



Perspectives on California Proposition 65

Summary

The Polyurethane Foam Association is keeping members informed about compliance with California Proposition 65, which has recently added TDCPP to its list of chemicals that require warnings. TDCPP has been used by some in the industry as a flame retardant to meet customer requests and regulatory requirements. A large number of everyday products such as cosmetics, computer keyboards, luggage, extension cords – even coffee – may contain chemicals that are on the Prop 65 list. There are roughly 800 chemicals on the list, some of which may or may not be found as impurities in foam products and in finished products that contain foam components.

What is Proposition 65 and what is its significance to flexible polyurethane foam?

California's Proposition 65 (Prop 65) is a "right to know" law that began in 1986. Prop 65 applies to California places of employment, and to goods manufactured or sold in California only. The law requires manufacturers (and retailers) of products to notify California workers, communities and consumers if Prop 65 - listed chemicals are present in their products or workplace environment. Recently listed TDCPP is a flame retardant that can be used in some flexible polyurethane foam products to meet the small open flame testing requirements of California Technical Bulletin 117 (TB117) for residential upholstered furniture and the federal Motor Vehicle Safety Standard 302 (MVSS-302) for interior vehicle components. It may also be found in some combustion modified foam products that may be used in commercial furnishings to meet California Technical Bulletin 133 (TB 133) for high-risk occupancies.

What do we know about chemicals on the Prop 65 list?

The initial question that governs listing a chemical as a carcinogen or genetic hazard under Prop 65 is whether a chemical has the potential to cause cancer, birth defects or reproductive harm. In making this decision, the California Office for Environmental Health Hazard Assessment (OEHHA) does not consider the amount of daily exposure necessary to cause a health effect. For newly added chemicals, a safe dosage (Safe Harbor) may be determined later; however, establishing a Safe Harbor can be a long and involved process. Most chemicals on the list of roughly 800 substances do not have a Safe Harbor level. Not having a Safe Harbor determination does not mean there may be a threat to health, it simply means that a safe maximum daily exposure level has not been determined.

What is the polyurethane industry doing about Prop 65?

The Polyurethane Foam Association has developed detailed information to help members understand the requirements of and comply with Prop 65 to ensure that consumers, workers and communities are properly notified. Manufacturers of flexible polyurethane foam have an excellent track record of contributing to health, safety and environmental progress. Please read

Commonly used chemicals on the Prop 65 list

Prop 65 includes a wide-ranging list of chemicals and products of concern to the state of California, many of which are contained in commonly used products. Here are a few products that may contain chemicals included on the current Prop 65 list:

- Extension cords
- Wood dust
- Titanium dioxide (sunscreen)
- Computers
- Keyboards
- Food products
- Clothing
- Leaded glass
- Power tools
- Cosmetics and beauty products
- Luggage
- Alcoholic beverages
- Roasted coffee
- New automobiles and trucks

Adapting to Environmental Progress, available for download at www.pfa.org to learn more about the foam industry's history on environmental issues.

Concerns about Prop 65 and “over-warning” consumers

With the barrage of product warnings and information consumers receive every day, in many different ways, it's difficult for consumers to make science-based decisions about the products they purchase. Some experts fear that over-labeling and over-warning desensitizes consumers, and labeling programs may be largely ignored by consumers who feel overwarned about the products they buy. This may particularly be the case in California where warnings are commonplace. Unfortunately, if you manufacture, distribute or sell a product in California that contains any of the substances included on the Prop 65 list, warning labels are not optional. The product warnings are required in California.

Does the removal of TDCPP from my foam exclude me from Prop 65 compliance? How can I be positive that my products do not contain Prop 65-listed chemicals?

Unfortunately, Prop 65 makes compliance difficult by its sheer enormity. If a Safe Harbor is not listed (more than 500 Prop 65 chemicals do not have Safe Harbor notations) any amount of a listed chemical, even contamination or trace amounts, found in a product could raise compliance questions unless the amount of exposure poses “no significant risk” or “no observable effect.” The simple removal of TDCPP from a foam formulation, for instance, may not guarantee that 100% of this fire retardant is removed. Residual or cross-contamination of a raw material used in foam production, though in miniscule amounts, may or may not be found in chemical analysis. Foam also is an efficient absorptive medium and has been known to acquire contaminants during handling, transportation, assembly or simply by being in contact with other products that may contain listed substances. Heightening the importance of compliance with Prop 65 is its police mechanism: bounty hunters. Individual citizens, usually in the form of attorneys or NGOs, can report a suspected violator on a designated website. Once a complaint has been filed, the State Attorney General has 60 days to decide whether the State should take the case or allow the filer to have it. In 2011, settlements totaled more than \$17 million. Nearly 75% of that amount went to the attorneys involved. Among about 300 cases listed on the State website, only 11 were prosecuted by the State.

What should a seller of foam or foam-containing products in California do to comply?

Unless there is an established safe harbor level for a chemical, the easiest way to comply is to put a warning label on a product that might be subject to Prop 65. In addition, proper Prop 65 signage should be present at the entrance to any California facility where customers and/or employees may be exposed to Prop 65 substances. These warning signs can already be found at gas stations, factories, restaurants, and many retail stores in California.

What's the worst case scenario?

At any time, but especially after October 28, 2012, the date when warnings for TDCPP content are required, an attorney or NGO operative could enter your California store, showroom, or distribution facility and, after noting the absence of Prop 65 warning labels, purchase a foam product or foam-filled item. They could serve notice alleging violation and put you in the position of defending your innocence. Whether the State or a concerned citizen initiates the case, you'll have the choice of settling with a fine and plaintiff's legal fees and expenses – the average 2011 payout was about \$65,000 – or you can fight by proving that the amount of Prop 65 substances in your product will not increase the risk of cancer by more than 1 in 100,000 chances for a person exposed to the substance(s) in your product 24 hours/day for 70 years (no significant risk level) or, in the case of substances known in California to cause birth defects or reproductive harm, not exceed 1/1000th of the “no observable effect level.”

Is it just foam that I should be concerned about?

With about 800 listed substances, Prop 65 bounty hunters have a lot of opportunities to find a chemical of concern in almost any product. Natural products are not exempt. Home furnishings raw materials such as latex, viscoelastic foam, combustion barrier materials, fabrics, stains, lacquers, finishes, plastic parts, leaded glass, lubricants, etc., may also be subject to Prop 65 warning requirements; however, because of the recent addition of TDCPP to the list, flexible polyurethane foam now is in the forefront.

NOTE:

This document is not intended to be legal advice. You should consult an attorney to seek legal advice on how California Proposition 65 may apply to your situation.

Issued: June 21, 2012

Examples of Prop 65 Warnings



Restaurant wall posting in three languages

California Proposition 65 WARNING:
 WARNING: This product contains chemicals known to the state of California to cause cancer, birth defects or other reproductive harm.



Retail store luggage hangtag



Grocery shelf sign

California Prop 65 Statement
 WARNING: The red wine vinegar and balsamic vinegar on these shelves contain lead, a chemical known to the State of California to cause birth defects and other reproductive harm.



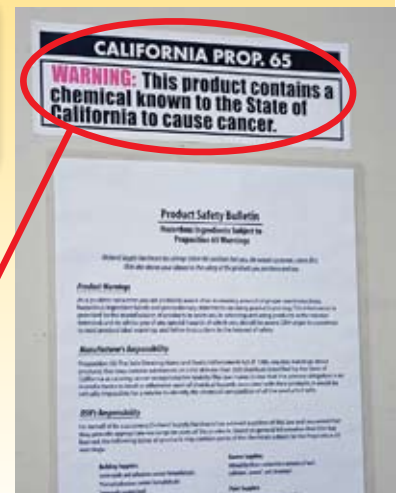
Gas station notice

WARNING
 Chemicals known to the state to cause cancer, birth defects, or other reproductive harm are found in gasoline, crude oil, and many other petroleum products and their vapors, or result from their use. Read and follow label directions and use care when handling or using all petroleum products.



Electric cord packaging

WARNING:
 The power cord on this product contains lead, a chemical known to the State of California to cause birth defects or other reproductive harm.
Wash hands after handling.



Hardware store wall sign

CALIFORNIA PROP. 65
WARNING: This product contains a chemical known to the State of California to cause cancer.