



April 26, 2016

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

Re: Clear and Reasonable Warning Regulations

Dear Ms. Vela:

The American Home Furnishings Alliance (“AHFA”) appreciates the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment’s (“OEHHA”) Notice of Modification to Text of Proposed Rulemaking to Article 6 in Title 27 of the California Code of Regulations (“Proposed Modification”). AHFA is the largest trade organization serving the home furnishings industry, which AHFA and its predecessor organizations have been doing since 1905. AHFA’s 400 member companies operate numerous domestic wood furniture manufacturing facilities and comprise an extensive global supply chain that provides a wide variety of home furnishings to American consumers. Member companies provide approximately 100,000 manufacturing jobs throughout the U.S. and represent a \$35 billion segment of the nation’s economy. The Proposed Modification will impact AHFA’s member companies’ business in the State of California.

AHFA acknowledges OEHHA’s willingness to work with AHFA in the past on this regulatory process. AHFA was disappointed the Proposed Modifications did not address the majority of concerns raised in AHFA’s last comment letter. Those concerns continue to weigh heavily on AHFA member companies. For example, the Proposed Modification does not delete or alter the second sentence of Proposed Section 25607(a). AHFA requested that OEHHA remove that language which withholds safe harbor protection for furniture companies complying with the consumer product safe harbor warning. The sentence appears to be arbitrary. The Proposed Modification permits furniture companies to employ any clear and reasonable warning. The Proposed Modification does not require or ensure uniformity of warnings on furniture products. Having already determined that the consumer product safe harbor warning is deemed to be clear and reasonable for consumer products generally, there is no reason for the Proposed Modification to continue to state that compliance therewith would not be deemed clear and reasonable for furniture companies.

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1912 Eastchester Drive
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AHFA hereby incorporates by reference is January 25, 2016 comment letter, another copy of which is enclosed, which reiterates AHFA's outstanding concerns. These comments are intended to supplement those submitted concurrently by the California Chamber of Commerce ("Coalition Comments"), in whose comments AHFA joins.

Thank you for considering these comments. AHFA looks forward to continuing its dialogue with OEHHA.

Regards,

A handwritten signature in black ink, appearing to read "B. Perdue", with a long horizontal stroke extending to the right.

VP Regulatory Affairs

American Home Furnishings Alliance

bperdue@ahfa.us

336-881-1017



January 25, 2016

Via Email to: P65Public.Comments@oehha.ca.gov

Monet Vela

Office of Environmental Health Hazard Assessment
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Re: **Clear and Reasonable Warning Regulations**

Dear Ms. Vela,

Office:

1912 Eastchester Drive, Suite 100

High Point, North Carolina 27265

The American Home Furnishings Alliance (“AHFA”) thanks you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment’s (“OEHHA”) 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 - Clear and Reasonable Warnings (“Proposed Rulemaking”). AHFA is the largest trade organization serving the home furnishings industry, which AHFA and its predecessor organizations have been doing since 1905. AHFA’s 400 member companies operate numerous domestic wood furniture manufacturing facilities and comprise an extensive global supply chain that provides a wide variety of home furnishings to American consumers. Member companies provide approximately 100,000 manufacturing jobs throughout the U.S. and represent a \$35 billion segment of the nation’s economy. The Proposed Rulemaking will impact AHFA’s member companies’ business in the State of California.

The comments below are intended to supplement those submitted concurrently by the California Chamber of Commerce (“Coalition Comments”), in whose comments AHFA joins. AHFA also incorporates by reference its April 8, 2015 comment letter, another copy of which is enclosed herewith, with respect to those comments not addressed in the Proposed Rulemaking.

Proposed Section 25600(f) – ‘Grandfathering’

Proposed Section 25600(f) states: “A person that is a party to a court-ordered settlement or final judgment establishing a method or content for a consumer product or environmental warning is deemed to be providing a “clear and reasonable” warning for that exposure for purposes of this article, if the warning fully complies with the order or judgment.” AHFA agrees that a provision in the Proposed Rulemaking expressly acknowledging the continuing validity of court judgments is necessary to avoid needless litigation that might

arise if the Proposed Rulemaking was silent as to the continued validity of court judgments.

However, the final clause of subsection (f) which states “if the warning fully complies with the order or judgment” should be stricken. Existing law already provides a mechanism to address compliance with court judgments. Courts retain jurisdiction to enforce their own judgments and any challenge to a party’s compliance with a court judgment should be brought in the action in which the judgment was entered. As drafted, subsection (f) could be improperly interpreted to allow private enforcers to ignore a court judgment by simply alleging that the targeted defendant is not in compliance therewith and proceeding with litigation before another court. According to the Attorney General’s website, more than 150 consent judgments have been entered by courts regarding exposures to ‘*chlorinated tris*’ (TDCPP). Re-litigating those exposures would increase frivolous litigation and burden an already overtaxed court system. Accordingly, AHFA respectfully requests that the phrase “*if the warning fully complies with the order or judgment*” be stricken from Section 25600(f) of the Proposed Rulemaking.

Proposed Section 25600.1(i) – Consumer Product Exposure

The furniture industry takes pride in its customer service, including the replacement of cushions, slipcovers, and other parts and components where necessary and appropriate. Those parts and components are identical to those being replaced and intended for use only with the finished furniture product. AHFA requests that OEHHA clarify that a separate Proposition 65 warning is not required for replacement parts and components intended to be used with a finished consumer product, including a furniture product, which already bears a Proposition 65 warning.

A Proposition 65 warning on those parts and components would not provide any new or additional consumer information, but could be extremely costly and burdensome if the mechanism by which the company provides a clear and reasonable warning as to its furniture products is physically and logistically inapplicable to replacement parts and components. To accomplish this clarification, AHFA suggests that the following sentence be added to the definition of “*consumer product exposure*” in Proposed Section 25600.1(i):

“A consumer product exposure excludes an exposure that results from a replacement part or component, designed and intended for use only with a finished consumer product, if the finished consumer product bears a clear and reasonable warning”

Proposed Section 25600.2 – Responsibilities of Manufacturers and Retailers

AHFA agrees with OEHHA that the term “*authorized agent*,” as used in the Proposed Rulemaking, must be defined to avoid needless litigation regarding its meaning. However, the definition in the Proposed Rulemaking would not accomplish this goal. As drafted in Proposed Section 25600.1(b):

“Authorized agent” means the person or entity designated by a retail seller to receive notices from product manufacturers, suppliers, and distributors under this article. (emphasis added)

This definition is ambiguous and ripe for wasteful litigation as the emphasized language could be interpreted to exclude from the definition an agent authorized to receive notices under “Proposition 65” or “Health and Safety Code Section 25249.5 *et seq.*” or “the Safe Drinking Water and Toxic Enforcement Act,” or “California law,” if the authorization does not specifically mention “Article 6 of Title 27 of the California Code of Regulations.”

Moreover, while the authorized agent, as drafted, must be specially and specifically designated by the retailer for purposes of the Proposed Rulemaking, the Proposed Rulemaking does not require a retailer to make such a designation. Without such a requirement, a retailer could unilaterally vitiate a manufacturer’s right to comply with Proposition 65 under the program outlined in Proposed Section 25600.2 by simply not specially and specifically designating an authorized agent.

This special designation is unnecessary. The law already recognizes a definition of authorized agent, which is familiar to businesses (manufacturers and retailers alike), and intended by the law to facilitate the administration of justice and compliance with all California laws, including Proposition 65. AHFA urges OEHHA to maintain consistency in California law by defining an authorized agent to be those persons authorized to receive service of a summons as defined in California Code of Civil Procedure Section 416.10.

Proposed Section 25601 – Clear and Reasonable Warnings

AHFA appreciates OEHHA’s intent, as stated in its Initial Statement of Reasons (“ISOR”), that *the*

“new regulations proposed for adoption into Article 6 retain the ‘safe harbor’ concept by giving a business the opportunity to use warning methods and content that OEHHA has deemed ‘clear and reasonable,’ or a business may use any other warning method or content that is clear and reasonable under the Act” (ISOR at 5).

However, the Proposed Rulemaking is circular as to what constitutes a “clear and reasonable warning” other than the safe harbor language.

Under existing law, a clear and reasonable warning requires that ***“the method employed to transmit the warning must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure”*** and ***“[t]he message must clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm”*** (Cal. Code Regs., tit. 27, §25601). This definition is not carried over to the Proposed Rulemaking.

Section 25601(b) of the Proposed Rulemaking would expressly permit any clear and reasonable warning, other than the safe harbor warning, that complies with the statute. However, the statute does not define the term “clear and reasonable.” Instead, as drafted, Section 25601(a) of the Proposed Rulemaking would define a clear and reasonable warning under the statute to mean “the warning complies with all applicable requirements of this article [the Proposed Rulemaking].” At best, this is a circular definition - - a clear and reasonable warning under the regulations would be defined as a clear and reasonable warning under the statute, and a clear and reasonable warning under the statute would be defined as a clear and reasonable warning under the regulations. At

worst, this implies that the only clear and reasonable warning is the safe harbor warning as the Proposed Rulemaking contains no other definition of a clear and reasonable warning. While that interpretation would be at odds with OEHHA's ISOR, needless litigation regarding the definition of a clear and reasonable warning will ensue nonetheless absent clarification in the Proposed Rulemaking. Therefore, AHFA requests that OEHHA maintain the existing regulatory definition of a clear and reasonable warning.

Proposed Section 25607(a) - Specific Product, Chemical and Area Exposure Warnings

AHFA acknowledges that OEHHA has undertaken to define a safe harbor warning program for the furniture industry that takes into account the specific needs, constraints, and parameters of the industry. However, under this proposed section, furniture manufacturers that comply with the general consumer product safe harbor warning provisions would not be deemed to be providing a clear and reasonable warning. There is no reason for this distinction as furniture is a type of consumer product. It is axiomatic that a warning that is deemed to be clear and reasonable for consumer products is clear and reasonable for products that meet the definition of a consumer product.

While many companies in the furniture industry may choose to avail themselves of the specific furniture industry safe harbor warning, some furniture companies may choose to comply with the general consumer product safe harbor warning for several different reasons:

1. The latter may be more consistent with a company's existing warning program.
2. A company may manufacture furniture and other consumer products such that maintaining multiple different Proposition 65 warning regimes will be logistically difficult or impossible.
3. The general consumer product safe harbor warning may be more compatible with a company's mission and vision. Whatever the reason, there is no basis to deem the consumer product safe harbor warning clear and reasonable for all consumer products but not furniture, a type of consumer product.

AHFA requests that the second sentence of Proposed Section 25607(a), to wit - ***"Where warning methods or content are included in this section, a person must use the warnings specified in this section in order to satisfy the requirements of this subarticle,"*** be deleted, or, in the alternative, that the phrase "excepting section 25607.12 and 25607.13" be inserted so that the sentence reads - ***"Excepting section 25607.12 and 25607.13, where warning methods or content are included in this section, a person must use the warnings specified in this section in order to satisfy the requirements of this subarticle."***

Proposed Section 25607.13(a)(1)(C) Furniture Product Exposure Warnings – Content

As drafted, the proposed safe harbor warning language for furniture product exposures would be: "This product can expose you to [name of one or more chemical], a chemical [chemicals] known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/furniture." While there is no evidence that OEHHA

intends, or desires, the safe harbor warning to list the name of every chemical exposure that may occur, the Proposed Rulemaking could be interpreted by some as providing a safe harbor only as for exposures to chemicals listed in the warning text. OEHHA's ISOR does not address the consumer confusion, or disregard of warnings, that may result from lengthy Proposition 65 warnings that name every listed chemical to which an exposure can occur, even if such a warning is feasible, which it is not.

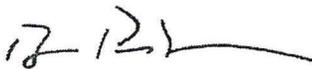
AHFA understands that it was OEHHA's intent, as reflected in the slides presented by OEHHA at the public hearing on January 13, 2016, to require the regulated community, for the safe harbor, to name at least one listed chemical for which a Proposition 65 warning is being given, but to provide that, with such chemical(s) named, the safe harbor warning is clear and reasonable as to all exposures under Proposition 65. Absent clarification in the Proposed Rulemaking, litigation regarding the sufficiency of Proposition 65 warning text will abound, and the concept of a "safe harbor" that defines a clear and reasonable warning to avoid frivolous litigation will be obviated.

AHFA hereby proposes two alternatives for Proposed Section 25607.13(a)(1)(C); proposed additions are underlined and deletions are struck through:

- ***"This product can expose you to chemicals, including [name of one or more chemical], ~~a chemical~~ ~~[chemicals]~~ known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to ww.P65Warnings.ca.gov/furniture."***
- ***"This product can expose you to [name of one or more chemical], ~~a chemical~~ ~~for other chemicals~~ known to the State of California to cause cancer or birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/furniture."***

Thank you for considering these comments. AHFA looks forward to continuing its dialogue with OEHHA.

Regards,



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