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June 28, 2024

California Environmental Protection Agency
Office of Environmental Health Hazard Assessment
Via upload <https://oehha.ca.gov/proposition-65/comments/comment-submissions-modification-proposed-amendments-regulations-clear-and>

Re: Modification to Proposed Amendments to Regulations Clear and Reasonable Warnings, Safe Harbor Methods and Content (11 pages edited version with underline and strikeout text)

Dear OEHHA:

I represent a consortium of manufacturers (brands) and distributors in California and throughout the United States. I am writing this letter on their behalf. They all choose to remain anonymous and for me to assert their viewpoints on the proposed amendments to the short form warnings regulations. Most are in the recreational products industry which includes bicycles, e-bikes, motorcycles and other off-road vehicles. Some of these companies sell complete vehicles, others only create parts for these vehicles. Many of the companies that I represent sell these parts to retailers and or other distributors and or large online retailers. Some also sell their products directly via their own branded websites.

I have been working in the product liability field since 1986 primarily in the defense of products in product defect cases. I am quite knowledgeable about product warnings and draft them for many many clients in this space. More information about me can be seen on my website including a very detailed profile here <https://www.swhlaw.com/2007/11/profile-of-steven-w-hansen.html>

I am attaching my earlier letter dated 1/3/24 to reemphasize my earlier points. None of my suggested changes were made nor were any of my very legitimate concerns addressed. The OEHHA Staff has little or no experience in product manufacturing and distribution unlike myself and all my clients who have done this our entire careers. Please re-examine my previous letter and address the concerns therein.

Very Truly Yours,



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attached: 1/3/24 letter

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January 3, 2024

California Environmental Protection Agency
Office of Environmental Health Hazard Assessment
Via upload <https://oehha.ca.gov/proposition-65/comments/comment-submissions-notice-proposed-rulemaking-and-announcement-public>

Re: Response to Proposition 65 Initial Statement of Reasons Clear and Reasonable Warnings Safe Harbor Methods and Content (dated Oct 27 2023; 52 pgs)

Dear OEHHA:

I represent a consortium of manufacturers (brands) and distributors in California and throughout the United States. I am writing this letter on their behalf. They all choose to remain anonymous and for me to assert their viewpoints on the proposed amendments to the short form warnings regulations. Most are in the recreational products industry which includes bicycles, e-bikes, motorcycles and other off-road vehicles. Some of these companies sell complete vehicles, others only create parts for these vehicles. Many of the companies that I represent sell these parts to retailers and or other distributors and or large online retailers. Some also sell their products directly via their own branded websites.

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In summary I feel that OEHHA (hereinafter OEHHA or “the agency”) should leave the short form warning regulations as they are now and not change anything or add anything. The only thing that might be clarified is specifically how the warning should be applied to packaging, catalogs and websites when companies sell products to consumers directly. As for the off road vehicle parts installation warning that should only be required on an instruction page.

The agency needs to realize that most consumer recreational products today are sold worldwide “multi-channel” meaning they’re sold to retailers, other Distributors, through catalogs, direct to Consumers over the internet, and through third party websites such as Amazon, Walmart and Target etc. And what California does affects sales and product worldwide (which I think is an intended result by CA regulators)

You should also realize that the entire Recreational Products industry is going through a very difficult time right now with many years worth of excess inventory that is going to take probably 2 years or more to completely sell off. This has created a cash flow crunch for many of these companies when it comes to creating and testing new product.

Another thing to note is that large retailers like REI, Walmart, Target Amazon etc don't really have to worry about Prop 65 because they force their suppliers, no matter how small, to comply with Prop. 65 and indemnify them for any Prop. 65 violation. Also this risk is not insurable so that risk cannot be lessened by small brands selling to large retailers.

Meanwhile a very small select number of very aggressive plaintiff's attorneys are ever present in the background drumming up Prop 65 cases using artificial organizations that they have created. They troll various retailers and internet websites for products and then purchase these products and start testing to see if they can find a violation somewhere. Its a very lucrative business with low overhead and high profit margin. If they find a chemical on the list they write the perfunctory letter to 58 CA County District Attorneys to get permission (which is given by no response from the DA's) to basically co-opt the case and act as a private attorney general which of course forces defendants (guilty or not) to pay their outrageous hourly attorneys fees. These cases are basically impossible to litigate or win not only because it's not cost-effective but because it's impossible to litigate the de minimis amounts of chemicals that could be in these products. Harm to users is already presumed under the law. The vast majority of these products of course are never even touched by human hands but as parts of them are "accessible" to human hands Proposition 65 applies.

With the foregoing background I now address the short form warnings which I think were a good regulatory solution to a problem that was quite vexing and expensive for my clients. Rather than spend many thousands of dollars determining whether or not one of 800 or so chemicals was in a product (I've been told that only a hundred of those chemicals can even be tested for) it was easier to label the product with the so-called "safe harbor" warning (A *safe harbor* is a provision of a statute or a regulation that specifies that certain conduct will be deemed not to violate a given rule.) The whole purpose of a safe harbor is to go ahead and warn and forgo the testing to see if your product does or does not have the chemical. Now the agency wants to destroy the safe harbor and penalize its users with burdensome testing requirements for no good reason.

The agency has determined that the rule is being followed to such an extent that more companies are providing warnings and the agency feels that the effect of the warnings is being diluted and that the way to prevent this is to force companies to test products to determine which chemicals may or may not be in them and then to put the names of those chemicals in the warning.

First off, the practicality of doing this is difficult because some of these chemicals have very long names and some products may have more than one chemical. Just listing these chemicals in the warning itself will increase the size of the warning (let alone spelling errors on the chemical names) which is going to be a problem for smaller packages and smaller parts. Also there are many years worth of existing short form labeled products still in stock.

The other problem is that the agency appears to feel that the new short form warning should be rather punitive in nature and that in order to use the short form, it should force all companies to test these products to get the names of potential chemicals that are potentially in them. Again this is defeating the entire purpose of the Safe Harbor. This will essentially force companies into non-compliance with the warnings or to somehow circumvent the warning requirements because the cost of testing is exorbitant and because many of these chemicals cannot even be tested for under current methods. The agency does not realize the cost involved in testing some of these products. If you were to sell 15 different models of bicycle or motorcycle and each of those models utilized different component parts (which is typical) you would need to test hundreds if not thousands of parts for hundreds of chemicals. The testing costs for each SKU that you sell could easily exceed \$50,000 per year and this would be ongoing forever. Those costs would have to be passed on to Consumers. Given the current inflationary costs and

consumers being upset with the current condition of the economy because of this inflation it would probably result in a huge reduction in sales of Recreational Products. And as I mentioned previously the market is already in a depressed state due to excess inventory problems.

In reviewing the agency's "Initial Statement of Reasons" dated Oct 27, 2023, as stated on page 9. The statutory requirement is to give "clear and reasonable" warning for exposures to listed chemicals. There is nothing in that language that says a warning has to contain the name of a chemical, it just says they have to give "clear and reasonable" warnings. The current short form warning complies with this requirement and it does not require the name of a chemical. Adding chemical names will not add "clarity" and will not be a "reasonable" warning (given the current regulations).

An example of a inquiries to the department as a rationale for requiring chemical names in the warning:

"I have purchased a ... bidet seat. Please advise of chemical carcinogens. For example, where are they coming from, on the device water systems, or deodorizer?" page 8.

Again nothing in the law says that you must state specifically *where* the chemical might be in the product just that the product possibly contains one of 800 banned chemicals somewhere in it. How would it even be possible on an item with 500 parts to use the short form label to point out 15 or 30 places or areas on the product or many components where the chemicals might be hidden.? That's impossible and would likely involve even more costly detailed testing. Surely this would not fit on any "short form" warning. The changes in the short form warning don't even propose this change so it's unclear how this comment is even related to the changes in chemical listing in the warning.

Even if I were to accept the agency's assertion that many consumers are calling or emailing the agency to ask it about what sort of chemical might be in a short form labeled product (and I don't accept that proposition as my clients who sell these products labeled with short form warnings are net getting these types of inquiries and they should be getting more than the agency) there is no evidence whatsoever that listing one, two or three of 800 different chemicals will in any way educate or inform consumers about risks they should or should not undertake with the product. The agency has already done all of the thinking for the consumers; if it is determined that any amount of these chemicals are present anywhere in a product, whether it's touched or not, it could lead to either cancer or birth defects. So how could it be that an individual consumer by reading a label that contains the chemical X (of which he has no personal familiarity and is not an epidemiologist) could then determine that encountering chemical X would be "safe" even though the agency has determined that it's not? I categorically reject this conclusion which is not based on any scientific data or study:

"Naming a carcinogen and/or reproductive toxicant in the warning will help inform consumers about exposures to listed chemicals so they can make better informed choices, thereby furthering the consumer right-to know purposes of Proposition 65." Page 42

I also categorically reject this logic:

"Prophylactic warnings confuse consumers and dilute the overall value of Proposition 65 warnings,..." Page 42

All warnings are prophylactic in nature. Warnings are just that. They warn of many "potential" dangers which may or may not be present (or be encountered) in any particular case depending

upon use of the product etc. That is what is being done here with the current safe harbor warnings.

“...the proposed amendments may discourage businesses from providing prophylactic warnings as a litigation-avoidance strategy...” page 42

What is wrong with litigation avoidance? That is a good thing. The agency should be encouraging warnings in bonafide potential exposure situations. If the agency does not like the proliferation of Prop 65 warnings then it should curtail the private attorney general enforcement overreach (which was never intended by the voters in 1986). With a listing over over 800 chemicals and this proliferation of regulations how could it say that it did not anticipate a proliferation of warnings? The agency brought this proliferation upon itself.

Adding chemical names to the short forms WILL NOT lead to any further consumer understanding or the risk at all nor will it increase safety or the readability or comprehension of the short form warning. If anything it may reduce it. It will also lead to less warnings (on products that potentially contain banned chemicals) which is not good.

I also note that the agency acknowledges this foregoing problem (consumer unfamiliarity with chemicals and their potential affects vs others) later on on page 36 by stating:

“The warning makes the broad statement that “vehicle parts can expose you to chemicals” and uses as examples lead and phthalates. These chemicals are used as examples because handling of some parts may cause significant exposures to these chemicals, *and they are likely familiar chemicals to the general public.*”

The other thing that's painfully obvious from the “Initial Statement of Reasons” Oct 2023 is that the agency has asked (or polled or surveyed consumers) if they would like to have more information about the chemicals that potentially led to these proposed changes to the short form warning. Predictably, like with most consumers, they are very quick to say they would like to have more information about a product, and more owners manuals, more instructions and more detailed information on everything. The reality is the vast majority of consumers never look at any labels, never read any owners manuals, never look at any detailed safety information on the product. All they really want to know is the price, the color, what it does, and how to get it.

Also in order to properly do a survey of consumers the inquiry/polling should go something like this: here is a short form warning without the listing of a chemical and here is a short form warning listing some exotic chemical that you've never heard of. Now would you prefer to have this label or this label BUT you would need to inform the consumer that in order to get the label with the chemical listed on it the price of the product would have to go up significantly. Price is how many consumers decide if they are going to purchase a product and many are price sensitive especially in the consumer Recreational Products industry for products bought at large discount retailers. The cost factor to add the name of one or more chemicals would probably greatly reduce their desire to have more information. (which they perceive as no cost to provide to them)

As for further regulations about products purchased on the Internet or through a catalog I think the current regulations are sufficiently clear at this point and I don't think adding the word California to the warning is necessarily going to make it any easier for manufacturers or Distributors with respect to placing these warnings on all of their products worldwide because most manufacturers and distributors cannot differentiate their California destined product from products destined for other states and other parts of the world.


Additional options for warnings for passenger or off-highway motor vehicle and recreational marine vessel parts exposures

There is no way this warning is going to be able to fit in the same space that the current short form warning does. So as long as this warning is not required in the current short form circumstances then we have no issue with it. However we strongly feel it should only be required to be placed in the instructions with the product, not on the website page for that part or on the packaging as there is not sufficient space (which is obviously why the short form was created). It makes more sense to include it with the instructions for installation as that is essentially what it is. There is usually much more space on the product instructions to include such a long warning. We are also assuming that since the examples of Lead and Phthalates are used that those chemicals can be used as examples by the manufacturer and no testing is required. (see proposed sec. 25607.51(b))

⚠ WARNING: Handling passenger or off-highway motor vehicle parts can expose you to chemicals such as phthalates and lead, which can cause cancer and reproductive harm. To minimize exposure, service the vehicle in a well-ventilated area, wear gloves, and wash your hands. For more information see www.P65Warnings.ca.gov/motor-vehicle-parts.

In conclusion the agency should leave the short form warning regulations as they are now and not change anything or add anything. The only thing that might be clarified is specifically how the warning should be applied to packaging, catalogs and websites when companies sell products to consumers directly. As for the off road vehicle parts installation warning that should only be required on an instruction page.

Very Truly Yours,



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