



October 21, 2019

By On-Line Submission

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
P. O. Box 4010
Sacramento, California 95812-4010

Re: Comments on Proposed Regulatory Changes - Section 25600.2

Dear Ms. Vela:

Thank you for the opportunity to comment on the proposed changes to section 25600.2 that were released by OEHHA on October 4, 2019. These comments are shared by the California Chamber of Commerce, the American Beverage Association, the Beer Institute, and the Grocery Manufacturers Association.

We support having the regulation apply to all businesses to which products are transferred, rather than just retailers and those who transfer to them directly. We appreciate that this change to section 25600.2(b) that was proposed last year remains part of OEHHA's proposal.

We oppose OEHHA's modification proposal for subsections (b)(4) and (c)(1) of section 25600.2, however, as too expensive and not workable. For individuals who have been identified as the authorized agent (as opposed to a corporate agent such as CT Corporation), these proposals remove compliance that may be proven by obtaining information from the Post Office or from another delivery service. The regulation currently provides that the upstream manufacturer or distributor can demonstrate compliance if it has "obtained confirmation electronically or in writing of receipt of the notice" (current section 25600.2(b)(4)), which confirmation may be provided by any signature at the appropriate address. This is already more than should be required (what should be required is proof of delivery, not a receiving signature), and the existing language in (b)(4) should simply be adjusted to cover more than just retailers, as noted below, rather than removed. Indeed, OEHHA's proposal is more than the Supreme Court has said is required for actual notice. See *Tulsa Prof. Collect. Servs. v. Pope*, 485 U.S. 478, 489-490 (1988) ("Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."); see also Cal. Civ. Proc. Code § 1013(a).

In addition to removing key language in subsection (b)(4), OEHHA's modification proposal changes subsection (c)(1) so that "Confirmation of receipt . . . must be received . . . *from the authorized agent* to which the manufacturer . . . of the product sent the notice." (Emphasis added.) Thus, confirmation from another person at the proper address is not sufficient to satisfy this proposed regulation. This proposal is unduly burdensome and wholly unnecessary. If adopted, this regulation would call for entities attempting to follow the words of this proposed modification to undertake personal service on individual authorized agents, which adds about \$100 to the expense of serving each agent in a big city and even more for personal service in remote areas. Neither FedEx nor the US Post Office have a delivery option that specifically requires the signature of an individually identified recipient; they simply require a signature of an adult at the relevant address. For products that are widely distributed, this could increase the cost of compliance by anywhere from \$100,000 to \$1,000,000 per year or more, depending on the number of individual (as opposed to corporate) authorized agents identified.

Based upon OEHHA's Initial Statement of Reasons and Notice for the Modification, the added expense this new language would require appears to be unintended and could be avoided. We request that OEHHA require proof of delivery, not a receiving signature. The most practical way to avoid unnecessary expense in this area would be to use the following language for subsections (b)(4) and (c)(1):

(b)(4) Has been sent to the authorized agent for the retail seller **or other entity subject to Section 25249.6 of the Act**, and the manufacturer, producer, packager, importer, supplier, or distributor has obtained confirmation electronically or in writing of receipt of the notice.

(c)(1) The notice must be renewed, and receipt of the renewed notice confirmed electronically or in writing ~~by the retail seller's authorized agent no later than February 28, 2019, then annually thereafter~~ during the period in which the product is sold in California by the retail seller.

Making Proposition 65 compliance through warning signs, as opposed to labels, too expensive is likely to expand the scope to which Proposition 65 is found to be preempted. For example, in *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 945-949 (9th Cir.1992), the court relied on the feasibility of compliance via "point-of-sale signs" in determining that Proposition 65 is not preempted by the labeling requirements of the Federal Insecticide, Fungicide, and Rodenticide Act. "Point-of sale signs are sufficient to satisfy" Proposition 65 and therefore the Act does not "in any way pressure[] manufacturers to affix additional labels to the containers of their products." *Id.* at 947-948. The less feasible warning signs become, or the more pressure manufacturers feel to provide on-product warnings, the more likely courts may be to find federal preemption of Proposition 65. OEHHA should weigh this consideration.

Sincerely,



Adam J. Regele
Policy Advocate
California Chamber of Commerce

A handwritten signature in black ink that reads "Maia M. Jack". The signature is written in a cursive style with a large initial 'M'.

Maia M. Jack, Ph.D.
Vice President, Science and Regulatory Affairs
American Beverage Association

A handwritten signature in black ink that reads "Jim McGreevy". The signature is written in a cursive style with a large initial 'J'.

Jim McGreevy
President and Chief Executive Officer
Beer Institute

A handwritten signature in blue ink that reads "John Hewitt". The signature is written in a cursive style with a large initial 'J'.

John Hewitt
Senior Director, State Affairs
Grocery Manufacturers Association