



January 25, 2016

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

Monet Vela

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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.

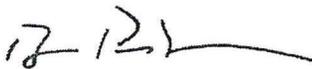
AHFA understands that it was OEHHA's intent, as reflected in the slides presented by OEHHA at the public hearing on January 13, 2016, to require the regulated community, for the safe harbor, to name at least one listed chemical for which a Proposition 65 warning is being given, but to provide that, with 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](http://www.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,



VP Regulatory Affairs

American Home Furnishings Alliance

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336-881-1017



April 8, 2015

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

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Re: **Clear and Reasonable Warning**

Dear Ms. Vela,

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 Proposition 65 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.

Proposed Section 25600 General

Proposed Section 25600(a) states: “Subarticle 2 provides ‘safe harbor’ content and methods for providing a warning that have been determined to be ‘clear and reasonable’ by the lead agency.” However, that section also states: “Article 6, subarticles 1 and 2 apply when a clear and reasonable warning is required.” The combination of these statements implies that the “safe harbor” warning is the only clear and reasonable warning. This is a significant divergence from existing law and contrary to OEHHA’s stated intent in its Initial Statement of Reasons (“ISOR”). See ISOR at p. 43 (“The proposed regulations do not impose any mandatory requirements ... and provide guidance for safe harbor warnings that a business may use”).

Existing law makes clear that the “safe harbor” warning provisions of Article 6 are not mandatory by defining what constitutes a clear and reasonable warning in terms broader than the safe harbor provisions themselves. To wit, 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. That definition is not carried over to the Proposed Rulemaking.

Nor does the Proposed Rulemaking include a section on grandfathering court approved warnings as in the pre-regulatory draft document. The absence of a provision on grandfathering in combination with Proposed Section 25600(a) implies that previously Court approved warnings are not “safe” from attack, on the grounds that they are not clear and reasonable, under the Proposed Rulemaking. This would have a significant economic impact on the furniture industry.

Last year, the furniture industry was the target of a massive Proposition 65 enforcement wave that cost the industry millions of dollars, most of which were paid to plaintiffs’ attorneys. Hundreds of companies signed consent judgments with Court approved warnings. Several more avoided litigation by implementing warnings that are clear and reasonable under existing law. Proposed Section 25600(a), as drafted, in combination with the absence of a provision on grandfathering, could embolden plaintiffs’ attorneys to renew the enforcement wave against the furniture industry because the warnings previously understood to be clear and reasonable differ from the new proposed safe harbor warnings. Such a result would run counter to the Governor’s objective of reducing frivolous litigation, tax an already overburdened court system, and accomplish no public benefit.

For the foregoing reasons, AHFA reiterates the requests set forth in the Coalition Comments to (1) carry forward the current law’s guidance regarding the meaning of “clear and reasonable” into the new Proposed Rulemaking, and (2) add, as a new subsection (f), that “Nothing in this Article shall affect warnings for specific exposures that are approved by courts as compliant with the Act or require that such warnings be revised.”

AHFA also reiterates the Coalition Comments to subsection (b), which, as drafted, provides that the Proposed Rulemaking will become effective two years after adoption. Again, the furniture industry has recent relevant experience that informs AHFA’s request that the Proposed Rulemaking should grandfather products that have a warning compliant with current law unless the plaintiff can prove that the product was manufactured after the Proposed Rulemaking becomes effective.

Several of the “exemplar” products identified in the notices of violation that precipitated last year’s multi-million dollar enforcement wave against the furniture industry were old discontinued furniture pieces. Some pieces targeted by plaintiffs’ attorneys had been in the marketplace for eight years. The furniture industry took significant steps to address the new listing of chlorinated tris in furniture pieces manufactured and sold after chlorinated tris

was listed. However, furniture pieces have an exceptionally long shelf-life and are too cumbersome and expensive to readily recall or relocate. Plaintiffs' attorneys capitalized on these older products outside the manufacturers' control. A two year effective date, without a provision that grandfathers products with warnings that comply with existing law, would once again provide an opening upon which plaintiffs' attorneys could capitalize for potential monetary gain, but no public benefit.

Perhaps recognizing this, when the Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation adopted TB117-2013 it stated that the law will not be retroactive and the existing furniture can be sold without the flame retardant chemical labeling. Applying the Proposed Rulemaking prospectively, and subjecting durable goods (like furniture) manufactured on or after the effective date to the Proposed Rulemaking, affords the furniture industry the due process needed to comply with the law. Prospective application does not harm the public since furniture manufactured before the effective date of the Proposed Rulemaking will continue to be subject to the Act and the implementing regulations from the time the product was manufactured.

Proposed Section 25600.2 Responsibility to Provide Product Exposure Warnings

AHFA recognizes the preference in the law for Proposition 65 warnings to be provided by manufacturers instead of retailers to the greatest extent practicable. However, Proposed Section 25600.2 would interfere with existing lawful business and contractual relations between manufacturers and retailers and is unnecessary to effectuate the goal of the law.

Subsection (b): The term "**authorized agent**" is used in this proposed subsection but is undefined and, as a result, differing interpretations could arise that lead to unnecessary litigation and/or interference with parties' contractual rights. AHFA suggests that all references to an authorized agent clarify that such person includes anyone authorized to receive service of a summons as defined in California Code of Civil Procedure Section 416.10.

Importantly, manufacturers must be able to control their compliance with Proposition 65's warning obligation. Under Proposed Section 25600.2(b)(4) and (5), a manufacturer that otherwise complies with the Proposed Rulemaking would be deemed out of compliance if the retailer fails to provide a written acknowledgment of receipt of the notice and renewal required under this proposed subsection. A manufacturer must be able to discharge its legal obligations through its own actions. Written proof of receipt in any form should suffice, whether through the retail seller's acknowledgment of receipt, a third-party delivery service's confirmation of delivery, or a declaration of service under penalty of perjury.

The requirement in proposed subsection (b)(5) for renewal of notice to the retailer every 180 days during the period in which the product is sold in California by the retailer is unworkable, especially given the long sell-through period for furniture pieces. Manufacturers are without personal knowledge as to which furniture pieces are offered for sale by retailers, especially years after the furniture was sold by the manufacturer to the initial retailer who purchased it, and therefore lack personal knowledge sufficient to comply with this proposed

subsection. Moreover, a 180 day renewal is unnecessary in the absence of any product changes that would alter the terms of the prior notice. It also is fraught with the potential for harmless human error, since the compliance deadline will fall on different dates every year. Renewal notices should only be required in the event of changed circumstances. However, in the event the OEHHA retains the requirement to renew notice periodically, the renewal should be (i) annual, and (ii) tied to the period in which the product is sold into California by the manufacturer.

Subsection (e): As AHFA understands this subsection, only those public and private enforcers with standing to pursue a Proposition 65 enforcement action may request information pursuant to this subsection and only if such enforcer provides a reasonable description of the product at issue. To clarify this, AHFA proposes the following changes: (i) add an “or” between subsection 25600.2(e)(1) and subsection 25600.2(e)(2); and (ii) add “under subsection (e)(1) or (2)” to subsection 25600.2(e)(3), as follows – “The person or entity making the request under subsection (e)(1) or (2) must provide a reasonable description of the product so that the retailer can readily identify it.” (Proposed additional language underscored).

Subsection (f): AHFA appreciates OEHHA’s recognition that a manufacturer and retailer enjoy the freedom to contract with one another and may agree to allocate the burdens of Proposition 65 compliance among themselves. However, as drafted, proposed subsection(f) would only recognize “written agreements.” All lawful agreements, whether written or unwritten, should be recognized, and the Proposed Rulemaking should not nullify otherwise lawful oral contracts or implied obligations that are currently recognized by the law.

Moreover, any burden sharing agreed to between a manufacturer and retailer should be effective so long as the warning “to be” provided to the purchaser under the parties’ agreement meets the requirements of the Act. As this subsection is currently drafted, the burden sharing agreement would only be effective if the retailer in fact provided the Proposition 65 compliant warning. Drafted that way, the retailer could unilaterally nullify an otherwise valid contract by simply failing to perform. The Proposed Rulemaking should not reward a party for breaching its contractual obligations. This result would unnecessarily interfere with the parties’ freedom of contract, and can be avoided by inserting the phrase “to be” into the last clause of subsection (f) as follows: “to the extent that the warning to be provided to the purchaser of the product meets the requirements of Section 25249.6 of the Act.” (Proposed additional language underscored).

Proposed Section 25602 Chemicals Included in the Text of a Warning

AHFA fully supports the Coalition’s Comments on this Proposed Section. Once again, the furniture industry’s experience provides a useful example of the regulated community’s concerns with the Proposed Rulemaking.

As noted above, last year hundreds of companies in the furniture industry spent millions of dollars to settle a large wave of Proposition 65 actions of questionable merit. Those actions involved chlorinated tris and phthalate listed chemicals. As a result of that litigation, dozens of

consent judgments, which included agreed upon warning language for exposures to chlorinated tris and phthalates, were entered into and approved by the Court. None of those court approved warnings requires chlorinated tris or phthalates to be specifically listed in the warning.

Proposed Section 25602's requirement to specifically list chlorinated tris and phthalates (along with 10 other chemicals) in warnings is incongruous with those multi-million dollar settlements. If, as discussed above, the Proposed Rulemaking is a new "safe harbor" only, and warnings previously determined by a court to be clear and reasonable continue to satisfy the Act (as AHFA thinks they must), then the result of Proposed Section 25602 will be to cause some furniture products to bear warnings specifically listing chlorinated tris and phthalates while otherwise identical furniture products need not. This exacerbates consumer confusion, implies that the furniture product which bears the court approved warning does not contain chlorinated tris or phthalates, and may improperly influence competition as a result.

Accordingly, AHFA reiterates the Coalition's request that this proposed section be eliminated altogether.

Proposed Section 25608 Specific Product, Chemical and Area Exposure Warnings

Proposed Section 25608 states in relevant part that ***"a person must use the warnings specific in this section in order to satisfy the requirements of this Article."*** AHFA understands this to mean that compliance with this proposed section is necessary to take advantage of the ***"safe harbor"*** created by the Article. For the reasons set forth above, clarification on proposed section 25600 is needed to ensure that proposed section 25608 is not misinterpreted to mean that compliance with this proposed section is necessary to establish a clear and reasonable warning.

Proposed Section 25608.12 Furniture Product Exposure Warnings – Methods of Transmission

AHFA continues to be concerned that the burden placed upon the furniture industry to meet the "safe harbor" of the Article is heavier than the burden placed on other consumer products.

As drafted in proposed section 25608.12, warnings for furniture products must be placed on: a notice displayed at each public entrance or point of display, or printed or stamped on the receipt; and a warning affixed to the furniture product. In contrast, proposed section 25603, governing other consumer products, states that on-product labeling is alternative to store signs and warnings provided electronically at purchase. Requiring methods of transmission to be additive of each other for the furniture industry, but alternative to each other for other consumer products, places a disproportionate burden on the furniture industry and removes the flexibility afforded to other industries.

AHFA suggests that all the methods of transmission proscribed by OEHHA for furniture product warnings be stated as alternatives to ensure parity among industries and avoid the

imposition of an extraordinary burden upon the furniture industry. It is particularly difficult for the furniture industry to affix unique labels to products for the California market only. AHFA members have reported several instances of consumer confusion regarding Proposition 65 warnings received by individuals outside the state of California. The industry requires a method of transmission for furniture product warnings that does not require on-product warning to avoid causing unnecessary consumer confusion outside the state of California and to afford all industries operating within the state an appropriate degree of flexibility.

Thank you for considering these comments.

Bill Perdue

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

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