



April 25, 2016

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

Via: P65PublicComments@oehha.ca.gov

Re: Proposed Modifications to Title 27, Article 6 of the California Code of Regulations, Proposition 65 Clear and Reasonable Warnings

Dear Ms. Vela:

California Retailers Association appreciates the opportunity to comment on OEHHA's Notice of Modification to Text of Proposed Rulemaking to Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65") dated March 25, 2016. CRA appreciates OEHHA's willingness to consider our previous written and oral comments and for the progress that has been made in a number of areas. CRA joins in the comment letter submitted by the California Chamber of Commerce on behalf of the larger business coalition, but we write separately to address some remaining issues with the March 25 proposal that are specifically related to retailers.

Shifting the Burden from Manufacturers to Retailers

Health and Safety Code Section 25249.11(f) states, "In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question." As we explained when we met with OEHHA in February, OEHHA's proposal to allow manufacturers comply with their warning obligations by simply providing warning materials to retailers, without obtaining the consent of the retailers, has the effect of shifting the burden of compliance to retailers, in contravention of the statutory direction.

Indeed, by allowing manufacturers, importers, and distributors to unilaterally bind retailers to providing warnings for those manufacturers, importers, and distributors, OEHHA has transformed the “safe harbor” nature of consumer product warning methods (e.g., labels vs. signage) into a mandatory warning regime for retailers, at the sole discretion of those supplying the products to the retailers. Suppliers themselves decide, whether to provide warnings through point-of-sale signs, without consulting with their retail sellers about whether that is a practical method for providing warnings in their California stores.

Given that Proposition 65 warnings are not required anywhere except for California, we can envision numerous manufacturers moving to signage as a warning option rather than labeling their products, or simply mailing labels to retailers and direct them to sticker products in inventory. A business that, for example, wants to avoid enforcement litigation over phthalates in vinyl and other soft plastics, and does not want to have to pay to reformulate those products with other plasticizers or provide on-label warnings in other states, can neatly avoid those costs and disruption to its business by directing its retailers to provide warnings through signs or stickers. This is completely contrary to the goal of encouraging reformulation.

Retailers who have the warning obligation foisted on them by their suppliers will now have to manage a potential torrent of warning signs in their California stores and/or sticker millions of individual units of consumer products in order to avoid enforcement actions. And this will result in a hugely impracticable compliance program, with retailers responsible for managing signs and/or stickered inventory in the state’s over 100,000 retail establishments in California. OEHHA’s proposal creates a completely impractical, duplicative, and ultimately unnecessary warning program.

Not only does this outcome violate the statutory direction to minimize the burden on retailers, the economic impact analysis in support of the proposed regulation completely fails to identify, much less analyze, these costs. While recognizing that “manufacturers bear primary responsibility and cost burden for providing warnings for their products,” the analysis states, without support, “most of the costs relating to warnings for products sold in retail establishments would likely be borne by product manufacturers, rather than retailers.” (See Economic and Fiscal Impact Analysis at p. 5.) The analysis fails to acknowledge what will happen when manufacturers and suppliers take advantage of the immunity from enforcement actions that the proposed regulation provides them at the small cost of sending warning signs or stickers to their retailers.

OEHHA’s proposal would allow retailers and suppliers to enter into written agreements to supersede the allocation of warning responsibilities specified in subsections (b), (c), (d), and (e). However, that is a hollow promise, because the proposed regulation gives all of the leverage in any negotiation over contractual terms to suppliers, as it allows them to unilaterally impose the warning obligation on retailers.

CRA is extremely concerned that the proposed regulation violates the intent of the voters to allocate the burden of warning, where practicable, on entities upstream from retailers; will cause retailers to incur substantial costs and burdens that have not been evaluated; and may diminish the effect of warnings by causing a proliferation of warning signs in California retail stores that will be impossible for retailers to manage effectively .

Online Warnings

Current law provides that a warning method must make the warning message reasonably available prior to the exposure (27 C.C.R. § 25601(a)), and the safe harbor provides that a consumer product warning must be “likely to be read and understood by an ordinary individual under customary conditions of purchase or use.” (27 C.C.R. § 25603.1(c).) In the November 27, 2015 proposal, OEHHA first introduced a unique concept to Proposition 65’s warning requirement: a product that was properly labeled with a Proposition 65 warning would need yet another warning if it was sold online. We noted in the Coalition comments to that proposal that this was a significant shift in interpretation without any statutory support. We continue to believe that the Act, which requires a warning before exposure, is not properly construed *always* to require a warning before a consumer purchases a consumer product. We are aware of no precedent for such a construction of any law regulating health and safety aspects of consumer products where the online retailer makes no affirmative representation regarding the product.

We also pointed out in our February meeting that, as written, the November 27 proposal would have required each retailer to manually review labels of the hundreds or thousands of products that it sold online, to determine whether a warning is required. We appreciate OEHHA’s narrowing of retailer obligations to provide online warnings only where the supplier specifically identifies the product, and provides the warning language to the retailer. That will considerably lessen the burden on retailers to identify which products require a warning. But it does not render the March 25 proposal any less burdensome on retailers to manage warnings for suppliers. As with the discussion above, suppliers can force retailers to provide warnings for products sold in California, even if the retailers do not wish to put the warning language on their websites or if their websites would need to be reprogrammed to be able to provide the warnings. And, even if retailers are not forced by their suppliers to provide an online warning in lieu of labeling or other warnings, they will be forced by OEHHA to provide a warning so despite the fact that the product label contains a warning.

“Actual Knowledge”

We have commented before, in CRA’s written comments, as part of the Coalition comments, and in our February meeting, that the two business days originally proposed for a retailer to have “actual knowledge” of an exposure due to receipt of a 60-day notice (proposed § 25600.2(f)) was far too short, given the logistics involved in processing and understanding a 60-day notice, communicating with the supplier, and executing a warning or pulling a product from retail shelves. We very much appreciate the move in the March 25 proposal to five business days, although it will still strain most retailers to be able to take corrective action in that time frame. We suggest that in order to allow for efficient handling of notices, such notices be directed to the “authorized agent,” as designated in the proposed regulations. We also propose a change to Section 25600.1(b) that a retailer may designate more than one agent if it wishes. The proposed change would be from “the person or entity” to “a person or entity.”

We also propose, as we have done in prior comments, that OEHHA explain in its Final Statement of Reasons that “sufficient specificity for the retail seller to readily identify the product in accordance with Article 9, section 25903(b)(2)(D)” is not met by a notice that identifies one product by name, SKU or other identifier, but attempts to provide notice for a broader, alleged “specific type” of product for which the one product is name as an “example.” We also ask that

Ms. Monet Vela
April 25, 2016
Page 4

OEHHA clarify that the retailer's obligation to provide information to a private person who has served a notice under proposed section 25600.2(g)(2) be similarly limited to the product(s) specifically identified in a 60-day notice, and not, for example, for all suppliers of "handbags," or "tools with vinyl/PVC handles."

Section 25600(b) (effective date)

The March 25 proposal continues to provide that Article 6 will become effective two years after the date of adoption. CRA submits that the delineation of retailer responsibility for providing warnings in section 25660.2(e) should become effective immediately. There is no reason for retailers to continue to be exposed to enforcement actions for two years where they do not fit one of the scenarios outlined in subsection (e), and there is no need to delay the effectiveness of this provision.

We appreciate OEHHA's consideration of these comments, and welcome any questions you may have.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeffrey B. Margulies, Esq.", written in a cursive style.

Jeffrey B. Margulies, Esq.
Partner, Norton Rose Fulbright US LLP

A handwritten signature in black ink, appearing to read "Pamela Boyd Williams", written in a cursive style.

Pamela Boyd Williams
Executive Vice President
California Retailers Association