June 13, 2014

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

RE: Proposition 65 Warning Regulations Comments

Dear Ms. Vela:

The California New Car Dealers Association (CNCDA) is a statewide trade association that represents the interests of over 1,100 franchised new car and truck dealer members. CNCDA members are primarily engaged in the retail sale and leasing of new and used motor vehicles, but also engage in automotive service, repair and part sales.

We are writing to you regarding the pre-regulatory draft proposed regulations addressing the “clear and reasonable warnings” mandated by Proposition 65. CNCDA and its members thank you for the opportunity to provide comments to OEHHA. This letter addresses specific concerns unique to CNCDA’s members. However, CNCDA is also a signatory to the California Chamber of Commerce’s comments and incorporates those comments by reference herein. Further, CNCDA will provide additional and more highly detailed comments if and when OEHHA begins the formal rulemaking process.

We have serious concerns with the proposal as written. First, the proposal is unnecessarily punitive to industries that currently and successfully comply with the requirements of Proposition 65, as it will require them to abandon well-established warning programs for a new and untested system. Second, the proposal is overly prescriptive and needlessly burdensome on franchised dealers. Third, the proposal’s use of the term “will expose” is potentially false and misleading, especially in the context of automobiles.

Further, CNCDA Proposition 65 compliance program used upon by California dealers is successful and comprehensive. In light of the issues with the current proposal and based on the unique characteristics of the automobile sales and service industry, CNCDA believes that its current warning program should be adopted by OEHHA with few changes as an industry-specific warning program.

It is CNCDA’s hope that OEHHA will extend its timeline for proposing draft regulations as there are numerous issues with the current proposal. Most importantly, meaningful solutions will emerge with additional time and collaboration with effected industries and their representatives. CNCDA is committed to working with OEHHA to reach such
solutions and hopes this letter is viewed as an invitation to work together towards an approach that furthers the intent of Proposition 65 without confusing consumers and unnecessarily burdening CNCDA members.

**CNCDA’s Proposition 65 Compliance Program Works**

CNCDA currently promotes to its members a Proposition 65 compliance program that it voluntarily developed that is both comprehensive and successful. By way of background, in 2002, private plaintiffs filed a large number of Notices of Violation against California franchised car dealers. These Notices were without merit; no complaints were filed by the plaintiffs against any franchised car dealer and no franchised car dealer in California entered into any settlement, in or out of court, with the plaintiffs.

CNCDA nonetheless worked with experienced Proposition 65 counsel to develop a comprehensive system of compliance for its members. CNCDA conducted training workshops across the state after debuting the compliance program. Since adoption of the program in 2004, no California franchised dealer, to CNCDA’s knowledge, has received a Notice of Violation of Proposition 65.

Attached to this letter are copies of the warnings CNCDA recommends that dealers adopt. These are for use as:

1. a sticker on vehicles to provide warnings to consumers (Attachment A);
2. a sign and language printed on service order documents and/or receipts to provide warnings regarding the possible exposures caused by vehicle service, maintenance and cleaning as well as those that may be caused by handling used vehicle parts (Attachment B);
3. a sign at the entrance to all dealership buildings and customer waiting areas to provide warnings regarding possible exposures, such as vehicle emissions and tobacco smoke (Attachment C); and
4. employee acknowledgements of general and specific exposures that may occur during the course of employment (Attachment D).

These warnings already contain many of the elements that OEHHA is proposing to require. Several specific chemicals are highlighted in the warnings, including lead, formaldehyde, acetaldehyde, acrylamide, tobacco smoke, and exhaust emissions. The warnings also contain statements as to how to avoid or minimize exposure, such as to: (a) “work in a well ventilated area”; (b) avoid “smok[ing], drink[ing] or eat[ing] while working”; (c) “wash your hand when finished or when taking a break”; and (d) “follow all manufacturer instructions pertaining to proper use and maintenance of motor vehicles and vehicle components.” Finally, most of the warnings direct individuals to OEHHA’s website for more information regarding Proposition 65.
Despite the fact that CNCDA’s compliance program is successful and already reflects many of the elements proposed by OEHHA, it would likely fall far short if the current pre-regulatory proposal is adopted. Perversely, it would not benefit from the proposed grandfathering of court approved settlements as the program was the result of a voluntary (and expensive) compliance effort, not a concession in litigation. So while these warnings are closer to OEHHA’s pre-regulatory proposal and more comprehensive than the vast majority of court approved settlements, they would not comply with the pre-regulatory proposal in part because no California franchised dealer has agreed to settle a Proposition 65 case.

**The Pre-Regulatory Proposal is Overly Prescriptive and Needlessly Burdensome**

Our concerns with the pre-regulatory proposal straddle several different areas because CNCDA’s members engage in a multi-faceted business. Franchised car dealers typically sell both new and used automobiles, which are complex durable goods with literally thousands of parts that will differ across make, model, model year, and model trim. They also service vehicles, sell replacement parts, and return used components to the vehicle’s owner upon request. Each of these activities raises complex issues for compliance with the pre-regulatory proposal.

The California Chamber of Commerce comments letter addresses in greater detail many of the specific concerns these activities raise. Below is a summary of these issues and how they relate to franchised car dealers.

First, automobiles are complex durable goods. The average vehicle contains thousands of unique components manufactured by suppliers from around the world. There are also numerous listed chemicals present in these components. The vast majority of components that contain listed chemicals are “working parts” and are not accessible from the passenger compartments or storage areas. OEHHA should therefore permit a single, general warning for automobiles in light of the complex nature of these products.

Second, the pre-regulatory proposal is nearly impossible to comply with in used car sales. As with all resellers, dealers do not have the benefit of receiving product information directly from the manufacturer with used vehicles. This is especially true for older models and sales of off-brand makes of vehicles at a franchised dealer (e.g. sale of a Toyota at a franchised Ford dealer). Further, many used vehicles contain non-factory replacement parts, accessories, and servicing products that may contain listed chemicals not present in the vehicle when sold new. As a result, each used vehicle would arguably require a unique warning and may require testing of each used vehicle and its thousands of parts for a dealer to provide a compliant warning. This is simply untenable.

Finally, replacement parts sold to consumers or installed in serviced vehicles pose additional problems. One of the most important roles franchised dealers play in their communities is as service facilities, especially after a vehicle is recalled for a safety issue.
This proposal would put that community service in jeopardy. Franchised dealers use and sell parts that are sometimes 20 years of older, as they service vehicles for their entire useful life. These parts may require new content and exposure testing to comply with the pre-regulatory proposal. This is especially burdensome for franchised dealers who service discontinued makes of vehicles, such as Saturns and Pontiacs.

The best way to address these issues is to allow automobile dealers to continue to provide the general warning listed above on vehicles and for service parts.

**The Proposed Mandatory Warning Language is Potentially False and Misleading**

CNCDA takes particular issue with the pre-regulatory proposal that the mandatory warning require the phrase “will expose....” As noted in the California Chamber of Commerce comments letter, this language is potentially false when it is applied to a product that only “may” expose the consumer to a listed chemical. The warning requirement is not limited to those products that “will expose” a consumer to a listed chemical. Businesses must provide a warning for an exposure that is the result of a “reasonably foreseeable use of a consumer good,” including exposures that only occur if the consumer engages in specific activities. Cal. Code Regs. Tit. 27, art. 1, § 25602(b).

Automobiles and replacement parts are a particularly salient example of why this phrase is a problem, as consumers reasonably and foreseeably interact with vehicles in very different ways. For example, some consumers service and maintain their vehicles at home, accessing a wide variety of the working parts of a vehicle. Their exposures will be very different from those of consumers who rarely or never open the hood of the vehicle and rely on professionals to service and maintain their vehicles. The phrase “will expose” is false and misleading to many consumers who will never experience an exposure to a chemical present in a component that is deep within the engine block, even if it is reasonably foreseeable that other consumers will do so.

Further, the “will expose” language may have the unintended consequence of diluting important safety information. Consumers may substantially reduce and even eliminate their exposure to a variety of listed chemicals by following product manufacturer instructions and general safety advice. The “will expose” term appears to state that an exposure is a foregone conclusion. Consumers may be less inclined to follow safety measures if they perceive that they will experience an exposure to a listed chemical no matter what they do. This result is against public policy.

**Conclusion**

Despite CNCDA’s many concerns with the pre-regulatory proposal, we remain interested in working with OEHHA to adopt general, industry-specific warnings that further the purpose of Proposition 65. In fact, we are confident that with additional time and collaboration, this goal can be achieved.
We thank you for considering our comments and look forward to working with you moving forward.

Sincerely,

[Signature]

Monica J. Baumann
Director of Legal and Regulatory Affairs
California New Car Dealers Association
Attachment A
WARNING

Motor vehicles contain chemicals known to the State of California to cause cancer and birth defects or other reproductive harm. These chemicals are contained in many vehicle components and replacement parts, vehicle fluids, and paints and materials used to maintain vehicles, including, but not limited to, fuel, oil, batteries, brakes, and wheel balancing weights. In addition, motor vehicles emit engine exhaust and fumes, and when serviced, cleaned, or maintained, generate used oil, waste fluids, fumes, grease, grime, and particulates from component wear, which contain chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

Attachment B
WARNING

Motor vehicles contain chemicals known to the State of California to cause cancer and birth defects or other reproductive harm. These chemicals are contained in many vehicle components and replacement parts, vehicle fluids, and paints and materials used to maintain vehicles, including, but not limited to, fuel, oil, batteries, brakes, and wheel balancing weights. When you service, clean or maintain your car, you will be exposed to listed chemicals contained in used oil, waste and replacement fluids, fumes, grease, grime, touch-up paint, certain replacement parts, and particulates from component wear. When we service your car, we will return used components to you upon request. Used parts and components contain chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

To minimize your exposure when servicing, maintaining or cleaning your vehicle: 1) work in a well ventilated area; 2) do not smoke, drink or eat while working; 3) wash your hands when finished or when taking a break; and 4) follow all manufacturer instructions pertaining to proper use and maintenance of motor vehicles and vehicle components.

Attachment C
WARNING

ALL AREAS OF THIS DEALERSHIP CONTAIN CHEMICALS KNOWN TO THE STATE OF CALIFORNIA TO CAUSE CANCER AND BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM. THESE CHEMICALS ARE CONTAINED IN VEHICLES AND PARTS AND ACCESSORIES OFFERED FOR SALE AND IN SOME OF THE PRODUCTS AND MATERIALS USED TO MAINTAIN THE PROPERTY, AND IN EMISSIONS, FUMES, AND SMOKE FROM BUSINESS OPERATIONS, EMPLOYEE AND GUEST ACTIVITIES, INCLUDING, BUT NOT LIMITED TO, THE OPERATION AND SERVICING OF MOTOR VEHICLES, AND THE USE OF TOBACCO PRODUCTS.

(POSTED IN ACCORDANCE WITH PROPOSITION 65, CALIFORNIA HEALTH AND SAFETY CODE §25249.5 ET SEQ.)
Attachment D
Like all businesses in California, our business is subject to the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65. The key provisions of this law: 1) require businesses exposing any individual to listed chemicals to warn the individual; and 2) prohibit discharging listed chemicals into any source of drinking water. For more detailed information about Proposition 65, please contact California’s Office of Environmental Health Hazard Assessment website: www.oehha.org. A complete and current list of the approximately 800 chemicals that are listed can be downloaded from the site.

Proposition 65 Exposure Warning. While many chemical exposures are associated with industrial activities, everyday items, even the air we breathe and the food we eat, routinely contain Proposition 65-listed chemicals. These chemicals are listed for one or more hazard characteristics: chemicals known to the State of California to cause cancer, and chemicals known to the state of California to cause birth defects or other reproductive harm. This notice provides information and warnings specific to exposures that you will encounter at this dealership. In many instances, we do not have information specific to this dealership. Instead, we have relied upon experts in this field to tell us where Proposition 65 exposures may occur. For other exposures to listed chemicals, enough is known to identify specific areas where exposures occur.

Motor vehicle – related exposures. Gasoline and diesel engine exhaust contain many Proposition 65-listed chemicals including benzene and carbon monoxide. Enclosed or partially enclosed spaces, such as service bays, garages, parking structures, can concentrate exhaust fumes, increasing exposure to these chemicals. At this dealership, exposure to engine exhaust is likely in all areas, both indoor and out, due to the presence of engine exhaust in the ambient air from dealer operations, adjacent streets and parking areas. In addition, many vehicle components and replacement parts, vehicle fluids, touch-up paints and materials used to service vehicles, contain listed chemicals, including, but not limited to, fuel, oil, batteries, brakes, and wheel balancing weights. When you operate, service, clean, or maintain a motor vehicle you will generate and be exposed to listed chemicals contained in used oil, waste fluids, fumes, grease, grime, and particles from component wear.

Second Hand Tobacco Smoke. Tobacco smoke is a listed chemical and it also contains many chemicals that are known to cause cancer and/or birth defects or other reproductive harm. Smoking is permitted in certain areas of the dealership.

Furnishings, Office Supplies and Electrical Components. Office furnishings, including furniture, carpeting, power cords, computers, printers, copiers, and carbonless paper, contain a number of Proposition 65 listed chemicals, including lead, formaldehyde and acetaldehyde. These listed chemicals are known to the State of California to cause cancer and/or birth defects and other reproductive harm. In addition, various common items made of brass (such as keys) or plastic may expose you to listed chemicals.

First-Aid Supplies. Certain first aid supplies, such as pain relievers and stomach coating medications, that contain aspirin, pink bismuth, attapulgite, and/or petroleum jelly, will exposure you to Proposition 65 listed chemicals.
Food and Beverages (vending machines and company events). Food and snacks are sold in vending machines and may be provided from time-to-time at company-sponsored events. Frying or baking at high temperatures produces acrylamide in certain foods, such as chips and French fries. Broiling or barbecueing meats and fish produces Proposition 65-listed chemicals that can cause cancer. Chocolate and other natural ingredients of foods contain listed chemicals including lead. Drinking alcoholic beverages may increase cancer risk and, during pregnancy, can cause birth defects.

Vehicle Service Exposures. Service technicians and mechanics are exposed to solvents, fluids, oils, fuel, worn car components, engine exhaust, batteries, brakes and brake pads, lead wheel balancing weights, grease, grime and other items that contain many chemicals known to the state of California to cause cancer and birth defects and other reproductive harm. Employees should consult the material safety data sheets and package instructions and follow recommended handling and safety procedures.

As a daily reminder of Proposition 65 exposures at this dealership, we have posted the following sign at the prominent locations throughout our facilities.

**WARNING**
ALL AREAS OF THIS DEALERSHIP CONTAIN CHEMICALS KNOWN TO THE STATE OF CALIFORNIA TO CAUSE CANCER AND BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM. THESE CHEMICALS ARE CONTAINED IN VEHICLES AND PARTS AND ACCESSORIES OFFERED FOR SALE AND IN SOME OF THE PRODUCTS AND MATERIALS USED TO MAINTAIN THE PROPERTY, AND IN EMISSIONS, FUMES, AND SMOKE FROM BUSINESS OPERATIONS, EMPLOYEE AND GUEST ACTIVITIES, INCLUDING, BUT NOT LIMITED TO, THE OPERATION AND SERVICING OF MOTOR VEHICLES, AND THE USE OF TOBACCO PRODUCTS.

To minimize your exposure to Proposition 65 chemicals, we urge you to follow all manufacturer instructions pertaining to proper use of motor vehicles, vehicle components, materials and supplies. If you have a question about a particular activity, please contact your supervisor for a material safety data sheet or other information. Always wash your hands before eating.

For additional information concerning this notice, please contact [insert name of supervisor/manager] at [Telephone]. Your cooperation and effort is required.

__________________________
Type name of Supervisor
Title

Received and Understood By: ________________________________
(Name of employee)
Dated: ________________________________