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California Law Has a Built-in Toxin Alarm

By DAVID ROE

In a remarkable experiment, Californians are using the power of the marketplace to reduce their exposure to toxic chemicals.

Up to now the demands of a free-market economy, whether for shinier apples or longer shelf life or no-knock gasoline, have been assumed to press in favor of chemicals entering our environment: "Better living through chemistry," as the old marketing slogan goes. The risk that some of the chemicals would be unacceptably toxic was a problem assigned to government regulators, who could succeed only by swimming against the economic tide.

But a month ago, a new California law began to reverse that tide. For a list of particularly dangerous chemicals (those officially known to the state to cause cancer or reproductive toxicity), it creates a market incentive for businesses to make sure they keep exposures below the level that would pose any significant risk to health. (For carcinogens, the state has established that threshold at the level that would produce one excess cancer per 100,000 exposures, based on standard Environmental Protection Agency methodology.)

The incentive is simple. A business that intentionally exposes people to one of the listed chemicals, and doesn't keep the exposure below that chemical's authorized level, must warn the people exposed. Excess exposures are still legal, but the warning must be included along with the chemical dose. Competition therefore presses in favor of keeping exposure levels down. If one company's product sits on the shelf with a cancer warning and a competitor's doesn't, it's not hard to foresee which one a consumer will choose.

The new law, a popular initiative known as Proposition 65, was overwhelmingly approved by California's voters in November 1986. Gov. George Deukmejian issued a list of chemicals that was much shorter than expected (and that he has since expanded following a lawsuit), but that contained important carcinogens such as benzene and vinyl chloride, and important reproductive toxins such as lead. Businesses have had a year's grace period to look over how they expose people to those chemicals and to decide, when necessary, whether to reduce the exposures or to warn.

Instead of trying to resist the incentives that animate private business enterprise, making use of those incentives is at the heart of Proposition 65's approach. And the incentives for business not only in the marketplace, but also in the regulatory process are consciously addressed.

For example, the question of "how much is too much" of a specific toxic chemical is one that has bedeviled regulatory agencies since the beginning of modern toxics law. Even after a chemical is absolutely confirmed to cause cancer, based on laboratory or workplace doses, there is extensive debate over the danger of smaller doses, and where or whether to draw a line between amounts worth worrying about and amounts that can more or less be safely ignored.

Under the typical toxics control law, government scientists and regulators have the job of deciding where to draw the line for each chemical; and until the line is drawn, in effect, the law is not in force. The typical system thus creates a perfectly rational incentive to continue the debate for as long as possible and to offer the government line-drawers a minimum of help, either scientific or political. It is no wonder that the "how much is too much" question can take decades to answer, even for a single chemical. In the meantime, as the debate goes on, the public continues to be exposed to known toxins in amounts of undetermined safety or harm.

Because of the way Proposition 65 is structured, however, private industry for the first time has a strong incentive to get the "too much" concept turned into precise numbers, for each chemical involved. The burden of proof has been shifted onto producers or sellers to show that their products or activities do not exceed the "no-significant-risk" level. It is very much in their interests, therefore, to have that level precisely defined. As as result, California's regulators have answered the "how much is too much" question for more chemicals in the past 12 months than the EPA has managed to address under the federal Toxic Substances Control Act in the past 12 years. The acceleration in the transition from scientific information to meaningful law has been dramatic.

Understandably, a law with such potential to change the status quo has been highly controversial. The incentives would not work, opponents have strenuously argued throughout the past year: The state's regulators would never be able to come up with the desired "how much is too much" numbers in time. (By the time the law went into effect at the end of February, regulators went beyond the initial request list of 29 chemicals by setting numbers for 31.) There would be massive overwarnings, with labels on every item in the supermarket instead of only on the few products actually presenting a significant risk and exceeding the law's standard. (Underwarning rather than overwarning now seems to be the problem, and so far there appear to be no labels in supermarkets at all. That will change as regulations on warning are issued in final form, and as case-by-case interpretation begins.)

Strong corporate resistance to Proposition 65's changes has been felt. H[illegible] few business leaders are thought[illegible] sidering the implications of a sy[illegible] which the incentives are for [illegible] rather than quarreling, one in which [illegible] mate on toxic chemical controls is not inevitable. Chevron's Chairman George Keller suggested in a recent public speech that in the post-Proposition 65 era it might be in industry's interest to take the initiative in controlling toxics problems, in advance of legal strictures, and that the traditional attitude of merely complying with regulations once written might be obsolete. In private, he and others have begun exploring ways to reach consensus on the longstanding scientific disputes over toxicity and risk assessment. If the stalemate is broken, in other words, it may be better to lead than to follow.

It is too early to say what the outcome of California's experiment will be. Response to the new incentives is only starting, on all sides; the noise level is still high; and the law's second half restricting discharges of the same chemicals into drinking-water sources has yet to go into effect. But if all sides discover self-interest in moving toward effective control of the toxics problem, instead of sticking grimly to their familiar trenches, the results will be as remarkable as the law itself.

Mr. Roe is a senior attorney with the Environmental Defense Fund and a co-author of Proposition 65.

Notable & Quotable

Anatole Kalestsky of London's Financial Times, in its April 6 edition:

The crumbling of nearly 10% of the U.S. banking system, followed by creeping nationalisation, has been one of the most paradoxical legacies of the Reagan era. The chances are that, like the Third World debt crisis, the domestic banking debacle will be a time bomb that ticks alarmingly and loudly, but never quite goes off.

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