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Proposition 65 Labeling Responsibilities Finalized for Intermediary Parties and Retail Sellers

California's Office of Environmental Health Hazard Assessment (OEHHA) issued finalized amendments on January 14, 2020, to California's Safe Drinking Water and Toxic Enforcement Act of 1986. Better known as Proposition 65, the act requires businesses that sell consumer products—including food—to notify Californians about certain chemicals that are in those products. Per OEHHA in its [Final Statement of Reasons](#), the new amendments, which will become effective on April 1, 2020, "clarify how intermediate parties in the chain of distribution can satisfy their obligation to provide a warning" under Proposition 65. OEHHA also revised the level of knowledge required to trigger warning obligations for retail sellers.

The amendments allow manufacturers, producers, packagers, importers, suppliers, or distributors of products to discharge their warning requirements under Proposition 65 either by (1) providing adequate warnings on the product's labeling that satisfy the Proposition 65 requirements, or (2) providing written notice to the authorized agent for the retail seller or the business to which they are selling the product. That notice must be renewed annually during the product's retail sale in California. *See* 27 Cal. Code of Regulations § 25600.2(b).

In addition, the amendments change certain aspects of when a retail seller is responsible for adding warnings to product labeling. A "retail seller" for Proposition 65 purposes means "person or business that sells or otherwise provides consumer products directly to consumers by any means, including via the internet." 27 Cal. Code of Regulations § 25600.1(1).

Pursuant to 27 C.C.R. § 25600.2(e), a retail seller is required to provide Proposition 65 warnings only in certain defined circumstances, such as when the seller has "actual knowledge" of potential exposure and no intermediary party or manufacturer meets certain requirements for California's jurisdiction.

Just what constitutes "actual knowledge" has been the source of some debate. Originally, OEHHA proposed a definition that imputed actual knowledge to the retail seller when it received information with "sufficient specificity" regarding chemical exposure. Commenters noted that the term "sufficient specificity" was vague, and OEHHA responded with a new definition.

The definition of "actual knowledge" is now two-fold. First, "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." And, the knowledge must "be received by the retail seller, its authorized agent or a person whose knowledge can be imputed to the retail seller from any reliable source."

The recent amendments make final two important changes to the responsibilities of intermediary parties in the supply chain and the knowledge requirements of retail sellers. Parties involved in the supply chain for consumer products should keep abreast of recent and proposed changes to OEHHA labeling requirements that may affect their responsibilities and obligations related to Proposition 65 warnings.

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