



January 21, 2022

Sent Electronically to: [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)

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

SUBJECT: Amendments to Article 6, Clear and Reasonable Warnings: Short-Form Warnings

Dear Ms. Vela:

The Alliance for Automotive Innovation<sup>1</sup> (Auto Innovators) appreciates the opportunity to provide comments on the modified text to the proposed rulemaking to amend California Code of Regulations, Title 27, Section 2560, Amendments to Article 6, Clear and Reasonable Warnings: Short-Form Warnings. Issued on December 17, 2021, this notice presented the Office of Environmental Health Hazard Assessment's (OEHHA) consideration of comments and subsequent modifications to its January 8, 2021 proposal to modify the Proposition 65 Short Form warning content and methods of transmission.

We appreciate the work and time that OEHHA has dedicated to finding a workable solution that provides both the necessary elements of a safe harbor warning and additional workable solutions for smaller products and packaging. In particular, we support OEHHA's reconsideration of the use of online and catalogue warnings. We remain concerned, however, about a number of other issues which remain unchanged in this proposal.

### **1. Support: Catalogue and Online Warnings and Use of California with the Warning**

The availability of a short-form warning is appropriate and needed, especially for smaller parts.<sup>2</sup>

In the original proposal, in Sections 25602(b) and (c), the option to use the short form warning content in online warnings or in a catalog, respectively, had been eliminated. By reinstating this transmission option, we believe that there will be increased consistency in warning language, and it will better meet

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<sup>1</sup> Formed in 2020, the Alliance for Automotive Innovation is the singular, authoritative and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, the Alliance for Automotive Innovation represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the U.S. The organization, a combination of the Association of Global Automakers and the Alliance of Automobile Manufacturers, is directly involved in regulatory and policy matters impacting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, technology and other automotive-related companies and trade associations. The Alliance for Automotive Innovation is headquartered in Washington, DC, with offices in Detroit, MI and Sacramento, CA. For more information, visit our website <http://www.autosinnovate.org>.

<sup>2</sup> Alternatively, development of a warning specific to vehicle parts may also be appropriate, along with consideration of the use of warnings used at point of sale and/or in owner's manual.

the needs of consumers, who use internet options for researching information about the products they purchase.

We also support the addition of the signal word options “**CA WARNING**” or “**CALIFORNIA WARNING**”. Auto Innovators believes that allowing businesses to make clear that the warning is being given pursuant to California law is an appropriate option for those complying with the Proposition 65 regulations.

## **2. Listing of Specific Chemical Names on Short-Form**

As proposed, the short-form warning would continue to require listing a chemical for each toxicity endpoint. OEHHA’s continued proposal to require the listing of a specific chemical(s) for each toxicity endpoint for “small” products would have far-reaching consequences for the automotive sector. As we have explained in previous comments,<sup>3</sup> Proposition 65 warnings may be used on automotive parts to ensure a safe harbor for manufacturers and retailers.

While OEHHA has often said that most “hard parts” likely do not have any exposure risk and therefore should not require a safe harbor warning, costly testing (\$10,000-\$20,000 per part) is required to definitively either (1) prove the negative, i.e., no chemical exposure is possible, or (2) identify specific chemicals and any potential exposure scenarios. Because Proposition 65 has established a very low threshold for plaintiffs to bring suit against a manufacturer or retailer, out of an abundance of caution, companies may choose to conduct this type of testing and/or label a product when there is any possibility that a listed chemical is present.

Each vehicle includes tens of thousands of parts, including sub-assemblies and assemblies. These same parts are sold as service and replacement parts to maintain vehicles throughout their lifetime. All of these articles are generated through a complex, multi-tiered, global supply chain that can span upwards of 10 tiers. Ascertaining which chemicals may have been used in the production of a service part and which may be present in minute quantities in the finished part may mean reaching back through those 10 tiers, or may result in a need to undergo testing of each article. While the threshold to bring a claim against any manufacturer or retailer is relatively low,<sup>4</sup> the cost to the manufacturer is prohibitively high to prove that there is no exposure.

The proposed amendments to list specific Proposition 65 chemicals would essentially require the domestic automotive sector to test and assess hundreds of thousands of automotive parts to identify any Proposition 65 chemical content and exposure potential. We recognize that OEHHA states that it does not require testing:

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<sup>3</sup> Alliance for Automotive Innovation comment: March 29, 2021.

<sup>4</sup> A noticing party must execute a certificate of merit stating “the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action.” California Health and Safety Code § 25249.7(d)(1).

Q3: What kind of testing does a business have to do in order to meet the safe harbor warning requirements?

A3: The warnings regulations do not address the question of whether a warning is required; rather, the regulations provide guidance on how to provide a warning once a business has made a determination that a warning is required. OEHHA's regulations do not require a business to perform any testing.<sup>5</sup>

However, the proposed requirement imposes a *de facto* testing requirement that would be cost-prohibitive and unworkable. Additionally, identifying chemicals that may be present as impurities, byproducts and/or in *de minimis* quantities is infeasible and of marginal value to consumers in California.

While listing chemical content is a key criterion of the safe harbor warning for OEHHA, we would appreciate any reconsideration of this requirement to assist in streamlining burden. For instance, one consideration could be making the identification of a specific chemical optional for short form warnings, where space on the label is already at a premium and must be balanced with the ability to list all other information on the packaging as well. The economic consequences of complying with this requirement are significant and should be given careful consideration as OEHHA moves forward. The minimal potential benefit of testing service parts is far outweighed by the significant economic consequences of this potential requirement. In addition to the costs, OEHHA should assess the time that it would take for the automotive sector to conduct this type of testing and the current availability of certified facilities to perform the testing.

### 3. Short Form Size Restrictions

The proposed amendment for the short-form warning, which would restrict the total surface area available for consumer information to 12 square inches or less, is an unworkable approach that may eliminate the ability to use a short-form warning for small parts or products. A 12 square inch label cannot possibly accommodate the information required by OEHHA, as well as any basic product information that could be included with the label. More importantly, a balance needs to be struck between the information required by OEHHA on the label, the size of the label, and the other information that must also be included on the packaging.

As proposed, this small packaging would need to include:

- The Proposition 65 safe harbor warning – “WARNING: Cancer Risk From [NAME OF ONE OR MORE CHEMICALS KNOWN TO CAUSE CANCER] Exposure - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)”
- Product identification including:
  - Name
  - Part number
  - Required external directions
- SKU
- And, possibly provide all information and warnings in multiple languages

We request that OEHHA reconsider the limited size of the short form. By limiting the size to 12 square inches, OEHHA is limiting the utility of the short form option and removing an important transmission

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<sup>5</sup> [https://www.p65warnings.ca.gov/sites/default/files/art\\_6\\_business\\_qa.pdf](https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf).

alternative. We believe that additional consideration should be given to the size of the label and the information required by the safe harbor warning, to ensure a workable and reasonable safe harbor warning for small products and their packaging.

#### **4. Exemption for Replacement Parts Manufactured Prior to the Effective Date of Any Final Rule**

If OEHHA moves forward with a final amendment for short-form warnings, we request that replacement parts manufactured prior to the effective date of any final rule be exempt from any new or revised labeling requirements. OEHHA has previously implemented a “manufactured by” date to make it clear that products manufactured before the applicable date are covered by the previous safe harbor warnings, and we highly encourage OEHHA to continue this application. Recalling replacement parts to be relabeled would be cost-prohibitive.

#### **5. Implementation Timetable**

Proposed changes to the current labeling requirements will require more than the one year proposed by OEHHA to implement. To the extent a short-form warning is already applied, any updates should allow adequate time to design and implement the new safe harbor warning label, and also to use the remaining stock of existing warning labels to avoid unnecessary waste or costs. Additional implementation time will be needed if the requirement to list chemicals results in the need for product testing in order to identify those chemicals. Therefore, we request that OEHHA provide at a minimum three years to comply with any changes.

These comments are offered with the intent of making the short form warning more readily available and useful to parts and other goods contained in small packaging. Regardless, the primary issue at hand may be that the use of the short form warning is at odds with the requirements, needs and use scenarios for parts and products for complex durable goods, like automobiles. The current proposal would require costly and time-consuming testing to name individual chemicals on the short-form label. While OEHHA states that it does not require testing, the proposed requirement would be a *de facto* requirement and those costs will be prohibitive. Combined with the proposed size limit for the short form, the proposal makes it almost universally unavailable to our members given the information that will be required for the warning.

Auto Innovators is open to considering additional means, like point-of-sale labels, reliance on other existing warnings, and/or development of specific vehicle part warnings that could also address our concerns. Finally, an exemption for parts in commerce and a longer implementation timeframe are key issues for our members.

Sincerely,



Julia M. Rege  
Vice President, Energy & Environment