

THE ORANGE COUNTY REGISTER

De-sludging California's Proposition 65 mandatory carcinogen disclosure

Michael L Marlow

July 1, 2019

For 33 years, California's Proposition 65 has required businesses to notify citizens about significant amounts of over 900 toxic chemicals in the products they purchase or that are released into the environment. Chemicals include additives or ingredients in pesticides, common household products, food, drugs, dyes and solvents.

The recent incident concerning coffee due to a chemical (acrylamide) that may cause cancer demonstrates how poorly Proposition 65 communicates risk. A lawsuit filed in 2010 argued that coffee should carry a warning, despite the Federal Drug Administration (FDA) having determined that requiring a warning label on coffee would be tantamount to making a "false or misleading statement." Although a Los Angeles judge agreed in 2018 to require such a label, California's Office of Environmental Health Hazard Assessment (OEHHA) recently overturned the label requirement citing that over 1,000 studies had found no significant link between coffee and cancer.

Proposition 65 is not enforced by any regulatory agency. Enforcement is when legal action is brought by "concerned" groups against businesses that allegedly have failed to warn consumers. These groups are often referred to as "bounty hunters" who receive one-quarter of penalties after successfully filing lawsuits against businesses alleged to be in violation of the law.

Despite its longevity, the California government has found it unnecessary to back claims of improved public health with any empirical evidence. California's OEHHA funded a 2015 study by the University of California – Davis that acknowledged only "anecdotal evidence regarding the effectiveness of the current warnings to inform the public of health risks."

My recent paper in the Cato Institute's Regulation magazine argues that gauging effectiveness is more complicated than assuming that warning signs somehow promote public health. A more sophisticated model assumes health improvements are proportional to the occurrence of each of four steps: (1) consumers read disclosures; (2) consumers understand disclosures; (3) consumers, as a result, make improvements in their choices; and (4) consumers, as a further result, experience improved health.

Even assuming a generous 50% probability for each step means that the joint probability of all four steps occurring is $50\% \times 50\% \times 50\% \times 50\% = 6.25\%$. That is, roughly one in 15 people would experience improved health if this model held true. However, Prop. 65 warnings are triggered for products carrying a cancer risk if there is a 1 in 100,000 chance of any person

exposed to the product over a period of 70 years contracting cancer. Warnings are thus triggered for products carrying probability risk thresholds of near-zero for many products thus suggesting little to no improvement in public health.

It is safe to say that most Californians are not statisticians, or chemists, and thus are unlikely to understand (or even know) these disclosure requirements. Proposition 65 is a prime candidate for what Nobel-laureate Richard H. Thaler refers to as “sludge cleanup campaigns.” Thaler argues that nudges act more like “sludges” when they do not help people better understand how to make decisions that are in their best interests.

Three recommendations should help “de-sludge” Proposition 65.

1. Proposition 65 disclosures are naively advocated on the basis of a simple framework that assumes health improves without considering any of the necessary steps that would make this intent come true. Empirical assessment of the above four-step model would re-focus risk communication toward higher-probability risks that significantly affect public health.
2. Estimate effects on public health by comparing cancer incidence in California to states without similar mandatory disclosure of toxic chemicals. The California government has yet to back up its belief that Proposition 65 has improved public health.
3. Assess the efficacy of enforcing Proposition 65 mostly through civil lawsuits. Total settlements of \$339,741,799 (\$2015) over 2000-2017 awarded “bounty hunter” attorneys \$227,372,070 (\$2015) (roughly 67% of settlement costs). Investigation should examine whether attorney fees are related to improving the public health of Californians.

A major obstacle to de-sludging is the misplaced notion that mandated disclosure is costless. This belief probably explains lack of interest in honest cost-benefit analysis. However, Proposition 65 ultimately imposes costs on many parties that include business owners, consumers, workers and taxpayers.

Encouraging citizens to misunderstand health risks is another potential harm. Proposition 65 leads Californians to mistakenly believe that most products with warnings are equally hazardous to their health. This far from the truth. Smoking tobacco, for example, carries a health risk over 10,000 greater than the legal risk level of Proposition 65. Removing low-probability risks will de-sludge Proposition 65 because consumers will navigate fewer warnings and warnings will better communicate risks that are more likely to impact lives.

Rather than presume that all mandatory disclosures fail miserably, it is socially desirable to use the scientific method to appraise, fix, leave unchanged, or remove mandated disclosure laws at all levels of government.