



Environment, Land Use & Natural Resources ADVISORY ■

APRIL 8, 2020

New Proposition 65 Amendments Clarify Duties to Warn in the Supply Chain

by *Maureen Gorsen* and *Greg Berlin*

The California Office of Environmental Health Hazard Assessment (OEHHA) recently approved another round of amendments to California's Proposition 65. These amendments provide more specific guidance for businesses in the chain of commerce on how to satisfy their responsibilities to provide consumer product exposure warnings for Prop 65-listed chemicals. The amendments became effective on April 1.

Background

Prop 65 requires businesses to provide clear and reasonable warnings before they knowingly and intentionally cause an exposure to a chemical listed as known to the state to cause cancer or reproductive toxicity. OEHHA is the lead agency that implements Prop 65. It also maintains the list of chemicals known to the state to cause cancer or reproductive toxicity and has the authority to promulgate and amend Prop 65 regulations.

On August 30, 2016, OEHHA adopted a new set of "Clear and Reasonable Warnings" regulations intended to make Prop 65 warnings more informative and meaningful than warnings provided under the previous regulations adopted in 1988. The new regulations became effective on August 30, 2018.

On December 31, 2019, OEHHA approved several amendments that clarify the statutory requirement to place the primary obligation for providing a Prop 65 warning on the product manufacturer, minimizing the impact of the warning requirements on the retail seller. The amendments resulted in three substantive changes.

Upstream Notices

Previously, the regulations specified that businesses had to either provide a warning on the product label or provide a written notice and warning materials to "the authorized agent" for a retail seller. In practice, the supply chain has many more actors or intermediaries in addition to the manufacturer and the retailer, and those intermediaries were passing along warning obligations up and down the supply chain. The regulations have now been amended to reflect that practice and specify that intermediate businesses in the chain of commerce may satisfy their obligation to provide a warning by providing a written notice and warning

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

materials directly to the next business *in line* that is subject to Prop 65 or to the authorized agent for the retail seller. In either case, the business providing the notice and warning materials must obtain written or electronic verification that the warning materials were received.

Many retailers purchase goods from intermediaries that do not manufacture those goods. By specifying that each upstream entity in the chain must communicate with its immediate customer, the amended regulation could help avoid confusion in the marketplace and allow retailers to rely on their communications and contracts with their direct suppliers in determining and allocating responsibility for providing Prop 65 warnings.

Notices to Authorized Agents and Agents for Service of Process

If a business has not designated an authorized agent to receive Prop 65 notices, the notice may be served on the business's legal agent for service of process. This clarification will help ensure that, if a retailer does not designate an authorized agent, important communications about Prop 65 warnings are not sent to random individuals or job positions at a retailer.

"Actual Knowledge"

A retail seller is responsible for providing a warning when the retailer has "actual knowledge" of a potential consumer product exposure. The new regulatory text clarifies that "actual knowledge" means "information from any reliable source that allows [the retailer] to identify the specific product or products that cause the consumer product exposure." A notice of violation may serve as actual knowledge of a potential exposure if it provides "sufficient specificity for the retail seller to readily identify the product or products subject to the notice." A retailer is not deemed to have "actual knowledge" until five days after receiving the notice of violation.

In Sum: Key Steps for Suppliers and Retailers

The recent amendments provide helpful clarification to facilitate businesses' compliance with Prop 65. Still, given the complex nature of the modern chain of commerce, businesses should take careful measures to ensure compliance with Prop 65. Manufacturers often do not know who the ultimate retailer of their product will be. Thus, manufacturers should ensure that they provide the requisite notices and warning materials to their immediate customer in the chain of commerce. In addition, because the scope of what constitutes actual knowledge has become broader, retailers should keep thorough records of any notices, warning materials, and instructions they receive from manufacturers and suppliers. Those notices must be renewed annually.

You can subscribe to future *Environment, Land Use & Natural Resources* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Environment, Land Use & Natural Resources Group

Gina Angiolillo
213.576.2606
gina.angiolillo@alston.com

Greg A. Christianson
415.243.1012
greg.christianson@alston.com

Clay Massey
404.881.4969
clay.massey@alston.com

Andrea Warren
213.576.2518
andrea.warren@alston.com

Doug Arnold
404.881.7637
doug.arnold@alston.com

Jeffrey Dintzer
213.576.1063
jeffrey.dintzer@alston.com

Kevin S. Minoli
202.239.3760
kevin.minoli@alston.com

Sara Warren
404.881.7472
sara.warren@alston.com

Greg Berlin
213.576.1045
greg.berlin@alston.com

Maureen Gorsen
916.498.3305
maureen.gorsen@alston.com

Clynton Namuo
213.576.2671
clynton.namuo@alston.com

Matt Wickersham
213.576.1185
matt.wickersham@alston.com

Caleb Bowers
415.243.1038
caleb.bowers@alston.com

Ronnie Gosselin
404.881.7965
ronnie.gosselin@alston.com

Elise Paeffgen
202.239.3939
elise.paeffgen@alston.com

Jessica Williams-Vickery
404.881.7167
jessica.williams-vickery@alston.com

Meaghan Goodwin Boyd
404.881.7245
meaghan.boyd@alston.com

Maya Lopez Grasse
213.576.2526
maya.grasse@alston.com

Geoffrey Rathgeber
404.881.4974
geoff.rathgeber@alston.com

Nicki Carlsen
213.576.1128
nicki.carlsen@alston.com

Kathleen Hill
213.576.1056
kathleen.hill@alston.com

Max Rollens
213.576.1082
max.rollens@alston.com

Edward Casey
213.576.1005
ed.casey@alston.com

Nate Johnson
213.576.1151
nate.johnson@alston.com

Phil Sandick
404.881.7632
phil.sandick@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2020

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
 SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, California, USA, 94304 ■ 650-838-2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333