June 12, 2014

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P. O. Box 4010
1001 I Street
Sacramento, CA 95814

RE: PROPOSITION 65 WARNING REGULATION

Dear Ms. Vela:

The California Retailers Association and the California Grocers Association submit these comments on OEHHA’s March 7, 2014 draft potential regulatory language for a revised Proposition 65 warning regulation.

We generally welcome OEHHA’s recognition of the special burden imposed on retailers by the historical private approach to enforcement, and the long-overdue attempt to provide some regulatory reinforcement of the statutory directive that warning responsibility should be placed first and foremost on suppliers. While the regulatory draft takes a step in the right direction, it could be improved by clarifying that warning responsibility should fall upon suppliers and adding provisions to eliminate the ongoing abusive litigation routinely brought against retailers, who lack the practical knowledge of chemicals in the products manufactured by others.

Allocation of Warning Responsibility and Reduction of Abusive Litigation

Proposed Section 25606(a) provides that the “primary responsibility” for providing Proposition 65 warnings lies with “the product manufacturer, producer, distributor or packager. The retail seller is required to cooperate with the manufacturer, producer, distributor or packager of the product to ensure that the warning is provided to the consumer prior to exposure.” While retailers are not unwilling to facilitate manufacturers and distributors in their providing Proposition 65 warnings, because proposed Section 25606(b) states that retailers have the primary responsibility for “placement and maintenance of warnings other than warnings provided on product labels,” the regulation might invite manufacturers who do not want to label their products to simply send batches of point-of-sale warnings to retailers, and
foist the warning duty on retailers without obtaining the retailers’ consent to posting warnings. This is an anomalous result of a proposed regulation intended to ease the burden on retailers.

Moreover, the current language of the regulation would not meaningfully reduce litigation involving retailers, as the language is susceptible to interpretation and would undoubtedly be the subject of factual disputes over such terms as whether this is one of “most cases”, and what is the meaning of the terms “primary responsibility” or “cooperate” in a particular factual scenario.

Thus, a bright-line approach is needed. Retailers are responsible for providing warnings, assuming they are otherwise required by law, for (i) private label products,1 (ii) products for which they consent to provide warnings; or (iii) products that they continue to sell after receiving a 60-day Notice where the manufacturer or distributor does not arrange for warning and where the retailer does not timely cure the violation (see below). In all other circumstances, the warning responsibility lies with the manufacturer, producer, distributor, or packager.

We also request that OEHHA consider revisions to Section 25903, regarding pre-suit notices of violations to retailers. This is necessary because private enforcers often seek to sue retailers over all products within a “type” or category of product (e.g., “handbags,” or “footwear”), despite the fact that such products may be sourced from dozens or hundreds of separate vendors, and made of a variety of materials, not all of which may contain the chemical at issue. If these revisions are not made, retailers would still be subject to “prospecting” lawsuits, in which an enforcer identifies one vendor’s products, and then requires the retailer to respond to discovery over all of the products within the “type” identified in the Notice, despite not having any evidence that other suppliers’ products contain the listed chemical identified in the Notice. It is precisely the burden associated with these fishing expeditions that gives plaintiffs leverage to secure settlements with unfounded claims.

In order to give effect to the instruction that the retailer is not responsible for the failure to provide warnings where they have no knowledge of an exposure, all retailers should be given the opportunity to cure an alleged violation by removing a product from sale or providing a warning within ninety days following receipt of a pre-suit notice. We believe that these proposed changes to Sections 25607 and 25903 are within the authority granted to OEHHA under Health & Safety Code Section 25249.11(f).

Burden Associated with the Website

We agree that a website maintained by OEHHA could provide important and meaningful information to consumers looking for more information than can be contained on a product label or point-of-sale sign. However, we are concerned that the information required under Section 25604 would require retailers who provide a warning to undertake an assessment of the presence of 800+ chemicals in the tens or hundreds of thousands of SKUs that they carry at any one time, in order to be able to determine which chemicals are actually present in the

---

1 We have proposed language to define such products as those that are sold under a brand or trademark owned or licensed by a retailer or affiliated entity. Similar language was adopted in settlements of enforcement actions, such as Center for Environmental Health v. Lulu NYC, et al., Alameda Superior Court no. RG09-459448
product, the anticipated route(s) of exposure, the anticipated level of exposure, and actions that can be taken to minimize or eliminate the exposure. As the Act – and the proposed regulation – recognize, retailers typically do not know and even with the exercise of diligence can often not find out, whether listed chemicals are present in a product at actionable levels. And, one can easily envision different businesses providing different information about identical products, given their different level of knowledge about the product or chemical. We are particularly concerned that allowing a private right of action where an enforcer can dispute the content of a retailer’s warning will create a plethora of litigation over the adequacy of the website disclosure where a compliant warning has been provided.

We believe that a far better approach is for OEHHA to develop a website that focuses on the major chemicals present in consumer products (one need only search the Attorney General’s 60-day notice website) and provide consistent information about chemicals found in various types of consumer products. All of the concerns about determining the information to be submitted to the website, its potential for liability, and the cost of submitting the level of detail required, are resolved if OEHHA is the source of information provided for consumers per the proposed website signage referral.

**Disclosing Supplier Identities**

The provision in Section 25606(b) requiring retailers to disclose the name and contact information for the manufacturer, producer, distributor or packager should be limited to situations where the product is not packaged with such information (that is generally required for the vast majority of consumer products, which are subject to UPLR and FPLA). Moreover, the requirement should not include private label products, which are distributed by retailers directly and where the identity of the suppliers is typically trade secret and not necessary. The Lead Agency and Attorney General have the ability to obtain information in retailer possession regarding the identity of manufacturers and suppliers through existing means.

**Online Warnings**

We have identified several issues related to provision of warnings for products sold online. First, we request that OEHHA clarify that the requirement in Section 25607.1(a)(2) is simply a description of how to provide an online warning, and does not require online sellers to provide an online warning for products that are already labeled with a compliant warning. Such a requirement would put a substantial and unnecessary burden on online retailers to review labeling for each product to determine whether it contains a Proposition 65 warning, and to then ensure that the warning is reproduced on a website (and all appropriate information is provided to OEHHA if not provided by the manufacturer). Many online retailers do not even take possession of products that are sold to consumers, which are often drop-shipped directly by manufacturers, or may actually be sold by a third party who has listed the product on the retailer’s website.

Second, we believe that it is important to preserve the current practice of many retail online sites to provide a link to a Proposition 65 warning on the product display page. Changing online platforms to provide a warning during checkout only to the those customers with California addresses typically requires rewriting a website’s architecture, and consumers are
already familiar with click-through Proposition 65 warnings. We believe that this approach would not run afoul of the decision in ICC v. Lungren, as consumers are not required to go “searching” for information—the warning is simply a hyperlink away.

**Technology Catch-All**

We believe that the technology catch-all of Section 25607.1(a)(5), which requires that the warning must be provided “while the consumer is making a purchase,” is in need of some clarification. A warning by QR code reader, for example, while the consumer is standing in front of the product in the store aisle, would be appropriate, yet might not be considered “while the consumer is making a purchase.” Moreover, a cash register receipt warning, when coupled with a sign directing consumers that products subject to a warning are identified on their receipt, is an ideal way for some retailers to be able to take advantage of sophisticated point-of-sale systems to ensure that non-label warnings are given that are product-specific. Section 25607.1(a)(5) should specifically allow for such warnings.

We have developed draft language to implement our suggestions, which you will find attached.

On behalf of the members of both the California Retailers Association and the California Grocers Association, we thank you for your consideration of our comments and suggestions. Should OEHHA decide to pursue issuing these warning regulations, we pledge to work with you and hope that you will allow sufficient time for the back-and-forth of analysis and commentary that is needed in development of substantive regulations such as these.

Sincerely,

Pamela Boyd Williams  
Executive Vice President  
California Retailers Association

Keri Askew Bailey  
Senior VP, Government Relations  
California Grocers Association
CRA/CGA Proposed Revisions to the Regulatory Draft

Section 25606

(a) In most cases, except in the case where a retail seller is selling a product under a brand or trademark that is owned or licensed by the retail seller or affiliated entity, or where the retail seller has consented to provide warnings other than warnings provided on product labels, providing clear and reasonable warnings for consumer products, including foods, is the primary responsibility of the product manufacturer, producer, distributor or packager. To the extent that the retail seller has consented to provide warnings other than warnings provided on product labels, the retail seller is required to cooperate with the manufacturer, producer, distributor or packager of the product to ensure that the such warning is provided to the consumer prior to exposure.

(b) Except in the case where (i) a retail seller is selling a product under its own in-house brand or trademark that is owned or licensed by the retail seller or affiliated entity label, (ii) a retail seller has consented to provide warnings other than warnings provided on product labels, (iii) a retail seller has offered a consumer product for sale after having been informed by the manufacturer, producer, distributor or packager that the consumer product requires a warning, or (iv) after having received a pre-suit notice of violation pursuant to section 25903 and having not cured the violation pursuant to section 25607(b), any consequences for failure to comply with this article shall be the primary responsibility of the manufacturer, producer, distributor or packager of the consumer product, provided that the retail seller makes reasonable efforts to post, maintain, or periodically replace the warnings provided. The placement and maintenance of warnings other than warnings provided on product labels shall be the primary responsibility of the retail seller. The retail seller shall disclose the name and contact information for the manufacturer, producer, distributor or packager of the consumer product not sold under a brand or trademark that is owned or licensed by the retail seller or affiliated entity, to the extent such information is available and is not disclosed on the labeling or packaging of the consumer product, to the Lead Agency, the Attorney General and any member of the public upon request.

Section 25903(b)(2)(D):
(D) For notices of violation of Section 25249.6 of the Act involving consumer product exposures, the name of the consumer product or service, or the specific type of consumer product or services, that cause the violation, with sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged. The identification of a chemical pursuant to subsection (b)(2)(A)4. must be provided for each product or service identified in the notice. For notices of violation served on a retail seller of a consumer product that is not sold under a brand or trademark that is owned or licensed by the retail seller or affiliated entity, the notice must identify the manufacturer, distributor, importer, or supplier of the consumer product, if reasonably available to the person serving the notice, and shall not be construed to provide standing for an action to enforce the violation alleged in the notice as to consumer products supplied by any other manufacturer, distributor, importer, or supplier.

Section 25607

(a) A retail seller with fewer than 25 employees shall have a limited opportunity to cure a minor violation of this Article such as the short-term absence of a sign or other warning materials that had been previously provided, inadvertent obstruction of a warning label or sign, or the interruption of an electronic device due to software problems or internet connectivity issues. The opportunity to cure only exists where the retail seller was previously in compliance with the requirements of this Article and the violation is:

(1) Not the result of intentional neglect or disregard for the requirements of this Article, and

(2) Not avoidable using normal and customary quality control or maintenance, and

(3) Corrected within 24 hours of discovery or notification, or within 14 days where software or equipment must be repaired or replaced, and

(4) Not recurrent.

(b) A retail seller shall have an opportunity to cure an alleged violation of this Article following receipt of a pre-suit notice of violation pursuant to section 25903, provided that the alleged violation is:
(1) With respect to a consumer product identified in a pre-suit notice of violation that is not sold under a brand or trademark that is owned or licensed by the retail seller, and

(2) Not the result of intentional neglect or disregard for the requirements of this Article, and

(3) Corrected by removing the consumer product from sale in California or providing warnings that comply with this Article within 30 days of receipt of the pre-suit notice of violation.

(c) Except as provided in subsection (cd), a retail seller that cures an alleged minor violation in compliance with this section shall not be liable for the violation under Health and Safety Code section 25249.6.

(cd) Nothing in this section shall prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action pursuant to Health and Safety Code section 25249.6.

Section 25607.1(a)(2), (5)

(2) For internet purchases, the warning message is provided on the internet by hyperlink on the product display page, or otherwise displayed to the consumer prior to the time the consumer completes his or her purchase of the product.

(5) A product-specific warning is provided via any electronic device or process that automatically provides the warning to the consumer while to the consumer before or during the is making a purchase of the product, without requiring the consumer to seek out the warning.