



Innovative Products For **Home. Work. Life.**

January 21, 2022
Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
PO. Box 4010
Sacramento, California 95812-4010

Re: Notice of Proposed Rulemaking, Proposed Amendments to Article 6 Clear and Reasonable Warnings – Short Form

Dear Ms. Vela,

On December 13, 2021, the Office of Environmental Health Hazard Assessment (OEHHA) published a revised notice¹ proposing to amend Title 27, California Code of Regulations, Sections 25601, 25602, 25603, and 25607.1 to clarify certain provisions of the regulations addressing Proposition 65 short-form warnings. The Household & Commercial Products Association² (HCPA) appreciates the opportunity to provide these comments and has significant concerns with the proposal that merit its withdrawal.

HCPA represents a wide range of trusted and familiar household and commercial products and hold their products to the highest safety standards and ensure every ingredient's safety through rigorous science-based analysis and evaluation. Safety is always our first priority, which is why companies invest significant time and resources to make products that are better for human health and the environment. Formulators and manufacturers are continuously improving their products to account for new science and technology, ever-changing regulations, consumer demand, sustainability goals, and a host of other factors that change what's possible as the marketplace evolves.

Still, formulators and manufacturers must sometimes use materials and substances that are or contain chemicals that California identifies as causing

¹ Available at <https://oehha.ca.gov/proposition-65/cnr/notice-extension-public-comment-period-proposed-modification-text-title-27>

² The Household & Commercial Products Association (HCPA) is the premier trade association representing companies that manufacture and sell \$180 billion annually of trusted and familiar products used for cleaning, protecting, maintaining, and disinfecting homes and commercial environments. HCPA member companies employ 200,000 people in the U.S. whose work helps consumers and workers to create cleaner, healthier and more productive lives.

cancer or reproductive harm. In that case, companies use “Clear and Reasonable” warnings to ensure consumers and workers can make informed decisions. HCPA has a proud history of promoting product transparency and believes that consumers and workers deserve to know what ingredients are in their products. Notably, HCPA played a lead role in negotiating the Cleaning Product Right to know Act of 2017 in California, which requires manufacturers, distributors, and marketers to disclose information about the chemicals in cleaning products, both on the label and their website. That being said, HCPA believes the short-form label warning proposal is a fundamental change that goes well beyond providing consumers and workers with the Clear and Reasonable Warnings they deserve to know. We also argue that it does not provide any tangible benefit and that OEHHA has not adequately accounted for the economic impact of the proposal and that an Economic Impact Analysis is necessary.

Summary points

- Economic impact not analyzed
- Significant change to Label Size and impacts not adequately considered
- Insufficient time to phase in changes
- Confusion caused by differing warning requirements

Economic impact not analyzed

OEHHA has stated that their original intent for the short form warning was to truncate the warning for use only on small labels that could not fit the full warning. However, the proposed amendments go beyond limiting the short form warning’s usage by now proposing for the short form warning to list at least one chemical that requires the warning. This requirement was not part of the 2015 Initial Statement of Reasoning (ISOR) or the 2016 Final Statement of Reasoning (FSOR). Additionally, the plain language from Section 25601(b) makes it clear that the warning requirement is product specific, not chemical specific. Indeed, both the current long-form and short form warnings provide a product-specific warning, i.e., the long-form warning uses the phrase “chemicals including,” while the short form does not enumerate specific chemicals. However, the revised short form warning proposal incorporates a chemical-specific warning. This inconsistency significantly increases the burden and compliance risks on companies that were not adequately addressed in the proposal. On these points alone indicates that this is a significant change to the regulation.

Significant change to Label Size and impacts not adequately considered

HCPA appreciates that OEHHA has increased the maximum label size for short form warnings from 5 square inches to 12 square inches, however this limitation continues to be an arbitrarily derived size and remains inadequate for many products. The short form warning's purpose is to balance the requirement of including the clear and reasonable warning with the limited space available on the label. According to the ISOR published in 2015, OEHHA believed the approach of incorporating a URL into the short form warning would allow businesses to provide a short warning message that complies with the Act, while still pointing an interested persons to a location where they could obtain more information. The concern over label space is further increased by the proposed requirement that labels that have a maximum area of twelve square inches are only able to use the new short form warning. Depending on the chemical (or chemicals if a product needs to warn of both a cancer and reproductive risk), the space limitations of the new short form warning may be insufficient. Further, with other labeling requirements, such as the Federal Hazardous Substances Act, Fair Packaging and Labeling Act, and California Cleaning Product Right to Know Act, along with a range of other state and federal requirements it is going to be challenging, if not, impossible to fit all that information into such a small area. All of this information, in addition to the Clear and Reasonable Warnings under Article 6, is important for consumers and workers as it provides critical safety information to avoid misuse and potential unnecessary exposure. Further many products include warnings in multiple languages to ensure that consumers and workers have the appropriate information on the label. Providing all of this information will be even more challenging on the smaller packages with the increased short form warning requirements and will likely require a complete reworking of label artwork for impacted products. With these considerations, HCPA requests that OEHHA undertake a comprehensive study to ascertain the appropriate size to ensure that short form warnings address OEHHA's concerns while meeting the concerns identified here. In the event, OEHHA proceeds with the proposal without undertaking a study, HCPA recommends that the minimum size criteria be increased to 40 square inches.

Insufficient time to phase in changes

Additionally with the changes in the allowable verbiage, all short form labels will need to be updated, regardless of whether they meet the new size criteria or must be updated to the long form warning. With the proposed modifications to Article 6, companies that would still be allowed to use the short form warning because their label size is less than twelve square inches and companies that used the short form warning due to limited label space but have small products with a label larger than twelve square inches will have to update all of their labels. A one-year phase-in period is not a realistic transition period under normal circumstances, let alone while many companies combat and deal with the COVID-19 pandemic. Many industries have state and

federal regulations that require specific warnings or safety instructions to the consumer that must be included on product labels. 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. HCPA requests, that should the proposed changes go forward, that OEHHA provide 36 months to implement the changes. This additional time will minimize the likelihood of exacerbating the existing impacts of the ongoing pandemic and associated supply chain constraints, shutdowns and remote working. In addition, inclusion of a unlimited sell-through of products manufactured prior to the effective date of the regulation would assist in minimizing market disruptions for similar reasons.

Confusion caused by differing warning requirements

As a rationale for amending Article 6, OEHHA states a concern around businesses utilizing the short form warning without a justifiable need for it. HCPA would appreciate more information regarding this reasoning since an appliance manufacturer and a guitar manufacturer are not representative of the household and commercial products industry and many other entities impacted by the proposal. HCPA does not believe that businesses are using the short form warning without a reason for doing so (i.e., a product in which the consumer is exposed to a chemical or chemicals that require the warning). As previously stated, label space is a premium. Companies do not want to waste that space on a warning that is not needed and would rather utilize it in a more productive manner, such as proper product use, consumer safety, or including directions in multiple languages. For products that need to comply with the California Cleaning Product Right to Know Act of 2017, products have to list all intentionally added ingredients on the Prop 65 list on the label by January 1, 2023, making the listing of the chemical in the warning redundant. Further, the intent of right-to-know laws and regulations is to warn consumers and workers that a product presents a potential cancer or reproductive risk to help them make informed decisions, so a company is not going to include this warning unless it is warranted. There are products that clearly require a warning due to the intentional inclusion of certain substances, but product manufacturers also have to be cognizant of impurities within the chemicals that are used to formulate products. Those impurities will vary in their levels between different sources and different lots, whether they are from natural sources or synthetic. As such, companies typically take a conservative approach in calculating the potential exposure of various chemicals when the product is used in a reasonable manner because it is not feasible to test and modify each product to determine which batch will or will not require the warning. Additionally, HCPA does not believe that the OEHHA survey of seventeen companies, which noted that “limited chemical exposure information from some businesses; other companies failed to respond to OEHHA’s request for

information. Most did not identify an exposure that likely needed a warning," is representative of the entire industry. ³ Undoubtedly, had OEHHA contacted an association, such as HCPA, they would have likely received these and other challenges in the proposal.

The proposed changes to the short form warnings increase compliance and litigation risk for manufacturers. The new proposed short form warning does not provide the manufacturer with the safe harbor protection for other chemicals that may be in the product. See Example in Table 1. Specifically, the long form of the warning uses the phrase "chemicals including" and the current short form warning does not enumerate specific chemicals. Thus, currently, both forms of the warning provide product-specific warning. Contrary, the proposed new short form is a chemical-specific warning. Plaintiff's attorneys would seize the opportunity to force settlements for non-specified chemicals – suits that would not be possible if the long-form warning, or the current short form, were used. The plain language of the regulation Sec. 25601(b) makes it clear the warning requirement is product specific, not chemical specific. Warnings are required if more than one endpoint risk (repro/ cancer) exists, but it does not require listing out all P65 chemicals in the warning. If the warning was intended to be chemical-specific, the regulations would not repeatedly use the phrase "product-specific warning." For the long-form warning, Section 25603 still envisions using the phrase "chemicals including...". The proposed revised short form warning could utilize this same nomenclature, i.e., "WARNING: Cancer risk from exposure to chemicals including [lead] – www.P65WARNING.ca.gov" would be acceptable, but such language is too many characters and no longer is a short warning. It is far better to retain the existing short form warning "WARNING: Cancer – www.P65WARNING.ca.gov", which is product-specific and not chemical-specific. Given that the proposed short form warning opens does not provide product-specific coverage and given that it significantly lengthens the short form warning, we instead strongly recommend that OEHHA abandon its proposed changes to the wording of the short form warning. HCPA strongly recommends that OEHHA align the short form warning language with the long form warning language to ensure consistency in the marketplace.

The proposed changes to the short form warnings also increases consumer confusion. By offering three warning word options, and two options for the short form warning, OEHHA will create even greater confusion in the marketplace. OEHHA also expresses a concern that the current short form warning limits the usefulness of the warning to consumers. HCPA disagrees with this observation and would appreciate more information on the informal tally of public inquiries. For example, how many inquiries does this include? Or do the consumers contact the manufacturer or go online for more information? It is difficult for stakeholders to understand any potential benefit of the proposed fundamental change in the short form warning without having more information on the sample size of the informal information provided by OEHHA.

³ <https://oehha.ca.gov/media/downloads/crn/p65shortformisorf2021.pdf>, page 6-7

HCPA reiterates the recommendation that OEHHA align the short form warning language with the long form warning language to ensure consistency in the marketplace.

HCPA appreciates that OEHHA now includes the option to allow website and catalog warnings consistent with warning provided on the label. The provision at §25602(c) of “If a short form warning is being provided on the label pursuant to Section 25602(a)(4), the warning provided on the website [or catalog] may use the same content” will provide greater flexibility to companies while minimizing consumer confusion.

HCPA appreciates the opportunity to comment on OEHHA’s proposed amendments to *Article 6 Clear and Reasonable Warnings Amendments to Related to Short-Form Warnings for Consumer Product Exposures* but significant concerns remain. HCPA respectfully requests OEHHA withdraw the revised short-form proposal for the reasons stated above. In the event, OEHHA proceeds with the proposal, we ask for a minimum implementation timeline of three years with an unlimited sell-through, modify the short form warning for consistency and increase the label size to 40 square inches.

We thank you for your time and attention.

Sincerely,

A handwritten signature in black ink, appearing to read 'Steven Bennett', with a long horizontal flourish extending to the right.

Steven Bennett, Ph.D.
Executive Vice President, Scientific & Regulatory Affairs