

June 15, 2015

Monet Vela
Office of Environmental Health Hazard Assessment
P. O. Box 4010
1001 I Street
Sacramento, CA 95812-4010

Sent Electronically to: P65Public.Comments@oehha.ca.gov

SUBJECT: Lead Agency Website Regulation Amendments

Dear Ms. Vela:

We are writing on behalf of the members of the Association of Global Automakers, Inc.¹ (Global Automakers) and the Alliance of Automobile Manufacturers² (AutoAlliance), which include nearly every company selling new vehicles in the United States. We appreciate the opportunity to provide the following comments on the California Office of Environmental Health Hazard Assessment's (OEHHA) proposed amendments (amendments) for the Proposition 65 (Prop 65)³ Lead Agency Website.⁴

With the amendments, OEHHA has addressed some of our previous concerns with the regulation,⁵ and we appreciate OEHHA's willingness to work with the industry to create a better regulation. We are particularly pleased that OEHHA took into account our requests to:

¹ Global Automakers' members are Aston Martin, Ferrari, Honda, Hyundai, Isuzu, Kia, Maserati, McLaren, Nissan, Subaru, Suzuki, and Toyota. Please visit www.globalautomakers.org for further information.

² AutoAlliance members are BMW Group, FCA US, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Cars of North America. For additional information, please visit <http://www.autoalliance.org>.

³ Safe Drinking Water and Toxic Enforcement Act of 1986, Title 27, California Code of Regulations, Sections 25601-25607.

⁴ We also support the comments submitted by the California Chamber of Commerce on the 15-Day Notice for the "Lead Agency Website" and herein incorporate those comments by reference.

⁵ Global Automakers and AutoAlliance "Joint Comments-Prop 65 Lead Agency Website," submitted to OEHHA on April 8, 2015. Attached for reference.

- Specify that the information requested should be provided if it is readily available, thus removing the need for additional testing and coordination with extensive supply chains; and
- Help protect trade secrets by providing manufacturers with 30 days instead of 15 to dispute trade secret claims.

We agree there are benefits associated with providing chemical exposure information to consumers via a website. However, we remain concerned about issues we originally raised. In addition, OEHHA's amendments present new concerns for us. For instance, Article 2, Section 25205 gives OEHHA authority to create a website and request information for populating the website from manufacturers, producers, distributors, or importers of products. In our previous comments, we stated our concern that the rule was vague regarding the type of information requested and how it would be used. The amended draft of the regulation is clearer in terms of the type of information requested, but a timeframe for submitting information has not been specified. We also continue to believe that the information requested for the website could overwhelm consumers with overly technical information. Additionally, stronger protection for trade secrets is necessary as it is still possible for OEHHA to release confidential information. Finally, OEHHA should focus its process for collecting information on the entities that make the chemical choices.

Timeframe and Cost for Providing Information

Section 25202(b) states that information requested must be submitted to OEHHA "within the timeframe specified in the request." This is unclear, and deadlines may vary by request, potentially resulting in insufficient time for information collection. We request that the time to submit information to OEHHA be no less than six months from the receipt of the request. To determine what information a manufacturer has direct access to, the request needs to be sent through the proper channels within the organization. The average automobile is a complex web of systems and networks, containing thousands of unique components from hundreds of suppliers around the world. Therefore, sufficient time is necessary for manufacturers to do their due diligence to obtain information and to ensure accuracy of the information being provided. Additionally, having a minimum fixed period of time for responses would allow manufacturers to have a consistent process in place for responding to requests received. OEHHA should also clarify how it will handle situations in which information is not submitted in the requested timeframe, or not submitted altogether.

In addition to time, the costs of providing the requested information are not insignificant for automobile manufacturers. OEHHA claims in the Notice of Proposed Rulemaking that providing information to populate the website will not add any significant new costs

to businesses. This statement is inaccurate; given the size and complexity of their supply chains, populating the website will add significant costs for our members who manufacture complex goods. The requirements mentioned on page six of the Initial Statement of Reasons (ISOR) are all examples of information that are time and resource intensive to collect, even when they are available to the manufacturer. Aggregating the necessary information requires substantial resources, including cost and manpower.

Website Could Overwhelm Consumers with Overly Technical Information

As noted in our comments on the proposed regulations for the Lead Agency Website, we understand the intent for consumers to be informed and to be aware of possible health risks, but we believe providing additional information on every product containing Prop 65 chemical(s) would inundate consumers with overly technical information which, ultimately, does not help them gauge exposure. We recommend that OEHHA instead provide consumers with high-level information on the characteristics of the chemicals covered by the regulation and methods of reducing exposure. This would balance the consumers' ability to make an informed decision regarding exposure with the amount and types of information provided.

Trade Secrets

We appreciate OEHHA's effort to strengthen the protection of trade secrets in the amended draft regulation by notifying businesses 30 days instead of 15 days prior to disclosure of claimed trade secrets. However, stronger protection of trade secrets is still needed. The language in the rule should be strengthened to stress the importance of protecting against the disclosure of trade secrets in the development of the Lead Agency Website. Otherwise, there is a significant potential that legitimate concerns regarding intellectual property rights and competition could be overwhelmed by the effort to compile information for the website. Therefore, in Section 25205(a), we recommend adding a new subparagraph (8) as follows:

(8) Prevent the public disclosure of trade secrets and confidential business information in the course of providing the information described above.

Process for Collecting Information

To increase the likelihood of obtaining the type of information intended for the website, OEHHA should focus the collection process on the entities that make the chemical choices and physically create the products. Precedence for this approach has already been established by the Department of Toxic Substances Control (DTSC) in California's Safer Consumer Products Act⁶ (SCP), which established an order of precedence for potentially responsible parties. While the auto industry does convey guidance and global regulatory

⁶ Title 22, California Code of Regulations, Chapter 55. Safer Consumer Products.

prohibitions to its suppliers, it cannot reasonably be responsible for material and chemical selection beyond ensuring that said requirements are met. Furthermore, while the original equipment manufacturers (OEMs) maintain data on production and service parts via the International Material Data System (IMDS), as assemblers, OEMs are not permitted to share data pertaining to formulation or ingredients. The IMDS serves primarily as a method to screen for the presence of and concentration of chemicals contained in parts. It does not provide information on potential routes of exposure, potential hazards associated with any of the substances or risk assessment or risk screening information reacted to any individual part or use. Therefore, OEMs cannot provide guidance or factual evidence as to a product's risk or exposure profile without undertaking a complete risk assessment or at a minimum a detailed risk screening effort, taking into account the chemical's characteristics, the amount of the chemical, and its location in the vehicle. Performing such assessments would be cost prohibitive for OEMs given the sheer magnitude of parts in an automobile and because this information is not readily available to them; OEHHA has recognized this constraint by adding clarifying new information does not have to be generated to meet the request for information.

The SCP includes a definition for the term “manufacturer”⁷, and the final regulation states that this is the entity primarily responsible for the SCP requirements.⁸ The “assembler” is listed in the order of precedence as a potentially responsible party, as shown below:

“Responsible entity” means any of the following⁹:

- (A) Manufacturer;
- (B) Importer;
- (C) Assembler; or
- (D) Retailer.

DTSC refines the application of compliance responsibility and even delineates a “chain of command” detailing the stepwise progression of compliance applicability through the various responsible parties.¹⁰ We suggest OEHHA pursue any regulatory requirements pertaining to data collection within Prop 65 using the same order of responsibility and precedence. OEHHA should note that Tier 1 suppliers also have extensive supply chains and face the same difficulties in obtaining the requested information as an OEM.

⁷ “‘Manufacturer’ means any person who manufactures a product that is subject to the requirements of this chapter, or any person that controls the manufacturing process for, or specifies the use of chemicals to be included in, the product.” Title 22, California Code of Regulations, Chapter 55. Safer Consumer Products, Section 69501.1(44).

⁸ Title 22, California Code of Regulations, Chapter 55. Safer Consumer Products, Section 69501.2.

⁹ Title 22, California Code of Regulations, Chapter 55. Safer Consumer Products, Section 69501.1(60).

¹⁰ Title 22, California Code of Regulations, Chapter 55. Safer Consumer Products, Section 69501.2.

In summary, OEHHA should specify a time frame for submitting comments, increase protections to trade secrets, and focus data collection efforts on the manufacturers most likely to have the chemical information in their possession. Though the website may overwhelm consumers with overly technical information, if OEHHA decides to proceed, we recommend additional consideration and industry engagement to better define the type of information that would best inform the consumer and the optimal collection methods for this information.

We thank you for considering the arguments presented herein. Please do not hesitate to contact us with questions or for additional information. We look forward to working with OEHHA as the amendment moves forward.

Sincerely,



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Attachment



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April 8, 2015

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Sent Electronically to: P65Public.Comments@oehha.ca.gov

SUBJECT: “Lead Agency Website Regulations”

We are writing on behalf of the members of the Association of Global Automakers, Inc.¹ (Global Automakers) and the Alliance of Automobile Manufacturers² (AutoAlliance), which include nearly every company selling new vehicles in the United States. We appreciate the opportunity to provide the following comments on the California Office of Environmental Health Hazard’s (OEHHA) proposed regulations (proposal) for the Proposition 65 (Prop 65)³ Lead Agency Website.⁴

We agree there are benefits associated with providing information to consumers on exposure to potentially harmful chemicals via a website because by only providing what the proposal calls the “clear and reasonable warnings,” consumers have no method of gauging the actual risk posed by the product or environment. The website could help consumers make educated decisions about products or environments that could cause exposure to Prop 65-listed chemicals. However, despite these intended benefits, we have a number of concerns regarding the proposed Lead Agency website, and information that could be requested from consumer product manufacturers.

Article 2, Section 25205 gives OEHHA authority to create a website and request information for populating the website from manufacturers, producers, distributors, or importers of products. Although the Initial Statement of Reasons (ISOR) specifically details OEHHA’s intent with these information requests, the rule is vague about the type of information that can be requested,

¹ Global Automakers’ members are Aston Martin, Ferrari, Honda, Hyundai, Isuzu, Kia, Maserati, McLaren, Nissan, Subaru, Suzuki, and Toyota. Please visit www.globalautomakers.org for further information.

² AutoAlliance members are BMW Group, FCA US, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Cars of North America. For additional information, please visit <http://www.autoalliance.org>.

³ Safe Drinking Water and Toxic Enforcement Act of 1986, Title 27, California Code of Regulations, Sections 25601-25607.

⁴ We also support the comments submitted by the California Chamber of Commerce on the “Clear and Reasonable Warning Regulations” and herein incorporate those comments by reference.

the timeframe for submitting the information, and how that information, which could be confidential, would be available in the public domain. Furthermore, we believe that the information requested for the website could overwhelm consumers with overly technical information and could be costly for industry collect and submit.

Type of Information Requested:

The ISOR states OEHHA intends to “collect publicly existing, publicly available information.” However, OEHHA does not make this intent clear in the rule itself. OEHHA states that information must be provided “when reasonably available.” The rule should specify that information not currently available may be provided, but is not required to be submitted as follows:

Article 2, Section 25205(b)

Upon the lead agency’s request for the following information from the manufacturer, processor, distributor, or importer of a product, (including food), or other a particular business that is providing a warning must provide the following information, the recipient of such request shall, when reasonably available, upon the lead agency’s request, and within the timeframe specified in the request, provide the requested information to the agency, to the extent that the recipient knows or is in possession of such information:

Furthermore, OEHHA has the authority to request “any other related information that the lead agency deems necessary.” The information intended for the website is very specific and highly technical and not likely to be readily available for many products. It may also be protected as a trade secret, especially for complex products comprised of hundreds, or even thousands of components. The type of information being sought needs to be clearly defined in the regulations.

Confidential Business Information

We appreciate the fact that OEHHA’s draft regulation includes language acknowledging the existence of a pathway for protecting confidential business information. We do, however, think that the language of the rule should be strengthened to stress the importance of protecting against the disclosure of trade secrets and confidential business information in the development of the Lead Agency Website. Otherwise, there is a significant potential that legitimate concerns regarding intellectual property rights and competition could be overwhelmed by the effort to compile information for the website. Therefore, in Section 25205(a), we recommend adding a new subparagraph (8) as follows:

(8) Prevent the public disclosure of trade secrets and confidential business information in the course of providing the information described above.

In keeping with OEHHA’s intent to require businesses to provide “reasonably available” information only, please note that in the case of complex products such as automobiles, product manufacturers may not have access to certain confidential information, and/or may not be in a good position to assert claims of confidentiality on behalf of their suppliers. For example, under current automotive industry practices, original equipment manufacturers (OEMs) and suppliers have confidentiality agreements that generally prevent such information from being shared and/or being made available to share. Depending on what is ultimately requested, OEMs may need to refer OEHHA to one or more of their suppliers. A request for “the matrix in which the listed chemical or chemicals is found in the product and the concentration of the listed chemical(s) in the product matrix” would likely need to be directed to the supplier of the specific component or chemical, rather than to an OEM. The entity responding to an OEHHA request should be the entity that is in the best position to know whether the requested information contains trade secrets or confidential business information whose disclosure could affect competition in the marketplace. These practical realities should be taken into account in both the drafting of the final rule, and in OEHHA’s administration of the rule in practice.

Timeframe for Providing Information

Section 25202 (b) states that information requested must be submitted to OEHHA “within the timeframe specified in the request.” This is extremely vague, and could result in insufficient time for information collection. We request that the time to submit information to OEHHA be no less than 6 months from the receipt of the request. This time is necessary for manufacturers of complex goods such as automobiles to query their supply chains, consisting of multiple tiers, for the information. This assumes that OEHHA requests information that is already known to or in the possession of the manufacturer, processor, distributor, or importer of a product.

Website Could Overwhelm Consumers with Overly Technical Information

The ISOR states that the intent of the website is to provide “supplemental, contextual information” for the consumer. While we understand the intent for consumers to be informed and aware of possible health risks, we believe providing additional information on every product containing Prop 65 chemical(s) would inundate consumers with technical information which, ultimately, does not help them gauge exposure. We recommend that OEHHA instead provide consumers with high-level information on exposure routes and reducing exposure. The Prop 65 warnings for vehicles already notify the consumer of potential exposure. Providing information on the chemicals would help consumers making an informed decision regarding exposure, but there has to be a balance to avoid overwhelming consumers. For example, OEHHA identified 12 chemicals in the “Clear and Reasonable Warning” ISOR and provided information on the uses, sources and health effects of these chemicals. We believe this type of information strikes the right balance of informing consumers while being concise and easy to understand. In addition, such information would be readily and publically available. However, as currently proposed by OEHHA, the website would not follow this model.

Cost to Provide Information

OEHHA claims in the Notice of Proposed Rulemaking that providing information to populate the website will not add any significant new costs to businesses. This statement is inaccurate for manufacturers with large supply chains; it will add significant costs for our members.

Furthermore, any request for information requires time and resources to respond. The average automobile is a complex web of systems and networks, containing thousands of unique components from thousands of suppliers around the world, and the supplier network for these components can be as deep as six to seven tiers. The global nature of the supply chain greatly complicates information-gathering capabilities. Aggregating the necessary information requires substantial resources, including cost and manpower. The requirements mentioned on Page 6 of the ISOR are all examples of information that are time and resource intensive to collect and in many cases, nearly impossible.

If OEHHA decides to proceed with the website, we recommend additional consideration and industry engagement to better define the type of information intended, the availability of such information, and how it can best be used to inform the consumer.

We thank you for considering the arguments presented herein. Please do not hesitate to contact us with questions or if I may provide additional information. We look forward to working with OEHHA as it moves forward.

Sincerely,



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