

California Seeks Clarity on Retailer/Supply Chain Prop 65 Warning Provisions

[Joseph J. Green](#)

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Only a few months after new provisions went into effect (on August 30th), California's Office of Environmental Health Hazard Assessment (OEHHA) is proposing to clarify the rules governing retailer and supply chain responsibility for providing warnings under Proposition 65. These provisions (found in Section 25600.2 of Article 6 of the Prop 65 regs) are intended to provide greater certainty to retailers, distributors, and manufacturers on who is responsible for providing Prop 65 warnings and when, but have sparked a fair amount of confusion due to several ambiguous provisions.

The 2016 amendments to the warning provisions of Prop 65 aimed to limit potential retailer burdens by providing manufacturers (and distributors) with two basic compliance options: (1) affix an appropriate warning to the product; or (2) provide written notice to the retailer regarding the required warning for the product. The manufacturer/distributor then must obtain confirmation of the retailer's receipt electronically or in writing. Retailers that receive such a notice are only liable if they fail to post, obscure, or alter a warning provided to it. Retailers also may be liable for products sold under their own brand name or if they have "actual knowledge" that a warning is required for a product and there is no other potentially responsible party.

Most notably, OEHHA is proposing three main changes:

First, OEHHA proposes to allow distributors to satisfy their obligation by providing written notice and warning materials either to the retailer or to the business to which they directly sell or transfer the product (*i.e.*, the next distributor in the supply chain). The current rule only provides that such notice be sent to "the authorized agent for the retail seller." The proposal responds to business concerns that "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."

Second, OEHHA would clarify that where a business has not designated an authorized agent to receive Proposition 65 notices, the notice may be served on the business's legal agent for service of process.

Third, OEHHA addresses the concept of "actual knowledge" that may trigger retailer responsibility for providing a warning. Currently, the regulations state that retailers must provide a warning when they have "actual knowledge of a potential consumer product exposure and there is no manufacturer, producer, packager, importer, supplier, or distributor of the product who is subject to the act, and who has a designated agent for service of process or a place of business in California." The definition of "actual knowledge" would be expanded to clarify that "actual knowledge" must be of "sufficient specificity for the retail seller to readily identify the product that requires a warning. Consistent with traditional agency/corporate law, OEHHA also would confine the scope of employees whose

knowledge may be attributed to the business to either "an authorized agent for the organization, or an employee in a position of sufficient responsibility that his or her knowledge can be imputed or attributed to the retail seller."

UPDATE: OEHHA has extended the comment period through January 11, and scheduled a public meeting on January 3.