



**VIA E-MAIL**

March 29, 2021

Ms. Monet Vila  
Office of Environmental Health  
Hazard Assessment  
1001 I Street, 23<sup>rd</sup> Floor  
Sacramento, CA 95812-4010

RE: NAIMA's Comments on OEHHA's Notice of Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warning Short-form Warnings

Dear Ms. Vila:

The North American Insulation Manufacturers Association (“NAIMA”) appreciates the opportunity to submit comments on California’s Office of Environmental Health Hazard Assessment’s (“OEHHA”) Notice of Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warning Short-form Warnings. In this notice, OEHHA is proposing changes to short-form warnings on which the regulated community heavily relies.

NAIMA is the trade association for manufacturers of fiber glass, rock and slag wool insulation products. NAIMA promotes energy efficiency and pollution reduction through energy savings achieved through the use of thermal insulation products. NAIMA’s members have four fiber glass manufacturing plants in the State of California. Some of the products manufactured by NAIMA’s members are subject to the requirements of Prop. 65. Therefore, there is direct and very relevant interest in OEHHA’s proposed amendments.

Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, requires businesses with 10 or more employees to provide a clear and reasonable warning before exposing individuals in California to any listed chemical that may cause cancer or reproductive harm.

When OEHHA’s revisions to the warning requirement were issued in 2016 (and in full effect in August of 2018), OEHHA included a short-form warning option as an acceptable alternative to the revised requirements for consumer product exposure warnings. This alternative was welcomed by the regulated community. It is used in many industries. Some NAIMA members use this short-form and urge OEHHA to retain it as an alternative.

The short-form offers many advantages. Specifically, the short-form allows for shorter language that can fit on a product’s label or packaging. In addition, the short-form affords the ability to provide a compliant warning without identifying at least one chemical listed under Prop. 65 that triggers the warning. The current short-form warning regulation provides an appropriate balance between the Proposition 65 warning and other critical consumer safety warnings and

information. NAIMA urges OEHHA not to disturb that delicate balance by implementing these proposed modifications. With OEHHA's proposed amendments, these advantages will be lost.

Moreover, OEHHA's proposed amendments will significantly limit the circumstances when the short-form warning would be permissible. An additional concern is that the proposed amendment will end up requiring a far more elongated warning. This may cause over-crowding on the product packaging and is an unwelcome burden upon the regulated community without a clearly articulated benefit to the consumer or members of the public.

OEHHA seeks to avoid a warning that does not provide knowledge of exposure to a specific chemical. There are other alternatives that do not involve over-populating product labels with information that will likely be ignored. Product information is already provided online, on safety data sheets, and company websites. OEHHA's objective ignores the complicated circumstances many companies will face when attempting to be compliant with Prop. 65. For example, one challenge that will be encountered is determining whether to test all products for trace levels of hundreds of Prop. 65 listed substances; this is costly and, in reality, counterproductive. Another difficulty that must be addressed is how to test such a wide range of chemicals in an economical manner.

This difficult problem faces companies that are also simultaneously facing an onslaught of increased activity from bounty hunters. The companies already are required to quickly (60 days) demonstrate compliance when confronted with a bounty hunter claim. Now these additional burdens of losing the short-form is quite literally revising the model and method of doing business. This disregard for the complexities of running a business in a heavily regulated state is frustrating and burdensome. NAIMA urges OEHHA to forego removal of the short-form and allow its continued use. By incentivizing bounty hunters, OEHHA has created something like a plague that keeps coming at businesses in a rush, so giving companies a little relief is merited.

The repeal and replacement of the Article 6 warning requirements were some of the most substantial amendments to the Prop. 65 regulations in many, many years. Both the plain language of the amendments and direct statements from OEHHA promised the regulated community more certainty and confidence in the new warning requirements. The regulated businesses in turn sacrificed time and capital to overhaul their Prop. 65 warning programs to bring them into compliance with the new regulations. Now OEHHA proposes to effectively undo that entire regulatory process by proposing changes so substantial that the Article 6 warning requirements would require all businesses utilizing the short-form warnings to redo their programs. That OEHHA finds no financial impact to businesses from this action is not believable given the costs already incurred in the previous revisions to Prop. 65 warnings.

These substantive changes to the warning requirements further infuse uncertainty and liability for businesses attempting to comply. With good reason, businesses are very frustrated that they went through a three-year regulatory process culminating in the repeal and replacement of Article 6 and the creation of the long-form and short-form safe harbor warnings, only to have the Agency come back two years later with major changes. Businesses relied upon the plain language of the

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regulations, but OEHHA's own statement ensured them their compliance with the new warning regulations would provide businesses with more certainty and confidence that they are in compliance with the regulation while retaining the right to provide other non-safe harbor warnings.

That lack of confidence is particularly unsettling because that uncertainty makes businesses more vulnerable to frivolous Prop. 65 litigation, which seems to increase every year. Businesses' fear of increased litigation is justified as statistical data provided by California's Attorney General office shows that the volume of settlements is trending upward, along with the number of suits trending upward. Many of these lawsuits have little to do with the merits of effective communication but rather "gotcha" like lawsuits where the business is caught in an error because of confusion over the regulations and requirements. These new changes will surely add yet more opportunities for bounty hunters to cash in on frivolous claims.

While the OEHHA amendment may have some merit as an individual measure, that amendment adds yet another layer to what has become known as the regulatory thicket of California. The burdens increase at a regular pace, and it makes conducting business in California very difficult. This could be a small instance where you give the regulated community a break that will be received with gratitude, and OEHHA will not have really lost anything but will have created good will within the regulated community.

For the reasons stated above, NAIMA urges OEHHA to withdraw the proposed amendments to Article 6.

Sincerely,



Angus E. Crane  
Executive Vice President, General Counsel