

Toxic Torts Law

An Update on Regulatory Changes in California, Washington, and Oregon

Elizabeth V. McNulty, Esq.

Taylor Anderson LLP
Irvine, CA

Paul S. Rosenlund, Esq.

Duane Morris LLP
San Francisco, CA

“Regulating the Manufacturing Life Cycle”



California's Green Chemistry

GREEN CHEMISTRY



Sports & Fitness Legal Summit 2017

California's Green Chemistry Initiative

“Safer Consumer Product Regulations”

- Department of Toxic Substances Control (DTSC) Safer Consumer Products regulations took effect October 1, 2013.
- The stated purpose of the Safer Consumer Product Regulations is to:
 - Reduce toxic chemicals in consumer products
 - Create new business opportunities in the emerging safer consumer products industry
 - Help consumers and businesses identify what is in the products they buy for their families and customers



What Do the Regulations Require?

- The regulations provide for a continuous four-step process:
 - **Candidate Chemicals.** The regulations immediately establish a list of Candidate Chemicals (approximately 1,200) based on the work of authoritative organizations, and specify a DTSC process to add to the list. Candidate Chemicals have at least one quality that can cause harm to people or the environment.
 - **Priority Products.** "Priority Products" are consumer products that contain one or more chemicals – known as "Candidate Chemicals". An initial list of three product-chemical combinations was released on March 13, 2014, and on July 15 2016, a proposal to list Children's Foam-Padded Sleeping Products containing the flame retardants TDCPP and TCEP as a Priority Product began. Before a Priority Product is finalized it goes through the rulemaking process which may take up to one year. Sixty days after a Priority Products is finalized, responsible entities, e.g., manufacturers, will need to submit Priority Product Notifications.
 - **Alternatives Analysis.** The regulations require responsible entities (manufacturers, importers, assemblers, and retailers) to notify DTSC when their product is listed as a Priority Product. DTSC will post this information on its web site. Priority Product manufacturers (or other responsible entities) must perform an Alternatives Analysis on the product's COCs to determine how to limit exposure to, or reduce the level of, public health and/or environmental harm.
 - **Regulatory Responses.** The regulations require DTSC to identify and implement regulatory responses that will protect public health and/or the environment, and maximize the use of acceptable and feasible alternatives of least concern. DTSC may require regulatory responses for a Priority Product if the manufacturer decides to keep it, or for an alternative product selected to replace it.

* See <http://dtsc.ca.gov/SCP/WhatAreTheSCP-Regulations.cfm>.

Sports & Fitness Legal Summit 2017

What Priority Products Have Been Identified?

- Two criteria assessed in selecting Priority Products:
 - The products have the potential to expose people or the environment to one or more Candidate Chemicals, and
 - This exposure has the potential to “contribute to or cause significant or widespread adverse impacts.”
- Current Proposed Potential Priority Products:
 - Children’s Foam Padded Sleeping Products containing TDCCP or TCEP—*Now a Proposed Regulation*
 - Spray Polyurethane Foam Systems containing unreacted MDI
 - Paint Stripper containing methylene chloride
- Anticipated Future Priority Products Based on Listed Chemicals of Concern

What Are the Next Anticipated Priority Products?

- Based upon the Three Year Priority Work Plan Issued by The DTSC the following Product Categories will be used to identify the next Priority Products:
 - Beauty, Personal Care and Hygiene Products
 - Building Products, Household, Office Furniture and Furnishings
 - Cleaning Product
 - Office Machinery (Consumable Products)
 - Fishing and Angling Equipment (Metals)
 - Clothing (Alkyl-phenol ethoxylates (APEs) , phthalates, Aromatic amines and azo dyes, Perfluorochemicals, formaldehyde, Triclosan)
 - Full Body Wear
 - Lower Body Wear
 - Sleepwear
 - Sportswear
 - Underwear
 - Upper Body Wear



Why Does It Matter to You?

- If you manufacture a Priority Product it affects you!
 - Responsible Entity must self report within 60 days of effective date of the regulation establishing a product-chemical combination as a final Priority Product.
 - DTSC posts identifying information on their website.
 - Must progress through the Alternatives Analysis of the Chemicals of Concern to determine how to limit exposure to, or reduce the level of, public health and/or environmental harm.
 - DTSC reviews Alternatives Analysis and determines need for regulatory action, if any.
- Failure to comply with the Regulations results in monetary fines, regulatory action and possible criminal proceedings.

—



What Is the Result of a Failure to Comply?

- If the manufacturer of a Priority Product fails to comply with the requirements to submit a notification or complete an Alternatives Analysis:
 - The importers must cease to place the product in the stream of commerce in California
 - Retailers or assemblers must cease ordering the Priority Product and submit a Cease Ordering Notification to the Department.
 - Fines and further regulatory action.

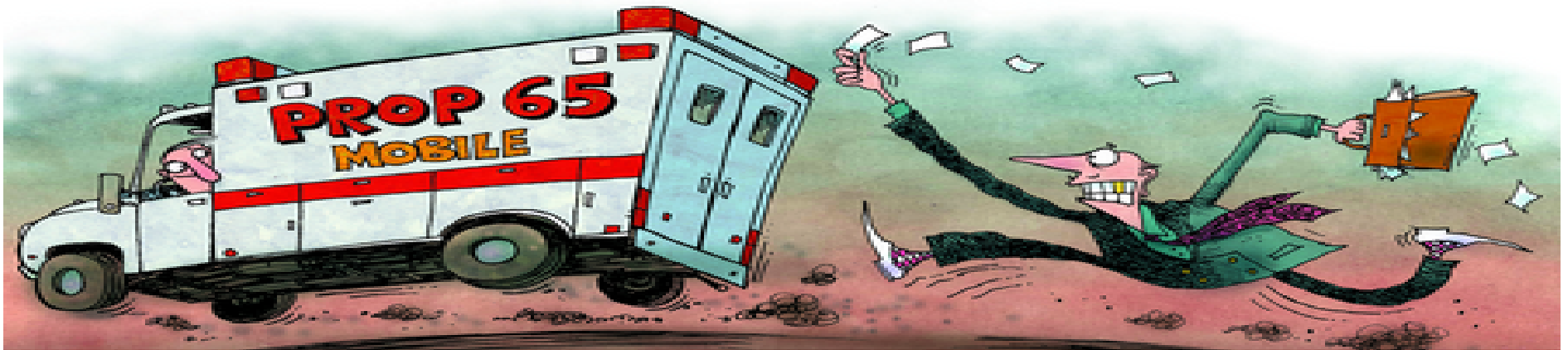
PROP. 65 WARNING
The State of California contains
one or more chemicals known
to the State of California to
cause cancer, birth defects,
or other reproductive harm.



WARNING: Proposition 65 May be Harmful to Your Business

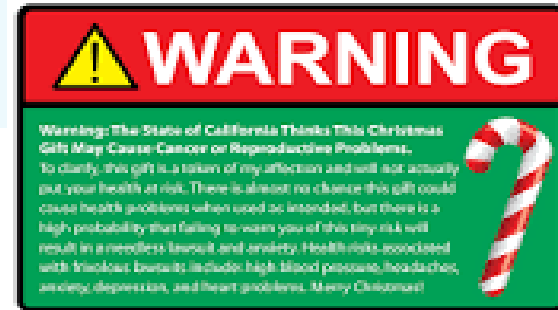
Prop 65:

An Ambulance Chaser's Dream.



What is Proposition 65?

- “Safe Drinking Water and Toxic Enforcement Act of 1986”
- Enacted as a ballot initiative in November 1986
- Protects against chemical contamination of the state’s drinking water sources with chemicals known to the state to cause cancer, birth defects or other reproductive harm
- Requires businesses with 10 or more employees to warn about exposures to chemicals
- State maintains and updates a list of chemicals



And More...

- Warning required one year after a chemical is listed.
- Businesses are required to provide a “clear and reasonable warning” before *knowingly and intentionally* exposing consumers to a listed chemical unless:
 - it can establish that exposure level will not pose a significant risk of cancer or
 - The exposure level is significantly below levels observed to cause birth defects or other reproductive harm.

So Why Does Proposition 65 Matter?

- Applies to businesses of 10 or more employees selling into California
- Enforcement
 - Attorney General and Private Enforcers
 - 60 Day Notice and Complaint
- Resolution
 - Court trial
 - Consent Judgment or Private Settlement
- Penalties and Fees



Current Exposure Warning

WARNING: *This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.*

- No specific requirements for font size, placement, etc.
- Same warnings for on product and off product.




California's Proposition 65

New Warnings Regulations— What You and Your
Business Need to Know

Sports & Fitness Legal Summit 2017

New Prop 65 Warnings

- Final regulations issued September 2, 2016
- Operative August 30, 2018, but can be used NOW
- Complete rewrite of “safe harbor” warning label:
 - New language: “product contains” to “product can expose”
 - New text and new format requirements
 - Specific reference to at least one chemical
 - Mandatory use of warning triangle 
 - Different warnings for on product and off product
 - Reference to official Office of Environmental Health Hazard Assessment (OEHHA) website

New Warning – on product label

-  WARNING: Cancer – www.P65Warnings.ca.gov.
-  WARNING: Reproductive Harm – www.P65Warnings.ca.gov.
-  WARNING: Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

Proposition 65 Warning Comparison

Pre August 2018 Warnings


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

WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

Post August 2018 Warnings

 **WARNING**
This product can expose you to formaldehyde, a chemical known to the State of California to cause cancer. For more information, go to www.p65Warnings.ca.gov/product.

New Warning Label – off product

-  WARNING: This product can expose you to chemicals including lead and phthalates, which are known to the State of California to cause cancer birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.
- Note: warning text and listed chemical(s) must match!

New Warnings – Internet & Catalogs

- Communicate warnings *before* a sale is consummated
 - On product display page or prominently displayed to the purchaser prior to completing the purchase
 - May use on-product warning label *if* it's really on product
 - “For purposes of this sub-article, a warning is not prominently displayed if the purchaser must search for it in the general content of the website.”
 - Catalog warning must be displayed in a way “that clearly associates it with the item being purchased”

“Special” Warnings

- Food
- Alcoholic beverages
- Restaurants
- Medical and dental care
- Raw wood
- Furniture
- Diesel engines & motor vehicles
- Enclosed parking facilities
- Amusement parks
- Petroleum products
- Service stations and vehicle repair facilities
- Smoking areas
- Recreational vessels



Risk Allocation

- Stated intent to reduce burdens upon retailers
- Manufacturers, producers, packagers, supporters, suppliers, importers, distributors and retailers may agree on warning burden allocations and obligations
- Prepare for a battle of forms



Retailer Liability



1. Has received warning materials from an upstream party and failed to provide the warnings; or
2. Knowingly introduced a listed chemical to be created in or added to a product; or
3. Modified or obscured a product's label warning; or
4. Has “actual knowledge” of the potential consumer exposure requiring the warning (such knowledge can “arise” *upon receipt* of a 60 Day Notice of Intent to Sue Letter); and
5. If no upstream person in the product supply chain is subject to Proposition 65

New Enforcement Procedures

- **Offense:** Retailers must provide public and private enforcers with information regarding manufacturers or suppliers upon request



- **Defense:** Safe harbor for retailers

- No actual knowledge of the listed chemical, *and*
- Within *five days* of receiving the 60-day notice, either stop selling the product or begin providing appropriate warnings

And Don't Forget About the “Helpful” Website...

- Dedicated Proposition 65 website for consumers.
 - The website will feature information explaining which chemicals are included in consumer products and methods of common exposure.
 - Information will be pulled from OEHHA, interested third parties (like environmental activist groups), and manufacturers.
 - Wholly inadequate and provides a playground for Plaintiff's attorneys to gin up cases.



California Proposition 65

Reaching for a BPA free world...

Sports & Fitness Legal Summit 2017

New BPA Regulations



- Bisphenol A (BPA) listed May 11, 2015
- Already regulated in some children's products
- Found in food container linings, thermal paper cash register receipts, polycarbonate beverage containers, eyeglass lenses, "plastic" glasses and more
- WARNING: Many cans containing foods and beverages sold here have epoxy linings used to avoid microbial contamination and extend shelf life. Lids on jars and caps on bottles may also have epoxy linings. Some of these linings can leach small amounts of bisphenol A (BPA) into the food or beverage. BPA is a chemical known to the State of California to cause harm to the female reproductive system. For more information go to: www.P65Warnings.ca.gov/BPA.





State Action Outside California

As California goes, so goes the Nation...

Sports & Fitness Legal Summit 2017

Washington

- **Washington State Children's Safe Products Act (2008)**
 - Bans lead, cadmium and phthalates, but defers to CPSC
 - Identification of chemicals with potential adverse effects on children (focus on the highest priority chemicals)
 - Manufacturers of children's products must notify Department of Ecology when "Chemicals of High Concern to Children" (CHCC) are present in the product
 - 66 chemicals currently identified as CHCC's, but more being added (6 new flame retardants)



Washington - WSCSPA



- Applies only to “children’s products” including:
 - Toys (intended by mfr to be used by a child at play)
 - Children’s cosmetics & jewelry
 - Items to promote sleep, teething, feeding, etc.
 - Children’s apparel & footwear
 - Children’s car seats
- “Children’s Products” excludes sporting goods, snow sports, skates, scooters, athletic shoes (cleats / spikes), bicycles, tricycles, electronics, video games, etc.

Washington WSCSPA

- Reporting chemicals of high concern is based upon
 - Size of manufacturer
 - Tier of children's product relative to duration and nature of a child's use and exposure
- Reporting schedule phased in from 2012 to 2018
- Compliance / avoidance measures
 - Test for all 66+ chemicals?
 - Alternatives



Washington State 66 CHCC

CAS	Chemical
99-99-9	Formaldehyde
62-86-3	Aniline
62-76-9	N-Nitrosodimethylamine
71-43-2	Benzene
75-91-4	Vinyl chloride
75-07-0	Acetaldehyde
75-09-2	Methylene chloride
75-16-0	Carbon disulfide
75-93-3	Methyl ethyl ketone
78-34-5	1,1,2,2-Tetrachloroethane
79-84-7	Tetrabromobisphenol A
80-06-7	Bisphenol A
84-86-2	Diethyl phthalate
84-74-2	Dibutyl phthalate
84-76-3	Di-n-Hexyl Phthalate
85-44-9	Phthalic Anhydride
85-69-7	Butyl Benzyl phthalate (BBP)
86-30-6	N-Nitrosodiphenylamine
87-69-3	Hexachlorobutadiene
94-11-3	Propyl paraben
94-26-8	Butyl paraben
95-53-4	2-Aminotoluene
95-90-7	2,4-Diaminotoluene

CAS	Chemical
99-76-3	Methyl paraben
99-96-7	p-Hydroxybenzoic acid
100-41-4	Ethylbenzene
100-42-5	Styrene
104-40-6	4-Nonylphenol; 4-NP and its isomer mixtures including CAS 84852-15-3 and CAS 25154-52-3
106-47-8	para-Chloroaniline
107-13-1	Acrylonitrile
107-21-1	Ethylene glycol
108-88-3	Toluene
108-96-2	Phenol
109-98-4	2-Methoxyethanol
110-80-6	Ethylene glycol monoethyl ether **
115-96-8	Tris(2-chloroethyl) phosphate
117-81-7	Di-2-ethylhexyl phthalate
117-84-0	Di-n-octyl phthalate (DnOP)
118-74-1	Hexachlorobenzene
119-93-7	3,3'-Dimethylbenzidine and Dyes Metabolized to 3,3'-Dimethylbenzidine
120-47-8	Ethyl paraben
123-91-1	1,4-Dioxane
127-18-4	Perchloroethylene
131-55-3	Benzophenone-2 (Bp-2); 2,2',4,4'-Tetrahydroxybenzophenone

CAS	Chemical
140-66-9	4-tert-Octylphenol; 1,1,3,3-Tetramethyl-4-butylphenol
140-67-0	Estragole
140-57-5	2-Ethylhexanoic Acid
558-67-2	Octamethylcyclotetrasiloxane
505-93-5	Benzene, pentachloro
842-07-9	C.I. Solvent Yellow 14
872-50-4	N-Methylpyrrolidone
1163-19-6	2,2',3,3',4,4',5,5',6,6'-Decabromodiphenyl ether; BDE-209
1763-43-1	Perfluorooctanyl sulphonic acid and its salts; PFOS
1806-36-4	Phenol, 4-octyl-
8466-77-3	2-Ethyl-hexyl-4-methoxycinnamate
7439-97-6	Mercury & mercury compounds including methyl mercury (22967-92-6)
7440-08-7	Molybdenum & molybdenum compounds
7440-36-0	Antimony & Antimony compounds
7440-38-2	Arsenic & Arsenic compounds including arsenic trioxide (1327-53-3) & dimethyl arsenic acid(75-60-5) **
7440-43-8	Cadmium & cadmium compounds
7440-48-4	Cobalt & cobalt compounds
113674-67-6	Tris(1,3-dichloro-2-propyl)phosphate
24013-16-6	Butylated hydroxyanisole; BHA
25637-99-4	Hexabromocyclododecane
26701-49-0	Diisodecyl phthalate (DIDP)
28553-12-0	Diisononyl phthalate (DINP)

Sports & Fitness Legal Summit 2017

Oregon

- Oregon SB 478 –Toxic Free Kids Act
 - Passed 2015
 - Inclusions and exclusions very similar to Washington
 - Covers children's toys, apparel and certain other products made for, marketed for use by or marketed to children under 12 years of age
 - Excludes sporting goods, snow sports, skates, scooters, athletic shoes, bicycles, tricycles, electronics, video games, and many other categories



Oregon



- Sort of like Washington, but ...
 - Covers component parts, even if inaccessible
 - Contaminants exceeding 100 ppm must be reported, or the manufacturer must apply for a reporting exemption, even if a manufacturing control program is in place;
 - Additional rules for mouthable products, children's cosmetics, or products made for or marketed to children under the age of three years

Remember the Maine

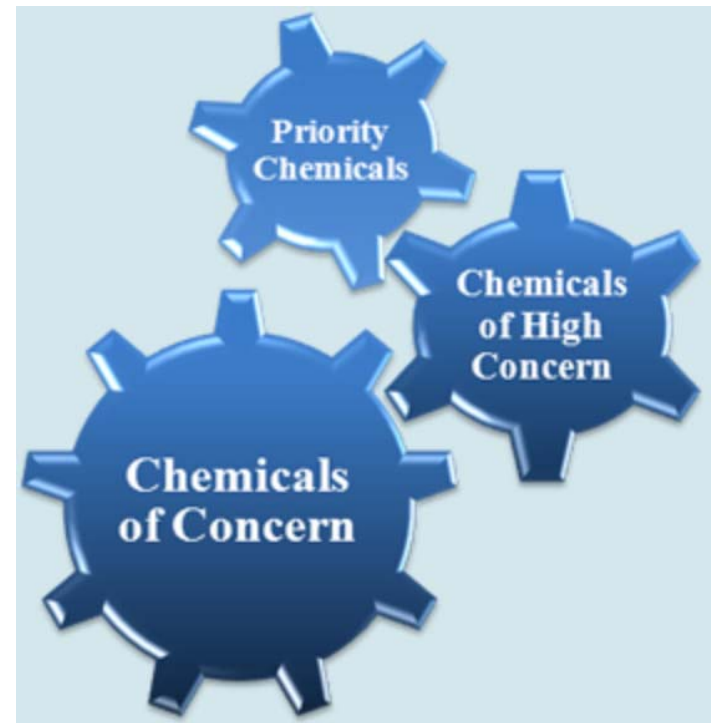
- Act to Protect Children's Health and the Environment from Toxic Chemicals in Toys and Children's Products (2008)
 - Covers products sold for indoor use in a residence, child care facility, or school, or a sold for outdoor residential use if a child under 12 years of age may have direct contact
 - Dept of Environmental Protection generates List Chemicals of Concern (CC), Chemicals of High Concern (CHC), and Priority Chemicals (PC)



And More Maine

- **Priority Chemicals in Children's Products**

- Report to DEP any use of a PC in an amount greater than de minimis
- PCs prohibited in children's products
- PCs include Arsenic, BPA, Cadmium, Formaldehyde, Mercury, Nonylphenol and Nonylphenol Ethoxylates and Phthalates



More Maine

Act to Ensure that Children's Toys and Products Are Free from Lead (2008).

Prohibits children's products that:

1. contain lead at more than .009% overall or in accessible components; or
2. coated with a paint or surface coating with a lead content that exceeds CPSC lead paint rule.
3. Exempts consumer electronic products in which the lead-containing component is inaccessible to children

But wait, There's More Maine...

- Act to Improve Toxics Use Reduction and Reduce Energy Costs by Maine Businesses (2010)
 - DEP to establish list of up to 10 priority toxic chemicals
 - 5 chemicals now on list (formaldehyde, cadmium, hexavalent chromium, perchloroethylene, and trichloroethylene)
 - Manufacturers in Maine using more than 1,000 pounds annually must file a use report with the DEP and develop a pollution prevention plan specific to these chemicals



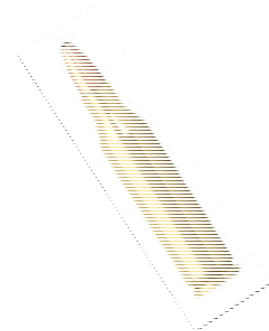
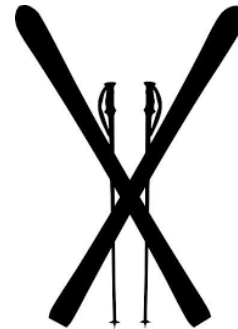
Vermont

- Vermont SB.239 –An Act Relating to the Regulation of Toxic Substances (2014)
 - Uses Washington state's same list of Chemicals of High Concern for Children (CHCC)
 - But, this list can be supplemented
 - Reporting mandatory if CHCC is intentionally added or is present as a contaminant at a level of 100 ppm or greater



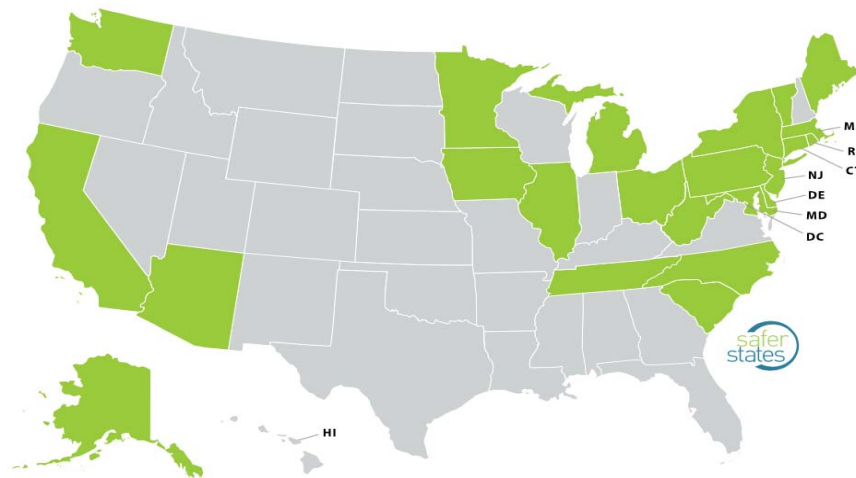
Vermont

- Applies to children's products (under 12 years of age), including apparel
- But not the same exemptions as other states:
 - Snow sporting equipment (skis, bindings, etc.) is exempt
 - Guns & ammo are exempt
 - Inaccessible components are exempt
 - Batteries are exempt
 - Sporting goods and athletic footwear are NOT exempt



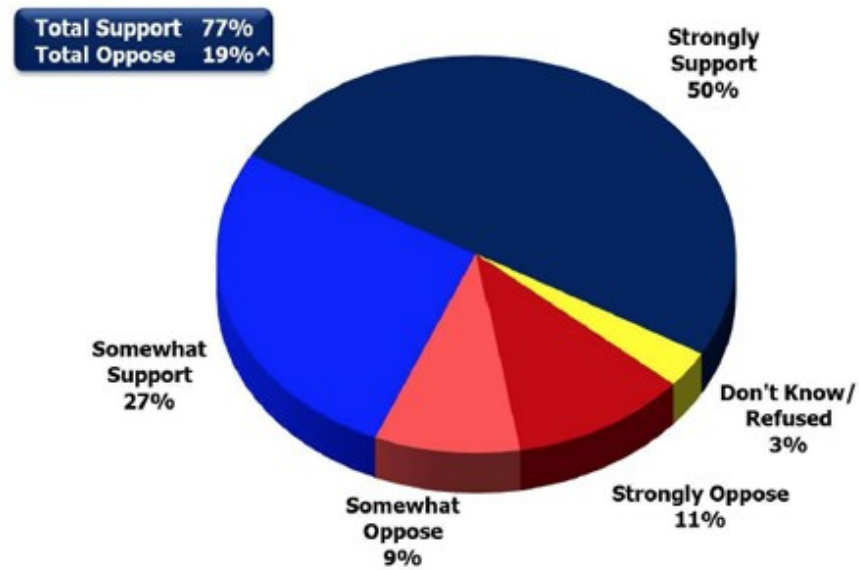
And that is just the tip of the toxic iceberg...

- 23 States and the District Of Columbia had toxic regulations in place or had pending legislation in 2016.



Voters will continue to push regulation forward...

Polls Show Support for Stronger Protection from Toxic Chemicals





QUESTIONS?

Elizabeth V. McNulty, Esq.
Taylor Anderson LLP

Paul S. Rosenlund, Esq.
Duane Morris LLP

Sports & Fitness Legal Summit 2017

Thank you

Elizabeth V. McNulty

Taylor | Anderson LLP
19100 Von Karman Ave.
Suite 820
Irvine, CA 92612
949.390.6499 (direct)
949.466.3463 (cell)
emcnulty@talawfirm.com

Paul S. Rosenlund

Duane Morris LLP
One Market Plaza, Spear Tower
Suite 2200
San Francisco, CA 94105-1127
415.957.3178 (direct)
415.867.5297 (cell)
psrosenlund@duanemorris.com