



April 26, 2016

VIA EMAIL to [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)

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

**RE: CLEAR AND REASONABLE WARNINGS REGULATION -- PROPOSED  
REPEAL OF PROPOSITION 65 ARTICLE 6 AND ADOPTION OF NEW  
ARTICLE 6**

Dear Ms. Vela:

The American Beverage Association appreciates the opportunity to comment on the Office of Environmental Health Hazard Assessment's ("OEHHA") March 25, 2015, Notice of Modification to Text of Proposed Regulation as related to the proposed repeal of, and adoption of a new, Article 6 in Title 27 of the California Code of Regulations (the "Modified Regulations"). The American Beverage Association is the trade association representing the broad spectrum of companies that manufacture and distribute non-alcoholic beverages in the United States, many of which could be impacted by the proposed regulations.

We appreciate the changes OEHHA has made in the Modified Regulations in response to comments it received from the California Chamber of Commerce and its coalition partners on the November 2015 proposed regulations. However, there are several concerns that remain. We incorporate by reference the California Chamber coalition comments regarding the Modified Regulations, and submit this letter to address several additional issues that specifically impact the food and beverage industry.

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*Label "Box" Requirement*

The requirement that a food product warning provided on the product label be enclosed in a box remains problematic. See Proposed Section 25607.1(b). Such a requirement may confuse and mislead consumers by signaling a more significant or acute level of risk than that being presented by the exposure at issue. In addition, it could cause

consumers to think that other product information relating to health, such as cooking or storage instructions, which is not required to be boxed in, is less significant than that for which the Proposition 65 warning is being given. OEHHA has provided no evidence and no rationale to support the emphasis of the Proposition 65 warning over other product information that this box would communicate. Therefore, we request that OEHHA remove the in-box requirement from proposed Section 25607.1(b).

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### *Truncated On-Product Warning Option*

Proposed Section 25603(b) provides a short version of the consumer goods warning language for on-product warnings. As stated in OEHHA's November 2015 Initial Statement of Reasons, this option is available to accommodate product manufacturers' concerns that a longer warning message will not fit on the labeling or packaging of some small products. The same concerns exist for food and beverage products in that many such products have *limited available space* for a longer warning message, thereby effectively eliminating the on-product warning option (especially when Section 25607.1(c)'s foreign language requirement is also considered). Proposed Section 25607.2, however, does not include a shortened warning option for food exposures. Given that OEHHA believes its shortened language "will provide useful information to individuals while avoiding unwieldy on-product warnings" (ISOR at p. 29), such language should also be permitted for food exposure warnings. Therefore, we request that new subsections (b) and (c) be added to Section 25607.2 as follows:

25607.2(b): An on-product warning label may be provided using all the following elements:

- (1) The word "WARNING" in all capital letters, in bold print.
- (2) For exposures to a listed carcinogen, the words, "Cancer - [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)."
- (3) For exposures to a listed reproductive toxicant, the words, "Reproductive Harm - [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)."
- (4) For exposures to both a listed carcinogen and a reproductive toxicant, the words, "Cancer and Reproductive Harm - [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)."

25607(c): A person providing an on-product warning label pursuant to subsection (b) is not required to include within the text of the warning the name or names of a listed chemical.

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### *Chemical Identification Requirement*

We continue to have concerns regarding the requirement to specifically identify chemicals in the warning language. Including the name of one or more chemicals makes the warning language cumbersome, lengthy and potentially unmanageable for some products. We appreciate, however, the Modified Regulation's further clarification that generally a warning need only identify one chemical even if a product contains multiple chemicals.

The Modified Regulations require that where a warning is being provided for more than one endpoint, specifically cancer and reproductive toxicity, the warning must include the name of at least one chemical for each endpoint. See Section 25601(c). To facilitate the implementation of this new requirement and in response to specific concerns regarding the warning language in the previous version of the regulations, Section 25603(a)(2)(C) now includes the following safe harbor warning language:

This product can expose you to chemicals such as [**name of one or more chemicals**] which is [are] known to the State of California to cause cancer, **and** [**name of one or more chemicals**] which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product).

(Emphasis added.)

Significantly, the same modification has not been made to Section 25607.2(a)(4), the food exposure warning regulation. Section 25607.2(a)(4) contains the safe harbor warning language to be used when there is an exposure to "both listed carcinogens and reproductive toxicants." OEHHA's March 25th Notice states that both Sections 25603(a)(2)(C) *and* 25607.2(a)(4) have been "modified to clarify situations in which a warning is required for multiple chemicals that each cause a different toxicity endpoint." However, the warning language in Section 25607.2(a)(4) remains unchanged. We therefore request Section 25607.2(a)(4) be modified as follows:

(4) For exposure to both listed carcinogens and reproductive toxicants, the words, "Consuming this product can expose you to chemicals such as [name of one or more chemicals], which is [are] known to the State of California to cause cancer, and [**name of one or more chemicals**], **which is [are] known to the State of California to cause** birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

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### *Delineation of Responsibilities*

We appreciate OEHHA's desire to clarify when retailers are not responsible for a warning under Proposition 65. Retailers are too often unnecessarily included as defendants in Proposition 65 litigation by private plaintiffs in order to burden the defense, rather than for any legitimate purpose. This laudable objective, however, has been laden with unworkable and expensive concepts that we urge OEHHA not to pursue.

First, it is not clear whether proposed Section 25600.2 is intended to articulate requirements for the entire warning article or whether it simply is an attempt to restate requirements that appear elsewhere in the context of assigning responsibility between the retailers and others. This should be clarified with great precision, at present, it is neither clear from the words of the regulation nor from the Initial Statement of Reasons.

Second, proposed Section 25600.2(b) requires communication with "the authorized agent" of a retailer, but does not appear to permit or anticipate communication directly with a retailer, which seems odd, unjustified, and probably unintended.

Third, the requirement that the manufacturer identify the "exact name or description" of products is unduly burdensome and expensive. Where a clear product category description will suffice, we see no reason why that should not be an option.

Fourth, the requirement that "all necessary warning materials" be included in a written notice from a manufacturer to a retailer will result in substantial waste and unnecessary expense. Since manufacturers do not know how many signs a particular retailer may need, and since those needs may change over time, it is much more efficient to allow the retailer to order warning materials for free rather than to burden manufacturers with the duty to provide all that is necessary when what is necessary for a retailer is not generally known to a manufacturer. Nor is it logical or efficient for a manufacturer to undertake the responsibility to know such information for each retailer to which it sells. The key concept of placing the cost on manufacturers and having manufacturers provide the necessary notices may be achieved much more efficiently through more flexibility. Thus, we consider it important for OEHHA to retain the phrase "or offers to provide such materials at no charge to the retail seller" in proposed sections 25600.2(b)(3) and 25600.2(e)(4) ("or an offer to provide warning materials"). Another example of where this is necessary, more efficient and more environmentally sensitive is when both a manufacturer and distributor need to discharge their Proposition 65 responsibility. Each should be able to provide a notice and an offer rather than provide what otherwise would be duplicative materials.

Fifth, it is not clear whether the obligation to obtain retailer confirmation of receipt of warning materials is a requirement OEHHA considers necessary to provide a clear and reasonable warning. If so, OEHHA is creating a massive new frontier for possible litigation and expensive discovery, and a huge recordkeeping burden of retaining various confirmations. General proof of transmission should be adequate and is used in other aspects of implementing Proposition 65.

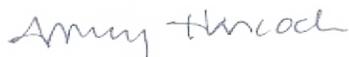
Sixth, warning notices at least every 18 months is more than adequate; renewing a notice after only six or twelve months is a substantial burden for all involved, and OEHHA offers no justification for this level of frequency.

Seventh, five days is not nearly enough time for a retailer to evaluate whether an exposure is taking place in response to a private enforcer's 60-day notice. The full 60-day notice period should be available for this evaluation and is more consistent with the framework of Proposition 65. Moreover, this concept will not work at all for notice letters that would be tautological under this regulation, such as notice letters that say "all pvc-containing bags with DEHP."

Eighth, we are concerned that proposed Section 25600.2(g) would shift the private plaintiff's obligation to research appropriate enforcement targets to retailers, and would place an undue burden on retailers. Other laws require statements as to the manufacturer or distributor of products, and adding this section is unduly burdensome. Again, this section is not adequately justified in the initial statement of reasons. We are aware of no circumstances where it would be impossible to enforce the Act in the absence of this provision, and OEHHA has identified none.

We appreciate the opportunity to comment on the Modified Regulations and we thank you for the considering our comments.

Sincerely,



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Amy Hancock  
American Beverage Association