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GlobalAutomakers



January 25, 2016

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Sacramento, CA 95812-4010

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

SUBJECT: “Clear and Reasonable Warning Regulations”

Dear Ms. Vela:

We are writing on behalf of the members of the Alliance of Automobile Manufacturers¹ (Auto Alliance), the Association of Global Automakers, Inc.² (Global Automakers), and the Motor & Equipment Manufacturers Association³ (MEMA). Together, our associations include nearly every company selling new vehicles in the United States (U.S.) and represent more than 1,000 companies that manufacture and supply parts, components and systems for use in light- and heavy-duty motor vehicles in the original equipment and aftermarket industries. We appreciate the opportunity to provide the following comments on the California Office of Environmental Health Hazard Assessment’s (OEHHA) proposed regulations for the Proposition 65 (Prop 65) warning requirements.⁴

We appreciate OEHHA’s openness and willingness to work with industry and other stakeholders throughout the regulatory and pre-regulatory stages of this rulemaking. We have seen many positive changes in the latest draft of the proposed regulations that demonstrate that OEHHA has carefully considered our previously-submitted comments.⁵ However, the latest proposal raises several new, as well as some ongoing, concerns.⁶ Although the amendments to the rule are

¹ Auto Alliance 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>.

² 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.

³ MEMA represents more than 1,000 companies that manufacture and supply parts, components and systems for use in light- and heavy-duty motor vehicles in the original equipment and aftermarket industries.

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

⁵ Changes since the last draft that we support include removal of the GHS pictogram and changing from “will expose” to “can expose.”

⁶ We remain concerned about issues identified in our previous comments submitted June 13, 2014, October 17, 2014, and April 8, 2015 that have not been resolved.



intended to minimize lawsuits, provide more sufficient warnings to consumers, and generally improve the regulations, the proposed rule still falls short of this intent in many areas. In certain sections, the proposal is more confusing than the current regulation. This lack of clarity may create more opportunities for frivolous lawsuits and does not achieve the purpose of streamlining consumer warnings. We believe OEHHA can take the following actions to address our concerns:

- Provide more flexibility for label transmission methods
- Clarify label formatting
- Adjust label content
- Amend definitions to account for various vehicle types
- Make special allowances for aftermarket, replacement, and service parts or include them in the safe harbor warning
- Clarify what is meant by “one or more chemical” in the generally-applicable warnings
- Either exempt replacement parts or include them in the Safe Harbor Label
- Consider the practical implications of excluding a *de minimis* exemption
- Use the phrase “end users” instead of “purchasers”
- Clarify how specific sections relate to the general section to ensure safe harbor protections
- Avoid inadvertently requiring exposure assessments
- Provide a three-year transition period

We discuss our concerns in detail below.

OEHHA Should Provide More Flexibility for Label Transmission Methods

We urge OEHHA to provide more flexibility for vehicle labels. Section 25607.16 of the proposal requires two different methods of label transmission for vehicles. The first specifies that a warning should be printed in the owner’s manual, while the second specifies that a warning should be attached to the driver’s side window. Because a dealer would not be able to control what is printed in an owner’s manual, and conversely, an OEM may not have control over how a window appears at a dealership, these two requirements should be separated, and the relative duties of the OEM and the retailer should be specified.

We are concerned about over-labeling on the vehicle.⁷ A window label provides point-of-purchase information, and from our understanding it is OEHHA’s intent to notify consumers of potential exposure prior to entering an area in which exposure may occur. However, consumers

⁷ Vehicles already include a “Smog Index Label” that was required by the California Air Resources Board (CARB) beginning with the 1998 model year to provide information regarding vehicle emissions. Beginning with the 2013 model year, CARB harmonized its requirements with Federal agencies to accept the “Fuel Economy and Environment Label” that presents environmental information, including fuel economy and vehicle greenhouse gas and smog emissions, to purchasers of automobiles in a simplified fashion. Thus, the U.S. Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA), along with CARB, have worked hard to eliminate the multitude of vehicle environmental labels that were previously required.



recognize that new motor vehicles are highly complex products consisting of or containing many substances, including solids and liquids. Consumers are unlikely to digest and remember exposure information that a) is not unique to the vehicle they are purchasing, and b) was contained on a label that is likely to be removed once the vehicle is purchased. It is appropriate to limit the use of window labels to the display of information likely to be relevant to a consumer's purchase decision, *i.e.*, to facilitate comparisons of Vehicle A and Vehicle B. In contrast, the owner's manual is a reference guide that stays with the vehicle. In light of the above, we believe that maintaining a prominent Prop 65 warning in the owner's manual is the appropriate course of action, and that no additional vehicle labels should be required.

If, however, OEHHA continues to require both methods of warning, OEHHA should specify in §25607.16 (a)(2) and the Final Statement of Reasons (FSOR) that the warning labels provided on vehicles are intended to be easily removable. OEHHA should also provide an option for that removable label to be either a temporary label (*i.e.* sticker) or a hang tag that would be hung from the rear view mirror; a hang tag is also visible at point of sale and should be allowed. Dealers currently have a reliable system in place for applying the labels – a supplier makes the stickers or hang tags with the warning, and the dealers place the warning on the vehicles upon delivery at the dealership.

We recommend the following changes shown in red underline (additions) and red strikeout to the language in Section 25607.16 to allow for the option to use an owner's manual warning, window sticker, or a hang tag:

§ 25607.16 Vehicle Exposure Warnings – Methods of Transmission

(a) warning for exposures that occur during the operation, service and maintenance of a "passenger vehicle," as defined in Vehicle Code Section 465, or an "off-road vehicle" as defined in Vehicle Code Section 38012(b) meets the requirements of this article if it complies with the content requirements in Section 25607.17 and is provided using ~~both~~ either of the following methods:

(1) The warning is printed in the owner's manual for the passenger vehicle or off-road vehicle, in no smaller than 12-point type enclosed in a box printed or affixed to the inside or outside of the front or back cover of the manual or on the first page of the text;

and or

(2) The warning is provided on a label attached to the front window on the driver's side of the passenger vehicle or off-road vehicle or provided on a hang tag which is hung from the rear view mirror. The warning is printed in a type size no smaller than the largest type size used for other consumer information affixed to the vehicle. In no case shall the warning appear in a type size smaller than 8-point. ~~If the vehicle does not have a driver's side window, the warning may be provided on a hang tag which is hung from the rear view mirror.~~ If the vehicle does not have a driver's side



window or rear view mirror, the warning may be placed in another prominent location. The label need not be permanently affixed.

OEHHA Should Clarify Label Formatting

Clarity is needed on the format of the label. For example, the current proposal states that the label must be written “no smaller than the largest type size used for other consumer information affixed to the vehicle.” This would make the warning equivalent to the size of the fuel economy rating on the Fuel Economy and Environment label,⁸ which displays the fuel economy rating in 72-point font, an unfeasible size for a warning label. Therefore, we recommend OEHHA specify the font on the label at a minimum font size of 12.

OEHHA should also specify the size of the stickers and hang tag. Based on a discussion between Global Automakers and OEHHA on January 14, 2016, we understand that the label is intended to mimic the existing practices found on vehicles at dealerships. If OEHHA intends to incorporate these existing practices for vehicle labeling, the regulations should specify that a minimum 3x3 inch sticker with text on a clear background meets the window sticker requirements, placed on the bottom-right corner of the driver-side window. The regulation should also specify that nothing will be placed on the windshield. Similarly, the hang tag minimum size should be specified based on existing sizes of hang tags.

OEHHA Should Adjust Label Content

OEHHA proposes to include four chemicals on the vehicle-specific warning label: lead, phthalates, carbon monoxide and engine exhaust. OEHHA should consider amended language for labels on battery and fuel cell electric vehicles (EVs). These vehicles do not produce engine exhaust or carbon monoxide. The current vehicle-specific label would be inaccurate if placed on these EVs and could inadvertently act as a deterrent for consumers purchasing these vehicles. California’s Zero Emission Vehicle mandate will require larger numbers of EVs on the road in the upcoming years. Therefore, consumers should be accurately informed of the chemicals to which they are potentially exposed and not confused by the information on the Prop 65 Warning label. We recommend that OEHHA either provide a separate label for EVs or include language stating that for battery and fuel cell electric vehicles, it is not necessary to include engine exhaust and carbon monoxide on the warning label.

Additionally, OEHHA should include language on replacement parts in the vehicle-specific label. We discuss this in further detail below.

OEHHA Should Amend Definitions to Account for Various Vehicle Types

The section for passenger vehicles in the regulations should be amended to make it clear that this section includes, in addition to passenger cars, light-duty trucks, medium-duty vehicles, and

⁸ Fuel Economy and Environment Label as required by the U.S. Environmental Protection Agency and the National Highway Traffic Safety Administration. <http://www3.epa.gov/carlabel/>.



heavy-duty vehicles. It is applicable to “passenger vehicle” as defined in Vehicle Code Section 465, or an “off-highway motor vehicle” as defined in Vehicle Code Section 38012(b). There are cases in which a vehicle is heavier than the light duty definition in Vehicle Code 465, but these vehicles are not classified as heavy-duty vehicles. In cases where neither definition is applicable, OEHHA needs to provide clarity as to which label should be used, or allow for the use of one label for all vehicles. This change would provide better consistency for product types that all have similar content and should therefore be treated the same under the Prop 65 warning requirements.

Separate categories (passenger vehicle, diesel engine, products not classified under a category) could lead to different labels on different types of vehicles, thereby making it confusing for consumers and difficult for manufacturers to comply. For example, the proposal requires a warning label for diesel engines “other than passenger vehicles” (§ 25607.14 Diesel Engine Exposure Warnings (Except Passenger Vehicle Engines)). Therefore, in addition to incorporating by reference the definition for passenger vehicles in California Vehicle Code Section 465,⁹ OEHHA should also incorporate by reference the definition in Section 670,¹⁰ Section 410,¹¹ 49 CFR § 523.5, and 49 CFR § 523.6 for both gasoline and diesel vehicles, and provide the same Safe Harbor, vehicle-specific labeling requirements for vehicles defined in Section 465.

OEHHA Should Make Special Allowances for Aftermarket, Replacement, and Service Parts or Include Them in the Safe Harbor Warning

OEHHA should make special allowance to account for the unique situation created by aftermarket, replacement, and service parts used to maintain and repair motor vehicles. Replacement parts, often produced in close succession to those made as original equipment parts, must be available for many years, as vehicle durability has improved so much that the average automobile on U.S. roads today is over 11 years old, making it more important than ever that consumers be able to obtain replacement parts. Regulators must avoid disrupting the supply of hundreds of thousands of older model replacement parts, impacting automakers’ ability to fulfill consumer warranties, recalls, service campaigns, upgrades, or repairs of the existing fleet. Service parts for legacy vehicles should be exempted from any chemical substitution.

Replacement parts have an extremely long shelf life since many replacement parts manufactured today could be on service and repair shop shelves for several years, even decades. During the discussion that took place at the January 14th, 2016 meeting between Global Automakers and OEHHA, OEHHA staff explained that consumer warnings are not needed if

⁹ “A ‘passenger vehicle’ is any motor vehicle, other than a motortruck, truck tractor, or a bus, as defined in Section 233, and used or maintained for the transportation of persons. The term ‘passenger vehicle’ shall include a housecar.” CA Vehicle Code Section 465.

¹⁰ “A ‘vehicle’ is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.” CA Vehicle Code Section 670.

¹¹ A “motor truck” or “motortruck” is a motor vehicle designed, used, or maintained primarily for the transportation of property.



parts are going directly to mechanics and repair shops, as they are covered by OSHA and by appropriate occupational hazard warnings. However, parts sold directly to consumers through retailers require an appropriate Prop 65 label. While this is consistent with current practices, labeling decisions are made based on information provided from the article manufacturer. As a general rule, OEMs do not have the information necessary to make a Prop 65 applicability determination, nor will a Safety Data Sheet be available,¹² so OEMs must rely on the part manufacturer or importer of the part to determine if a Prop 65 disclosure is required.

It is critical that replacement parts are available to service the 254 million motor vehicles¹³ currently on our nation's roadways without manufacturers having an increased burden to meet the changes in Prop 65 warning requirements. For this reason, replacement parts should be given a special allowance under the new Prop 65 warning requirements. If OEHHA is unwilling to provide an exemption for replacement parts, at a minimum, OEHHA should provide a model year based exemption from the warning requirements for replacement parts, according to the warning requirements in place at the time the vehicle was produced.

If OEHHA is unwilling to provide a special allowance for aftermarket, replacement, and service parts from the proposed new warning requirements, we urge OEHHA to include a safe harbor warning for aftermarket replacement and service parts used to maintain and repair motor vehicles as part of the vehicle specific warning language. OEMs provide an owner's manual in every vehicle, which can be used as a reference for simple vehicle repairs that do not require a mechanic. Prior to purchasing vehicle parts, such as batteries or light bulbs, it is recommended that consumers reference their owner's manual to identify the appropriate service part. Therefore, providing a replacement part warning within the owner's manual would satisfy the need to provide a warning to consumers prior to purchase.

For simplicity, we recommend that OEHHA include the replacement part warning as part of the passenger vehicle warning in Section 25607.17. The chemicals within the replacement parts are typically the same as those in the vehicles, so it is reasonable to include replacement parts in the passenger vehicle warning. Section 25607.17(a) should be changed to read "during the service, operation, and maintenance of a passenger vehicle or-off-road vehicle, **and use of replacement parts for vehicles.**" Section 25607.17(a)(3) should be changed to read "expose you to chemicals **from the vehicle and/or replacement parts** such as..."

OEHHA Should Clarify What is Meant by "One or More Chemical" in the Generally-Applicable Warnings

The current wording of the generally-applicable warnings in Sections 25603 and 25605 does not make clear OEHHA's intentions and could potentially be construed as requiring that the warning

¹² In the U.S., a SDS is not required for manufactured articles.

¹³ Total number of registered vehicles (passenger cars, commercial vehicles/trucks, non-transit buses, motorcycles), "National Transportation Statistics" Section B, Table 1-11, U.S. Department of Transportation, Bureau of Transportation Statistics, January 2015.



list all the Prop 65 chemicals for which the product is required to warn. This lack of clarity may contradict OEHHA's stated goal of creating a reformed statute. This would not only be extremely costly and unreasonably burdensome for the motor vehicle industry, but more importantly it would be virtually impossible given the industry's complex supply chain. We urge that the proposed warning language be revised to make clear that businesses are required to list at least one chemical in the warning.

It appears to be OEHHA's intent to establish a compromise position between having to identify all chemicals being warned for, on the one hand, and not having to identify any specific chemical, on the other. However, the proposal would open a business to litigation over chemicals that are **not** identified in the warning. There is a simple fix: Revise the proposed safe harbor warning to say "... expose you to **chemicals, including** [at least one specifically identified chemical] known to the State of California..." That is the language used in OEHHA's UC Davis study, which participants said provided clear information. OEHHA should use the same language offered to these study participants for their input.

OEHHA Needs to Consider the Practical Implications of Excluding a De Minimis Exemption

OEHHA should establish *de minimis* exemptions for Prop 65-listed chemicals. We understand that the intent of Prop 65 is to warn of exposures rather than chemicals contained in the product. However, without *de minimis* exemptions, companies would need to perform testing on all listed chemicals to ensure that trace amounts of chemicals do not exist.

Furthermore, for the over 800 Prop 65 chemicals, only approximately 300 have "safe harbor" levels,¹⁴ and those safe harbor levels are expressed as exposure levels (NSRL (µg/day)), not percent-by-weight. Data, such as percent-by-weight is readily available for industry, including the automotive sector, based on existing data collection methods. This would simplify deciding when a label may need to be applied.

OEHHA stated in the ISOR that the revisions to the rule will be beneficial by "helping the public to make informed decisions regarding the products they choose to purchase and the places they frequent." Over-warning does not achieve this purpose, so a more concrete method is needed to identify when a label is required. A *de minimis* percent-by-weight level will help consumers distinguish between small or insignificant risks and significant risks that potentially pose a threat to human health and the environment. *De minimis* levels are commonly used by other regulatory bodies, including the European Union, various state chemical laws and the California Department of Toxic Substance Control. Moreover, weight-percent data, such as a *de minimis* level, is more accurate than exposure levels. Exposure levels can vary due to a number of conditions (temperature, volume, whether there's a route of exposure, distance from the chemical, velocity of gaseous stream, container, etc.). However, initial percent-by-weight of a chemical is controlled to meet specifications, and is therefore more accurate.

¹⁴ CA Title 27, Section 27505.



The costs of not establishing *de minimis* levels for Prop 65 chemicals are unreasonably high for all involved in the process, including OEHHA, the regulated community and the public. Requiring warning labels for *de minimis* levels that pose little or no risk dilutes the intended impact of the warning labels. The additional cost of over-labeling does not result in an additional benefit to consumers. A practical and predictable *de minimis* exemption is essential, especially one that is already being used as an industry standard.

De minimis levels are also important in relation to the lead agency website. Chemicals for which information needs to be provided should be guided by *de minimis* levels. If OEMs could use *de minimis* levels to decide if information on a chemical needs to be provided based on the concentration, it would help streamline the process.

As noted in our comments on the pre-regulatory draft, the automotive industry uses the International Material Data System (IMDS) and accompanying Global Automotive Declarable Substance List (GADSL) to identify certain chemicals in vehicle components.¹⁵ In the absence of a *de minimis* level, neither the IMDS nor the GADSL system would help us determine our duty to comply. While we understand resource constraints may prevent OEHHA from setting *de minimis* levels for each of the listed Prop 65 chemicals, numerous other authoritative sources, such as the EPA Toxic Release Inventory and National Emissions Standards for Hazardous Air Pollutants and have determined *de minimis* levels for chemicals. We urge OEHHA to adopt *de minimis* levels for Prop 65 chemicals, from other authoritative sources or the GADSL *de minimis* level, applicable at the component level, to clarify and streamline the application of labels under Prop 65.

OEHHHA Should Use the Phrase “End Users” Instead of “Purchasers”

Section 25600.1(j) states that a “[r]etail seller’ means a person or business that sells consumer products, including foods, directly to purchasers by any means, including via the internet. For purposes of this article, a retail seller includes those functions of a business involved in the sale of consumer products, including foods, directly to purchasers, even if the business or facility is primarily devoted to non-retail activities.”

Automotive dealers purchase vehicles and parts from original equipment manufacturers (OEMs). Is an OEM a seller under this definition? To increase clarification, we suggest changing the word “purchasers” to “end users”: “...a retail seller includes those functions of a business involved in the sale of consumer products...directly to *end users*.”

OEHHHA Should Clarify How Specific Sections Relate to General Sections to Ensure Safe Harbor Protections

¹⁵ GADSL includes substances that are expected to be present in a material or part that remains in the vehicle or part at point of sale. The listings in GADSL are based on *de minimis* threshold levels routinely assigned at 0.1%. www.gadsl.org



Section 25601(c) states that “[e]xcept as provided in Section 25603(c), a warning meets the requirements of this article if the name of one or more of the listed chemicals for which the warning is being provided is included in the text of the warning, to the extent that an exposure to that chemical or chemicals is at a level that requires a warning.” We understand that the vehicle-specific section of the proposal (Section 25607.17) overrides Section 25601(c)’s general requirement and should state this clearly. We recommend the following addition (shown in red underline):

§ 25607 Specific Product, Chemical and Area Exposure Warnings

(a) This section provides warning methods and content for specific types of exposures that are subject to the warning requirements of Section 25249.6 of the Act. 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 and would not need to apply the label under Section 25602.

OEHHA Should Avoid Inadvertently Requiring Exposure Assessments

Section 25601(c) states that at least one chemical must be identified in the warning “to the extent that an exposure to that chemical is at a level that requires a warning.” The ISOR, at page 23, even seems to suggest the possibility of an over-warning claim if a business provides a warning with “no knowledge of an exposure to a listed chemical.” Taken together, these provisions might be read as requiring a business to undertake an exposure assessment before providing a warning. Put another way, the law **requires** warnings if exposures are above the warning level for the chemical; the law **permits** warnings if exposures, if any, are below the warning level for the chemical. OEHHA should clarify that they do not expect those covered by the regulation to undertake an exposure assessment.

OEHHA Should Provide a Three-Year Transition Period

In Section 25600, the proposal provides for a two-year transition period before the new requirements become fully effective. We strongly support inclusion of lead-time prior to implementing the regulations, because any change to existing owner’s manuals or labeling requires time for notification, redesign of materials (i.e. labels), and application of any changes. However, we request an additional third year to better align with engineering cycles and model change overs in the industry.

If OEHHA cannot provide a longer transition period, a model year approach for automobiles would be beneficial. Automobiles are manufactured and planned on a model year basis, not by calendar year. As product plans are made for a specific model year, certainty in the regulation regarding which model years require specific labeling will allow for automakers to obtain the



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necessary information from suppliers for replacement parts and design their owners' manuals accordingly.

We thank you for considering the arguments presented herein. Please contact us with questions or if we may provide additional information. We look forward to working with OEHHA as it moves forward.

Sincerely,

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