 & Other Hazards in the Stream of Commerce

Kilpatrick Townsend's [Alex Bullock](#) and [Laura Miller](#) recently presented to clients at the firm's [2022 Small Legal Department Client Summit](#). They discussed "California Proposition 65 & Other Hazards in the Stream of Commerce."

5 key takeaways from the presentation include:

1

California's Proposition 65 continues to create risks for manufacturers, distributors, and sellers of retail products. The state's Office of Environmental Health Hazard Assessment ("OEHHA") continues to identify new (now over 950) chemicals that it alleges are carcinogenic or are capable of causing reproductive harm. Unlike most categories of lawsuits, the burden is on the defendant to prove either that the chemical is not present in the product or its presence is at such a low level that no warning is required.

OEHHA has revised the language used in warning labels under Proposition 65. The warning must identify at least one chemical in each category and provide a link to OEHHA's website in order for the consumer to obtain more information. Importantly, this same warning must also be placed on any website through which the consumer can purchase the product on-line.

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Manufacturers should also review their agreements with distributors and retail customers to make sure that the appropriate warning language has been provided in all sales documents. Warning downstream purchasers may insulate manufacturers from Proposition 65 liability.

Companies should consider preemptive testing of their products to determine if they contain any chemicals of concern identified by OEHHA in order to determine if a warning is necessary. This type of testing is important not only for the purposes of Proposition 65, but also for other "right to know" statutes such as the state's "Cleaning Products Right to Know Act."

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In addition to California, a number of other states have enacted "right to know" statutes that require companies to report the presence of specific chemicals to the respective state agencies. These states include Oregon, Washington, Vermont, and New York. It is highly likely that other states will enact similar reporting statutes, some of which may require the manufacturer to remove listed chemicals from the product.

For more information, please contact:
Alex Bullock, abullock@kilpatricktownsend.com
Laura Miller, lamiller@kilpatricktownsend.com
Nancy Stagg, nstagg@kilpatricktownsend.com

Related People



Alexander M. Bullock

t 202.824.1416

abullock@ktslaw.com



Laura C. Miller

t 336.607.7466

lamiller@ktslaw.com