



## TEXTILE ASSOCIATION OF LOS ANGELES

# Proposition 65 - An Update

## March 2014

**California's Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Prop 65"), continues to be a scourge of the fashion industry.**

For the first time in years there are signs that the California legislature and Governor Brown recognize the harm that has been done to California businesses in the name of Prop 65.

### **Overview:**

Under Prop 65, the State of California is required to publish a list of chemicals known to cause cancer or birth defects. Currently there are over 800 chemicals on the list. The State may place a chemical on the list even if a federal agency has determined the chemical is not to be cancer causing or a threat to reproductive health.

Prop 65 requires businesses to notify the public if a product they sell or that is released into the atmosphere in California contains certain chemicals. The law requires 'adequate notice' in the form of a warning label. It does not prohibit or restrict the sale of the product (with the exception of chemicals released into drinking water). No warning is required if the exposure level is low enough to be on a "safe harbor" list established by the State.

Prop 65 is not limited to California businesses. An out-of-state company selling a product to a California consumer (e.g., online) can be subject to a Prop 65 claim. All businesses with less than 10 employees are exempt.

Prop 65 allows "citizen plaintiffs" ('bounty hunters') to pursue alleged Prop 65 violators. These plaintiffs are entitled to retain 25% of the damages or penalties collected in a Prop 65 case, plus all of their attorneys' fees.

Each violation of Prop 65 can result in a penalty of up to \$2,500 per day. There is the potential of an additional \$2,500 a day if the California Attorney General also pursues the alleged violator. Thus, a retailer who sells a dozen toys in California, alleged to contain even a miniscule amount of a listed chemical, can find itself subject to a penalty of tens of thousands of dollars, plus an ever larger amount of attorneys' fees. It does not matter that the retailer may not have known of the presence of the chemical, or that the product has not resulted in any injury or harm to a consumer, or that the retailer did not make

any profit on the item.

As a result of these incentives eight or ten Prop 65 bounty hunter groups have emerged, terrorizing scores of businesses. These groups typically send out hundreds of letters a year that demand a settlement (\$25,000-\$50,000 is typical), or else threatening to sue. Almost all companies feel they have no choice but to settle, given the time and expense involved to defend such litigation.

The number of claims, and settlements, is on the rise. Over the years these bounty hunters have obtained settlements totaling almost \$150,000,000, the majority of the monies going for attorneys' fees (which often go to their allied law firms), not to the State of California. The net effect of Prop 65 has been to serve as a tax on doing business in California, to the detriment of California businesses and consumers.

#### **Prop 65 and the Fashion Industry:**

Initially the Prop 65 firms went after refineries, oil rigs and chemical plants. Now, Prop 65 firms have turned their attention to consumer products, including toys, electronics, jewelry, apparel, footwear, eyewear and handbags. Many manufacturers and retailers of such products were not aware, until recently, that their products might contain substances on the Prop 65 list.

In the apparel and footwear sphere, anything (not just children's products) that is painted, beaded, embellished, as well as any item that contains plastic or vinyl, is a target. It is not uncommon for beads to contain lead, cadmium or phthalates, and for plastic and vinyl to be treated with a softening agent called DEHP. The result has been an onslaught of Prop 65 claims against fashion-related businesses.

#### **Legislative Developments:**

Earlier in 2013 legislation (AB 227) was introduced in Sacramento to allow a cure period for any alleged violation of Prop 65. The bounty hunters fought back, and were successful in 'watering down' the bill. As finally signed into law AB 227 gives restaurants, bars and parking garages a 14-day period to place Prop 65 warning notices about alcohol or car exhaust at their premises and avoid any Prop 65 penalties or attorneys' fees other than a \$500 fine. Governor Brown has implored the legislature to put a cap on Prop 65 cases, and calling out bounty hunters for filing "nuisance lawsuits."

#### **So Where Does That Leave Us?**

Prop 65 remains intact, despite increasing efforts by the business community to rein in bounty hunters. Fashion industry businesses must proceed defensively, and take all reasonable measures to avoid the use of any chemical listed on the Prop 65 schedule, or label accordingly.

This requires that every beaded dress, sweater, shoe, purse, sunglass, belt, hat or other item that conceivably could have a Prop 65 chemical be tested to make sure that it does not contain any Prop 65 chemical or, if it does, that it is well within the Prop 65 'safe harbor'.

*California fashion industry companies should join in the CFA's efforts to inform the State that reform of Prop 65 is necessary. These efforts may take time, but they may result in new legislation with changes to Prop 65, making it practical for the industry.*

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**AUTHOR:**  
**Robert L. Handler**  
**Glaser Weil Fink Jacobs Howard Avchen & Shapiro LLP\***  
[rhandler@glaserweil.com](mailto:rhandler@glaserweil.com)

*\*Glaser Weil is a full-service law firm that represents fashion industry clients in a variety of matters, including environmental matters. The views expressed in this article are solely those of the author and do not necessarily represent the views of the Glaser Weil firm.*

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