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March 29, 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

SUBJECT: COMMENTS TO PROPOSED AMENDMENTS TO ARTICLE 6, CLEAR AND REASONABLE WARNINGS SHORT-FORM WARNINGS

Dear Ms. Vela:

Rheem Manufacturing Company (including its subsidiaries) ("Rheem") thanks you for the opportunity to submit comments regarding 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 ("Proposed Rulemaking"). Rheem is a global manufacturer of sustainable and innovative heating, cooling, water heating, and commercial refrigeration products, for both residential and commercial applications. Under its Raypak Inc., brand, Rheem proudly manufactures pool heaters and boilers in Oxnard, California, where we employ hundreds of manufacturing workers. Additionally, a portion of Rheem's business is dedicated to the sale and distribution of replacement parts for these various applications. As both a manufacturer of finished products and a distributor / reseller of parts, Rheem would be significantly impacted by OEHHA's proposed amendments to Article 6.

Rheem is aligned with comments submitted by the California Chamber of Commerce and its coalition partners, as well as those submitted by the Air-Conditioning, Heating, & Refrigeration Institute (AHRI). The changes proposed by OEHHA are substantial and ill-timed. They will impose significant burden and business risk to Rheem and its affiliates while providing no meaningful benefit to consumers. Instead, this will only decrease the understanding of the Prop 65 label's original intent.

In addition, Rheem requests that OEHHA explicitly exclude master distributors, repackagers, and resellers of components / parts ("reseller"), as one of the parties with primary responsibility to provide warnings. OEHHA incorrectly assumes resellers have access to product composition information, which is a gross oversimplification of the resale and distribution process. The fact is, as a reseller of parts and pieces, we typically do not have the information that the proposed regulation would require us to disclose. Therefore, to disclose such information would require us to independently test, which OEHHA has clearly stated in the past is not a requirement or expectation.

For these reasons, **Rheem respectfully requests OEHHA withdraw its proposal** and urges OEHHA to consider the following in any future proposed amendments:

Grant a Reseller Exemption

Explicitly exempt resellers from the obligation to provide a Prop 65 warning unless they have actual knowledge of an exposure to a listed substance. In other words, OEHAA should apply the same rationale that underlies the 2016 exemption for retailers to resellers. This would address the disconnect between a reseller's 'knowledge of products' composition and their responsibilities under Prop 65.

In its Final Statement of Reasons for the 2016 rulemaking ("2016 FSOR"), OEHHA explicitly acknowledged that companies are not required to test products to determine whether they need to provide a warning, and instead should use only information they already have to determine whether a warning is required:

> The regulation does not require businesses to test their products. The regulation simply provides safe harbor warning methods and content for businesses that have already determined they are causing an exposure to a listed chemical and need to provide a warning.[1]

By including resellers as one of the parties with primary responsibility to provide warnings for all products and to identify a listed substance by name in the warning, OEHHA is in effect imposing an obligation on resellers to test products.

OEHHA incorrectly assumes resellers have access to product composition information. This assumption is based on a gross oversimplification of the distribution process and fails to acknowledge the number of complex relationships between companies in the resale and distribution chain. OEHHA expects that resellers will have the leverage and/or direct contracting ability with upstream manufacturers and suppliers to demand composition information. In practice, upstream suppliers and manufacturers may be two or more parties separated from resellers, creating a lack of contractual privity with the party that has composition information. Moreover, even where contractual privity exists, these upstream parties often take the position that as long as they are not selling directly into California, the obligation to comply with Prop 65 instead should fall to the reseller that is sending the product into California. This structure leaves resellers liable for Prop 65 compliance without the underlying information needed to identify a listed substance on a warning.

To address the disconnect between a resellers' knowledge of products' composition and their responsibilities under Prop 65, OEHHA should extend the rationale that underlies the 2016 retail exemption to resellers.[2] Specifically, OEHHA should exempt resellers from the obligation to provide a Prop 65 warning. As OEHHA stated in the 2016 FSOR,

> The regulations place retail sellers in a separate category and imposes the responsibility for providing the warning on them under specific circumstances. Specifically, where the retailer has failed to display warnings received from the manufacturer, producer, packager, importer, or distributor; or has actual

[1] Final Statement of Reasons, Proposed Repeal of Article 6 and Adoption of New Article 6 Regulations for Clear and Reasonable Warnings ("2016 FSOR"), Response to Comment 176, p. 112.
[2] While the retail exemption has an underlying basis in the statute, nothing precludes OEHHA from extending this exemption by regulation to other similarly situated parties.

> knowledge of an exposure under circumstances where there is no manufacturer, producer, packager, importer, or distributor who can be readily compelled to provide the warning. See subsections 25600.2(e)(1)-(5) of the regulation (May 20, 2016 2ndmodified text).
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> This is reasonable, as manufacturers usually will have greater knowledge than retailers of a product's chemical content and whether it causes chemical exposures that require a warning.
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> ***
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> Under Section 25600.2, retail sellers essentially would pass through the warning materials they are provided by the upstream businesses. This process would help ensure that those parties that are most likely to know that a warning is required bear the cost of providing warning materials for those products. (emphasis added).[3]

These excerpts from the 2016 FSOR demonstrate that OEHHA has acknowledged explicitly that retailers without actual knowledge to support a warning determination should be exempted from Prop 65 compliance. The same rationale that OEHHA cited to justify an actual knowledge standard for retailers also applies to resellers and similarly justifies extending an actual knowledge standard to the reseller category.

Importantly, if an upstream supplier or manufacturer notifies a reseller of a potential exposure to a listed substance, then a reseller would have a duty to provide a warning. Or, like retailers, a reseller could gain "actual knowledge" through receipt of a notice from a private attorney general under Section 25249.7(d)(1). The receipt of such a notice would put the burden on the reseller to begin providing a warning five days after receipt of the notice and the reseller could be held liable for any later failures to warn. See 27 CCR § 25600.2(f)(2).

Retain Short-Form Warning for Small Products

Rheem believes the current short form warning provides sufficient notice to consumers. Rheem urges OEHHA to retain the short-form warning language from the 2016 rulemaking. Many products, parts, and components have insufficient space to provide the additional information that OEHHA is proposing. Furthermore, Rheem believes the additional information that OEHHA is proposing be included will add no additional benefit in terms of consumer awareness or increased consumer protection.

Provide a Reasonable Implementation Period

OEHHA must provide manufacturers with a longer, more reasonable implementation period. During the 2016 rulemaking, OEHHA provided a two-year implementation period. However, given the enormity of the changes being proposed by OEHHA, Rheem will be required to evaluate all of its products, parts and components. This is both a time consuming and resource-

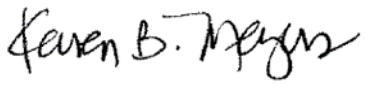
[3] 2016 FSOR, Response to Comment 49, p. 35; Response to Comment 51, p. 39 (emphasis added).

intensive process. Five years is the minimum time necessary to conduct the research, implement the changes, and absorb the associated costs.

Conclusion

For the reasons outlined above, Rheem urges OEHHA to withdraw the Proposal. Absent a full withdrawal, OEHHA should extend the retailer exemption to resellers, who are similarly situated to retailers. In addition, Rheem urges OEHHA to retain the short-form warning language from the 2016 rulemaking. Finally, if OEHHA moves forward with finalizing the Proposal, OEHHA must provide a minimum five-year implementation period to provide the regulated community adequate time to develop compliance strategies.

Sincerely,



Karen B. Meyers
Vice President of Government Affairs
Rheem Manufacturing Company