

# Buchalter

## CLIENT ALERT

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### Amendments to Proposition 65's "Downstream" Warning Procedures would include the full Distribution Chain

➤ **Will protect manufacturers of bulk products, among others**

California's "Proposition 65" requires manufacturers and others in the chain of distribution to warn consumers before causing them to be exposed to a list of almost 900 chemicals "known to the State of California to cause cancer, birth defects and other reproductive harm."

Under current regulations, a manufacturer can place the required warning on the product or its packaging, or it can pass the obligation to provide appropriate warnings to "downstream" retailers by notifying the retailer that a warning is required and providing the retailer with the materials necessary to give the warning to the consumer.

Current regulations, however, do not address how a manufacturer may pass the warning obligation through the ordinary distribution chain where the manufacturer may not even know who the ultimate retailer might be. This problem is particularly acute for manufacturers and distributors of bulk products that may be repackaged as they pass through the chain of commerce.

#### **Proposal: Notice from Manufacturer to Distributor**

California's Office of Environmental Health Hazard Assessment (OEHHA) originally determined that responsibility within the distribution chain could best be allocated by contract between the manufacturer and its distributors. It has now realized that transferring responsibility by requiring that the manufacturer notify the retailer directly is often not feasible so OEHHA has proposed modifying the procedures for transferring the warning obligation to others "downstream" in the retail distribution chain.

OEHHA's proposed amendments will allow the manufacturer to pass the warning obligation down the chain of distribution by notifying either the retailer or the person to whom the manufacturer sells the product. The distributor may do the same, and so on down the distribution chain to the retailer. To pass responsibility downstream, the notice must also include the "materials necessary to transmit the warning," which could be labels or labeling, hang tags, or shelf signs. The notice should also include the appropriate warning language for products sold on the internet.

The notice and warning materials will need to be given to an “authorized agent” that has been designated by the downstream recipient to receive these notices. If no “authorized agent” has been designated, notice, including the warning materials, may be sent to the legal agent for service of process for the downstream party.

To be effective, the manufacturer is required to receive an acknowledgement from the downstream party that it received the notice. The notice, and the acknowledgement of its receipt, must be renewed annually.

### **Downstream Responsibility need not be “Accepted”**

Notably, the amendments do not require the downstream party to affirmatively accept responsibility for providing the warning. The manufacturer and others in the distribution chain may unilaterally pass the warning obligation downstream by mailing the notice and the warning materials “return-receipt requested” to the distributor or to its agent for service of process. For products that will be sold on the internet (for which notice must be given prior to the sale, rather than simply placing it on the packaging), a “downstream” notice sent by e-mail to the appropriate person with an automatic “delivery receipt” that will confirm the e-mail was received likely will be sufficient.

### **New Standard for “Actual Knowledge” by Retailer**

The regulations will also revise the standard for determining when a retailer has “actual knowledge” of potential exposure to a Proposition 65 chemical. A retailer with “actual knowledge” has an obligation to provide a warning if there is no other party in the distribution chain that is subject to Proposition 65 (e.g., if a manufacturer or distributor is overseas, does not conduct business in California or employs fewer than 10 people).

Currently, the information comprising “actual knowledge” must be known to the “authorized agent” of the retailer. The amended regulations will add that the retailer will be deemed to have “actual knowledge” if the information triggering the requirement to warn is known to “a person whose knowledge can be imputed to the retail seller.” This addition is intended to incorporate existing law regarding management-level employees whose knowledge may be imputed to the company as a whole.

The retailer will continue to have a 5-day grace period if it learns of information triggering a Proposition 65 warning requirement from a 60-day notice it receives from a private enforcer.

The public comment period for these proposed amendments closed on January 11, 2019. OEHHA has not announced when it will consider formal adoption of the amendments.



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