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

California Environmental Protection Agency
Office of Environmental Health Hazard Assessment

Contents

Summary

The Office of Environmental Health Hazard Assessment (OEHHA) published the Notice of Proposed Rulemaking and Initial Statement of Reasons (ISOR) for this action on November 16, 2018. A request for a public hearing was received from Tyler Bowlin of Miller Nash Graham & Dunn LLP. The hearing was held on January 3, 2019. Two oral comments were received at the public hearing. The comment period closed on January 11, 2019. Seven written comments were received during the 45-day comment period.

Following careful consideration of the relevant comments received during the initial comment period, OEHHA published a Notice of Modification of Text of Proposed Regulations on October 4, 2019. The 15-day public comment period closed on October 21, 2019. OEHHA received nine public comments during the 15-day comment period. OEHHA's responses to the relevant comments received during both comment periods are incorporated within this Final Statement of Reasons (FSOR).

Some written and oral comments submitted during the regulatory process included observations about these regulations that do not constitute an objection or recommendation directed at the proposed action or the procedures followed in this rulemaking action. In addition, some commenters offered their interpretation of these regulations, which does not constitute an objection or recommendation directed at changing the proposed action or the procedures followed in this rulemaking process. OEHHA is not required under the Administrative Procedure Act (APA) to respond to such remarks in the rulemaking and therefore is not providing responses to all of these comments in this FSOR. However, the absence of responses to such comments should not be construed to mean that OEHHA in any way agrees with them.

Update of Initial Statement of Reasons

In the Notice of Modification of Text published on October 4, 2019, OEHHA proposed additional amendments to Section 25600.2 to clarify that a business may comply with the warning requirement if they provide written notice of the warning requirement to the next business in line *that is subject to Proposition 65* and that intermediate sellers may enter into a written agreement to provide the warning and notice in an alternative manner. OEHHA also provided additional guidance concerning the definition of "actual knowledge" used in this section. More specifically, OEHHA made the following revisions:

- In subdivision (b)(4), the transmittal requirement was deleted and text from existing subdivision (c)(1) was added with minor revisions.
- In subdivision (c)(1), language regarding renewal notices was added.
- In subdivision (f)(1), language regarding "specific knowledge" and "sufficient specificity" was deleted and language regarding "information from a reliable source" was added. These changes were made for clarification based on public comments and are discussed in response to comments 15 and 16.
- In subdivision (f)(2), clarifying language regarding a product or products subject to Proposition 65 notices was added. These changes were intended to conform with the existing regulation for Notices of Violation (see Title 27, Section 25903(D)).
- In subdivision (i), the reference to "retail seller" was deleted and "business to which they are selling or transferring" was added. This change was made in response to comment 19.

Summary and response to comments received during the 45-Day public comment period

The following individuals or organizations submitted comments to OEHHA on the proposed amendments during the first comment period ending on January 11, 2019:

Adam in Marin (Adam)

As You Sow (AYS)

Tyler Bowlin, Miller Nash Graham & Dunn LLP (Bowlin), oral and written comments

California Retailers Association (CRA)

Center for Environmental Health (CEH)

Consumer Technology Association (CTA)

George Salmas, The Food Lawyers (Salmas)

Dave Lawson, Western Plant Health Association (WPHA), oral comments

Section 25600.2 Responsibility to Provide Consumer Product Exposure Warnings

Subsection (b)

Comment 1 (AYS and CEH): The proposed amendments to subsections 25600.2(b) and (c) exceed OEHHA's statutory authority. Subsection 25600.2(b) currently authorizes a manufacturer, producer, packager, importer, supplier, or distributor of a

product to comply with the warning requirement by either: (1) "providing a warning on the product label or labeling that satisfies Section 25249.6 of the Act," or (2) "by providing a written notice directly to the authorized agent for a retail seller who is subject to Section 25249.6 of the Act." The latter provision is contrary to Proposition 65, which requires that warning regulations place the obligation to provide warnings on the producers to the extent practicable. The proposed amendments to subsections 25600.2(b) and (c)(1) would compound this problem by allowing producers to meet their Proposition 65 duty by simply providing a written notice to either "the authorized agent for the business to which they are selling or transferring the product" or "the authorized agent for a retail seller." The proposed amendments inappropriately limit producers' responsibility to comply with Proposition 65 by allowing a simple pass-through of materials to intermediaries to satisfy their duties under the law, whether the warning ever makes it to the consumer or not.

Response: To the extent these comments are directed towards the existing language of Section 25600.2, they are beyond the scope of the present rulemaking. No further response is required. To the extent these comments are directed to the current proposed changes, the proposed amendments do not limit producers' responsibility to provide warnings but rather clarify how intermediate parties in the chain of distribution can satisfy their obligation to provide a warning under the Act. As stated on page 4 of the ISOR:

> 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. (emphasis added)

In the situation where the upstream business does not know where or by whom the product will ultimately be sold to a consumer, it is functionally impossible for the business to provide the warning Notice and materials to the retailer. However, if a warning is not given to the end consumer, enforcement action can be taken against those businesses that were given the Notice and subsequently failed to pass it along either to their customers or the end consumer.

No change was made to the proposed amendments based on this comment.

Comment 2 (AYS and CEH): A producer who is subject to Proposition 65 can claim it has met its legal duty of providing warnings so long as it has provided the necessary materials and obtained written confirmation from an intermediate buyer, even if the product is ultimately passed on to a small distributor, or sold to consumers via a small retail seller, not subject to the Act and with no legal duty to provide any warning. This creates a significant loophole in the warning system and is particularly troubling in today's e-commerce world where many consumer products are sold by small online retailers. OEHHA must revise the proposed amendments to prevent such system failures, as all businesses in the supply chain are prohibited from knowingly and intentionally exposing individuals to listed chemicals under Proposition 65. CEH suggested making the following changes Section 25600.2(b): "... or by providing a written notice directly to the authorized agent for the business to which they are selling or transferring the product or to the authorized agent for a retailer seller, so long as the business to which they are providing the written notice ~~who~~ is subject to Section 25249.6 of the Act, which **. . . ."** With this edit, the phrase, "who is subject to Section 25249.6 of the Act" could then be eliminated from Sections 25600.2(b)(4), 25600.2(c), and 25600.2(c)(1).

Response: OEHHA revised subsection (b) to include the suggested edits, and made similar changes to subsection (c). These revisions clarify that the upstream business must provide notice to a downstream business that is subject to the Act in order for that notice to be sufficient under this section.

Comment 3 (AYS): The proposed amendments effectively create an exemption from producers' duty to provide warnings to individuals by allowing producers to meet their legal warning requirements by simply passing warning materials to the next downstream entity.

Response: OEHHA disagrees with this comment. The proposed amendments do not create an exemption from the warning requirement but instead clarify the responsibilities of intermediate parties in chain of commerce to pass through the warning notice and materials.

No change was made to the proposed amendments based on this comment.

Comment 4 (AYS and CEH): The proposed amendments do not in any way minimize the burden on retail sellers of consumer products; their only goal appears to be to benefit producers. The ISOR explains that the amendments are made " . . . 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." (ISOR, p. 5). While this may be true, the appropriate resolution is not to further weaken the warning obligations of producers. Neither should the regulations flip the burden by minimizing the burden on upstream suppliers while making it more challenging for retailers to comply. Alternatively, producers can choose not to sell to distributors that cannot verify the ultimate retailer; provide on-product warnings to ensure that warnings are provided to consumers; or develop other solutions. The above explanation from the ISOR underscores the benefit of on-package warnings when possible given that neither the manufacturer, nor OEHHA can be sure that intervening supply chain entities will have any responsibility to provide warnings to California consumers under the law. The potential that warnings may be placed on a small number of products that eventually make their way out of California, to protect consumers outside of the state, does not justify the likely abrogation of warnings to California consumers that this amendment may cause.

CEH also commented that it is unclear whether the limiting language applies only to retail sellers, only to downstream entities, or both. CEH requested that OEHHA clarify that a manufacturer or distributor can still be held responsible if a small downstream entity with fewer than 10 employees fails to pass along warning materials

Response: To the extent these comments are directed towards the existing language of Section 25600.2 and not directed toward the proposed amendments, they are beyond the scope of this rulemaking and no response is required. Moreover, the statute and its implementing regulations only apply to the businesses that are covered and defined by the Act.

Regarding the comments related to the burden on retail sellers, the overall structure of Section 25600.2 already minimizes the burden on retail sellers. The amendments do not shift the burden of providing warnings to the retail seller but rather clarify how intermediate parties in the chain of distribution can satisfy their obligation to provide a warning under the Act. Making the changes suggested by the commenter would make on-product warnings virtually mandatory. OEHHA disagrees with this approach. Nothing in the law requires on-product warnings. In fact, Proposition 65 expressly states that warnings may be provided through means other than on-product labels (see Section 25249.11(f)).

No change was made to the proposed amendments based on this comment.

Comment 5 (AYS): The law's preference that the producer provide warnings is reasonable. Producers choose what chemicals to use in their products, and have the ability to place on-product warnings at the beginning of the supply chain. If producers are relieved of liability, it would be a rational decision not to provide on-package

warnings, pushing all responsibility to downstream entities. As more and more producers choose to pass off warning obligations, the burden on retail sellers and the distribution chain will grow, increasing the risk that mistakes will be made, warnings will not be passed on timely, and that consumers will be left without warning where distributers, other intermediate business entities, and/or retail sellers are, or claim not to be, subject to the terms of the Act.

Response: To the extent these comments are directed towards the existing language of Section 25600.2 and not directed toward the proposed amendments, they are beyond the scope of this rulemaking and no response is required. The commenter incorrectly characterizes the proposed amendments to the regulations. Intermediate parties are required to pass on the notice and warning materials and to obtain confirmation of receipt of the notice in order to discharge their responsibility under the Act. If the entity transferring or selling the consumer product cannot obtain confirmation from the downstream entity, they can opt to provide the warning on the label or labeling, or provide the information to any known retail sellers of the product.

No change was made to the proposed amendments based on this comment.

Comment 6 (AYS and CEH): AYS requests OEHHA withdraw the proposed amendments to subsections 25600.2(b) and (c)(1), and instead require that a producer provide direct warning to consumers unless it is not feasible to do so. Alternatively, OEHHA should revise the proposed amendments such that, where a producer is unaware or unsure of the identity of the ultimate retail seller, the producer remains liable for any failures to provide warnings for its products, or otherwise must ensure that warnings are provided to the ultimate consumer of its products, including requiring that distributors and retail sellers provide proof of compliance. CEH suggests adding language that requires the manufacturer, producer, packager, importer or distributor to provide the warning itself to consumers unless it is not feasible to do so, which would prevent entities higher up in the production chain from shifting the burden down the line without making any showing of infeasibility.

Response: To the extent these comments are directed towards the existing language of Section 25600.2 and not directed toward the proposed amendments, they are beyond the scope of this rulemaking and no response is required. For the reasons stated in response to comment 1 above, and as the commenters' suggestions imply, requiring upstream businesses to provide the warning directly to consumers may not be feasible. These businesses, particularly in an increasingly global marketplace, may not know who the ultimate consumer will be. In addition, Health and Safety Code section 25249.11 does not require producers or other upstream businesses to assume all responsibility

for providing a warning or that retailers should be excused from responsibility in all circumstances. Thus, the suggested alternatives to the proposed amendments are contrary to the intent and purpose of the entire section. OEHHA believes it is reasonable and feasible for a business to provide a warning to an intermediate party to pass along, since they often may not know the identity of the ultimate retail seller or consumer.

No change was made to the proposed amendments based on this comment.

Comment 7 (AYS): The proposed amendments are ambiguous as they can be read to authorize producers to simply pass on the written notice and warning materials to the business to which a producer is selling or transferring its product, without verifying whether the business is subject to section 25249.6 of the Act. Commenter recommends that OEHHA make clear that producers can only comply with Proposition 65 via written notice to a business that is subject to section 25249.6 of the Act. The amendment should thus read, "by providing a written notice directly to the authorized agent for the business to which they are selling or transferring the product *which has been verified to be subject to Section 25249.6 of the Act,* or to the authorized agent for a retail seller who is subject to Section 25249.6 of the Act." OEHHA should make the same edits where necessary throughout subsections 25600.2(b) and (c)(1).

Response: While the proposed amendments do not explicitly require a business to verify that the business to whom they are providing the warning and selling or transferring the consumer product is subject to the Act, the revisions to subsections (b) and (c), discussed in response to comment 2 above, clarify that the producer must provide notice to a business that is subject to the Act for the notice to be sufficient under this section.

Comment 8 (CRA): CRA supports the clarification that requires communication of warning materials to the immediate customer of an upstream supplier. By specifying that each upstream entity in the chain must communicate with its own customer, the proposed amended regulation will help to avoid confusion in the marketplace, and will allow retailers to rely upon their communications and contracts with their direct suppliers in determining and allocating responsibility for providing Proposition 65 warnings.

Response: OEHHA acknowledges the comment. No further response is required.

Comment 9 (CEH): CEH urges OEHHA to withdraw Section 25600.2 altogether because it is unworkable, contrary to Proposition 65 and exceeds OEHHA's statutory authority.

Response: This comment concerns the existing language of Section 25600.2 and is not directed toward the proposed amendments. Therefore, it is beyond the scope of this rulemaking and no response is required. Further, OEHHA disagrees that Section 25600.2 is unworkable, contrary to Proposition 65 and exceeds OEHHA's statutory authority. As noted in the ISOR for this rulemaking (at page 3) and the ISOR for the Article 6 Clear and Reasonable Warnings regulations adopted in 2016 (at page 5), OEHHA has the authority to promulgate and amend regulations to further the purposes of the Act. Section 25600.2 furthers the purposes of the Act by clarifying the relative responsibility between manufacturers, retail sellers and other businesses in the stream of commerce for providing warnings under the Act. Further discussion of the benefits and necessity of this section can be found on pages 17 through 22 of the ISOR for the Article 6 rulemaking.

No change was made to the proposed amendments based on this comment.

Comment 10 (Salmas): It is impossible for the manufacturer, producer, packager, importer, supplier or distributor to know how many signs or tags would be necessary to equip retailers to give the necessary warning. Commenter proposes adding the following language to Section 25600.2(b):

> (5) The number of shelf signs or tags to be provided with the notice shall be the lesser of
>
> > (i) respecting existing customers and/or existing products, the average number of shipping cartons of the subject SKU sold monthly to the customer during the preceding twelve months, or
> >
> > (ii) for new customers and/or new products, the number of shipping cartons in the first shipment, or
> >
> > (iii) 25.
>
> When providing shelf signs or tags, the written notice prescribed by Section 25600.2(b) shall include the following sentence: "To receive more shelf signs or tags, please send an e-mail to [e-mail address] stating the SKU, the number of shelf signs or tags needed and where they should be shipped."

Response: The comment is outside the scope of the proposed amendments. No further response is required.

No change was made to the proposed amendments based on this comment.

Subsection (c)

Comment 11 (AYS): OEHHA is proposing to clarify, in section 25600.2(c)(2), that where a business has not designated an authorized agent, a producer may serve the written notice and materials authorized under subsection 25600.2(b) on a business' legal agent for service of process. While commenter has no objection to the proposed clarification, they continue to be concerned that the proposed amendment only serves the interest of making it easier for producers to pass on written notices and warning materials. The proposed amendment is thus contrary to Section 25249.11(f) of the Act, which requires the warning regulations to place the duty to warn on the producers "to the extent practicable."

Response: As noted in prior responses, the proposed amendments do not limit the producers' responsibility to provide warnings but rather clarify how intermediate parties in the chain of distribution can satisfy their obligation to provide a warning under the Act. Facilitating compliance by producers and other parties upstream of the retail seller in this manner is consistent with Health and Safety Code 25249.11(f). Such methods of compliance are even more reasonable given an increasing global marketplace where a manufacturer may never know who the end seller of its products will be.

No change was made to the proposed amendments based on this comment.

Comment 12 (CRA): Commenter supports the new language in subsection (c)(2), that a supplier may provide notice to the legal agent for service of process. This change will help ensure that, in the event a retailer does not designate an authorized agent, important communications regarding Proposition 65 warnings are not sent to random individuals or job positions at a retailer.

Response: OEHHA acknowledges the comment. No further response is required.

Comment 13 (CTA): Section 25600.2(c)(1) requires that "confirmation of receipt…must be received electronically or in writing…". Can OEHHA clarify the difference between a confirmation that is electronic versus one in writing? Is there a clear or important distinction between the two options?

Response: On page 35 of the FSOR for the Article 6 Clear and Reasonable Warnings regulations, OEHHA distinguished between electronic confirmation of receipt, such as email, and "hard-copy" or written form by stating, "confirmation of receipt can be given

via e-mail or other electronic method to the entity that provides the notice. It need not be provided in hard-copy form." A "hardcopy" notice of receipt would be the same as a "written" notice for purposes of the proposed amendments.

The language in subdivision (c)(1) was changed for clarity and consistency with the changes made to subdivision (b), and for consistency with the previous amendments to the Article 6 Clear and Reasonable Warnings regulations.

No change was made to the proposed amendments based on this comment.

Comment 14 (Salmas): Some legal agents are located out of California and would be confused by the receipt of notice, list of SKUs and shelf signs and/or tags. Commenter proposes adding the following: "(c)(2)…for the business or the chief executive officer of the business." Commenter feels that enabling service on the chief executive officer of the business provides a practical, workable solution for giving good notice to the company in question.

Response: OEHHA declines to make this change. It is unclear how providing notice to a business's CEO is more practical and workable than providing it the legal agent for service of process. Moreover, it cannot be assumed that the CEO is in California or has more knowledge of Proposition 65 compliance than the agent.

On page 5 of the ISOR, OEHHA addresses why the "legal agent for servie of process" is used in the regulatory text: "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."

By referring to "existing law", OEHHA's intent is to be consistent with the civil code. For example, businesses are required by statute to designate an agent for service of process with the Secretary of State (see https://www.sos.ca.gov/business-programs/business-entities/service-process/). The Secretary of State makes this information publicly available.

No change was made to the proposed amendments based on this comment.

Subsection (f)

Comment 15 (AYS): The proposed amendments to subsection 25600.2(f) create a new exemption to warning requirements by retail sellers that is not authorized by the

Act. Commenter agrees with clarifying who can receive information regarding potential consumer product exposure on behalf of a retail seller, but the proposed amendment creates an exception to the duty to warn that contradicts existing Proposition 65 jurisprudence. Current regulations explain that an exposure is "knowing" where a party has "knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring." Knowledge may be actual or constructive. As drafted, the proposed amendment may be interpreted to allow a retail seller to sit back and wait for a specific communication "received by the authorized agent or a person whose knowledge can be imputed to" the retail seller, even if it otherwise has knowledge that it is selling a product for which a warning is required through other means, such as information reported in mass or social media, governmental sources, or formal and informal consumer communication. Proposition 65 does not allow a retail seller to knowingly and intentionally expose individuals to listed chemicals without a warning.

Response: OEHHA disagrees with this interpretation of the regulation. The pass-through language is only one way the retailer may obtain actual knowledge. As stated at page 5 of the ISOR for these proposed amendments, "Subsection (f) defines 'actual knowledge' as 'specific knowledge of the consumer product exposure received by the retail seller *from any reliable source*.'" (Emphasis added). The modifications to this subsection that were noticed on October 4, 2019, were made in part to clarify that "actual knowledge" is information received "from any reliable source". These modifications reflect OEHHA's intent that the primary responsibility for providing warnings is not on the retailer who likely will have no knowledge at all that a warning is required for a given exposures. Where the retailer does have actual knowledge (as defined), it should be responsible for providing the warning in the circumstances defined in the regulation. The general definition is still operative, but has been limited in the case of a retail seller to "actual knowledge" based on the circumstances laid out in the regulation. This provision does not apply to the manufacturers or other businesses upstream and is reasonable in order to place the primary burden on the manufacturer to determine when a warning is needed for a given exposure.

Comment 16 (AYS and CEH): The proposed amendment may be interpreted as creating a heightened level of specificity to enforce Proposition 65 against a retail seller. Existing regulations state that a notice of violation alleging a consumer product exposure only needs to provide "sufficient specificity to inform the recipient 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." (Section 25903(b)(2)(D)). OEHHA's proposed amendment, requiring

information with "sufficient specificity for the retail seller to readily identify the product," may be interpreted to set a higher bar, thus creating inconsistent application of the Act. AYS recommends withdrawing the proposed amendment to subsection 25600.2(f) or replace that language with the current language set forth in the California Code of Regulations, title 27, section 25903(b)(2)(D).

Response: OEHHA disagrees with this interpretation of the proposed amendments. The proposed language simply requires manufacturers or upstream sellers to provide specific enough information for retailers to be able to pass-through the warning to consumers of the products to which the warning applies. The modifications to this subsection that were noticed on October 4, 2019, were made in part to clarify the level of specificity needed. Subsection (f)(1) now reads, "'Actual knowledge' means 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." This subsection remains 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." Adoption of these amendments in no way changes the application or purpose of Section 25903.

Comment 17 (CRA): Section 25903 and its supporting final statement of reasons have been construed by some courts to leave open litigation against retailers based on pre-suit notices that identify one or more products by name, SKU or other identifier, but then purport to identify a broader, alleged "specific type" of product as the scope of the alleged violation. This proposal takes a positive step by limiting "actual knowledge" to those products that can be "readily identified" from the information in the notice. However, given that Section 25903 allows a notice to identify a "specific type" of product, the regulation (or at a minimum, the final statement of reasons) should clarify that such a notice sent to a retailer does not, in and of itself, "readily identify" any products other than the products that are in fact identified in the notice.

Response: The comment is not within the scope of the subject of this rulemaking. No further response is required.

No change was made to the proposed amendments based on this comment.

Comment 18 (CTA): CTA requests OEHHA clarify or define what qualifies as "sufficient specificity" to provide actual knowledge of a chemical exposure. It is unclear what is required based on the proposed language. The term "sufficient specificity" is

vague (e.g., is it limited to the product name? other information?). Additional clarification is necessary for compliance purposes.

Response: Based on this and other comments, OEHHA has modified the regulatory text to clarify the definition of “actual knowledge”. The term “sufficient specificity” has been replaced with “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.”

Subsection (i)

Comment 19 (Bowlin): The current proposal resolves certain ambiguities in Section 25600.2(b); however, it does nothing to resolve similar ambiguity in subsection (i). Subsection (b) allows a party to provide written notice and warning materials, if required, "to the authorized agent for the business to which they are selling or transferring the product..." Subsection (i) does not take such a consideration into account. Subsection (i) permits manufacturer, producer, packager, importer, supplier, or distributor (MPPISD) to enter into a written agreement allocating legal responsibility for providing a warning. However, subsection (i) only permits MPPISD to enter into such an agreement with the retail seller, not the "business to which they are selling or transferring the product". The ambiguity is exacerbated by the fact that the term "retail seller" in subsection (b) was revised.

Commenter also asks whether warning materials would need to be provided if using subdivision (i).

Response: Based on this comment, OEHHA revised subsection (i) by replacing “retail seller of” with “business to which they are selling or transferring”. This change is intended to clarify that any business in the chain of commerce can enter into an agreement with another to facilitate the delivery of the warning to the eventual consumer.

Regarding whether warning materials need to be provided under subdivision (i), this subdivision does not change the requirement to warn for businesses subject to the Act. This is implicit in the opening clause of this subdivision that states, “Provided that the consumer receives a warning that meets the requirements of Section 25249.6 of the Act prior to exposure,…”

Miscellaneous

Comment 20 (Adam): The commenter states that Proposition 65 was a bad idea and that it "will mute actually valid and needed warnings".

Response: The comment is not directed towards the subject of the proposed amendments. No further response is required.

No change was made to the proposed amendments based on this comment.

Comment 21 (AYS and CEH): Commenters suggest OEHHA revisit subsection 25600.2(e)(5). Proposition 65 does not authorize OEHHA to excuse retail sellers from liability for knowingly and intentionally exposing individuals to listed chemicals without a warning where an upstream entity is subject to Proposition 65 and is amenable to jurisdiction in California state courts. Some defendants have asserted an interpretation that a large retailer can continue to knowingly and intentionally expose its customers to listed chemicals in consumer products without a warning so long as there is a single entity in the upstream supply chain with 10 or more employees and a California agent or business address, even if that upstream entity has not provided adequate warnings. Besides being contrary to law, this overly broad interpretation of the law also leads to innumerable practical problems. What if the retail seller does not know whether any of the upstream entities in the supply chain of a product employ 10 or more individuals and have a California agent or business address? What if the status of the upstream suppliers in this regard changes over time? OEHHA should take this opportunity to revise subsection 25600.2(e)(5) to make clear that a retail seller with knowledge of an unwarned consumer product exposure has an obligation to provide a warning irrespective of the identity of the product's manufacturer, importer, distributor or supplier.

Response: The comment is outside the scope of this rulemaking. The regulation already provides that the retail seller must give a warning where they have "actual knowledge" that one is required. Thus, retailers are not entirely excused from providing warnings. However, the purpose of the entire section of regulations is to ensure that manufacturers, and others in a position to know a warning is required, pass that information along to the retailer, along with warning materials. The retailer is then obligated to provide the warning. It is not unreasonable or contrary to the statute for an enforcement action to be filed against the manufacturer or other upstream entity that knowingly and intentionally causes an unwarned exposure because those entities are in a better position to know when a warning is needed. OEHHA will consider clarification of intent or possible modification of this part of the regulation through a future rulemaking if necessary.

No change was made to the proposed amendments based on this comment.

Comment 22 (WPHA): At the public hearing, Dave Lawson representing WPHA stated that in the case of pesticides sold in California, all sales and uses are required to have a pest control advisor (PCA) recommendation. A critical component of the process is their vendors' electronic recommendation providers, such as Crop Data Management Systems and Agrium. Most, if not all, registrants use these vendors. Recommendations for pesticide product use would be available electronically and may not go directly to the dealer or applicator, but may go directly to the grower with the PCA written recommendation. At the hearing, WPHA stated it would provide some language to clarify that there are other ways to provide warnings other than labels and shelf signs. WPHA also stated that the idea with their recommendations would be to include the new warning with the new triangle and the language on the printouts that go through these systems. However, no follow-up written comments were received.

Response: The comment is not directed towards the subject of the rulemaking. However, it appears that the types of warnings described by the commenter may already be covered by the 'catch-all' provision (Section 25602) allowing electronic methods of providing a warning. Without further clarification from the commenter, no further response is required at this time.

No change was made to the proposed amendments based on this comment.

Summary and response to comments received during the 15-Day public comment period

The following individuals or organizations submitted comments on the proposed amendments to OEHHA during the second comment period from October 4, 2019 to October 21, 2019:

Anonymous

As You Sow (AYS)

California Chamber of Commerce, American Beverage Association, Beer Institute, and Grocery Manufacturers Association (CalChamber et al.)

California Retailers Association (CRA)

Center for Environmental Health (CEH)

Cheriel Jensen (Jensen)

Raley's Legal Department (Raley's)

Sidley Austen LLP for Amazon (Amazon)
Western Wood Products Association (WWPA)

Section 25600.2 Responsibility to Provide Consumer Product Exposure Warnings

Subsection (b)

Comment 23 (AYS): The proposed amendment is contrary to Health and Safety Code Section 25249.11(f), which requires that the warning regulations place the duty to warn on the producers "to the extent practicable." The proposed amendments inappropriately limit producers' responsibility to comply with Proposition 65 by allowing a simple pass-through of materials to intermediaries to satisfy their duties under the law, without any guarantee from the receiving party that end users will receive a warning about their exposure to the listed chemicals. There is no justifiable reason to allow the producer, who is best situated to develop a product without listed chemicals or provide on-product warnings, to avoid responsibility under law. OEHHA has provided no justification for reducing a consumer's protection under the law in this manner. AYS urges OEHHA to withdraw amendments to subsections (b) and (c)(1) or revise the proposed amendments such that the producer ultimately remains liable for any failures to provide warnings for its products or must otherwise ensure that warnings are provided to the ultimate consumer of its products, including requiring that distributors and retail sellers provide proof of compliance. Proposition 65 places the legal obligation to provide warnings to consumers on all businesses in the supply chain. Current regulations are inconsistent with this obligation. A system in which all entities have potential liability will best ensure that the consumer ultimately receives the warning required by law.

Response: To the extent the commenter is repeating prior comments that are not directed at the 15-day comment period modifications, they are outside the scope of this comment period and no further response is required. In any case, similar comments were responded to in responses to comments 1 through 6 and 11 above.

No change was made to the proposed amendments based on this comment.

Comment 24 (CalChamber et al.): Proposed amendments to subsections (b)(4) and (c)(1) are too expensive and not workable. For individuals identified as the authorized agent, these proposals remove compliance that may be proven by obtaining information from the Post Office or from another delivery service. The regulation currently provides that the upstream manufacturer or distributor can demonstrate compliance if it has

"obtained confirmation electronically or in writing of receipt of the notice". Confirmation may be provided by any signature at the appropriate address. This is already more than should be required (what should be required is proof of delivery, not a receiving signature), and the existing language in (b)(4) should simply be adjusted to cover more than just retailers, rather than be removed. The added expense this new language would require appears to be unintended and could be avoided. Commenter requests OEHHA require proof of delivery, not a receiving signature. The most practical way to avoid unnecessary expense would be to use the following language for subsections (b)(4) and (c)(1):

> (b)(4) Has been sent to the authorized agent for the retail seller **or other entity subject to Section 25249.6 of the Act**, and the manufacturer, producer, packager, importer, supplier, or distributor has obtained confirmation electronically or in writing of receipt of the notice.
>
> (c)(1) The notice must be renewed, and receipt of the renewed notice confirmed electronically or in writing ~~by the retail seller's authorized agent no later than February 28, 2019, then annually thereafter~~ during the period in which the product is sold in California by the retail seller.

Response: The comment is beyond the scope of the modifications of the proposed amendments. Nothing in these proposed amendments prohibits notices from being sent or acknowledged via regular mail or other delivery service. The regulation allows for confirmation of receipt to occur “electronically or in writing”. Proof of delivery obtained from a post office or other delivery service would be considered a writing under this regulation. No additional expenses will be incurred because of the modified text. OEHHA declines to make the substantive changes suggested by the commenter.

No change was made to the proposed amendments based on this comment.

Comment 25 (CEH and CalChamber): CEH supports the modification in subsections (b) and (c) that, in order for an upstream manufacturer or distributor to pass along the responsibility to provide a warning to a downstream entity, that downstream entity must be “subject to Section 25249.6 of the Act.”

Response: OEHHA acknowledges the comment. No further response is required.

Subsection (c)

Comment 26 (CalChamber et al.): OEHHA's modification proposal changes subsection (c)(1) so that "Confirmation of receipt ... must be received ... *from the authorized agent* to which the manufacturer ... of the product sent the notice." Confirmation from another person at the proper address is not sufficient to satisfy this proposed regulation. This proposal is unduly burdensome and unnecessary. If adopted, this regulation would call for entities attempting to comply to undertake personal service on individual authorized agents, which adds about $100 to the expense of serving each agent in a big city and even more for personal service in remote areas. Neither FedEx nor the US Post Office have a delivery option that specifically requires the signature of an individually identified recipient; they simply require a signature of an adult at the relevant address. For products that are widely distributed, this could increase the cost of compliance by anywhere from $100,000 to $1,000,000 per year or more, depending on the number of individual authorized agents identified.

Response: OEHHA disagrees with the commenter's interpretation of the proposed amendments. The authorized agent for a given business is any person or even an electronic mailbox or post office mailbox designated by the business. (See Section 25600.1(b)). It is up to the business to determine the best approach for providing confirmation of receipt. Confirmation of receipt has always been required under this regulation. It is not OEHHA's intent to change the existing processes for providing confirmation. Further, if the process set out in the regulation does not fit a given business model, the subject businesses are free to contract out of this process, so long as the consumer ultimately receives a warning (Section 25600.2(i)).

No change was made to the proposed amendments based on this comment.

Comment 27 (Raley's): Section 25600.2(c) should be revised to clarify that confirmation of receipt of the written notice must be received electronically or in writing from the legal agent for service of process in the event that the written notice is given to the legal agent instead of an authorized agent. It is unclear whether the receipt confirmation requirements of Section 25600.2(c)(1) apply in the event that written notice is given to the legal agent pursuant to Section 25600.2(c)(2). This receipt confirmation requirement is especially important from a retailer's perspective because the legal agent for service of process may not be accustomed to handling or responding to Proposition 65 notices. Requiring confirmation of receipt from the legal agent will help ensure that the legal agent properly responds to the Proposition 65 notice and notifies the persons within the company that are responsible for Proposition 65 compliance.

Response: Confirmation of receipt is not required where the notice is *served* on the agent for service of process, as proof of service would be sufficient to confirm receipt. Requiring an agent to take any specific action is beyond the scope of the proposed amendments.

No change was made to the proposed amendments based on this comment.

Comment 28 (WWPA): Since an Authorized Agent can be a monitored electronic mailbox or post office box, requiring a confirmation of receipt from the Authorized Agent is confusing and may be impractical. It is better to require confirmation of delivery of the notice and any renewed notices to the Authorized Agent to which the manufacturer, producer, importer, supplier, or distributor of the product sent the notice is received electronically or in writing.

Response: Confirmation of receipt is the functional equivalent of confirmation of delivery.

No change was made to the proposed amendments based on this comment.

Comment 29 (WWPA): "Authorized Agent" and "legal agent for service of process for the business" referred in the proposed Section 25600.2(c)(2) are not well understood or not routinely designated explicitly by all businesses. There is no registry in existence of Authorized Agents and this role is not static and may change multiple times within a year. This can make it challenging to get the Proposition 65 notification to the person responsible for compliance when an individual's name must be used. WWPA suggests allowing notifications to be generically addressed to the Regulatory Compliance Manager of a business. Regulatory Compliance Manager is more meaningful to businesses so the Proposition 65 notification sent will more likely reach the right individual for getting the proper attention for better compliance.

Response: This comment is outside the scope of the 15-day comment period modifications. The receiving business designates its agent. It would be prudent for the manufacturer to determine the agent prior to sending the notice and warning materials. No further response is required.

No change was made to the proposed amendments based on this comment.

Subsection (f)

Comment 30 (AYS): The commenter reiterated their previous comments made during the initial comment period, summarized in comments 15 and 16 above, that were not addressed by the modifications to the proposed amendments.

Response: To the extent commenter is repeating prior comments that are not directed at the 15-day comment period modifications, they are outside the scope of this comment period and no further response is required. In any case, these comments were responded to in response to comments 15 and 16 above.

No change was made to the proposed amendments based on this comment.

Comment 31 (Amazon): OEHHA proposes to modify the definition of "[a]ctual knowledge" as follows: "...received by *the retail seller*, its authorized agent or a person whose knowledge can be imputed to the retail seller." (Italics added). The addition of the phrase "the retail seller" to Section 25600.2(f)(1), dilutes the clarification provided by the original amendment. By adding "the retail seller", the modification renders superfluous the amendment specifically designating the retailer's "authorized agent or a person whose knowledge can be imputed to the retail seller" as recipients of actual knowledge. Adding the phrase "the retail seller" should be stricken in favor of the original amendment.

Response: OEHHA disagrees that adding the phrase “the retail seller” dilutes the clarification of these changes. This phrase reinforces the fact that knowledge can be received directly by the retail seller.

No change was made to the proposed amendments based on this comment.

Comment 32 (Amazon): OEHHA proposes a modification to the proposed amendment to state that "'[a]ctual knowledge" means, in relevant part: "...information from any reliable source that allows it to identify the specific product or products that cause the consumer product exposure." This proposed modification dilutes the clarity provided in the proposed amendment. For example, this modification may be mistakenly read to imply that specificity is only required with respect to the identity of the product or products at issue and that actual knowledge does not require specific knowledge of any exposure. That would be contrary to the law as Proposition 65 only applies to persons who knowingly and intentionally cause an exposure.

Response: OEHHA disagrees with this interpretation of the proposed modifications. Actual knowledge necessarily includes the knowledge that an exposure from the

product requires a warning. Where the retail seller has such knowledge and does not provide a warning, it is knowingly and intentionally causing an unwarned exposure.

No change was made to the proposed amendments based on this comment.

Comment 33 (Amazon): The definition of "actual knowledge" of a retail seller in Section 25600.2(f) is proposed for modification to conform with the requirements for "notices of violation" in Section 25903(b)(2)(D) requiring "sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law." However, the requirements for "notices of violation" encompass more than this new proposed definition of "actual knowledge," including not only the product at issue (Section 25903(b)(2)(D)) but also the exposure (Section 25903(b)(2)(A), (C) & (D)) and circumstances of the alleged violation (Section 25903(b)(2)(A)(I)-(4)). As proposed, the modifications require less specificity to establish the "actual knowledge" of a retail seller than to meet the requirements for "notices of violation." The text of the proposed modifications should be rejected in favor of the text of the original proposed amendments, which provided greater clarity as to the meaning of "actual knowledge."

Response: OEHHA disagrees with this interpretation of the proposed modifications. The cross reference to Section 25903(b)(2)(D), is specifically limited to the requirements in that section related to the information provided concerning the product or products at issue.

No change was made to the proposed amendments based on this comment.

Comment 34 (CRA): CRA appreciates and supports OEHHA's revision to this section to define actual knowledge of an exposure as relating to "the specific product or products that cause the consumer product exposure." Specifically, CRA appreciates OEHHA's apparent intent to limit the sources of information that could give rise to "actual knowledge" to sources of information that are "reliable." However, in order to minimize disputes in litigation, we believe that OEHHA should take the opportunity in the final statement of reasons to provide some contours to help the regulated community understand what is meant by the term.

Response: OEHHA acknowledges the commenter's support for the revisions to Section 25600.2(f). The term "any reliable source" was discussed on page 55 of the FSOR for the Article 6 Clear and Reasonable Warnings regulations adopted in 2016:

> "Subsection (f) defines "actual knowledge" of the exposure to include knowledge from "any reliable source". For example, a retail seller may acquire knowledge of

an exposure that requires a warning through news media, its customers or a trade association."

The term was not introduced in the modified text; rather it was moved for purposes of clarity and internal consistency.

Further discussion of what constitutes "actual knowledge" for purposes of this section can be found in the ISOR for this rulemaking (pages 5-7) and the ISOR for the Article 6 Clear and Reasonable Warnings regulations adopted in 2016 (at page 21).

No change was made to the proposed amendments based on this comment.

Comment 35 (CEH): CEH supports the modification in subsection (f) as it will ensure consistency between this regulation and OEHHA's longstanding regulation governing the required content for pre-suit 60-day notices in Section 25903(b)(2)(D).

Response: OEHHA acknowledges the comment. No further response is required.

Miscellaneous

Comment 36 (Anonymous): The law gives the right to choose between a) warning label on packaging or b) notifying the receiving business, to the manufacturer, producer, packager, importer, supplier, or distributor of a product. Not the retailer! Retailer should carry the burden of warning at the final point of retail, by simply placing a placard. Some retailers are pushing manufacturers to place warning labels on printed packaging. It is extremely difficult to do so for global products shipping all over the world. Therefore, we suggest some sort of protection against retaliation from retailers to the entities issuing notices. For example, some modification like this: "The business that received a written Prop 65 warning notice shall not retaliate against a product or the manufacturer, producer, packager, importer, supplier, or distributor of a product by issuing printed packaging labeling ultimatums."

Response: This comment is not directed at the 15-day comment period modifications. No further response is required.

No change was made to the proposed amendments based on this comment.

Comment 37 (AYS): The commenter reiterated their previous comments made during the initial comment period that are summarized in comment 21.

Response: As stated in response to comment 21 above, this comment is not directed towards the subject of this rulemaking. OEHHA will consider clarification of intent or possible modification of this part of the regulation through a future rulemaking if necessary.

No change was made to the proposed amendments based on this comment.

Comment 38 (AYS): Section 25600.2(g) creates an obligation that a retail seller "promptly provide the name and contact information for the manufacturer, producer, packager, importer, supplier, and distributor of the product… to the extent that this information is reasonably available to the retail seller." OEHHA should take this opportunity to clarify that a retail seller must maintain the name and contact information for a verified, legally responsible party of the manufacturer, producer, packager, importer, supplier, or distribution of the product. Consumers are entitled to this transparency.

Response: This comment is not directed at the modifications to the proposed amendments. No further response is required.

No change was made to the proposed amendments based on this comment.

Comment 39 (CalChamber et al.): By making Proposition 65 compliance too expensive through using warning signs, as opposed to labels, it is likely to expand the scope to which Proposition 65 is found to be preempted. For example, in Chemical Specialties Mfrs. Assn, Inc. v. Allenby, 958 F.2d 941, 945-949 (9th Cir.1992), the court relied on the feasibility of compliance via "point-of-sale signs" in determining that Proposition 65 is not preempted by the labeling requirements of the Federal Insecticide, Fungicide, and Rodenticide Act. "Point-of sale signs are sufficient to satisfy" Proposition 65 and therefore the Act does not "in any way pressure manufacturers to affix additional labels to the containers of their products." Id. at 947-948. The less feasible warning signs become, or the more pressure manufacturers feel to provide on-product warnings, and the more likely courts may be to find federal preemption of Proposition 65.

Response: This comment is beyond the scope of this rulemaking. Further, nothing in the regulation requires the use of any particular method of providing the warnings. In fact, Section 25600.2(b)(3), which would not be modified by the proposed amendments, only provides a non-exclusive list of potential methods for providing the warning. It is up to a given business to determine the method that works best for them. If the process set out in the regulation does not fit a given business model, the subject businesses are

free to contract out of this process, so long as the consumer ultimately receives a warning (Section 25600.2(i)).

No change was made to the proposed amendments based on this comment.

Comment 40 (CEH): OEHHA has failed to address the overarching problems CEH identified with the regulation in its current and proposed revised form. Section 25600.2 both in its current form and with these proposed modifications exceeds OEHHA's statutory authority and creates potentially huge gaps in enforcement. Rather than restate its previous comments of January 2019, CEH hereby incorporates them by reference.

Response: OEHHA responded to CEH's comments in responses to comments 1, 2, 4, 6, 9, 16 and 21 above.

No change was made to the proposed amendments based on this comment.

Comment 41 (Jensen): **"**It is frustrating to see Proposition 65 notices and not know what the substances are that we are being warned about or what an alternative might be to the substance/product so we could choose a safer alternative. Department stores now post general notices even though most things they sell (hopefully) are probably not subject to Proposition 65. The notice process in these cases is unhelpful. The specific label, and the box in which it comes should carry the Proposition 65 warning and say to what chemicals it refers to to be meaningful. If the entire facility could be contaminated, then the general notice should say so."

Response: This comment is outside the scope of this rulemaking. No further response is required.

No change was made to the proposed amendments based on this comment.

Local Mandate Determination

OEHHA has determined this regulatory action will not impose a mandate on local agencies or school districts nor does it require reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. Local agencies and school districts are exempt from Proposition 65. OEHHA has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from this regulatory action.

Alternatives Determination

In accordance with Government Code section 11346.9(a)(4), OEHHA has considered available alternatives to determine whether any alternative would be more effective in carrying out the purpose for which the regulations were proposed. OEHHA has also considered whether an alternative existed that would be as effective as, and less burdensome to, affected private persons than the proposed action. OEHHA has determined that no alternative considered would be more effective, or as effective and less burdensome to affected private persons, than the proposed action. OEHHA considered no action, but finds that taking no action is inconsistent with the intent of the Act and its implementing regulations and would perpetuate confusion and lack of clarity as articulated in various inquiries by stakeholders. Therefore, OEHHA has determined that no alternative considered would be more cost-effective, or as effective in implementing the statutory policy or other provision of law.

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. The amendments will benefit workers safety and the state's environment.