



March 30, 2015

Monet Vela  
Office of Environmental Health Hazard Assessment  
P. O. Box 4010  
Sacramento, California 95812-4010

Re: Comments of The Vision Council to the Notice of  
Proposed Rulemaking and Announcement of Public Hearing - Title 27,  
California Code of Regulations Proposed Repeal of Article 6 And  
Adoption of New Article 6 Proposition 65 Clear and Reasonable Warnings

Dear Ms. Vela:

We respectfully submit on behalf of The Vision Council (“TVC”) the following comments to the proposed rulemaking regarding Proposition 65 warnings. Serving as the global voice for vision care products and services, including optical laboratories, TVC is a nonprofit organization representing the manufacturers and suppliers of the optical industry through education, advocacy and consumer outreach. By sharing the latest in eyewear trends, advances in technology and advice from eyewear experts, TVC also serves as a resource to the public looking to learn more about options in eyeglasses and sunglasses. Its member companies employ over 5000 Californians.

#### GENERAL OBSERVATIONS REGARDING PROPOSED CHANGES

Between January 1, 2011 and December 31, 2014 the industries represented by TVC felt the full brunt of Prop 65 lawsuits commenced by private parties seeking to enforce this law. During that period more than 50 different 60-day notices of intent to sue were served on companies in the non-prescription sunglass, over-the-counter reading glass, and eyeglass case industries, most claiming the lack of product warning labels, and all purportedly brought “acting in the public interest.” It is our understanding that most, if not all, these enforcement actions were resolved via payment of large settlements.

In light of this, TVC was pleased to hear Governor Brown’s May 2013 statements supporting changes to Prop 65, especially changes addressing aspects of the private right of enforcement. A delegation from TVC met with a representative from Governor Brown’s office in December 2013 to express support for greater control over these lawsuits, and to share with his office the difficulties that TVC members were experiencing with their product sales and production in California in light of the proliferation of litigation targeted against them by primarily one enforcement group. We expressed our opinion on the difficulty and expense of testing for the exposure level of a named substance found in a specific product rather than the

actual concentration of that substance in that product. As a corollary to this point, we discussed our concern that California allows the commencement of a Prop 65 action based on the submission of a notice of intent to sue without any scientific documentation demonstrating that the named product actually failed the exposure test for the listed substance. This allows enforcement groups to target a specific industry where a Prop 65-listed substance is believed to exist in a product, commence an action by filing the bare-bones notice with no submission of supporting scientific proof, and force the named respondent to either wage a costly defense or pay a settlement. It is our understanding that a vast majority of the named respondents in Prop 65 cases pay the petitioner to settle the case.

Therefore, TVC is concerned that the current proposed revised regulations do nothing to stem the growth of these types of lawsuits. The proposed regulations do not seek to cap the legal fees collected by the attorneys representing the enforcer groups, or to reapportion the settlements to better benefit the State rather than the private parties and attorneys. No changes have been proposed to require the petitioning party to present evidence of a violation at the time of filing, or even before the litigation begins in earnest against the respondent. To the contrary, and for the reasons stated below, the proposed changes, if promulgated, could spur on new and different enforcement actions.

As such, TVC cannot support most of the proposed changes in that the problem of “frivolous ‘shake-down’ law suits”, to quote Governor Brown, are not addressed. Furthermore, many of the proposed changes create new and unnecessary compliance requirements, giving private parties additional opportunity to bring unfounded enforcement actions.

#### COMMENTS TO SPECIFIC PROPOSED CHANGES

##### **§25600.2 Responsibility to Provide Product Exposure Warnings**

As a concept, TVC supports the proposed change allowing the manufacturer, producer, packager, importer, or distributor of a product containing a Prop 65 substance to partner with its retailers on Prop 65 warning compliance, making point of sale warnings rather than label-based ones more practical. In turn, this has the potential to ease the problem of inventory management felt by companies who sell into states and countries other than California and which may be maintaining California-specific, Prop 65 packaging in addition to its generic packaging used for all other sales.

That being said, TVC believes the likelihood to be small that retailers will be willing to assume this additional responsibility, or if they do then the ultimate cost of the merchandise to the consumer will be increased to cover the cost associated with the risk transfer. This will be especially true for retailers with the economic strength to mandate terms of business with their vendors.

### **§25602 Chemicals Included in the Text of a Warning**

The Vision Council strongly objects to the proposed language requiring the identity in the warning language of twelve specific chemical substances. No scientific explanation is offered as to why these twelve substances have been identified for special treatment over the other substances listed on the Prop 65 list. While the State may promote its belief that these substances are more commonly found in consumer products as a basis for its proposed action, TVC respectfully submits that such random method of selection is arbitrary, capricious and contrary to the existing law, which law does not provide a basis for differentiating one listed substance from another in the manner proposed.

All proposed changes including those to section 25602, if promulgated, provide a two-year phase-in period but do not appear to “grandfather” currently compliant Prop 65 warnings on products “on the shelf” when the phase-in period ends. This will create new opportunities for specious law suits – simply identify a product group containing one of the twelve named substances, and find those units still on store shelves that were labeled prior to the two-year transition date and that do not spell out on the warning label the particular substance.

### **§25603 Product Exposure Warnings – Methods of Transmission**

Proposed section 25603(a)(1) will require that product specific warnings posted at the point of sale (rather than on the product label) be in a font no smaller than the largest type face used for other information on the shelf tag or shelf sign. The Vision Council believes that this change will simply create another avenue for frivolous law suits based on allegations that an existing clear and reasonable warning is nevertheless noncompliant because its font size is smaller than that of other information on a shelf sign or tag. The statute currently requires that the warning be “clear and reasonable”; the State runs the risk of increasing these frivolous law suits by making this a quantifiable test.

### **§25604 Product Exposure Warnings Content**

The Vision Council cannot support the proposed change to the product exposure warning language. The current product exposure language (“WARNING: This product contains chemicals known to the State of California to cause cancer . . .”) and the proposed language (“WARNING: This product can expose you to a chemical [or chemicals] known to the State of California to cause cancer . . .”) both acknowledge the presence of a listed substance in a product; however, the proposed language extends this to suggest exposure could occur, even if none actually would occur. In this regard, the proposed language can be misleading and even incorrect depending on the listed substance, the product in which it is found, and the use of that product. The proposed language will not benefit the user of the product, and is inconsistent with the existing statute (Cal. HSC § 25249.7(h)(1)(2), where claims found not to be based on “actual

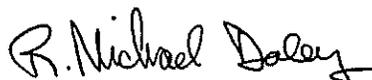
or threatened exposure” (rather than the mere possibility of exposure suggested by the draft proposal) can be deemed frivolous by a reviewing court. Therefore, TVC fails to see how the proposed draft promotes either consumer education or the reduction of “stick-up” law suits, where the goal of plaintiff is to settle before it is put to proving actual or threatened exposure.

Nor does TVC feel that the addition of the pictogram provides the public with any additional benefit over the written warning. To the contrary, it has the potential to confuse and to suggest that the use of a product containing a listed substance will result in a harmful exposure, when in fact that may not be the case. Companies will have to reconfigure their current labeling at additional expense to include this symbol, the expense of which will be passed on to the ultimate purchaser in the form of increased prices.

In its discussion of the proposed changes to section §25602, TVC raised concern over the lack of a grandfathering provision to cover existing inventory. The proposed changes to section 25604 raise the same concerns, so TVC incorporates its earlier comments here by reference.

Thank you for your consideration of our comments. Please feel free to contact either of the undersigned if you require any more information regarding this submission.

Sincerely,



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Mike Daley  
Chief Executive Officer



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Rick Van Arnem  
Regulatory Affairs Counsel