

July 13, 2020

Via Electronic Mail

Mr. Joe Calavita
Manager, Consumer Products Implementation Division
California Air Resources Board
Sacramento, CA 95812-0806
joe.calavita@arb.ca.gov
csmrprod@arb.ca.gov

Re: Comments on the Draft Proposed Amendments to the Definition of “Labeled” and Web-Based Claims in ARB’s Consumer Products Regulations

Dear Mr. Calavita:

The Personal Care Products Council (PCPC) is submitting additional comments on the California Air Resources Board (CARB) draft proposed rule to expand the definition of “labeled” and web-based claims.

In its previous comments sent to CARB on May 28, 2020, PCPC opposed CARB’s proposal to expand its definition of “label” beyond physical product label, primarily because the draft definition is too broad and not specific enough as to the requirements.

Since then, we have had several discussions with CARB staff, and attended the July 9, 2020, public webinar on this topic, and we believe CARB is making a good faith effort to place some guardrails around this proposal to address our concerns. Indeed, it was noted during the public webinar that CARB intended to take a “small bite of the apple” on this aspect of the proposal to ensure there are no adverse, unintended consequences. We agree with this approach.

To that end, and in the spirit of cooperation, PCPC submits the following:

Acknowledgements

1. We recognize CARB’s overall concern that products are increasingly marketed and sold over the internet and that the physical label may no longer be the primary source of consumer information.
2. We recognize CARB’s concern that potential inconsistencies between the product label and internet claims may result in unintended increased emissions due to potential off label uses.

PCPC Concerns

- **Third Party Claims.** Manufacturers should not be expected, expressly or implicitly, to control the claims and advertising practices of third-party merchants, distributors, or importers. The same is true of social media statements outside the control of the manufacturer, customer reviews (even when hosted on company websites), and the like. Customer reviews, in particular, are opinions not claims. Further, requiring companies to police third-party statements would demand a tremendous amount of time, effort and resources, undermine the credibility of the company-owned website, and potentially raise “free speech” concerns under the 1st Amendment.
 - CARB: It is our understanding that CARB will limit the proposal to only product claims on sites controlled by a company. We concur that using this approach will help ensure that manufacturers are not unduly held accountable for materials outside of their control or for claims or uses that were not intended for the California consumer. Further, we strongly urge CARB to be prescriptive and provide several examples of what constitutes a “manufacturer controlled” website or claim in its technical document accompanying the proposed rule, as well as examples of websites that are “directly” or “indirectly” controlled by manufacturers. Such examples are very useful in providing additional clarity for industry.
- **Cross-Border Issues.** In almost every instance, the accessibility of a manufacturer’s website is not limited to the State of California. The internet is, by nature, international and crosses borders. This presents a problem as manufacturers may be allowed to lawfully communicate and advertise certain product benefits (claims) in one state that cannot be made in California.
 - CARB: One solution to this problem is to exclude any product claims on a website where there is a disclaimer that the product is not intended for sale in California. We strongly urge CARB to consider adding this exclusion to the proposed rule. Another option is to limit the rule to only manufacturer-controlled websites where a product can actually be purchased. If, as acknowledged above, CARB’s concern is that *consumers* often make purchasing decisions based on web-based claims, then limiting the proposal to only claims made on “saleable” websites would address this concern. A manufacturers’ “saleable” website would mean a website that is controlled by the manufacturer and where a product may be purchased and shipped to a consumer in the State of California.
- **Timeline/Compliance Issues.** Due to various federal and state regulatory requirements (e.g., FTC, FDA, CARB, etc.) for labels and label copy, companies typically have very robust, disciplined processes for ensuring that product labels meet and exceed the regulatory and legal requirements. Currently, however, company websites do not have the same stringent regulatory requirements as label copy and, as

such, companies may not have the same robust, disciplined processes in place to approve text copy. If CARB, in effect, begins to regulate internet claims in the same vein as “label copy”, companies will need to develop, train, and implement the same rigorous, somewhat bureaucratic approach for approvals. While the implementation of such a process can be done, it will take several years to ensure that all facets of the business, including marketing, sales, packaging, legal, formulation, and regulatory personnel, are trained on the new processes to ensure full compliance with the regulations that CARB has proposed.

- CARB: PCPC strongly recommends that the effective date of the new label definition, which includes internet advertising and claims, be no earlier than January 1, 2025.

Thank you for the opportunity to submit these comments and we welcome continued dialogue on this important issue.

Sincerely,



Thomas F. Myers
EVP-Legal & General Counsel
Personal Care Products Council

Cc: Ravi Ramalingam, CARB (Ravi.Ramalingam@arb.ca.gov)
Josh Berghouse, CARB (Josh.Berghouse@arb.ca.gov)