



June 6, 2016

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**Re.: Prop 65 – OEHHA Modifications to Clear and Reasonable Warning Regulations**

Dear Ms. Vela:

The Frozen Potato Products Institute (FPPI) is pleased to submit these comments to the California’s Environmental Protection Agency Office of Environmental Health and Hazard Assessment (OEHHA) regarding its Notice of Modifications to Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act (“Proposition 65”). <sup>1/</sup> FPPI is the national trade association representing the producers and processors of frozen potato products, committed to representing their specific interests. The frozen potato products industry is committed to producing safe, wholesome, and nutritious products that consumers enjoy. Since acrylamide was discovered in foods about a decade ago, FPPI has made significant strides in better understanding acrylamide formation, developing effective acrylamide mitigation strategies, and educating Member Companies as well as end-users—both customers and consumers—about meaningful and practical acrylamide-reduction strategies.

On May 7, 2013, Governor Brown proposed reforms to Proposition 65. The Administration announced it will revamp Proposition 65 by ending frivolous “shake-down” lawsuits, improving how the public is warned about dangerous chemicals and strengthening the scientific basis for warning levels. <sup>2/</sup> According to OEHHA’s January 16, 2015 Initial Statement of Reasons for the proposed revision to the Proposition 65 warning regulation (“ISOR”), the proposed regulations are intended

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<sup>1/</sup> See OEHHA “Notice of Modification to Text of Proposed Regulation, Proposed Repeal of Article 6 and Adoption of New Article 6 - Proposition 65 Clear and Reasonable Warnings” (*available at*: <http://oehha.ca.gov/proposition-65/crnr/notice-modification-text-proposed-regulation-proposedrepeal-article-6-and>).

<sup>2/</sup> May 7 (2013) Press Release, Governor Brown Proposes to Reform Proposition 65 (<http://www.gov.ca.gov/news.php?id=18026>)

to implement the Administration's vision concerning improving the quality of the warnings being given while providing compliance assistance to businesses subject to the warning requirements. <sup>3/</sup> Additionally, OEHHA published its most recent modifications to the language to several provisions of the Section 25600.2 of the proposed Article 6 ("Responsibility to Provide Consumer Product Exposure Warnings").

FPPI commends OEHHA's new language in section 25600.2(b)(1) providing additional flexibility to manufacturers regarding the content of written notices to retailers. As discussed in detail below, FPPI recommends further changes to make the regulations better align with the stated objectives of providing more meaningful warning to consumers and reducing frivolous "shake down" lawsuits. Clear and unambiguous guidance from OEHHA is essential in reducing frivolous lawsuits because OEHHA itself does not enforce Prop 65 and is not involved in private litigations.

### **Proposed § 25600.2 (b)(2) Responsibility to Provide Consumer Product Exposure Warnings**

The proposed § 25600.2(b)(2) was intended to provide the name or description of the product to allow retailers to identify the product that might expose consumers to listed chemicals. FPPI is concerned that the specific language "Includes the exact name or description of the product or specific identifying information for the product such as Universal Product Code or other identifying designation;" imposes unnecessary administrative burden on the manufacturers while providing no tangible benefits to consumers. FPPI proposes that the term 'exact' be removed from the above provision as a general description would be sufficient.

### **Proposed § 25600.2 (b)(3) Responsibility to Provide Consumer Product Exposure Warnings**

The proposed § 25600.2(b)(3) language places undue burden on manufacturers of frozen potato products of providing all necessary warning materials such as labels, labeling, shelf signs or tags. FPPI member companies have no control over the varied locations and designs of product shelves where their products may be sold. As such, manufacturers would not be able to offer appropriate warning materials without spending substantial time and resources in researching and designing appropriate warning materials that are appropriate for retailers' uses. On the other hand, retailers are in a better position than manufacturers to prepare appropriate warning materials. Indeed, even under the current language of the proposal, it is the retail seller's responsibility to place and maintain warning materials. FPPI recommends that OEHHA provide manufacturers with the option to offer to provide such warning materials at no cost to retailers or reimburse retailers of the reasonable costs of such warning materials.

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<sup>3/</sup> Initial Statement of Reasons for Proposed Repeal of Article 6 and Adoption of New Article 6 ([http://oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/Article6\\_ISOR.pdf](http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/Article6_ISOR.pdf))

**Proposed § 25600.2 (b)(4) Responsibility to Provide Consumer Product Exposure Warnings**

The proposed § 25600.2(b)(4) language needs further clarification regarding what constitutes “electronic confirmation” in accommodating for special functions now available in current day electronic tools. For example, Microsoft Outlook has the optional function of confirming the electronic delivery of e-mails automatically once the message is accessed by the receiver. We request that OEHHA deem such functionality to be considered as meeting the ‘electronic confirmation’ requirement under the proposal.

**Proposed § 25600.2(e) Responsibility to Provide Consumer Product Exposure Warnings**

The proposed § 25600.2 (e) does not include provision for those circumstances where a final, potentially smaller retailer not originally identified in the supply chain purchases the products from another larger retailer. For examples, FPPI members are concerned that they may be held liable when an owner of a corner store sells products without the proper warning messages. FPPI members would not be able to utilize their compliance with written notice provisions of this proposed regulation because the identities of these small retail sellers are unknown to the manufacturers. In practice, this would leave manufacturers no choice but to put warning messages on their products and negate the purpose of having written notice provisions. This would be extremely burdensome for national companies such as many of our FPPI members.

Therefore, we respectfully ask OEHHA to add the following provision to § 25600.2 (e)(5) as § 25600.2 (e)(5)(C) –

“(C) has actual knowledge the retail seller is engaging in selling the products to consumers.

**Conclusion**

FPPI applauds OEHHA’s efforts in updating these regulations that were originally adopted over 25 years ago. As the national trade association for frozen potato product manufacturers and producers, FPPI’s members face unique challenges in complying with the proposed Prop 65 regulations. FPPI’s members have limited control over the levels of acrylamide, which is mainly formed during the cooking process after products leave the manufacturer’s control. FPPI thanks OEHHA for taking into consideration the above comments on its proposed rules and also generally supports the California Chamber of Commerce’s submission.

Thank you for your consideration and for this opportunity to provide comments.

Respectfully submitted,



Sanjay Gummalla, Ph.D.  
Vice President, Regulatory and Technical Affairs  
Frozen Potato Products Institute

cc: The Honorable Richard Bloom, Chair,  
Assembly Budget Subcommittee No. 3  
The Honorable Lois Wolk, Chair, Senate Budget Subcommittee No. 2  
Lauren Zeise Ph.D., OEHHA Acting Director  
Karen Ross, CDFA Secretary  
Matt Rodriguez, Secretary for Environmental Protection  
Dana Williamson, Cabinet Secretary, Office of the Governor  
Cliff Rechtschaffen, Office of the Governor  
Martha Guzman-Aceves, Office of the Governor