

# California Proposition 65



*\*The material in this presentation is provided as general information and is not intended to be used as legal advice. Please refer to Proposition 65 requirements posted on the OEHHA website and seek the advice of qualified counsel.*



Electronic Components Industry Association



# Signs of the Times Starbucks

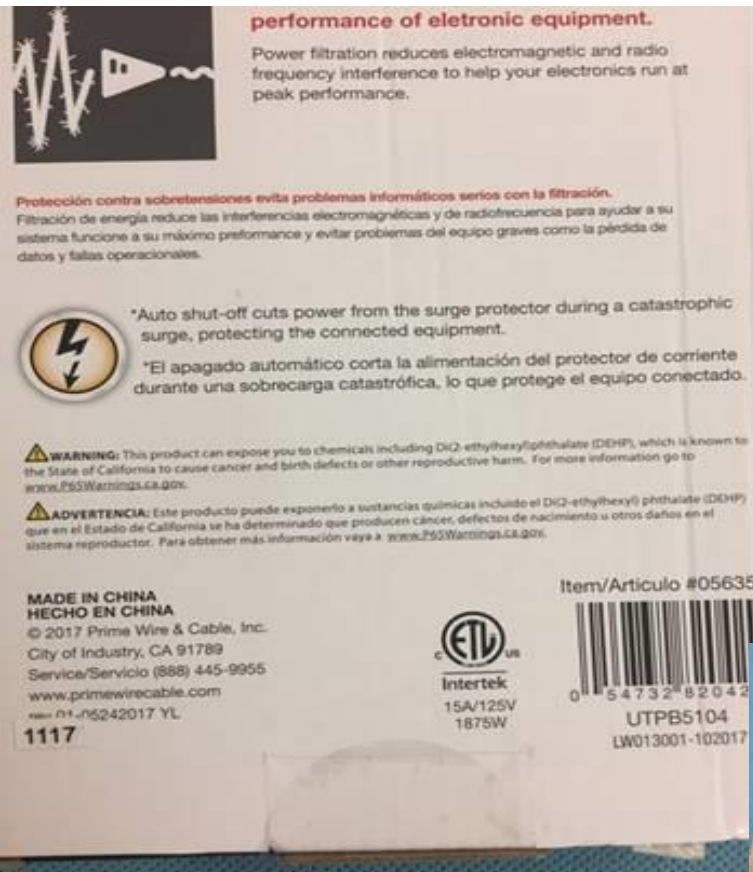


Acrylamide is a substance that occurs naturally when heating coffee beans to >250 Degrees. Acrylamide is reported to be carcinogenic by the Agency for Research on Cancer, a position not supported by the American Cancer Society. Enforcement of Warnings has been directed by the courts. The (OEHHA) Office of Health Hazard Assessment is now reassessing risks.

# Signs of the Times Disneyland







Household Surge Protector

It's Everywhere!



Marine Spotlight



Crown Molding Wood Trim

Connect. Influence. Optimize.

# What is California Proposition 65?

## SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT

Supported on a 1986 California referendum by 63% of voters.

Proposition 65 requires businesses to provide warnings to Californians about significant exposures to chemicals which cause cancer, birth defects or other reproductive harm.

The law applies to items that Californians purchase, or may be exposed to in their homes, workplaces, public places, or substances that are released into the environment.<sup>1</sup>

Proposition 65 requires California OEHHA to publish a [list of chemicals](#) known to cause cancer, birth defects or other reproductive harm and update it at least once a year. The list now includes over 900 substances.<sup>1</sup>

<sup>1</sup> “About Proposition 65 - What is Prop 65?”.OEHHA. <https://oehha.ca.gov/proposition-65/about-proposition-65>. 30 April 2018.

# What is Changing?

Originally, Proposition 65 warnings were required to state that a chemical is present that causes cancer or reproductive harm.

Revised OEHHA regulations require new warnings on products manufactured after **August 30, 2018**:

Specific Language on warning labels to identify the specific chemical/risk

Specific warning requirements for retail/public signs

Visible warning requirements for **Internet and Catalog Sales**

Unless the business can show that the anticipated exposure level is below significant risk levels for cancer (NSRLs) or below Maximum Allowable Dosage Levels (MADLs) believed to cause birth defects or other reproductive harm.

Source: <https://oehha.ca.gov/proposition-65/>.

# Who is Required to Provide Warnings?

Manufacturers

Producers

Importers

Distributors

Retailers

Website Sales

*Everyone in the supply chain!*



- Manufacturer/Packager/Importer/Supplier/Distributor:
  - ***Must Affix warning label to the product;***  
**Or**
- **Provide written notice** to authorized agent for resellers which:
  1. States that a warning is required
  2. Includes the name, description or identifying information for the product
  3. Includes all necessary warning materials
  4. *The Business providing written notice must **obtain confirmation of receipt**, electronically or in writing.*





# New Warning Labels

## Examples of Acceptable Warning Labels Under the New Regulations

### Cancer



**WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information, visit [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

### Combined Cancer/Birth Defect



**WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer or birth defects or other reproductive harm. For more information, visit [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

### Birth Defect



**WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information, visit [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

### Truncated on Product Warning



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

**Type Size:** The warning text must be the same size as other consumer information presented on the package and may not be smaller than 6-point type.

# Potential for Abuse

Under most federal or state environmental regulations, the government is in charge of ensuring that businesses comply with the law.

But California's Proposition 65 contains a unique "citizen lawsuit" provision. That means **private citizens can file lawsuits against businesses they claim aren't fully complying with the law.**

There are strong incentives for citizens/organizations to file lawsuits:

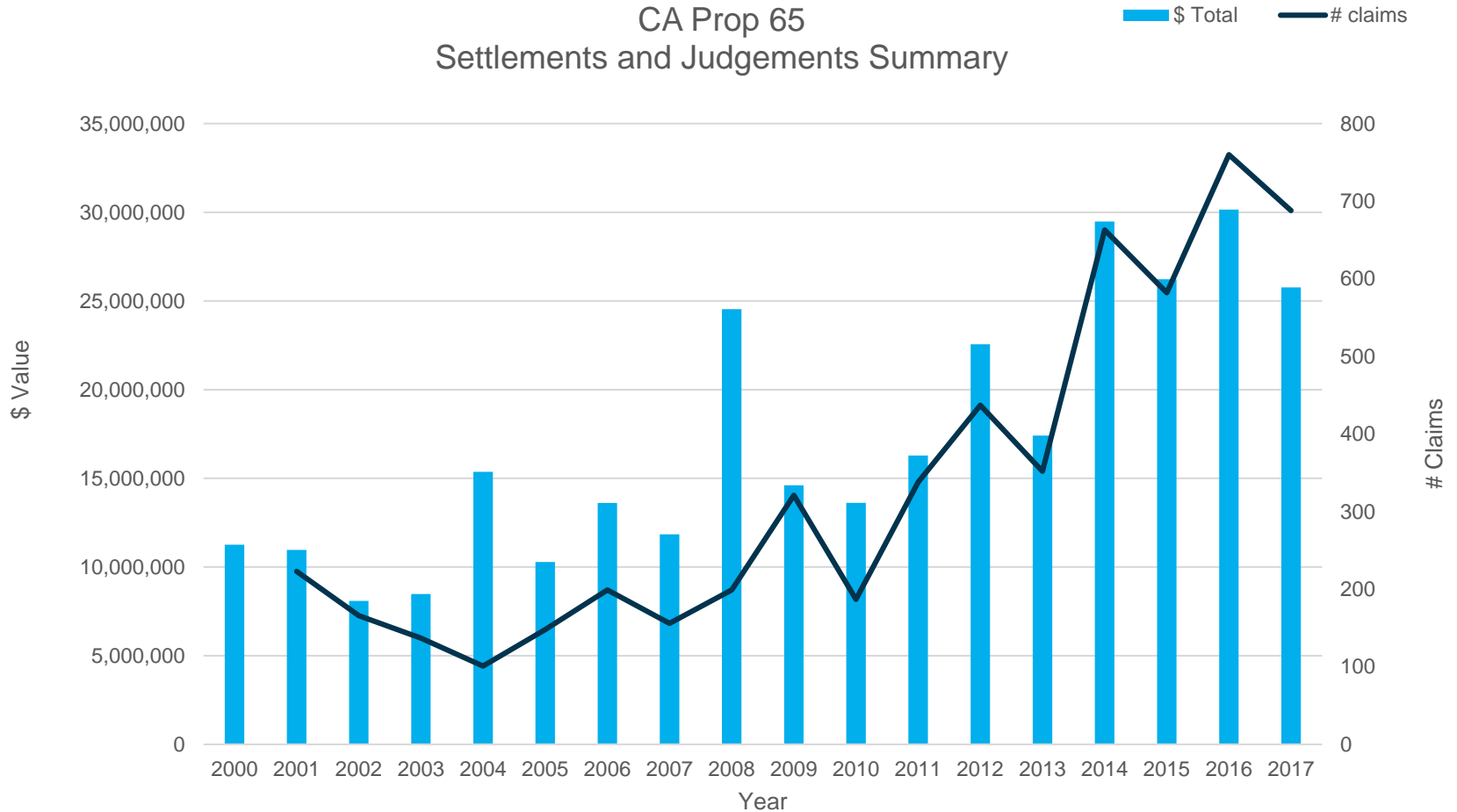
- Citizens or organizations that bring lawsuits are awarded one-quarter of the civil penalty paid by a business found in violation.
- Many businesses opt to settle lawsuits out of court.
- There is no requirement that organizations or individuals prove that they have been injured in any way.
- The plaintiffs' attorneys' fees are substantial.

Some of those most active "bounty hunters" have brought [in more than \\$1,000,000](#) per year in collected enforcement fees.

Source: <http://prop65scam.com/lawsuit-abuse/> accessed 5/23/2018

# Settlements and Judgements

CA Prop 65  
Settlements and Judgements Summary



Data accessed 4/26/2018 from <https://oag.ca.gov/prop65/annual-settlement-reports>

# Who Profits from the Litigation?

Between 2000 and 2016, businesses paid more than [\\$284.7 million](#) to settle Proposition 65 cases—a figure that does not include the amount paid from cases that actually went to trial. Over \$189 million, or 67 percent, of that settlement money went to attorney's fees.

Over that time period, cases brought by the State of California (rather than citizen bounty hunters) only accounted for \$23 million, less than 9 percent of all settlement money collected.

**Claims in 2018 are running at a rate that could double the \$25 million paid in 2017.**



Source: <http://prop65scam.com/lawsuit-abuse/> accessed 5/23/2018

# CA Prop 65 and Electronic Components

A recent RINA study found that 102 of the over 900 substances listed in the latest CA Prop 65 List may be found in mechanical or electrical products.

Based on review of the CA Prop 65 substance list, BomCheck found that 28 of the Prop 65 substances are already identified in RoHS, REACH, or POPS regulations or on the REACH Candidate list.

Component Manufacturers and Finished Product Manufacturers should assess the potential for exceeding “safe harbor” levels and provide labeling and warnings where appropriate.

Source: <https://demo.bomcheck.net/proposition65>



# Risk of “Over-warning” ?

“When faced with this rather vexing reality, businesses often choose to provide a warning instead of risking a lawsuit because Proposition 65 statutorily places the legal burden on the business to prove that no warning is required, a burden which makes defending Proposition 65 cases expensive.

Rather than risk being embroiled in litigation involving a battle of the experts at trial, businesses often will instead elect to voluntarily provide a warning out of an abundance of caution in order to shield themselves from the inevitable threat of litigation that would otherwise exist if they did not warn.

These types of prophylactic warnings have contributed to the oft-criticized “over warning” problem under Proposition 65, wherein many Proposition 65 warnings are provided to shield off a legal challenge rather than to warn consumers of actual chemical exposures.

**Despite being a criticized practice, over warning often is the right business decision because it has historically been an extremely safe course of action from a liability standpoint.”**

<https://calchamberalert.com/2017/03/31/proposition-65-compliance-challenges-include-warning-rules-litigation-threat/>

# Pre-Emptive Warnings



From the Specialty Equipment Marketing Association article accessed 8/3/2018:

“Even if a business is not certain whether a product requires warning, it can choose to comply with the Prop 65 warning requirements as a pre-emptive measure. Often, the cost of providing a warning is lower than the cost of laboratory testing and can help insulate a business from being sued. Although the California Attorney General looks at “over-warning” with disfavor, we are unaware of any cases brought against a business for labeling a product that does not require one. **In some cases, a pre-emptive warning may be the most cost-effective way to mitigate risk.**”

<https://www.sema.org/prop65>

# Manufacturer Prop 65 Compliance Considerations

Identify chemical content at the MPN Level

Compare to the current Prop 65 Substance List

Consider potential exposure paths for downstream manufacturers and end customers for listed substances.

Conduct toxicology reviews to determine if potential exposure levels are exceeded.

Determine warning requirements at the MPN Level

Develop a customer notification plan (Policy, Labels, Warning Instructions)

Communicate to customers (Distributors, Direct Customers).

Monitor changes in the P65 Substance List and Product Changes.

Focus on Litigation Prevention.

Develop a Litigation Response Plan.

# Distributor Prop 65 Compliance Considerations

Survey Suppliers to determine how they are going to address Prop 65 compliance.

Update Distributor Supplier Specifications/Contracts with Supplier Prop 65 requirements.

Develop Distributor Prop 65 Position Statements for Customers

Add P65 Warning fields to product files

Add Warning label text to inventory labels as appropriate.

Add Prop 65 warning to Web sites at the line item level.

Add Prop 65 warning to printed catalogs

Employee training on labeling and component handling safety.

Focus on Litigation Prevention.

Develop a Litigation Response Plan.

## *Important Note:*

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## Additional Resources

[OEHHA Prop 65 Page](#)

[Listed Chemicals](#)

[California Attorney General Prop 65 website](#)

[List of AG Settlements Regarding Prop 65](#)

[Current Prop 65 Statutes](#)

[Prop 65 Regulations](#)