

Swimming Upstream? Warning Obligations for Manufacturers, Distributors and Other Non-Retailers

Rick McNeil

Partner, Crowell and Moring

3 Park Place, Suite 2000

Irvine, CA 92614

Warning Burden On Upstream Companies

Manufacturer/Seller/Packager/Importer/Supplier/Distributor/Other Transferor

- Former Section 25603 required manufacturers and other upstream companies - as opposed to retailer sellers -- provide warning materials “[t]o the extent practicable” -- but included retail sellers as potentially liable persons.
- New Section 25600.2 more emphatically states that “the lead agency [shall] minimize the burden on retail sellers of consumer products”
- New Section 25600.2 also expressly states that the manufacturer or other transferor may comply by “providing a warning on the product label” or “by providing written notice directly to the authorized agent for the retail seller”
- More limited liability for retail sellers?

Examples of Written Notice

COMPANY A

- Company A makes power tools
- Dust from grinding and sanding may contain Prop 65 chemicals
- It only sells to hardware stores and others retailers
- It sends a letter to all of its customers asking them to check one of two boxes and return the letter
- One box says Company A is authorized to add retail packaging warning labels
- The other box says Company A is not so authorized but the customer will indemnify Company A

Examples of Written Notice

COMPANY B

- Company B makes vehicle components
- As these products wear, Prop 65 chemicals can be released
- These products would be repaired or replaced only in vehicle maintenance facilities or service centers
- Company B sends a letter to its customers reciting the following from 27 CCR 25606:
- "A warning to an exposed employee ... meets the requirements of this subarticle if it fully complies with all warning information, training and labeling requirements of the ... California Hazard Communication Standard"

Examples of Written Notice

COMPANY C

- Company C sells bulk chemicals to intermediaries
- The bulk chemicals contain undesired byproducts or impurities that are listed under Proposition 65
- Company C sells only to other out-of-state companies which formulate, sell, and distribute commercial or consumer chemicals
- Company C does not fully know which Proposition 65 chemicals are in its products or their concentration
- Company C does provide Safety Data Sheets to all its customers

crowell.com

Crowell & Moring LLP is an international law firm with more than 500 lawyers representing clients in litigation and arbitration, regulatory, and transactional matters. The firm is internationally recognized for its representation of Fortune 500 companies in high-stakes litigation, as well as its ongoing commitment to *pro bono* service and diversity. The firm has offices in Washington, D.C., New York, Los Angeles, San Francisco, Orange County, London, and Brussels.

© Crowell & Moring LLP 2018

Attorney advertising. The contents of this briefing are not intended to serve as legal advice related to any individual situation. This material is made available by
Crowell & Moring LLP for information purposes only.