

March 24, 2021

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

Via portal at: <https://oehha.ca.gov/comments>

Re: Proposed Amendments to Proposition 65 Short Form Warnings

Dear Ms. Vela:

The National Shooting Sports Foundation, Inc. (NSSF) appreciates the opportunity to provide the following comments in opposition to the proposed amendments to Proposition 65 “short-form warnings” as reflected in the Office of Environmental Health Hazard Assessment’s (OEHHA) Notice of Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short-form Warnings dated January 8, 2021.

Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association with a membership of over 9,000 businesses involved in the manufacture, distribution and retail sales of shooting sports and hunting related goods and services; sportsmen’s organizations; public and private shooting ranges; gun clubs; and outdoor media publishers. While over 700 NSSF members are located in California, the majority of NSSF’s members manufacture and/or distribute products for sale into the California market. Accordingly, Proposition 65 regulations significantly impact NSSF member businesses, and its fair and equitable application is therefore of great importance to NSSF.

As is explained more fully below, OEHHA’s proposed amendments to short-form warnings are ill-conceived, poorly timed and ultimately of little or no value to California consumers. NSSF therefore respectfully urges OEHHA to withdraw its proposed amendments.

A. NSSF Supports Comments Provided by the California Chamber of Commerce

As an initial matter, NSSF enthusiastically supports the comments provided to OEHHA by CalChamber. Those comments raise a number of concerns shared by NSSF member businesses, and they also highlight several critical failings in the process OEHHA is using to enact the short-form warning amendments. Like NSSF, CalChamber views the proposed amendments as fatally flawed and respectfully requests they be withdrawn.

B. The Proposed Amendments are Ill-Timed

The current regulations governing short-form warnings became effective on August 30, 2018. Those regulations forced manufacturers, distributors and retailers to make wholesale changes to the way in which they did business with California customers – changes that required significant investments of time and resources. The rulemaking process that resulted in those regulations began with OEHHA’s Initial

Statement of Reasons some 3 ½ years earlier.¹ Thus, OEHHA is now proposing another round of wholesale changes to be implemented in a shorter period of time than it took to create the last set of changes.

Manufacturers and distributors are still dealing with the dramatic adverse financial impact COVID-19 has had on their businesses, just like all Americans. OEHHA's proposed amendments will force them to sustain yet another financial set-back in the form of increased manpower and hard costs. Many of NSSF's member companies, like other small businesses, are ill-equipped to weather another financial storm and may be forced to simply close their doors. If OEHHA moves forward with the proposed amendments, NSSF respectfully requests that the phase-in period be extended to at least three (3) years.

C. The Proposed Amendments Run Counter to the "Certainty" the 2018 Regulations Promised to Provide

In its Initial Statement of Reasons in 2015, OEHHA made clear that the new warnings would "reduce the number of unnecessary warnings, make the warnings more informative, and *provide certainty for businesses who must comply* with the warning requirements of the Act."²

Reference to "certainty" was no accident, as OEHHA recognized that compliance with state and federal regulations is a serious concern – and a potential for increased costs, as well as exposure to regulatory fees, penalties and attorneys' fees – for businesses of all sizes who engage in sales nationally and regionally. To be sure, for companies who do business in California, Prop 65 liability is no small concern. Yet, OEHHA is proposing amendments that will result in wholesale changes to Prop 65 short-form warnings and upend the certainty the 2018 changes created. If OEHHA was truly interested in providing businesses with certainty in how they provide Prop 65 warnings, it would withdraw the proposed amendments and leave the current warning conventions in place.

D. Smaller NSSF Members Are Disproportionately Affected By The Proposed Amendments

NSSF's membership nationally is largely skewed toward small businesses, with almost 4,000 members having an average of 18 employees. Just as in other industries, larger companies often have the capital and reserves to survive financial crises and emerge relatively unscathed. Not so for small businesses, whose reserves are lower or non-existent, and whose profit margins are thinner and cash flows smaller. For those reasons stated above, the financial toll of OEHHA's proposed amendments will therefore adversely affect a larger percentage of NSSF members.

NSSF member companies manufacture, distribute or sell at the retail level literally millions of SKUs. Yet, the number of SKUs involved in a company's business is not necessarily reflected in its size. In other words, there are many NSSF members which are considered small companies but which manufacture or sell hundreds and thousands of individual SKUs. Thus, the changes OEHHA is proposing will have a profound effect on those businesses who must evaluate current short-form warnings and implement them, all of which will require a huge investment of employee or consultant time and resulting expenses.

¹ See *Initial Statement of Reasons for Adoption of New Article 6 regulations*
<https://oehha.ca.gov/media/downloads/crn/article6isor.pdf> January 16, 2015.

² Initial Statement of Reasons ("2015 ISOR") at p. 51 (emphasis added), available at:
<https://oehha.ca.gov/media/downloads/crn/112715warningreg20isor.pdf>

E. OEHHA's Packaging Size Limitation Is Arbitrary

In the proposed amendments, OEHHA sets a package size of 5-square inches as the acceptable limit for the use of short-form warnings. But OEHHA does not indicate how it arrived at this space limitation and it therefore appears to be an arbitrary determination. OEHHA should first provide the public with the basis for choosing the 5-square inch limitation and why that package size serves the purposes of Prop 65. As recently as May 2019, OEHHA made clear that there was no package size limit for the use of short-form warnings.³ What has changed since then? The public is entitled to OEHHA's response.

Many NSSF members manufacture or distribute products in packaging which will be affected by the 5-square inch limitation, including ammunition boxes and accessories of all types. As a result, a larger package size limit – say 8-square inches or 10-square inches – would be less burdensome for some NSSF businesses, recognizing that the change in other short-form warning conventions will still have a negative financial effect. If OEHHA moves forward with the proposed amendments, NSSF respectfully requests that further consideration be given to package size limitations and a size developed based on stakeholder input and further deliberation.

F. OEHHA Has Not Justified The Costs to Businesses the Proposed Amendments Will Cause

In its January 8, 2021 “Notice of Proposed Rulemaking,”⁴ OEHHA included the following statement:

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

OEHHA is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulatory action. The action does not impose any new requirements upon private persons or businesses. Instead, it modifies an existing, non-mandatory safe harbor warning method.

This statement is incorrect and not supported by any data OEHHA has provided in connection with the proposed amendments. As discussed above, the proposed short-form warning amendments will result in significant cost impacts on NSSF member businesses because they will require wholesale changes to products currently using such warnings, and will also force the modifications of existing websites and printed catalogs. The proposed amendments are not “modifications,” they are wholesale changes which have real financial costs.

G. Current Short-Form Warnings Do Not Cause Over-warning; The Broken Current Prop 65 Enforcement Scheme Encourages Over-warning

OEHHA attempts to justify the proposed amendments by claiming the current short-form warning conventions encourage “over-warning.”⁵ This claim is unsupported by any reliable data. What is without

³ OEHHA's Proposition 655 Clear and Reasonable Warnings Questions and Answers for Businesses, Revised May 2019, available at: <https://oehha.ca.gov/media/downloads/cnr/art6businessqa.pdf>

⁴ See, <https://oehha.ca.gov/media/downloads/cnr/p65noticeshortformold2021.pdf>

⁵ See, Initial Statement of Reasons at pg. 16.

dispute, however, is the dramatic increase over time in the number of 60-Day Notices filed by “citizen enforcers” and their attorneys. These enforcement actions result in more and more businesses becoming ensnared in a Prop 65 claim which they must then defend against and, most commonly, pay to resolve. It is therefore the entire private enforcement aspect of Prop 65 that encourages “over-warning” in the hope of avoiding future Prop 65 claims.

The Prop 65 system is horribly broken and the statistics make clear why that is. Based on data available from the California Attorney General’s Office, there were 840 Prop 65 claims resulting in settlements or judgments in 2018, 901 claims in 2019 and 654 claims in 2020. The total amounts of those judgments/settlements (including civil penalties, other payments and attorneys’ fees) were \$34,610,674, \$30,023,518 and \$20,575,208, respectively.

Most telling, however, is the small number of individual chemicals identified in those cases.

| Top Five Chemicals Identified in P65 Judgments and Settlements 2018 - 2020 | | | |
|---|------------------------|----------------------|----------------------|
| | 2018: 840 cases | 2019: 901 cases | 2020: 654 cases |
| 1. | DEHP (425) – 51% | DEHP (523) – 58% | DEHP (362) – 55% |
| 2. | Lead (190) – 23% | Lead (163) – 18% | Lead (168) – 26% |
| 3. | DINP (104) – 12% | DINP (131) – 15% | DINP (60) – 9% |
| 4. | Acrylamide - (36) – 4% | Cadmium (50) – 5.5% | Acrylamide (25) – 4% |
| 5. | Cadmium - (26) 3% | Acrylamide (35) – 4% | Cadmium (23) – 3.5% |

As is evident, DEHP is far and away the most common chemical identified in 60-Day Notices. Lead and DINP follow right behind. When DEHP, Lead and DINP are combined, however, the totals reach a staggering 86% in 2018, 91% in 2019 and 90% in 2020.

Why is it that with about 900 chemicals currently on OEHHA’s Prop 65 list, only 3 of them consistently account for approximately 90% of the annual 60-Day notices? The answer is simple: products containing trace amounts of these three chemicals are easily identified on store shelves and on websites, easily and inexpensively tested, and thereafter difficult to defend against without engaging attorneys and experts. It is no secret that most companies targeted by a 60-Day Notice would rather pay to resolve the claim than spend much more to evaluate potential exposure and determine if a Prop 65 warning was even necessary in the first instance.

The NSSF respectfully contends that Prop 65 – The Safe Drinking Water and Toxic Enforcement Act of 1986 – has strayed far from what voters expected to see with its passage. Little could voters know then what the system has become, where tens of millions of dollars are collected from businesses each year, many of them small businesses including NSSF members, because of imperfect warnings on products containing trace amounts of a mere 3 chemicals on an OEHHA list of around 900.

So, it is disingenuous for OEHHA to claim short-form warnings encourage “over-warning” when it is clearly the broken Prop 65 system itself.

H. Conclusion

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In light of the foregoing, NSSF respectfully requests that OEHHA withdraw the proposed amendments to Article 6, Clear and Reasonable Warnings Short-Form Warnings. If and when OEHHA develops further data to support the proposed amendments, and accurately identify the adverse factors which would result from such amendments, NSSF would propose sufficient time be allowed for all stakeholders to participate in the process of crafting meaningful revisions as occurred prior to the 2018 amendments.

Thank you again for the opportunity to submit comments regarding the proposed short-form warning amendments.

Very truly yours,

The National Shooting Sports Foundation, Inc.

Lawrence G. Keane
Senior Vice President for Government & Public Affairs,
Assistant Secretary & General Counsel

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