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# Supply Chain Issues Under the New Warning Regulations

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## Whose Responsibility Is It?

“The manufacturer, producer, packager, importer, supplier, or distributor of a product may comply with this article either by affixing a label to the product bearing a warning that satisfies Section 25249.6 of the Act, *or by providing a written notice directly to the authorized agent for a retail seller . . . which . . . Includes all necessary warning materials such as labels, labeling, shelf signs or tags.*” 27 CCR § 25600.2(b)

- What’s an authorized agent?
  - How is a supplier to know?
  - What happens if the retailer has not designated an authorized agent?
  - Use of email boxes (e.g., [prop65@retailer.com](mailto:prop65@retailer.com))?
- What exactly has to be included?
  - How many labels, signs, etc?
  - Can you tell the retailer to order more?
- What are the obligations of intermediary distributors?

## Whose Responsibility Is It? – In-Store Warnings

"The retail seller is responsible for the placement and maintenance of warning materials . . . that the retail seller receives pursuant to subsections (b) and (c)." 27 CCR § 25600.2(d).

"The manufacturer, producer, packager, importer, supplier, or distributor of a product that may cause a consumer product exposure may enter into a written agreement with the retail seller of the product to allocate legal responsibility among themselves for providing a warning for the product, which shall bind the parties to that agreement and which shall supersede the requirements of subsections (b), (c), (d), and (e)." 27 CCR § 25600.2(f).

- Do retailer standard terms and conditions supersede manufacturers' ability to send warning signs/labels to retailers under § 25600.2(b).
  - Can retailers rely on rep/warranty that the product "complies with all applicable laws" or does there need to be specificity about the supplier's obligation to label?
- How are retailers communicating with suppliers?
  - Vendor communications, vendor portals, revisions to vendor manuals
  - Auto-respond email boxes

## Whose Responsibility Is It? – Online Warnings

“The retail seller is responsible for the placement and maintenance of warning materials, *including warnings for products sold over the Internet*, that the retail seller receives pursuant to subsections (b) and (c).” 27 CCR § 25600.2(d)

- What are the manufacturer/distributor’s affirmative obligations (“may comply”)?
- What are the retailer’s affirmative obligations?
- What happens if the retailer’s platform does not support the specific warning language requested by the supplier?

# Catalog Warnings

“For catalog purchases, the warning must be provided in the catalog in a manner that clearly associates it with the item being purchased.” 27 CCR § 25602(b).

- What is a catalog purchase?
  - Catalog is “a list or record, as of items for sale or courses at a university, systematically arranged and often including descriptive material.” FSOR at 93.
  - Are advertisements/circulars “catalog purchases”?
  - Does this apply to B2B catalogs for consumer products?
- How do you clearly associate a warning with a product, other than putting the warning next to each product listing?
  - Symbols?
  - Footnotes?
- Timing for compliance with August 30 date vs. printing of catalogs.



## Are Catalog and Internet Warnings Legally Required?

- “The Act requires a warning prior to exposure to a listed chemical. OEHHA is sympathetic to concerns about the difficulty of receiving warnings post-purchase and recognizes that the circumstances of some transactions such as internet and catalog sales are particularly challenging to a consumer who has made a purchase online and has received the item. In this situation, a person may be faced with the difficulty of returning an item through the mail if they do not wish to keep it. For these reasons, OEHHA has established safe harbor warning methods for internet and catalog sales wherein a warning must be provided on the webpage or in the catalog as well as on the product.” FSOR at 77.
- “The new regulations proposed for adoption into Article 6 retain the “safe harbor” concept by giving a business the opportunity to use warning methods and content that OEHHA has deemed “clear and reasonable”. Alternatively, a business may use any other warning method or content that is clear and reasonable under the Act.” FSOR at 8.
- “Failure to meet the requirements of Subarticle 2 is not an automatic violation of the Act; rather, a business may provide warnings that differ from the safe harbor warnings, but that are nevertheless compliant with the Act.” *Id.*

# Is A Product Label Legally Required for Online or Catalog Purchases?

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- Why?

# Retailer Liability

## The 5 scenarios

- Private label products
  - Test vs. rely on supplier?
- Adding a listed chemical
- Removing/defacing a warning
- Not providing warnings from supplier
- “Actual knowledge” of an exposure and no one upstream is non-exempt and located/registered in California.
  - Rely upon supplier to respond to claim?
  - Pull products/provide warnings within 5 business days to avoid litigation?

# Retailer Response to 60-Day Notices/Complaints

- How does new allocation of responsibility interplay with certificate of merit requirements and CCP 128.7 requirement of good faith belief in evidence to support allegations?
- When/how to challenge claim based on the allocation of responsibility?
- Impact of regulation on existing litigation seeking civil penalties and injunction?
  - “when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, a repeal of the statute without a saving clause will terminate all pending actions based thereon.” *Governing Board v. Mann*, 18 Cal. 3d 819, 829 (1977).
  - “A regulation adopted by an administrative agency pursuant to its delegated rulemaking authority has the force and effect of law.” *California Teachers Assn. v. California Com. on Teacher Credentialing* (2003) 111 Cal.App.4th 1001, 1008.
  - “repeal or amendment of a law will apply retroactively to a pending statutory action unless “vested or contractual rights have arisen under the statute.” *Zipper v. County of Santa Clara*, 133 Cal. App. 4th 1013, 1024 (2005). “No person has a vested right in an unenforced statutory penalty or forfeiture.’ ... Until it is fully enforced, a statutory remedy is merely an ‘inchoate, incomplete, and unperfected’ right which is subject to legislative abolition.” *Id.*

The logo for Norton Rose Fulbright, featuring a gold-colored house-shaped icon above the word "NORTON" and the full name "NORTON ROSE FULBRIGHT" in red, uppercase, sans-serif font.

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