

January 22, 2015

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

Re: Comments of The Vision Council to the 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

Dear Ms. Vela:

We respectfully submit on behalf of The Vision Council (“TVC”) the following comments to the proposed rulemaking regarding Proposition 65 warnings. Serving as the global voice for vision care products and services, including optical laboratories, TVC is a nonprofit organization representing the manufacturers and suppliers of the optical industry through education, advocacy and consumer outreach. By sharing the latest in eyewear trends, advances in technology and advice from eyewear experts, TVC also serves as a resource to the public looking to learn more about options in eyeglasses and sunglasses. Its member companies employ over 5000 Californians.

GENERAL OBSERVATIONS REGARDING PROPOSED CHANGES

TVC states its concern that the proposed revised regulations do nothing to stem the growth of the frivolous, shake-down lawsuits brought pursuant to Prop. 65. The proposed regulations do not cap the legal fees collected by the attorneys representing the enforcer groups, or reapportion the settlements to better benefit the State rather than the private parties and attorneys. No changes have been proposed to require that the petitioning party at the time of filing a notice of action present actual evidence, such as product exposure testing, of a violation. To the contrary, and for the reasons stated below, certain of the proposed changes if promulgated could spur on new and different enforcement actions.

COMMENTS TO SPECIFIC PROPOSED CHANGES

§25600.2 Responsibility to Provide Product Exposure Warnings

TVC supports the proposed change in section 25600.2(b) allowing the manufacturer, producer, packager, importer, or distributor (hereafter collectively referred to as the

“manufacturer”) of a product containing a Prop 65 substance to partner with its retailers on Prop 65 warning compliance, making point of sale warnings rather than label-based ones more practical. In turn, this has the potential to ease the problem of inventory management felt by companies who sell into states and countries other than California and which may be maintaining California-specific, Prop 65 packaging in addition to its normal packaging used for all other sales.

TVC also supports the proposed change that makes it the affirmative responsibility of the retailer to place and maintain the warning materials that it receives pursuant to this proposed revised section, thus amending the previous draft that gave the retailer the right to reject the manufacturers’ attempt to use proposed section 25600.2(b). TVC, however, requests that the phrase “has obtained confirmation of receipt of the notice” be clarified to confirm that the retailer has no right to reject the warning materials or the offer to provide them, and that confirmation of the retailer’s receipt of notice can be established via any means, including by return receipt from the U.S. Postal Service; proof of delivery by a courier service like Federal Express or United Postal Service; admission of receipt by the retailer, such as by email, regular mail or other means; affidavit of service provided by a serving party, including third-party messaging services, etc.

This section of the law should also be revised to state that if the manufacturer complies with proposed revised section 25600.2(b), then this is an affirmative defense against any notice of action filed against it alleging a violation of Proposition 65. Furthermore, the regulation should be amended to state that a notice of action against the manufacturer cannot proceed beyond the filing stage against the manufacturer if it produces the confirmation of receipt set out in proposed section 25600.2(b)(4).

§25602 Product Exposure Warnings – Methods of Transmission

Proposed section 25602(a)(1) will require that product warnings posted at the point of sale (rather than on the product label) be in a font no smaller than one-half the largest type face used for other consumer information on the shelf tag or shelf sign, but in no case smaller than 8-point font. Similarly, proposed section 25602(a)(3) will require that product warnings on the product label be in a font no smaller than the largest type face used for other consumer information on that label, but in no case smaller than 8-point font. The Vision Council believes that this change will simply create another avenue for frivolous law suits based on allegations that what appears to be a clear and reasonable warning is nevertheless noncompliant because its font size is smaller than that set out in the proposed revision. The statute currently requires that the warning be “clear and reasonable”; the State runs the risk of increasing these frivolous law suits by making this a quantifiable test by incorporating font size restrictions.

§25603 Product Exposure Warnings Content

The Vision Council cannot support the proposed change to the product exposure warning language. The current product exposure language¹ and the proposed language² both warn of the presence of a listed substance in a product; however, the proposed language extends this to suggest exposure could occur, even if none actually would occur. In this regard, the proposed language can be misleading and even incorrect depending on the listed substance, the product in which it is found, and the use of that product. The proposed language will not benefit the user of the product, and is inconsistent with the existing statute (Cal. HSC § 25249.7(h)(1)(2), where claims found not to be based on “actual or threatened exposure” (rather than the mere possibility of exposure suggested by the draft proposal) can be deemed frivolous by a reviewing court. Therefore, TVC fails to see how the proposed draft promotes either consumer education or the reduction of “stick-up” law suits where the goal of the plaintiff is to settle before it is put to proving actual or threatened exposure.

Nor does TVC feel that the addition of the pictogram provides the public with any additional benefit over the written warning. To the contrary, it has the potential to confuse and to suggest that the use of a product containing a listed substance will result in a harmful exposure, when in fact that may not be the case. Companies will have to reconfigure their current labeling at additional expense to include this symbol, the expense of which will be passed on to the ultimate purchaser in the form of increased prices.

The Vision Council strongly objects to the proposed language requiring the identity in the warning of the specific chemical substances found in the products or work environments that are on the Prop 65 list. This will create additional costs to the labelers as compliance with the proposed revision will require testing for all substances that could possibly be present in the product or work environment. This proposed requirement will only result in the proliferation of more law suits (typically brought by parties who have not done exposure testing but who have simply determined by chemical assay what substances are found in target products or work environments), and will not benefit the public. The public policy benefit of informing the consumer or employee that a product or work environment contains a substance known to the State to cause “cancer,” “birth defects,” or “reproductive harm” is accomplished through the use of those words. Adding a litany of chemical names unknown to most individuals does not improve that communication but rather is an unnecessary scare tactic.

The draft needs additional clarification in this section. For example, does the reference to “one or more chemicals” require the listing of all listed substances found in the product or work environment, or simply one, if multiple are present? If it is the former, then the warning label could become excessively long and wordy if multiple chemical substances are listed by their chemical names. If it is the latter, which interpretation is suggested by proposed section 25601(c), then the draft should give direction to the labeler as to which of multiple substances must be listed, or is it simply the labeler’s choice. For example, would the substance most

¹ “WARNING: This product contains chemicals known to the State of California to cause cancer.”

² “WARNING: This product can expose you to [name of one or more chemicals], a chemical [or chemicals] known to the State of California to cause cancer. For more information go to www.P65Warningsca.gov/product.”

present in the product or work environment be the one listed? The Vision Council believes that without such additional clarification the enforcer groups will seize on this section and file notices in those situations where multiple chemical substances are found in the product or work space but where only one is identified by chemical name.

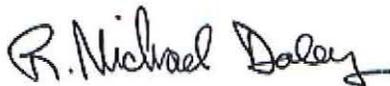
We also feel that the reference to “on product” warnings needs to be clarified. Does this mean that the warning has to be physically and indelibly incorporated into the product? Or can an “on product” warning be found on a pressure label, a hang tag or other labeling that is attached to the product, but which is removed by the consumer prior to use?

§25606 Occupational Exposure Warnings

TVC submits that the existing regulatory language is sufficient and provides clearer direction and more options to the employer for warning against occupational exposures than does the proposed changed language. While both the current and the proposed language identify that compliance can be achieved if the employer complies with one of three federal or California state laws, the existing language provides additional direction on how to comply through the use of signs specifically drawn to comply with Prop. 65. TVC feels that retention of this additional choice will enhance compliance in the work place.

Thank you for your consideration of our comments. Please feel free to contact either of the undersigned if you require any more information regarding this submission.

Sincerely,



Mike Daley
Chief Executive Officer



Rick Van Arnam
Regulatory Affairs Counsel