CalChamber
California Chamber of Commerce

Consumer Brands Association

HCPA
Representing Household & Commercial Products

California Food Producers

American Chemistry Council

Independent Bakers Association

California Farm Bureau

CMTA
California Manufacturers & Technology Association

IFA International Franchise Association
Franchising
Building local businesses, one opportunity at a time.

Can Manufacturers Institute
CANS: Infinitely Recyclable

Wima
Writing Instrument Manufacturers Association

AHPA
American Herbal Products Association

HACH
Be Right™

NFIB

U.S. Hemp Roundtable

CBIA
California Building Industry Association

American Bakers Association

WPQA

San Gabriel Valley Economic Partnership
Est. 1991

Carlsbad Chamber of Commerce

CICC
Chemical Industry Council of California

Rancho Cordova Chamber of Commerce

North Orange County Chamber

Asian Food Trade Association
美國亞洲食品公會

Greater Coachella Valley Chamber

Tulare Chamber of Commerce

Greater High Desert Chamber of Commerce
Adelanto • Apple Valley • Hesperia • Victorville

California Business Properties Association

BOMA California

International Council of Shopping Centers

NAIOP
Commercial Real Estate Development Association
NAIOP of California

nacd
National Association of Chemical Distributors

California Cannabis Industry Association

NAMA
Bringing convenience to life.

Pleasanton Chamber of Commerce

the toy association

MEMA

IEA
Industrial Environmental Association
Promoting Industry and Protecting the Environment

AHRI
Air-Conditioning, Heating, & Refrigeration Institute
we make life better®

MFANC
Metal Finishing Association of Northern California, Inc.

MFASC
Metal Finishing Association of Southern California, Inc.

International Crystal Federation

Greater Riverside Chambers of Commerce

American Beverage
Driving Solutions Together

CFFA
Chemical Fabrics & Film Association, Inc.

Western Growers
Fresh produce from our families to yours

NEMA
National Electrical Manufacturers Association

SAAMI
Sporting Arms and Ammunition Manufacturers' Institute, Inc.
Since 1926

NSSF
The Firearm Industry Trade Association

The Vision Council

California Retailers Association
Consumers Economy Jobs

The Vinegar Institute

The Association for Dressings & Sauces

Juice Products Association

wph Western Plant Health
HealthyPlants.org

ASPA
Automotive Specialty Products Alliance

iba Independent Beauty Association

PTNPA
Since 1939
Peanut and Tree Nut Processors Association

FPA
Flexible Packaging Association
Connecting. Advancing. Leading.

CCCA
Communications Cable & Connectivity Association

pti power tool institute, inc.

pmi Plumbing Manufacturers International

Western Wood Preservers Institute

socma
Solutions for Specialties

CHPA
Consumer Healthcare Products Association
Taking healthcare personally.

DTA
Dental Trade Alliance

ISSA
Advancing Clean. Driving Innovation.

March 26, 2021

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
Sacramento, CA 95812-4010

Via portal at: https://oehha.ca.gov/comments

SUBJECT: COMMENTS TO PROPOSED AMENDMENTS TO ARTICLE 6, CLEAR AND REASONABLE WARNINGS SHORT-FORM WARNINGS

Dear Ms. Vela:

The California Chamber of Commerce, the Consumer Brands Association and the below-listed organizations (hereinafter, "Coalition") thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's ("OEHHA") Notice of Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short-form Warnings, dated January 8, 2021 ("Proposed Rulemaking"). The Coalition consists of 119 California-based and national organizations and businesses of varying sizes that, collectively, represent nearly every major business sector that would be directly impacted by OEHHA's Proposed Rulemaking.

The Coalition has substantial concerns with the Proposed Rulemaking because it seeks to upend the Article 6 warning requirements that just went into effect a little over two years ago.[1] Many members of this Coalition, including the California Chamber of Commerce and the Consumer Brands Association, engaged with OEHHA in an extensive multi-year regulatory process that culminated in the repeal and replacement of Article 6 and the creation of the "long-form" and "short-form" warnings.[2] The repeal and replacement of the Article 6 warning requirements were the most substantial amendments to the Prop 65 warning regulations in decades, changing a stable safe harbor warning structure that had been in place for about thirty years. OEHHA correctly described these as "major changes" in the ISOR for this new proposal.[3] Both the plain language of the amendments and direct statements from OEHHA promised the business community "more certainty and confidence" in the new warning requirements than the certainty and confidence inherent in a long-term program.[4] Businesses in turn invested significant time and capital to overhaul their Prop 65 warning programs to bring them into compliance with the new regulations. A two-year phase-in period was included because of the significant changes and new burdens imposed on businesses.[5]

OEHHA now proposes to effectively undo that multi-year process and explode the promised certainty by proposing substantial changes to the Article 6 warning requirements that will require every business utilizing short-form warnings to redo their programs. OEHHA disguises the weight and financial impact of its Proposed Rulemaking by framing the changes as "clarifying" and finding no financial impacts to

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[1] The Modified Article 6 Clear and Reasonable Warnings became effective on August 30, 2018 after a two-year phase-in period. https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf

[2] https://oehha.ca.gov/media/downloads/crnr/art6fsor090116.pdf

[3] *See Initial Statement of Reasons for Adoption of New Article 6 Regulations*, January 16, 2015 ("2015 ISOR"), available at: https://oehha.ca.gov/media/downloads/crnr/article6isor.pdf, at p. 41 ("Because businesses are given the option to use warning methods adopted by the lead agency, a business will enjoy more certainty and confidence that it is in compliance with the regulations while retaining the right to provide other non-safe-harbor warnings they believe are compliant with the Act. Litigation concerning the adequacy of warnings should

[4] *See Initial Statement of Reasons for Adoption of New Article 6 regulations* https://oehha.ca.gov/media/downloads/crnr/article6isor.pdf ("Because businesses are given the option to use warning methods adopted by the lead agency, a business will enjoy more certainty and confidence that it is in compliance with the regulations while retaining the right to provide other nonsafe-harbor warnings they believe are compliant with the Act. Litigation concerning the adequacy of warnings should also be reduced because of the increased clarity provided by the proposed changes to the regulations.") January 16, 2015.

[5] *See* 2015 ISOR at p. 5 ("Providing a two-year phase-in period will also lessen any potential financial impacts for businesses that decide to take advantage of the new safe harbor provisions because these costs can be spread over a longer period.").

businesses because safe harbors are not mandated.[6] Far from "clarifying" and directly contrary to the agency's unsupported findings regarding fiscal impacts, the Proposed Rulemaking will inject confusion into the market and impose substantial financial burdens and additional litigation risks on businesses at a time when they can least afford it.

1. The Proposed Rulemaking is Not a Clarification of Existing Law and Effectively Repeals the Short-Form Warning Requirements Developed Under a Three-Year Regulatory Process

OEHHA erodes confidence and creates uncertainty with the Proposed Rulemaking that nullifies the existing short-form warning requirements through new arbitrary size limitations, substantive changes to the short-form warning label contents and new online-warning requirements. Contrary to OEHHA's assertion that the amendments merely provide "clarification and specificity to the existing regulations,"[7] the proposed changes are so substantial that they would compel every business currently utilizing short-form warnings to redo their Prop 65 warning programs. This is inconsistent with OEHHA's Initial Statement of Reasons in 2015 touting the need to overhaul the warning requirements to "reduce the number of unnecessary warnings, make the warnings more informative, and *provide certainty for businesses who must comply* with the warning requirements of the Act."[8]

Substantial Change in Law

The proposed new regulations will substantially change the law by: (1) radically limiting the availability of the short form warning, (2) changing the content of the short form warning, and (3) changing the existing law on internet warnings.

Specifically, OEHHA proposes to change Section § 25602. Consumer Product Exposure Warnings - Methods of Transmission as follows:

> (4) A short-form warning on the product label that complies with the content requirements in Section 25603(b). The short-form warning may only be used if:
>
> A. The total surface area of the product label available for consumer information is 5 square inches or less, and;
>
> B. the package shape or size cannot accommodate the full-length warning described in Section 25603(a), and;
>
> C. The entire warning is printed ~~must be~~ in a type size no smaller than the largest type size used for other consumer information on the product. In no case shall the warning appear in a type size smaller than 6-point type.

It is unclear how OEHHA determined the new sizing requirement limiting short-form warnings to product labels with a total surface area of 5-square inches or less. While OEHHA acknowledges its intent

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[6] *See Notice of Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short-form Warnings*, January 8, 2021 ("2021 Notice"), available at: https://oehha.ca.gov/media/downloads/crnr/p65noticeshortformoald2021.pdf, at p. 3 ("The proposed regulatory action will facilitate businesses' compliance with the Act by providing clarifying guidance concerning the provision of safe harbor warnings under Proposition 65.").

[7] *Initial Statement of Reasons for Proposed Amendments to Article 6 Clear and Reasonable Warnings: Short-Form Warnings for Consumer Product Exposures* ("2021 ISOR"), available at: https://oehha.ca.gov/media/downloads/crnr/p65shortformisorf2021.pdf, at p. 16.

[8] 2015 ISOR at p. 41 (emphasis added).

is to limit short-form warnings to small items only, the agency does not explain nor provide evidence to justify why the 5-square inches or less requirement is the appropriate cutoff. Nor does the agency provide reasoning as to why the change is necessary right now. OEHHA's most recent guidance published in May of 2019 expressly told businesses that Article 6 had "no size limitations for which products could utilize short-form warnings."[9] OEHHA now proposes to limit short-form warnings under the new sizing limitations *after* businesses already invested in redoing their warning programs pursuant to the plain language of the regulations and reliance on OEHHA's own guidance.

Many industries have state and federal regulations that require specific warnings or safety instructions to the consumer that must be included on product labels. These warnings serve an essential consumer safety objective and can include such cautions as not using the product when pregnant or breastfeeding or keeping the product from children under a certain age. Often these labels must appear on smaller products that already have limited space. The proposed changes to the short-form warning threaten to crowd that limited space, resulting in labels that lose their consumer safety value due to small type and excessive verbiage. The current short-form warning regulation provides an appropriate balance between the Proposition 65 warning and the other critical consumer safety warnings and information.

In order to logically and appropriately justify such a massive change in the Prop 65 warning program, OEHHA should at the very least perform a feasibility study to evaluate the smaller products in the marketplace with warnings to confirm that labels with more than five square inches of "available" "surface area" can accommodate the longer warning. The coalition believes such a feasibility study would demonstrate that OEHHA's proposal is not feasible.

OEHHA proposes to change Section § 25603 Consumer Product Exposure Warnings - Content as follows:

(b) A short-form warning may be provided on the product label pursuant to Section 25602(a)(4) using all the following elements:

(1) The symbol required in subsection (a)(1).

(2) The word "WARNING:" in all capital letters, in bold print.

(A) For exposures to listed carcinogens, the words, ~~"Cancer - www.P65Warnings.ca.gov."~~ "Cancer Risk From [Name of one or more chemicals known to cause cancer] Exposure - www.P65Warnings.ca.gov"

(B) For exposures to listed reproductive toxicants, the words, "~~Reproductive Harm - www.P65Warnings.ca.gov."~~ "Risk of Reproductive Harm From [Name of one or more chemicals known to cause reproductive toxicity] Exposure - www.P65Warnings.ca.gov"

(C) For exposures to both listed carcinogens and reproductive toxicants, the words, "~~Cancer and Reproductive Harm - www.P65Warnings.ca.gov."~~ "Risk of Cancer From [Name of one or more chemicals known to cause cancer] And Reproductive Harm From [Name of one or more chemicals known to cause reproductive toxicity] Exposure - www.P65Warnings.ca.gov"

(D) For exposures to a chemical that is listed as both a carcinogen and a reproductive toxicant, the words, "Risk of Cancer and Reproductive Harm From [Name of one or more chemicals known to cause cancer and reproductive toxicity] Exposure - www.P65Warnings.ca.gov"

[9] OEHHA's Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses, Revised May 2019, available at: https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf.

~~(c) A person providing a short-form warning on the product label pursuant to subsection (b) is not required to include within the text of the warning the name or names of a listed chemical.~~

These substantive changes to the warning requirements infuse significant uncertainty and litigation risk for businesses attempting to comply with Prop 65. Understandably, businesses are frustrated that they went through a three-year regulatory process culminating in the repeal and replacement of Article 6 and the creation of the "long-form" and "short-form" safe harbor warnings, only to have the agency come back two years later with major changes. Businesses relied not only on the plain language of the regulations, but OEHHA's own statements ensuring them that their compliance with the new warning regulations would provide businesses "more certainty and confidence that [they are] in compliance with the regulations while retaining the right to provide other nonsafe-harbor warnings."[10]

Finally, OEHHA goes even further by eliminating the option that allows internet and catalog warnings to mirror the short form content on the product label. Specifically, OEHHA proposes striking the below language from Sections 25602(b) and (c), respectively:

Section 25602(b): ~~If warning is provided using the short-form warning label content pursuant to Section 25602(a)(4), the warning provided on the website may use the same content.~~

Section 25602(c): ~~If a short-form warning is being provided on the label pursuant to Section 25602(a)(4), the warning provided in the catalog may use the same content.~~

In doing so, OEHHA creates substantial confusion, will place undue burden and impose significant financial obligations on California retailers, and will unnecessarily heighten their risk of liability by forcing the use of a different warning from that which could be found on the actual product.

Requiring retailers to convert short-form warnings found on products into long-form warnings to sell those products online or in a catalog is contrary to OEHHA's prior guidance. When OEHHA created the short-form warnings it reassured retailers that conversion of warnings would not be required, stating that "[w]here the product manufacturer has included the warning on a product label or labeling, the retail seller may use the same warning language on their website, or provide a picture of the label or labeling." 9/2/16 FSOR at p. 117. Placing this added burden on retailers is also inconsistent with Health & Safety Code section 25249.11(f), which states a preference to "minimize the burden on retail sellers of consumer products" by "to the extent practicable plac[ing] the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller."

The fiscal impact of having all online and catalog retailers update their Prop 65 warnings for tens of thousands of products would be substantial, and any online or catalog warning that retailers fail to update would be at risk for future lawsuits. Moreover, this change will further burden manufacturers and suppliers of products and will sow confusion for the consumers with different warnings for the same product. The existing regulations contemplated the supply chain complexities and provided a

[10] 2015 ISOR at p. 10.

commonsense approach of allowing the online and catalog warning to mirror that which is found on the actual product.

Tremendous Confusion Will Be Created, Not Clarification

OEHHA's proposed changes to section 25602(a) introduce a confusing, undefined, new phrase - "product label." Although the regulations define "label", they do not define "product label," and since OEHHA is making a change, courts will assume that a change in meaning, which OEHHA does not explain or define, is intended. This is particularly confusing since the proposed section 25602(a)(4)(B) refers to "package" size, in contrast to "product" size.

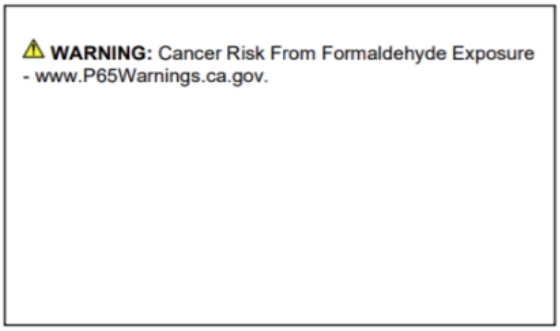
OEHHA's proposed section 25602(a)(4)(A) introduces another undefined phrase "product label available." It is beyond dispute that product manufacturers and Prop 65 private enforcers will differ over what "available" means. For example, manufacturers rightly will observe that certain space on the front of a product near the product name and other identifying information is not "available", and based on experience we would expect at least some Prop 65 private enforcers to contend otherwise. This basis for litigation and ambiguity is compounded by the 2021 ISOR referring at times only to "label space" rather than "available label space."[11]

OEHHA's proposed change to section 25602(a)(4)(C) introduces another undefined term - "printed." Does OEHHA intend by this that means for applying the warning to a "product label" other than "printing," are no longer allowed? This proposed change is confusing.

Additionally, the Initial Statement of Reasons for the Proposed Rulemaking provides internally conflicting examples that add to the confusion to the regulated community. For example, OEHHA includes an appendix of compliant short-form warnings, one of which highlights a product label that exceeds OEHHA's own proposed limitation of 5-square inches (3" x 1.75" is 5.25-square inches, or 0.25-quarter inches larger than the maximum allowable under the proposed amendments).[12]

Examples of Short-form Warnings Compliant with the Proposed Amended Regulations on 5 sq. in, cont.

Short-form warning on 3" x 1.75" Product Surface Area



[11] 2021 ISOR at 4.
[12] 2021 ISOR at p. 22.

The Proposed Rulemaking also goes beyond just the imposition of a new arbitrary size limitation by requiring considerable changes to the content of the warning label itself under Section 25603. Consequently, even businesses selling small products that meet OEHHA's new 5-square inches or less size requirement would need to redo their entire warning programs to comply.

In sum, OEHHA cannot profess the Proposed Rulemaking to be merely "clarifying" when wholesale changes are being proposed that would render all short-form warnings in circulation today non-compliant inject confusing language and new arbitrary sizing requirements, and force retailers to completely redo their online and catalog warnings for literally millions of SKUs.

2. Changes Will Exacerbate Frivolous Prop 65 Litigation Increasing Year After Year

OEHHA justifies the changes to the current short-form warning because the agency believes the shorter warnings "facilitate 'over-warning' by providing businesses with safe harbor protection from enforcement actions without requiring the business to provide sufficient information to consumers."[13] OEHHA will not address the Prop 65 issue of over-warning by upending the short-form warning requirements. The Proposed Rulemaking will only further exacerbate the already abusive Prop 65 litigation climate by providing additional opportunities for private enforcers to file frivolous and unscrupulous lawsuits against businesses as small as 10 employees by, for example, taking differing interpretations of undefined terms this proposal introduces. These same small businesses are already struggling to stay afloat under state-imposed closures and trying to keep up with rapidly changing COVID-19 requirements as the pandemic continues to wreak havoc across California's economy. Their limited time and resources should be preserved for dealing with COVID-19 compliance and safety protocols – not re-doing their Prop 65 compliance plans to avoid "gotcha" lawsuits.

The business community's concern regarding Proposition 65 litigation abuse is well-founded and supported by statistical data provided by the California Attorney General's Office in its Annual Summary of Proposition 65 Settlements. Year after year, the Attorney General's summary shows that the volume of settlements and settlement amounts is consistently high and trending upward. The year 2020 was no exception. Even amid the COVID-19 global pandemic that shuttered all non-essential businesses, disrupted global supply chains and resulted in millions of job losses, private enforcement of Prop 65 was at an all-time high in 2020. Private enforcers issued 45 percent more notices in 2020 than in the prior year.[14] And already in the first 30 days of 2021, private enforcement attorneys have secured more than $1.3 million in settlements, of which more than $1.1 million was for attorneys' fees and costs.[15]

These proposed short form warning regulation changes will increase litigation. Throughout the earlier regulatory process concerning changing safe harbor warnings, the Chamber Coalition predicted OEHHA's

[13] 2021 ISOR at p. 16.
[14] In 2020, 3,503 notices of violation were filed against food companies compared to 2,410 in 2019. Information obtained from the State of California Department of Justice, Office of the Attorney General, at https://oag.ca.gov/prop65/60-day-notice-search.
[15] https://oag.ca.gov/prop65/annual-settlement-reports

proposal would increase litigation, and that has happened. [16] In the two years since OEHHA's last change to the warning regulations took full effect (2019-2020), Proposition 65 60-Day Notices of Intent to Sue have increased over 28 percent relative to the two years before that change (2016-2017). [17] This has significantly increased companies' defense and compliance costs. Many of these 60-day notices were issued by new plaintiffs and new law firms engaged in practices that claim to be in the public interest but are driven solely by the pursuit of profit. Furthermore, a considerable number of the post-2018 notices were for products that *had* a warning, but for which the plaintiff disagreed with the defendant on the interpretation of the regulations. This phenomenon would only increase under the new proposed regulations given the uncertainties noted above and given the increase in issues raised by private enforcers the last time the regulations changed.

The surge in Prop 65 lawsuits place tremendous pressure on companies to rethink their Prop 65 compliance plans and issue warnings to avoid litigation. Changing the length of the Prop 65 warning will not address the systemic reasons why there are more warnings in the marketplace than OEHHA would prefer – it will only cause more confusion, more litigation and impose more costs to businesses.

3. Introducing the word "risk" in the warning is not warranted and would be misleading

OEHHA also proposes that new short form warnings state "**WARNING**: Cancer Risk . . ." or "**WARNING**: Risk of Reproductive Harm . . . ." Use of the word "risk" is not warranted and would be misleading for chemicals where there is not credible human evidence of risk. Prop 65 chemicals include chemicals for which there is only animal data of an association with tumors or reproductive harm. For at least some of these chemicals, and perhaps many, the notion that there is a "risk" in humans would be false and misleading because there is not sufficient evidence of a human risk. Stating that there is "risk" clearly implies that the "risk" is not zero, and OEHHA does not have evidence that the human risk from exposure to each chemical on the Prop 65 list is greater than zero. Furthermore, Prop 65 calls for warnings whenever a chemical exposure can be detected, unless the business wishes to undertake the expensive task of analyzing whether the exposure does not require a warning pursuant to section 25249.10(c) of the act. It also is unquestionably true that OEHHA does not have evidence that the human risk from any amount of exposure to any listed chemical poses a risk of cancer or reproductive harm.

Prop 65 warnings are misleading and not warranted in certain circumstances under current law. This proposal by OEHHA would significantly expand the occasions in which Prop 65 warnings would be misleading, not warranted, or controversial (and not factual), and thus not constitutional.

[16] The Chamber Coalition's comments to OEHHA in 2014, 2015 and 2016 contained multiple warnings that OEHHA's actions would increase litigation. In contrast, OEHHA asserted "Businesses would continue to be assured that compliance with the safe harbor regulations will help them avoid litigation . . . ." 2016 FSOR at p. 9.
[17] Underlying data available at oag.ca.gov/prop65/.

OEHHA's unsupported and circular assertion that "[t]he term 'risk', added with reference to the applicable endpoint(s), will help better convey the risk a consumer is facing from exposure to the listed chemical" offers no rationale, justification, or support for the addition of this word in the warnings.

4. OEHHA's Proposed Requirement to Identify a Specific Chemical is not Supported

For the first 32 years of Prop 65 implementation, OEHHA and the courts have agreed that a clear and reasonable warning may be provided without identifying the name of one or more chemicals that give rise to the warning. OEHHA proposes to upend that long standing position in this proposal. As justification for this position, OEHHA relies upon an assertion that 18% of customer inquiries that it received asked about the chemical for which the warning was being given.[18] OEHHA did not reveal, however, how many of the relevant customer inquiries could not be answered based upon information available to OEHHA. There is no reason to believe OEHHA does not know or could not learn most or all of this information through its implementation of Prop 65, its understanding of the public literature, and its power of inquiry pursuant to section 25205(b) of the Prop 65 regulations.

OEHHA also asserted that it sent 17 letters to businesses during 2019-2020 asking for information concerning the chemical exposure for which a warning was given.[19] OEHHA's explanation of this information is woefully inadequate. First, it is not fair to impose a massive new regulatory burden on all California businesses because fewer than 15 did not respond fully to OEHHA's inquiry, at least half of which apparently was made during a global pandemic. Second, OEHHA offers no rigorous description of how many businesses failed to provide information and the grounds for OEHHA saying that certain businesses "did not identify an exposure that likely needed a warning."[20] OEHHA also did not identify what efforts, if any, it took to follow up with businesses that provided information it considered unsatisfactory. OEHHA's further efforts to support its proposal based on unverified hearsay reports from callers should not be given any weight.[21] OEHHA's explanation of the mechanics of its "carefully assessing businesses' use of the short-form warning since . . . 2016" refutes OEHHA's assertions that the justification for this new proposal was careful or adequate.[22]

5. OEHHA Fails to Analyze the Economic Impact of the Proposed Rulemaking to Businesses

The Proposed Rulemaking will have significant adverse economic impacts on businesses as small as 10 employees that utilize the short-form warnings and retailers that will now be forced to redo their websites and catalogs. These fiscal impacts will exceed $50 million across the entire regulated

[18] 2021 ISOR at p. 6.
[19] *Id*.
[20] *Id*. The Coalition doubts that OEHHA applied the same standard for what "needs a warning" as some of the private enforcers who are issuing notices of intent to sue right and left.
[21] 2021 ISOR at p. 7.
[22] *Id*.

community.[23] Yet, OEHHA provides no analysis of the economic impacts from the proposed rulemaking on the basis that "[t]he action does not impose any new requirements on private persons or businesses because the safe harbor regulations are non-mandatory guidance."[24] However, OEHHA in 2015 held the exact opposition position and conducted an economic analysis for its then proposed amendments to Article 6 safe harbor warning requirements.[25]

Unlike the agency's position today that includes a conclusory and unsupported "no impact" finding, in its 2015 economic analysis OEHHA acknowledged and analyzed the fiscal impacts to regulated entities directly associated with the proposed amendments to Article 6 warning requirements.[26] OEHHA estimated the costs of revising and printing product labels and purchasing signs with new warning content, costs of providing warnings for Internet and catalog sales, and costs of providing warnings in foreign languages would be in the tens of millions of dollars.[27] In OEHHA's analysis, the agency concluded that it would cost businesses approximately ***$1000 per label, per product*** to comply with changes to Article 6 warning requirements -- a substantial fiscal impact to any business, but especially small businesses.[28] Just as OEHHA noted in its 2015 economic analysis, the proposed amendments to Article 6 short-form warning requirements would fiscally impact a broad swath of California sectors, including health care, retail, utilities, construction, manufacturing, transportation, arts, entertainment, food, rental and housing and more.[29]

The Proposed Rulemaking does impose new requirements on every business intending or already utilizing this safe harbor protection, and these costs must be analyzed by OEHHA under California law just as the agency did in 2015.[30] Furthermore, OEHHA ignores the structure of Prop 65 that provides businesses with the choice of warning for an exposure or face expensive litigation and related

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[23] For example, in just one sector alone, the proposal would cost as much as $12 million *per company* to relabel tens of thousands of products sold into California. The impact of this regulation to almost every sector will greatly exceed $50 million. *See* OEHHA's public hearing held on March 11, 2021.

[24] 2021 ISOR at p. 16.

[25] *See* Economic and Fiscal Impact Statement, Proposed Repeal Of Article 6 And Adoption Of New Article 6 Regulation For Clear And Reasonable Warnings, ("OEHHA's 2015 Economic Analysis") *available at:* Clear and Reasonable Warning Economic Fiscal Impact Statement.

The $10-30 million estimate was disputed then and is disputed now as a gross underestimate of the true costs imposed by the regulations across hundreds of thousands of SKUs.

[26] *See* OEHHA's 2015 Economic Analysis, p. 3 ("Anticipated costs directly associated with the proposed regulation that this assessment estimates include: the cost of revising and printing product labels or purchasing signs with new warning content, including the exclamation-point graphic; the cost of providing warnings for Internet sales; the cost of providing warnings in the larger-format newspaper advertisements that conform with the proposed regulation; and, when necessary, the cost of providing warnings in foreign languages").

[27] *See* OEHHA's 2015 Economic Analysis, p. 14 (High estimate $30.9 million; Low estimate $19.3 million). However, some of the assumptions made were significant underestimates as to the number of SKUs

[28] *See* OEHHA's 2015 Economic Analysis, p. 6 providing the $1000 estimate. See also Table 2a highlighting increased costs to varying sectors, including housing, retail, manufacturing, construction, utilities, health care.

[29] *See* OEHHA's 2015 Economic Analysis, Tables 2a and 2b, pp. 10-11.

[30] We strongly dispute, however, OEHHA's underestimate of $30 million in 2015. We would be willing to work with the agency to help better estimate actual costs to regulated entities, which we estimate greatly exceeds the $50 million dollar major regulations threshold.

settlement demands to try and defend why they are not warning so if they are called upon by a private enforcer. This is reflected in the data of court-approved settlement agreements compelling companies to warn. Of the 1,215 court-approved consent judgments issued between 2016 and 2020, about 85% (1,025) included as injunctive relief a specific requirement that the defendant provide a Proposition 65 warning. The other 190 judgments did not include a warning requirement (e.g., because they instead required the defendant to reformulate its product or cease selling the product in California).[31]

Every business using short-form warnings will need to substantially change their Prop 65 warning label programs to comply with the proposed new requirements. The number of businesses impacted by the proposed amendments will be large, as OEHHA acknowledges in its Initial Statement of Reasons as justification for the Proposed Rulemaking, and as the agency recognized in its 2015 economic analysis flagging over 152,000 businesses, which we believe is an underestimate.[32] Accordingly, OEHHHA was required by law to conduct a Standardized Regulatory Impact Assessment ("SRIA") to estimate the fiscal impacts of the Proposed Rulemaking to the thousands of businesses large and small currently utilizing short-form warnings and directly impacted by the Proposed Rulemaking.

6. OEHHA Fails to Consider Reasonable Alternatives

OEHHA also failed as a matter of law to provide a description of reasonable alternatives to the regulation that are less burdensome to regulated entities and the agency's reasons for rejecting those alternatives.[33] OEHHA only considered repealing the short-form warning requirements, which is an alternative that is incongruent to the stated purpose of the Proposed Rulemaking to "clarify" the use of short-form warnings.[34] Accordingly, it is unreasonable for OEHHA to consider a full repeal of short-form warnings a reasonable alternative. OEHHA must analyze less burdensome alternatives to achieving the agency's stated purpose of "reduc[ing] potentially unnecessary warnings for products."[35] [36]

OEHHA has existing authority to request from companies that are providing a short form warning more information, and to follow up as appropriate. OEHHA should have, but did not, analyze as an alternative using section 25205(b) of the regulations a more targeted approach to obtaining and disseminating the information OEHHA now considers desirable.

OEHHA was further required to analyze reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives.[37] However,

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[31] Data derived from period September 1, 2016 through October 15, 2020, available at: https://oag.ca.gov/prop65/annual-settlement-reports.
[32] *Id.* at p. 5. *See also* OEHHA's 2015 Economic Analysis, p. 13.
[33] *See* Government Code Section 11346.2 (b)(5)(A) and (B) Senate Bill 617, Chaptered October 6, 2011.
[34] 2021 ISOR at p. 8.
[35] *Id.* at p. 10.
[36] For example, OEHHA could analyze whether the uncertainty factor is driving unnecessary warnings. Prop 65 establishes extremely conservative safe levels of exposure as no observable effect at one thousand (1,000) times the level in question.
[37] *Id.*

OEHHA avoids any analysis and simply concludes with no evidentiary support that the proposed regulation will have no adverse impact to small businesses "because Proposition 65 is limited by its terms to businesses with 10 or more Employees."[38] This highly constrained definition of what constitutes a small business under Prop 65 defies credibility in the real world, especially given the U.S. Small Business Administration's size regulations. OEHHA should conduct a fiscal analysis of the Proposed Rulemaking to ensure the proposed amendments would not deal a death knell to California businesses. This is critically important, especially considering the current economic climate where many small businesses are still reeling from state-imposed shutdowns and other emergency orders.

7. Conclusion

The Proposed Rulemaking subverting the short-form warning requirements will not achieve the agency's stated purpose of reducing warnings in the marketplace.[39] The perversion of Prop 65 by private enforcers drives more and more businesses to warn, regardless of the size or length of the warning. The proposed changes to Article 6 will add uncertainty into the market, add liability to businesses and result in substantial financial implications to small, medium and large businesses that will need to overhaul their Prop 65 compliance programs to receive a safe harbor. At a time when thousands of businesses are trying to keep employees and customers safe, comply with a myriad of COVID-19 emergency regulations and orders, and stay afloat in an uncertain economic climate, OEHHA proposes to do serious harm to businesses with ill-conceived and ill-timed changes to Article 6 warning requirements.

In conclusion, for the reasons noted above, the Coalition respectfully requests that the Proposed Rulemaking amending the short-form warning requirements under Article 6 be withdrawn.

Respectfully,

Adam Regele, Policy Advocate
California Chamber of Commerce

John Hewitt, Senior Director
Consumer Brands Association

[38] 2021 Notice at p. 6.

[39] 2021 ISOR at p. 8 ("OEHHA anticipates that some businesses may stop the practice of over-warning as a strategy to receive safe harbor protection if they must warn customers of a specific chemical exposure that can occur through use of their product.)

On behalf of the following organizations:

Agricultural Council of California
Air-Conditioning, Heating, & Refrigeration Institute
American Apparel & Footwear Association
American Bakers Association
American Beverage Association
American Chemistry Council
American Cleaning Institute
American Coatings Association
American Forest & Paper Association
American Frozen Food Institute
American Herbal Products Association
American Sportfishing Association
American Supply Association
Archery Trade Association
Asian Food Trade Association
Association of Home Appliance Manufacturers
Auto Care Association
Automotive Specialty Products Alliance (ASPA)
Brea Chamber of Commerce
Building Owners and Managers Association
California Automatic Vendors Council
California Building Industry Association
California Business Properties Association
California Cannabis Industry Association
California Cotton Ginners and Growers Association
California Farm Bureau
California League of Food Producers
California Manufacturers & Technology Association
California Pool & Spa Association
California Restaurant Association
California Retailers Association
California Walnut Commission
Can Manufacturers Institute
Carlsbad Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
Chemical Fabrics & Film Association (CFFA)
Chemical Industry Council of California
Chino Valley Chamber of Commerce
Civil Justice Association of California
Communications Cable & Connectivity Association
Consumer Healthcare Products Association
Council for Responsible Nutrition
Dental Trade Alliance
Diving Equipment & Marketing Association
Far West Equipment Dealers Association
Flexible Packaging Association

FMI The Food Industry Association
Fragrance Creators Association
Frozen Potato Products Institute
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chambers of Commerce
Hach Company
Household & Commercial Products Association
Independent Bakers Association
Independent Beauty Association
Independent Lubricant Manufacturers Association
Industrial Environmental Association
Institute of Shortening and Edible Oils, Inc.
International Bottled Water Association
International Council of Shopping Centers
International Crystal Federation
International Franchise Association
ISSA – The Worldwide Cleaning Industry Association
Juice Products Association
Juvenile Products Manufacturers Association
Lighter Association Inc.
Lodi Chamber of Commerce
Metal Finishing Association of Northern California
Metal Finishing Association of Southern California
Motor & Equipment Manufacturers Association (MEMA)
NAIOP of California
National Association of Chemical Distributors
National Automatic Merchandising Association (NAMA)
National Confectioners Association
National Electrical Manufacturers Association (NEMA)
National Federation of Independent Business
National Marine Manufacturers Association
NAMM
National Shooting Sports Foundation (NSSF)
North Orange County Chamber of Commerce
Oceanside Chamber of Commerce
OPEAA—Representing the Outdoor Power Equipment Parts & Accessories Industry
Outdoor Power Equipment Institute
Oxnard Chamber of Commerce
Pacific Water Quality Association
Peanut and Tree Nut Processors Association (PTNPA)
People for Bikes Coalition
Pine Chemicals Association International
Plastic Pipe and Fittings Association
Pleasanton Chamber of Commerce
Plumbing Manufacturers International
Pool & Hot Tub Alliance
Power Tool Institute, Inc.

Promotional Products Association International (PPAI)
Rancho Cordova Area Chamber of Commerce
San Gabriel Valley Economic Partnership
SNAC International
Society of Chemical Manufacturers & Affiliates (SOCMA)
Specialty Equipment Market Association
Sporting Arms and Ammunition Manufacturers Institute (SAAMI)
The Art and Creative Materials Institute, Inc.
The Association for Dressings & Sauces
The National RV Dealers Association
The Toy Association
The Vinegar Institute
The Vision Council
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
U.S. Hemp Roundtable
Vinyl Institute
Water Quality Association
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association
Western Wood Preservers Institute
Writing Instrument Manufacturers Association

cc: Dee Dee Myers, Senior Advisor and Director, Go-Biz
Christine Hironaka, Deputy Cabinet Secretary, Office of the Governor
Jared Blumenfeld, Secretary, CalEPA
Julie Henderson, Deputy Secretary, Health & Public Policy, CalEPA
Lauren Zeise, Director, OEHHA
Carol Monahan-Cummings, Chief Counsel, OEHHA
Mario Fernandez, Staff Counsel, OEHHA