



April 7, 2015

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Sent via email to: P65publiccomments@oehha.ca.gov

**RE: PROPOSED CLEAR AND REASONABLE PROPOSITION 65 WARNING REGULATIONS**

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of \$571 billion annually and employing 2,776,000 people—nearly one fifth of California's total employment. The retail industry in California represents one in every four jobs in the State, a total of nearly 5 million jobs (2009), and accounts for 17.8% of the State's GDP.

California Grocers Association is a non-profit, statewide trade association representing the food industry since 1898. CGA represents approximately 500 retail members operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies. Traditional supermarkets in California employ more than 300,000 residents in virtually every community in the State.

California Retailers Association (CRA) and the California Grocers Association (CGA) appreciate that OEHHA has taken the opportunity to clarify the original intent of Prop 65 to reduce the burden on retailers through this rulemaking. We offer the following retailer-specific comments on the proposed regulations, on a section-by-section basis.

1. Section 25600

Section 25600(b) provides that the warning regulations will become effective two years after adoption. We suggest that there is no reason to delay the effective date of Section 25600.2, allocating the warning responsibility between manufacturers and retailers, and in particular the agency's intended result that retailers not be subject to enforcement actions unless one of the conditions stated in subsection (d) exist. CRA/CGA appreciates the agency's intention to offer a phase-in period for new warnings methods and messages, but there is no reason for retailers to continue to be subjected to enforcement actions for two years where OEHHA has appropriately

determined that they should not be subject to enforcement actions. Waiting for two years to reduce the burden on retailers serves no legitimate purposes, and this section should be carved out of the delayed effective date for the remainder of the regulations.

Also, with regard to the Effective Date, the regulations should make clear that product labeled with the existing safe harbor language that is manufactured and distributed to a retailer prior to the Effective Date can be sold subsequent to the Effective Date and deemed to comply with the safe harbor. Retailers should not be forced to incur the burden of scouring their inventory to read labels on individual products where such labels have a warning that is currently deemed in compliance with Proposition 65.

CRA/CGA also believes that either Section 25600 or some other provision in Subarticle 1 of the proposed regulations should provide general guidance for courts and parties to determine whether warnings are “clear and reasonable” under the Act. The current regulation, 27 Cal. Code Regs. § 25601, provides such guidance. CRA/CGA are concerned that the absence of such guidance will result in the safe harbor becoming a mandatory warning requirement (a “warning straight-jacket,” as described in the Final Statement of Reasons for the initial regulations in 1988), because businesses have no assurance as to how a court will assess a non-safe-harbor warning. If the agency does intend for the current proposal to be a safe harbor, then it needs to provide some benchmark against which businesses and courts can assess whether other warning methods or messages comply with the Act, as section 25249.6 does not, itself, provide adequate notice of the conduct that is prohibited, or required, by the Act. Given the potential for enormous civil penalties, businesses should not be left to guess whether they are in compliance.

## 2. Section 25600.2

As noted above, CRA/CGA appreciates the agency’s intent to delineate when retailers are responsible for providing warnings—and thus subject to enforcement actions—and when they are not. While we are supportive of the concept, and recognize the limitations related to goods sourced by retailers in a global economy, the current proposal leads us to offer several suggestions and questions for clarification.

### a. Section 25600.2(b)

This section allows manufacturers to avoid having any responsibility to provide a warning by providing a “notice” to a retailer, without obtaining the retailer’s consent. We have several concerns about this proposal.

This provision is directly contrary to the direction in Section 25249.11(f) of the Act to reduce the burden on retailers when they are not responsible for introducing a listed chemical into a product, and serves as an invitation to manufacturers to foist the warning obligation on retailers without their consent. While section 25600.2(f) allows the retailer and manufacturer to contractually alter this requirement, the retailer still ends up being the party sued if a warning is not in fact given, and the manufacturer is “off the hook.” This is not acceptable to retailers. Through purchase orders and other contractual requirements, many retailers attempt to require their suppliers to ensure that their products comply with applicable laws, including Proposition 65, though not all have the market power to do so. OEHHA’s proposal would encourage suppliers, who may not wish to label their products with warnings, to take the position that they are not required to provide warnings, and to foist the obligation on retailers by sending warning signs or stickers, and telling retailers that they have the obligation to make sure the product has a

warning when offered for sale in California. The Initial Statement of Reasons (ISOR) does not explain how this will further the statutory intent of minimizing the burden on retailers, and CRA/CGA are concerned that it will only increase the amount of litigation that retailers will face without any corresponding benefit.

We do recognize that there are situations where a retailer can and should provide a warning, and can work cooperatively with a supplier to do so, whether by posting point-of-sale signage, stickering products, or providing a warning for internet sales. However, the default should be that the domestic, non-exempt supplier should be responsible for providing a warning, unless the parties contractually agree otherwise.

We note an additional issue with the proposal. Section 25600.2(b) requires the supplier to provide the notice to the “authorized agent” of the retailer. It is not clear who this agent can or should be. Is it the agent for service of process? To the extent that OEHHA retains this or some similar provision in the final regulation, it should ensure that any notices sent by manufacturers need to reach the person or position in a retail organization who is capable of understanding the significance of the request, and is capable of acting upon it. If that is what OEHHA means by an “authorized agent,” then OEHHA should explain; otherwise, further guidance is required, because it is highly likely that many notices will go to retailer employees who will not appreciate their significance or be able to take appropriate action in response.

b. Section 25600.2(d)

While CRA/CGA appreciates the agency’s intent to limit the responsibility of a retailer to provide warnings, and thus the retailer’s exposure to enforcement actions, we offer several issues that we believe constitute minor revisions or clarifications.

Subsection (d)(1) would leave retailers responsible for providing warnings, and for enforcement actions, over private label products. Many retailers source such from products from responsible manufacturers and are not directly involved in the design, formulation, or manufacture of the products. To the extent that the manufacturer of a private label product is non-exempt and domestic, there is no reason to treat the retailer any differently than for other products supplied by domestic, non-exempt manufacturers. We suggest the following revision to subsection (d)(1):

- (1) The retailer is selling the product under a brand or trademark that is owned or licensed by the retailer or an affiliated entity, unless one of the conditions identified in subsection (d)(5)(A) or (B) apply:

With regard to subsection (b)(5)(C), we have three concerns.

First, in the situation where a retailer is deemed to have “actual knowledge” of an exposure from a 60-day Notice, it is not clear the extent to which Notices that address “specific types” of products will create actual knowledge to a retailer. Retailers receive numerous Notices that identify a type or category of product, with an “exemplar” listed (e.g., “Hand tools with vinyl/PVC grips containing DEHP, *including but not limited to* Product “Name,” SKU 1234567”). CRA/CGA believes that such Notices often do not comply with the requirement to provide “sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged” (27 Cal. Code Regs. § 25903(b)(2)(D)).

However, judges have inconsistently applied that requirement and a number of them have overruled defense challenges to complaints or discovery on the basis that the Notice provides a plaintiff with standing to pursue violations over all “hand tools with vinyl/PVC grips,”<sup>1</sup> notwithstanding the fact that: (a) there may be multiple suppliers of such products; and (b) the retailer likely has no knowledge of the components of the products that are the subject of the notice and cannot tell which “hand tools with vinyl/PVC grips” contain DEHP and which do not. To the extent that OEHHA intends that a 60-day Notice provide “actual knowledge” of an exposure for purposes of creating potential liability for a retailer whose supplier is exempt or overseas, it should limit such actual knowledge to products that are specifically described in the Notice. If the plaintiff has not tested and identified a product, and thus cannot credibly assert that the product exposes a consumer to a chemical, it would be highly inappropriate to state that a description of a “specific type” of product gives the retailer “actual knowledge” of an exposure to the chemical to all such products. If the plaintiff has tested a product, then it should be required to specifically identify the product before it can claim to have provided “actual knowledge” of an exposure to that product.

Second, we suggest that OEHHA should clarify what is meant by the term “actual knowledge.” It appears from the proposed regulatory language, that “actual knowledge” is simply a defined term that is used to determine when a retailer—as opposed to some other party in the chain of commerce—is deemed “responsible” for providing a warning under the Act. “Actual knowledge” due to receiving a 60-day Notice should not be a substitute for a plaintiff proving a “knowing and intentional” exposure to a chemical.

Third, we join in and incorporate the comments asserted by the California Chamber of Commerce Coalition regarding the unworkability of a two-day timeframe for a retailer to be able to take remedial action following receipt of a notice. To reiterate those concerns:

i. Ensuring the Notice Gets to the Right Person(s)

Section 25903(c)(4) requires a notice of violation to be served on the Chief Executive Officer, President, or General Counsel of a business. Typically, that person is not the individual in a retail organization responsible for assessing and responding to such a notice; the notice directed to a CEO, President, or General Counsel will likely never reach that person, but instead must be processed by administrative staff and then be routed to the individual responsible for handling the company’s response to the notice. In our experience, this alone can take two or more business days.

ii. Understanding What is at Issue in the Notice

Even as to the specific product identified in the notice, retailers may have difficulty accurately identifying that product from the information provided in the notice. Not infrequently,

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<sup>1</sup>Plaintiffs typically rely upon the Final Statement of Reasons for (former) 22 CCR § 12903, which states that notices can identify “specific types” of consumer products, such as “spray paint” or “ceramic tableware” and do not need to identify specific items. We believe that the agency’s comments were directed to manufacturers of such products, who were in a position to know which spray paints contained toluene, or which ceramic tableware contained lead, not to retailers who carry products from many suppliers and have limited to no knowledge of the chemical makeup of such products. We believe that the agency should address this issue separately, to the extent that plaintiffs will continue to pursue retailers in enforcement litigation under the new rules specified in this rulemaking.

the retailer needs more information (such as a receipt or the ticket on the product, or even a photo if the exemplar item cannot be located) in order to be able to identify the actual product and the supplier. As such, the retailer would need to reach out to the party serving the Notice to request that information. The retailer also may not be able to tell quickly whether the supplier is exempt or outside the US for purposes of service, to determine whether this subsection applies to a particular notice. The process of attempting to identify the product, and reaching out to the enforcer to seek more information can take a day or two.

### iii. Interacting with the Vendor

Retailers typically need to reach out to the product manufacturer or supplier (who may or may not be named in the notice) to find out whether they want the retailer to take any particular course of action with respect to the products identified in the notice. The manufacturer may not want a warning to be placed on the product and be prepared to defend it, or may want the product pulled from sale in California or elsewhere. This process can itself will take more than two business days and the retailer should not be put in the position of having to make a decision about whether to warn or stop sale of a product without obtaining necessary information from the supplier and affording the supplier with an opportunity to be involved in that decision.

### iv. Taking Action

If the retailer decides that it wants to avail itself of the limited warning exemption and avoid a lawsuit by subsequently providing a warning or removing the product from sale within two business days of the notice, it then needs to quickly implement this corrective action. Implementation involves several steps, depending on the size of the retail entity. For large retailers, often with several hundred stores in the state, implementation involves crafting a communication to stores, potentially programming a stop-sale in the point-of-sale software system, and/or a do- not- ship notice at the distribution centers and the actual action that needs to be taken to either post a sign, sticker the identified product in all stores, or remove the product from all shelves.<sup>2</sup>

Assuming the retailer has reached a decision to take affirmative action, it will typically take at least two to three business days for the process of implementing that action to conclude.

Accordingly, CRA/CGA submits that the absolute minimum time frame for a retailer to take corrective action in response to a pre-suit notice should be 10 business days. The regulation should also provide that if the retailer needs additional information to identify the product, that the enforcer must provide identifying information on request of the retailer, which request tolls the time period until it has been received by the retailer.

## 3. Section 25602.

CRA/CGA joins in the Chamber of Commerce Coalition's comments opposing the requirement that specific chemicals be identified in product warnings as an improper "super-

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<sup>2</sup> To provide some backdrop to the issue, the typical supermarket carries 40,000-50,000 different items; a chain pharmacy store carries 15,000-20,000 items, and a convenience store carries 1,000-3,000 items. CRA members have thousands of stores in California, including: CVS (866), Walgreens (638), Safeway (591), Rite Aid (577), Walmart (296), Payless Shoe Stores (254), Ross Stores (242), Target (236), Macy's (148), PetSmart (146), and Kohl's (114)

listing” that does not provide consumers with any material or meaningful information, and will serve as a “gotcha” when enforcers find chemicals in a product that are not listed on the label.

#### 4. Section 25603.

There are several issues of concern with the safe harbor methods for consumer products.

First, CRA/CGA appreciates the flexibility that OEHHA appears to be giving to retailers in to subsection (a)(2) by allowing a warning to be provided by an electronic device or process. However, the term “automatically” has the potential of artificially constricting the ability of retailers to provide warnings through “electronic shopping carts, QR Codes, smart phone applications, barcode scanners, self-checkout registers, pop-ups on Internet websites and any other electronic device that can immediately provide the consumer with the required warning,” as described in the ISOR. We recognize the comment in *Ingredient Communication Council, Inc. v. Lungren*, 2 Cal. App. 4th 1480, 1494 (1992) that “an invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning about a specific product.” However, that does not mean that warnings need be “automatically” provided to consumers. As the Act itself specifies, warnings “need not be provided separately to each exposed individual and may be provided by general methods.” Health and Safety Code section 25249.11(f).

Second, it is not clear from the description in subsection (a)(2) that warnings on cash register receipts are within the safe harbor, and they should be. Many retailers have, or are developing, point-of-sale software systems that allow for specific messages to be printed on receipts, based on information coded into the SKU for specific products. The use of such a system, in combination with a sign alerting consumers to look at their receipts for warnings, is far more manageable for many retailers than attempting to post product-specific warnings at the point of display. Many retailers find point of display warning signs to be extremely problematic to correctly place, and to maintain in proximity to products. OEHHA should explicitly sanction the use of cash register receipt warnings as one of the safe harbor methods, whether within the rubric of subsection (a)(2) or otherwise.

Third, the structure of section 25603 makes it unclear whether the Agency intends that the requirement to provide warnings for products sold over the Internet in subsection (b) is *in addition* to warnings provided on product labeling in subsection (a)(3), or is a separate safe harbor method. As a separate safe harbor method, CRA/CGA supports the language in section (b), as it appears to allow for sufficient flexibility for online retailers to provide warnings without having to undertake costly website design that would be required for a one-size-fits all approach, and allows continued flexibility as technology continues to develop.

To the extent, however, that OEHHA intends that products sold online must have an online warning *in addition* to product labeling, CRA/CGA submits that this would be unnecessary, unwarranted, and extraordinarily burdensome. Any online retailer carrying products would be required to review the labeling of each product listed on the website to determine whether it is labeled with a Proposition 65 warning, and then attempt to reproduce that warning on its website. Many online websites do not actually sell products (see, e.g., the Amazon Marketplace), and/or do not take physical possession of products. The number of individual items that can be carried online dwarfs the number of items that can be carried in a brick-and-mortar store (see, *infra*, note 3). There is simply no need to require an online retailer to incur an extraordinary burden to identify products that are labeled with a safe harbor warning, and then

implement redundant warnings for such products. The same is true of the requirement for warnings in catalogs in subsection (c).

Finally, we believe that subsection (d), requiring warnings to be given in any other language that is on “any label, labeling or sign about a product,” is overbroad and should be limited. For example, some retailers carry products labeled for the US and Canadian market, and the law in Canada requires all labels to be in French and English. We are aware of no significant French-only speaking population in California; thus, requiring those labels to carry the Proposition 65 warning in French would serve no useful purpose. Some stores have sections where there are signs in Spanish to aid and inform customers, but the labeling of the products is in English only. Again, there is no reason for a special rule to be created for Proposition 65 warnings to be in Spanish where other labeling is not. We recommend that subsection (d) be revised to limit the alternative language requirement to situations where it is truly necessary and appropriate, and that the language from the alcoholic beverages safe harbor be used for all consumer product warnings: “The warning must be provided in English and in any other language used for labeling or advertising the product on the premises.” (Proposed section 25608.3(b)).<sup>3</sup>

In conclusion, CRA/CGA acknowledges and appreciates the transparency and willingness of OEHHA to meet with affected parties and consider all suggestions.

Sincerely,



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<sup>3</sup> This language should also be used for the food-specific safe harbor (§25608.1(b)).