

CLIENT ALERT

OEHHA Clarifies Responsibilities and the Meaning of "Actual Knowledge" Under Prop 65 Regulations

January 29, 2020

The Office of Administrative Law has approved amendments to California's Safe Drinking Water and Toxic Enforcement Act of 1986 (aka "Proposition 65") regulations regarding the responsibility to provide consumer product exposure warnings and the meaning of "actual knowledge" as used in the regulations.¹¹ The amendments, which are set to go into effect on April 1, 2020, are specifically intended to clarify Title 27, California Code of Regulations, section 25600.2, subsections (b), (c), (f) and (i).²²

These amendments, drafted by California EPA's Office of Environmental Health Hazard Assessment (OEHHA), were prompted by requests for clarification from various stakeholders regarding certain of the substantial changes to the Prop 65 warning regulations that went into effect in August 2018.³³ In particular, section 25600.2 was then updated to allow manufacturers to either provide warnings on the product label or to provide written notice and warning materials directly to the retail seller.⁴⁴ According to OEHHA, the new amendments are needed because there was uncertainty among intermediate parties in the chain of commerce as to whether providing a warning or notice to their immediate downstream customer would satisfy the 2018 requirements.⁵⁵

The amendments thus clarify that an entity in the chain of commerce, including intermediate parties, must provide notice and warning materials directly to the designated agent for the entity to which it is transferring or selling the product, or provide the notice and warning materials to the ultimate retail seller in order to discharge its duty.⁶⁶ The entity providing the notice and warning materials must obtain verification of receipt.

OEHHA rightly concluded this clarification is necessary because, in some situations, the original manufacturer, distributor, importer, or others in the chain of commerce may not know where or by whom the product will ultimately be sold to a consumer.⁸⁷

The new amendments also clarify that if a business has not designated an authorized agent to receive Proposition 65 notices pursuant to section 25600.2(c), the notice may be served on the entity's legal agent for service of process.⁹⁸

In addition to clarifying the responsibilities for providing warnings, OEHHA now explains what is meant by "actual knowledge" as used in section 25600.2(e)(5), including whose knowledge is required. Under the amendments, "actual knowledge" exists when

“the retail seller receives information from any reliable source that allows it to identify the specific product or products that cause the consumer product exposure.”¹⁰⁹ Previous regulatory language referring to “specific knowledge” and “sufficient specificity” was eliminated as too vague.¹¹⁰

With respect to whose knowledge is needed, OEHHA concedes that, as written, the regulation could be interpreted to mean that a retail seller will have “actual knowledge” of an exposure from information provided to any employee in the organization from any reliable source.¹²¹¹ This could conceivably include low-level employees who could not reasonably be expected to evaluate the information and take action on behalf of the retail seller.¹³¹² The modified rule now requires knowledge of an “authorized agent” for the organization, or an employee in a position of sufficient responsibility that his or her knowledge can be imputed to the entity.¹⁴¹³

While the amendments provide greater clarity regarding the retailer notification provisions of the Proposition 65 regulations, companies in the middle of a lengthy supply chain may continue to struggle to ensure that their notifications are received by the appropriate agents for their downstream customers.

¹ OEHHA, Notice of Amendments – Article 6 Clear and Reasonable Warnings, Section 25600.2, Responsibility to Provide Consumer Product Exposure Warnings, <https://oehha.ca.gov/proposition-65/crn/notice-amendments-article-6-clear-and-reasonable-warnings-section-256002>.

² Id.

³ OEHHA, Initial Statement of Reasons, Title 27, California Code of Regulations, Proposed Amendments to Article 6 Clear and Reasonable Warnings Section 25600.2 Responsibility to Provide Consumer Product Exposure Warnings (November 16, 2018), <https://oehha.ca.gov/media/downloads/crn/isor111618.pdf>.

⁴ 27 CFR § 25600.2(b) (effective August 2018).

⁵ OEHHA, Initial Statement of Reasons, supra.

⁶ OEHHA, Final Statement of Reasons Title 27, California Code of Regulations Proposed Amendments to Clear and Reasonable Warnings Section 25600.2 Responsibility to Provide Consumer Product Exposure Warnings, https://oehha.ca.gov/media/fsor_art_6_section_25600.2.pdf

⁷ Id.

⁸ Id.

⁹ OEHHA, Initial Statement of Reasons, *supra*; see Final Regulatory Text, § 25600.2. Responsibility to Provide Consumer Product Exposure Warnings, https://oehha.ca.gov/media/final_regulatory_text_25600.2.pdf.

¹⁰ OEHHA, Final Statement of Reasons, *supra*; Final Regulatory text, *supra* at 25600.2(f).

¹¹ Id.

¹² OEHHA, Initial Statement of Reasons, *supra*.

¹³ Id.

¹⁴ Id.; see Final Regulatory Text, *supra* at 25600.2(f).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Warren Lehrenbaum

Partner – Washington, D.C.
Phone: +1.202.624.2755
Email: wlehrenbaum@crowell.com

Richard McNeil

Partner – Orange County
Phone: +1.949.798.1381
Email: rmcneil@crowell.com

Sigourney R. Haylock

Associate – Los Angeles
Phone: +1.213.443.5527
Email: shaylock@crowell.com

Nina M. MacLeay

Senior Environmental Specialist – Los Angeles
Phone: +1.213.443.5559
Email: nmacleay@crowell.com