



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

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Via E-mail

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

[P65Public.Comments@oehha.ca.gov](mailto: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 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. In this letter, AHAM addresses several concerns with the regulatory proposal, chief among them the elimination of 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.

We have reviewed the regulatory proposal and Initial Statement of Reasons for the proposed rulemaking by the Office of Environmental Health Hazard Assessment (OEHHA) and respectfully offer the following specific comments on the current proposal.

## **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.<sup>1</sup>

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.<sup>2</sup>

The proposed rulemaking, however, would not achieve these goals for the reasons discussed below. Further, OEHHA’s regulatory action would result in unintended consequences and increase litigation risks and compliance costs.

## **II. §25602(3) Consumer Product Exposure Warnings – Methods of Transmission**

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.

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<sup>1</sup> 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).

<sup>2</sup> 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).

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. Having all consumer warnings and safety information in one location also provides increased simplicity to the consumer. 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 is proposing 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. For example, Room Air Conditioners are manufactured almost a year before the summer season. This manufacturing process attempts to predict how many Room Air Conditioners will be purchased. However, the sale of these units is extremely dependent on the weather. As a result, Room Air Conditioners can remain in inventory for years before they are sold. It is 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. These older warnings, if on products manufactured prior to the effective date, should continue to provide a safe harbor. The regulations should explicitly state that if a previous version of a warning is on a product label or its labeling and it was compliant with the safe harbor criteria at that time, then it continues to benefit from the safe harbor. AHAM suggests the following revision to proposed subsection 25600(b) in bold and capitalized –

(b) This article will become effective two years after the date of adoption. A person may provide a warning that complies with **ALL APPLICABLE REQUIREMENTS OF** this article prior to its two-year effective date. **A WARNING THAT COMPLIES WITH ALL APPLICABLE REQUIREMENTS OF THIS ARTICLE PRIOR TO THE ARTICLE’S TWO-YEAR EFFECTIVE DATE IS “CLEAR AND REASONABLE” WITHIN THE MEANING OF SECTION 25249.6 OF THE ACT.** A warning for a consumer product manufactured prior to the effective date of this article is deemed to be clear and reasonable if it complies with the September 2008 revision of this article **WHEN IT WAS MANUFACTURED.**

### **IV. §25601 Safe Harbor Clear and Reasonable Warnings – Methods and Content**

AHAM opposes the proposed requirement to include specific chemicals in the warning. The Prop 65 list is continually changing. In 2014 alone, 30 chemicals were added or deleted and there are over 900 chemicals on the list. In instances where a listed chemical is removed from the list a manufacturer would only have one year to sell through its inventory of products with

labels identifying that chemical, and that timing could include transportation from as far away as Asia.

Further, the proposal would require manufacturers to prove a warning is needed. To alleviate this problem, AHAM suggests the following amendment to the proposed regulation at §25601(c):

Except 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.~~

Although OEHHA clarified that the proposal's intent was only to require at least one chemical on the label, the regulatory text is far from clear on this matter. By using the phrase "one or more," the proposal can easily be interpreted to require *all* of the chemicals for which a warning is being provided. In addition, OEHHA needs to clarify that a manufacturer can choose which chemical to identify in the warning and that there are no preset conditions for this choice. To address this matter, we suggest the following addition to the proposal at §25601(c):

If a warning is being provided for more than one listed chemical, the warning meets the requirements of this article if the name of any one of the listed chemicals for which the warning is being provided is included in the text of the warning.

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](mailto:kmessner@politicallogic.net) with any questions.

Sincerely,



Robert D. McArver  
Vice President, Policy & Government Relations