



AmericanCoatings
ASSOCIATIONSM

January 21, 2022

Mrs. 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 Mrs. Vela,

The American Coatings Association (“ACA”)¹ appreciates the opportunity to comment on the proposed amendments to short-form warnings under Article 6 of regulations implementing the *California Safe Drinking Water and Toxic Enforcement Act* (hereinafter, “Prop. 65”). We are committed to working with OEHHA to help ensure accurate disclosure of information to enhance consumer safety. Being manufacturers of formulated products, ACA members have carefully analyzed issues related to labeling requirements and safety to provide downstream users with information to enable safe use of products.

The Association’s membership represents 90% of the domestic paint and coatings industry, including downstream users (or processors) of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture paint, coatings, sealants and adhesives and raw materials that go into formulation. ACA members will be directly affected by OEHHA’s proposed changes to short-form warnings. Similarly, our membership is concerned about the utility of this proposal. ACA is eager to assist OEHHA in developing an effective system of conveying information to consumers to enable purchasing decisions based on safety considerations.

¹ ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services.

ACA appreciates OEHHA's willingness to interact with stakeholders during this process. ACA understands that implementation of Prop. 65 presents several challenges, and we commend OEHHA on its efforts. We are optimistic that through continued involvement with the public and stakeholder community, OEHHA will successfully implement a viable labeling program.

Considering revisions to OEHHA's proposed changes to Prop. 65 safe harbor requirements published on December 13, 2021, ACA suggests that it be rescinded for reasons articulated in ACA's comment to OEHHA's original proposal, attached hereto. ACA briefly emphasizes the following issues that OEHHA has not addressed in its revised proposal:

- With the revised proposal of December 13, 2021, OEHHA changed the threshold for short-form warnings from 5 square inches to 12 square inches. OEHHA seems to have selected the threshold arbitrarily. Some ACA members have suggested that a viable threshold must be at least 50 square inches. At 12 square inches, ACA is concerned that proposed changes would not leave enough space to provide consumers with all required information, including federally mandated statements and discretionary statements providing consumers with information required for using formulated products safely. Spacing consideration apply to labels of all sizes. Manufacturers of formulated products carefully design labels to convey critical information. Altering labels on containers of a gallon or less is extremely difficult due to existing label information. (See Sections I and II of the attachment for additional information).
- ACA strongly suggests that the rule be rescinded in its entirety or at a very minimum amended to apply articles only. As described in Section IV of the attachment, OEHHA's statement of reasons and subsequent disclosures related to consumer inquiries identify articles only and not formulated products. This is because formulated products are subject to federal and state laws and industry practices resulting in disclosure of information about chemical content and how to use the product safely, considering hazards and risks of a product. Consumers in California simply will not benefit from further disclosures on formulated products. Here again, the rule would impose an arbitrary requirement on manufacturers of formulated products.
- ACA appreciates OEHHA's willingness to provide an unlimited sell through for products manufactured prior to the operative date and labeled in compliance with the August 2016 amendments. ACA suggests that the operative date be set at least

36 months after the effective date, to allow enough time for evaluation and revision of labels, should OEHHA not rescind the proposal.

ACA appreciates the opportunity to submit comment on this matter. ACA also supports the comments filed by the coalition lead by the California Chamber of Commerce and incorporates those comments herein. Please contact me if you require additional information about any issues described herein.

Sincerely,

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Attachment

ACA Comment in Response to OEHHA's original Proposal



AmericanCoatings ASSOCIATIONSM

March 29, 2021

Mrs. 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>

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Dear Mrs. Vela,

The American Coatings Association (“ACA”)² appreciates the opportunity to comment on the proposed amendments to short-form warnings under Article 6 of regulations implementing the *California Safe Drinking Water and Toxic Enforcement Act* (hereinafter, “Prop. 65”). We are committed to working with OEHHA to help ensure accurate disclosure of information to enhance consumer safety. Being manufacturers of formulated products, ACA members have carefully analyzed issues related to labeling requirements and safety to provide downstream users with information to enable safe use of products.

The Association’s membership represents 90% of the domestic paint and coatings industry, including downstream users (or processors) of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture paint, coatings, sealants and adhesives and raw materials that go into formulation. ACA members will be directly affected by OEHHA’s proposed changes to short-form warnings. Similarly, our membership is concerned about the utility of this proposal. ACA is eager to assist OEHHA in developing an effective system of conveying information to consumers to enable purchasing decisions based on safety considerations.

² ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services.

ACA appreciates OEHHA's willingness to interact with stakeholders during this process. ACA understands that implementation of Prop. 65 presents several challenges, and we commend OEHHA on the solutions it has offered thus far. We are optimistic that through continued involvement with the public and stakeholder community, OEHHA will successfully implement a viable labeling program.

ACA and its members respectfully submit the following comment:

Introduction

On January 8, OEHHA published a proposal to restrict use of short-form warnings and proposed amendments to short form safe-harbor statements. The proposal would require changes to all products currently using short-form warnings. Any product with a label size greater than 5 square inches must be labeled in a manner compatible with or using the long-form warning text. Companies could use amended short-form safe-harbor warning statements when:

- The total surface area available for labeling, for all consumer information, is 5 square inches or less;
- The package shape or size cannot accommodate the full-length warning; and
- the entire warning is printed in a type size no smaller than the largest type size used for other consumer information on the product, but in no case no smaller than 6-point type.

OEHHA also proposes to amend short-form, safe-harbor statements to require identification of one chemical for each toxicity end-point. For example, the proposed short-form warning would include the text, "Cancer Risk From Formaldehyde and Reproductive Risk From Toluene Exposure - www.P65Warnings.ca.gov," placed after the hazard symbol and the "WARNING:" signal word. OEHHA also proposes to eliminate short-form warnings for internet and catalog warnings while providing additional requirements for using short-form warnings on food products.

ACA appreciates OEHHA's flexibility in proposing an unlimited sell-through. The rule would have a one-year phase-in period and an unlimited sell-through for products labelled in compliance with the August 2016 amendments, currently in effect, when manufactured prior to the "operative date." The final rule would include an "operative date" set one-year from the effective date of the rule, allowing phase-in of requirements. Products manufactured prior to the operative date labelled according to the August 2016 amendments would have an unlimited sell through.

OEHHA proposed this rule due to concerns that the short-form warnings are currently being over-used on products with packaging large enough to accommodate a full-length warning. OEHHA notes a short-form warning is often included on products even when a manufacturer has no knowledge of a listed chemical in the product. OEHHA states manufacturers should be required to disclose one chemical for each toxicity end-point due to consumer inquiries requesting additional information about products with short-form warnings. OEHHA characterizes this change as a “clarifying amendment” rather than a substantive change to Prop. 65 labeling.

ACA is concerned that the proposed rule would impose redundant and impractical labeling requirements. Implementation is not feasible. Even if implementation were possible, identification of a hazard-based toxicity endpoint of a Prop. 65 listed chemical would not convey additional information to enhance consumer understanding of product safety over information already provided on product labels. OEHHA’s justifications do not apply to a broad range of consumer products. Manufacturers already label with principal chemical hazards and provide instructions to use products safely. This is particularly true of paints, coatings, sealants, adhesives and formulated products in general.

ACA suggests that OEHHA rescind the current proposal to gather additional information to clearly identify issues it is attempting to address, while continuing stakeholder engagement to effectively address any issues OEHHA identifies.

Additional details are provided below, consisting of the following sections:

- I. Proposed changes would not convey additional information to enhance consumer understanding.
- II. Label and font size requirements are not viable.
- II. Proposed changes would lead to an increase in civil suits with no public benefit.
- III. The proposal does not address a clearly identified problem with existing Prop. 65 requirements.
- IV. OEHHA proposes an unduly burdensome labeling change.
- V. Conclusion

ACA recognizes that OEHHA deems safe harbor warning language as optional. However, companies that choose varying statements can be required to defend such statements in a legal action. Therefore, using safe-harbor language is the most reliable method of Prop. 65 compliance. Moreover, companies that use varying statements would also need to amend those statements to identify at least one toxicity end-point, to comply with OEHHA’s proposal if finalized. The end result is that any change to safe-harbor language will have as

far-reaching an impact as any change to a mandatory aspect of the regulation. In practicality, safe harbor statements function as mandatory requirements, despite OEHHA's view of them as "optional."

I. Proposed changes would not convey additional information to enhance consumer understanding.

ACA is concerned that due to extensive disclosure requirements under federal law, amendments to Prop. 65 short-form, safe-harbor statements will not convey additional meaningful information to consumers while requiring difficult to impossible revisions of already crowded labels. This is especially true of very small labels of 5 square inches or less.

ACA members, like all manufacturers of consumer products containing hazardous chemicals, are subject to ingredient disclosure requirements in the *Federal Hazardous Substances Act*. Depending on the composition of products, other federal statutes and regulatory programs require further ingredient disclosure, warning statements and general product information. These include disclosures of pesticides (FIFRA) and general label information under the *Fair Packaging and Labeling Act*.

Several ACA members use short-form, safe harbor statements on products designed for the workplace in industrial and commercial settings, to supplement label statements provided under OSHA's Hazard Communication Standard at 29 CFR 1910.1200. Manufacturers use safe-harbor, short-form statements to clearly demonstrate Prop. 65 compliance and to avoid non-compliance where a workplace product is inadvertently distributed to consumers.

California also recently implemented another ingredient disclosure requirement. Manufacturers of consumer products falling under OEHHA's broad definition of cleaning products must now also disclose hazardous ingredients under the *California Cleaning Products Right to Know Act*. The act covers products manufactured by ACA members used in conjunction with cleaning and removing paints, coatings, sealants and adhesives.

a) Label elements for consumer products under the *Federal Hazardous Substances Act*

Prop. 65 warnings provide supplemental disclosures but are not the sole or even the primary source of information to a consumer. The primary disclosure and warning requirements for *consumer* products are mandated under the FHSA (*Federal Hazardous Substances Act*), administered by the Consumer Product Safety Commission. Under the FHSA, manufacturers must provide compliant labels for products that can be brought into a place where people live, including garages and storage areas that are part of a household. On a label, companies must list "the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each

component which contributes substantially to its hazard, unless the Commission by regulation permits or requires the use of a recognized generic name.” ([15 U.S.C. 1261\(2\)\(p\)\(1\)](#)).

Under the FHSA, hazardous chemicals are defined as toxic chemicals including carcinogens and reproductive toxins, corrosive chemicals, flammable chemicals, irritants and strong sensitizers.³ Manufacturers of formulated products typically identify any carcinogen or reproductive toxin that contributes substantially to hazards associated with a product. Typically, any carcinogen or reproductive toxin will be disclosed at amounts of 1% or more in a formulated product, according to manufacturer’s practice, even when not a significant contributor to hazards associated with a product. A manufacturer will disclose chemical identity at any concentration if it is a significant contributor to overall product hazards.

In addition to requiring disclosure of hazardous ingredients by name, FHSA requires signal words, handling and care instructions, precautionary statements and instructions, and first aid instructions, where appropriate.

b) Label elements for workplace products under OSHA’s Hazard Communication Standard

Companies designing products for the workplace may also use short-form, safe-harbor statements, while providing details on workplace labels and Safety Data Sheets. Users can usually access detailed Safety Data Sheets online, if questions arise. On a label, users will find statements of hazard, pictograms, precautionary statements, product identifier and signal words.⁴ These include warnings for carcinogens and reproductive toxicity. Manufacturers typically provide additional use instructions and safety precautions. Safety Data Sheets readily accessible either with the product or online convey additional information regarding product composition, first aid instructions, regulated substances and other details.⁵

c) Utility of Prop. 65 Short-Form Safe-Harbor Statements

Prop. 65 functions as a supplemental disclosure of chemicals identified by the State of California as being carcinogens or reproductive toxins. Where those chemicals “contribute substantially” to the overall hazard of a product, a manufacturer has already disclosed the hazardous ingredient, as required under the FHSA, rendering the Prop. 65 disclosure redundant. Where the Prop. 65 listed chemical does not contribute substantially to overall product hazard, its disclosure under Prop. 65 is secondary and not a primary source of warning to a consumer.

³ 16 CFR 1500.3(c)(1) and (c)(2), explaining toxicity with 16 CFR 1500.135 focused on carcinogens.

⁴ Additional details regarding hazard communication label elements listed by hazard are available in Appendix C of 29 CFR 1910.1200, available online at: <https://www.osha.gov/hazcom/appendix-c>.

⁵ Additional details regarding required elements on a Safety Data Sheet are available at App. D, 29 CFR 1910.1200, available online at: <https://www.osha.gov/hazcom/appendix-d>.

Similarly, where a workplace product is labeled with a safe-harbor Prop. 65 statement, under existing requirements, the warning serves to notify users of the presence of a listed chemical. Users already have detailed hazard warnings, precautionary statements and additional information. Users can access additional details from online Safety Data Sheets, including composition of a product. Under the OSHA Haz Com standard,⁶ identity of Cat. 1 and 2 carcinogens must be included on an SDS in amounts of 0.1% and greater. Irrespective of percent composition, companies typically include information about carcinogens on labels and SDS for Prop. 65 listed chemicals, often including chemical identity on the SDS.

Whether labeled according to FHSA, OSHA Haz Com or both, the disclosure of an additional chemical name does not provide consumers with valuable information, considering hazard and other information clearly described on labels. An emphasis on the Prop. 65 warning is likely to detract from other information that is vital to a consumer understanding of product safety. It can mislead consumers by placing undue emphasis on Prop. 65 listed chemicals instead of substantial contributors to product hazards.

Labels are not the sole source of information to consumers. Consumers can access details using websites, QR codes commonly placed on products, online SDS available for most products or contacting a manufacturer directly, using contact information provided on product labels. Most of these sources of information can be accessed using a Smartphone, prior to purchasing a product, but more importantly these sources supplement the label information that fully inform consumers of product hazards and safety instructions prior to purchase.

Considering that a Prop. 65 warning is either redundant or warning of a non-substantial contributor to overall product hazard, a change to the warning requirement does not convey additional information critical to assisting consumers in selecting safe products. The change however comes with significant implementation costs to product manufacturers while providing a new basis for “bounty hunter” lawsuits that have seen a steady rise since implementation of Prop. 65.

II. Label and font size requirements are not viable.

As proposed, the revised short-form warning requirements would apply to package labels whose consumer information sections are 5 in² or less. Larger labels would comply with long-form warning requirements. ACA is concerned that proposed changes would not leave enough space to provide consumers with all required information, including federally mandated statements, discretionary statements and Prop. 65 warnings. Spacing consideration apply to labels of all sizes. Manufacturers carefully designed labels to convey

⁶ See Appendix A, 29 CFR 1910.1200, available online at: <https://www.osha.gov/hazcom/appendix-a>

critical information. Altering labels on containers of a gallon or less is extremely difficult due to existing label information.

As noted above consumers must provide label information required under the *Federal Hazardous Substances Act*⁷ and/or the *OSHA Hazard Communication Standard*. Product manufacturers also commonly combine both consumer and workplace label elements on products designed for both markets or provide dual labels.

Paint, coatings, sealants and adhesive labels typically must include appropriate product identification, directions for use, third party certifications (e.g. Safer Choice) where appropriate, advisory statements, company/poison control phone number, corporate internet address and marketing claims. Retailers and downstream users often also benefit from and request Spanish language labels, in addition to English language labels. Manufacturers commonly include detailed information in both English and Spanish on a bifurcated label, maximizing all available space, including Prop. 65 warnings in both English and Spanish. Spanish language information must meet the same type size requirements as the English language. This cuts the available label space in half to fit the required and voluntary label statements in two languages. Some ACA members also provide labels in French, Spanish and English to ship products to Canada, Mexico and domestically, further reducing available space.

OEHHA's proposal, if implemented, would lead to an unworkable and costly requirement for label design. It also conveys little to no additional information to consumers, considering extensive information already provided about chemicals contributing substantial hazards associated with the product disclosed on labels.

ACA is also concerned that OEHHA's proposed variations from federal requirements for font size on small labels further contributes to over-crowded labels. The Prop. 65 warning is already the largest warning on small labels. Now OEHHA is asking for an expansion of Prop. 65 label text.

Under Prop. 65, type size must equal the size of the largest font of the label's cautionary language, being the "signal word" under FHSA specifications, but in no case less than 6 point font. With manufacturers including information that directly addresses product

⁷ Federal Hazardous Substances Act (FHSA) or "the Act"), 15 U.S.C. 1261(p)(1), requires that hazardous substances bear certain cautionary statements on their labels. These statements include: signal words; affirmative statements of the principal hazard(s) associated with a hazardous substance; the common or usual name, or chemical name, of the hazardous substance; the name and place of business of the manufacturer, packer, distributor, or seller; statements of precautionary measures to follow; instructions, when appropriate, for special handling and storage; the statement "Keep Out of the Reach of Children" or its practical equivalent; and, when appropriate, first-aid instructions. Section 2(p)(2) of the Act specifies that all such statements shall be located prominently on the label of such a substance and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the label. (See also 16 CFR 1500.121)

safety, including discretionary warnings and instructions, requiring larger font for secondary Prop. 65 warnings could mislead consumers, assuming it fits on the label at all.

Difficulty in label design and size considerations are demonstrated by the varying font-size requirements of the FHSA. FHSA prescribes font sizes according to the principal display panel, not actual label size. Six-point font, as required by OEHHA, is approximately .083 inches for the height of the lower case letter “x.” Comparing to FHSA requirements is further complicated since FHSA font specifications address the *height of capital letters* whereas 6 point font describes the *height of the lower case letter “x.”* Using an approximate comparison, FHSA prescribes a smaller size for capital letters than 6 point-font where the principal display panel size is 5 square inches or less, making the Prop. 65 warning the largest warning on small labels.⁸ Requiring additional Prop. 65 text is simply not possible.

OEHHA’s proposal to add additional text to a secondary, Prop. 65 warning, at a larger font size than other text on small labels is unreasonable. OEHHA’s requirement for small-sized labels are also unworkable, considering necessity to convey primary warnings and safety information, variations from federal font size requirements and potential to confuse consumers about the primary hazards associated with a product due to the prominence of Prop. 65 warnings.

⁸ At 16 CFR 1500.121, FHSA allows for the following font sizes (of capital letters):

Area of Principle Display Panel in Square Inches	0 to 2 (sq. inches)	>2 to 5 (sq. inches)	>5 to 10 (sq. inches)	>10 to 15 (sq. inches)	>15 to 30 (sq. inches)	>30 (sq. inches)
Type Size (inches)						
Signal Word	3/64” (about .047”)	1/16 (about .0625)	3/32 (about .094)	7/64 (about .11)	1/8 = 0.125	5/32 (.156)
Statement of Hazard	3/64” (about .047”)	3/64 (about .047)	1/16 (about .063)	3/32 (about .094)	3/32 (about .094)	7/64 (about 0.11)
Other Cautionary Material	1/32” (about .031”)	3/64 (about .047)	1/16 (about .063)	1/16 (about .063)	5/64 (about .078)	3/32 (about .094)

Size restriction also fails to distinguish between total container label area and what the Federal Hazardous Substances Act defines as *principal display panel area* (16 CFR 1500.121). Font size requirements in the FHSA are relative to the principal display panel. *Principal display panel* means the portion(s) of the surface of the immediate container, and of any outer container or wrapping, which bear(s) the labeling designed to be most prominently displayed, shown, presented, or examined under conditions of retail sale.

III. Proposed changes would lead to an increase in civil suits with no public benefit.

ACA is concerned that amendments provide a new basis for unnecessary civil enforcement actions with no advancement in quality of information conveyed to consumers. Although OEHHA considers short-form safe harbor statements voluntary, companies use safe harbor statements as the most reliable method of compliance and to avoid defending alternative statements in a legal action. In practical effect, any changes to OEHHA's safe harbor statements have the effect of a mandatory regulatory change. Civil actions from private plaintiffs' attorneys have steadily increased since 2000, as documented on the website of the California Attorney General.⁹ In the year 2000, the AG's office reports 200 settlements with 65% of settlement costs being paid as attorneys' fees. Total settlement costs for that year are \$11,257,271.36.

The AG's most recent information is from 2018. In 2018, the AG's Office reports 829 settlements with a total settlement amount of \$35,109,924.00. Attorneys' fees amounted to 77.5% of settlement costs with a total amount of \$27,250,534 paid in attorneys' fees. Settlement information for the years 2000 and 2018 are summarized in the table below:

Year	Number of Settlements	Total Amount of Settlement	Civil Penalties	Attorneys' Fees	% Attorneys' Fees of Total Settlement	% Civil Penalties of Total Settlement
2000	200	\$11,257,271.36	\$868,620.500	\$7,341,115.78	65.2%	7.7%
2018	829	\$35,169,924.00	\$6,015,932.00	\$27,250,534.00	77.5%	17.1%

ACA is concerned that the amendment will lead to even more rapid increases in civil enforcement actions with no benefit to consumers. As described above, ACA members already provide detailed hazard information and use instructions to minimize risk.

To the extent that over-use of Prop. 65 safe harbor statements is a problem in other product sectors, the threat of civil suits for failure to warn may be a driving factor. OEHHA should rescind the current proposal and gather additional information to comprehensively understand the perceived problem of over-labelling it is attempting to address.

IV. The proposal does not address a clearly identified problem with existing Prop. 65 compliance.

In its Statement of Reasons, OEHHA states that a Prop. 65 amendment is necessary due to several consumer inquiries requesting additional information about chemicals in products

⁹ Annual reports of settlement are available on the website of the Office of the Attorney General at: <https://oag.ca.gov/prop65/annual-settlement-reports>

containing Prop. 65 warnings. In response to a *Public Records Act* request, OEHHA disclosed a list of consumer inquiries requesting additional identity of chemicals contained in products. Of the approximately 4,900 inquiries summarized in the disclosure, **ACA did not identify inquiries related to paint, coatings, sealants, adhesives, or other formulated products. Inquiries identify almost exclusively articles.**

In its *Statement of Reasons* for this proposal, OEHHA states it must amend short-form warnings to require disclosure of at least one toxicity end-point in response to consumer inquiries and to prevent over-use. OEHHA explains:

OEHHA frequently receives inquiries from the public regarding exposures from a wide range of consumer products labeled with a short-form warning. An informal tally of public inquiries to OEHHA related to Proposition 65 warnings during December 2019 through December 2020, nearly 70% of consumer inquiries requested more information about a specific product, and at least 18% of consumer inquiries included a request for information regarding a short-form consumer product exposure warning. These consumers wanted to know the name of the chemical to which they might be exposed.

(Statement of Reasons, p. 5-6)

In OEHHA's *Statement of Reasons*, it notes inquiries related to "a wide range of consumer products" when inquiries are almost exclusively related to articles. Even here, only 18% of inquiries requested chemical identity. Based on OEHHA's disclosures of about 4,900 Prop.65-related inquiries over a year, this would result in 617 inquiries requesting chemical identity. To base such a broad-reaching change in short-form warnings on these 617 inquiries is unconscionable, especially when considering these inquiries relate to articles. In effect, OEHHA's proposal is demonstratively of no utility as it relates to paints, coatings, sealants, adhesives, other formulated products and a wide-range of other consumer products with no consumer inquiries listed.

To further demonstrate the low number of inquiries OEHHA receives, consider the number of inquiries compared to the population of California, estimated at about 40 million.¹⁰ Only .01% of the population requested information from OEHHA related to a Prop. 65 warning. Further only, .002% of the population requested information about chemical identity. ACA appreciates OEHHA's interest in serving even a minority of the population who file inquiries, but the current proposal is unnecessarily over-broad while leveraging severe

¹⁰ Estimate of the Public Policy Institute. Information available online at: <https://www.ppic.org/publication/californias-population/>

costs on manufacturing industry. These statistics become even more miniscule when you consider the number of consumer products that an individual purchases in any given year.

Further, OEHHA does not provide information related to over-use of short-form warnings, where a manufacturer is not aware of a Prop. 65 listed chemical in its products. Contrary to OEHHA's assertion, ACA's members provide disclosures identifying chemicals, significant hazards, use information, etc. These disclosures are typical of a wide range of consumer products subject to the FHSA and other federal disclosure laws.

As noted in the section above, with increased civil actions over Prop. 65 warnings, manufacturers have an incentive to overwarn. The current proposal would only exacerbate the problem. OEHHA should consider reform of the civil suit provisions as a means of addressing alleged over-warning.

V. OEHHA proposes an unduly burdensome labeling change.

The proposed amendment results in an unduly burdensome requirement, considering costs and adequacy of current label information. Relabeling is a time-consuming and costly process. Manufacturers recently completed label updates to comply with OEHHA's 2016 Prop. 65 amendments, coming into effect in August 2018. One medium-sized manufacturer documents cost to revise labels of about 500 products at \$800,000. In addition to this relabeling expense, the company devoted about 3,000 hours of work, being an additional expense. Many ACA members would need to revise thousands of product labels using sophisticated algorithms or by revising labels manually. Either method is costly and time consuming.

Some companies also recently completed another costly label update to comply with *California's Cleaning Product Right to Know Act of 2017*, with labeling requirements taking effect in January 2021. With manufacturers already conveying information related to hazards to consumers, OEHHA's proposal brings no additional information of real value to the consumer, while imposing yet another costly label update on manufacturers.

These costs are not limited to manufacturers of consumer products. Manufacturers of industrial and commercial products often choose to label using safe-harbor statements. Manufacturers use the warning to provide a clear statement related to Prop. 65 thereby addressing questions from downstream users up front. Manufacturers may also use Prop. 65 safe harbor language in case an industrial or commercial product is inadvertently sold to a consumer by a downstream distributor or retailer.

The timing of changes provides further difficulties. OEHHA's proposed "operative date" set one-year from the effective date is not enough time to design, print and affix labels across hundreds to thousands of products per manufacturer. Assuming label changes could be

accommodated, although this is highly unlikely, manufacturers would need an operative date of at least five years to evaluate, redesign labels and incorporate them on to products.

VI. Conclusion

ACA members carefully evaluate hazards and risks associated with their products to provide warnings and information so consumers can use products safely and can select products based on safety. Labels not only include information required by federal law, but also include discretionary warnings and information, often conveyed in English and Spanish, and sometimes in English, Spanish and French so products can be shipped to Canada, Mexico and within the U.S. Because of details already conveyed to consumers, OEHHA does not receive inquiries for additional information regarding paint, coatings, sealants, adhesives and other formulated products.

OEHHA has not clearly justified and supported its assertion of a problem with current Prop. 65 compliance. ACA suggests that OEHHA rescind the proposal to gather additional information while continuing to work with stakeholders to address any issues OEHHA identifies. The proposal should be rescinded for the reasons described in this comment, summarized below:

- A change to the warning requirement does not convey additional information critical to assisting consumers in selecting safe products. Manufacturers of paint, coatings, sealants, adhesives and other products already label chemicals with identity of hazardous ingredients, signal words, handling and care instructions, precautionary statements, use instructions and first aid instructions, where appropriate. Prop. 65 warnings are redundant when a Prop. 65 listed chemical is associated with significant hazards of a product or the warning is secondary when the listed chemical is not associated with significant hazards of the product.
- Labels on containers of a gallon or less are already crowded with information necessary to consumer understanding such that adding text is difficult to impossible. This is especially true of extremely small labels of 5 square inches or less.
- Revising labels is expensive, estimated at about \$800,000 for about 500 products. Manufacturers recently updated labels to comply with the 2016 Prop. 65 amendments and the *Cleaning Product Right to Know Act*, for some products. Costs affect manufacturers of consumer, industrial and commercial products.
- The amendments provide a new basis for “bounty hunter” lawsuits that have seen a steady increase since implementation of Prop. 65, without providing enhanced information to consumers.
- Consumer inquiries, identified as a reason for the proposal, do not relate to several types of consumer products. Inquiries do not relate to paint, coatings, sealants,

adhesives and other formulated products. The proposed rule is overly broad and not necessary for many product types.

ACA appreciates the opportunity to submit comment on this matter. Please contact me if you require additional information about any issues described herein.

Sincerely,

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