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March 29, 2021

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

Re: Proposed Amendments to Article 6, Clear and Reasonable Short-form Warnings.

Oshkosh Corporation, founded over 100 years ago, is an American industrial company with 16,000 employees that designs and builds specialty trucks, military vehicles, truck bodies, airport fire apparatus, and access equipment headquartered in Wisconsin. We appreciate OEHHA's convening a public hearing on March 11 and providing an opportunity for public comments on its Proposed Amendments to Article 6, Clear and Reasonable Short-form Warnings.

Consistent with every one of the more than 20 commenters who spoke at the March 11 public hearing, Oshkosh opposes OEHHA's proposed amendments for the below reasons. As an initial matter, Oshkosh believes that OEHHA's proposed rulemaking lacks the objective, foundational support commonly underlying such administrative rule development. As acknowledged on page 15 of the Initial Statement of Reasons, remarkably, "OEHHA did not rely on any technical, theoretical, and/or empirical studies, reports, or documents as part of this rulemaking."

In addition, Oshkosh disagrees with the proposed amendments for the following three significant reasons:

- 1) The proposal effectively eviscerates the short-form warning in all but the scarcest of situations, and
- 2) As acknowledged by OEHHA, Prop. 65 does not require testing of products to determine the presence of any of the 1,000+ Prop. 65-listed chemicals but, if adopted as currently structured, the practical implication will cause businesses to have to test products throughout the chain of commerce, and
- 3) As with previously adopted regulatory changes meant to "improve" Prop. 65 and how the public is warned about possible chemical exposures, the proposed amendments will almost certainly exacerbate, rather than quell, "frivolous 'shake-down' lawsuits...by unscrupulous lawyers". See, May 2013 statement by former Governor Brown, found [here](#).

OEHHA's Proposal Guts The Short-Form Warning. The language in proposed new section 25602(a)(4) would limit the short-form warning to product labels with a total surface area of 5 square inches or less *and* only when the package shape or size cannot accommodate the long-form warning. On its face, these requirements are subjective, arbitrary, capricious, vague, unnecessary, and not workable. The current short-form warning was adopted by OEHHA to alleviate a host of warning issues and was deemed appropriate by OEHHA in 2016. Here, now, OEHHA's Initial Statement of Reasons does not

even credibly try to objectively evaluate the impacts of the proposed changes and no evidence (other than anecdotal presumption) is provided to support OEHHA's desired changes. The Initial Statement of Reasons developed to support the proposed regulations is rife with conclusory statements and is not predicated on a serious investigation of the matters. Therefore, the proposed amendments violate the California Administrative Procedures Act and are subject to successful challenge, leading to more frivolous Prop. 65 litigation.

Further, if the proposed regulations are adopted, it will lead to yet more inconsistent warnings throughout the State since there are many, many court approved consent judgments that allow for the current version of the short-form warning on any size label or product.

Prop. 65 Does Not Require Products Testing. As OEHHA acknowledges on its website, impacted entities can apply "knowledge of [their] business operations and the chemicals" used to determine whether operations or products are likely to expose individuals to any listed chemicals. Further, the law and implementing regulations do not require testing to determine the presence or lack of a listed chemical.

However, if listing a chemical for each harmful end point is required by both long-form and short-form warnings, the practical impact is that extensive product testing will be necessary to identify which chemical or chemicals to list. Contrary to OEHHA's assertion, this is both costly and impractical. This problem is exacerbated by the breadth of world-wide supply chains of products and product component parts which may not be consistent from one supplier to the next or which may vary over time. OEHHA should not adopt this requirement or, at a minimum, make clear that if an entity identifies a chemical in good faith, but later that chemical is not in the product, this cannot be a basis for a Prop. 65 60-day notice of violation.

The One Year Grace Period To Phase In A New Short-Form Warning Is Too Short. Various factors, including: i) COVID-19 work interruptions and adverse economic effects, ii) the magnitude of implementing international supply chain modifications needed to change packaging, iii) the need for product testing mentioned above, and iv) the fact that the warning regulations OEHHA seeks to change have only been operative for less than three years and businesses *continue* to struggle to comply with them, make clear that the one year phase-in is just too short. Contrary to the Initial Statement of Reasons which, without any study, claims "[t]he proposed regulatory action will not have a significant adverse economic impact directly affecting businesses", the proposed changes will, in fact, be costly.

The One Year Product Sell-Through Provision Is Too Short. The sell-through provision for products manufactured up to one year after the effective date of the amendments is not workable and is arbitrary. OEHHA has not provided any basis to justify this time period. In many instances, products using the existing short-form language do not carry a "manufactured on" date and will, therefore, be indistinguishable from later manufactured products leading to more litigation and shake-down suits.

Products Already Carry Numerous Warnings. Depending on the specific type of product that needs a warning, there are already so many mandated warnings (hazard communication labels, use instructions, recycling messaging, multiple language, etc...) that situations will abound where there will literally not be sufficient room on labels to implement the new warning and, on top of that, the new requirements will cause confusion due to overcrowded labels. In short, this provides yet another basis for the aforementioned "unscrupulous lawyers" to issue 60-day notices of violation claiming a warning does not comply with the statutory requirement that warnings be "clear and reasonable." OEHHA has done

nothing to recognize and address this point. Further, OEHHA's proposal creates the potential for inconsistent Prop. 65 warnings across labeling, containers, catalogs, and internet warnings and as between various businesses in the chain of commerce (from manufacturers to retailers), including businesses with less than 10 employees.

Oshkosh appreciates OEHHA's consideration of and responses to these concerns. Thank you.

Sincerely,

/s/

Patrick T. Taverna  
Associate General Counsel