

**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



**California Environmental Protection Agency
Office of Environmental Health Hazard Assessment**

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Summary

Proposition 65¹ requires businesses to provide a clear and reasonable warning before they knowingly and intentionally cause an exposure to a chemical listed as known to the state to cause cancer or reproductive toxicity.² The Office of Environmental Health Hazard Assessment (OEHHA) is the lead agency that implements Proposition 65. OEHHA maintains the list of chemicals known to the state to cause cancer or reproductive toxicity and has the authority to promulgate and amend regulations to further the purposes of the Act.³ On August 30, 2016, OEHHA adopted a new set of Article 6 Clear and Reasonable Warnings regulations (Title 27, Cal. Code of Regs., section 25600 et seq.)⁴ intended to make Proposition 65 warnings more informative and meaningful than warnings provided under the previous Article 6 regulations adopted by OEHHA's predecessor entity in 1988. The new Article 6 regulations became effective on August 30, 2018, at which time the older Article 6 regulations were repealed. On November 20, 2017, OEHHA adopted several amendments that further clarified the guidance OEHHA provides to businesses and the public concerning the warning requirements under Proposition 65. Based upon additional questions and comments from stakeholders, this rulemaking proposes additional clarifying changes to Section 25600.2, Responsibility to Provide Consumer Product Exposure Warnings.

Background - Problem to be Addressed by the Proposed Rulemaking

OEHHA has received a number of questions and requests for clarification on Section 25600.2 and has determined that additional clarification of certain provisions of this regulation would be helpful to the regulated community. In particular, OEHHA intends to clarify the responsibility to provide warnings provisions consistent with the 2016 Final Statement of Reasons for the Article 6 Clear and Reasonable Warnings Regulations rulemaking.

The proposed amendments to the warning regulations are discussed below.

¹ Health and Safety Code section 25249.5 et seq., The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as "Proposition 65". Hereafter referred to as "Proposition 65" or "the Act".

² Health and Safety Code section 25249.6

³ Health and Safety Code section 25249.12(a)

⁴ All further references are to Title 27 of the California Code of Regulations, unless otherwise indicated.

§ 25600.2. Responsibility to Provide Consumer Product Exposure Warnings

OEHHA is proposing to modify Sections 25600.2, subsections (b), (c) and (f). Consistent with the Act, Section 25600.2 places primary responsibility for providing warnings on product manufacturers, producers, packagers, importers, suppliers or distributors.⁵ For consumer product exposures, businesses in the above categories must either provide a warning on the product label or labeling, or provide a written notice and warning materials to “the authorized agent”⁶ for a retail seller and receive a written or electronic acknowledgment that the notice and materials were received.⁷ The retail seller is responsible for placement and maintenance of the warning materials he/she receives from the product manufacturer, producer, packager, importer, supplier or distributor.⁸ Further clarification is needed in order to better meet the objectives of the regulation.

Subsection 25600.2(b)

Under Section 25600.2, manufacturers and others in the chain of commerce must take appropriate actions to ensure that the notice and warning materials are passed along to the retailer and ultimately to the consumer. OEHHA is proposing to amend subsection (b) to clarify that intermediate businesses in the chain of commerce may satisfy their obligation to provide a warning by providing a written notice and warning materials directly to *either* the authorized agent for the business to which they are selling or transferring the product, *or* to the authorized agent for the retail seller. This clarification is needed 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. Thus, OEHHA intends to clarify that a given business in the chain of commerce need only provide the notice and warning materials directly to the designated agent for the business to whom it is transferring or selling the product, or provide the notice and warning materials to the retail seller in order to discharge their duty to warn under the Act. In either case, the business providing the notice and warning materials must obtain verification of receipt.

⁵ Section 25600.2(a); Health and Safety Code section 25249.11(f).

⁶ Section 25600.1(b) defines an “authorized agent” as “the person or entity, including a monitored electronic mailbox or post office box, designated by a retail seller to receive notices from product manufacturers, producers, packagers, importers, suppliers, and distributors under this article.”

⁷ Section 25600.2(b).

⁸ Section 25600.2(d).

Subsection 25600.2(c)

Consistent with the proposed changes to subsection (b), subsections (c) and (c)(1) would provide intermediate parties in the chain of commerce the option of renewing the notice provided in accordance with subsection (b) with confirmation from either the authorized agent of the business to which they are selling or transferring the product, or the authorized agent for the retail seller. Subsection (c)(1) was also modified to clarify that confirmation of receipt must be received electronically or in writing, and must be renewed with receipt of the notice confirmed electronically or in writing by the parties receiving the notice in accordance with subsection (b) .

In addition, OEHHA is adding subsection (c)(2) to clarify that where a given business has not designated an authorized agent to receive Proposition 65 notices pursuant to this section, the notice may be served on the business's legal agent for service of process. This clarification is needed in order to avoid a circumstance in which a given business in the chain of commerce fails to identify an authorized agent, so there is no place to send the required notice and warning materials. OEHHA's intent is not to expand or reduce the application of existing law as it applies to this issue. The modification would simply reflect OEHHA's intent to incorporate existing law related to legal agents for service of process.

Subsection 25600.2(f)

Section 25600.2, subsections (e)(1)-(5) describe the circumstances under which a retail seller is required to provide a warning under the Act for a consumer product exposure. Subsection (e)(5) provides that a retail seller is responsible for providing a warning when the retail seller has "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. Subsection (f) defines "actual knowledge" as "specific knowledge of the consumer product exposure received by the retail seller from any reliable source."

OEHHA is proposing to modify Section 25600.2(f) to clarify the definition of "actual knowledge" for purposes of subsection (e)(5). The modification to subsection (f) consists of two parts: clarification as to the level of specificity for "actual knowledge"; and clarification as to the persons whose specific knowledge of a consumer product exposure can be imputed to the retail seller.

Subsection (f), as proposed, would clarify that the basis for "actual knowledge" of the retail seller must be of "sufficient specificity for the retail seller to readily

identify the product that require a warning”. This is consistent with the level of specificity required in notices of violation of the Act involving consumer product exposures. Notices must be of “sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged.”⁹

The proposed amendments would also clarify whose specific knowledge of a consumer product exposure may be imputed to the retail seller. 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, including lower-level employees who could not reasonably be expected to evaluate the information and take action on behalf of the retail seller. The proposed modification would provide that “actual knowledge” requires specific knowledge of the consumer product exposure be received either by an “authorized agent”¹⁰ for the organization, or an employee in a position of sufficient responsibility that his or her knowledge can be imputed¹¹ or attributed to the retail seller. It is not OEHHA’s intent to expand or reduce the application of existing law as it applies to this issue. The modification would simply clarify OEHHA’s intent to incorporate existing case law and legal principles under which knowledge gained by an agent or employee with a legal relationship may be attributed to the business. For example, if an authorized agent of a business receives information of sufficient specificity that would otherwise provide “actual knowledge” of an exposure if it were provided directly to the business, because of the legal relationship between the parties (i.e., agent to principal¹²) the information would be treated as if it were delivered directly to the business. Similarly, information provided to an officer of a business, would

⁹ Section 25903(b)(2)D).

¹⁰ Section 25600.1(b), *supra*, note 6.

¹¹ Imputed: As used in legal phrases, this word means attributed vicariously; that is, an act, fact, or quality is said to be “imputed” to a person when it is ascribed or charged to him, not because he is personally cognizant of it or responsible for it, but because another person is, over whom he has control or for whose acts or knowledge he is responsible.(Black’s Law Dictionary, Second Edition, available at: <https://thelawdictionary.org/imputed/>)

¹² Agency: A relation, created either by express or implied contract or by law, whereby one party (called the principal or constituent) delegates the transaction of some lawful business or the authority to do certain acts for him or in relation to his rights or property, with more or less discretionary power, to another person (called the agent, attorney, proxy, or delegate) who undertakes to manage the affair and render him an account thereof... (<https://thelawdictionary.org/agency-by-operation-of-law/>)

be treated as if it were conveyed directly to the business, because of the legal relationship between the parties.¹³

Necessity

OEHHA received several comments requesting clarification of the existing regulations. Specifically, there is uncertainty among intermediate parties in the chain of commerce as to whether providing a warning or notice to their customer or purchaser will satisfy the requirements of Section 25600.2. In addition, the proposed changes are necessary to add clarity and specificity regarding authorized agents.

Benefits of the Proposed Regulation

Regulated businesses will benefit from the proposed amendments because the amendments clarify the division of responsibility for providing warnings among the various entities in the chain of commerce. Specifically, the responsibility of intermediate parties to provide warning notices and materials under this regulation. The health and welfare of California residents will likely benefit because the warning information will be passed along through the various entities and ultimately be provided to the consumer so they can make an informed decision about their exposures to listed chemicals. Businesses will also benefit from the clarifications provided in the proposed amendments.

Technical, Theoretical, and/or Empirical Study, Reports, or Documents Relied Upon

OEHHA did not rely on any technical, theoretical, and/or empirical studies, reports, or documents as part of this rulemaking.

Reasonable Alternatives to the Regulation and the Agency's Reasons for Rejecting Those Alternatives

OEHHA has determined there are no reasonable alternatives to the proposed regulatory action that would carry out the purposes of the Act. The action provides clarification and specificity to the existing regulations.

¹³ Civil Code section 2332; Trane Co. v. Gilbert (1968) 267 Cal.App.2d 720, 727 [73 Cal.Rptr. 279, 283–284] “[I]t is a well established rule in California that the principal is chargeable with, and is bound by the knowledge of, or notice to, his agent, received while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends.” (Columbia Pictures Corp. v. De Toth (1948) 87 Cal.App.2d 620, 630; Dressel v. Parr Cement Co. (1947) 80 Cal.App.2d 536, 540; see also American Sur. Co. of N. Y. v. Heise (1955) 136 Cal.App.2d 689, 695.)

Reasonable Alternatives to the Proposed Regulatory Action that Would Lessen Any Adverse Impact on Small Business and the Agency's Reasons for Rejecting Those Alternatives

OEHHA has determined that no reasonable alternative considered by OEHHA, or that has otherwise been identified and brought to the attention of OEHHA, including alternatives that would lessen any adverse impact on small business, would be as effective or less burdensome on small business. In addition, OEHHA has determined that the proposed regulatory action will not impose any significant requirements on small businesses that already must comply with the warning requirements in the Act. Further, Proposition 65 expressly exempts businesses with less than 10 employees¹⁴ from the requirements of the Act.

Evidence Supporting Finding of No Significant Adverse Economic Impact on Business

The proposed regulatory action will not have a significant adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The action does not impose any new requirements upon private persons or businesses. It simply clarifies existing provisions of the regulations.

Efforts to Avoid Unnecessary Duplication or Conflicts with Federal Regulations Contained in the Code of Federal Regulations Addressing the Same Issues

Proposition 65 is a California law that has no federal counterpart. OEHHA has determined that the regulatory action does not duplicate and will not conflict with federal regulations.

Economic Impact Assessment Required by Gov. Code section 11346.3(b)

Creation or Elimination of Jobs within the State of California

The proposed regulatory action will not impact the creation or elimination of jobs within California. The action provides clarification and specificity to the existing regulations in terms of the responsibility of intermediate parties in the chain of commerce to provide a warning for consumer products and does not alter the requirement to provide a warning under the Act.

¹⁴ Health and Safety Code section 25249.11(b).

Creation of New Businesses or Elimination or Expansion of Existing Businesses within the State of California

The proposed regulatory action will not impact the creation of new businesses or the elimination or expansion of existing businesses within California. The action provides clarification and specificity to the existing regulations in terms of the responsibility of intermediate parties in the chain of commerce to provide a warning for consumer products and does not alter the requirement to provide a warning under the Act.

Benefits of the Proposed Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

Affected businesses will likely benefit from the proposed regulatory action because the amendments provide clarifying guidance concerning the responsibility to provide warnings for consumer product exposures under Proposition 65. The health and welfare of California residents will likely benefit from the increased clarity which will help ensure warnings are provided from the manufacturer and intermediate parties in the chain of commerce to the retail seller, so that the retail seller can provide warnings to consumers before exposure to a listed chemical in a consumer product.