



International Fragrance Association  
North America

1655 Fort Myer Drive  
Suite 875  
Arlington, VA 22209  
T +1 571 312 8005  
F +1 571 312 8033

ifrana.org

**Date:** July 31, 2013

**To:** Office of Environmental Health Hazard Assessment

**From:** Megan Ekstrom - International Fragrance Association, North America

**Re:** Request for Public Participation and Notice of Public Workshops and Public Comments Title 27, California Code of Regulations Proposed Section 25904 Listings by Reference to the California Labor Code

---

The International Fragrance Association, North America (IFRA North America) appreciates the opportunity to submit comments regarding OEHHA's (the agency) proposed Labor Code mechanism rulemaking.

IFRA North America is the principal trade association representing the fragrance industry in the United States. Our member companies create and manufacture fragrances and scents for personal care, home care, industrial and institutional use as well as home design products all of which are commercialized by consumer goods companies.

### **Background**

IFRA North America's members are committed to ensuring that ingredients used in fragrances are safe for both consumers and the environment. Similarly, we share OEHHA's desire to clarify and revise the procedures for listing new chemicals under Proposition 65. However, we are concerned that the agency's current proposal is rooted in an inaccurate interpretation of Proposition 65. Rather than clarify the law, this would create further uncertainty by mandating a constitutionally questionable listing mechanism that has little or no basis in the text of the measure passed by voters.

In our view, each of the four subsections in the proposed subparagraph (a) in OEHHA's draft regulations would impermissibly expand the scope of the labor code mechanism beyond the agency's statutory authority. Specifically, OEHHA proposes that following may be a basis for listing via the labor code mechanism:

1. The Director's List;
2. 29 C.F.R. part 1910.1200, subpart Z of OSHA's health standards;
3. The National Toxicology Program's Report on Carcinogens based on sufficient animal or human evidence;
4. IARC Monographs based on sufficient animal or human evidence.

But as the text of Proposition 65 makes clear, and as courts have confirmed, the labor code mechanism is expressly restricted to substances listed as carcinogens by the International Agency for Research on Cancer (IARC) and substances within the scope of the Federal Hazard Communication Standard (HCS), which now includes only subpart Z of 29 C.F.R. part 1910 (“subpart Z”).

In addition to the legal concerns discussed below, we are concerned that the agency’s proposed actions are unnecessary and exceed statutory authority. Taking all these factors into account, and for the reasons outlined below, IFRA North America urges OEHHA not to proceed with this rulemaking.

### **Inclusion of the Director’s List Exceeds the Scope of the Statute**

The Director’s List is not an authorized basis for listing a chemical under Proposition 65’s Labor Code mechanism when viewed in the proper statutory context. Health and Safety Code section 25249.8 (a) reads as follows:

On or before March 1, 1987, the Governor shall cause to be published a list of those chemicals known to the state to cause cancer or reproductive toxicity . . . Such list shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and those substances identified additionally by reference in Labor Code Section 6382(d).

The relevant portions of Labor Code section 6382 are as follows:

The director shall prepare and amend the list of hazardous substances according to the following procedure:

...

(b) The listings referred to in subdivision (a) are as follows:

(1) Substances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC).

...

(d) Notwithstanding Section 6381, in addition to those substances on the director's list of hazardous substances, any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200) is a hazardous substance subject to this chapter.

In support of its proposal, OEHHA reads section 6382(d) of the Labor Code, which requires a single subcategory of chemicals to be included in the Director’s List, as incorporating the entire Director’s List. But this analysis begs the question: if the Labor Code mechanism was to include the entire Director’s List, why does it only reference part of it?

The official ballot argument submitted to voters in support of the Proposition makes clear that inclusion of the Director’s List was never the intent. It stated that “At a minimum, the Governor must include the chemicals already listed as known carcinogens by two organizations of the most highly-regarded national and international scientists,” referring to IARC and the National Toxicology Program. The ballot argument does not reference the Director’s List.

Additionally, the Court of Appeal recently rejected this faulty interpretation when it described the mechanism as follows:

Proposition 65's Labor Code reference method embraces “[s]ubstances listed as human or animal carcinogens by the [IARC]” (Lab.Code, § 6382, subd. (b)(1)) and “any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200)” (Lab.Code, § 6382, subd. (d)).

*California Chamber of Commerce v. Brown*, 196 Cal. App. 4th 233, 241 (2011). Looking at the statutes closely and in context, as the Court of Appeal did, the error in OEHHA’s interpretation is plain. For OEHHA to include the Director’s List in the Labor Code mechanism would thus exceed the scope of the statute.

### **The Scope of the Federal Hazard Communication Standard Exceeds OEHHA’s Authority**

It is now widely understood that chemicals do not fall within the scope of the 2012 Hazard Communication Standard (HCS) merely because of an IARC Monograph or listing under the National Toxicology Program’s (NTP) Report on Carcinogens (ROC). OEHHA’s interpretation to the contrary, expressed in proposed paragraphs (a)(3) and (a)(4) and further clarified in OEHHA’s Draft Initial Statement of Reasons, reflects the prior version of the HCS which employed an outdated approach to hazard communication.

In 2012, the HCS was revised to include the “weight of evidence” approach which underlies the Globally Harmonized System of Classification and Labeling of Chemicals – which necessitated the elimination of the prior HCS’s mandatory inclusion of chemicals based on IARC monographs and the ROC. Despite these well-documented changes to the HCS, OEHHA’s proposed rule would have the effect of adhering to the outdated standard.

Under the updated HCS, the only chemicals now expressly within the scope of the regulation are the chemicals determined by OSHA to be carcinogens through substance-specific rulemakings and listed in 29 C.F.R. part 1910, subpart Z. Before the 2012 revisions to the HCS, however, 29 C.F.R. § 1910.1200(d)(4) did require manufacturers, importers, and employers to use IARC’s Monographs and the NTP ROC, in addition to subpart Z. However, this is no longer the case and OEHHA continues to interpret the HCS as if the revisions never occurred.

Additionally, under the current HCS, Appendix A.6 of 29 C.F.R., part 1910.1200 addresses the classification of carcinogens and Appendix A.7 addresses the classification of reproductive toxicants. Pursuant to those regulations, the only substances declared to be carcinogens under the HCS are the substances explicitly identified as carcinogens in OSHA’s substance-specific standards found in 29 CFR part 1910, subpart Z. OEHHA cannot unilaterally expand this list.

As for reproductive toxicants, there is no cross reference to subpart Z in the classification criteria for such substances under Appendix A.7. Accordingly, OEHHA cannot use this method as a basis for listing a chemical under Proposition 65 for causing reproductive harm. OEHHA may have other methods for listing such chemicals, but the HCS and the Labor Code mechanism is not one of them.

Also of concern is OEHHA’s proposal that would permit the listing of chemicals based on Safety Data Sheet (SDS) determinations made by individual employers, importers or manufacturers regardless of evidence, qualifications, or the company’s motive as suggested in the Draft Initial Statement of Reasons. In addition to being an unnecessary delegation of OEHHA’s duty to enforce Proposition 65 based on authoritative and trustworthy determinations of toxicity, which was the clear intent of the Labor Code

mechanism, OEHHA's proposal to allow private actors to impose their own interpretation of the law on others poses serious constitutional problems.

**Conclusion**

On behalf of IFRA North America and its members, we appreciate the opportunity to submit comments concerning possible revisions to Proposition 65's labor code mechanism rulemaking. I would be happy to provide more information or discuss any of the concepts outlined in this submission.

However, for the aforementioned reason we remain concerned that the proposed revisions exceed statutory obligations. For each of these reasons, we urge OEHHA not to proceed with this proposed rulemaking.

Sincerely,



Megan Ekstrom  
Manager, Government Affairs