NORTON ROSE FULBRIGHT

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VIA PORTAL: https://oehha.ca.gov/comments

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Re: Comments on Proposed Amendments to Title 27, Article 6, Clear and Reasonable Warnings - Safe Harbor Methods and Content

Dear Ms. Vela:

These comments are submitted on behalf of California Retailers Association. CRA appreciates the opportunity to comment on OEHHA's Notice of Proposed Amendments to Title 27, Article 6, regarding short-form warnings for consumer products.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA's mission is to provide effective representation of its diverse membership base through legislative and administrative advocacy.

CRA joins in the California Chamber of Commerce Coalition comment letter regarding the proposed amendments. We write separately to address additional issues specific to retailers.

Under the proposed amendments, retailers will bear a disproportionate share of the burden of compliance for online sales of consumer products. Much of this will occur as a result of the work that will be required in order to change online warnings that are provided. As a practical matter, retailers will not have the ability to take advantage of the two-year grace period after the effective date of the amendments, as they will need to be able to provide the new warnings whenever their suppliers ask them to do so, consistent with the retailer liability scenarios outlined in section 25600.2(e)(4) (requiring retailers to post online warnings provided to them by suppliers). Many retailers will have to reprogram their websites in order to accommodate the new warning language, and if they are unable to immediately do so, they may be exposed to liability if they continue to provide warnings that a supplier no longer supports, and which may be challenged by enforcers. In order to minimize the burden on retail sellers (Health & Saf. Code § 25249.11(f)), if OEHHA proceeds with this rulemaking it should clarify that retailers may continue to provide the current safe-harbor short-form warning during the grace period, even if their suppliers ask them to change to the new short-form warning.

The proposal effectively bans the use of any online short-form warning.[1] If this proposal is adopted, retailers may be exposed to enforcement litigation for products that are listed for sale on their online platforms, if suppliers who previously provided short-form warnings for the products do not provide direction on new or different warnings. If a retailer does not obtain new warning language from a supplier, it will be unable to determine what chemicals to list. In order to avoid enforcement actions, retailers will have to identify all such products, and either (i) remove them from online sale in California (assuming that they have the capability of doing so), (ii) leave them for online sale with the old short-form warning, or (ii) try to figure out what warning should be given for unknown chemicals in each product. All three scenarios pose a real risk of litigation costs and potential liability. OEHHA should ensure that any revisions to the proposed short-form warning do not leave retailers holding the bag when they don't hear from their suppliers.

The risk of litigation over online warnings is not speculation. There has been a spate of enforcement litigation against retailers alleging the lack of – or inadequate – online warnings, where products have been labeled with clear and reasonable warnings, and retailers have not been provided with any warning language for online sales by their suppliers. OEHHA's proposal to enshrine in the safe harbor a requirement to require both on-product and online warnings, will be being treated by many enforcers as a mandatory, and OEHHA should clarify that it is not.[2] An on-product warning complies with Proposition 65. (See Health & Saf. Code §25249.11(f) ["'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 . . . ."].)

The current proposal restricts short form warning to on-product use only. OEHHA has not offered any rationale for removing online short-form warnings from the safe harbor in its Initial Statement of Reasons. The chances for error, and potential retailer liability, will undoubtedly increase by requiring a different warning for online sale of a product that is labeled with the short-form warning. Particularly where the regulations already allow manufacturers to require retailers to bear the burden of providing warnings if they provide warning materials to retailers for <u>both</u> in-store and online sales, retailers should not be forced to manage two different warnings for the same product. OEHHA should withdraw the proposed language limiting short-form warnings to product labeling. It should further provide an exemption from retailer liability for alleged failure to provide a warning so long as *either* the retailer provides an online warning or the product or its labeling bears a warning and the retailer has not been provided warning language by the supplier.

OEHHA's predecessor, the Health and Welfare Agency, said over 30 years ago, "[n]othing requires that each business conduct a scientific analysis of all its products. Unless a business has reason to know that the product contains a listed chemical, no testing is needed, and no warning is necessary." (Revised Final Statement of Reasons, 22 California Code of Regulations, Division 2, Section 112601, November 1988, at p. 32.) The effect of the proposed amendments would be to require manufacturers and importers to engage in such testing, in order to protect themselves

[1] Proposed § 25603(b) allows for short-form warnings "on the label" and the proposed revisions to § 25602(c) remove the current provision allowing short-form online warnings when the product is labeled with a short-form warning.

[2] As the Chamber Coalition letter notes, the concept of requiring *two* warnings is inconsistent with the language of Proposition 65, and should be rejected for that reason alone. (*Association for Retarded Citizens v. Department of Developmental Services*, 38 Cal.3d 384, 391 (1985).)

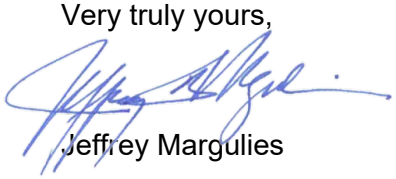
and their customers from Proposition 65 enforcement litigation. Many of our suppliers are exempt from Proposition 65 or are otherwise very small businesses, and use the current short-form warning to avoid getting themselves and their retailers caught up in litigation that they cannot afford to defend or settle. OEHHA's proposal makes retailers and small suppliers more vulnerable to such lawsuits. The problem that OEHHA is trying to solve – the alleged indiscriminate, prophylactic use of short-form warnings – is a direct result of overzealous, economically motivated private enforcers who bring cases with little or no merit to force settlements with companies who wish to avoid crushing litigation costs. The current short-form warning, because it does not require the identification of chemicals, allows small and exempt suppliers to avoid the Hobson's choice of having to either engage in expensive testing that HWA specifically said they did not need to undertake, or defend or settle unmeritorious cases that are too expensive to litigate. If OEHHA proceeds with this rulemaking, retailers will bear the burden of being left to deal with even more cases that their suppliers cannot afford to litigate or settle.

CRA also disagrees with OEHHA's assertion that there will not be substantial compliance costs associated with the proposed amendments. As noted above, many retailers will have to reprogram their websites in order to accommodate the revised warnings. Many retailers have designed their online platforms to minimize the risk of mistakes and confusion in providing warnings, including restricting what warnings can be provided or how information is collected from suppliers. Some retailers require the current short-form warnings due to space, cost, and logistic reasons. If the proposed amendments are adopted, many retailers will incur significant costs in reprogramming in order to accommodate the new short-form warnings.

There will also be substantial costs associated simply with changing warnings for existing products in order to comply with the proposed amendments. In the course of the prior rulemaking on this issue in 2021, one of our members estimated that they have approximately 100,000 items on their e-commerce platform that currently carry a short-form warning (about one-third of all items that carry Proposition 65 warnings). Based on a project associated with remediating online Proposition 65 warnings, that member estimated that it would take approximately seven minutes per product to change from the current short-form warning to an online warning compliant with the proposed regulation. For this particular retailer, this project would require approximately 12,000 hours, or 1,500 eight-hour days, which represents a cost of $192,000 assuming the current California minimum wage of $16/hour. Considering the size of the entire retail community serving California consumers with online sales, the costs simply to change the warning for existing products would be considerable, well into the millions of dollars. And for retailers who cannot determine what warning to provide, or who decide simply to restrict products for sale in California because of the uncertainty about their warning status, that is often a manual and costly process, far more difficult than changing a warning.

CRA supports OEHHA's goals of minimizing *unnecessary* prophylactic warnings and better informing consumers about potential exposures to listed chemicals. However, we believe that this proposed rulemaking does not materially further either goal, imposes significant costs on retailers and others in the regulated community, and creates more potential liability for retailers from meritless enforcement actions. For these reasons, CRA joins in the CalChamber Coalition's request that OEHHA withdraw the proposed amendments.

Very truly yours,



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JBM