



June 13, 2014

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

**RE: Potential Regulatory Action to Expand Proposition 65 Warnings**

Dear Ms. Vela,

On behalf of the U.S. apparel, footwear, travel goods, and fashion accessories industries, the undersigned associations are writing in opposition to the Office of Environmental Health Hazard Assessment (OEHHA)'s pre-regulatory proposal to expand Proposition 65 (Prop 65) warnings.

The undersigned associations are the national trade associations representing the apparel, footwear, travel goods (luggage, leather goods, business and travel accessories, business and computer cases, handbags, backpacks, courier bags and other products for people who travel), and fashion accessories (handbag, belt, small leather goods, glove, umbrella and luggage accessory) companies. These industries directly employ more than 4.1 million U.S. workers, and accounts for more than \$380 billion in retail sales each year. As one of the largest consumer segments in the United States, the footwear, apparel, fashion accessories, and travel goods industries are comprised of companies headquartered in California that represent thousands of jobs in the state. Most others, although not headquartered in California, directly employ thousands of Californians in retail, distribution, design, and other roles.

On May 7, 2013, Governor Brown proposed reforms to Prop 65. This reform would “revamp Proposition 65 by ending frivolous ‘shake-down’ lawsuits, *improving how the public is warned about dangerous chemicals* and strengthening the scientific basis for warning levels.”<sup>1</sup> One aspect of this proposed reform was to “require more useful information to the public on what they are being exposed to and how they can protect themselves.”<sup>2</sup> As put forth, OEHHA’s pre-regulatory proposal is intended to improve the quality of Proposition 65 warnings and provide certainty for businesses subject to the regulation.

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<sup>1</sup> Press Release, Office of Governor Edmund G. Brown, Jr., Governor Proposes to Reform Proposition 65. (May 7, 2013), available at <http://gov.ca.gov/news.php?id=18026>

<sup>2</sup> Ibid

While we welcome the intent behind OEHHA's proposal, we believe OEHHA's proposal, as currently written, undermines the Governor's vision for meaningful Prop 65 reform. Furthermore, the proposal, as currently drafted, would impose significant, onerous, and unnecessary compliance obligations on businesses and result in more frivolous litigation while doing little to improve public safety. As such we offer the following comments:

#### **A. Maintain the "Safe Harbor" Warning Language**

As currently written, Prop 65 requires businesses to provide a clear and reasonable warning before knowingly and intentionally exposing individuals to a list of chemicals that are known to cause cancer, birth defects or other reproductive harm.<sup>3</sup>

To date, OEHHA's adoption of "safe harbor" warning language, which provides guidance for both the methods and content of Proposition 65 warnings for consumer products, is relied upon and frequently used by businesses to comply with the law and protect themselves from frivolous litigation.

OEHHA's proposal to strike the existing "clear and reasonable" warnings regulation eliminates the "safe harbor" warning language, replacing it with mandatory content for Prop 65 warnings and acceptable warning methods. We believe the elimination of the "safe harbor" warning will lead to increased litigation and impose extraordinary compliance cost to businesses.

Currently, the safe harbor warnings for consumer products cover all chemicals and exposure scenarios. As such, the potential for litigation is only possible when the business fails to warn, and a citizen enforcer alleges that the product or the occupational or environmental setting contains a listed chemical at infinitesimal levels or trace amounts.

However, under the draft regulation, the potential for litigation arises not only for failing to warn about one of the twelve specific chemicals listed in the draft, but for other chemicals an enforcer alleges are contained in the product. Likewise, a business's description of chemical routes of exposure, levels of exposure, and actions a person can take to minimize or eliminate exposure can be challenged by enforcers as allegedly insufficient, resulting in costly litigation.

In addition to the increase in litigation, the repeal of the current "safe harbor" warning will impose significant economic cost and compliance burdens on businesses as best demonstrated in following illustrative situation:

To comply with the draft regulation, in every instance in which a warning is required, a business will have to have the product tested by a lab, and provide documentation as to how the product will be used and handled (ie., what type of contact the item will have with the user). The lab in turn, has to develop a specific transference test for that item that considers how many times the product will be handled in a day, what type of contact will it have to the body, how heat or cold effects the contact, and will contact be with children or adults etc. The lab then determines a testing cost for that specific test. Once the test is completed, the results are sent to a toxicologist who will translate that transference information into numbers to that can be compared to the standard. In addition, the toxicologist also conducts risk assessments to provide information to the level of exposure. It is only then, businesses would be able to determine if the product is

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<sup>3</sup> <http://www.oehha.org/prop65.html>

compliant or if there are problems what those problems would be and that is the info that will need to be reported and filed for the product.

The above mentioned process can take at least 30 days and in some instances up to a year to get this testing done for a single product. In conjunction with the timing required, the testing costs will be prohibitive for most businesses.

The undersigned associations believe any proposed reforms to strengthen and restore the intent of Prop 65 must address the crux of the issue that Governor Brown raised in his initial call for reform: abuse by unscrupulous lawyers driven by profit rather than public health. Further, proposed reforms should not impose such extraordinary costs with no demonstration of any improvement to public safety. As such, we strongly object to any language in the proposed regulation that would exacerbate the potential for groundless litigation or imposes undue costs on businesses. As such, the undersigned associations urge OEHHA to maintain the “safe harbor” language as written in regulation.

### **B. Eliminate the GHS Pictogram from Consumer Product Exposure Warning Content**

As proposed, certain consumer products will be required to bear the international health hazard symbol (GHS pictogram). First, while GHS is utilized around the world, the general public has no familiarity with GHS. As such, requiring GHS could actually create more confusion among the general public, rather than less.

Furthermore, while the pictogram can mean carcinogen, mutagenicity, and reproductive toxicity, it also communicates hazards outside the scope of Prop 65, such as respiratory sensitizer, target organ toxicity, and aspiration toxicity.<sup>4</sup> It is reasonable to assume that consumers who research the elements of the GHS pictogram may assume they are being exposed to all the hazards that the pictogram represents.

The undersigned associations believe the use of this symbol will only confuse the public. As such, we urge OEHHA not to move forward with aspect of the proposal.

### **C. Eliminate the Requirement to List Specific Chemicals in the Warning**

OEHHA proposes to require that warnings for exposures to acrylamide, arsenic, benzene, cadmium, chlorinated tris, 1,4-dioxine, formaldehyde, lead, mercury, phthalates, tobacco smoke, or toluene specifically name those chemicals in the warning.

The undersigned associations do not support this amendment as it will lead the public to believe OEHHA has prioritized the above chemicals based on thorough scientific review, when in fact, according to OEHHA’s pre-regulatory draft initial statement of Reasons, the selected chemicals were chosen because they are commonly found in consumer products, commonly understood, and are easy to pronounce. Based on OEHHA’s rationale for identifying specific chemicals in warnings, the undersigned associations are concerned that OEHHA is proposing a significant compliance obligation upon business without a demonstrable scientific basis for the proposal, or

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<sup>4</sup> [https://www.osha.gov/Publications/HazComm\\_QuickCard\\_Pictogram.html](https://www.osha.gov/Publications/HazComm_QuickCard_Pictogram.html)

how such a proposal will further the goals of Prop 65. As such, the undersigned associations urge OEHHA not to proceed with this amendment.

#### **D. Court Approved Settlements**

As proposed, parties subject to court approved settlements prescribing warning content and methods entered prior to January 1, 2015 are exempted from the proposed requirements.

The undersigned associations supports the court approved settlements amendment to the extent that it provides certainty for those parties to litigation that have agreed on a given method or content for warnings.

However, the draft does not go far enough in acknowledging the numerous businesses that voluntarily adopted court approved settlement limits and took steps to comply with Prop 65 by providing their suppliers with specifications so that the ingredients in their products avoid or significantly limit exposure to Prop 65 chemicals that have been the subject of settlements. This “quiet compliance” approach is acknowledged on the State of California Attorney General website as an example of Prop 65’s success in protecting consumers from toxic chemicals.<sup>[1]</sup> Indeed, we publish a chart showing the limits of prior limits for just this purpose. Therefore, the undersigned associations urge OEHHA to include a provision in the proposal that recognizes this voluntary compliance and creates a mechanism so that those businesses can claim the 1/1/2015 exemption.

#### **E. Lead Agency Website**

As proposed, all businesses that provide warnings would be required to submit a detailed report to OEHHA containing 11 items of information for each Prop 65 warning. By all accounts, this provision is a substantial change to the existing regulation, and would impose immense costs and administrative burdens on businesses. We note- that nowhere in the proposal does OEHHA provide a cost benefit analysis to consider economic and human resources burden for compliance. Nor does OEHHA provide any evidence that imposing this immense cost will translate into significantly improved public safety. The undersigned associations strongly recommend OEHHA remove the website provision until it demonstrates the tremendous costs that would be imposed by the proposed changes would be significantly outweighed by improvements to the safety of California consumers.

#### **F. Substantial Changes To Warning Labels Without Adequately Educating the Public Will Result in Confusion**

As previously stated, one aspect of the proposed Prop 65 reform is to “require more useful information to the public on what they are being exposed to and how they can protect themselves.

The undersigned associations acknowledge that, as written, the pre- regulatory draft proposes to provide a substantial amount of information and detail to the public regarding chemical

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<sup>[1]</sup> <http://oag.ca.gov/prop65/faq>

exposure, however OEHHA fails to explain if and how the public will actually be educated on the meaning of the changes.

At best, according to pre-regulatory draft Initial Statement of Reasons, OEHHA states, “ it is aware that making significant changes to the regulations will require some retooling by businesses in order to comply with the new provisions and **some education for members of the public.**

Given the timeline for implementation, if the pre-regulatory draft is adopted, please explain how OEHHA plans to educate and raise awareness among the public (not only Californians) regarding the changes to Prop 65 warning labels?

The undersigned associations believes the substantial changes to Prop 65 warning labels without adequately educating the public regarding the meaning of the changes will result in confusion, and therefore cannot support this provision of the draft.

## CONCLUSION

The undersigned associations again wish to express support for the original intent of California Prop 65, which sought to ensure that California's families, workers, and businesses were protected by meaningful product safety protections. The undersigned associations members are committed to consumer product safety and working as partners with OEHHA on furtherance of shared goals of risk reduction and hazard avoidance. Therefore, the undersigned associations urges OEHHA to withdraw the proposal and work with the undersigned associations and all other stakeholders to develop and implement reforms that would restore Proposition 65 to its original intent.

Thank you for your time and consideration in this matter. Please contact Danielle Abdul of AAFA at 703.797.9039 or by email at [dabdul@wewear.org](mailto:dabdul@wewear.org) if you have any questions or would like additional information.

Sincerely,



Steve Lamar  
AAFA  
Executive Vice President



Sara Mayes  
President  
Fashion Accessories Shippers Association (FASA)

*Michele Marini Pittenger*

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