



September 2002

CALIFORNIA PROPOSITION 65

Information for Wire and Cable Manufacturers

In 2000, lawsuits were filed in San Francisco against representative defendant companies that manufacture or sell jacketed wire and cable products and products containing wire and cable alleging violations of California's "Proposition 65." The companies included manufacturers of wire and cable products, appliance and electronic product manufacturers and resellers of their products. NEMA coordinated the defense of these actions with a group of appliance makers with the goal of resolving liability for past failure to warn, and defining what is required to comply with the law going forward. At the request of NEMA members, we were able to expand the settlement so that it covers all of the chemicals listed under Proposition 65 that we believe might be found in the surface contact layer of covered wire and cable. This litigation has now been settled, and this memorandum endeavors to address frequently asked questions about Proposition 65 and the wire and cable settlement. The settlement takes the form of a Consent Judgment, which has been submitted to the court in San Francisco. This memo contains generic information, and does not contain specific legal advice about specific products or brands of products.

I. GENERAL INFORMATION

What is Proposition 65?

In November 1986, California approved a referendum initiative ("Proposition 65") requiring warnings about exposures to toxic chemicals. This initiative became known as The Safe Drinking Water and Toxic Enforcement Act of 1986. This Act is found in Sections 25249.5 – 25249.13 of the California Health and Safety Code. The law is intended to prevent contamination of water and to inform residents and

workers about exposures of listed chemicals.

What does Proposition 65 Say?

Proposition 65 required the Governor of California to publish a list of chemicals that are "known to the State of California" to cause cancer, birth defects or other reproductive harm. The list is updated quarterly, and a copy of the list can be found at the website of California's Office of Environmental

Health Hazard Assessment

<http://www.oehha.ca.gov/prop65.html>

There are hundreds of chemicals on this list. Firms that produce, use, release, or otherwise engage in activities involving the chemicals on this list must comply with the following:

PROVIDE CLEAR AND REASONABLE WARNINGS. A firm is required to provide a warning before knowingly and intentionally exposing a person to a listed chemical. The warning must be “clear and reasonable,” which means that it must clearly make known that a chemical in the product is known to cause cancer, birth defects or other reproductive harm and be given in such a way that it will effectively reach the person before he or she is exposed.

DO NOT DISCHARGE CHEMICALS INTO DRINKING WATER. A firm must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water.

What are the penalties for non-compliance?

Firms that are in violation of Proposition 65 may be subject to civil penalties of up to \$2500 per day for each violation. Courts have authority to issue injunctions to prevent violations of the Act. While the Attorney General has the power to enforce the Act, private parties also have standing to enforce the legislation and act as private attorney generals. These private parties must give 60-days advance notice of the alleged violation to the State. These cases are typically settled through a consent judgment, payment of a civil

penalty and attorneys fees.

Contributions to charitable or educational institutions are often made in lieu of penalties.

Have there been other Proposition 65 settlements like the wire and cable settlement?

Yes. Recent cases have targeted the faucet industry, miniblinds, ceramics and leaded crystal, diesel exhaust and many other industries. These case have all settled with agreements similar to the wire and cable settlement, specifying the required warning, paying attorneys fees and making contributions to non-profit groups. The highest of these settlements was about \$3 million for the faucet industry.

II. THE WIRE AND CABLE PRODUCTS SETTLEMENT

What liabilities are “settled” by this agreement?

For companies who join the Consent Judgment, all past liability for claims under Proposition 65 and certain other provisions of California law relating to exposures to the certain chemicals specified in the Consent Judgment contained in jacketed wire and cable. Future liability is settled provided there is compliance with the Consent Judgment.

What products are covered?

The Settlement Agreement covers thermoset/thermoplastic and thermoplastic elastomer coated wires, cables and cords and their plugs and

connectors (collectively referred to as “Cords”) and associated products (all of which are “Covered Products”). The Agreement is not limited to PVC jackets.

Which listed chemicals are included?

Acrylonitrile
Antimony trioxide
Arsenic
1,3 butadiene
Cadmium
Carbon Tetrachloride
Carbon black extracts
Chlorinated paraffins
Chloroform
Vinyl chloride
Hexavalent compounds of chromium
Ethyl acrylate
Ethylene thiourea
Lead and lead compounds
Lead acetate
Lead phosphate
Lead subacetate
Nickel
Di(2ethylhexyl) phthalate
Toluene

What products require a warning label?

Unless otherwise exempted or preempted, Covered Products where the surface contact layer of the Cord has a lead content by weight of 0.03% (300 parts per million) or more. There is a non-exempt products list that may be used for guidance.

What products are exempt from warning labels?

Infrequently handled cords are exempt.

Even though the surface contact layer of a cord contains more than 300 parts per million of lead by weight, Cords and Covered Products, which because of their size, weight or function, are infrequently handled (such as upon their installation in a setting where they are not typically plugged and unplugged). A list of over 200 of these types of infrequently handled products was created in Exhibit F of the Settlement Agreement. This list provides guidance for products not on the list, and may be supplemented or clarified in the future by agreement in the manner spelled out in Section 8 of the Settlement Agreement. The list identifies types of Cords that are exempt as well as appliances and electronics products to which Cords are attached.

Some examples of infrequently handled cords:

Building wire (designed for permanent or long-term installation behind walls, beneath floors, above ceilings or under ground).

Printer cables

Riser/Plenum cable (designed for permanent/long term installation)

Speaker wire (designed for permanent/long term installation)

Telecom data cable

Telecom Power Cable

Telephone power and data cords (phone to wall)

Thermostat cable

Diesel locomotive and motor cable

Ignition cable for gas tube signage

Telephone switching station cable

Loop detector wire

Utility Cable

Signal cable

Power Control/Instrumentation/Cable

Utility Cable and Wire

Some examples of exempt products with infrequently handled cords:

Answering machine
Air conditioner
Can Opener
Non-portable CD/DVD player
Computer modem line
Dishwasher
Fax machine
Lighting (except holiday string lights and clip-on lights).
Microwave oven
Oven
Power tools
Refrigerator
Surge protector
Television (except small mobile models)
Television antenna
Toaster and toaster oven
Washer/Dryer

Exhibit F should be reviewed for additional listings of infrequently handled products.

ALSO EXEMPT:

Cords that are internal components not normally accessible to consumer during ordinary use.

Where chemical is part of inner conductor or other component not normally accessible to consumer during ordinary use.

Covered products manufactured before one year after the Court enters the Consent Judgment.

Covered products distributed or shipped for sale outside California.

The Consent Judgment refers to “cords.” Does that cover all wire and cable?

Yes, it covers all wire and cable with the three types of exterior jackets recognized by the National Electric Code. The term “cords” is not limited to what the industry calls cords.

What does the warning label have to say?

If you are obligated to warn, there are three options.

WARNING: This product contains chemicals, including lead, known to the State of California to cause [cancer, and] birth defects or other reproductive harm. *Wash hands after handling.*

WARNING: Handling the cord on this product will expose you to lead, a chemical known to the State of California to cause [cancer, and] birth defects or other reproductive harm. *Wash hands after handling.*

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

The terms must be boldfaced and italicized as indicated above. Use of the bracketed term “cancer, and” is at the option of the settling defendant.

Where must the warning appear?

Printed or affixed (by label or tag) on the product or on the unit product packaging. If warning is on product or package label, it shall be contained in same section of label as other safety information or near its price or UPC Code. Must be conspicuous and legible.

There is a very limited list of products for which it is permissible to put the warning in the Owner's Manual. These are products where consumer is likely to read the manual to program, assemble or use product, and they are listed on Exhibit G of the settlement. Special conditions apply: must be on front cover (outside or inside), the first page, or on outside of back cover.

In cases where Seller never has physical possession of product or packaging, on the invoice confirming sale.

For products sold to consumer on Internet, the warning may be posted on the Internet, on the same page that the product is displayed, or on the Order Form, or on the same page as the price for the product is listed.

When do I have to start using a warning label?

September 3, 2003.

Do I have to test my wire and cable product for lead and what is the procedure?

As a practical matter, the thermoplastic or thermoset material used to cover Cords that intentionally contains lead will have more than 300 ppm of lead by weight. Your supplier of this material can advise you whether lead is intentionally added as a stabilizer or for some other purpose. The Settlement Agreement enables you, in lieu of testing, to rely on information obtained from your suppliers that lead has not been intentionally added to the material, as long as such reliance is in good faith. The 300 ppm threshold contemplates that there may be some situations where lead is not intentionally added, but the material has been contaminated.

You may also test for lead. A test procedure is outlined in Exhibit E of the Settlement Agreement. Other test procedures may be used.

Do I have to test for chemicals other than lead?

There is no measure of the other chemicals by weight that triggers a warning obligation under the Settlement Agreement. It is believed that these other chemicals are present only as trace amounts or in such low amounts that the exposure thresholds set by the State of California are not implicated. If you are warning for lead in the surface contact layer, you are also warning for these other chemicals as well. On the other hand, if the surface layer is lead-free, and you have reason to believe that a particular wire or cable product contains more than trace amounts of a chemical in an amount likely to result in the product exceeding California's exposure threshold for the chemical, you would also need to warn.

If my wire and cord product is sold for occupational use only, does my company have an obligation to warn?

This is a question of federal preemption of California's Proposition 65 law by the federal Hazard Communication Act enforced by OSHA.

How does the federal Act affect the settlement obligations when the product is used in an occupational setting?

Proposition 65 is preempted to the extent that a product is regulated by the federal Hazard Communication Act. In the workplace or occupational setting, federal law obligates "chemical manufacturers" to supply material safety data sheets (MSDS) describing the health hazards and other information associated with products. Thus, to the extent that a product is used in an occupational setting, the MSDS is a recognized method for warning under Proposition 65. The Settlement Agreement provides at Paragraph 4.6 that an out-of-state manufacturer is not required to provide a Proposition 65 warning for occupational exposures inside the State of California.

The Hazard Communication regulation adopted by OSHA contains an exemption for "articles." An article is a manufactured item (i) which is formed to a specific shape or design during manufacture, (ii) which has end use

function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities (e.g. minute or trace amounts of a hazardous chemical), and does not pose a physical hazard or health risk to employees." This last requirement excludes releases under conditions of mishandling or abnormal use. While each company needs to obtain its own legal advice on this issue, in the case of wire and cable, the first two elements of the definition of "article" are likely met, leaving only the third element -- whether the cord releases only minute amounts of the hazardous chemical "under normal conditions of use" not posing a hazard or health risk to employees. Legal advice on this latter issue prior to relying on the "article exemption" under the OSHA regulations may be appropriate. The California Attorney General's Office has recently taken the position that the release/health risk referred to in the OSHA article exemption is similar to that, which requires a warning under Proposition 65. Others have noted that the California 65 exposure levels for warning purposes are set well below that which poses a risk to a person's health, therefore the article exemption does not incorporate or relate to the Proposition 65 exposure levels. If a firm concludes that its wire and cable product meets the definition of "article," it would not be obligated to transmit an MSDS to its customer with respect to the product. Some companies, however, may find it easier just to transmit an MSDS with the information about lead. Section 7.6 of the Settlement Agreement provides the following optional warning when the Covered Product is not intended for sale to retail consumers in California:

“CALIFORNIA PROPOSITION 65 NOTICE: The surface contact layer of this electrical wire/cord contains lead in excess of 300 parts per million and may therefore be subject to certain additional requirements pursuant to a court-ordered Consent Judgment entered in *Mateel v. Sprint et al* (San Francisco Superior Court Nos. 312962 and 320342). California Employers should ensure that their employees are informed that this PVC-coated electrical wire and cord contains a chemical known to the State of California to cause birth defects or other reproductive harm.”

This optional warning for Cords not intended for sale to retail consumers can be included in an MSDS, a letter to the customer, or on or with the product.

On the other hand, California employers cannot argue federal preemption and may be required to post warning signs in their facilities or have MSDS’s with the foregoing warning at their facility.

My product is sold for commercial and industrial use to customers in California. What do I need to know about my California customer’s obligations under Proposition 65?

Under California regulations, there are three recognized methods for complying with the warning requirements of Proposition 65 in the case of occupational exposures.

1. A label on the product or substance used in the workplace that meets the requirements for labeling products.

2. A warning on a sign in the workplace that is posted in a conspicuous place so that it is likely to be read. It is acceptable if the sign says “WARNING: This area contains a chemical known to the State of California to cause cancer [or to cause birth defects or other reproductive harm].”

3. A warning about the chemical in question that fully complies with all information, training and labeling requirements of the federal Hazard Communication Standard.

Thus, if you elect to put a label on your product used for commercial or industrial purposes and the label meets the legal requirements for labeling under the settlement, your customer will be in compliance. Similarly, if you supply a Material Safety Data Sheet (MSDS) to your customer for your product and your customer is in full compliance with the Hazard Communication regulation, your customer may claim compliance. Finally, your customer may elect to post a sign in his facility to warn.

My wire product is not sold to customers in California, but it is possible that my distributors or OEM customers may resell some of our wire or incorporate our wire in their product and it finds its way to California. What do we have to tell our customers? Do we have to label for them?

At some point in the chain of distribution, sellers of Covered Products (including products incorporating wire) in California will have to determine if

they have an obligation to warn under this settlement. Your customer may want to know about the lead content of the surface contact layer to determine its legal obligations. You have a variety of ways of communicating to your customers about this issue including the optional warning in Section 7.6 of the Settlement Agreement quoted above.

As a practical matter, wire and cable producers may want to protect themselves from any claim that their customers did not realize that the outer layer of the their product contains lead (assuming this is true) by affirmatively informing their customers of this fact, using one of the mechanisms set forth in the settlement (e.g. MSDS, invoice notice, package label). For bulk wire and cable product, a label on the outer packaging or on the spool would be sufficient.

Again, in the case of occupational use of the product, your Company may want to obtain legal counsel on the question of federal preemption and whether you product qualifies for the “article” exemption.

If my company joins the consent judgment and becomes a settling defendant, can another plaintiff under Proposition 65 later sue us?

Not for matters covered by the scope of the consent judgment (cords, covered products, and the chemicals listed in the settlement agreement).

The agreement also releases your distributors, retailers and customers of

Settling Defendants from prospective liability under Proposition 65, if they provide warnings as required by the settlement.

If my company was not part of the initial group of firms that signed on as Settling Defendants, can my company still join?

The Settlement Agreement provides that firms may opt-in within 120 days of entry of the Consent Judgment and agree to be bound by the terms of the Settlement Agreement.

If my company is a Settling Defendant, can they later terminate their participation in the Consent Judgment?

Yes, but not until January 31, 2005. If you do that, you no longer have the protection from future lawsuits and would be forced to argue again that you have no legal obligations under Proposition 65.

For further information:

Contact:

Clark Silcox, Counsel
National Electrical Manufacturers Assn.
1300 N. 17th Street
Suite 1847
Rosslyn, VA 22209
(703) 841-3280
Cla_Silcox@nema.org