



March 31, 2020

Ms. Monet Vela
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Via portal at: <https://oehha.ca.gov/comments>

SUBJECT: COMMENTS TO PROPOSED AMENDMENTS TO TITLE 27, CALIFORNIA CODE OF REGULATIONS, SECTIONS 25602, 25607, 25607.1, AND 25607.3.

Dear Ms. Vela:

The Consumer Brands Association, the California Chamber of Commerce and the organizations listed (hereinafter, "the Coalition") thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's ("OEHHHA") Proposed Amendments to Title 27, California Code of Regulations Sections 25602 and 25607 ("Proposed Amendments").¹ We appreciate your extension of the deadline for these comments as well.

The membership of the Coalition consists of tens of thousands of California-based and national businesses of varying sizes that, collectively, represent nearly every major business sector that would be directly impacted by

¹ The Coalition does not have any comments with respect to the proposed amendments to sections 25607.1 and 25607.3.

OEHHA's Proposed Amendments. OEHHA's Proposed Amendments would change the safe harbor warning for sales of almost every consumer product, including food and beverages, over the internet or through mobile applications, so that if a Prop 65 warning is required for the item, it has to be provided not only at the time of the online purchase but also on the label of the product. The Proposed Amendments therefore essentially eliminate online warnings as a safe harbor warning method.

As discussed below, the Proposed Amendments are a dramatic change to the safe harbor warning regulations – not a clarification. See Initial Statement of Reasons issued January 2020 ("2020 ISOR") at p. 3 ("OEHHA has determined that additional clarification of certain provisions of the safe-harbor regulations would be helpful to the regulated community."). The plain language of the current safe harbor regulations does not require businesses selling online to provide an online warning and then a **second** on-label warning for the same exposure. Instead, the current safe harbor regulations, which provide four safe harbor methods, include online warnings as one of the safe harbor methods. The four safe harbor methods in the regulations are:

- 1) a posted sign, shelf tag or shelf sign at the point of display;
- 2) a warning provided "via **any** electronic device or process;"
- 3) a long-form label warning; or
- 4) a short-form label warning;

27 Cal. Code Regs. § 25602(a)(1)-(4) (emphasis added). If the Proposed Amendments are adopted, online warnings via a website or mobile application will no longer be safe harbor warnings because the Proposed Amendments will limit electronic device warnings to warnings provided by an electronic device or process "at the physical retail location." See <https://oehha.ca.gov/media/downloads/cnr/regtext013120.pdf>

This elimination of online warnings as a safe harbor warning method is an extreme change to the safe harbor warning regulations with wide-ranging practical effects that are highly detrimental to online retailing in California. Since the regulations were adopted in 2016, thousands of companies have relied upon the plain language of the regulations for creating and implementing their Prop 65 warning programs. The proposed change will cause businesses to have to invest significant time and resources into changing their Prop 65 warning programs **again**. Furthermore, it will spur frivolous litigation with respect to warnings that are "clear and reasonable" under the statute and therefore compliant with the law, but that nevertheless do not comport with the Proposed Amendments' two-warning approach for online sales.

In addition, the Proposed Amendments are tainted by a clear violation of the Administrative Procedures Act ("APA"). In 2017, OEHHA filed with the Office of Administrative Law "non-substantive changes" to the safe harbor warning regulations pursuant to section 100 of Title 1, which allows for grammar and punctuation errors in a regulation to be corrected without notice and comment by the regulated community. As discussed below, one of those changes was decidedly substantive because it has been used by OEHHA to interpret the safe harbor regulations to require a label warning when the retailer already provided an online warning for the product.

For all the reasons discussed herein, the Coalition respectfully request that the Proposed Amendments to Sections 25602 and 25607 be withdrawn.

1. Overview

The Prop 65 statute requires that California consumers receive a "clear and reasonable" warning prior to exposure to a listed chemical. Cal. Health & Safety Code § 25249.6 ("No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or

reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.”). The statute defines the word “warning” as follows:

“Warning” within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable. In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question.

Cal. Health & Safety Code § 25249.11(f).

After three years of public workshops and regulatory proceedings, OEHHA adopted new warning regulations in August of 2016, including new safe harbor warnings for consumer products and foods. The new safe harbor warning regulations went into effect on August 30, 2016, and the old safe harbor warning regulations expired two years later, on August 30, 2018. The new warning regulations were supposed to allow the business community to “enjoy more certainty and confidence that it is in compliance with the regulations.” Initial Statement of Reasons dated November 27, 2015 (“2015 ISOR”) at p. 52.

The regulations set forth the methods and content for safe harbor warnings. See 27 Cal. Code Regs. § 25600(a) (“Subarticle 2 provides ‘safe harbor’ content and methods for providing a warning that have been determined ‘clear and reasonable’ by the lead agency.”). Specifically, the regulations provide for general safe harbor warnings for consumer product, occupational and environmental exposures, as well as safe harbor warnings for specific types of exposures, known as “tailored warnings.”

Safe harbor warnings conclusively establish that the warning is clear and reasonable as required by Section 25249.6. 27 Cal. Code Regs. § 25601(a) (“A warning is ‘clear and reasonable’ within the meaning of Section 25249.6 of the Act if the warning complies with all applicable requirements of this article.”). “[T]he method of transmission relates to the reasonableness of the warning, whereas the content of the message relates to its clarity.” *Environmental Law Foundation v. Wykle Research, Inc.*, 134 Cal. App. 4th 60, 66 n. 6 (2005).

The safe harbor warning regulations identify four safe harbor methods and provide, in relevant part, as follows:

- (a) Unless otherwise specified in Section 25607.1 et seq, a warning meets the requirements of this subarticle if it complies with the content requirements in Section 25603 and is provided using **one or more of the following methods**:
 - (1) A product-specific warning provided on a posted sign, shelf tag, or shelf sign, for the consumer product at each point of display of the product.
 - (2) A product-specific warning provided via **any** electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the consumer product, without requiring the purchaser to seek out the warning.
 - (3) A warning on the label that complies with the content requirements in Section 25603(a).

- (4) A short-form warning on the label that complies with the content requirements in Section 25603(b). The entire warning must be in a type size no smaller than the largest type size used for other consumer information on the product. In no case shall the warning appear in a type size smaller than 6-point type.

27 Cal. Code Regs. § 25602(a) (emphases added). The second safe harbor method is to provide a warning “via **any** electronic device or process.” *Id.* (emphasis added). Website and mobile application warnings are provided via an electronic device or process. Thus, the plain language of Section 25602(a)(2) establishes that an internet warning is a permissible safe harbor warning method and that a business can use “one” safe harbor method to comply with Prop 65. In other words, if a business only provides a Prop 65 warning online, then that is a safe harbor warning as long as the language of the warning complies with the regulations.²

The Proposed Amendments change the second safe harbor method by limiting it to warnings provided via any electronic device or process “at the physical retail location.” The amendment would change this second safe harbor to read as follows:

A product-specific warning provided at the physical retail location via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the consumer product, without requiring the purchaser to seek out the warning.

This proposed amendment eliminates website and mobile application warnings from the list of four safe harbor warning methods.

2. The Proposed Amendments Are Not a Clarification of Existing Law.

The Initial Statement of Reasons for the current Proposed Amendments states that “OEHHA has determined that additional clarification of certain provisions of the safe-harbor regulations would be helpful to the regulated community.” Initial Statement of Reasons (“2020 ISOR”) at p. 3. As to section 25602, the provision that sets forth the four safe harbor methods, OEHHA claims that “Subsection (a)(2) is proposed to be amended to clarify that the product-specific warning provided by electronic device or process is intended to apply to products purchased at the retail location and is separate from those online for internet purchases.” 2020 ISOR at p. 4. This is a wholesale change and not a “clarification” of the safe harbor warning regulations. Moreover, it is the culmination of an effort by OEHHA to change the requirements of the safe harbor warning regulations that it issued in August of 2016.

On November 27, 2015, OEHHA issued the draft of the safe harbor warning regulations along with the required Initial Statement of Reasons (“2015 ISOR”). In the 2015 ISOR, OEHHA explained that a business may use “one or more of the methods of transmission” for the warning set out in section 25602. OEHHA explained the “electronic device or process” safe harbor method as follows:

The “catch-all” provision in subsection (a)(2) is intended to capture existing and future methods of communication, including currently available tools such as electronic shopping carts, **smart phone applications**, barcode scanners, self-checkout registers, **pop-ups on Internet websites** and any other electronic device that can immediately provide the consumer with the required warning. OEHHA does not intend for this provision to be read in such a way that a business

² As will be discussed in more detail below, the regulations also describe how warnings should be presented on the internet. See 27 Cal. Code Regs. § 25602(b).

may rely exclusively on a website or other device to provide a warning where the individual must seek out the warning.

2015 ISOR at pp. 24-25 (emphasis added). In this manner, OEHHA explained that one of the four safe harbor warning methods is using a website or mobile application.

On August 30, 2016, OEHHA promulgated the new safe harbor warning regulations. The new safe harbor regulations had the four safe harbor methods, including “via any electronic device or process.” 27 Cal. Code Regs. § 25602(a)(2). The regulations also contained the provision explaining how to post warnings for internet purchases that read as follows:

For internet purchases, a warning that complies with the content requirements of Section 25603(a) must be provided by including either the warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. If an on-product warning is provided pursuant to Section 25602(a)(4), the warning provided on the website may use the same content as the on-product warning. For purposes of this subarticle, a warning is not prominently displayed if the purchaser must search for it in the general content of the website.

See August 30, 2016 version of safe harbor regulations found here:

<https://oehha.ca.gov/media/downloads/crn/art6regtextclean090116.pdf> The Final Statement of Reasons (“2016 FSOR”) repeated the language of the 2015 ISOR providing that websites and smart phone applications are safe harbor methods. See 2016 FSOR at p. 85 (“The ‘catch-all’ provision in subsection (a)(2) is intended to capture existing and future methods of communication, including currently available tools such as electronic shopping carts, smart phone applications, barcode scanners, self-checkout registers, pop-ups on Internet websites and any other electronic device that can immediately provide the consumer with the required warning.”); p. 106 (same). In addition, the 2016 FSOR had repeated statements, consistent with the plain language of the regulations, that website warnings are safe harbor warnings. See 2016 FSOR at p. 83 (“Thus, a warning may be provided through electronic means such as clicking a link, scanning a bar code, reading a QR code or viewing a display as long as the consumer has reasonable notice and instructions on how to locate the warning.”); p. 83 (“‘Considerable effort’ could include searching for a warning that is buried within a “disclaimer” section in the legal notices portion of a website, rather than being easily accessible through a clickable and clearly labeled link on the product display page.”); p. 84 (“Providing a warning electronically is just one of several methods for providing a warning under this regulation.”).

On January 12, 2017, OEHHA published a “Notice of Non-Substantive Changes to article 6: Clear and Reasonable Warnings.” See <https://oehha.ca.gov/proposition-65/crn/notice-non-substantive-changes-article-6-clear-and-reasonable-warnings>. Most of the proposed changes were truly non-substantive – correcting punctuation and capitalization. See 1 Cal. Code Regs. § 100. One change, however, is a substantive revision in violation of the APA. OEHHA changed the language of the section that explained the requirements for safe harbor internet warnings. OEHHA added the word “also” as shown below:³

(b) For internet purchases, a warning that complies with the content requirements of Section 25603(a) must **also** be provided by including either the warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. If an on-product warning is provided pursuant to Section 25602(a)(4), the warning provided on the website may use the same content as the on-product warning.

³ In addition, OEHHA added the word “also” to the provision dealing with catalog purchases.

For purposes of this subarticle, a warning is not prominently displayed if the purchaser must search for it in the general content of the website.

Section 100 of the APA regulations allows an agency to make non-substantive regulatory changes without notice and public comment. 1 Cal. Code Regs. § 100(a) (“an agency may add to, revise or delete text published in the California Code of Regulations without complying with the rulemaking procedure specified in Article 5 of the APA only if the change does not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision”). OEHHA claimed that its addition of the word “also” was “consistent with the existing safe harbor warning requirement in the regulatory text; as such, the changes do not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.” See OEHHA’s Section 100 Final Explanatory Statement found here: <https://oehha.ca.gov/media/downloads/crnrr/sec100final.pdf>

After adding the word “also” in violation of the APA, OEHHA began issuing guidance documents for businesses relying on the word “also” for its interpretation of the safe harbor regulations. OEHHA interpreted the regulations to eliminate internet and mobile application warnings as a stand-alone safe harbor method – directly contrary to the plain language of the regulations. The most recent version of OEHHA’s guidance contains the following question and answer:

Q1: Must warnings be provided for internet purchases? Must a product sold on the internet also have a warning on the product to meet the safe harbor requirements?

A1: For consumer product purchases made over the internet, if the business wishes to provide a “safe harbor” warning that is deemed to comply with Proposition 65, the business would have to provide warnings following the methods in Title 27, Cal. Code of Regs., Section 25602, subsections (a) and (b). Specifically, the business would have to provide a warning on or with the product via any one of the four methods for consumer products warnings in Section 25602, subsections (a)(1)-(4). Under subsection (b), the business would **also** need to provide a warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the internet purchase. For a website warning, if a label is used for a product warning, a business may opt to provide a hyperlink to the warning or a photograph of the warning label used on the product (See page 89 of the Final Statement of Reasons (FSOR) for these regulations). In addition, if the short-form warning described in Section 25603(b) is provided on the product label, the website warning may use the same warning content.

See Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses: Internet and Catalog Warnings at p. 2 (emphasis in the original). OEHHA’s guidance can be found here: https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa_internet_warnings.pdf

OEHHA’s addition of the word “also” without notice and public comment was a clear violation of the APA. OEHHA’s reliance on the word shows that the addition was not a change without regulatory effect. See *Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal. App. 4th 1135, 1177-1179 (2006) (change modifying pesticide registration requirements was not “change without regulatory effect” because by clarifying ambiguities it materially altered the regulation). Rather, it is the key word to indicate that, according to OEHHA, an internet or mobile application warning is insufficient and two warnings are required for products sold online.

OEHHA's addition of the word "also" was a regulatory amendment in violation of the APA and therefore, it is invalid. *Id.* OEHHA's current Proposed Amendments are an attempt to shore-up its illegal amendment to section 25602 and correct the clear error OEHHA made earlier. But the addition of the word "also" did not change the meaning of the catch-all term "electronic device," as had been explained in the 2015 ISOR and the 2016 FSOR. Moreover, OEHHA's 2017 guidance documents expanding upon the "also" concept are unenforceable. *See id.* at 1176 (quoting Gov. Code § 11340.5, subd.(a).) ("No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.").

3. The Proposed Amendments Are Inconsistent with The Statute and Regulations.

Proposition 65 does not require that an individual receive two warnings prior to an exposure to a listed chemical. Indeed, the statute recognizes that an individual does not even need to receive one individualized warning because a warning "need not be provided separately to each exposed individual." Cal. Health & Safety Code § 25249.11(f). Similarly, the regulations provide that "[a] person is not required to provide separate warnings to each exposed individual." 27 Cal. Code Regs. § 25600(d).

The Coalition acknowledges that the safe harbor regulations seek to provide warnings prior to purchase, rather than prior to exposure. *See* 2016 FSOR at p. 148 ("In regard to post-purchase warnings, in general OEHHA believes that warnings should be provided prior to purchase in the case of consumer products."). This means that if a manufacturer puts a warning on the product label and it is sold over the internet, the purchaser will receive both an internet warning and a label warning. That is true because for online sales, an internet warning is the only way a person can get a warning prior to purchase.

The Proposed Amendments do not further OEHHA's objective that customers receive the warning prior to purchase. Instead, the change singles out website and mobile application sales for different treatment, requiring two different types of warnings for those purchases instead of one. If a product has a warning on the label and is sold in a brick and mortar store, there is no requirement of a second warning via a shelf sign, or an electronic form of warning provided at checkout. Conversely, if a product has a shelf sign in a brick and mortar store or an electronic form of warning provided at checkout, there is no requirement that the product also have a warning on the label.

4. The Proposed Amendments Are Unnecessary and Unjustified.

Not surprisingly, because OEHHA describes the Proposed Amendments as mere clarifications of the current safe harbor requirements, it does not attempt to explain, analyze, or justify the substantive change encompassed therein. But even had OEHHA tried to do so, it could not. There is simply no policy-based reason why a consumer who purchases a product online should need a warning at the time of purchase and a warning on the label of the product that is shipped to the consumer.

As noted above, consumers at brick-and-mortar stores can receive a single warning, either at the point of purchase like a shelf sign or on the label of the product. There is no reason to treat online purchasers any differently. Furthermore, OEHHA justified requiring safe harbor warnings at the point of purchase even though the statute only requires warnings before exposure (i.e., use of the product) because, in OEHHA's view, the consumer is making its purchase decision at the point of purchase and is more likely to consider and heed a warning at that point rather than, for example, once the product is already purchased and in the consumer's home. *See* 2016 FSOR at p. 89 (stating that providing online warnings for internet purchases "furtheres the

purpose of Proposition 65 by providing consumers with the information before they make a final purchasing decision, thus furthering the right-to-know purposes of the statute.”). For products sold online, the point of purchase is online, and so by OEHHA’s own reasoning, that is the point at which the warning should be provided. A warning on the label of the product itself would be superfluous.

Furthermore, from the perspective of the businesses represented by the Coalition, adding a requirement for on-label warnings will severely impact production, distribution, and manufacturing costs. Unless a business is willing to provide an on-label warning to consumers outside of California, which the law does not require and which may cause confusion or alarm among those consumers, the business will need to create two lines of products with separate stock keeping unit (sku) designations so that online retailers will know which are destined for California and which for other jurisdictions. This will increase expenses and complexity in the supply chain and could add to consumer costs.

Furthermore, the Proposed Amendments will spur additional frivolous litigation by private enforcers. The Coalition’s members currently are experiencing the most aggressive Proposition 65 enforcement climate by private enforcers. These Proposed Amendments increase the risk of frivolous litigation over whether appropriate warnings were provided. If a company only warns online but does not put a warning on the product label, it risks receiving a notice of violation alleging that the online warning was insufficient because a stand-alone online warning would no longer be a safe harbor method.

These are just examples of the major reasons why the Proposed Amendments cannot be justified as a policy change and therefore should be withdrawn. If OEHHA intends to proceed, and endeavors to justify the change to the safe harbor regulations for online purchases, then the Coalition will be entitled to and hereby request an additional opportunity to comment.

5. OEHHA Has Failed to Analyze the Economic Impact of The Proposed Amendments.

The Proposed Amendments will have a significant adverse economic impact on businesses selling products online and through mobile applications. Those business will be required to provide a second warning on the product label to fall within the safe harbor. OEHHA failed to analyze the economic impact of the Proposed Amendments. See Cal. Gov. Code § 11346.3. OEHHA is wrong when it claims that “[t]he action does not impose any new requirements on private persons or businesses.” 2020 ISOR at p. 8. As discussed above, this is a regulatory change, not a clarification. If it is adopted it will force businesses to modify their existing Prop 65 warning programs to meet the new requirements so that they can remain in the safe harbor.

In conclusion, for the reasons noted above, the Coalition respectfully requests that the proposed amendments to Sections 25602 and 25607 be withdrawn.

Respectfully,



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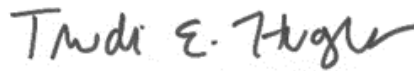
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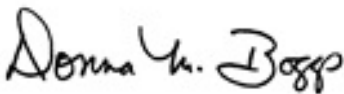
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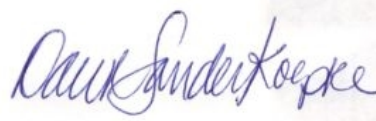
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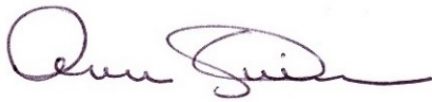
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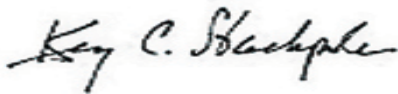
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