



April 8, 2015

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

Re: Proposition 65: Clear and Reasonable Warnings and Lead Agency Website Regulatory Proposals

Dear Ms. Vela:

On behalf of the Wine Institute, the Beer Institute and the Distilled Spirits Council of the United States, beverage alcohol trade associations representing the producers of wine, beer and distilled spirits sold within the State of California and across the country, we appreciate the opportunity to comment upon the Office of Environmental Health Hazard Assessment's (OEHHA) proposed regulations regarding the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") regarding the rulemaking docket referenced above.

Executive Summary

We commend OEHHA for its "open door" and "listening ear" in considering the substantive points made by stakeholders concerning the various iterations of this rulemaking proposal. Our coalition comments are proffered from the perspective of how the current proposals respond to and are consistent with Governor Brown's proposed Proposition 65 reforms in the context of the beverage alcohol industry. Announced in May 2013, the Governor's proposed reforms sought to achieve three primary goals by: (1) ending frivolous "shake-down" lawsuits; (2) improving how the public is warned about dangerous chemicals; and (3) strengthening the scientific basis for warning levels.

To achieve these goals, we respectfully submit that, since regulatory agencies may not alter the terms of a pre-existing Proposition 65 Consent Judgment entered by a Court after providing notice to the State of California and the public through the Attorney General's website, the proposed rulemaking package should include an express statement that parties to a pre-existing Consent Judgment are exempt from any and all parts and/or portions of these rulemakings that are inconsistent with or would alter the terms of any pre-existing Consent Judgments.

As described more fully below, our industry members recently were parties to a Consent Judgment approved by the Court and the Office of the Attorney General “in furtherance of the public interest.” Defendants to the Consent Judgment represent the overwhelming percentage of beverage alcohol volume and revenue sales in California, and the terms of that Judgment specify with particularity a robust Proposition 65 compliance plan.

An express statement exempting parties to a Consent Judgment in this proposed rule would meet the objectives of OEHHA’s undertaking—“derailing” bounty hunter lawsuits and providing more certainty for all stakeholders. Conversely, without such action, our industry is placed in a “do over” situation—exacerbating an already abusive Proposition 65 litigation climate, creating needless consumer confusion about beverage alcohol Proposition 65 warning signage, decreasing business certainty, and increasing compliance costs.

It is true that OEHHA in its Initial Statement of Reasons (at page 13) regarding court-approved settlements recognizes “the fact that businesses who are parties to a settlement or judgment must comply with the provisions of the court’s order, regardless of whether this regulation states that fact;” nevertheless, an explicit rule reflecting this self-evident proposition will deter “bounty hunter” lawsuits and provide the regulated community with the requisite assurance of their relevant Proposition 65 obligations.

Further, OEHHA appropriately recognizes that a non-party to a Consent Judgment should have the option of petitioning the Agency for inclusion in the court-approved settlement. To that end, OEHHA references proposed Section 25600(c) (Initial Statement of Reasons at page 13); however, that referenced Section in the rulemaking package does not specifically identify this option. To ensure robust compliance systems, such as the Proposition 65 sign distribution program mandated by the beverage alcohol industry’s recent Consent Judgment, we urge that OEHHA amend its proposed rule to allow industry members to opt-into these settlements via a petition to OEHHA. A streamlined process to accomplish this result furthers the objectives of Proposition 65, the goals of any proposed reforms and serves the public interest, including the interest of California’s business community.

With such actions, the beverage alcohol industry as a whole would not be confronted with two sets of requirements—compliance obligations pursuant to a Court Order and regulatory provisions that are not in sync with the provisions of the Consent Judgment. It is difficult, if not impossible, to envision how the public interest would be served under such circumstances. To that end, we would be pleased to work with OEHHA in drafting the requisite language for these two amendments to accomplish these goals presumably shared by OEHHA.

I. Beverage Alcohol’s Rigorous Sign Management Compliance Program

Proposition 65 regulations for the beverage alcohol industry are more specific and detailed than those pertaining to any other industry with a signage requirement, as recognized by OEHHA in its Initial Statement of Reasons: “The existing regulations addressing alcoholic

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beverage warnings are the most comprehensive provisions in the current regulations. They contain very detailed requirements for the size, font, and placement of warnings for exposures from alcoholic beverages.” (Initial Statement of Reasons at page 31.)

For over 27 years, wine, beer and spirits companies have rigorously complied with the provisions of Proposition 65 and continue their strong compliance commitment. The major producers of wine, beer and distilled spirits products came together in the late 1980’s to fund the Sign Management Company to meet their Proposition 65 obligations by charging that company with distributing the beverage alcohol Proposition 65 signage to all California retail licensees and thereby avoiding numerous postings of similar signage that otherwise would be provided by multiple producers.

Since 1988 and every year thereafter, we have distributed free of charge the requisite signage to the State’s over 83,000 retail licensees on an ongoing basis, complying with the beverage alcohol “safe harbor” Proposition 65 requirements. Beverage alcohol Proposition 65 signage is everywhere throughout the State and has been for decades. The Sign Management Company program has been widely endorsed and has served the objectives of Proposition 65.

Critically important, this initiative provided retail licensees with one point of distribution for the signs, rather than each of the thousands of vintners, brewers and distillers providing signs to each retailer, which only would have the result of having the retailer be a recipient of thousands of identical signs for posting in its establishment.

Over the decades, the California Department of Alcoholic Beverage Control (ABC) has played a vital role in informing its retail licensees about the Proposition 65 signage requirement and has assisted in disseminating the signage by identifying the Sign Management Company and its 1-800 number as a source for obtaining the beverage alcohol Proposition 65 signs. For example, the Department sets forth the Proposition 65 sign requirement in its licensee education package “Signage Requirements and Ideas for Retail Licensees,” as well as other publications.

The California ABC is not obliged to provide these education tools; nevertheless, their initiatives are a critical component of the industry’s program. We are grateful for their assistance in underscoring the Proposition 65 signage requirement for California retail licensees and commend the Department’s undertakings, which have been and continue to be a successful component of our Proposition 65 sign distribution program.

II. Consent Judgment Codifies by Judicial Decree Industry’s Current “Safe Harbor”

In late 2012, an enterprising lawyer identified a handful of retail establishments that did not have Proposition 65 signage posted, which led to claims against eighteen wine, beer and distilled spirits companies. (As an aside, the 12 restaurants identified in the 60-day producer notices constituted less than .02% of the over 80,000 retail ABC licenses in California, which was about 1 of every 6,500 licensees in the State. (See California ABC’s FY 2011-2012 and FY 2012-2013 Annual Reports.))

On May 30, 2014, a Consent Judgment between the plaintiffs' attorney and defendant companies was approved by the Los Angeles Superior Court and the Office of the Attorney General. This Court Order allows 8 ½ inch by 11 inch beverage alcohol signage and specifies that suppliers (defendants and opt-in defendants) furnish signage to retailers who then have an obligation to post and maintain these signs that comply with the message, size and appearance specified in current Regulation 25603.3(e).

With the exception of an 8 ½ inch by 11 inch sign and the obligation of the retailer to post and maintain signs at its establishment, the Consent Judgment codifies the industry's "safe harbor"—the current warning language, the current type size and font of the message, and the posting/placement of signage at a retail establishment—with no additional requirements and/or obligations pursuant to Proposition 65. As referenced above, the terms of the Consent Judgment were reviewed and approved by the Office of the Attorney General "in furtherance of the public interest."

The Court recently added 243 defendant companies to the Consent Judgment, also with the approval of the Office of the Attorney General. These defendants, who agreed to assume specific obligations regarding the terms of the Consent Judgment and its mandate regarding a sign distribution program, represent the overwhelming percentage of volume and revenue sales of beverage alcohol products sold in California as discussed above.

In addition to the obligations set forth in the Consent Judgment codifying the current "safe harbor" rules for beverage alcohol with the exceptions noted above, this Court Order approved by the California Attorney General's Office also requires the following activities for the defendants regarding the Proposition 65 sign distribution program:

- (a) obtaining from the Department of Alcoholic Beverage Control (ABC) a list of current retail licensees and thereafter obtaining from the ABC information about new licensees, including transferred licenses;
- (b) printing and mailing Proposition 65 signage to ABC licensees, including a mass mailing to all ABC retail licensees every five (5) years;
- (c) regular mailings to new and transferred licensees;
- (d) providing 8 ½ inch by 11 inch signage by regular mail or electronic mail (the Consent Judgment permits signage to be sent to retailers by email with an electronic link to or downloadable file suitable for and capable of printing the Proposition 65 signage);
- (e) furnishing a letter accompanying the signage to each licensee that:
 - i. provides contact information (electronic mail address, website address and telephone number) for ordering additional Proposition 65 signage;
 - ii. informs the licensee that such Proposition 65 signage is available at no charge;

- iii. informs the licensee that, if it intends to offer for sale, sell and/or serve any of the defendants' beverage alcohol products in the State of California and employs ten (10) or more persons, the licensee must post and maintain Proposition 65 signage at its establishment; and
 - iv. describes the regulatory requirements regarding the placement of Proposition 65 signage and references the ABC's premises inspection sheet that includes a Proposition 65 signage requirement.
- (f) maintaining an e-commerce site (www.prop65signmanagement.com) from which licensees may request signs free-of-charge or download Proposition 65 signage by means of an electronic link; and
- (g) maintaining a toll-free number for licensees to call with sign orders or with questions.

Our mass mailing of these signs was sent to the over 83,000 retail licensees on July 31st, 2014 in compliance with the Consent Judgment terms, and additional mailings to new and transferred ABC licensees are ongoing. Requests for Proposition 65 signage come through the website on a daily basis.

The California ABC last summer added a hyperlink to our online Proposition 65/Sign Management Program on its website with the current signage language, which will increase the visibility and usage of this Court and Attorney General approved initiative.



III. OEHHA's Proposed Regulations vis-à-vis the Beverage Alcohol Consent Judgment

Regarding OEHHA's proposed "Clear and Reasonable Warnings" and "Lead Agency Website" rules, we proffer the following views. Consistent with the Consent Judgment, we fully support the following provisions in the proposed "Clear and Reasonable Warnings" rule to the extent that they are consistent with and embodied in the obligations set forth in the Consent Judgment:

- (1) Section 25600.2(b), which states that, once suppliers have provided warning signs to retailers, they have fulfilled their obligations under Proposition 65;
- (2) Section 25600.2(c), which imposes on retailers the obligation to post and maintain these signs; and

- (3) Section 25608.3(a)(1), which allows beverage alcohol warning signs to be 8 ½ inches by 11 inches in size.

These three regulatory reforms evidence a common sense approach and achieve the Governor's objective of ending frivolous "shake-down" private enforcement actions.

As stated in our meeting last October, we believe that the terms of the Consent Judgment, which were set by the Court and binding upon the defendants, take precedence over any subsequent regulatory proposal, particularly regulatory proposals that are inconsistent with the Consent Judgment. OEHHA's proposals are inconsistent with the Consent Judgment to the extent they:

- alter the existing beverage alcohol warning signage requirements in any respect (see, e.g., proposed Section 25608.4(a)(1) and (2));
- include the URL statement: "For more information go to: www.P65Warnings.ca.gov/alcohol" (see proposed Section 25608.4(a)(2));
- require the warning to be provided in English and in any other language used on other signage on the premises (see proposed Section 25608.3(b)); and
- expand the warning to include the list of 12 chemical or classes of chemicals (see proposed Section 25602).

As discussed at our fall meeting, while we appreciate that OEHHA will give businesses substantial time to comply, we know that OEHHA agrees that it does not have the authority to modify the terms of a pre-existing Consent Judgment by regulation. (Initial Statement of Reasons at page 13.)

A. OEHHA's Proposed "Clear and Reasonable Warnings" Rule

As discussed above, we urge OEHHA to revise the proposed "Clear and Reasonable Warnings" rule by:

- (1) expressly grandfathering court settlements and Consent Judgments in Section 25600. While we agree with the Agency that OEHHA does not have the authority to modify the terms of a pre-existing Consent Judgment by regulation, an express statement grandfathering court settlements and Consent Judgments would alleviate unnecessary confusion.
- (2) incorporating, as proposed in prior draft regulations, a "petition" process for non-party businesses that are not currently in the California market or not currently subject to Proposition 65 requirements to opt-in to a pre-existing court-approved settlement. Section 25600(c) lacks sufficient specificity as to whether and/or what entities may join a pre-existing settlement. It is a matter of fairness and only equitable to provide a "safe harbor" for those businesses that may enter the California

marketplace or existing California businesses that grow by employing 10 or more employees and as such become subject to Proposition 65. Businesses that did not opt-in would remain vulnerable to Proposition 65 violations.

- (3) clearly stating that one and only one warning applies to beverage alcohol—any other course of action will cause widespread consumer and retailer confusion, as well as undercut the expressed intent of Proposition 65.

For example, two different signage requirements would dismantle the comprehensive program for beverage alcohol Proposition 65 signage in which the California ABC has played a vital role in informing its retail licensees about the signage requirement, including posting on its website (and distributing) retail licensee education/compliance documents with the current language requirements (<http://www.abc.ca.gov/FORMS/ABC608.pdf>; <http://www.abc.ca.gov/FORMS/abc617.pdf>).

As discussed above, last summer, the ABC added a hyperlink to our online Proposition 65/Sign Management program on its website with the current signage language. If two different signs were mandated, the ABC would needlessly have to change its signage documents that have been deemed to be in the public interest by the Court and the Office of the Attorney General.

Additionally and putting aside the terms of the Consent Judgment, we offer the following suggested amendments to the proposed “Clear and Reasonable Warnings” rule:

- (1) Section 25600.2(b)(5) would impose a burden for retailers to affirmatively acknowledge and renew every 180 days that they are posting and maintaining signage (see also Section 25600.2(b)(4) and (c)), and would expose suppliers to frivolous lawsuits not afforded the option to petition/join the beverage alcohol Consent Judgment; and
- (2) To avoid any confusion, the term “purchasers” should be changed to “consumers” in proposed Section 25608.3(a)(4) for consistency with the Consent Judgment and marketplace rules/realities. Since the term “purchasers” receiving such packages may include retail establishments, as well as consumers, this proposed provision of this rule needlessly would cause confusion and create business uncertainty without serving any commensurate benefit in achieving Proposition 65 goals and/or otherwise.

B. OEHHA’s Proposed Lead Agency Website Rule

Relative to the proposed “Lead Agency Website” rule, we very much know and appreciate that this new initiative would not apply to beverage alcohol given that it was not part of the provisions of the Consent Judgment, nor is the newly-proposed “URL” signage requirement part of the Consent Judgment beverage alcohol Proposition 65 signage provisions. Nevertheless, we urge the Agency to “rethink” its initiative for several reasons that are

applicable to the California business community at large, using beverage alcohol as an example. First, as OEHHA more than likely knows, beverage alcohol is one of the most studied compounds over the decades and across the centuries, with thousands of studies published about beverage alcohol and health each year. For example, there were over 3,750 publications about beverage alcohol and health in 2014. Consequently, there are a myriad of scientific reports and assessments about beverage alcohol consumption, including the Dietary Guidelines for Americans published by the U.S. Department of Health and Human Services and the U.S. Department of Agriculture every five years since 1980.

Each edition of the Dietary Guidelines for Americans has included a guideline regarding alcohol consumption that references potential risks and benefits of consuming beverage alcohol products. The Dietary Guidelines for Americans serve as the basis for nutrition advice and public policy for all Americans. Would the posting of this document on OEHHA's website run afoul of proposed Section 25600(d) stating that supplemental information regarding the warning may not "contradict, dilute, or diminish the warning?" (Presumably, the referenced proposal refers to materials that an entity posts on the OEHHA website; if not, its purpose and objective are unclear. Separately, the provisions of this proposed rule inevitably will provide "fodder" for opportunistic litigation against entities subject to Proposition 65.)

Second, although OEHHA characterizes the furnishing of information for its website as "voluntary and upon request," it will be viewed as a mandate and be a receptacle for a myriad of "scientific" reports and information that may be inconsistent or conflict with the body of scientific literature.

Third, we respectfully submit that OEHHA's proposed provisions regarding websites places the Agency in a position where it would be rendering medical advice given that one of the goals of this initiative is to provide "strategies for reducing or avoiding exposures to [listed] chemicals...[and] assist individuals who wish to obtain additional information about listed chemicals, their effects, nutritional benefits, health concerns or related issues." (See proposed Section 25205(a)(4) and (a)(5).)

Fourth, OEHHA's website materials separately and in combination with the proposed "URL address" very well could be viewed as an endorsement by the affected party/relevant entity of the statements and conclusions set forth in those website materials. In today's litigious environment, the easily foreseen circumstances of these proposals will result in more, not less, "shake-down" lawsuits that are without foundation and undercut the purpose of this rulemaking initiative, as well as the underpinnings of the Safe Drinking Water and Toxic Enforcement Act itself.

Further, affected parties would be forced to be constantly vigilant in reviewing OEHHA's website materials since those documents could be viewed as an admission against interest, though they had no control or say regarding their posting.

Conclusion

In sum, the current signage and compliance requirements for beverage alcohol have been approved by the Court and the Attorney General as meeting the objectives of Proposition 65 and in the public interest. Two different regulatory systems only will cause mass confusion for both retailers and consumers, without any benefit served.

On behalf of the beverage alcohol community, we very much appreciate the opportunity to provide our thoughts regarding OEHHA's January 16th rulemaking package and welcome the opportunity to discuss these issues with representatives of OEHHA and Cal/EPA.

With best regards,



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Wine Institute



Ms. Mary Jane Saunders
Beer Institute



Ms. Lynne J. Omlie
Distilled Spirits Council