

January 3, 2024

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

Re: Proposed Amendments to Existing Sections 25601 - 25603, 25607.2 and Proposed Adoption of New Sections 25607.50 - 25607.53 (Short Form Warnings)

Dear Ms. Vela,

On behalf of the Household & Commercial Products Association¹ (HCPA) and its members, we want to convey comments on the Proposed Amendments to Existing Sections 25601 - 25603, 25607.2 and the Proposed Adoption of New Sections 25607.50 - 25607.53² to address Proposition 65 short-form warnings. The HCPA has commented throughout the process to revise the short-form warning and appreciates the Agency's efforts to address the previously raised concerns.

HCPA represents a wide range of trusted and familiar household and commercial products, holds their products to the highest safety standards and ensures 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.

Occasionally, formulators and manufacturers must use materials and substances that are or contain chemicals that California identifies as causing cancer or reproductive

¹ HCPA is the premier trade association representing the interests of companies engaged in the manufacture, formulation, distribution and sale of more than \$180 billion annually in the U.S. of familiar consumer products that help household and institutional customers create cleaner and healthier environments. HCPA member companies employ hundreds of thousands of people globally. HCPA represents products including disinfectants that kill germs in homes, hospitals and restaurants; air fresheners, room deodorizers, and candles that eliminate odors; pest management products for pets, home, lawn, and garden; cleaning products and polishes for use throughout the home and institutions; products used to protect and improve the performance and appearance of automobiles; aerosol products and a host of other products used every day.

² <https://oehha.ca.gov/proposition-65/cnr/notice-proposed-rulemaking-and-announcement-public-hearing-amendments-article-6>

harm. As required, companies use “Clear and Reasonable” warnings to ensure consumers and workers can make informed decisions when using products according to instructions. HCPA has a proud history of advocating for 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, which requires manufacturers, distributors, and marketers to disclose information about chemicals in cleaning products, both on the label and on their website. Accordingly, HCPA believes the short-form label warning proposal is a fundamental change that detracts from established policies that have improved access to detailed ingredient use and handling instructions for consumers and workers and can be interpreted as exceeding Clear and Reasonable Warning requirements.

The intent of right-to-know laws and regulations is to provide information to consumers and workers to help them make informed decisions by notifying them that a product contains a chemical that may present a potential human health risk. Multiple state right-to-know laws require disclosure of certain chemicals, with other states relying on OEHHA's Proposition 65 list in developing their own programs. In instances where the Proposition 65 chemical is already disclosed on the label or online, it should not be required for disclosure specific to Proposition 65, if the necessary short-form warning is provided.

Fundamental Change to Warning Requirements

OEHHA has stated that their original intent for the short-form was to truncate the warning for use only on small labels on which the full warning cannot fit, and as a rationale for amending Article 6, OEHHA states concern about businesses utilizing the short-form warning without a justifiable need.³ HCPA appreciates the information regarding “large products with ample space for full-length warnings, including home appliances such as washing machines, refrigerators, and stoves” to support this reasoning. However, HCPA is concerned that this scenario is not representative of the household and commercial products industry and many other entities impacted by the proposal. The proposed amendments unnecessarily limit the use of the short-form warning by proposing that at least one chemical be listed within the warning. This proposed requirement was not included in the 2015 Initial Statement of Reasoning (ISOR)⁴ or the 2016 Final Statement of Reasoning (FSOR).⁵ Additionally, the plain language from Section 25601(b) makes it clear that the warning requirement is product-specific, not chemical-specific. Moreover, both the current safe harbor and current short-form warnings provide a product-specific warning, i.e., the safe harbor warning uses the phrase “chemicals including,” while the short-form does not enumerate

³ ISOR, Section III

⁴ <https://oehha.ca.gov/media/downloads/crn/112715warningreg20isor.pdf>

⁵ <https://oehha.ca.gov/media/downloads/crn/art6fsor090116.pdf>

specific chemicals.

The proposed changes to the short-form warnings unnecessarily increase compliance and litigation risk for manufacturers. The new proposed short-form warning does not provide manufacturers with safe harbor protection for other chemicals that may be in the product. 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 provide product-specific warning. Conversely, the proposed new short form is a chemical-specific warning. Consequently, the plaintiff’s attorneys would seize the opportunity to force settlements for non-specified chemicals – lawsuits that would not be possible if the safe harbor warning or the current short-form warning were used.

HCPA is concerned that the proposed changes to §25602 (a)(4) no longer offer clear safe harbor protection for manufacturers. Previously, manufacturers were able to rely upon “(t)he entire warning must be in a type size no smaller than the largest type size used for other consumer information on the product”, whereas the proposed revision to reference the broader provisions of §25601 (c) encompasses elements potentially available at the point of purchase beyond the control of the manufacturer. HCPA recommends modifying §25602 (a)(4) to include the label-specific provisions of §25601 (c) for clear, safe harbor protection.

HCPA strongly recommends that OEHHA align the short-form warning language with the safe harbor warning language to ensure consistency in the marketplace. Given that the proposed short-form warning does not provide product-specific coverage and significantly lengthens verbiage, we strongly recommend that OEHHA abandon its proposed changes to the wording extension of the short-form warning. Currently, warnings are required if more than one endpoint risk (reproductive / cancer) exists, but it does not require listing out all Proposition 65 chemicals. Under Section 25603, labels must use the phrase “chemicals including.” The proposed revised short-form warning would utilize this same nomenclature, i.e., “WARNING: Cancer risk from exposure to chemicals including [name of chemical] – www.P65WARNING.ca.gov”. Unfortunately, such a format defeats the short warning intent. HCPA believes it would benefit consumers and workers to retain the existing format “WARNING: Cancer – www.P65WARNING.ca.gov”, which, again, is product-specific and not chemical-specific.

HCPA does not believe that businesses are applying the short-form warning without adequate justification (i.e., a product in which the consumer is exposed to a chemical or chemicals that require the warning). Myriad labeling and packaging requirements limit available labeling space, and manufacturers are concerned that excessive warnings detract from important, commensurate health and safety information such as product use, consumer safety, or multiple lingual translations.

Economic Impact Significantly Underestimated

OEHHA provides an economic model utilizing the North American Industrial Classification System (NAICS) codes times product estimate multiplies portion of products requiring short form warning to arrive at an estimated economic impact. Correspondingly, if any of the parameters are under (or over) estimated, the economic estimate will not be reflective. In our experience, each of the parameters underestimates the impact of each and *significantly* underestimates the economic impact.

For example, Appendix Table 1 lists the NAICS codes of California Businesses Likely Providing Proposition 65 Consumer Product Warnings, but based upon a survey of our membership, there are numerous NAICS codes not included. The missing NAICS codes within our membership are 3256 - Soap, Cleaning Compound, and Toilet Preparation Manufacturing, 325998 (All Other Miscellaneous Chemical Product and Preparation Manufacturing.), and 32532 (Pesticide and other agricultural chemical manufacturing), which encompass a large number of businesses that are unaccounted for in the proposal. There are likely additional NAICS codes missing in other industries as well. HCPA strongly recommends that OEHHA reevaluate the NAICS codes included in Table 1 and repeat the economic analysis.

The use of inflation-adjusted 2015 cost estimates of \$1330 per label change is arbitrary. When OEHHA made the original proposal, there was little market experience with the cost of a label redesign of warning labels. That is no longer the case, and based on a survey of our members, a label redesign can range from \$600 to \$7500 per product. The baseline cost is compounded with each offering in a variety of sizes. Moreover, label redesign estimates are highly variable and depend upon whether it is a California-specific product, a product distributed nationally, or regulated under other regulations (i.e., the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)). EPA-regulated products must be reviewed with each labeling change which is an added cost that impacts business decisions across the value chain. The cost estimates in the proposal assume that “a business using the current short-form warning language can change the warning language on its labels to conform to this proposal,” but there are likely businesses that will begin to utilize the safe harbor warning.⁶ The cost estimate for this shift in warning would undoubtedly be greater. HCPA recommends that OEHHA poll different segments of potentially impacted businesses to determine a more reflective cost estimate for a label redesign.

HCPA also has concerns that the short-form warning is now variable in length and size due to the inclusion of the [name of the chemical] driving the warning. For example, the name of the chemical could be as short as four characters in the case of lead or exceed eighty characters in “*trans*-2-[(Dimethylamino)methylimino]-5-[2-(5-

⁶ Final Combined 399 Attachment, page 4.

nitro-2-furyl)vinyl]-1,3,4-oxadiazole” or “Perfluorooctane sulfonic acid (PFOS) and its salts and transformation and degradation precursors”. Obviously, this is an extreme situation, but the practicality is that this variability would require additional time to be accounted for when preparing and reviewing the format of labels. Essentially, the variable size of the warning would likely impact other elements on the product label, and manufacturers that have standardized with the current short-form warnings on their product labels would need to account for this difference. In some cases, manufacturers would only require a simple update to the label, while in other cases, the label would require a complete reworking of the artwork rework to fit all the new text on the label. There is even the possibility that the increased amount of text would require additional or larger packaging to accommodate the warning, contradicting packaging and waste reduction efforts underway in California.

The sliding scale used to derive the number of products per company underestimates the number of products, especially on the high end of the sliding scale.⁷ This is particularly pronounced for companies that have multiple variations of similar products with differing fragrances or colors, as this can often exceed one thousand products for an individual company. HCPA recommends that OEHHA revisit the sliding scale and product estimates, especially for NAICS codes that commonly have wide variations in the number of similar products.

HCPA questions whether OEHHA’s assumption “that 50 percent of the products in each sector have short-form warnings on their labels” is reflective of the current marketplace.⁸ While label space is a premium on many of our members’ products, it is particularly pronounced with smaller packages. HCPA recommends that OEHHA poll different segments of potentially impacted businesses to determine a more reflective percentage of products utilizing the short-form warning.

In our estimation, the catalog estimates are reflective of the cost incurred, but note that the continued shift to online sales minimizes the utilization of catalogs.

The Cost of Revising Short-form Warnings on the Internet underestimates the actual cost of making these changes. While a web content editor may be able to make four edits per hour, this assumption implies that only one edit per short-form warning is required. This is simply non-reflective of the current online marketplace. In most cases, product manufacturers will have their products available via multiple online retailers, who would need to make the requisite edits to the short-form warnings. For example, within our membership, the online retailers included Advance Auto, Amazon, AutoZone, Chewy, NAPA, O’Reilly, Target, and Walmart, along with numerous grocery outlets. Sometimes, the manufacturer would review and proof the edits by the online retailer, but in many cases, the edits would be handled exclusively by the retailer

⁷ Final Combined 399 Attachment, page 3 and Appendix 3.

⁸ Final Combined 399 Attachment, page 4.

and/or distribution channels. HCPA recommends that OEHHA survey different retailers to ascertain a more reflective cost for updating products utilizing the short-form warning.

In our estimation, the economic impacts of the proposal have not been adequately accounted for, and HCPA strongly recommends that OEHHA conduct a more comprehensive Regulatory Impact Analysis.

In the event OEHHA moves forward with the proposal, HCPA strongly recommends that at least three years be provided for companies to make the transition from current short-form warnings to revised versions. This is particularly important for slower-moving products for which companies have labels printed by external suppliers and need additional time to consume existing label inventories.

Confusion caused by differing warning requirements

The proposed modifications to the short-form warnings also increase consumer confusion. With the introduction of three warning word options and two options for the short-form warning, OEHHA will create even greater confusion in the marketplace. The proposal for “CA WARNING” or “CALIFORNIA WARNING” appears particularly confusing to consumers for products sold via the INTERNET or outside the state of California. OEHHA also expresses a concern that the current short-form warning limits its usefulness 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 consumers contact the manufacturer or search for more information online? 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. HCPA reiterates the recommendation that OEHHA align the short-form warning language with the safe harbor warning language to ensure consistency in the marketplace.

HCPA is concerned that the proposed addition of the term "labeling" in §25602 (d) brings collateral materials in scope for determining if/when multi-language warnings are needed. Currently, multi-language warnings are required if multiple languages are used on the product label. However, the inclusion of the term labeling, which is defined in §25600.1 (j) as "...any written, printed, graphic, or electronically provided communication that accompanies a product including tags at the point of sale or display of a product," could bring literature or collateral communications that provide more context to non-English speakers beyond the control of the manufacturer. If the intent is to ensure the collateral material offers a clear and reasonable warning in all languages on the associated collateral materials, then OEHHA should clarify

accordingly.

HCPA appreciates the opportunity to comment on OEHHA's proposed modifications to Article 6 Clear and Reasonable Warnings Amendments to Related to Short-Form Warnings for Consumer Product Exposures. HCPA believes that OEHHA should explore other pathways of addressing the stated concerns with over-warning rather than upending the entire regulation and impacting companies with legitimate needs for the use of the short-form warning. At a minimum, we recommend that OEHHA complete a Regulatory Impact Analysis to fully understand the economic impact of the proposal and strongly reconsider whether the changes to the short-form warning are warranted. At the very least OEHHA should give appropriate time to transition to the new rules, including a three-year delay before the effective date.

Sincerely,

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

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