



State vs. Federal Chemical Rules: Multi-State Momentum, Preemption and Compliance

2026 Prop. 65 Clearinghouse Conference

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HUNTON

Today's Speakers

Moderator:

- **Malcolm Weiss**, Partner, Hunton Andrews Kurth LLP

Panel:

- **Alexander Avery**, Associate, Steptoe LLP
- **Martha Sandy**, Chief, Reproductive and Cancer Hazard Assessment Branch, OEHHA
- **Avinash Kar**, Senior Director, Toxics, Environmental Health, NRDC
- **Joseph Daniels**, Director Chemical Management, ACC
- **Mike Easter**, Principal, EnSIGHT



Today's General Topics

Preemption – A survey of recent cases/decisions

OEHHA's perspective on preemption/compliance

Trends in state chemical regulations

Commercial/Industry perspective

A technical perspective

Questions?

State “Patchwork” of PFAS Restrictions

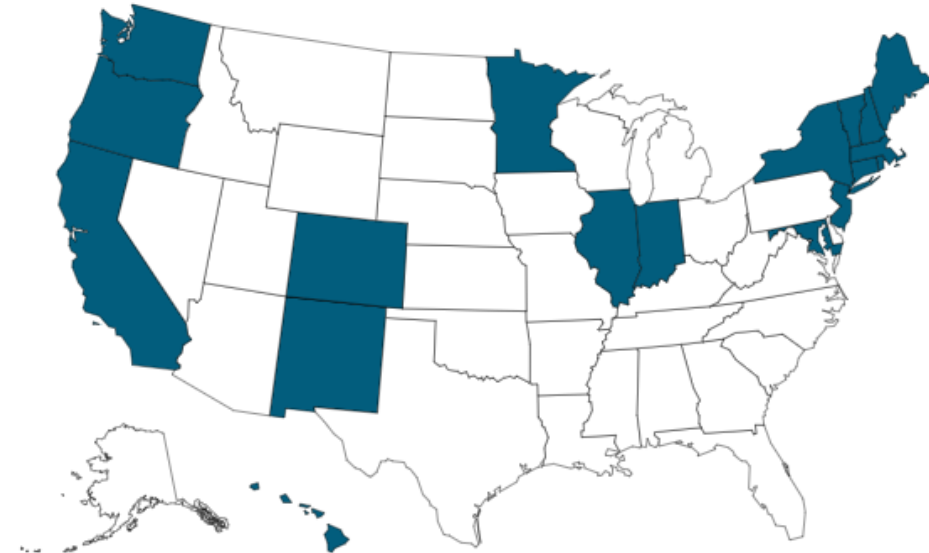
18 states currently have or will have product bans or reporting or disclosure requirements in place for intentionally added PFAS in consumer products

Typical consumer product categories: food packaging, textiles, juvenile products, cookware, outdoor gear, cosmetics, cleaning products, etc.

PFAS defined broadly (most states): any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.

Emerging trend: bans or reporting for **ALL** products (industrial, commercial, consumer)

- **Minnesota** – reporting begins Sept. 15, 2026; sales ban effective 2032
- **New Mexico** – reporting/labeling begins January 1, 2027
- **Maine** – sales ban effective 2032



18

States currently have PFAS Bans or Reporting/Disclosure Requirements

Data Updated as of: 4/18/2026

<https://www.hunton.com/pfas-state-tracker>

Federal (TSCA) PFAS Reporting

- **Scope:** Backward-looking, covers any PFAS manufactured or imported (including in formulations and articles) in any year from 2011 through 2022. Key is **manufacture/import** (NOT sale of PFAS).
- **What to report:** Data includes chemical identity, trade names, uses, production volumes, environmental/health effects, worker exposure, and disposal methods.
- **"Reasonably Ascertainable"** standard of diligence. Companies must report information known or reasonably ascertainable, meaning they must perform a reasonable search of their records and supply chain. This diligence standard may require surveying suppliers.
- **Recordkeeping:** Companies must maintain records supporting their submissions for five years from the submission date.
- **Reporting Period:** Will begin 60 days following the effective date of a forthcoming **REVISED** final rule (**expected 2026**); reporting period closing date will be confirmed in final rule.
- **Proposed exemptions that could be finalized:** PFAS in imported articles; research and development substances; impurities; byproducts; non-isolated intermediates; PFAS present below a 0.1% de minimis concentration in manufactured and imported mixtures.

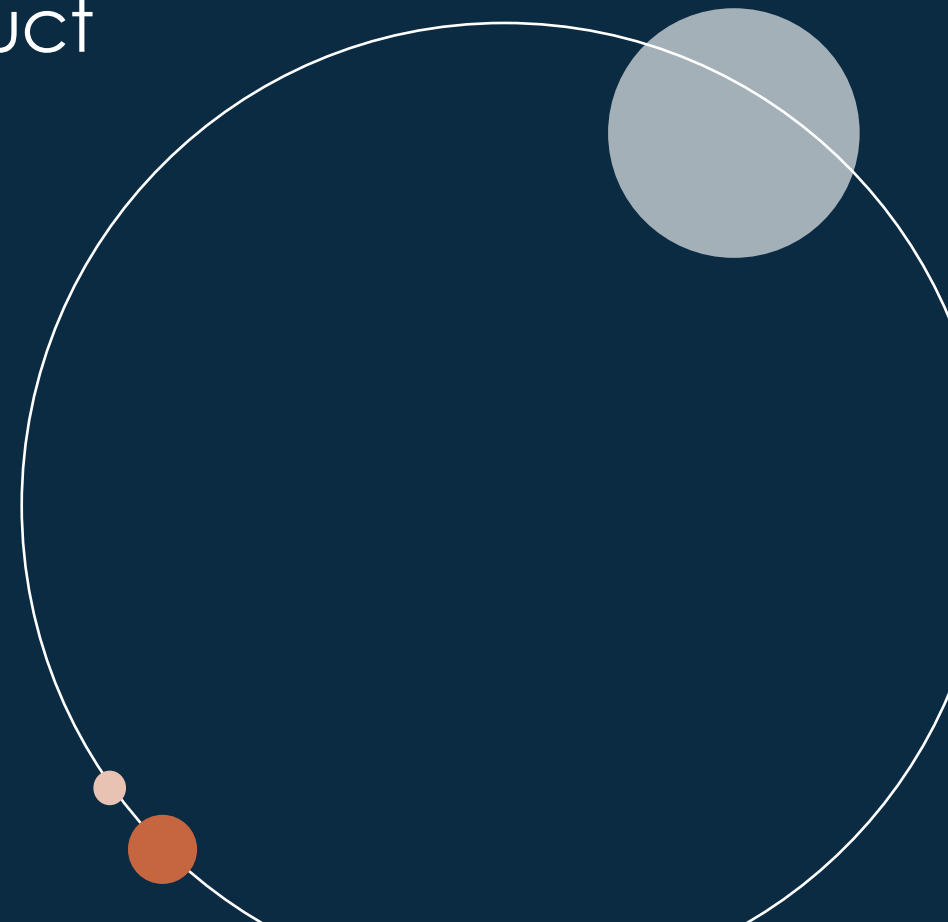
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Conflict Preemption in Proposition 65

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Conflict Preemption – Two Types

Proposition 65 claims may be preempted where:

1. It is impossible to comply with both federal and state law

- The question is whether the defendant can **independently** do what state law requires (i.e., **independent** of the acts or approvals of third parties or federal agencies).

2. Prop 65 stands as an obstacle to federal purposes and objectives.

- The focus is on the federal scheme's purpose and/or the federal agency's regulatory judgment.

Conflict Preemption Analysis

1. Identify the state-law duty precisely.

- Duty to warn? Duty to reduce or eliminate exposure?

2. Identify the relevant federal requirement or guidance.

- Required, prohibited, or approved warning?
- Federal policy encouraging use or consumption of a category of goods?

3. Compare the messages and practical consequences.

- Does the Prop 65 warning complement federal law or convey a materially different message about nature or magnitude of risk?

4. Evaluate federal purpose and statutory context.

- Consumer health, labeling uniformity, drug equivalence?

Opinion	Key Analyses	Holding
<i>Dowhal v. SmithKline Beecham Consumer Healthcare</i> , 32 Cal.4th 910 (2004)	FDA letter established federal policy: The FDA specifically rejected the manufacturers' request for permission to use a Prop 65 warning, fearing that it would deter pregnant smokers from using cessation products. Prop 65 would conflict with the FDA's policy not to discourage use of those products.	Obstacle preemption
<i>Sciortino v. Pepsico, Inc.</i> , F.Supp.3d 780 (N.D. Cal. 2015)	Federal purpose differed from Prop 65 purpose: The NLEA was intended, "to cover only nutrients or substances in food that nourish," and it, "does not in anyway regulate carcinogens or other, non-nutritive substances in foods." The NLEA provisions concerned how a label identifies "caramel color"—but Prop 65 addressed the safety of a byproduct of the caramel color.	No preemption.
<i>CEH v. Perrigo Co.</i> , 89 Cal.App.5th 1 (2023)	Reformulating or seeking federal approval is not "compliance" with Prop 65: Prop 65 does not impose a duty to reformulate, so the relevant question is whether the defendants could <i>give warnings</i> that comply with both Prop 65 and federal law. Generic OTC-drug manufacturers were prohibited from altering labels, so they could not <i>independently</i> comply with both Prop 65 and federal law.	Impossibility preemption
<i>Post Foods, LLC v. Superior Court</i> , 25 Cal.App.5th 278 (2018)	Federal agency's explanation of how state laws affect regulatory scheme is relevant: Although a federal agency's conclusion on preemption is irrelevant, its concerns about how state laws affect the regulatory scheme should be given weight—appellate court credited FDA's letters advising that Prop 65 warnings for acrylamide on foods would cause consumers to avoid whole grain foods, frustrating the FDA's dietary goals.	Obstacle preemption.
<i>Jessica Argueta v. Walgreens Company</i> , Case 1:24-cv-00072-JLT-CDB (E.D. Cal. Dec. 20, 2024)	Whether defendant complies with federal requirement is not determinative of preemption: Plaintiff asserted breach of warranty and UCL for selling OTC drug "unlawfully" for lack of FDA approval. FDA has exclusive authority to enforce its regulations; the state law claims that predated the federal scheme would exert an impermissible "extraneous pull" on the federal scheme.	Conflict preemption (Buckman)

Monsanto V. Durnell: A Specific Federal Label Requirement

- **State-law duty** : Plaintiff alleged Roundup *failed to warn* him of the risk of cancer.
- **Holding**: FIFRA expressly preempted a state-law failure-to-warn claim seeking a glyphosate cancer warning.
- **Key Points**:
 - **Specific federal requirements matter, not just the general policy**
 - **Durnell**: Missouri state law is *parallel* to FIFRA because it requires adequate warnings to protect human health and that do not include false or misleading statements. Because registration is not a defense to EPA enforcement for misbranding, it cannot be a defense to parallel state tort laws.
 - **Majority**: The argument is too general and, “disregards the central and comprehensive role that EPA performs in making labeling determinations.” Monsanto did not invoke the mere fact of “registration” as a complete defense; it relied on EPA’s specific determination that cancer warnings are not required for glyphosate-based pesticide labels.
 - **The federal agency’s process for addressing scientific developments suggests conflict preemption.**
 - **Durnell**: The state law duty can require different warnings to protect human health where new or evolving safety information arises after the EPA has approved a label.
 - **Majority**: “Regulatory lag is amply addressed by the extensive processes that FIFRA and EPA’s implementing regulations have established to respond to new or evolving safety information.” The EPA commissioned multiple reports after the IARC’s classification of glyphosate as probably carcinogenic before reiterating its position that glyphosate is not likely to cause cancer.

Litigation Takeaways

- Is there a federal requirement or policy addressing the same risk for which Prop 65 requires a warning?
- Is a federal agency entrusted with monitoring scientific developments and evaluating the same risk for which Prop 65 requires a warning?
- Can a federally-required warning and Prop 65 warning be given at the same time without violating federal law or conflicting with federal policy?
- Does a dual-compliance argument improperly rely on a federal agency or third party taking future action?
- Define the conflict precisely.

Proposition 65: The Safe Drinking Water and Toxic Enforcement Act of 1986

- California law, approved by the voters by a 63 - 37 % margin.
- Requires California to publish a **list of carcinogens and reproductive toxicants**.
 - Listings based on findings by Governor-appointed scientific panels, US EPA, US National Toxicology Program, International Agency for Research on Cancer, Food and Drug Administration, National Institute of Occupational Safety and Health, and formal labeling/identification required by California or federal agencies.
- Does **not ban or restrict the use of a listed chemical**, however businesses with 10 or more employees (excluding government entities)
 - must **provide a “clear and reasonable warning”** if they “knowingly and intentionally” cause significant exposures to listed chemicals.
 - are **prohibited from discharging significant amounts of listed chemicals to sources of drinking water**.
- Attorney General, local prosecutors, and private citizens can sue to enforce the law.
 - OEHHA does not have enforcement authority.



Trends in State Regulation of Chemicals

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The Shortcomings of Chemical Regulation in the US

- **“Regrettable substitution”**: BPA to BPS, BPF, etc.—drop-in replacements often share toxic traits
- **Very slow timelines**:
 - Regulating PFAS uses one at a time would take decades if not centuries, despite broad agreement on the harms
 - New substances enter the market far faster than agencies can review the old ones
- **Data gaps**
 - Companies very often don't disclose where chemicals are used — many products list no ingredients at all.
 - Many, many chemicals have not been fully tested, especially for long-term impacts

The Solutions States are Leading On

01

The Class Approach

To avoid substitutions with related/similar chemicals

02

“Currently unavoidable use”

Comprehensive and quicker approaches to eliminating harmful chemicals. Only allow use if:

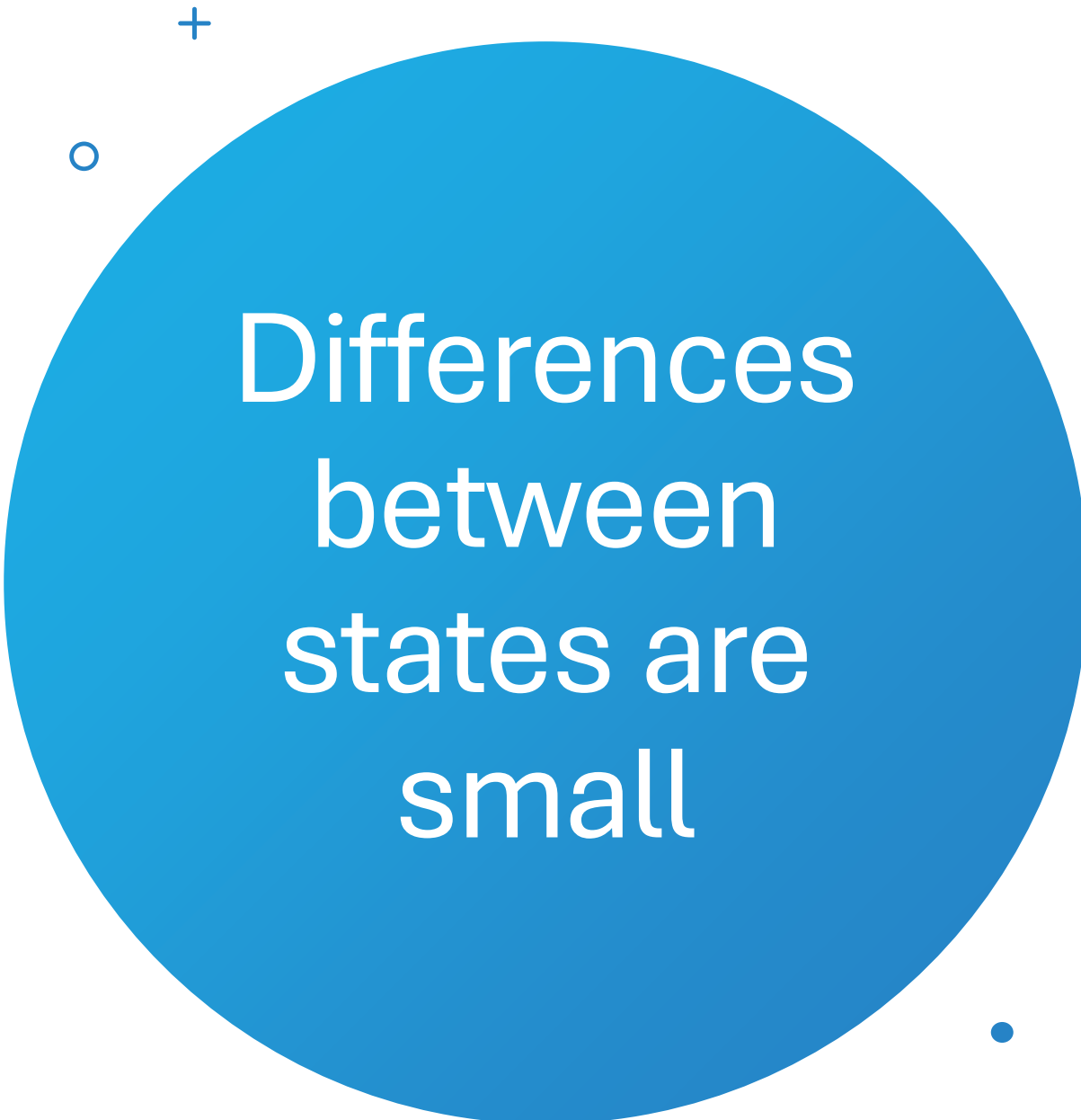
- There are no safer alternatives to the chemical available; and
- The function of the chemical is necessary for the product to work; and
- The chemical is being used in a product that is critical for health, safety, or the function of society.

At a minimum, phase harmful chemicals out for product categories where they can be eliminated and are unnecessary

03

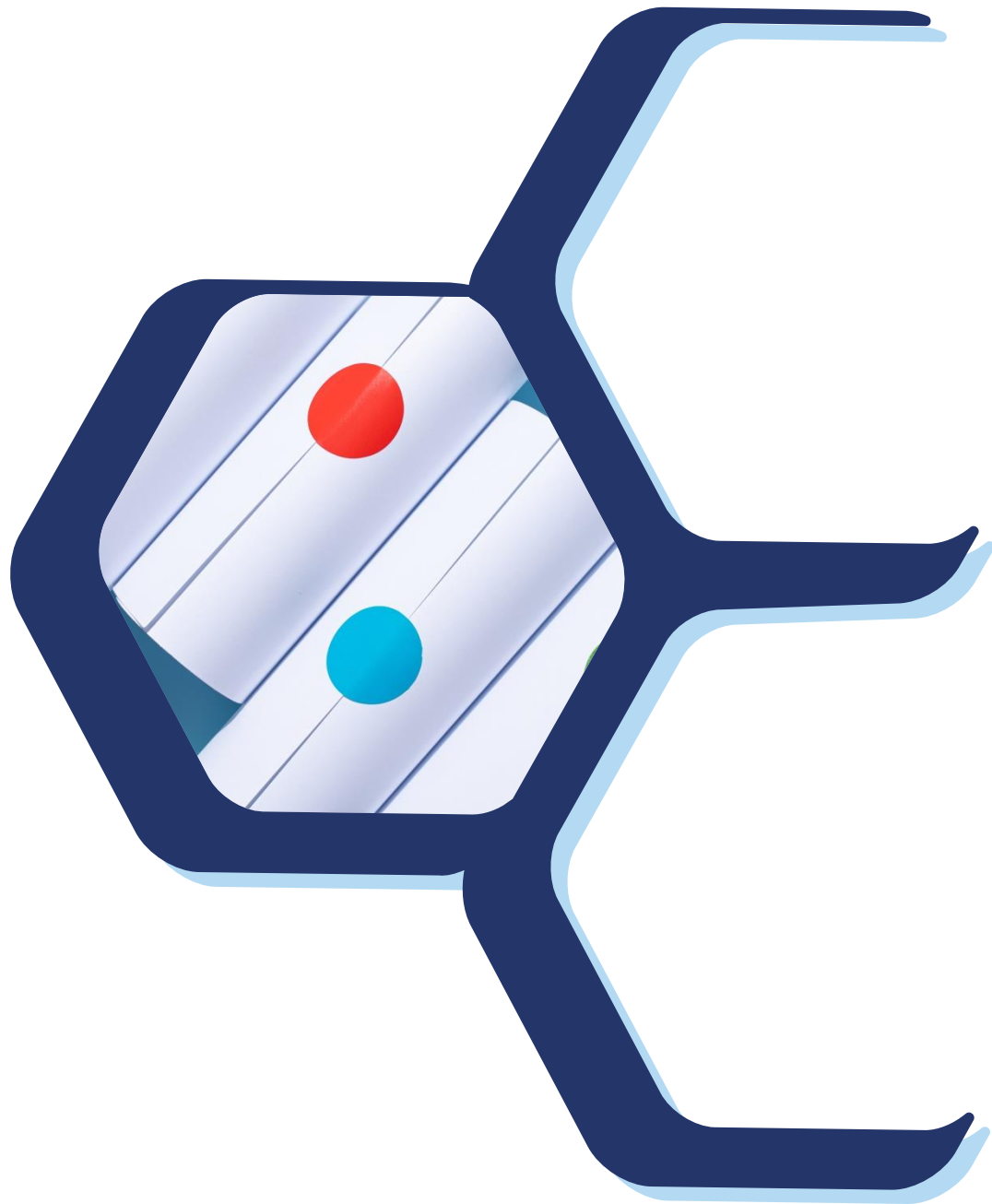
Disclosure

- Reporting to state agencies—this is the biggest area of activity
- Website disclosures—this is also common
- On label disclosures—limited efforts in this arena
- Warnings—less common, outside of Prop. 65



Differences between states are small

- Minor differences on similar laws
- BUT no conflicts
- Companies meet different requirements in different states on a host of issues
- Companies can avoid most problems by disclosing proactively and using safer chemicals
 - Disclose all ingredients possible and all chemicals of concern
 - Use the safest ingredients possible
- "Consistency" means the lowest common denominator — some states barely regulate, and the federal floor is sparse.
 - Consistency is a false target; proponents of consistency won't support strong federal laws
- Consumers don't complain about more information — those who care use it, and so do regulators. The complaints come from industry, "on behalf" of consumers.



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Multi-State Labeling

In addition to federal labeling requirements, chemical manufacturers face growing pressure to comply with expanding state requirements:

- Evolving Prop 65 Warnings
- Emerging Labeling Laws in Other States

Core issue: State-specific requirements can be difficult to reconcile on a single label without creating confusion.

Practical Impacts

Operational burden: Frequent revisions to labels, packaging, SDSs, websites, and related materials.

Cost Impacts: Ongoing redesign, relabeling, inventory management, and supply chain disruption

Legal Considerations: Increased risk from inconsistent or overlapping state warning schemes.

Consumer Impact:

- Too many or conflicting warnings may undermine clarity and contribute to warning fatigue.
- Different graphics and signal words may be confusing

Bottom line: More warning requirements do not always produce better risk communication.

2026 PROPOSITION 65 CLEARINGHOUSE

FEDERAL vs STATE REGULATIONS

Product Regulation • Analytical Testing • Exposure & Risk

Baby Food • Dietary Supplements • Cosmetics • PFAS Consumer Products

August 2026



Three Sections

01

Federal vs State Regulation of Products

Baby food • Dietary supplements • Cosmetics • PFAS consumer products (other than cosmetics)

02

Analytical Testing Requirements

Lab qualifications • Method selection • Sensitivity & proficiency standards

03

Exposure Estimation & Health Risk

Converting concentration data to exposure • Toxicology factors • Compliance thresholds

Four Product Categories

Baby Food	Dietary Supplements	Cosmetics	PFAS Products (non-cosmetics)
FEDERAL FDA action levels (guidance only) STATE State testing + disclosure mandates + Prop 65	FEDERAL Manufacturer-set cGMP specs No federal ppm limits STATE Prop 65 exposure Limit + CA transparency bills	FEDERAL MoCRA (Modernization of Cosmetics Regulation Act) process duties No broad chemical bans STATE Intentional-addition bans + Prop 65 (CA, WA, others)	FEDERAL Packaging phase-out TSCA reporting only STATE Multi-state bans TOF thresholds 2025–2032 phase-outs

Baby Food: Guidance vs Mandate

Aspect	Federal (FDA)	State Programs
Limit type	Action levels (guidance) Exceeding may support adulteration	No independent ppm limits Some states ban sale above FDA levels
Lead	10 ppb (most foods) 20 ppb (root veg, dry cereals)	No separate state number Focus is on the testing process
Testing	Not required monthly Food Safety Modernization Act (FSMA) hazard analysis sets a risk-based duty to analyze & control hazards	Monthly testing of each production aggregate required
Lab standard	No prescribed accreditation or proficiency floor	ISO 17025 + ≥ EAM 4.7 method + proficiency ≤ 6 ppb
Disclosure	Not required	Public website posting + QR code on label
Prop 65	N/A	Lead MADL 0.5 µg/day can force a warning even below FDA ppb

Analytical Testing Considerations

Lab Qualifications	Method Selection	Sensitivity Floor
ISO/IEC 17025:2017 accreditation Method $\geq$ FDA EAM 4.7 sensitivity Proficiency $\leq$ 6 ppb (z-score $\leq \pm 2$)	Almost never set by statute Performance criteria drive the choice ICP-MS for metals LC-MS/MS + TOF for PFAS Validated methods for organics	State laws set the practical minimum $\leq$ 6 ppb for toxic elements TOF 100 $\rightarrow$ 50 ppm thresholds Must support Prop 65 exposure calculations

Method Selection by Analyte

Analyte	Primary Method	Why It Matters
Heavy metals (Pb, Cd, As, Hg)	ICP-MS after microwave digestion	FDA EAM 4.7 — state reference method
Inorganic arsenic (speciation)	HPLC-ICP-MS	Needed for 100 ppb rice-cereal action level
Targeted PFAS	LC-MS/MS	Standard for intentional-addition checks
Total Organic Fluorine (TOF)	Combustion Ion Chromatography	Statutory metric in CA / VT packaging & textiles
Formaldehyde / releasers	HPLC or validated free/releasable methods	State cosmetics ban compliance
Phthalates & organics	GC-MS / LC-MS	Prop 65 and cosmetics

Exposure Estimation & Health Risk

01

Convert Concentration Data to Exposure Estimate

Exposure Assessment Guidance

- Federal – USEPA Exposure Factors Handbook, USEPA Residential Pesticide Exposure Assessment Guidance, FDA Dietary Intake Guidance
- State – OEHHA Air Toxics Hot Spots Stochastic Guidelines, P65 regulations

02

Use Toxicology Factors to Estimate Potential Health Risk

- Non-Cancer Endpoints – federal USEPA Integrated Risk Information System (IRIS); States – OEHHA RELs, MADLs,
- Cancer – Federal USEPA IRIS; States – OEHHA Air Toxics, NSRLs
- Guidance – USEPA Cancer Assessment Guidance; State – OEHHA Air Toxics Hot Spots Stochastic Guidelines & P65 regs

03

Compare Health Risk Estimates with Compliance Values

- Derive estimates of potential health risk using exposure estimates and toxicology factors & compare with reference doses, threshold values, compliance values, etc.

Five Points to Carry Forward

1

Product regulation is dual-track

Federal = FDA guidance + process duties. State = detailed mandatory testing, disclosure, bans, and Prop 65 warnings.

2

State drives more detailed testing requirements

ISO 17025, EAM 4.7 sensitivity, ≤ 6 ppb proficiency, and public disclosure come from state law — not federal mandate.

3

Concentration is not exposure

Convert lab results to daily exposure before comparing to Prop 65 MADLs/NSRLs.

4

PFAS bans are almost entirely state-led

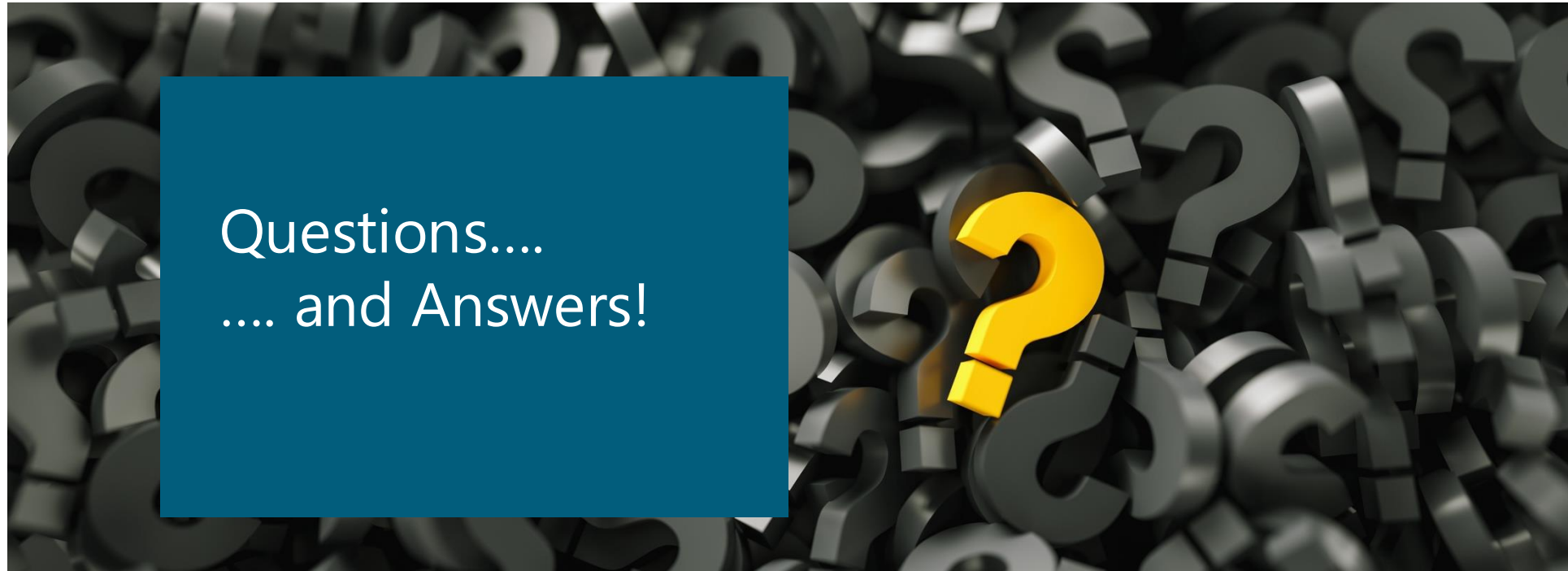
No federal ban on PFAS in cosmetics or most consumer articles. ME/MN 2032 phase-outs and multi-state intentional-addition bans control compliance.

5

Document the full chain

Lab qualification → method → concentration → exposure calculation → risk comparison.

Conclusion



Today's Panel Contact Information

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