



BENO J. GUNDLACH COMPANY

Specialists in Manufacturing and Marketing of Floor and Wall Covering Installation Tools

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

Comments on Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short-form Warnings.

Dear Ms. Vela:

Beno J. Gundlach Company ("Gundlach") was founded in Belleville, IL in 1927. The company was named after its founder, Beno J. Gundlach. Today, Gundlach offers over 2,500 different quality installation products for resilient flooring, carpeting, plastic laminate, ceramic tile, and stone. The company's catalog can be found at <http://www.benojgundlachco.com/catalog/>.¹

Since the adoption of the amendments to California's code of Regulations governing Proposition 65 Article 6 (§ 25601 et seq.) in 2016, Gundlach has relied heavily on Short-form Warnings as both an effective and efficient method of complying with California Proposition 65. While we are unaware of any consumers questioning or objecting to the use of the Short-form Warning, as described in further detail below, the proposed changes would do nothing to provide additional information to California's consumers. Rather, it would cause chaos and confusion in the current, well developed, and effective warning system.

A preliminary issue that the proposed rulemaking fails to address is the need for this change. Rather, this proposed rulemaking appears to be a solution in search of a problem.

In its Initial Statement of Reasons OEHHA states that it "frequently receives inquiries from the public regarding exposures from a wide range of consumer products labeled with a Short-form warning. An informal tally of public inquiries to OEHHA related to Proposition 65 warnings during December 2019 through December 2020, nearly 70% of consumer inquiries requested more information about a specific product, and at least 18% of consumer inquiries included a request for information regarding a Short-form consumer product exposure warning. These consumers wanted to know the name of the chemical to which they might be exposed."

Unfortunately, OEHHA fails to provide any relevant information regarding the total number of inquiries received, how many inquiries requesting more information about a product were associated with the use of the Short-form warning, or how many inquiries involved a request for information regarding a Short-form consumer product exposure warning. Thus, without disclosing the actual number of inquiries OEHHA received regarding Short-form warnings the statistics provided by OEHHA in its

¹ Catalog purchases can only be made through the internet. Proposition 65 warnings are provided to California consumers when they check out based on the zip code provided in the shipping instructions.

preliminary rulemaking are ambiguous at best and possibly disingenuous at worst. The question remains 18% of what? If OEHHA received 10,000 consumer inquiries then 18% of those inquiries which were purportedly related to the Short-form warning might be a meaningful statistic. On the other hand, if OEHHA received only 100 such inquiries, this suggests that there may not be an issue. If OEHHA seeks to rely on this statement as substantial evidence, we suggest that the number and content of the inquiries be fully documented. Otherwise, OEHHA's reference to the inquiries fails to constitute substantial evidence on which to base a finding that the proposed revisions are really required.

OEHHA then goes on to provide the reader with a parade of horrors including the misuse of vacuum filters, and explanatory statements by two product manufacturers. These alone or the purported examples in Appendix A do not constitute substantial evidence necessary to support a wholesale change in the regulations.

The fact is that there is nothing in Proposition 65's enabling legislation that requires a "Clear and Reasonable Warning" to provide the identification of the specific compound of concern. Moreover, the history of the legislation makes clear that there was never an intention to penalize manufacturers for applying a warning in an abundance of caution. The only conceivable purpose for this proposed rulemaking is to allow OEHHA to rewrite the enabling legislation to require manufactures to take on the burden of detailed and expensive scientific evaluation of each of their products for a myriad of suspect chemical. This has never been the intent of Proposition 65. The market will control the overuse of the Short-form warning by impacting consumer acceptance of the product. OEHHA's proposed rulemaking does nothing to advance the purpose or intent of the legislation.

Even if OEHHA could demonstrate that there was a need for these proposed changes, which it has not, in many cases the proposed changes are vague and or unenforceable and will only lead to litigation. For example, the proposed amendment would only allow the use of the short form warning if:

- the total surface area of the product available for labeling is 5 square inches or less, **and**;
- the package shape or size cannot accommodate the full-length warning content described in Section 25603(a), **and**
- the entire warning is printed in a type size no smaller than the largest type size used for other consumer information on the product, but in no case no smaller than 6-point type.

This language is an invitation to Citizen Suit litigation. Who determines the total surface area of the product available for labeling or whether the package shape or size cannot accommodate the full-length warning content? Unfortunately, as written, these will become issues of fact to be determined by the court.

Requiring the use of a different form of warning for catalogs and the internet can only lead to confusion and unnecessary costs. Either the Short-form warning is sufficient, or it is not. The application of different warning for different audiences is simply another invitation to litigation. If OEHHA believes the Short-form warning is inadequate for catalogs or the internet, then it should seek to remove the option in its entirety rather than killing its use through unnecessary and expensive over regulation. Moreover, the Statement of Reasons for this proposed change relies on an unsubstantiated assumption that "there are generally fewer space limitations on a webpage or in a catalog". OEHHA provides no substantial

evidence to support this speculation. Thus, the findings necessary to support the change cannot be supported.

Conversely, the cost to manufacturers to implement this unnecessary change is both quantifiable and, in the aggregate, substantial. In Gundlach's case these changes will require an entire relabeling regime for its products, website, and catalog. In addition, Gundlach will be required to invest significant costs in the process of identifying the appropriate compounds to be identified in the revised warnings. These costs will have to be passed on to California consumers. When considered in the aggregate California consumers will be forced to shoulder draconian costs in the middle of an economic crisis for which there is not demonstrable health or safety benefit.

For the above stated reasons, Gundlach objects the OEHHA's proposed Amendments to Article 6 in their entirety. Moreover, Gundlach believes the proposed changes limiting the use of the Short-form warning on products and preventing its use in catalogs or over the internet are improperly vague and unenforceable. Gundlach respectfully requests that OEHHA withdraw the proposed amendment in its entirety.

Sincerely yours



Jeff Gundlach
Director
Beno J. Gundlach Company

CC: S. Wayne Rosenbaum – Environmental Law Group

<https://oehha.ca.gov/proposition-65/cnr/notice-proposed-rulemaking-amendments-article-6-clear-and-reasonable-warnings-0>