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REPOSITRAK
PROPOSITION 65
WHOLESALER MEMORANDUM

TO: Leigh Feitelson
FROM: Shawn Stevens, Esq.
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SUBJECT: Potential Wholesaler Exposure to Proposition 65 Claims

GENERAL BACKGROUND

Proposition 65, which is also known as the California "Safe Drinking Water and Toxic Enforcement Act," was approved by California voters in November 1986 by a margin of 63-37 percent. In relevant part, Proposition 65 requires food companies to provide written warnings to California consumers if the consumption of their food products will expose those consumers to chemicals that are "known" by the State of California "to cause cancer or birth defects and other reproductive harm." The California Office of Environmental Health Hazard Assessment ("OEHHA"), which is a part of the California Environmental Protection Agency, maintains a list of the specific chemicals requiring warnings. A list of the Proposition 65 chemicals can be found at the following link: https://oehha.ca.gov/proposition-65/chemicals.

QUESTION

Do food product wholesalers, as opposed to food product manufacturers or retailers, have any potential liability exposure under Proposition 65?

SHORT ANSWER

Yes. Although plaintiffs' lawyers generally target manufacturers and retailers of food products that are alleged to be in violation of Proposition 65 for failing to provide the requisite warnings, wholesalers could also find themselves facing Proposition 65 exposure. This is because, under the regulations, the burden to establish compliance with the law is placed squarely on the shoulders of the product "manufacturer, producer, packager, importer, ***supplier, or distributor***." For this reason, both product manufacturers ***and*** wholesalers share responsibility for ensuring compliance under Proposition 65.

DISCUSSION

Under the current law, if the use of a food product sold to California consumers will expose those consumers to a Proposition 65 chemical at levels exceeding the established thresholds, then the food product must contain a warning that the product contains a chemical known to the State of California to cause cancer and/or (as applicable) birth defects or other reproductive harm. *See* 27 CCR § 25603.3 (current regulatory warning requirements in effect until August 30, 2018); *see also* 27 CCR § 25607.2 (modified regulatory warning requirements in effect beginning August 30, 2018). In turn, the warnings must be "prominently" placed upon a product's label, or point of display, "with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use." *See* 27 CCR § 25603.1 (current regulatory warning requirements in effect until August 30, 2018); *see also* 27 CCR § 25601 (modified regulatory warning requirements in effect beginning August 30, 2018).

Under the revised regulations, which become effective beginning August 30, 3018, the required warnings must be provided by the food product "manufacturer, producer, packager, importer, ***supplier, or distributor.***" *See* 27 CCR § 25600.2 (modified regulatory warning requirements in effect beginning August 30, 2018) (emphasis supplied)); *see also* 27 CCR § 25603 (current regulatory warning requirements in effect until August 30, 2018, which place the burden of compliance upon any entity that "manufactures, produces, assembles, processes, ***handles, distributes, stores, sells, or otherwise transfers a consumer product"***). Thus, under both the current and revised regulations, wholesalers share responsibility for ensuring compliance.

Under the revised regulations, the responsible parties will be required to either place warnings on the product label, or provide notice to the retail seller that is receiving the product that a warning is required. *See* 27 CCR § 25600.2. The responsibility for providing the required warnings under the regulations, however, will shift to the retail seller when the retail seller is selling the product under a brand or trademark that is owned or licensed by the retail seller. *See id.* As a result, and with only limited exceptions, if a wholesaler (as a "supplier or distributor" of the product) is distributing a food product requiring a warning to a retail seller, and the wholesaler does not provide either the required warning or notice to the retailer that a warning is required, then the wholesaler could be named in a lawsuit alleging a Proposition 65 violation along with the manufacturer and retailer. *See id.*

Initially, Proposition 65 was designed to be enforced by the California Attorney General and/or any district attorney or city attorney for cities whose population exceeds 750,000. Thus, in the event a consumer food product without a warning was discovered to contain a Proposition 65 chemical at a level which exceeds the permissible thresholds, any of those governmental attorneys were empowered to bring a lawsuit against the offending companies.

Because of the vast number of potential exposures and violations, however, California recognized that it was unreasonable to expect that government attorneys would have the resources or time to adequately enforce Proposition 65. As a result, consumer advocacy groups, private citizens and law firms were, in essence, deputized by the State of California to enforce Proposition 65 on the government's behalf. In turn, these private groups are constantly sampling and testing

consumer food products which do not contain Proposition 65 warnings to determine whether they contain any Proposition 65 chemicals which exceed the permissible thresholds. In the event any such food products are discovered to contain chemicals at levels which exceed those permissible thresholds, then these groups will initiate proceedings against the companies involved.

When a food product without a warning is discovered to contain a chemical above the applicable thresholds, the entity enforcing the Proposition 65 requirements (*i.e.*, a private citizen, consumer advocacy group or law firm) will serve a 60-Day Notice on the alleged violator. This entity will also contemporaneously serve a notice of the violation on the State Attorney General, and all district and city attorneys capable of enforcing Proposition 65. In the event none of the governmental attorneys initiate enforcement proceedings against the alleged violator within 60-days, then the entity that provided the notice of alleged violation will be permitted to file a private lawsuit against the alleged violator. In the private lawsuit, the plaintiff will seek to recover both civil penalties and attorneys' fees. The penalties for violating Proposition 65 can be as high as $2,500 per violation per day. Attorneys' fees would be assessed in excess of these amounts.

RECOMMENDATIONS

Unfortunately, there are very few food products that are do not contain trace amounts of Proposition 65 chemicals. Proposition 65 60-Day notices have recently been filed, for example, for a wide-range of food products including gingerbread cookies (acrylamide), nutrition bars and shakes (lead and cadmium), baby food (acrylamide), potato chips (acrylamide), black olives (acrylamide), natural juices (lead), seasoning (lead), chocolate (lead and cadmium) bagels (acrylamide), and clams (lead).

For this reason, food wholesalers should continuously stay abreast of new Proposition 65 notices to ensure that the types of food products they are sourcing are not being targeted. Wholesalers should also ask their suppliers if the products they are sourcing contain proposition 65 chemicals at levels which exceed the permissible thresholds, or consider testing the products they are distributing against the standards established under Proposition 65 to ensure they are compliant. In turn, each of these inquiries and responses should, of course, be appropriately and carefully managed and documented.