

April 6, 2015

Monet Vela  
Office of Environment Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95812

**RE: Proposals to Adopt New Article 6 for Proposition 65 & Proposition 65 Lead Agency Website**

Dear Ms. Vela:

Sashco, Inc. appreciates the opportunity to comment on the Office of Environmental Health Hazard Assessment's (OEHHA) proposed rules to revise Article 6 to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65") and the establishment of a website to provide the public additional information regarding Proposition 65 (Prop 65) chemicals.

As we understand it, the intended goals of revising the current Prop 65 warning requirement are:

1. Clearly communicate with consumers their risks associated with using products. Repeal the current Prop 65 rules, implement revised rules by January 2016, and compliance by January 2018.
2. Identify products that pose valid health risks due to exposure.
3. Minimize economic impact to businesses.
4. Provide a safe harbor for businesses that are compliant to recommendations.

As a manufacturer of consumer products, we have concerns about the current proposal. These include:

1. Updating the warning on each product label.
2. The pictogram requirement for each product label.
3. The requirements for a special call-out of 12 specified chemicals.
4. The retailer requirement to post exposure warnings at point of sale.
5. The compliance grace period of January 2016 to January 2018.
6. Advent of regulatory website

**Label Warnings for Consumer Products**

Updating the package warning is a cost prohibitive endeavor for a company of our size. Our estimates of cost are as high as \$650,000 to change all of our packaging. This includes, (a) new dies and plates, (b) regulatory agency reviews, (c) printing and proofs, (d) disposal of products with incorrect labels. This estimate does not include internal costs such as the marketing

components, communication to our customers, controlling our inventory, additional employees, additional space for the extra inventory, etc. We have 17 branded product lines, with an average of 5 SKUs per line, so the costs and amount of work for each SKU multiply.

It will take our company approximately 2 years of internal work to updating all the packaging to the new Prop 65 standard. In addition, it would necessitate adding 2 more employees in the short-term. We would be required to allocate additional space for inventory. All of these measures will increase the cost to us as a manufacturer.

It will take 3 years of sell-through at the retail level to get the new Prop 65 complaint labels to the consumer. Based on information from previous label changes, there will inevitably be a fraction of the product made with the previous Prop 65 label that will have to be discarded or bought back at additional cost by us from our retailers. There is also a lost opportunity cost associated with the returned product.

We strongly feel that the warning text requirements are excessive in length and are requiring space beyond our current package label constraints. There is limited space on the standard package size for caulks and sealants (a 10.5 oz cylinder cartridge.) Currently, our products must have the following printed on each package, many with minimum size requirements:

1. Warnings required under Federal regulations
2. Product use information in English and Spanish
3. Size of product
4. Company contact information
5. Branded product name
6. Manufactured country statement
7. UPC code
8. Transportation restrictions, if any
9. Marketing copy – our one chance to tell customers what the product is and why it works

Adding further information about Prop 65 restricts our ability to add more text without losing our ability to communicate to the consumer. Currently there are only 2 cartridge manufacturers in the US, both with the requirement of printing directly on the cartridge. Neither have the ability to print the warning symbol as outlined in the proposed regulation; upgrading their printers will substantially increase the cost of the cartridge to Sashco and all of the sealant manufacturers, ultimately these costs will be passed on to the consumer. Upgrading the printers may also constrain our ability to sell products, as the anticipated downtime on the manufacturing of cartridge will be 4-6 weeks. Sashco can't afford to be out of saleable product for that period of time and maintain our business.

One possible “solution” for this package constraint, which will add additional cost to manufacturers and retailers, and ultimately consumers, is to maintain a separate package for each SKU just for California:

1. This requires Sashco to maintain duplicate inventory for the same SKU.
2. This requires a new SKU just for sale into California.
3. This requires our distributors to update all their information and manage multiple SKUs when they ship to both California and other states (as most do).

4. This requires retailers to update all their information and verify they have the correct SKU shipped from the distributor or face regulatory action.
5. Having a separate SKU would necessitate a substantial price increase of \$1 - \$2 per cartridge (due to new printing requirements); our estimates are somewhere between a 20-25% price increase, per cartridge to the consumer.

A second option for label space constraint is to wrap the cartridge with a paper, fold-out label to provide the additional information. This adds another 20% to the per-cartridge cost for the consumer.

A third option for label space constraint is to stop selling Prop 65 regulated caulks and sealants into California. We feel this would be a disservice to consumers in California; and will certainly restrict consumer choice. It may also create an unintended black market for products that are no longer available in California, if consumers start driving to other states to get products or buying them online to subvert the rules. Ultimately, this translates into the state of California losing out on sales tax revenue without protecting its citizens.

### **Pictogram on Consumer Products**

The label pictogram requirement is unreasonable and unnecessary. The development of the Global Harmonized System (GHS) program was negotiated over many years by hazard communication experts, international organizations, and stakeholder groups working with the United Nations. It is based on major labeling systems from around the world with input that reflects the most modern approach to warning both consumer and industrial users. OEHHA seems to have chosen to discount years of work by international experts by mandating unique warning language, unique font size, and an agency-designed pictogram in its own color. Some of the numerous problems with the pictogram are (but not limited to):

1. The yellow background is very difficult to print on the cartridges.
2. As stated earlier, the pictogram size requirement is prohibitive and not feasible given our label constraints.
3. Further, the size requirement restricts our ability to market the product to the consumer.
4. The current manufacturers of our packaging are unable to print the pictograms as currently outlined in the rule changes.
5. Modifications to the printing capabilities of the package manufacturers will result in a 20-25% increase per cartridge, and that cost will be passed on to the consumer.
6. The pictogram requirement for Prop 65 differs from the GHS requirement, and this becomes confusing to a consumer who has seen other pictograms. The OSHA adoption of GHS includes thorough training on the use and types of pictograms, and there is no indication that OEHHA would do the same.
7. Adopting a current and federal-level requirement for pictograms makes more sense than designing and requiring a new one for an individual state.
8. What information is available that shows consumers understand the meaning of that pictogram symbol? What information is available that shows the pictogram color is important and appropriate? What information shows that the color, size and placement have any meaning to consumers?

9. This pictogram, along with varying changes results in consumer “warning fatigue.” Consumers are now so inundated with warnings that they will ignore them. It’s just another warning that overwhelms consumers and that they will overlook or ignore.
10. GHS pictograms allow for black and white symbol to mitigate the concerns with color printing. This has not been a concern worldwide, so why is it in California?
11. Many product manufacturers print in black and white because color printing is cost prohibitive and they want to provide consumers with quality products at the lowest price.
12. We feel that the symbol currently means little to consumers. Does it indicate exposure or products that contain chemicals at issue?

### **Chemical Name Disclosures in Warning**

We have concerns about the 12 specific chemicals chosen for additional warning information. The criteria used to identify these 12 materials is lacking from the proposed regulation, and appears to be arbitrary. What system was used to rank these 12 versus other chemicals prevalent in the marketplace? No information was provided that indicates consumers are familiar with these chemicals, nor pertaining to their awareness as to relative and/or cumulative toxicity. This information is absent from the proposed regulation. The scientific studies utilized to assess toxicity of these materials needs to be included, at a minimum, to demonstrate potential harm to consumers, and inform manufacturers of these studies, there should also be a time allowance to research the impact of these studies. The lack of scientific justification for choosing these 12 chemicals serves only to elevate their significance in the eyes of the public without any scientifically supportable information.

One specific example of the arbitrary nature of these 12 chemicals is the inclusion of the broad term “phthalates.” Manufacturers can use a wide range of phthalate chemistries in their formulations, yet the approach to singling out this particular chemical family leaves the consumer with an impression that all phthalates pose a danger to their health. This broad term results in a factually incorrect assessment of phthalate chemistries. It is safe to assume that consumers will consider the use of the term “phthalates” in a similar fashion to the recent CPSC ban on the use of certain phthalates in children’s toys. This could be misleading and confusing for consumers. Currently, only 6 phthalates are on the Prop 65 list, and those are just a fraction of the dozens of phthalates that would now be automatically grouped into that category in the mind of the consumer. This does not serve the intent of the revision to Prop 65: to clearly communicate to consumers the risks associated with the use of the product.

There is no provision or threshold for trace amounts of these 12 chemicals. We feel that calling out anything that may be in trace quantities in such a way unintentionally creates alarm with consumers when no known risk may exist. It also fails to take into account that varying states of product (i.e., gels and pastes), do not expose consumers in the same way that airborne or liquids do – and failing to distinguish between what may be harmful versus what cannot be harmful is a travesty for California consumers. Failing to provide a threshold for trace amounts, and varying state of product, may be exceedingly dangerous to consumers. It gives them false information and prohibits the original intent of Prop 65 warnings, a consumer risk of exposure by using the products, in a clearly communicated manner. Calling out trace levels as possible exposures also exacerbates warning fatigue amongst consumers.

Many consumer products are complex mixtures, with and without trace quantities of materials. There is the likelihood that chemical combinations will result in the production of by-products. Product manufacturers are unable to adequately test the formation of by-products in trace amounts. Asking a manufacturer like Sashco to perform these tests would impose a significant financial hardship. Product manufacturers would have to disclose proprietary formulas, making Prop 65 decidedly anti-business. Asking manufacturers to disclose these formulas enables competitors to have access to them, and also the general public. We feel that this would prohibit many manufacturers, including Sashco, from conducting business within California. Consumer product manufacturers buy their raw materials from chemical manufacturers and distributors, and often raw material formulas are protected as proprietary. Our raw material suppliers have Non-Disclosure Agreements with the Regulatory Compliance Agencies that Sashco employs for the regulatory review of our product labels. These raw material suppliers refuse to disclose the contents of their raw materials to Sashco, due to proprietary formula and trade secret concerns. This puts us at a large disadvantage in trying to assess what chemical constituents may be causing a hazard in our formulas.

The standard Proposition 65 warning has stated that a product “contains” a listed chemical. It is not a simple process to determine whether a product contains a listed chemical, yet it is far easier than determining whether average users of a consumer product “can be exposed” to the chemical on their average intake under California law. It is difficult to assess exposure levels due to the complex mixtures that comprise caulks and sealants. An individual chemical may have a known exposure, but when that material is blended into a chemical matrix it may behave differently, and have a different level of toxicity. It is quite possible that mixtures of these chemicals may reduce some types of exposure, and one example is with airborne respirable crystalline silica. If this material (commonly found in trace quantities of mined mineral constituents) is contained within the matrix of a paste mixture that then turns solid as it dries, how exactly is the consumer exposed to airborne crystalline silica, a Prop 65 listed material? (Hint: the answer is that they are not exposed, since it is not possible for the silica to magically become airborne from a paste.)

Prop 65 revision is too concerned with exposure of individual materials, yet fails to account for the variables involved with exposure. Sashco’s products may contain a trace amount of one of the 12 chemicals called out by the revision of Prop 65. A manufacturer of products that are sold through distribution, and then subsequently sold to a retailer, Sashco has little to no interaction with the end-user. We are removed from any perceptible data on usage of our products. Specifically, we have no way of knowing or calculating the percentage of consumers who utilize our products on the interior versus the exterior, and all of our caulks and sealants are available for use interior and exterior. For example, an interior caulking job would have the following variables:

1. The thickness of the applied caulking bead.
2. Amount of caulking used.
3. The size of the room.
4. The air exchanges in the room.
5. The windows in the room.
6. Whether or not windows are open and air is flowing through the room.
7. Temperature of the room.
8. Amount of humidity in the room.

9. Whether the caulking was painted, or allowed to skin-over or cure.
10. Personal protective equipment used, if any.

The exposure calculations for exterior use of caulks and sealants are just as complex to determine. We know that the rate of release of emission of chemicals is widely variable and dependent on multiple factors. Calculating the rate of emission of chemicals that are complex mixtures will be a challenging and costly burden for manufacturers that may be subjected to litigation or necessary to prevent litigation.

### **Retailer Requirement to Post Exposure Warnings**

We have concerns with the retailer posting requirement. What is the reasoning for asking manufacturers to provide signage for posting at retail? Most manufacturers of consumer products do not sell direct to retailers. Many sell to distributors who then sell the product to retailers, or sometimes another distributor and then finally to retailers. It has been our experience that distributors will not disclose to whom they sell, due to business concerns. Thus, the requirement for the manufacturer to communicate directly to the retailer AND receive the retailer's acknowledgement of receipt of the notice is unnecessarily burdensome and extremely costly. Again, this requirement has significant economic impact to businesses. There is also concern that the postings be meaningful to consumers. This could exacerbate the continued "warning fatigue" and the inundation with warnings is to such a degree that the consumer will be overwhelmed and ultimately ignore them.

### **Compliance Grace Period of January 2016 to January 2018**

We feel that manufacturers such as ourselves will not be protected during the grace period, because the current wording states there's a full repeal of the original Prop 65. As stated above, it will take about 2 years of work to update all the packaging to the new Prop 65 standard. It will take an additional 3 years of sell-through at the retail level to get the new Prop 65 complaint labels to the consumer. This timeline is not feasible nor reasonable.

### **Advent of the Regulatory Website**

While the intent to inform the public is good, the burdensome and costly requirement for manufacturers to exhaustively update this website is less so. Manufacturers are required to comply with the new Safety Data Sheet (SDS) format by June 1, 2015; SDS is part of the new GHS compliance requirements, and enables a more friendly approach to understanding the contents of products in a comprehensive manner. GHS saw fit to develop requirements that encompass all products, and create an efficient and effective means of communication by doing so. Consumers are able to access this information readily from the SDS. Most manufacturers already maintain this type of information on their websites, for the very purpose of educating and informing consumers. Creating yet another website that requires constant maintenance and support is not the answer to simplifying communication. Perhaps an aggregated website would be more prudent – enabling consumers to go to the OEHHA website, and accessing the manufacturer's website from there, via a link. This would entail OEHHA maintenance, rather than burdensome manufacturer maintenance, and direct the consumer to the one place that is updated and controlled by the manufacturer: their website. Further, the information presented on the OEHHA website that identifies arbitrary chemicals is based on selected scientific studies. These studies do not present the results of all available studies nor adequately provide the

consumer the opportunity to draw their own conclusions on the risks of using products that may contain chemicals of concern, as identified solely by OEHHA. Sashco is opposed to the requirement of updating and maintaining yet another website, as it does little to simplify the flow of information, let alone provide accurate, scientific-based information.

### **Summary**

Sashco is a proponent of valuable, clear and effective warnings on products that unduly expose consumers to unsafe amounts of toxic chemicals. We feel that the current provisions in the revised version of Prop 65 fail to meet this objective. The notion of clear communication is muddled by lengthy warnings and the addition of a website with an unclear function other than disclosing proprietary information to the public. The warning pictogram symbol is a burden on businesses to print, and is meaningless to consumers who are overwhelmed with more warning information. Requiring manufacturers to update labels on all their products in order to qualify for safe haven is cost prohibitive and not conducive for economic growth. Requiring packaging manufacturers to make printing changes only serves to increase the cost to the consumer, who ultimately derives no value from said printing changes. Exposure calculations of complex mixtures are difficult to calculate, and widely dependent on many variables. There are 12 chemicals identified for further warnings without any supporting evidence. The 12 chemicals have no constraints around them, allowing for trace amounts or byproducts, and some are even groups of chemicals, making it unclear to the consumer which appear on the Prop 65 list and which do not.

Sashco is requesting the following provisions be added to the revision of Prop 65:

1. Exclusions for calling out chemicals in trace amounts.
2. Additions to the Prop 65 chemical list and warnings showing the threshold for trace quantities.
3. Further details about the 12 chosen chemicals.
4. Access to research studies related to these 12 chemicals.
5. A provision to allow manufacturers to protect proprietary formulas from disclosure to the public via the website.
6. Removing the requirement to re-label our products in order to secure safe haven.
7. Removing the requirement for retailers to post warnings at point of sale.
8. Inclusion of a protected grace period. We feel that manufacturers are not protected during the grace period.
9. Inclusion of a sell-through period greater than 3 years, as our products have extended shelf-lives.

Thank you for your time.

Regards,

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Sashco, Inc.

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Sashco, Inc.