



1111 19th Street NW > Suite 402 > Washington, DC 20036
t 202.872.5955 f 202.872.9354 www.aham.org

April 26, 2016

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
Sacramento, California 95814

Via E-mail: P65Public.Comments@oehha.ca.gov

Re: Clear and Reasonable Warning Regulations -- *Proposed Repeal of Article 6 and Adoption of New Article 6 - Clear and Reasonable Warnings*

Dear Ms. Vela:

The Association of Home Appliance Manufacturers (AHAM) would like to comment on the March 25, 2016 regulatory proposal by the Office of Environmental Health Hazard Assessment (OEHHA) that would modify substantially Proposition 65's warning requirements. As currently formulated, this regulatory action would have unintended consequences that would result in consumer confusion, increased business compliance costs and uncertainty. AHAM supports and agrees with the coalition comments submitted by CalChamber and will not reiterate those concerns and comments; however, AHAM wants to emphasize the concern with the regulatory proposal being unclear or worse eliminating the ability to place the warning in an owner's manual or use and care guide. The proposal needs substantial reformulation to align better with the Governor's stated reform goals.

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's membership includes over 150 companies throughout the world. In the U.S., AHAM members employ tens of thousands of people and produce more than 95% of the household appliances shipped for sale. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience.

I. Overview

Prop 65 enacted into law the Safe Drinking Water and Toxic Enforcement Act of 1986 (the Act) which states that the people of California declared their right "to be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm." Prop 65 was intended, in part, to create a labelling scheme to help notify consumers of possible exposures to chemicals known to be associated with cancer and/or reproductive harm, often based on animal studies alone. A product that carries a Prop 65 warning, however, does not necessarily mean that the product violates any product safety standard, or poses an actual health risk. This point is not

fundamentally understood by many members of the public, who often are confused and alarmed by the presence of a Prop 65 warning if they even are aware of them.

Consumers have the right to know what is in the products they use, but far more information is available today than in the pre-Internet days when Prop 65 was enacted. Information overload and information in multiple places and differing labels can be counter-productive and lead to poor decision-making. This is exactly the problem Prop 65 has created. Over time, Prop 65 warnings have proliferated, partly in response to private enforcement actions. The result is that many consumers who are not alarmed by Prop 65 warnings believe that they convey no meaningful information other than a decision to forestall a Prop 65 enforcement suit. Such overwarning is counter-productive, can result in “warning fatigue” and, ultimately, undermines the effectiveness of a Prop 65 warning. The California Supreme Court has recognized that overwarning dilutes the force of a warning and is counterproductive.¹

As a result of these dynamics, Prop 65 has increased substantially the litigation costs and compliance burdens on industry without any corresponding benefit to public health or consumer awareness. Further, issues that should be addressed through open and transparent regulatory processes have been relegated to closed door settlement discussion with trial lawyers who wind up receiving the bulk of the settlement payments. Against this backdrop, in May 2013 the Governor announced Prop 65 reform goals that were intended to provide more meaningful information to the public, limit frivolous Prop 65 lawsuits and provide greater certainty for businesses.²

II. Continued Option to Allow Warnings in Owner’s Manuals or Use & Care Guides

Currently, Prop 65 permits the transmission of a Prop 65 warning label via several methods, including by supplying a warning that appears on a product’s label or “other labeling.” 27 Cal. Code Reg. § 25603.1(a). The phrase “other labeling” includes printed material that accompanies a product, such as its container, wrapper or the owner’s manual that accompanies a consumer product. This is clear, plain language that includes owner’s manuals or use & care guide.

In the proposed regulations, however, the section on the methods of transmitting a warning provides, “A label that complies with the content requirements in Section 25603(a).” The proposal deletes the phrase, “or other labeling” from this subsection. We strongly urge OEHHA to modify the proposed regulation to retain the option of furnishing a Prop 65 warning via “other labeling” that accompanies the product. This is a sensible method –indeed, for products that are small in size, the only method -- of transmitting many types of warning information, often as required by voluntary industry standards. A warning in the owner’s manual is a good option for consumers to see and read the warning because an owner’s manual --

¹ See *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 931-32 (Cal. 2004) (Against the benefits that may be gained by a warning must be balanced the dangers of overwarning and of less meaningful warnings crowding out necessary warnings, the problems of remote risks, and the seriousness of the possible harm to the consumer).

² See Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Proposes to Reform Proposition 65. (May 7, 2013), available here <http://gov.ca.gov/news.php?id=18026> (last accessed Jan. 13, 2016).

- has other health and safety warnings and cautions along with proper usage instructions, technical specifications, dimensions, warranty information, etc.;
- is generally kept longer than the immediate container or packaging, and the immediate packaging or container may never be seen by the consumer;
- is more likely to be kept intact while a package is destroyed and discarded;
- is usually accessible on-line long after the purchase and for any resale;
- provides manufacturer contact information so that the consumer can obtain additional information;

Further, products are sometimes returned and resold sometimes without the original packaging but with the owner's manual, and used products can be sold with the owner's manual and other information to increase resale value.

Therefore, AHAM suggests the following revision to proposed subsection 25602(3) in bold and capitalized:

(3) A label **OR OTHER LABELING** that complies with the content requirements in Section 25603(a).

III. §25600(b) General – Effective Date

OEHHA proposed that the finalized regulations would not become effective until two years after the date of its adoption. Although this is longer than the normally allotted one-year, this is not long enough for all product types. Nevertheless, AHAM supports and appreciates OEHHA's proposal to allow a warning that complies with the regulations prior to the end of the two-year transition period. This provides an ability to "sell-through" products that are in the chain of commerce already. It would be impractical to force manufacturers to go to every warehouse and every retail store where a unit may exist and determine if an updated and revised label that meets the more recent regulations is included.

AHAM appreciates the opportunity to comment on the proposed Prop 65 regulations and would be glad to discuss further these important public policy issues. Please contact me or Kevin Messner at (530) 309-5629 or kmessner@politicallogic.net with any questions.

Sincerely,



Robert D. McArver
Vice President, Policy & Government Relations