IMPORTANT: The answers to the questions below is being provided using regulatory text and supporting information provided by OEHHA. Some of the answers do contain insight based on the review of this information and discussions amongst members of various industry working groups. Each person reviewing this information should ensure that they take the information provided and discuss within their organization to determine the most appropriate course of action for their specific product and situation.

- Does Prop65 apply to Industrial Products?
  Prop 65 applies to Consumer Products. According to the California Health and Safety Code 25251, a consumer product is any "product or part of the product that is used, bought, or leased for use by a person for any purpose." This broad definition along with previous notices that have been filed (e.g. Diesel Exhaust Equipment Manufacturers) seems to indicate that all products are in-scope of the law. It is probable that there are certain product types that are more likely to be targeted. High-volume general consumer use products, products sold at big box stores or via large internet sites, such as Amazon, are likely to be at increased risk.

- Instead of placing a warning label on the product, can the label be placed on the packaging instead of the product?
  Yes. A "label" is defined as a display of written, printed or graphic material that is affixed to a product or its immediate container or wrapper (Section 25600.1). The warning label should be placed in a manner to ensure that consumers receive the warning prior to exposure.

- We sell our products through distributors, instead of placing the label on the product or the packaging, can we add a statement on our website so that our distributors will be informed?
  A consumer product manufacturer that does not sell directly to retailers has two options for compliance: (1) Label the product with the required warning; or (2) Provide a warning notice and the warning materials to the packager, importer, supplier or distributor via their authorized agent who should take appropriate actions to ensure that the warning is passed along to the retailer and ultimately to the consumer. How this is done will vary from situation to situation. A manufacturer or producer may choose to enter into a contract with other businesses along the chain of commerce for their product to ensure that the warning is appropriately transmitted to the retailer and end
consumer. Per Q13 of “OEHHA’s Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses”.

- The law states that you must warn on the website for internet sales. If an order for a complete machine or an attachment cannot be placed on the web (machine or attachment must be purchased thru a dealer), is a warning needed when those portions of the website are for informational purposes only (pictures, specs, features, etc)?
  
  No. Under the safe harbor provisions of the regulations, warnings are required for purchases made over the internet. Per 25607(b) “For internet purchases, a warning that complies with the content requirements of Section 25603(a) must be provided by including either the warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. If an on-product warning is provided pursuant to Section 25602(a)(4), the warning provided on the website may use the same content as the on-product warning. 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. For purchases made via a printed sales catalog, the warning shall appear in the sales catalog. Per 25602(c) “For catalog purchases, the warning must be provided in the catalog in a manner that clearly associates it with the item being purchased. If an on-product warning is being provided pursuant to Section 25602(a)(4), the warning provided in the catalog may use the same content as the on-product warning.”

- If there is an attachment that is sold separately from the main machine, such as a backhoe, conveyor, or water system that requires a warning label (assume that a short-form warning is used) and it has its own operator’s manual, does that warning also need to be placed in that attachments’ operator’s manual, similar to the way the diesel exhaust warning must be provided, or is the labeling of the product itself adequate?
  
  This depends on the type of warning used:
  
  - Warning per Consent Order Settlement – follow all requirements, including method of transmission, outlined in the settlement
  - Product Specific Warning (25607.1 - 25607.33) – follow method of transmission requirement as specified for specific product type
  - General Warning (Standard or Short Form) – Warning is not required to be placed in Operator/Owner Manuals. Labeling the product or its immediate packaging is adequate.

- Just a comment that promotional and other items such as clothing, hats, mugs, pens, golf balls, etc., should not be overlooked; many of us could be focusing only on machines, attachments, and repair parts.
  
  Agreed. In fact, these types of products may be more likely to be targeted by bounty hunters.

- We install engines from both Deere and CAT who were named in the settlement. Does that exempt us from the new Prop 65 warnings for exhaust, since the engine manufacturer is exempt?
  
  No. The products that these engines are placed into (end products) would be required to comply with the warning requirements of Prop 65 (Consent Order Judgement Warning, Product Specific Warning or General Warning (standard or short form)). For end products with diesel engine exhaust (other than passenger vehicles) the two options that provide for the best “safe harbor” protection:
• If named as a defendant in the Diesel Engine Exhaust Consent Judgement Settlement (Case 965969 dated June 26, 1995) – follow all requirements outlined in the settlement
• If not named as a defendant in the Diesel Engine Exhaust Judgement Settlement (Case 965969 dated June 26, 1995) – follow all requirements for the product specific warnings for “Diesel Engine Exhaust Exposure Warnings (Except Passenger Vehicle Engines)” as outlined in 25607.14 and 25607.15.

• I’ve had Equipment OEM’s ask about prop 65 labeling of applicable service parts with a specific warning in addition to the equipment label itself. OEM’s are concerned about chemicals other than exhaust. In your opinion, should OEM’s be worried about labeling each individual service part?
  Yes. Because service parts are consumer products that are purchased and handled separately by the consumer, the applicable Prop 65 warning should be provided.

• Would a plastic product that only exposes a Prop 65 gas substance when burned considered a type of contact or inhalation exposure?
  No. If the intended use of the plastic product does not involve it being burned.

• Does an enclosed product that passes a substance wipe test, but has a substance internally that does not come in contact with the user require a prop 65 label?
  The need to provide a Prop 65 warning is based on if the product can expose a consumer to a Prop 65 chemical. If no exposure can occur (because a consumer cannot make contact) then a warning is not required. A bounty hunter only has to prove that a Prop 65 chemical is present in the product. It is up to the defendant to prove that it is not present at a level that would cause harm to a consumer. Because the burden of proof is with the defendant, some companies may choose to provide a warning even if a consumer is not readily or easily exposed to avoid a notice being filed and having to defend their position.

• Is the short form Prop 65 acceptable for industrial buildings warning signage?
  No. Environmental Exposure Warning requirements can be found in 25604.4 and 25604.5.

• What types of testing/documentation are required to prove a product does not contain a Prop 65 substance?
  There are no specific requirements on what documentation needs to be maintained to prove a product does not expose an individual to a Prop 65 chemical above a Safe Harbor Limit. The warning regulations do not require a business to perform any testing. Not providing a warning when a Prop 65 chemical is contained in a product exposes the manufacturer to potential for a Prop 65 notice to be filed. It is then up to the defendant named in the notice to prove that the chemical is below the safe harbor level (exposure below the listed safe harbor limit). Many chemicals on the Prop 65 list do not have a listed safe harbor limit which makes defending a Prop 65 notice difficult. Each manufacturer will need to determine their level of comfort regarding the documentation that is maintained. Documentation would only be used if a notice is filed (there is no requirements for manufacturers to keep “technical files” to support their Prop 65 strategy).

• It was mentioned that if we inform the dealers/retailers in California in writing, provide labels/signage, supporting materials and receive their written confirmation of their understanding and that they will label/mark the goods accordingly we do not have to label the products sent from our warehouse outside of CA to the dealers/retailers in CA. Is my understanding here correct?
• **What is the drawback of simply posting the short form warnings on the machine or packaging (along with the manual) and not worrying about the long form warnings at all?**

Both options for providing a warning (standard warning (long form) and short form warning) are deemed “clear and reasonable” and provide “safe harbor” (protection from Prop 65 litigation). Note: Neither type of “general warnings: (short form warnings or standard warnings (long form)) need to be placed in OMs.

• **If you are part of the diesel exhaust settlement and provide the warning in the manual do you still have to have a label on the machine?**

No. Labeling of the machine is not a requirement of the diesel exhaust consent order settlement. 25600(e) states that a person that is party to a court ordered settlement establishing a warning method is deemed to be providing a “clear and reasonable” warning for that exposure if the warning complies with the settlement. Ensure that the OM warning verbiage matches the verbiage as listed in the court ordered settlement. Maintaining the OM warning per the Consent Order Settlement does not preclude a notice from being filed but would allow the defendant a straightforward and legally defensible argument as to their position (maintaining the warning as outlined in the Consent Order Settlement).

• **Even if you do the short form warning label, doesn’t the consumer have the right to contact you to request the exact chemical of concern?**

It is highly unlikely that OEHHA would ever request that a business that is using the on-product short-form warning identify the listed chemicals for which the warning is being given. Even if OEHHA makes such a request, the website regulations (which were adopted separately from the warning regulations) provide that businesses need not conduct any additional testing or analysis to provide a response to OEHHA’s inquiry.

• **What if you can make the argument that your spare parts are not really consumer products?**

This would likely be a hard argument to win. Prop 65 applies to Consumer Products. According to the California Health and Safety Code 25251, a consumer product is any “product or part of the product that is used, bought, or leased for use by a person for any purpose.” This broad definition along with previous notices that have been filed seems to indicate that all product types are in-scope of the law (including service parts). In addition, the automobile industry asked OEHHA for its views on whether the warning for the assembled automobile made warnings for replacement parts unnecessary. OEHHA does not agree that this approach would meet the intent of the rule indicating pretty clearly that spare parts are in-scope.

• **While you may be able to buy one of our products at Home Depot, all parts are purchased through our authorized dealer network. You can’t just call or order on line without going through a dealer. Do parts still have to be labeled?**
Yes. A dealer is considered a retail seller of consumer products.

- **We distribute some parts of diesel powered machinery that were manufactured over the past 5-10 years. Are we okay to label them with the 2016 required labels, or do we need to start using the new standard of labeling?**
  
  A consumer product that is manufactured prior to August 30, 2018 and labeled with a warning that is compliant with the September 2008 version of the regulations is deemed to be compliant with the new regulations (Section 25600(b)). Such a product does not require the new warning.

- **I understand the need to label parts or the immediate packaging. There was a comment made about packaging possibly needing to be labelled. If I have a part in a bag which is in a box which is strapped to a pallet, what should I label?**
  
  The warning label should be placed in a manner to ensure that **end consumers** receive the warning prior to exposure.

- **If the dealer is labelling the product, do the labels need to be provided for free?**
  
  This is not clearly defined in the regulation. Each manufacturer should review the language and determine the appropriate course of action.

- **If we instruct our dealers to label the product and provide the necessary labels and they don’t do it, does the liability fall on them or ultimately come back to the manufacturer? I know there are some laws that address this situation and spell out the liability.**
  
  Everyone in the distribution chain—e.g., the vendors that supply the products, the manufacturer, and the independent dealer—may be held liable for a violation of Proposition 65, so ordinarily, all parties have an interest in ensuring that products are sold with a proper warning (However, occasionally parties in the distribution chain may be exempt from Proposition 65 because they employ less than ten persons, so those parties may be less incentivized to warn). Any assessed liability/penalty that the manufacturer wants to pass to the retail seller would be a separate activity outside of the Prop 65 settlement process and would be strictly the responsibility of the manufacturer.

- **Can the general warning be placed in the operator manual instead of placing it on the product itself?**
  
  No. This is not a “safe harbor” method for providing the general warning. Only placing the warning in the OM would leave you open to notices being filed and you defending your position. Because the law specifically outlines the method of transmission for general warnings you would likely be unsuccessful arguing your position of only providing the general warning in the OM.

- **Can a manufacturer opt to add the warning label to each product without doing any testing or analysis whether a listed chemical is present?**
  
  This seems counterproductive to the intent of providing California consumers with useful information but I don’t see anything in the law that speaks against such a practice. Yes. While this does seem counterproductive to the intent of the law this is allowed with many manufacturers likely using this option.

- **Is a manufacturer liable if the product is not originally sold into California but subsequently resold into California by a third party?**
  
  I am unaware of any situation where product re-sale has been a subject of litigation. It is more likely that bounty hunters will be focused on initial (new) product sales to consumers in the State of California.