



January 25, 2016

Ms. Monet Vela
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PO Box 4010
Sacramento, CA 95812-4010

Sent Via e-mail to monet.vela@oehha.ca.gov

Re: Proposed Repeal of Article 6 and Adoption of New Article 6 – Clear and Reasonable Warnings

Dear Ms. Vela:

Thank you for the opportunity to submit additional comments regarding the Office of Environmental Health Hazard Assessment's (OEHHA's) Notice of Proposed Rulemaking to Article 6 in Title 27 of the California Code of Regulations (CCR) pursuant to the Safe Drinking Water and Toxic Enforcement Act (Prop 65) dated November 27, 2015. As you may be aware, our organization has signed a coalition letter, dated January 25, 2016, submitted by the California Chamber of Commerce and more than one hundred seventy organizations and businesses. We support and are committed to the comments contained in that letter, however there are additional issues unique to grocery retailers that we would like to raise independently of the larger coalition. Those issues are the focus of this letter.

The California Grocers Association (CGA) is a non-profit, statewide trade association representing the food industry since 1898. CGA represents approximately 500 retail members operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies. Traditional supermarkets in California employ more than 300,000 residents in virtually every community in the State.

CGA's retail grocers are uniquely situated in the Prop 65 debate in that we do not generally manufacture the products sold in our retail stores, nor do we determine the chemical make-up of products we sell. Rather, we work with manufacturers to make their products available to the public. We believe this unique position was in some ways acknowledged in Prop 65 with Health and Safety Code (HSC) Section 25249.11(f)'s requirement that OEHHA minimize the burden on retail sellers when it adopts regulations relating to clear and reasonable warnings. We would urge that mandate be upheld in this process.

Proposed Section 25600.2

This section is fundamentally flawed in several ways. It directly contradicts HSC 25249.11(f) by shifting the actual and legal burden for providing consumer warnings from product manufacturers to retailers. Pursuant to (b), a manufacturer could simply include a notice letter and shelf tag/flyer/stickers containing specific warning label in a product shipment and thereby absolve itself of any additional burden. It would then be up to the retail entity to effectuate and maintain consumer warnings – and the retail entity would bear all liability if that were not done or done properly. This deficiency persists throughout the subsequent proposed regulation on warnings.

Beyond the overall shifting of actual and legal burden to notify, the specific language of the proposed regulation is deficient in several ways. First, the retailer is required to shoulder all burden for providing warnings once they have “actual knowledge” of the requirement to do so. Presumably, that would be triggered the moment the retailer receives a notice from the manufacturer pursuant to 25600.2(b) – and yet the manufacturer is not required to provide all necessary warning materials to the retailer at the same time the notice is provided. A manufacturer is only required to “...offer to provide such materials at no cost to the retailer.” This necessarily sets up a situation where a retailer would be forced to either create their own warnings or hold product off the sales floor until they receive all necessary material from the manufacturer.

The language referenced also sets up a situation for manufacturers to unduly delay transmission of warnings given there is no timeline noted for their response should a retailer take them up on the offer to provide warning materials. One could envision a scenario where a retailer would be forced, in an effort to manage their own legal risk, to create warning materials at their own expense.

Further, 25600.2(b)(3) is significantly problematic in that it not only allows a manufacturer to shift all responsibility and liability for providing warnings to a retailer, but it allows them to dictate the manner in which the warning is provided regardless of specific retail needs. The proposed regulation allows for, “...warning materials such as labels, labeling, shelf signs or tags...” without regard for which options may or may not work at a specific retail location. Retailers are denied all opportunity to dictate display, arrangement, and consumer interaction inside their own stores.

This proposed section also contains a significant deficiency in that it absolves product manufacturers of all legal responsibility for product warnings once they have complied with 25600.2(b). Proposed 25600.2(c) creates new obligations for placement and maintenance of warning materials squarely on retailers once they are received – and similarly would leave all liability squarely on the shoulders of the retail community. Again, this is in direct conflict with HSC 25249.11(f) ‘s requirement that, to the extent practicable, manufacturers bear responsibility for warnings required for their products.

In some cases, the proposed regulation specifically places the entire burden for compliance, even determining which products require warnings and crafting those warnings, on the retailer. Proposed 25600.2(d) creates new obligations for retailers if a product is manufactured by a company with fewer than 10 employees in California or an overseas company. This sets up a dangerous situation for California retailers. We are aware that some manufacturers have already begun the practice of shrinking sales offices in California to fewer than 10 employees specifically to avoid burdens created by Proposition 65 and other California laws and regulations. The proposal exacerbates this problem by explicitly shifting this particular legal burden to the retailer. It is unfortunate that California has such a difficult time retaining and attracting good-paying manufacturing jobs. However, it is inappropriate for these regulations to punish retail companies remaining in California by forcing them to take on burdens that should appropriately be borne by manufacturers.

Comments regarding concerns with the “actual knowledge” standard created in proposed 25600.2(e) are contained in the afore-mentioned coalition letter and are incorporated by reference here.

We would suggest that OEHHA revise the proposal to, at a minimum, address the inappropriate violations of HSC 25249.11(f) and other specific deficiencies. That could include provisions that allow a shifting of actual and legal burden for warnings to the retailer only if that retailer consents in writing to take responsibility for posting and maintenance of required warnings, and the format of the warning (shelf tag, on package, signage, etc...).

Should the Department wish to continue down the course of allowing manufacturers to unilaterally choose to shift all actual and legal warning burden to retailers, at a minimum the regulation should include:

- A requirement that the manufacturer provide retailers with 30 days' notice that it intends to provide information regarding a required Prop 65 warning for a given product;
- A provision shielding retailers from liability while they await receipt of any requested warning materials offered by a manufacturer;
- A provision allowing retail entities at least 30 days to make any adjustments to display areas, shelf tag configurations, product displays, etc... to accommodate warnings once received from a manufacturer;
- A provision allowing retail entities to sell through existing product when on-package warnings are employed and
- A provision allowing retail entities a 14-day opportunity to cure any violations associated with maintenance of required warnings once received from the manufacturer and installed at the retail setting.

25603 Product Exposure Warnings – Methods of Transmission: The language contained in proposed Section 25603 raises several questions. Specifically, which “largest font size” prevails if a product currently features more than one shelf tag? In addition to shelf tags containing mandated information about pricing, quantity, etc..., some companies voluntarily include additional shelf labels to identify product that are more environmentally beneficial. For a product that may already have more than one shelf tag, which prevails in determining the largest font size? The problem is exacerbated because the proposed regulation states in 25603(a)(1) that minimum font size also should be judged based on shelf tags for, “...similar products.” The regulation also could require a grocery store to frequently change warning shelf tags. If a retailer puts an item on sale for the week and changes the shelf tag to emphasize the lower sales price, they could arguably be required to change the Prop 65 required warning tag to meet the new, albeit temporary, font size. This only increases the opportunity for litigation, especially absent an opportunity to cure violations.

Language contained in proposed 25603(a)(2) is positioned in the Initial Statement of Reasons as a mechanism to incorporate existing and future technology. As we are all aware, much more information is available to consumers today via electronic means. In many cases, customers have access to that information at all times via their smart phones and can obtain it in real time while shopping. However, the proposed language would have a chilling effect on that kind of technology as it requires the warning to be provided, “automatically” and no requirement that the purchaser, “see out the warning.” QR codes, barcode scanners, smart phone applications all require a consumer to take action to find information. They require consumers to seek out the information. All would be prohibited under the plain language of the proposed regulation, which is at direct odds with the attempt to expand information available to consumers

In addition, there are significant concerns regarding the space needed to accommodate all warning information on a shelf tag and likewise over which information takes priority when legal obligations conflict or collide.

Proposed section 25603(d) is problematic at best, especially given the singular shift in responsibility to the retailer in situations where a manufacturer is overseas. California grocers attempt to meet the needs and desires of the State’s diverse population. That often means stocking products that immigrant families are familiar with and use to help continue valued cultural traditions. Under the proposal, retailers would be required to not only provide warnings in English but also any other language appearing on a product label – without limitation. A product containing one word in a foreign language on its label, even though the entire product description appears in English, would be subject to the translation requirement.

Similarly, a product with a label listing the product name in three different languages would require three separate warnings. Even in cases where the additional language(s) is included for strictly cosmetic purposes.

With regard to translation of warnings, it is unlikely that all grocery retailers have staff available to translate warnings into any conceivable language. They may stock a particular niche product only in one store in an attempt to cater to a group of immigrant families living nearby, but in the general course of business utilize English for all business purposes. The proposal would require that grocer to obtain the services of an individual fluent in the language on package – and likely would place liability for any mistaken translation squarely at their feet.

25603 Suggestions: The proposed language should be modified to better define font size requirements for shelf tag and sign warnings. It also should be clarified to allow warning sizes to be modified to accommodate appearance of other legally required information like quantity, price, etc... In addition, any font size comparisons should be limited to tags for the specific product, not “similar” ones, and only to shelf tags that appear when the item is being offered for sale at its usual and customary price not temporary promotional periods.

In addition, limitations on electronic information should be eliminated. The only requirement of the law is that warning information be provided to the consumer prior to or during purchase. Allowing a grocer to utilize electronic devices to transmit that information in store to consumers with an interest in the information should be not only allowed but encouraged. If information is available to interested consumers on premise, prior to or during purchase, the warning should meet the requirements of the law. To require complete passivity on the part of the consumer in practical effect eliminates electronic options entirely. It is not reasonable to think that bombarding customers with automatic electronic messages shouted from “smart carts” or chirping off their smart phones is anything more than clutter and noise that will ultimately disrupt the shopping experience and lead to abandonment of technologies deemed so intrusive.

25608.2 Food Exposure Warnings – Methods of Transmission: Substantially similar concerns exist across all warning categories, including those for food products. An additional challenge for food products with regard to shelf tags does exist with regard to the issue of multiple shelf tags. For example, separate shelf tags are required to identify items authorized for purchase under California’s Special Supplemental Food Program for Women, Infants, and Children (WIC) has specific requirements for shelf labels. In addition, some companies voluntarily include additional shelf labels to identify product that are gluten-free or diabetic-friendly or lower-sodium. For a product that may already have more than one shelf tag, which prevails in determining the largest font size?

In addition, it is highly likely that the same challenges would exist in terms of meeting the food needs and desires of our increasingly multicultural state with regard to the warning translation requirement.

25608.3 Alcoholic Beverage Exposure Warnings – Method of Transmission: The proposed regulation appears to vastly expand the number of warnings required for alcoholic beverages without improving the quality of those warnings. In addition, there are several ambiguities that could lead to significant litigation. Finally, the regulation represents a fundamental shift in actual and legal burden away from manufacturers onto retailers despite a requirement that such obligations be limited.

Specifically, proposed section 25608.3(a)(1) calls for a sign placed at “eye level” where patrons enter the area. The term “eye level” is so subjective as to be meaningless. Adults vary widely in height and thus eye level varies significantly. If the sign is placed at eye level for a 6’2” individual will the retailer be subject to liability because eye level for a 5’2” individual is approximately one foot lower?

In addition, given the generalized statement contained in proposed 25600.2(b) relieving a manufacturer of all actual and legal liability for warnings if they essentially notify retailers and offer to provide warning materials, it appears that proposed 25608.3 seeks to fundamentally alter standards for warnings on alcohol by shifting actual and legal liability to retailers. This is contrary to the requirement that burdens on retailers be minimized, and in direct conflict with existing regulations. Current section 25603.3(e)(7) specifically states that the burden of placement and maintenance of warnings is the responsibility of manufacturers and distributors. There is no justification for abandoning that scheme and instead forcing the retail community to assume new actual and legal obligations.

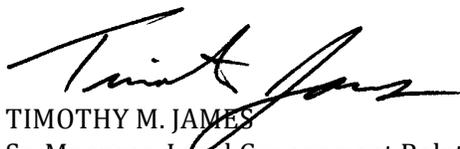
25608.3 Suggestions: The current system for warnings required for alcohol products is working well in the retail setting. Consumers purchasing alcoholic beverages for off-premise consumption already receive adequate warning under current Section 25603.3. Rather than reinvent the wheel unnecessarily, the relevant provisions of the current regulation should simply be renumbered and included in the proposal. If challenges exist with regard to litigation tied to defaced, damaged, or missing signage, manufacturers and distributors should be given a 14-day opportunity to cure after receiving notice of the alleged violation.

25608.5 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Methods of Transmission and 25608.6 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants - Content: This proposed section represents one of the most egregious examples of disparate treatment for identical food products based solely on business model. Food offered for sale in restaurants is substantially similar to that offered in the grocery store setting. The main difference is that consumers generally purchase items for future consumption at the grocery store while they consumer most restaurant purchases immediately. There is no logical rationale to provide a different warning scheme for potato chips, coffee, breakfast cereals, dried seaweed, cocoa, or any other food product simply because it is sold in a restaurant versus a grocery store. And yet the proposed regulation seeks to reiterate and solidify the disparate treatment based not on the fundamental requirement for a warning or knowledge on the part of the retailer, but rather based on business model alone.

Under the proposal, restaurants would be required to post specified signage at all public entrances or at each point of sale alerting customers to the fact that some food sold or served could expose consumers to specified chemicals. The signage requirement includes referral to the OEHHA-maintained web site. There is no identified reason for food in the restaurant setting to be treated differently than food in the grocery retail setting. We strenuously object to holding different food vendors to different standards and requirements despite in some cases identical food products. In fact the warning method and content the proposed regulation seeks for restaurants is equally appropriate and valid in the grocery retail setting and we would request that it be applied equally to all types of food vendors, not just restaurants.

Thank you for your consideration and we look forward to additional participation in this process.

Sincerely,



TIMOTHY M. JAMES
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