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RE: Clear and Reasonable Warning and Lead Agency Website Regulations

RMA is the national trade association representing major tire manufacturers that produce tires in the United States, including Bridgestone Americas, Inc., Continental Tire the Americas, LLC; Cooper Tire & Rubber Company; The Goodyear Tire & Rubber Company; Michelin North America, Inc.; Pirelli Tire North America; Toyo Tire Holdings of Americas Inc. and Yokohama Tire Corporation. RMA members thank the California Office of Environmental Health Hazard Assessment (OEHHA) for consideration of these comments on January 16, 2015, proposed Clear and Reasonable Warnings regulations and on the January 16, 2015 proposed Lead Agency Website regulations.

I. January 16, 2015, Clear and Reasonable Warnings Proposed Regulations

- A. RMA recommends that OEHHA include a grandfathering provision in section 25600(b) that specifies that products that have a warning compliant with the current Proposition 65 (“Prop 65”) requirements are not in violation of the proposed regulatory requirements unless a plaintiff can prove that the product was manufactured after the new warning regulations become effective.**

Section 25600(b) specifies: “This article will become effective two years after the date of adoption.” OEHHA mentions in the Initial Statement of Reasons for Article 6 (ISOR for Article 6) that businesses may use either the old safe harbor warnings or the newly adopted safe harbor warnings for two years following adoption of the proposed regulations to allow businesses the opportunity to “sell through” products that contain the old warning language. (ISOR for Article 6, Page 5 of 49). While the two year “sell through” period is an improvement from the one year period in the September 2014 discussion draft, we recommend that OEHHA provide additional time to comply with the proposed regulations.

Products may remain in the marketplace in California longer than two years because products are often warehoused by distributors and retailers. Additionally, there are certain retailers that specialize in selling products that may be slightly outdated. The two year effective date will expose businesses to increased litigation concerns caused by products that contain old

warning labels after the two year “sell through” period. Manufacturers often do not have control of their products after they have been sent to retailers. Furthermore, manufacturers have no way of knowing when a retailer will have sold through a product line containing an old warning label. Providing a grandfather provision for products that contain warning labels compliant with existing Prop 65 regulations will reduce exposure to litigation for businesses while furthering the Governor’s goals in revising Prop 65.

B. RMA supports the inclusion of section 25600(c) and recommends that this section be revised to clarify that interested parties can petition OEHHA for guidance concerning whether a product needs to be labeled.

Depending on the listed chemical and the language a manufacturer has to include on a warning label, manufacturers may have a need to work with OEHHA to tailor a warning to fit their product. Section 25600(c) enables interested parties to petition OEHAA for a specific warning or interested parties can request guidance from the lead agency. OEHHA mentions in the ISOR for Article 6 that “this provision should also encourage interested parties to use other available options under existing regulations to request guidance concerning application of the Act to specific situations or products, including whether a warning is required at all.” (ISOR for Article 6, Page 5 of 49). However, the regulatory text of proposed section 25600(c) does not mention that interested parties can request guidance from OEHHA to determine whether a warning is required at all. RMA recommends that section 25600(c) specify that interested parties can petition OEHHA for guidance concerning application of the Act to specific products, including whether a warning is required.

C. RMA has concern that the language in section 25600(d) may restrict a company’s ability to market a product and may violate First Amendment free speech rights.

Section 25600(d) specifies that information provided to an exposed individual that is supplemental to a warning, such as information about the form or nature of the exposure and ways to avoid exposure, may not contradict, dilute, or diminish the warning. However, the proposed regulation does not define what information would contradict, dilute or diminish a warning. As a result, statements made in advertising or information used in advertising a product, may be seen as contradicting, diluting or diminishing a warning label. Restricting what information a company can use in advertising their product, on the basis that the information can not contradict, dilute or diminish a Proposition 65 warning label may be seen as a First Amendment violation of free speech. To avoid this confusion, RMA recommends that OEHHA delete the words “dilute or diminish” from section 25600(d).

D. RMA recommends that OEHHA delete section 25602 in its entirety, “Chemicals included in the Text of a Warning,” from the proposed regulation.

Section 25602 requires that the names of certain chemicals listed in this section be included in the text of a warning. In the ISOR for Article 6, OEHHA explains that the list of 12 chemicals included in the proposed regulation were selected because they are prevalent in many

products, have the potential for significant exposure, have had recent Proposition 65 enforcement activity, and have chemical names that are recognizable to the public. (ISOR Article 6, Page 14 of 49). OEHHA has not provided any scientific basis or supporting documentation as to why these 12 chemicals should be specifically listed in a warning. Additionally, there is no statutory authority for OEHHA's inclusion of a list of 12 chemicals in the proposed regulation. RMA recommends OEHHA remove this section from the proposed regulations.

E. Tires may be unable to comply with the labeling requirements contained in section 25603

Section 25603 specifies the various methods for transmitting product exposure warnings. This section provides a number of options for labeling consumer products; however none of the options present a feasible labeling option for tires. RMA's concerns with each of the labeling options as applied to tires are discussed below.

i. §25603(a)(1) – Shelf Tag or Shelf Sign

The proposed regulation specifies that manufacturers are required to provide shelf signs or tags at no charge to retailers. §25600.2(b)(3). However, retail stores often have label requirements for shelf-tags and shelf-signs. RMA has concern that if a manufacturer provides a shelf-tag or shelf-sign to the retail store and the label does not comply with the retail store's label specifications, then manufacturers will have no control over whether the shelf-sign or shelf-tag is displayed to the consumer.

The requirement to provide a warning on a shelf-tag or on a shelf-sign is also problematic for tires because tire retail stores often display only a small number of the actual tires available for sale in the store. For tires that are not on display in a retail store, RMA members question how they might comply with this labeling requirement.

ii. 25603(a)(2) – Electronic devices or process that automatically provides the warning

This labeling requirement assumes that retail stores have access to the internet or the means to provide a process that would automatically provide a warning to the consumer while purchasing the product. The requirement to provide a product-specific warning via an electronic device or process that automatically provides the warning may not be feasible for many small tire stores or small automotive centers that do not have internet access.

iii. §25603(b) – Internet Purchases

Section 25603(b) also specifies that warnings must be provided by a clearly marked hyperlink on the product display page, or otherwise prominently displayed to the purchaser" prior to purchase. However, if the product contains a warning label according to section 25600.2, internet retailers are not required to provide a hyperlink. Additionally, a label on a product that is available for sale on an internet website may not be viewed as prominently displayed which would expose the internet retailer to potential litigation for failing to provide the

warning according to section 25603(b). As a result, section 25600.2 conflicts with the language in section 25603(b).

Tire manufacturers produce thousands of types of tires that are each identified by a distinct sku number. The requirement to provide a warning on a tire retailer's website for each individual sku numbered tire is overly burdensome. Additionally, RMA members are concerned that if an internet website does not properly provide the hyperlink on the product display page, tire manufacturers will be liable for failing to warn the consumer.

F. RMA recommends that section 25604(a)(1) should be deleted from the final regulation.

Section 25604(a)(1) requires that a Prop 65 warning include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. In the ISOR for Article 6, OEHHA explains that using a graphic symbol that is familiar to consumers "is likely to enhance the effectiveness of the warnings, particularly for non-English speaking or low literacy populations." (ISOR for Article 6, Page 26 of 49). Prop 65 requires that a clear and reasonable warning be given. The Act does not specify that a clear and reasonable warning includes a warning symbol as outlined in section 25604(a)(1). RMA recommends that OEHHA delete section 25604(a)(1) from the proposed regulations. Including this symbol is redundant when a warning is already required to include the word "WARNING."

II. January 16, 2015 proposed Lead Agency Website regulations

A. RMA questions what authority OEHHA is relying on as the basis for Section 25205 – Lead Agency Website.

Proposition 65 requires businesses to provide a "clear and reasonable" warning before knowingly and intentionally exposing individuals to Proposition 65-listed chemicals. Thus, OEHHA has the authority to promulgate regulations that specify when a label is "clear and reasonable." However, Proposition 65 does not provide OEHHA with the authority to require businesses to submit supplemental information for a warning.

Section 25600(d) in the Warning Regulation specifies that "a person may provide information to the exposed individual that is supplemental to the warning." This section provides the option, but does not require businesses to provide supplemental information for a warning. RMA recommends that OEHHA should not finalize the Lead Agency Website Regulation, and should instead rely on the language in section 25600(d) in the Warning Regulation which makes providing supplemental information to a warning optional.

In the event OEHHA finds the authority to move forward and finalize the Lead Agency Website regulations, RMA offers the following comments.

B. RMA recommends that OEHHA should only include information from government agencies and manufacturers on the lead agency website.

In the ISOR for the Lead Agency Website, OEHHA states that they primarily intend to collect existing, publicly available information to populate the website. Additionally, section 25205(a)(2) specifies that “any person may provide the lead agency with information that may be posted on the website, in the lead agency’s discretion.” Thus, OEHHA will be populating the lead agency website with supplement information for a warning from any source. As a result, this increases the opportunity that misleading or incorrect information regarding a chemical in a product, for which a warning is required, can be included on the lead agency website.

RMA strongly recommends that manufacturers are the best source for information to provide to consumers regarding the safety of a consumer product. Manufacturers of consumer products must comply with a number of federal regulatory programs that require them to report data on their product including: safety information, content information, and chemical disclosure information. Rather than OEHHA creating a website that contains information from any source on a chemical in a product, OEHHA should refer consumers directly to a manufacturer for additional information regarding a chemical in a product.

C. RMA supports the inclusion of a process to request a correction of material provided to the website.

If OEHHA populates the lead agency website with information from any source, it is essential that manufacturers have an opportunity to correct information contained on the website. This will ensure that the public does not have access to information about a product that is inaccurate or misleading. Section 25205(a)(2) provides the opportunity to correct information on the lead agency website, however this section does not specify that OEHHA will remove inaccurate information. RMA recommends that section 25205(a)(2) be revised to specify that if a request is made to correct information on the website, that is substantiated with information showing why the material is inaccurate, OEHHA should remove the information from the website. There may not always be an opportunity to correct information on the website, and if the information is shown to be inaccurate it should be removed from the website.

D. RMA specific concerns with information that must be provided under section 25202(b)

Section 25205(b) requires businesses that provide a warning to provide certain information, when reasonably available, upon OEHHA’s request and within the timeframe specified in the request. However, this section does not define what information is considered reasonably available. The ISOR for the Lead Agency Website explains that section 25202(b), “does not confer any responsibility on a business to do new testing or analysis in response to a request from OEHHA.” ISOR for the Lead Agency Website, Page 7 of 13. The ISOR further specifies that, “if the business does not have the requested information, then it would be sufficient for it to respond to an information request by providing the responsive information that it does have and informing OEHHA that it does not possess the other requested information.” *Id.* RMA recommends that the proposed lead agency website regulation should specify that

businesses are not required to conduct new testing in response to a request for information and can respond to OEHHA's request for information by stating that they do not have the information requested.

E. RMA recommends that OEHHA exclude section 25205(b)(7) from the proposed lead agency website regulation as this information is likely considered confidential business information (CBI) for many products.

Section 25205(b)(7) requires businesses to submit information regarding the matrix in which the chemical is found in the product and "the concentration of the listed chemical(s) in the product matrix, if known." The concentration of a chemical in the rubber matrix for a tire is likely considered confidential business information. Providing this information to OEHHA will not provide the public with additional information regarding a chemical in a product because this information will be claimed as CBI. RMA recommends that OEHHA delete this section from the lead agency website proposed regulation.

F. RMA recommends that OEHHA limit the scope of information that the agency can request under section 25205(b)(10).

Section 25205(b)(10) requires businesses to submit "any other related information that the lead agency deems necessary." This section enables OEHHA to request any information that may supplement a warning under Proposition 65. The ISOR for the Lead Agency Website explains that the information that can be requested in section 25205(b)(10) is limited "to information related to potential exposures to listed chemicals for which warnings are already being provided under the Act." ISOR for the Lead Agency Website, Page 7 of 13.

However, the proposed regulatory text in section 25205(b)(10) provides no limitation on the information OEHHA may request. RMA recommends that OEHHA incorporate the language in the ISOR for the lead agency website into the regulatory text for section 25205(b)(10). This will limit the information that can be requested to potential exposures to listed chemicals for which warnings are already being provided.

G. RMA recommends that OEHHA clarify in Section 25205(b) that trade groups and other organizations are also able to provide the information requested in this section.

The ISOR for the Lead Agency Website specifies that, "businesses may coordinate reporting through their trade groups or other organizations since many exposures to listed chemicals occur throughout an industry, not from a single product, occupational or environmental scenario." (ISOR for the Lead Agency Website, Page 8 of 13). Section 25205(b) requires manufacturers, producers, or importers to provide certain information upon the lead agency's request. As drafted, this section does not allow trade groups or other organizations to also respond to the lead agency's request for information. RMA recommends that OEHHA clarify in the regulatory text of section 25205(b) that trade groups or other organizations can respond to a request for information from the lead agency on behalf of an industry.

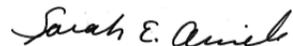
H. RMA supports the inclusion of CBI provisions in section 25205(c) and recommends that businesses be provided at least 30 days to submit additional information to justify a CBI claim or seek judicial review of the agency’s decision to disclose the information claimed as CBI.

Section 25205(c) specifies that if OEHHA “determines that the information that a business claims should not be available for public inspection must be released to the public under the Public Records Act or other law, it will promptly notify the business in writing at least 15 days prior to disclosure, in order to provide the business with the opportunity to submit additional justification for the claim or to contest the determination in an appropriate proceeding.” RMA recommends that OEHHA provide 30 days for businesses to submit additional information to support a CBI claim or to seek judicial review of a determination that information is not CBI and should be released. Thirty days is consistent with other California regulations. For example, the California Safer Consumer Products regulation provides 30 days, prior to the disclosure of information claimed as a trade secret, for a submitter to seek judicial review of the agency’s determination that the information submitted is not CBI.

III. Conclusion

RMA again thanks OEHHA for this opportunity to comment on these discussion drafts. Please contact me at (202) 682-4836 if you have questions or require additional information.

Respectfully Submitted,



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