

April 26, 2016

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*Sent Electronically to:* P65Public.Comments@oehha.ca.gov

**SUBJECT:** “Clear and Reasonable Warning Regulations”

Dear Ms. Vela:

We are writing on behalf of the members of the Alliance of Automobile Manufacturers<sup>1</sup> (Auto Alliance), the Association of Global Automakers, Inc.<sup>2</sup> (Global Automakers), and the Motor & Equipment Manufacturers Association<sup>3</sup> (MEMA). Together, our associations include nearly every company selling new vehicles in the United States (U.S.) and represent more than 1,000 companies that manufacture and supply parts, components and systems for use in light- and heavy-duty motor vehicles in the original equipment and aftermarket industries. We appreciate the opportunity to provide comments on the March 25, 2016 Notice, “Modification to Text of Proposed Regulation, Proposed Repeal of Article 6 and Adoption of New Article 6, Proposition 65 Clear and Reasonable Warnings” (“15-Day Notice”). This proposed regulation was originally the subject of a Notice of Proposed Rulemaking published on November 27, 2015 in the California Regulatory Notice Register (Register No Z-2015-1117-11). In addition, we support the California Chamber of Commerce (CalChamber) comments and incorporate them here by reference.

The 15-Day Notice reflects some positive changes that we believe will make this rulemaking more workable. We appreciate that the California Office of Environmental Health Hazard Assessment (OEHHA) has addressed a number of the concerns we raised with the previous proposal including changing the term “purchaser” to “consumer,” providing clarity in a number of areas of nomenclature and clarifying requirements for vehicle repair.

While some modifications have been made that will help to make this a more workable program, the changes in the 15-Day Notice raise several additional concerns, as explained below, including new language that appears to require the affirmative demonstration that a warning is required, the

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<sup>1</sup> Auto Alliance members are BMW Group, FCA US, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Cars of North America. For additional information, please visit <http://www.autoalliance.org>.

<sup>2</sup> Global Automakers’ members are Aston Martin, Ferrari, Honda, Hyundai, Isuzu, Kia, Maserati, McLaren, Nissan, Subaru, Suzuki, and Toyota. Please visit [www.globalautomakers.org](http://www.globalautomakers.org) for further information.

<sup>3</sup> MEMA represents more than 1,000 companies that manufacture and supply parts, components and systems for use in light- and heavy-duty motor vehicles in the original equipment and aftermarket industries.

requirement to add instructional language about vehicle idling to the diesel engine and passenger vehicle warning labels and concerns about clarity for product warning language. We believe these alterations in the 15-Day Notice are problematic and need to be addressed if these requirements are to be workable and effective.

In addition, although not addressed in the 15-Day Notice, we also remain concerned about a number of issues identified in our previous comments<sup>4</sup> that have not been addressed. These issues are critical to the implementation of the warning labels. If not accommodated, we believe these issues will create confusion for the general public and will impose unnecessary burden and hardship on the regulated sectors. Of continuing concern to us are the following issues:

- Passenger vehicle definition
- Need for a *de minimis* exemption
- Consideration for replacement parts
- Additional lead time prior to implementation

#### **(1) Proposed Section 25601(c): The Chemical Specification Requirements**

Section 25601(c) - In proposed Section 25601(c), OEHHA has added new language requiring warnings to name “one or more of the listed chemicals *for which the person has determined a warning is required...* (emphasis added).” The phrase “for which the person has determined a warning is required” infers that an entity must, in fact, make a determination that the exposure from the chemicals being listed will cause cancer or reproductive harm at the risk level defined in the statute. This appears to require that exposure testing and risk modeling be conducted prior to providing a warning, a requirement that exceeds statutory authority. Product manufacturers and others need the ability to warn in the absence of such definitive data.

Also, the addition of this language requires entities to concede that a warning is required at the point that it is placed on a product or other location. This introduces at least two new layers of liability to that entity. First, it would mean that a warning placed on a product/location that does not actually have “Proposition 65-level” of risk could be challenged by third parties as being improperly labeled. Second, should the warning be challenged by a third party for not being complete or properly displayed, for example, the entity providing the warning would not be able to make the case that the Proposition 65 risk level did not actually exist and the warning need not have been provided at all. This will likely lead to increased litigation which is contrary to the stated goals of this rulemaking.

Therefore, we urge OEHHA to remove this new language as it is contrary to the statute, costly, unworkable and will likely lead to increased litigation.

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<sup>4</sup> Comments submitted jointly by the Global Automakers and Auto Alliance, dated April 8, 2015 and comments submitted jointly by Global Automakers, Auto Alliance and MEMA dated January 25, 2016.

## (2) Passenger Vehicle Warning Font Size

Section 25601(d) - We appreciate that in the draft OEHHA has proposed language to ensure that most warnings adhere to the same parameters. However, we are concerned about the lack of clarity in how the language should be applied to the specific product, chemical and area exposure warnings under §25607. For many consumer products, the new parameters proposed in Section 25601(d) are practical because the warning size cannot follow a “one size fits all” approach. However, for some consumer product warnings under §25607, such as a passenger vehicle label, a common font size is appropriate.

We recommend that instead, OEHHA make the following modification to Sections 25601(d) and 25607.16 to clarify requirements for product, chemical and area exposure warnings under §25607:

Section 25601(d): “Consumer product exposure warnings must be prominently displayed on a label, labeling, or sign, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use. **Any label that satisfies the applicable subsections of Section 25607 shall be deemed as satisfying the requirements of this section.**”

Section 25607.16(a)(2): “The warning is provided on a label attached to the front window on the driver’s side of the passenger vehicle or off-road vehicle, **in no smaller than 8-point type...**”

## (3) Diesel Engine and Passenger Vehicle Warning Provisions

Sections 25607.15 & 25607.17 - This proposal has added new required language for the diesel engine and passenger vehicle exposure warnings. The warnings must now include the statement “do not idle the engine except as necessary.” This additional warning exceeds the authority provided under the Proposition 65 statute which only requires warnings for certain exposures to listed chemicals. This proposed requirement goes beyond a warning and urges an action. In addition, the proposed warning language would already require auto exhaust to be listed as a pollutant which would cover exposure from exhaust occurring during idling. Therefore, we urge OEHHA not to include this or any other additional text on the label.

Section 25607.16 - By requiring warnings both in the owner’s manual and on the driver’s window, this section requires two warnings for one product. Finalization of these proposed regulations would mark the first time since Proposition 65’s passage that two warnings for one product will be required for safe harbor.<sup>5</sup> In summary, OEHHA should provide flexibility by requiring either a warning in the owner’s manual (§ 25607.16 (a) (1)) *or* a label attached to the front window of the vehicle (§ 25607.16 (a) (2)).

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<sup>5</sup> This point is also made by the California Chamber of Commerce in its April 26, 2016 comments to this rulemaking with regard to Section 25600.2(d). Please also refer to Alliance comments dated January 25, 2016, pages two and three for a more thorough discussion of this issue.

Furthermore, regarding the warning in the owner's manual, OEHHA should ensure the requirements do not inadvertently limit the owner's manual to a printed version. In some cases, the owner's manual is provided in an electronic format and therefore the requirements should not explicitly use the words "printed" or "print" (for example, in Section § 25607.16(1)) so as to allow for both printed and electronic versions of the manual. Alternatively, a statement in the regulations and/or the Final Statement of Reasons that the provisions for the owner's manual warning apply to both printed and electronic versions would provide appropriate clarification.

#### **(4) Expansion of Passenger Vehicle Definition**

The current definition of passenger vehicle<sup>6</sup> states "[a] 'passenger vehicle' is any motor vehicle, other than a motor truck, truck tractor, or a bus, as defined in Section 233, and used or maintained for the transportation of persons." This definition is overly broad and has the potential to create significant uncertainty as responsible parties work to identify the appropriate warning for the appropriate vehicle. Section 25607.16(a) should be amended to make clear that passenger vehicle sections include, in addition to passenger cars, light-duty trucks, medium-duty vehicles and heavy-duty vehicles.

This change would provide better consistency for product types which all have similar content that would require a warning requirement under Proposition 65 and should otherwise be treated the same by the warning requirements. Separate categories (passenger vehicle, diesel engine, products not classified under a category) could lead to different labels on different types of vehicles, thereby making it confusing for consumers and difficult for manufacturers to comply. This requested clarification is not a major change. While our preference is that this clarification be made in the regulation itself, clarifying language could be added to the final Initial Statement of Reasons (ISOR).<sup>7</sup>

#### **(5) Need for a *De Minimis* Exemption**

For the over 800 Proposition 65 chemicals, only approximately 300 have "safe harbor" levels.<sup>8</sup> These safe harbor levels reflect "No Significant Risk Levels" (NSRLs) for carcinogens and "Maximum Allowable Dose Levels" (MADLs) for chemicals causing reproductive toxicity. By establishing these safe harbor levels, OEHHA has allowed for a rationale differentiation between levels of concern and levels for which there is no concern. This more scientific approach recognizes that the mere presence of a chemical in a product indicates neither exposure nor risk. If our understanding is correct, it is OEHHA's intent that businesses provide warning on chemicals that pose exposure risk, not all products containing a certain Proposition 65-listed chemical. Under the current proposal, since exposure information may not be readily available, manufacturers must resort to labeling products that contain a chemical, even if the chemical does not pose a significant risk. This over-labeling will likely confuse consumers.

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<sup>6</sup> As defined in Vehicle Code Section 465.

<sup>7</sup> See Alliance April 8, 2015 and January 25, 2016 comments for more detail.

<sup>8</sup> CA Title 27, Section 27505.

We recommend that OEHHA establish a *de minimis*, percent-by-weight level for Proposition 65 chemicals. *De minimis* levels are commonly used by other regulatory bodies, including the European Union, various state chemical laws and the California Department of Toxic Substance Control. As we have commented before, *de minimis* levels for chemicals, applicable at the component level, would clarify and streamline the application of labels under Proposition 65. Establishing a *de minimis* level will not only allow the automotive sector to use existing resources to expedite implementation, but it will also allow consumers to distinguish between small or insignificant risks and those that potentially pose a threat to human health and the environment.<sup>9</sup>

## **(6) Consideration for Replacement Parts**

As explained in our previous comments, we support OEHHA in addressing the passenger vehicle warning as it relates to replacement parts, which include aftermarket and service parts, used to maintain and repair motor vehicles. While OEHHA's proposed warning language touches on avoiding exposures from exhaust and servicing, we propose that language also be provided to extend the warning language provided on vehicles to apply to potential exposures from the parts for vehicle servicing that may require such a notice. These parts often contain the same Proposition 65-listed chemicals as those used in the original equipment part, which is covered by the existing vehicle warning label. Vehicle warning labels provided to consumers via printed or electronic owner's manuals should also warn that parts for servicing and maintaining their vehicle could cause exposures.<sup>10</sup>

Given that no such language is provided in the 15-Day Notice, we would like to reiterate our request to provide safe harbor for replacement parts by including them in the passenger vehicle warning label in Section 25607.17(a), as follows:

Section 25607.17(a): "...during the service, operation, and maintenance of a passenger vehicle or off-road vehicle, ***and use of replacement parts for vehicles.***"

Section 25607.17(a)(3): "...expose you to chemicals ***from the vehicle and/or replacement parts*** such as..."

The inclusion of this language will ease implementation and ensure that a proper warning for any replacement parts where a warning is needed is available to the consumer throughout ownership of the vehicle. Alternatively, if OEHHA does not explicitly include this language in the owner's manual, OEHHA should provide further clarification and explanation in the Final Statement of Reasons that the term could be added to the warning language without jeopardizing the safe harbor provided by the language.

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<sup>9</sup> See Alliance April 8, 2015 and January 25, 2016 comments for more detail.

<sup>10</sup> *Id.*

## **(7) Additional Lead Time Prior to Implementation**

In Section 25600(b), the proposal provides for a two-year transition period before the new requirements become fully effective. We strongly support inclusion of lead-time prior to implementing the regulations, because any change to existing owner's manuals or labeling requires time for notification, redesign of materials (i.e. labels) and application of any changes. However, given the complexity of implementing these requirements for a global industry sector, we request an additional third year. A model year approach is also necessary for these same reasons. Automobiles are manufactured and planned on a model year basis, not calendar year. A three-year transition period will better align with engineering cycles and model change overs in the industry.<sup>11</sup>

In conclusion, we urge you to consider the issues we have raised in these comments and to reconsider your position in addressing them. Our intent in pursuing these specific issues is to enhance the clarity and consistency of the warnings, and we thank you for your consideration of these comments.

Sincerely,



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<sup>11</sup> *Id.*