



## NATIONAL SHOOTING SPORTS FOUNDATION, INC.

400 N. Capitol Street NW, Suite 490 • Washington, D.C. 20001 • Tel (202) 220-1340 x203 • Fax (202) 220-1349  
Headquarters: 11 Mile Hill Road • Newtown, CT 06470-2359 • Tel (203) 426-1320 • Fax (203) 426-1087  
E-mail lkeane@nssf.org • nssf.org

**LAWRENCE G. KEANE**  
SENIOR VICE PRESIDENT  
& GENERAL COUNSEL

April 8, 2015

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

Sent via email to: [P65Public.comments@oehha.ca.gov](mailto:P65Public.comments@oehha.ca.gov)

RE: Clear and Reasonable Warning Regulations

Dear Ms. Vela:

The National Shooting Sports Foundation (NSSF) is the trade association for America's firearms, ammunition, hunting and recreational shooting sports industry. On behalf of our nearly 13,000 members, we thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's (OEHHA) Notice of Proposed Rulemaking to Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act (Proposition 65). NSSF has signed, and stands by, the CalChamber coalition comment letter, and offers the information below as a supplement to the coalition letter.

Our members include federally licensed manufacturers, distributors and retailers that sell their products in California. The proposed amendment would have a profound effect on our members by significantly changing the "safe harbor" warnings deemed to meet the Proposition 65 "clear and reasonable" warning requirements.

As stated in the January 16, 2015 Initial Statement of Reason (ISOR), OEHHA intends to address problems businesses have raised with Proposition 65 by: "clarifying the relative responsibilities of manufacturers and others in the chain of distribution for products that are eventually sold at retail, and making needed changes to the current requirements for a safe harbor warning, by integrating new technology, providing more useful information to Californians about their exposures to listed chemicals and by providing more compliance assistance for affected businesses..."<sup>1</sup>

As a concept, our industry agrees with the goal of amending Proposition 65 regulations to address the fundamental problems that lead to unwarranted and costly litigation against our members. The flood of lawsuits brought by "bounty hunters" seeking to collect large settlement fees for initiating frivolous lawsuits under the guise of action "on behalf of the general public." However, the new regulations

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<sup>1</sup> Office of Environmental Health Hazard Assessment, "Initial Statement of Reasons," Jan. 16, 2015.  
[http://oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/Article6\\_ISOR.pdf](http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/Article6_ISOR.pdf)

proposed for adoption into Article 6 fail to address these concerns and may lead to a more hostile litigation environment for our industry.

Although the ISOR characterizes the revisions as beneficial to businesses, this assessment is flawed and ignores the substantial negative impact the proposal would have on businesses, including those in the firearms and ammunition industry. From our industry's perspective, the revisions would further complicate the existing compliance challenges, impose a significant negative economic impact on the industry and lead to increased litigation. Further, the regulations fail to justify the process for selecting 12 chemicals to single out for chemical-specific warnings, out of the multitude of listed chemicals.

### **Increased Compliance Uncertainty**

Despite its intentions, as described in the ISOR, the proposal would only serve to increase the existing uncertainty with regard to compliance with Proposition 65 warning regulations. Providing non-mandatory safe harbor guidance for ensuring a warning is "clear and reasonable" may be well-intentioned but is poorly executed in the proposed rulemaking. Specifically, leaving the warning methods and messages unclear, with no interpretive guidance, in the regulation increases the compliance challenges.

Under the proposed changes, businesses may not be able to assume that prior guidance provided may still be relied on for determining whether a warning is considered "clear and reasonable." Excluding the earlier provision that would have grandfathered in previously approved warnings also serves to exasperate the uncertainty businesses will face in attempting to comply with the proposed regulation.

### **Fosters Litigation Threats**

Members of the firearms and ammunition industry already face the threat of Proposition 65-related lawsuits due to the problematic litigation climate. The proposal outlined by OEHHA would not improve this situation, and will further open new doors to litigation against businesses struggling to fend off frivolous lawsuits.

Currently, private "bounty hunters" harass members of our industry with lawsuits and threats of lawsuits. On May 7, 2013 Governor Brown proposed changes to Proposition 65. The governor's press release detailing the reforms noted that the law "has been abused by some unscrupulous lawyers driven by profit rather than public health" and described the reform efforts as intended to end "frivolous 'shake-down' lawsuits."<sup>2</sup>

Under current regulations, litigation threats tend to relate to whether a warning is provided or not for a particular product. The unclear proposed changes would open the door to litigation regarding the content of the warnings by requiring warnings to specify any of the 12 designated chemicals, to include warnings in any foreign language used elsewhere on the labeling or accompanying signage, and to not "dilute" the warning if the text includes additional information.

With the intention of allowing businesses to work with OEHHA to develop tailored warnings for particular scenarios, the proposal would permit an "interested party" to request OEHHA adopt regulations covering exposures to listed chemicals to the extent they are not already sufficiently covered by the regulations.<sup>3</sup> However, the provision may also serve to allow any entity to challenge whether any warning

<sup>2</sup> Office of Governor Edmund G. Brown, "Governor Brown Proposes to Reform Proposition 65" May 7, 2013. <http://www.gov.ca.gov/news.php?id=18026>

<sup>3</sup> See Section 25600(c) for provision. Intention found in "Initial Statement of Reasons," Jan. 16, 2015. p.5 [http://oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/Article6\\_ISOR.pdf](http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/Article6_ISOR.pdf)

requirement is sufficient. This is concerning in light of the additional proposed requirements outlined in the rulemaking.

### **Inadequate Economic Analysis**

In a deeply flawed analysis, OEHHA makes the erroneous conclusion that the proposal will not impose a financial burden on businesses:

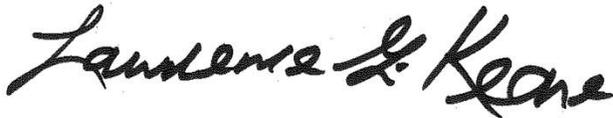
The proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed regulation does not impose any new requirements upon private persons or business because it primarily provides non-mandatory guidance and a voluntary safe harbor process for providing warnings already required under the Act that businesses can choose to follow.<sup>4</sup>

The proposed mandatory combination of new warning content and a pictorial symbol system that businesses would be required to include on labels and accompanying materials would impose significant new costs for businesses attempting to comply. For a single company producing a product with listed chemicals, it will be at least several hundred thousand dollars due to: 1) changing artwork to incorporate the required symbol; 2) buying new printing plates; 3) stickering inventory; and 4) destroying packaging inventory. Compounded throughout our industry, the cost impact will be significant.

NSSF urges a full economic impact analysis be conducted with defensible assumptions. If any businesses choose to use OEHHA's proposed warnings, the adverse economic impact cannot be ignored in the final statement of reasons.

NSSF opposes the proposed regulations and urges OEHHA to take steps to add clarity to the new warning requirement method and message provisions and to undertake a thorough economic analysis of the impact of such a proposal.

Sincerely,



Lawrence G. Keane

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<sup>4</sup> Office of Environmental Health Hazard Assessment, "Initial Statement of Reasons," Jan. 16, 2015. p. 42  
[http://oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/Article6\\_ISOR.pdf](http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/Article6_ISOR.pdf)