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January 21, 2022

SUBMITTED VIA ONLINE PORTAL

Attn: Monet Vela

Office of Environmental Health Hazard Assessment

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Re: NAFEM Comments on OEHHA's Modification (Dec. 17, 2021) to its Proposed Rulemaking: Clear and Reasonable Warnings Short-form Warnings (Jan. 8, 2021)

Dear Ms. Vela:

The North American Association of Food Equipment Manufacturers (NAFEM) previously submitted certain comments to the Office of Environmental Health Hazard Assessment (OEHHA) regarding its Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short-form Warnings (January 8, 2021) (Proposed Rulemaking).

On December 17, 2021, OEHHA issued a notice that it was modifying its Proposed Rulemaking to "increase the maximum label size for short-form warnings from 5 square inches to 12 square inches; allow use of the short-form warning on the internet or in catalogs where the short form warning is used on the product label; provide additional signal word options; provide additional warning language options; and provide minor clarifications on the wording of the warning." (Modifications to the Proposed Rulemaking at 1-2.) On December 24, 2021, OEHHA extended the public comment period by 7 days, until January 21, 2022, to comment on the Modifications to the Proposed Rulemaking. (Notice of Extension.)

NAFEM is a trade association of more than 600 commercial foodservice equipment and supplies manufacturers – a \$14.9 billion industry. These businesses, their employees and the products they manufacture, support the food-away-from-home market – which includes more than one million locations in the U.S. and countless more around the world.

Member companies sell either directly or through distribution relationships indirectly into California, and thus OEHHA's regulations, including Proposition 65 labeling mandates, apply.

In response to the Modifications to the Proposed Rulemaking, NAFEM refreshes and reincorporates its prior comments, as set forth below:

1. Enact a Safe-Harbor Provision: §§ 25603, 25607.2

The Modifications to the Proposed Rulemaking offer several helpful changes, which NAFEM supports, including: (1) increasing the maximum label size for short form warnings from 5 square inches to 12 square inches;¹ and (2) clarifying that if the company's product is eligible to use the short-form warning, the product's internet and catalogue advertisements can use the same.² NAFEM has no comments here and urges OEHHA to include them in the final rulemaking.

However, NAFEM encourages OEHHA to adopt a safe-harbor provision regarding manufacturers' good-faith efforts to provide listed chemical(s) in the labels. OEHHA has left unchanged from the Proposed Rulemaking the requirement that companies that desire to use either the long-form or the short-form warning disclose the Proposition 65-listed chemical(s) for which they are furnishing either of the Proposition 65 warnings. (See §§ 25603(a), 25607.2(a); see Proposed Amendments to §§ 25603(b), 25607.2(b).) Without a safe-harbor, strict compliance with this requirement may be, in some instances, thwarted by circumstances outside of a manufacturer's control.

Some context is necessary. NAFEM's manufacturer members cover the spectrum of foodservice equipment and supplies products: food preparation equipment; primary cooking equipment; refrigeration and ice machines; serving equipment; smallwares, cookware and kitchen tools; storage and handling equipment; tabletop and servingware; warewashing, janitorial and safety equipment; and furnishings, décor and custom fabrication. Many of these products and equipment are constructed and finished using materials and components from a diverse global supply chain.

Accordingly, in endeavoring to comply with Proposition 65, and its 1,000+ "listed" chemicals, many NAFEM members will attempt to consult with their material and component suppliers about the chemicals and substances contained in the materials and components that such suppliers are furnishing to NAFEM members. Certain NAFEM members estimate that in about 65% of instances of requests to such entities, the material and component suppliers will either: (i) not furnish **any** information; or (ii) generically state that there is a Proposition 65-listed chemical in the materials or components, without identifying the actual substance.

In each instance, NAFEM members face a "Catch 22"—do nothing, or label their products with the short-form warning in order to avoid the prospect of Proposition 65 litigation.

NAFEM's Suggested Revision: NAFEM encourages OEHHA to adopt a safe-harbor provision wherein if the product manufacturer solicits information from upstream component manufacturers about the Proposition 65-listed chemicals in their products, and either receives

¹ Section 25602(a)(4)(A).

² Sections 25602(b) and (c).

no response or a generic response without identifying the listed chemical. As long as a manufacturer can document that it requested appropriate information from its suppliers and the suppliers failed to comply with these Proposition 65 mandates, the manufacturer making the request should be free from any liability. Such a safe-harbor provision could be modeled after the safe-harbor provision in § 25600.2(b) that allows a manufacturer to provide written notice to a subsequent "authorized agent for the business to which they are selling or transferring the product or to the authorized agent for a retail seller" in order to comply with Proposition 65.

2. Delay the Effective Date: §§ 25602(e), 25603(d), 25607.2(c)

The revised Article 6 Clear and Reasonable Warnings regulations were adopted on August 30, 2016 and became operative on August 30, 2018. (Initial Statement of Reasons (ISOR), at 7 n.8.) Through this Proposed Rulemaking, OEHHA would largely withdraw the short-form warning option for businesses across the country about three years after it took effect, and substantially modify it for those who are still able to use it.

In connection with the prior change in 2018, NAFEM engaged counsel and other consultants in order to educate its membership about the change. Several of NAFEM's members on their own also engaged counsel and/or consultants, proactively, in order to revise product labels, websites, catalogues, and advise downstream distributors. Several other members did so after being targeted by Proposition 65 "bounty hunters" and incurring the additional costs to retain counsel and expend sums to settle threatened litigation that appeared more focused on enriching the complainant than on furthering the goals of Proposition 65.

Through the Proposed Rulemaking if left unchanged in the Modifications to the Proposed Rulemaking, OEHHA is proposing a change that would essentially require a company that relied upon and conformed to OEHHA's short-form warning regulations of 2018, to unnecessarily repeat that process yet again. If companies fail to do so, the Proposed Rule would subject them to Proposition 65 liabilities and citizen suits for existing labels on their products suddenly becoming "non-conforming." NAFEM disagrees with OEHHA's statement that "[t]he proposed regulatory action will not have a significant adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states." (ISOR, at 16.)

NAFEM members produce commercial foodservice equipment used in restaurants, school and university cafeteria halls, cruises, concerts, and other settings that have been significantly impacted, if not shuttered, during the ongoing COVID pandemic. NAFEM research indicates that commercial foodservice equipment and supplies sales are down 25% from 2019 levels. The same research also forecasts that the industry won't get back to pre-pandemic sales levels until sometime after 2024.

As to the restaurant industry alone, the National Restaurant Association (NRA) found that the industry ended 2020 with total sales that were \$240 billion below the Association's pre-pandemic forecast for the year; and at the end of 2020, more than 110,000 eating and drinking places were closed for business temporarily, or for good. (See, e.g., Nat'l Restaurant Ass'n, *State of the Restaurant Industry Report* (Jan. 25, 2021), available at <https://go.restaurant.org/rs/078-ZLA-461/images/2021-State-of-the-Restaurant-Industry.pdf>.) By

mid-year 2021, any gains in restaurant sales faced substantial headwinds of paying down debts used to stay afloat in 2020, as well as rapidly rising labor, food, and other commodity costs. (See, e.g., Nat'l Restaurant Ass'n, *State of the Restaurant Mid-Year Update* (Aug. 2021), available at https://go.restaurant.org/rs/078-ZLA-461/images/2021-SOI_Mid-Year%20Update%20Final.pdf.)

NAFEM's Suggested Revision: NAFEM urges OEHHA to revisit its conclusion, without citation,³ that "[t]he proposed regulatory action will not have a significant adverse economic impact directly affecting businesses" (ISOR, at 16.) In fact, the Proposed Rulemaking would have significant impacts on companies that already have been hit hard by the pandemic, and NAFEM requests that OEHHA consider the necessity of pursuing these changes in 2022.

At present, OEHHA through the Proposed Rulemaking has offered a one-year effective date from the final rulemaking of the amendments (See Proposed Amendments to §§ 25602(e), 25603(d), 25607.2(c).) NAFEM proposes that OEHHA extend the effective date by one-to-two years—*i.e.*, to allow for an effective date of two-to-three years from any final rulemaking—so as to allow NAFEM's membership, and countless other companies that manufacture products for sale in and into California, to begin to recover from the COVID pandemic before being forced to reformulate product labels, catalogues, and websites.

* * *

Please contact the undersigned if NAFEM can provide any additional insight or assistance. We would be happy to work with OEHHA on further development of the Proposed Rulemaking.

Respectfully submitted,

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³ Indeed, "OEHHA did not rely on any technical, theoretical, and/or empirical studies, reports, or documents as part of this rulemaking." (ISOR, at 15.)