

**Proposition 65**

**Final Statement of Reasons**

**Clear and Reasonable Warnings  
Safe Harbor Methods and Content**

**Title 27, California Code of Regulations  
Division 4, Chapter 1, Article 6, Subarticle 2**

**Amendments to Existing Sections 25601 - 25603, and 25607.2  
Proposed Adoption of New Sections 25607.50 - 25607.53**

**October 2024**



**California Environmental Protection Agency  
Office of Environmental Health Hazard Assessment**

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## General Information

### Overview of the Regulatory Action

This is the Final Statement of Reasons (FSOR) for amendments to sections 25601, 25602, 25603, 25607.1, and 25607.2, and to add sections 25607.50 through 25607.53 in Title 27 of the California Code of Regulations.<sup>1</sup> The proposed amendments are to the safe harbor warning regulations, which provide warning methods and content that are deemed “clear and reasonable,” as required by Proposition 65.<sup>2</sup> Businesses are not legally required to follow the safe harbor warning regulations and can also develop their own “clear and reasonable” warnings. However, many businesses choose to use these warnings in order to benefit from safe harbor protections.

The proposed amendments:

- make the Proposition 65 short-form warning more informative to consumers by adding at least one chemical name and by providing additional warning options for businesses to select from. The new short-form warning language can be used immediately upon the adoption of the regulation.
- provide businesses that currently rely on the existing short-form warnings three years to transition to the new short-form content.
- provide an unlimited sell-through period for products manufactured and labeled with the existing short-form warnings before or during the three-year transition period.
- make explicit safe harbor status for short-form warning content on food products.
- provide a 60-day transition period, during the three-year implementation period, for retailers to update online short-form warnings after notice from a manufacturer.
- provide new tailored safe harbor warnings for passenger or off-highway motor vehicle parts and recreational marine vessel parts.

### Process and Timeline

On October 27, 2023, the Office of Environmental Health Hazard Assessment (OEHHA) published the Notice of Proposed Rulemaking for these amendments in the California Regulatory Notice Register.<sup>3</sup> The Notice, the proposed regulatory text, and the Initial

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<sup>1</sup> All further references are to sections of Title 27, Cal. Code of Regs., unless indicated otherwise.

<sup>2</sup> Health and Saf. Code section 25249.5 et seq., The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as “Proposition 65”. Hereafter referred to as “Proposition 65” or “the Act”.

<sup>3</sup> California Regulatory Notice Register, October 27, 2023, Notice File Number 43-Z.

Statement of Reasons (ISOR)<sup>4</sup> were also posted on the OEHHA website on October 27, 2023.

On December 13, 2023, OEHHA received oral comments from 10 people at a public hearing. OEHHA received written public comments during the initial comment period which ran from October 27 to January 3, 2024. This comment period was set to close on December 20, 2023, but at the request of several stakeholders, OEHHA extended the comment period to January 3, 2024. OEHHA received 41 written submissions.<sup>5</sup> Some of the commenters provided both written and oral comments.

On June 13, 2024, OEHHA published a Notice of Modification of Text of the Proposed Amendments and released a modification to the proposed amendments. The 15-day comment period closed on June 28, 2024. OEHHA received 34 public comments.

OEHHA is providing responses to relevant comments submitted during the rulemaking process. OEHHA received some written comments during the comment periods that were not relevant or related to the proposed action or to the modified proposal. These comments do not constitute an objection or recommendation specifically directed at the proposed action, or the procedures followed in this rulemaking action. Accordingly, OEHHA is not required under the Administrative Procedure Act (APA) to respond to such comments in this FSOR.<sup>6</sup> The absence of responses to such comments should not be construed to mean that OEHHA in any way agrees or disagrees with them.

## **Update of Initial Statement of Reasons**

As authorized by Government Code section 11346.9(d), OEHHA incorporates by reference the ISOR, Notice and the June 13, 2024, 15-day Notice of Modification into this rulemaking. Unless specifically discussed otherwise below, or in these documents, the ISOR's stated basis for the necessity of the proposed regulation continues to apply to the regulation as adopted.

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<sup>4</sup> OEHHA, Initial Statement of Reasons, Clear and Reasonable Warnings Safe Harbor Methods and Content, Title 27, California Code of Regulations, Division 4, Chapter 1, Article 6, Subarticle 2, Proposed Amendments to Existing Sections 25601-25603, 25607.2, Proposed Adoption of New Sections 25607.50-25607.53. (October 27, 2023).

<<https://oehha.ca.gov/media/downloads/crn/isornprshortformamendments102723.pdf>> (hereinafter ISOR).

<sup>5</sup> There were 94 written comments from individuals and organizations who submitted identical letters and aligned themselves with the comments made by the Special Equipment Marketing Association (SEMA). This group is designated as, "SEMA Association Members". The comments are summarized and responded to in this document, and the names of commenters who are SEMA Association Members are listed in Appendix 1 Signatory Organizations for Coalition Comments and Association Members.

<sup>6</sup> Gov. Code section 11340 et seq.

OEHHA hereby updates the Initial Statement of Reasons to note that, after publication of the Notice and ISOR for this rulemaking, another proposed rulemaking was noticed on April 5, 2024 (Office of Administrative Law Notice File Number Z2024-0326-02). That proposal, though unrelated to the current rulemaking, would amend a portion of existing subsection 25607.2(b).

The current rulemaking described in this FSOR does not alter the language of the existing subsection 25607.2(b) but does relocate that subsection to 25607.2(c). The text of the regulation has been updated to align with changes approved as of October 4, 2024, and effective on January 1, 2025.

All modifications from the initial proposed text of the regulation are summarized below.

### **Modifications to the Proposed Rulemaking**

OEHHA published a 15-day Notice of Modification of the Proposed Amendments on June 13, 2024. OEHHA proposed modifications to the text of the proposed regulation to increase the time for implementation of the revised short-form warning content from two years to three years and revert to the existing regulatory text for most of the internet and catalog warning content, while making non-substantive clarifying changes. OEHHA added a new provision which would provide internet retailers a 60-day transition period, beginning when they receive a warning or written notice changing to the new warning content, to update their online short-form warnings during the three-year implementation period. These modifications of the proposed text were made in response to the public comments and to improve clarity.

### **Summary and Responses to Comments received on the October 2023 Proposed Amendments**

This section summarizes and provides responses to relevant comments submitted on the October 2023, 45-day proposed amendments. The public comment period was open from October 27, 2023, to January 3, 2024. OEHHA received 41 written comments, and 10 people commented at the public hearing.

Listed below are the organizations and individuals that submitted comments on the October 2023 proposed amendments. Those providing both oral comments at the hearing and written comments are denoted with an asterisk (\*) by their name.

#### **Hearing commenters in alphabetical order.**

- American Apparel and Footwear Association (AAFA),\* Nate Herman
- American Coatings Association (ACA),\* Riaz Zaman
- American Chemistry Council (ACC), Joseph Daniels

- Air-conditioning, Heating, and Refrigeration Institute (AHRI),\* Kaitlin Walker
- California Chamber of Commerce (CalChamber), Adam Regele
- Center for Environmental Health (CEH), Tom Fox
- Fluidra (Fluidra),\* Philip Escobedo
- Household and Commercial Products Association (HCPA),\* Christopher Finarelli
- The Vehicle Suppliers Association (MEMA),\* Alex Bosenberg
- The National Marine Manufacturers Association (NMMA)\* and Brunswick, David Marlow

**Individual Commenters in alphabetical order by last name.**

- Anonymous 1
- Anonymous 2
- Molly Burns (MBurns)
- John Clemens (JClemens)
- Bill Kaminski (BKaminski)
- Elise Park (EPark)
- Peter Chitakian (PChitakian)
- Scott Riebel (SRiebel)
- Jack Smith (JSmith)

**Organizational Commenters in alphabetical order.**

- Air-Conditioning, Heating, and Refrigeration Institute (AHRI)\*
- Alliance for Automotive Innovators (Auto Innovators)
- The American Chemistry Council Coalition (ACC Coalition)
- American Coatings Association (ACA)\*
- Association of Equipment Manufacturers (AEM)
- American Apparel & Footwear Association (AAFA)\*
- American Herbal Products Association (AHPA)
- California Retailers Association (CRA) (Norton Rose Fulbright)
- Center for Environmental Health Coalition (CEH Coalition)
- Color Pigments Manufacturers Association (CPMA)
- The Consumer Brands Association and the California Chamber of Commerce Coalition (CBA/CalChamber Coalition)
- Diamond Sports
- Fluidra (Fluidra)\*, Philip Escobedo
- Good Afternoon Toxicology Consulting, LLC, Brian C. Lee (BLee)
- Intex Recreation Corp. (IRC), Matthew Whalen
- Motorcycle Industry Council (MIC), the Specialty Vehicle Institute of America (SVIA), and the Recreational Off-Highway Vehicle Association (ROHVA)
- Mother's Oversight Network for Actionable Response to Contaminant Harm, LLC (MONARCH)
- Household and Commercial Products Association (HCPA)\*, Steven Bennett
- Home Ventilating Institute (HVI)
- Law Offices of Steven W. Hansen (SWH), Steven W. Hansen

- Madison Air
- “MEMA, The Vehicle Suppliers Association” (MEMA)\*
- Miller Nash LLP (MN)
- National Marine Manufacturers Association (NMMA)\*
- The North American Insulation Manufacturers Association (NAIMA)
- Outdoor Power Equipment Institute and Outdoor Power Parts & Accessories Association (OPEI/OPPAA)
- Pool and Hot Tub Alliance (PHTA)
- Quadratec
- Seymour of Sycamore (Seymour)
- Simply Sound Consulting
- The Specialty Equipment Market Association (SEMA), and SEMA Association Members
- Summit Racing Equipment (SRE) (also submitted comments as a member of SEMA)

### **Section 25602. Consumer Product Exposure Warnings – Methods of Transmission.**

#### **Subsection 25602(a). General provisions for consumer product warnings**

**Comment 1:** (ACC, CPMA, Diamond Sports, MEMA, PHTA, Seymour, SWH) The commenters state the current font size requirements limit companies in the amount of information they can display on outer packaging. The commenters state that requiring the warning to include the name of a carcinogen and/or a reproductive toxicant on product labeling, catalog, web, and other advertisements, would effectively end the short-form warning as it was originally intended. The additional wording poses a significant challenge for manufacturers as there’s not enough room on certain products and advertising materials to include the name of a carcinogen and/or reproductive toxicant.

MEMA states there is other important text on packaging for automotive parts, and a longer warning could distract from other significant messaging. Product packaging, especially for smaller automotive parts, already has limited space due to increased regulatory and customer information requirements, including multi-lingual requirements. The Proposition 65 short-form warning, as it appears today, stands out and is easier for consumers to notice. PHTA comments that changes to the short-form warning that make it longer may also result in larger packaging.

**Response:** While adding words to the short-form warning content, OEHHA’s proposed amended regulations also allow more discretion and flexibility to businesses concerning the content of the warning. OEHHA’s proposal would remove subsection 25602(a)(4) in the existing regulation, which states, “*The entire warning must be in a type size no*



*smaller than the largest type size used for other consumer information on the product,”*  
The new language would instead cross-reference the existing requirement in subsection 25601(c), which states:

*“Consumer product exposure warnings must be prominently displayed on a label, labeling, or sign, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use.”*

The existing requirement in subsection 25602(a)(4) that “[i]n no case may the warning be in a type size smaller than 6-point type,” remains in place. This continues to ensure that consumers can find and read the warning prior to exposure.

Thus, the amended regulation allows a business the flexibility to use a type size of 6-point or larger to provide the warning, rather than tying the type size to other text size used to communicate other consumer information on the product.

OEHHA originally adopted the short-form warnings for use on very small packaging, but its use has expanded beyond the original intent of the regulation.<sup>7</sup> At the same time, OEHHA has received many consumer inquiries requesting the name of the chemical(s) for which the warning is being provided. Without this information, it is not possible for a consumer to find information about the potential exposure and make an informed decision about the purchase or use of a product.

The full-length warning is 26-44 words. The proposed short-form warning is 8-14 words and is significantly shorter than the full-length warning. The proposal increases the short-form warning content from 2-5 words to 8-14 words, which will likely not necessitate increasing the size of a product label. If it does, the increased time for implementation should assist businesses in the transition. Also, methods for providing the warning without putting it on product labels are provided in the existing regulations.

The 15-day modifications also gave businesses additional time, extending the time to implement new short-form warning content from two years to three. This will also assist businesses in implementing any changes to their labels or packaging over an extended period.

No changes to the proposed amendments were made based on these comments.

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<sup>7</sup> OEHHA, Final Statement of Reasons Title 27, California Code of Regulations, Proposed Repeal of Article 6 and Adoption of New Article 6 Regulations for Clear and Reasonable Warnings. (2016) p. 114-115. <<https://oehha.ca.gov/media/downloads/cnr/art6fsor090116.pdf>> (hereinafter FSOR 2016).

**Comment 2:** (ACC Coalition, HCPA) HCPA states that eliminating the phrase, “(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,” changes the safe harbor protection for manufacturers because reference to subsection 25601(c) “encompasses elements potentially available at the point of purchase beyond the control of the manufacturer.” The comment also recommends that only the label-specific provisions should be added to subsection 25602(a)(4). ACC Coalition comments that removing the specific font size requirements makes the requirement to comply with this section vague and difficult to quantify.

**Response:** The proposed amendments should make it easier for businesses to comply with safe harbor warning requirements by providing more flexibility. The 6-point type is still the floor for the warning type size and that has not changed. Additionally, this is not a new requirement: Section 25601 has been included in the regulations since 2016, to promote conspicuous warnings. And most importantly, recent changes in some federal requirements necessitated this regulatory change, so that Proposition 65 warnings are not disproportionately large in relation to the label size. The ISOR provides an example where this could be the case: “[T]he Nutrition Facts Label final rule, which recently became effective, requires in some instances large font sizes on nutrition labels (e.g., 16- and 22- point font).<sup>8</sup>” If the regulation text were not amended to remove the following, “[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.” In some circumstances, this would result in the short-form warning being printed in 22-point font, dominating other important consumer information. These changes are a reasonable method to provide consistency with federal requirements.

No changes to the proposed amendments were made based on these comments.

### **Subsection 25602(b). Internet purchases**

#### ***Warning consumers outside California***

**Comment 3:** (CBA/CalChamber Coalition) The commenter explains that some manufacturers will be able to notify online retailers of the products that bear a Proposition 65 warning so they can edit the website accordingly, and some will not. This will lead to more products with warnings on the label and result in consumers outside of California receiving the “California-specific warning.”

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<sup>8</sup> See ISOR page 16, citation included in footnote, Food and Drugs, 21 C.F.R. subpart 101.9(d) (1). <<https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcr/cfrsearch.cfm?fr=101.9>> [as of 6/22/2023] Example visual, <<https://www.fda.gov/media/97999/download>> [as of 6/22/2023].

**Response:** The proposal does not require a warning to any consumers outside of California. Proposition 65 requires businesses that cause exposures to listed chemicals in California to provide a warning. The additional signal word options of “CA WARNING” or “CALIFORNIA WARNING” (proposed for subsections 25602(b)(1)(B), 25603(a)(2), 25603(b)(2), 25607(a)(1), and 25607(a)(2)), can be used by businesses to identify the warnings as California-specific signal words on products that may be sold outside the state.

No changes to the proposed amendments were made based on this comment.

### ***Retailer responsibility for internet warnings***

**Comment 4:** (CBA/CalChamber Coalition, CRA) The commenters are concerned that retailers will have to implement new warnings when they are provided to them by suppliers, per section 25600.2(e)(4). This may require changing their websites immediately for those products. Additionally, if they are not timely provided with a short-form warning that complies with the new content in section 25603(b), they will be exposed to potential liability and litigation costs. The commenters request that OEHHA clarify that retailers can continue to provide the current safe harbor short-form warnings during the two-year phase in period, even if revised short-form warnings are provided to them by their suppliers. The commenter requests “an exemption from retailer liability for alleged failure to provide a warning so long as either the retailer provides an online warning or the product or its labeling bears a warning, and the retailer has not been provided warning language by the supplier.”

**Response:** Based on these and other comments, the proposal was modified to revert to the existing regulation text for most of the internet and catalog warning content. OEHHA also amended the proposal to increase the time for implementation of the amended warning language from two to three years. These changes will provide additional time for a manufacturer to provide new warning content to the retailer.

The 15-day Notice changes to the proposal also include a new provision which would provide internet retailers a 60-calendar day transition period, from when they receive a warning or written notice changing to the new safe harbor warning content, to update their online short-form warnings during the three-year implementation period. However, OEHHA disagrees that retailers who receive notice of a revised warning from a manufacturer should then have two years to implement that warning update.

No additional modifications to the proposal were made based on these comments.

### ***Short-form warning for products sold on the internet or in catalogs***

**Comment 5:** (CEH, CEH Coalition) The commenters state that the short-form warning should not be allowed for products sold on the internet or in catalogs, and only a full-length warning should be acceptable as a safe harbor warning. They argue that allowing the short-form warning on the internet is inconsistent with the intent of the short-form warning option. The commenters state there is space for a lot of information on webpages, and if there are space concerns a business can include a hyperlink to the full-length warning. Further, businesses should provide consumers with “any details related to potential health concerns associated with the use of those products ... to the consumer during the selection process and before products are purchased.” The commenters state that the burden on businesses is low because the information is provided to the retailer from upstream businesses.

**Response:** The full-length warning and the short-form warning, as proposed, convey the same basic information to consumers and further the purposes of Proposition 65. The proposed short-form warning will allow consumers to make better informed choices about exposures to listed chemicals.

In the original proposed amendments to subsection 25602(b), the language was removed that allowed a short-form warning to be used on the internet if it is used on a label. In the subsequent 15-day changes to the proposed amendments, OEHHA reverted to the language in the existing regulation. Thus, short-form warning content may be used for internet sales. However, the new short-form warning content will be more informative to consumers because it includes a chemical name. Existing section 25600.2 allows a manufacturer to provide the retailer with a warning on the product, or written notice including warning materials for the retailer to use. The internet retailer may rely on this information when providing a warning on the webpage. The regulations do not require retailers to use the full-length warning on their websites. OEHHA may consider additional changes to the internet retailer provisions in a future rulemaking.

***Requested amendment for electronic transmission of warning for internet sales***

**Comment 6:** (Auto Innovators) The commenter requests an amendment to allow the second warning “on or with the product” to be transmitted electronically, to meet the warning requirement in subsection 25602(b)(2) using a timed-to-delivery-text message and/or email, for products sold on the internet.

**Response:** Proposition 65 requires that the consumer is warned prior to purchase so they can make an informed decision about the products they purchase and use. Using electronic means to provide a warning is allowed under existing subsection 25602(b)(2), if the warning is product-specific and “provided via any electronic device or process that *automatically* provides the warning to the purchaser *prior to or during the purchase* of the consumer product, without requiring the purchaser to seek out the warning” (italics

added). To give an example, for warnings provided on or with a product, requiring a consumer to scan a QR or bar code, when such scanning is not required to complete the purchase, forces the consumer to seek out or take several steps to find the warning for that product. Using these methods presumes consumers will notice the code, have immediate access to a smart phone or other device that can read the code, and know how to use it to access information about the product. This delivery method is not automatic and would not comply. However, if a purchase could not be completed without a consumer seeing an electronic warning, rather than requiring the consumer to take additional actions before encountering the warning, then it is possible that the electronic warning could be “automatically” provided before or during purchase. The methods for providing a warning electronically can be situation-specific and are not easily defined in a regulation of general application. The acceptable methods could change with advances in technology.

The commenter requests an additional warning method using a text or email that would be sent after the purchase of the product, near the time of delivery. A text or emailed warning is not the same as providing the warning on or with the product. Like the scanning process described above, sending a warning with, or in addition, to a text or email update or delivery confirmation is not a reasonable method for safe harbor purposes. The consumer would have to seek out the warning by opening the text or email. Additionally, there is no reason to believe that a consumer would be likely to view such a warning, since that person would have no way of knowing in advance that the text/email contained a warning. The consumer also might not associate the warning with the product, even if they did view it. Also, when the owner of the cell phone purchases the item for someone else, the recipient would not receive the warning at all.

Businesses are free to experiment with various methods of delivery for the warning, but providing warnings via texts or emails do not qualify for safe harbor protection under the existing regulations. OEHHA declines to add these options through this rulemaking. When adopting a new safe harbor method of transmission for a warning, OEHHA considers the timing of receipt of the warning (i.e., before purchase and before exposure) and the level of effort required for a consumer to access the information.<sup>9</sup> In general, the warning must be automatic, require very little effort to locate, and be clearly associated with the product to qualify for safe harbor protection.

OEHHA removed the text of proposed new subsection 25602(b)(2). Note that OEHHA will continue to monitor innovations around passive methods for providing information and modify its regulations, if appropriate.

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<sup>9</sup> *Ingredient Communication Council (ICC) v. Lungren*, 2 Cal.App.4th 1480, 4 Cal.Rptr.2d 216 (1992), modified (Feb. 14, 1992) providing a warning only through significant consumer effort is not reasonable.

***Request to remove a method to provide an internet warning***

**Comment 7:** (MONARCH) The commenter requests that the option to include a “clearly marked hyperlink” should be removed because “hyperlinks are notoriously difficult for screen readers to display, which could result in a lack of information for those utilizing these tools in their daily lives.”

**Response:** The option to use a hyperlink to display the signal words is not new with this rulemaking. This is also only one option that businesses have to provide an internet warning. OEHHA welcomes the opportunity to discuss technology and ways to make Proposition 65 warnings more accessible to all consumers with the commenter. OEHHA intends to revisit the issue of internet and electronic warnings in a future rulemaking and may address this further at that time.

No changes to the proposed amendments were made based on this comment.

**Subsection 25602(c). Catalog purchases**

**Comment 8:** (NMMA) The commenter requests clarification on the meaning of the phrase that requires a warning to be provided in a way that “clearly associates it with the item being purchased.” For example, does providing a warning on the first page of a catalog with a specific reference by each product back to the page 1 warning qualify for safe harbor protection? Or does providing a notation, such as a number in a yellow circle, by each product and then text of the safe harbor warning on the bottom of that page or a nearby page qualify for safe harbor protection?

**Response:** OEHHA notes that the phrase “clearly associates” is part of the existing regulation and therefore this comment may be outside the scope of this rulemaking. Nonetheless, OEHHA suggests that one way to assure a warning is clearly associated with the product being warned about in a printed catalog is to include the full-length, short-form, or tailored warning, whichever is applicable, next to that product. Another alternative is to place a symbol next to each product that a warning is being provided for and include the warning on the same page of the catalog. It may be difficult to use this method if there is a range of chemical exposures from different products on the same page requiring several different warnings at the bottom of the page. This method may be more effective where the products on the same page require the same warning, such as the proposed tailored warning for vehicle parts and marine vessel parts proposed in this rulemaking.

No changes to the proposed amendments were made based on this comment.



### Subsections 25602(b) and (c)

**Comment 9:** (ACC Coalition, CBA/CalChamber Coalition, CRA, PHTA) The commenters state that warnings on the internet or in a catalog and on a product or accompanying a product are not justified, will confuse consumers, may result in conflicting or duplicative warnings, may lead to as many as four warnings per product, or may expose businesses to a greater risk of liability and litigation.

CRA states that “the concept of requiring *two* warnings is inconsistent with the language of Proposition 65” and OEHHA should withdraw the proposal. CRA would like clarification that a label and an online warning is not mandatory. It quoted three cases to support its comment.<sup>10</sup>

**Response:** Existing regulations already require that, for safe harbor protection, a business must provide a warning on or with the product via any one of the four methods for consumer products warnings in section 25602, subsections (a)(1)-(4) and under existing subsection (b), the business must *also* provide a warning or a clearly marked hyperlink using the word “**WARNING**” on the product display page, or otherwise prominently display the warning to the purchaser prior to completing the internet purchase. The commenters are incorrect that this obligation would be newly added by this proposal. The original text of subsection 25602(b) stated, “For internet purchases, a warning that complies with the content requirements of Section 25603(a) must also be provided by including either the warning or a clearly marked hyperlink...”

The 45-day amendments sought to clarify the existing requirements for a safe harbor warning for products sold over the internet. However, in response to public comments, OEHHA reverted to the existing language as noted above, and the requirement to provide a warning on or with the product and on the internet remain in place.

In response to these and other public comments, OEHHA has modified the original proposal and removed the proposed new subsection 25602(b)(2) language which stated, “[i]n addition, the warning must also be included: on or with the product when delivered to the consumer using one or more of the methods in Section 25602(a)(3) or Section 25602(a)(4); on labeling accompanying the product as defined in Section 25600.1(j); or as otherwise specified in Section 25607 et seq.”<sup>11</sup>

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<sup>10</sup> *Nat’l Assoc. of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir.2023); *Cal. Chamber of Commerce v. Council for Educ. & Rsch. on Toxics*, 29 4th 468, 479 (9th Cir. 2022); *Association for Retarded Citizens v. Department of Developmental Services*, 38 Cal.3d 384 (1985).

<sup>11</sup> The 15-day Notice released on June 13, 2024, proposed an amendment to subsection 25602(b)(2), that uses this same subsection numbering to include an amendment to provide internet retailers with a 60-day grace period to revise an existing short-form warning after it has received notice of the change from the product manufacturer. The previously proposed language in this section was deleted.

OEHHA disagrees with the statement in the comment from CRA stating that the Supreme Court case, *Association for Retarded Citizens v. Department of Developmental Services*, 38 Cal.3d 384 (1985), provides support for the argument that “the concept of requiring *two* warnings is inconsistent with the language of Proposition 65, and should be rejected for that reason alone.” The cited case concerns the authority of the Department of Developmental Services to issue spending directives under the Lanterman Act, and has no bearing on Proposition 65 or warning requirements whatsoever. Further, the provisions of the regulations in Subarticle 1 of the warning regulations are mandatory and address the relative responsibility of businesses in the stream of commerce to provide a warning. Under the safe harbor provisions in Subarticle 2, the warning must be provided both on the internet website and on the product or with the product, or in another manner consistent with proposed subsection 25602(b)(2). The proposal is consistent with both the language of Proposition 65 and the intent of the statute enabling consumers to make informed decisions before exposure to listed chemicals.

No additional modifications to the proposal were made based on these comments.

**Comment 10:** (ACC Coalition, CalChamber, PHTA) PHTA states there is a substantial amount of lead time needed to publish a catalog, which may lead to misalignment between catalog warnings and warnings provided on or with the product that could confuse customers and increase the risk of liability for companies. ACC Coalition requested clarity on who is responsible when a product label and an internet warning do not match: “The addition of section 25602(b)(2) does not make it clear who is responsible when a product label and an internet warning do not match. We ask that OEHHA revise this section to clarify that internet sellers should not apply warnings to the product pages if the products themselves are not labeled with Proposition 65 warnings.”

**Response:** Proposition 65 requires warnings to be “clear and reasonable” and the safe harbor warnings meet this standard. The safe harbor warnings use different wording to provide the same clear and reasonable message. One way that safe harbor warning wordings may differ are by the chemicals that are listed, for example a vehicle part that uses the short-form warning on the product and a tailored warning in a catalog. Warnings for the same product that accurately identify exposures to different chemicals do not conflict so long as an exposure can occur for either or both chemicals. It is unlikely that consumers will be confused because they are being given information about the product that they can use to inform their decision to purchase or use the product. It is more confusing for a consumer to receive a warning for cancer and not know what chemical they are being exposed to or how they are being exposed.



Regarding the comment from ACC Coalition, the language in question from subsection 25602(b) was deleted from the proposal in the 15-day changes to the proposal. There may also be situations where the manufacturer has fewer than ten employees and is exempt from the warning requirement, but the online retailer is not exempt and must provide a warning. The commenter can refer to section 25600.2 for clarity on the Responsibility to Provide Consumer Product Exposure Warnings.

No changes to the proposed amendments were made based on these comments.

### **Section 25603. Consumer Product Exposure Warnings – Content**

#### **Subsection 25603(a). Full-length warning**

**Comment 11:** (MBurns) Commenter requests that if companies must use the full-length warning, then they should be allowed to explain where the contaminant came from. The commenter indicated that companies should be allowed to provide their own caveat language, and provides for example, "This product may contain [insert full language on chemical examples for both carcinogens and reproductive toxin]." These ingredients are not present at levels above OSHA's minimum concentration reporting requirements," or, as an alternative ending, "These ingredients are not present at levels above OSHA's minimum concentration reporting requirements and/or are not intentionally added."

See also comment and response 56 below.

**Response.** This request is beyond the scope of the current proposed amendments. However, OEHHA notes that businesses are free to use the modified short-form warning, the full-length warning, or any other warning they deem to be "clear and reasonable." as defined in section 25601. Where a business wishes to take advantage of the safe harbor protection provided by the regulations, any additional information is limited to the route of exposure to the chemical and ways to reduce or avoid the exposure.<sup>12</sup>

#### **Subsection 25603(b). Short-form warning**

##### ***Naming chemical in the short-form safe harbor warning***

**Comment 12:** (EPark) Commenter states short-form warnings should not be allowed if they do not include chemical information. Such warnings lack information for consumers, which is contrary to the intent of Proposition 65.

**Response:** Supporting comment noted. No response required.

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<sup>12</sup> Subsection 25601(e).

No changes to the proposed amendments were made based on this comment.

**Comment 13:** (CEH, MONARCH) CEH supports the requirement for chemical name in the short-form warnings. Similarly, MONARCH “fiercely supports the requirement to list a specific chemical name on all Proposition 65 warning labels: this transparency is necessary for these warnings to be both ‘clear’ and ‘reasonable.’” CEH states that it supports Proposition 65 and believes it protects consumers. It is the ultimate right-to-know law. And that Proposition 65 provides incentives for businesses to reformulate products to use safer alternatives. MONARCH explains that it makes the warnings more effective for reformulation and removal of toxic chemicals as cited by Dr. Claudia Polsky, Director of UC Berkeley’s Environmental Law Clinic, in her research on Proposition 65.

CEH supports most of the proposed rule changes. It is particularly supportive of listing at least one chemical name in the short-form warnings, and where the warning is provided for both endpoints, cancer and reproductive toxicity, requiring that it include the name of one or more chemicals for each endpoint is particularly informative.

CEH states that the proposed modifications are in line with the results from the UC Davis Extension Collaboration Center’s 2015 study on the effectiveness of Proposition 65 warnings that showed that most survey respondents preferred warnings with at least one chemical name. Commenter states that providing consumers with more information is necessary to further the purposes of Proposition 65, facilitate informed decision making, and protect public health. However, CEH is concerned with the overuse of short-form warnings as opposed to full-length warnings.

**Response:** Supporting comments noted, no response required.

No changes to the proposed amendments were made based on this comment.

**Comment 14:** (BLee, Good Afternoon Toxicology Consulting, LLC) Commenter worked for the US Consumer Product Safety Commission for 10 years and has worked for 22 years as an independent consumer product toxicology consultant. Commenter supports the proposal to identify the name(s) of the substance(s) requiring warnings in the short-form and full-length warnings. The omission of an identifying name of a chemical should never have been allowed, and is an impediment to the consumer’s ability to obtain relevant information.

**Response:** Comments noted, no response required.

No changes to the proposed amendments were made based on this comment.

**Comment 15:** (IRC, JClemens) Commenter JClemens states that generalities don't work when warning about a carcinogen. Commenter requests specific information in these warnings. “We need to know the exact chemical(s) in the specific product that is

triggering the warning. Citations would also help strengthen the effect of these warnings.”

IRC agrees with OEHHA that the short-form warnings should provide sufficient information for consumers to make informed choices about their exposures to listed chemicals in consumer products. IRC sells and distributes products that include the short-form warning. Since 2018, IRC has included the chemical of concern within its short-form warning. Specifically, “Warning: Reproductive harm – BPA – WWW.P65WARNINGS.CA.GOV”. However, IRC states that OEHHA should only require a chemical name and not add any additional words to the short-form warning.

**Response:** OEHHA agrees with the commenters that specific chemical information is needed in the short-form warning. The proposed amendments would require the name of at least one chemical for each endpoint for which the warning is being provided. Additional information about many chemicals is available on the OEHHA warnings website at <https://www.p65warnings.ca.gov/fact-sheets>, including citations to relevant authorities and information. Additional words in the warning are used sparingly and only to provide context to promote consumer understanding. OEHHA commends IRC for proactively including the chemical name in their warnings.

No changes to the proposed amendments were made based on these comments.

**Comment 16:** (ACC Coalition, ACA, AHRI, Cal Chamber/Coalition, CPMI, HCPA, PChitakian, PHTA, Seymore, SRE, SWH) The commenters state that OEHHA provides no support for the assumption that a warning is better with a chemical name included. ACC states there is no data supporting the requirement to include a chemical name in short-form warnings. ACC suggests that OEHHA consider how short-form warnings are perceived by consumers. PChitakian thinks the current warnings are sufficient.

The commenters suggest that OEHHA conduct a survey comparing the short-form warning to the full-length warning to better understand how consumers understand and act on the information before proposing changes to the existing short-form warning. Such a survey might reveal, for example, that the short-form warning is more effective in gaining attention, comprehension, or driving consumers to request more information about specific products. The commenters recommend that this work be conducted in accordance with accepted principles and best practices in the fields of consumer risk perception and decision making.

HPCA disagrees with OEHHA’s concern that the current short-form warning limits its usefulness to consumers. HCPA requests more information on the informal tally of public inquiries discussed in the ISOR. For example, the total number of inquiries, whether consumers contacted the manufacturer or searched for more information

online. Commenter requests information on the sample size of the informal tally provided by OEHHA.

ACA, AHRI and Seymour provide their interpretation of the requirements of the APA as it applies to this rulemaking. Commenter argues that OEHHA has not met the “necessity” requirements under the APA because OEHHA has not provided adequate information regarding the scope of over warning and supporting the costs of the proposed changes to the regulations. Commenter states that the proposed amendments will affect a broad range of products that it says already provide relevant information about hazardous ingredients. Commenter states that OEHHA needs to understand the extent of over warning and the causes.

AHRI states that OEHHA must provide justification for the proposed amendments to ensure that the amendments are in line with the overarching goal of public safety. It is unclear how the addition of one chemical to the short-form warnings will provide actionable information for the consumer.

**Response:** The proposed changes to the short-form warning content are consistent with the requirements for the full-length warning and are based in part on OEHHA’s significant experience in responding to consumer inquiries since the current safe harbor warning regulations became effective in 2018. As was explained in the ISOR for the current rulemaking, OEHHA has found that the current short-form warnings do not give consumers sufficient information to make informed decisions about their exposures to listed chemicals. Further, multiple businesses and business associations have admitted, even in their comments on this rulemaking, that they provide short-form warnings prophylactically, as a litigation avoidance strategy, regardless of whether they are aware that a significant exposure to a listed chemical may occur. This practice is inconsistent with the purposes of Proposition 65.

OEHHA has over 6 years of experience with comments and inquiries from businesses and consumers regarding the current consumer product exposure warnings. In our experience, when a chemical name is included in a warning, the consumer can search for information on that chemical. Further, OEHHA can easily refer the consumer to a chemical-specific fact sheet on its warning website so they can obtain more information concerning the potential exposure, including ways to reduce or eliminate exposure.

See for example the lead and lead compounds fact sheet:

<https://www.p65warnings.ca.gov/fact-sheets/lead-and-lead-compounds>. If OEHHA doesn’t already have a fact sheet for a given chemical exposure, it can create one based on consumer interest in a chemical or type of product.

It is not possible for OEHHA or a consumer to determine what chemical exposure the warning is being given for where a product may contain hundreds of components

made of many chemicals. Thus, consumers cannot find useful information on the OEHHA website to help them make an informed decision about their exposures when no chemical name is included. In addition, consumers have stated that when they contact product manufacturers for additional information, they seldom receive exposure route or chemical-specific responses. This situation does not further the right-to-know purposes of the Act.

As stated in the ISOR for this regulatory action, OEHHA receives many hundreds of inquiries via email, phone, and through its website every month. As an illustration of the problem OEHHA intends to address in this rulemaking, OEHHA staff collected information on all the inquiries received through its on-line inquiry form in the month of April 2023. The inquiries cannot easily be categorized as addressing a short-form warning since consumers do not use that phrase in their inquiries. Instead, OEHHA reviewed the questions and determined which questions were likely about short-form warnings, for example, questions about a warning that did not name a chemical. This categorization is reflected in the chart below. This data is not intended to be an exhaustive review of the inquiries OEHHA staff receive over time. Instead, it is merely a snapshot for the month of April 2023, but it nevertheless provides insight into consumers' need for information concerning their chemical exposures.

## Totals:

Total inquiries:	440
Total consumer inquiries:	310
Total non-consumer inquiries:	130
Total consumer inquiries about a product:	245
Total inquiries about short-form:	84
Total inquiries that could be about either short-form or full-length warnings:	122
Total inquiries about full-length warnings:	39
Total consumer inquiries that do not fit in other categories:	65

## Percentages:

Percentage of consumer inquiries about a product:	79.03%
Percentage of consumer inquiries that asked about short-form:	27.10%
Percentage of consumer inquiries that could be about either short-form or full-length warnings:	39.35%

OEHHA has included additional examples of consumer inquiries over the past several months as an attachment to this FSOR to provide more information for the commenters. (See Appendix 2). Although this is not an exhaustive list of every inquiry received, it is clear from this informal analysis that consumers need more information than they are receiving from the short-form warnings.

Product manufacturers are not currently required to provide OEHHA with information about the warnings they provide. That process is manufacturer- and product-specific and can take months to complete. It also often yields no useful information, since many businesses do not know what chemical in their product might cause a significant exposure. Warnings are not required for insignificant exposures. To the extent the commenter's members choose to provide warnings for insignificant or non-existent exposures, OEHHA discourages the practice since it can make it difficult for consumers to focus on warnings for real hazards. Over-warning provides no consumer benefits. One of the purposes of the proposed amendments is to curtail that practice by requiring businesses to identify at least one chemical for which the warning is being provided. OEHHA does not always know whether consumers contacted the product manufacturer or searched for information about the product on-line unless the consumer provides that information in their inquiry. Proposition 65 requires businesses to provide "clear and reasonable" warnings. Requiring consumers to independently search for information by contacting the product manufacturer or searching the internet, with no assurance of success, to understand the warning is inconsistent with the statute.<sup>13</sup>

OEHHA received similar comments when it first introduced the requirement to name a chemical in the full-length warning in the major rewrite of the warning regulations completed in 2016. As stated in the 2016 FSOR, to test the usefulness of warnings that include a chemical name, OEHHA contracted with the UC Davis Collaboration Center to conduct a study comparing warnings with a chemical name to the older warnings which had been used since 1988 that did not name a chemical:

"The effectiveness of the warnings was assessed in terms of helpfulness. The results showed that over 75 percent of the participants selected the warnings based on the proposed regulations [which included a chemical name] as being more helpful than the current warnings [which did not include a chemical name]. More specifically, *66 percent of the respondents said the warnings that named chemicals were more helpful than warnings that did not name chemicals...*" (italics added).<sup>14</sup>

OEHHA further explained its reasoning for requiring a chemical name:

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<sup>13</sup> See *Ingredient Communication Council (ICC) v. Lungren*, 2 Cal.App.4th 1480, 4 Cal.Rptr.2d 216 (1992), *modified* (Feb. 14, 1992). ...[F]ew consumers are willing to spend time researching and calling about those relatively inexpensive products they frequently buy in a grocery store; such purchases differ from those of automobiles or computers." "Availability of the warning message, to be consistent with the Act, must mean more than the possibility a consumer would be apprised of the specific warning message only through considerable effort. An invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning about a specific product." (Pages 1494 – 1495.)

<sup>14</sup> See FSOR 2016 page 70.



“... OEHHA’s experience over the past 25 years in responding to thousands of phone calls, emails and letters from the public on Proposition 65 warnings supports the findings of the UC Davis Study. Members of the public who contact OEHHA after seeing a warning frequently ask which chemical prompted the warning. One of the most common complaints OEHHA hears about Proposition 65 is that individuals do not know which chemical or chemicals they are being warned about.... The UC Davis findings are consistent with longstanding public perceptions of the inadequacies of Proposition 65 warnings that OEHHA has observed in its interactions with the public...”<sup>15</sup>

While OEHHA adopted the short-form warning in the same rulemaking, after 6 years of its use by various businesses, OEHHA has found that the short-form warning, which was originally intended to be used on very small packages, suffers the same problem as the original warnings adopted in 1988.<sup>16</sup> The lack of a chemical name in the warning causes confusion and an inability for consumers to make an informed decision.

The UC Davis study equally supports OEHHA’s current proposal to require a chemical name in the short-form warnings since it compared a warning with a chemical name (the full-length warning) to a warning without a chemical name (the only warning in use at that time). The additional study suggested by the commenters is unlikely to provide a significantly different result. This conclusion is supported by the recent informal tally discussed in the ISOR on pages 7-8.

These recent findings are remarkably consistent with the UC Davis study, as well as with OEHHA’s experience before the new full-length warning that includes a chemical name was adopted in 2018. OEHHA therefore declines to conduct an additional study. OEHHA has fully complied with the statutory and regulatory requirement for a rulemaking. In addition to the section-by-section explanation of each proposed change, in, the ISOR for the proposed amendments OEHHA stated, among other things, that:

“... the proposed amendments are necessary to ensure that California consumers receive information on safe harbor short-form warnings comparable to the content of the full-length safe harbor warnings for consumer products (section 25603(a)). Naming a carcinogen and/or reproductive toxicant in the warning will help inform consumers about exposures to listed chemicals so they can make better informed choices, thereby furthering the consumer right-to know purposes of Proposition 65.

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<sup>15</sup> See FSOR 2016 page 71.

<sup>16</sup> The original safe harbor warning adopted in 1988 stated: “This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.”

By requiring safe harbor short-form warnings to list a chemical, the proposed amendments may discourage businesses from providing prophylactic warnings as a litigation-avoidance strategy. Prophylactic warnings confuse consumers and dilute the overall value of Proposition 65 warnings, which should only be provided for knowing and intentional exposures to a significant amount of a listed chemical.”<sup>17</sup>

Further, regarding the comments that OEHHA has no data to support the proposal, the proposed rulemaking includes a discussion of the percentage of consumer inquiries related to the short-form warning, based on an informal review of data compiled by OEHHA, and a detailed analysis of the potential costs of the proposed amendments in the Economic Impact Statement. Lastly, OEHHA has proposed extending the implementation date for the proposed changes to the short-form safe harbor warnings to three years to allow businesses to spread costs for making changes to their warnings over a longer period if they choose to use the proposed safe harbor language. OEHHA notes the commenters' suggestion regarding consumer research. However, OEHHA has extensive experience with Proposition 65, for which it is the lead agency, as well as with science communication more broadly.

No changes to the proposed amendments were made based on these comments.

**Comment 17:** (ACA, AHRI) The commenters state that equipment manufacturers simply do not have information on how all parts or components that make up the whole of their equipment were produced. For a product such as an imported air-cooled chiller, some of the more mundane parts, such as structural channels, could be purchased from distributors. Multiplying this by the thousands of parts in thousands and thousands of products, these amendments will take significant time to implement.

The commenters further state that manufacturers of complex formulated products (i.e., paint, coatings, sealants, adhesives) often substitute out a Proposition 65 chemical due to frequent changes in availability of raw materials. The supply of raw materials is fluid, requiring quick adaptation and modification of formulated products, so certain ingredients change from batch to batch. Companies cannot modify the label to ensure accurate identification of a listed chemical due to these frequent changes in the raw material supply.

**Response:** If this proposal encourages businesses to know the contents of their products as necessary to provide accurate information to consumers, that is in keeping with the goals of Proposition 65. To the extent that manufacturers referenced by the commenters are already providing warnings without knowing if they are needed, OEHHA does not recommend or support that approach. It is unnecessary and dilutes

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<sup>17</sup> See ISOR, page 14 and following.



the effectiveness of those warnings that are required. Moreover, some of the products discussed in the comment may not be consumer products and thus will not be affected by the proposed changes to the short-form warnings. Warnings for occupational exposures to listed chemicals are addressed by other regulations.<sup>18</sup> Further, it is unlikely that every part of every SKU needs a warning. Warnings are only required for knowing and intentional exposures to significant amounts of listed chemicals. Where there is no exposure, no warning is required.

No changes to the proposed amendments were made based on these comments.

**Comment 18:** (CBA/CalChamber Coalition) The commenters suggest that rather than requiring businesses to provide chemical-specific warnings, OEHHA should use its warnings website to provide consumers with product-specific information. They suggest that OEHHA could group products by likely chemical exposures and explain those exposures instead of adding a specific chemical name requirement to the safe harbor short-form warning.

The commenters further state that in its 2016 changes to the warning regulations, OEHHA expressly “decline[d] to add the requirement to name a chemical in the short-form version.” OEHHA acknowledged that because “certain classes of products commonly carry the short-form warning,” the agency “can identify chemical exposures related to those products on its website.”<sup>19</sup> OEHHA does not explain in the current proposal why its earlier statement was incorrect or in need of revision. In the Coalition’s view, the reasoning behind OEHHA’s earlier decision still applies.

The commenters further state that businesses have been relying on the short-form warning for some time, and that therefore OEHHA can assess which classes of products “commonly carry” the short-form warning. They state that OEHHA can more effectively identify potential chemical exposures from certain products on its website, which some courts have encouraged.<sup>20</sup>

The commenters state that OEHHA should work with trade associations, including Coalition members, to gather information about exposures to listed chemicals from products that carry short-form warnings. However, the commenters allege that individual businesses who are regularly targeted by Proposition 65 notices of violation are reluctant to voluntarily provide any information about specific chemicals in their products or possible exposures that is not required by law that will be available to private

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<sup>18</sup> Section 25606.

<sup>19</sup> See FSOR 2016 page 72.

<sup>20</sup> See, e.g., *Nat’l Assoc. of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023); *CalChamber*, 529 F. Supp. 3d at 1121.

enforcers of Proposition 65, since that information could be used to file an enforcement action.

**Response:** The commenters suggest that OEHHA can use the Proposition 65 warnings website to provide information to the consumer instead of adding a chemical name to the warning. However, without identifying any specific chemical exposures, the consumer would not know how to search for additional information.<sup>21</sup> The ISOR explained that consumers are confused about the specific chemicals they may be exposed to and seek more information on the website to either inform their purchase or to give them more information regarding exposures.<sup>22</sup> Additionally, product-specific warnings take into account products manufactured through different processes, raw materials grown or sourced in different places, additives, unique uses for specific products and the use of good manufacturing practices to limit the presence of listed chemicals, that only the manufacturer would know. Asking OEHHA to provide information about the many hundreds or thousands of products that may currently or in the future carry a Proposition 65 short-form warning is unreasonable. The product manufacturer or seller is in the best position to provide this information, and other product-specific information, since it must determine whether to provide a warning for a given exposure. It is not feasible for the website to provide this information. In most cases, OEHHA does not know why a warning is being given any more than the consumer who sees the warning.

It should be noted that the full quote from the FSOR for the 2016 regulations that cited by the commenters gives context for the language quoted:

“Based on its discussions with business groups during the development of these regulations, *OEHHA believes a relatively limited number of products will carry the short-form warning* and that the vast majority of on-product warnings will conform with or at least be based on the longer safe harbor warning. However, there likely will be situations in which the longer warning will not fit on a product’s label. To the extent that certain classes of products commonly carry the ‘short-form warning,’ OEHHA can identify chemical exposures related to those products on its website. For these reasons, OEHHA declines to add the requirement to name a chemical in the short-form version of the warning” (italics added).<sup>23</sup>

As stated in the ISOR for the current rulemaking, contrary to its assumption in 2016, OEHHA discovered that the short-form warning is being widely used on all kinds of

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<sup>21</sup> See ISOR page 9.

<sup>22</sup> See ISOR pages 7-8.

<sup>23</sup> See FSOR 2016 pages 72-73.

products, including large products that could easily accommodate the longer warnings.<sup>24</sup> Moreover, as OEHHA explained:

“[I]n OEHHA’s experience, consumers often become confused when they see a short-form Proposition 65 warning that does not include a chemical. OEHHA receives many email and phone inquiries virtually every day, and several hundred email inquiries every month, concerning Proposition 65 warnings. Frequently these inquiries are from the public regarding exposures from a wide range of consumer products labeled with a short-form warning, including inquiries as to the specific chemicals to which the public is exposed. In an informal tally of the 440 public inquiries to OEHHA related to Proposition 65 warnings during April 2023, 79% of consumer inquiries requested more information about a specific product, and of these, 66% of the inquiries did not have a chemical name in the warning. Almost 30% of the consumer inquiries included a request for information regarding a short-form consumer product exposure warning or a warning that the consumer found to be unclear. These consumers wanted to know, among other things, the name of the chemical to which they might be exposed.”<sup>25</sup>

OEHHA provided a few examples of these inquiries in the ISOR, and is including additional examples in Appendix 2.

A fundamental purpose of Proposition 65 warnings is to provide notice of a chemical exposure by giving a clear and reasonable warning before that exposure occurs.<sup>26</sup> These inquiries confirm that those consumers’ right to know is not adequately addressed by the current short-form warnings that do not include a chemical name.

No changes to the proposed amendments were made based on these comments.

**Comment 19:** (ACA, Anonymous 1, HPCA) The commenters state that they already provide sufficient information when using the existing short-form warnings in combination with labeling requirements under other federal and state laws. These include requirements to list chemical names and certain hazard information pursuant to the Federal Hazardous Substances Act (FHSA) and the California Cleaning Product Right to Know Act of 2017, and in SDS’s and training materials pursuant to the federal Occupational Safety and Health Administration’s (OSHA) Hazard Communications Standards (occupational). They state the proposal is unnecessary as it does not convey additional information of value to consumers. Based on information included in a prior regulatory proposal, the commenters allege that OEHHA does not receive inquiries

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<sup>24</sup> See ISOR page 7.

<sup>25</sup> *Id.*

<sup>26</sup> Health and Saf. Code section 25249.6.

about “formulated products” (e.g., paint, coatings, sealants, adhesives, etc.) because they are already providing so much information on the label.

HPCA states that the proposed inclusion of a chemical name in a short-form label is redundant given existing ingredient communication requirements such as the California Cleaning Product Right to Know Act of 2017. Manufacturers already provide warnings either on-label or online informing consumers about the presence of chemicals, including those listed under Proposition 65.

ACA requests clarification concerning workplace labeling laws such as the OSHA Hazard Communications Standards regarding Proposition 65-listed chemicals. Commenter asks whether the current regulatory provisions for occupational exposure warnings will stay in place under the proposed amendments.

**Response:** OEHHA’s regulations provide that an additional warning is not required for occupational chemical exposures that are covered under the federal OSHA Hazard Communication Standards, when employers comply with those provisions (section 25606). This provision of the regulations is not affected by the proposed amendments.

However, under existing law, businesses causing *consumer product* exposures to listed chemicals must provide a Proposition 65 warning. This requirement is not altered by this proposal.

The proposed amended short-form warnings will provide consumers with sufficient information to know they may be exposed to a listed chemical that can cause cancer or reproductive toxicity, prior to exposure, so they can make informed decisions about whether to purchase or use a given product. Without the name of a chemical the consumer is being exposed to, it is impossible for the consumer to obtain any additional information about the chemical, or about how to reduce or eliminate their exposure.

While there are certain consumer product labeling requirements under the Federal Hazardous Substances Act and regulations, they do not preempt Proposition 65 requirements. (*People ex. rel. Lungren v. Cotter & Co.* (1997) 53 Cal.App.4th 1373). Furthermore, the addition of a chemical name to a short-form warning does not implicate FHSA. Chemical names are already included in full-length warnings, under existing law.

OEHHA disagrees with HPCA’s contention that the chemical disclosure requirements for cleaning products is sufficient under Proposition 65. The California Cleaning Product Right to Know Act of 2017 requires disclosure of certain intentionally-added chemical ingredients on product labels, and placement of additional information on the company’s website. The laws do not require companies to identify a specific chemical as a listed carcinogen or reproductive toxicant. A consumer would have to research each of a potentially long list of chemical ingredients and related sources on the company’s

website to determine what type of harm exposures to each chemical can cause. This does not comply with the Proposition 65 “clear and reasonable” warning requirement. Further, it is very unlikely that a consumer would be able to access this information prior to exposure to chemicals listed under Proposition 65.

No changes to the proposed amendments were made based on this comment.

**Comment 20:** (AAFA, ACC, ACC Coalition, AHRI, Anonymous 1, CalChamber, CBA/Cal Chamber Coalition, CPMA, Diamond Sports, Quadratec, HVI, Madison Air, MEMA, Fluidra, PHTA, SRE, SWH)

Some commenters indicated that the current short-form warning sufficiently alerts consumers to potential harm and that adding the name of a specific chemical does not give consumers actionable information and could be misleading and confusing. It was indicated that if a consumer wants to avoid all Proposition 65 listed chemicals, then the current short-form warning most efficiently supports that goal. It was asserted that the current short-form warning provides the same level of notice, and the link to the Proposition 65 website provides the consumer more information on the warning. A commenter indicated that it is not surprising that consumers prefer more information over less; but satisfying a consumer preference is not a justification for the regulation proposed by OEHHA. On the other hand, it was stated that most consumers never read safety information on the product, and that all they really want to know is the price, the color, what it does, and how to get it.

Including the chemical name gives no context about the actual risk, measurable content of the listed chemical(s), context for basis of listing, or even a full picture of the other Proposition 65 listed chemicals to which a consumer may be exposed by using the product. Providing the name of a specific chemical could imply that there is significant risk presented from the chemical where no such risk is present.

**Response:** The requirement to list at least one chemical name currently applies to the full-length warnings and has been in place since 2018. It allows consumers to find information about chemical exposures from consumer products, so they can make informed decisions about purchasing or using products that can expose them to listed chemicals. The commenters do not provide any evidence supporting their assertion that warnings that omit the name of a chemical are superior to those that include the name of a listed chemical in the product that may cause a significant exposure. The commenters do not provide any evidence such information in full-length warnings has caused undue consumer confusion or concern.

Proposition 65 is a right-to-know law. When the people of California adopted the law through the initiative process, they stated they wanted to be informed about exposures to chemicals that may cause cancer, or reproductive or developmental harm. See

Preamble to Proposition 65 (Section 1).<sup>27</sup> Providing at least one chemical name in the warning allows consumers to find information on that chemical and how they might be exposed. This furthers the right-to-know purpose of Proposition 65, while balancing some businesses' desire for a relatively short warning. Without the name of at least one chemical to provide context, it is impossible for the consumer to obtain any additional information about the chemical(s) in the product, or how to reduce or eliminate their exposure.

Adding a chemical name to the short-form warning provides consumers with additional information they need to make informed choices about their purchase and use of a product. More detailed information regarding the risks of exposure to certain chemicals and ways to avoid or reduce exposure is available on the OEHHA website but is not particularly useful without the identification of the particular chemical the consumer could research.

Regarding the concern that consumers will be confused or misled by the fact that a warning does not necessarily include every listed chemical in a product that could cause a significant exposure to the consumer, this proposal is consistent with the full-length warning regulations. Both allow safe harbor protection to be granted for a warning that lists only one chemical per endpoint (i.e. for cancer and/or reproductive harm). OEHHA must balance the need to provide additional information against the value of short, easily readable warning language and the practicalities of labels, packaging, etc. This proposal allows companies to include additional chemical names as needed; OEHHA encourages the inclusion of such information but has determined that safe harbor protection should be available to businesses even if not every pertinent chemical is noted in the warning.

The proposed changes still allow manufacturers to use the short-form warning while potentially reducing prophylactic use of the warning. Under existing law, companies currently may provide a warning with no chemical name for a product that does not cause any significant exposure to a listed chemical, because they would rather apply a generic warning to everything rather than determine which of their products actually create such an exposure and which do not. This litigation-avoidance strategy does not serve the interests of the Act because it does not provide accurate information. By

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<sup>27</sup> "SECTION 1. The people of California find that hazardous chemicals pose a serious potential threat to their health and well-being, that state government agencies have failed to provide them with adequate protection, and that these failures have been serious enough to lead to investigations by federal agencies of the administration of California's toxic protection programs. The people therefore declare their rights: .... b) To be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm. ... The people hereby enact the provision of this initiative in furtherance of these rights."



including a chemical, companies will be encouraged to actually determine which chemicals—if any—could expose consumers of their products.

See also response to comment 16.

No changes to the proposed amendments were made based on these comments.

**Comment 21:** (ACC Coalition, CBA/CalChamber Coalition, Quadratec) Commenters state that the proposed requirement to include a chemical name in the warning is compelled commercial speech that violates the 1<sup>st</sup> Amendment. Comments cited *Nat'l Assoc. of Wheat Growers v. Bonta* (9th Cir. 2023) 85 F.4th 1263, 1283.

**Response:** To the extent that the commenters believe that they will be legally compelled to use the proposed short-form warning, that is incorrect. For businesses which prefer to use a warning which is already deemed to be “clear and reasonable” by regulation, short-form warnings are only one option. Other safe harbor warnings are available. Additionally, although many businesses choose to use safe harbor warnings to reduce their litigation risk, companies may legally create their own warnings to satisfy Proposition 65, provided that those warnings are “clear and reasonable.”

The *Nat'l Wheat Growers* case addressed only the question of whether Proposition 65's requirement to warn as applied to one particular chemical, glyphosate, violated the First Amendment. That case did not address warnings as applied to any other chemical, and it did not address Proposition 65's warning requirement in general. The proposed amendments in this case offer a safe harbor warning that is factual, uncontroversial, and advances the state's interest in providing consumers with important public health information. Such warnings do not violate the First Amendment.

The commenter cannot rely on *Nat'l Wheat Growers* to support its contention that *all* Proposition 65 safe harbor warnings that name a chemical would violate the 1<sup>st</sup> Amendment, regardless of the strength of evidence behind each chemical.

No changes to the proposed amendments were made based on these comments.

**Comment 22:** (MIC, ROHVA, SVIA) The commenters state that the existing short-form warning language adequately informs consumers of the presence of materials known to the State of California to cause cancer or reproductive harm, and the warning requires no changes.

Manufacturers understand and support an approach that reduces confusion and clearly informs consumers about the presence of substances known to the State of California to cause cancer or reproductive harm. The commenters argue that the existing Proposition 65 short-form warning language does this. Upon reading the existing short-form warning language, consumers may choose to use other products, or take other

measures, including the use of suitable personal protective equipment (PPE), as specified by the product manufacturer. The commenters state that OEHHA must avoid proposals that cause consumer confusion.

**Response:** Proposition 65 requires warnings for significant exposures to chemicals listed as carcinogens or reproductive toxicants, or both. The mere presence of a listed chemical does not require a warning. OEHHA has determined that without a chemical name, the existing short-form warning provides inadequate information about a potential exposure. While a consumer can choose not to purchase or use a product with a Proposition 65 warning, it is not clear from the comment how a person would know what type of PPE to use if they are not provided with the name of a chemical along with information on the appropriate PPE to avoid exposure.

No changes to the proposed amendments were made based on these comments.

### ***Selecting chemicals for short-form warning***

**Comment 23:** (AAFA, CPMA, Quadratec, SRE). Listing only one or two specific chemical names on a warning label is arbitrary. For example, if a consumer wants to avoid Proposition 65 listed chemical A, and they purchase a product that warns of potential exposure to Proposition 65 listed chemical B, then they would have no way to know if the product could also expose them to chemical A or any of the 900 plus other Proposition 65 chemicals. Also, adding a chemical name creates misunderstanding that the product only contains the listed chemical, potentially exposing consumers to other chemicals without their knowledge and opening the door to future lawsuits and regulation changes. Further, the proposed regulation is not clear about how many chemical names are required and how a business should choose the named chemical.

**Response:** Regarding criteria for determining which chemical(s) should be named in the warning, OEHHA noted in its 2016 rulemaking on Proposition 65 warnings that

“OEHHA considered providing criteria for selecting a chemical such as the potency of the chemical, the chemical(s) with the highest concentration, or the chemical(s) most likely to be of interest to the person being warned. However, none of these criteria lend themselves to general application in a regulation of this type. Given that Proposition 65 does not establish any clear hierarchy of concern for listed chemicals, OEHHA determined that the decision concerning which chemical(s) to name on the warning should be left to the business causing the exposure. Under the regulations, a business can claim safe harbor protection by naming any one or more of the chemicals for which the warning is being provided. If a warning is provided for one endpoint, then one chemical is the minimum that must be named. If a warning is provided for more than one endpoint (e.g., cancer and reproductive harm), then one chemical name must be



included for each endpoint covered by the warning, unless the same chemical is listed for both endpoints, in which case it would be acceptable to just name that one chemical.”<sup>28</sup>

This remains OEHHA’s position. Nothing in the current or proposed regulations requires or prohibits a business from including the names of several of the Proposition 65 listed chemicals in their product that can cause a significant exposure, either in the warning or otherwise. The requirement to list at least one chemical name currently applies to the full-length warnings and has been in place since 2018.

No changes to the proposed amendments were made based on these comments.

### ***Product testing***

**Comment 24:** (AHRI, CBA/CalChamber Coalition, CPMA, CRA, Quadratec, Hansen, Nash, MEMA, NAIMA) The commenters indicate that the proposal will require product testing and state that costly testing yields only a small benefit. SWH alleges only a hundred of the Proposition 65 listed chemicals can even be tested for. Therefore, many businesses will skip testing altogether and just use the short-form warning to disclose a listed chemical that their products are most likely to contain (e.g., lead in many plant-based foods). The commenters state it is more efficient for businesses to provide a warning, even if OEHHA adopts the proposed amendments requiring a chemical name, therefore, the proposed amendments will not reduce warnings since they are provided to avoid expensive enforcement actions. CPMA states that one member company would have to change hundreds of Safety Data Sheets (SDS). Businesses will incur testing costs resulting from this proposal. Commenter Mr. Hansen estimated that a company selling 15 models of bicycles or motorcycles could spend more than \$50,000 a year testing many component parts.

**Response:** The warning regulations in Article 6 do not address *whether* a warning is required; instead, the regulations provide guidance to businesses on *how* to provide a warning once a business has decided to provide a warning. Other regulations adopted by OEHHA can assist businesses in this regard.<sup>29</sup> It is each respective business’s responsibility to determine if its product is causing an exposure to a listed chemical at a level that requires a warning under Proposition 65. Businesses are free to consult with a laboratory they deem appropriate for assistance in answering this question; however, the decision of whether to provide a warning is a business determination. Nothing in the proposed amendments requires a business to conduct testing or affects whether a warning must be given.

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<sup>28</sup> See FSOR 2016 page 69.

<sup>29</sup> See sections 25821, 25721 and 25901 for guidance.

Determining the most likely significant exposure from a product and naming that chemical in the warning is not contrary to the purposes of Proposition 65 if a business has a reasonable basis for making that determination. While product testing is one way to determine whether a warning is required for a given chemical exposure, the product manufacturer could rely on its knowledge of the product's ingredients or components to decide to provide a warning. These may be found on product specifications, application of the manufacturer's knowledge of the product's content, or information provided in Safety Data Sheets accompanying the ingredients. Where a business decides to test its products, it need not test for every listed chemical. Consulting with a knowledgeable laboratory or toxicologist may assist the business in determining which chemical exposures are likely to occur so testing can be focused on those potential exposures. Further, Proposition 65 only requires warnings for significant exposures. The mere presence of a chemical in a product, absent a significant exposure, does not require a warning. OEHHA is aware that many businesses provide unnecessary warnings as a litigation-avoidance strategy. Attempting to reduce those warnings is one of the goals of the proposed amendments. Businesses may find they do not need a warning once they complete an evaluation of their product.

This proposal does not affect the content of Safety Data Sheets, which are required by existing Hazard Communication regulations.<sup>30</sup> Further, compliance with Hazard Communication regulations regarding a listed chemical satisfies Proposition 65 for occupational exposures. This proposal does not alter employers' obligations under the Hazard Communication regulations.

No changes to the proposed amendments were made based on these comments.

**Comment 25:** (SWH) Commenter states its opinion that Proposition 65 only requires warnings that a product possibly contains one of 800 banned chemicals somewhere in it. SWH further states it is not possible to identify the location of a chemical in an item with 500 parts. Commenter states that a business would be unable to use the short-form warning label if it must describe 15 or 30 places or areas on the product or its components where the chemicals might be hidden, and it would require costly and detailed testing to find out.

**Response:** The commenter mischaracterizes the warning requirements of the statute. Proposition 65 requires a warning for significant, knowing, and intentional *exposures* to chemicals listed as known to the state to cause cancer, birth defects or other reproductive toxicity.<sup>31</sup> Where a chemical is "hidden" somewhere inside a product, no warning is required unless a significant exposure can occur. For example, a product or

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<sup>30</sup> See Cal. Code Regs., tit. 6, section 5198 and 29 C.F.R. section 910.1200.

<sup>31</sup> Health and Saf. Code section 25249.6.

component that contains a listed chemical that is inaccessible to a consumer and does not leach from the product does not require a warning. Further, Proposition 65 does not ban chemicals.

The safe harbor warning regulations only require the name of at least one chemical for each endpoint for which the warning is being given, not every listed chemical that may or may not be in the product. Therefore, 15 or 30 chemical names are not required to be provided under the existing safe harbor regulations. The same is true of the proposed amendments to the short-form warning. In addition, a business always has the flexibility to include the names of many chemicals in the warning if it so chooses.<sup>32</sup>

OEHHA has included additional illustrative examples of consumer inquiries as an appendix to this FSOR. Although these specific examples were not relied on for purposes of the proposed amendments, they are consistent with consumer inquiries received daily by OEHHA. Non-specific warnings generate questions OEHHA is unable to answer. Providing a chemical name in the short-form warning will further the purposes of Proposition 65 as a right-to-know law by providing consumers with necessary information to allow them to better understand the warnings and enable them to make an informed decision about exposures to listed chemicals. See Appendix 2.

No changes to the proposed amendments were made based on this comment.

**Comment 26:** (CBA/CalChamber Coalition, CRA, PHTA, Simply Sound Consulting, SWH) Simply Sound Consulting comments that businesses have no way to estimate exposure. Products are used differently by every individual. Exposure time, type of use, and the chemical involved can all have different estimates of exposure. A business would need a large group of studies on each chemical to prove “safe usage levels.”

PHTA states that manufacturers cannot reasonably know all trace elements that may be included in their products or its packaging. Though OEHHA cannot change the enforcement mechanism presented by its enabling legislation, the act of reducing the number of companies who will be able to place safe harbor labels on their products because of inability to name a chemical from the Proposition 65 list in good faith will necessarily lead to more companies being sued because of alleged failure to warn. These costs will be borne by the manufacturers and their insurance companies and will have widespread negative effects on the California economy. The commenter says that changes to the information required on the short-form label will expose more companies to enforcement actions. Because Proposition 65 relies largely on private enforcement, it has led to the widespread use of prophylactic or unnecessary Proposition 65 safe harbor short-form warnings and attorneys who specialize in “suing product

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<sup>32</sup> Subsection 25600(f): “Nothing in Subarticle 2 shall be construed to preclude a person from providing a warning using content or methods other than those specified in Subarticle 2 that nevertheless complies with Section 25249.6 of the Act.”

manufacturers based on the information presented in the Proposition 65 labeling or lack thereof.”

CBA/CalChamber Coalition, and CRA state that small and exempt businesses use the current short-form warning to avoid litigation for not providing a warning. Including a chemical name will require manufacturers and importers to engage in product testing. When adopting the original warning regulations, the Health and Welfare Agency stated “[n]othing requires that each business conduct a scientific analysis of all its products. Unless a business has reason to know that the product contains a listed chemical, no testing is needed, and no warning is necessary.”<sup>33</sup>

The commenters state that OEHHA suggests its proposal could incentivize businesses to test their products before deciding whether a warning is required. This is at odds with how Proposition 65 was presented to voters in the official ballot pamphlet. Voters were told that Proposition 65’s requirements “will not take anyone by surprise.” The scope of the law was described as “apply[ing] only to businesses that know they are putting one of the chemicals out into the environment, and that know the chemical is actually on the Governor’s list.” The proposed amendments are inconsistent with the original basis for the law.

**Response:** OEHHA agrees that product testing is not required under the regulations and that warnings are only required for “knowing and intentional” exposures to listed chemicals at significant levels. Moreover, warnings should not be provided for nonexistent exposures. It is the primary responsibility of the product manufacturer, importer, distributor, etc., to determine if a warning is required for a given product exposure. That determination does not require testing, though testing is one option to enable a manufacturer to determine the existence and extent of a potential exposure. A manufacturer can also use its knowledge of the product specifications, review information on SDS’s, and work with relevant trade organizations and the like to identify potential exposures that may require a warning. Providing a chemical name in the warning is entirely consistent with the right-to-know purposes of Proposition 65.

Where testing is conducted, the business does not have to test its products for exposure to all listed chemicals; it only needs to test for those chemicals it knows may cause an exposure to a consumer. This knowledge can be obtained through a review of the components or ingredients in a product, through trade associations, qualified toxicologists, or requests to manufacturers of component parts. OEHHA’s regulations provide guidance on how to calculate exposure to listed chemicals. See sections 25721(cancer) and 25821 (reproductive toxicity) of the regulations, among others. Further, OEHHA has adopted “safe harbor” levels for many listed chemicals that can

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<sup>33</sup> OEHHA, Revised Final Statement of Reasons, 22 California Code of Regulations, section 12601 (November 1988), page 32.

help businesses determine when a warning is required. See section 25701 (cancer) and 25801 (reproductive toxicity).

No changes to the proposed amendments were made based on these comments.

**Comment 27:** (MEMA) Commenter suggests that OEHHA work with product manufacturers to develop approved analytical testing methods to determine if a product contains a listed chemical and if exposures are possible. Such an action would serve consumers and manufacturers. This would also address OEHHA's over-warning concern with the use of the current short-form warning.

**Response:** This comment is outside the scope of the proposed rulemaking. Other existing regulations can assist businesses in determining when a warning is required.

No changes to the proposed amendments were made based on these comments.

### ***Restrictions on use of short-form warning***

**Comment 28:** (CEH Coalition) The commenter sees no justification for allowing the use of a short-form warning when a product label is large enough to accommodate a full-length warning. The commenter argues that this denies consumers full access to information that they may need to make an informed decision.

**Response:** In the previous rulemaking released on January 8, 2021, OEHHA proposed a limitation on the size of labels that may use a short-form warning. OEHHA received public comments to the effect that this proposal was impractical and burdensome for businesses. OEHHA did not include a label size limit in the current proposal because of the previous comments from stakeholders that indicated that the calculation of label size for the wide variety of consumer products being sold would be too complicated to be feasible. Additionally, the amended short-form warning language provides consumers with more information than the current short-form warning, including the name of at least one chemical, so consumers can make more informed choices, thus at least partially addressing the commenter's concern.

No changes to the proposed amendments were made based on this comment.

**Comment 29:** (IRC, NAIMA) The commenters state that OEHHA should not limit the circumstances where the short-form warning can be used. OEHHA should avoid requiring a far lengthier warning. This may cause over-crowding on the product packaging, does not provide useful information, and is an unwelcome burden upon the regulated community without a clearly articulated benefit to the consumer or members of the public.

IRC states that it has been providing a modified short-form warning since 2018. The modified warning only includes the name of a listed chemical. Adding additional wording such as "Risk of reproductive harm from exposure to [name of chemical]". See

www.P65Warnings.ca.gov.” only makes the short-form warning longer without adding any additional information to inform the reader. The commenter states making the warning text longer will serve to discourage consumers from reading the warning and does nothing to increase comprehension. Lastly, the commenters state that the increased length of the warning means it may not fit on smaller packages, particularly when presented in multiple languages.

**Response:** OEHHA’s intent with this rulemaking is to make short-form warnings more useful to consumers and consistent with the content of the full-length warning by requiring the name of a chemical be added to the warning along with additional words to provide context. This information will make it easier for consumers to evaluate their potential exposures and make informed decisions.

As explained in the ISOR for this regulatory action, the additional words are included in the warning for context.

The short-form warning content would be modified by adding terms such as “risk”, “can expose”, and “exposure” to warn a consumer that there is an increased risk of cancer and/or reproductive harm from exposure to the chemical named in the warning from the consumer product. Both forms of the proposed short-form warning are more informative than the current short-form warning, which only identifies the end point, i.e., “WARNING: Cancer” or “WARNING: Reproductive Harm”, does not provide context for the warning, and does not name the chemical to which the consumer is being exposed.<sup>34</sup>

OEHHA has determined that the information added to the warning will be beneficial to the consumer. And even with the addition of the contextual words, the proposed short-form warnings remain significantly shorter than the current full-length warning and are likely to fit on many small labels along with other required information including translations of the warning. Adding a short phrase such as “can expose you to” is unlikely to keep a consumer from reading the warning, as it does not significantly lengthen the warning, but it does provide context to the consumer. See comparison below:

Current full-length warning:

**⚠ WARNING:** This product can expose you to chemicals including formaldehyde, which is known to the State of California to cause cancer, and toluene, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

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<sup>34</sup> See ISOR, page 24.



Proposed short-form warning:

**⚠ WARNING:** Can expose you to formaldehyde, a carcinogen and toluene, a reproductive toxicant. See [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

Below is the same language as above, in the smallest font allowed under the existing regulations:

**⚠ WARNING:** This product can expose you to chemicals including formaldehyde, which is known to the State of California to cause cancer, and toluene, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

**⚠ WARNING:** Can expose you to formaldehyde, a carcinogen and toluene, a reproductive toxicant. See [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

While it is possible the new short-form warning language may require larger labels, or could theoretically fail to fit on extremely small products, the regulations also allow for the warning to be provided using methods other than on-product labels.<sup>35</sup> To the extent that the product label currently contains both a short-form warning and its translation, as stated above in the response to comments about font size, the proposal will only add 6-9 words per warning language.

No changes to the proposed amendments were made based on these comments.

**Comment 30:** (CEH, CEH Coalition) Commenter CEH states that the minimum six-point font size is generally too small and very difficult to read. Critical health information should be made equitably accessible to all consumers regardless of their ability to read fine print. The CEH Coalition further suggests, “The minimum font size of size 6 should be raised to a minimum of size 10 to be seen. Size 6 font should not be considered ‘clear and reasonable,’ because it is too small and important health information should be equitably accessible to all consumers.”

**Response:** OEHHA is carrying over the existing minimum type-size of 6 point because there are small products that cannot fit a warning on the package in larger fonts and still provide other required information (e.g. label information like nutrition, other warnings, and ingredients). However, OEHHA has proposed a change to the short-form regulations that would cross-reference a related provision. In the existing regulations, section 25601(c) provides that:

“Consumer product exposure warnings must be prominently displayed on a label, labeling, or sign, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use.”

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<sup>35</sup> Section 25602.

Subsection 25306(a)(4) states that one method of providing a warning is:

“A short-form warning on the label that complies with the content requirements in Section 25603(b). The entire warning 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” (italics added).

The proposed amendments would change this provision to read as follows:

“A short-form warning on the label that complies with the content requirements in Section 25603(b) and is provided on a product *in a type size that complies with Section 25601(c)*. In no case shall the warning appear in a type size smaller than 6-point type” (italics added).

Thus, the amended regulation would provide more flexibility to product manufacturers, given that some recent federal requirements concerning calorie counts have increased the type size so much that a comparably sized warning would be extremely large in relation to other information on the product label. On the other hand, depending on the size of the product or immediate container or wrapper, the warning will need to be provided in a larger type size to “render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use.” Thus, a short-form warning on a large appliance will need to be presented in a much larger type size than is currently being used. This better ensures that the warning will be readable on most products, relative to the current regulation. The minimum 6-type size remains but will likely only be used on smaller products.

No changes to the proposed amendments were made based on these comments.

**Comment 31:** (AAFA, HPCA, JSmith) The commenters state that they should be able to use a short-form warning on any product. They quote an OEHHA statement that a primary driver for the proposed amendments is that the short-form warning is currently being used in a manner that is inconsistent with the original intent of the regulations. Commenter points out that OEHHA’s current “Questions and Answers for Businesses” on the P65warnings website states, “There is no express prohibition, however, on using the short-form warning on larger products.” The commenters allege that the proposed amendments walk back that statement and create a moving target for businesses, and that the inconsistency increases costs for businesses and creates confusion for businesses and consumers. The commenters request that OEHHA allow the short-form warning to be used on any size product.

HCPA states that in its experience, businesses are responsibly applying short-form warnings, but that the proposed amended warning language could limit the label space available for other crucial health and safety information.



**Response:** The previously proposed maximum label size provision of the proposed amendments contained in the 2022 proposal was eliminated in the current proposed amendments. Instead, the current amendments cross-reference the existing provisions of 25601(c), which provides as follows:

“Consumer product exposure warnings must be prominently displayed on a label, labeling, or sign, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use.”

The proposed amendments therefore retain the existing requirements that the warning cannot be provided in a type size smaller than 6-point and that it must be placed on the product or its immediate packaging. However, they would delete the following sentence:

“The entire warning must be in a type size no smaller than the largest type size used for other consumer information on the product.”

Since the current proposal allows the short-form warning to be used on any size product so long as it complies with the existing regulatory provisions related to type size, it does not create a “moving target” or contribute to business or consumer confusion.

No changes to the proposed amendments were made based on these comments.

### ***Uniformity of warnings***

**Comment 32:** (HCPA) The commenters state that the changes to the short-form warning content will result in warnings with variable lengths, rather than one consistent size. HCPA recommends that OEHHA align the short-form warning language with the safe harbor warning language to ensure consistency in the marketplace.

**Response:** The commenters are correct that the length of the short-form warning will vary depending on the chemical name(s) the business includes in the warning and the other phrasing it chooses. The same is true for the full-length warning and many of the tailored warnings in the safe harbor regulations. In this case, the benefits to the consumer of adding a chemical name to the warning outweigh the logistics of revising product labels. On the other hand, where a business wishes to make its warnings a consistent size, it can choose to make the length of the warning roughly equivalent by adjusting the font size as appropriate, so long as the font is at least 6-point type and complies with subsection 25601(c).

No changes to the proposed amendments were made based on this comment.

**Comment 33:** (MIC, ROHVA, SVIA) The commenters state that OEHHA’s proposed amendments would require manufacturers to generate new labeling for products sold alongside existing products carrying the current warning language because it is difficult “for manufacturers to understand when existing stock labeled with the current language will be sold out.” They continue, “Different messaging on the same product may cause consumer confusion and could be viewed as manufacturer’s misinforming consumers about risks.”

**Response:** The fact that the same products may carry different warnings does not misinform the consumer since both are presumably accurate; the new, proposed short-form warnings just provide additional, important information to the consumer so they can make an informed decision about purchase or use of a product.

The proposed regulatory amendments would allow manufacturers an unlimited sell-through period for products already properly labeled at the time the new regulation goes into effect. And the proposed regulation, as modified, would provide a three-year transition period for implementing the new warning content.<sup>36</sup> Taken together, these provisions should help manufacturers avoid having products with different forms of the warning displayed alongside each other. Additionally, Proposition 65 warnings are communications about the potential health hazard of the listed chemical, not potential risks.

No changes to the proposed amendments were made based on this comment.

### **Subsection 25603(c). Existing short-form warning and sell-through**

**Comment 34:** (ACC, ACC Coalition, AHRI, CBA/CalChamber Coalition, Fluidra, HCPA, MEMA, MN, OPEI/OPPAA, Seymour, Sriebl) Many commenters were appreciative of the proposed two-year transition time to be able to begin using the new short-form warning and noted that this was an improvement over the 2022 proposal that included a one-year transition time. However, several commenters requested additional time to convert to the new safe harbor content for the short-form warnings. Most commenters requested a three- to five-year delay following the enactment of the proposal. The commenters explained that additional time is needed to review inventory, communicate with suppliers, revise labels, change artwork, update software, test products, allow for consumers to absorb higher prices passed on to them to pay for the revised warnings, deal with supply shortages, including labor and label shortages, retool manufacturing lines that apply some warnings, and use existing label supplies.

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<sup>36</sup> Note the proposed two-year implementation period was extended to three years by the amendments in the 15-day Notice.

The CBA/CalChamber Coalition argued that a three-year phase in period “would substantially soften the impacts of this regulation, which in turn, would protect consumers who would otherwise be forced to absorb this disruptive shock in the form of higher prices. Specifically, extending this timeframe would afford companies more time to redesign and manufacture labels and packaging to the new standard, the costs of which are acutely felt by smaller businesses with lower budgets, as well as larger companies with more extensive product lines.” ACC and the ACC Coalition state that an expanded timeframe of three years is needed “to redesign and manufacture labels to the new standard.” The commenters OPEI/OPPAA also noted that the two-year transition time included in the proposal was not adequate because following the enactment of the Article 6 regulation proposal in 2016, “many companies continued implementation actions well after the August 2018 effective date[,]” and that during that time, many businesses transitioned to the short-form warning, which did not require them to name a specific chemical.

**Response:** OEHHA has carefully considered these requests to extend the phase-in period and modified the regulatory text in the 15-day Notice to provide for a three-year phase-in period. While there were commenters who requested a longer phase-in time, many of the commenters agreed that three years provided adequate transition time for businesses, and would limit the economic impacts of the proposal. While the two-year timeframe is consistent with the implementation of the repealed and rewritten Article 6 Clear and Reasonable Warnings regulations in 2016, extending the implementation period for this regulation to three years will assist businesses in their compliance efforts and minimize costs.

No additional modifications to the proposal were made based on these comments.

**Comment 35:** (ACC, ACC Coalition, CBA/CalChamber Coalition, CPMA, HCPA, PHTA) Many commenters applauded the unlimited sell-through provision for products manufactured and labeled prior to two years after the effective date of the 2024 amendments.<sup>37</sup> Some commenters requested that this provision be expanded to include preprinted labels or packaging. Some commenters requested a minimum of five years, or an unlimited sell-through time frame. Some commenters requested that the unlimited sell-through period cover labels that have been applied to certain packaging and pre-printed labels that are ordered before a specific date. The commenters complained that it is wasteful to throw away existing labels, it erases any cost savings that businesses gain by ordering labels in bulk, and that a sudden change would punish businesses who order supplies years in advance. This can undermine businesses’ confidence in California’s regulatory landscape.

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<sup>37</sup> Extended to three years in the 15-day Notice.

**Response:** OEHHA declines to extend the unlimited sell-through period for products manufactured and properly labeled prior to the effective date to preprinted labels or packaging. This action would make enforcement more difficult and incentivize businesses to stock up on preprinted labels that could be used for many years, thus reducing the effectiveness of the proposed amendments.

Providing a three-year period for manufacturers to use up existing labeling stock is reasonable. The unlimited sell-through period applies to any product that is “manufactured and labeled” within that three-year timeframe. It does not matter when that product is eventually sold to a consumer. The proposal allows for the natural market cycles to absorb the older labels so businesses can either begin to use the proposed warnings immediately, or phase them in. And it provides certainty for businesses, so they do not have to recall products or relabel products that are already produced or in the stream of commerce.

No changes to the proposed amendments were made based on these comments.

**Comment 36:** (SWH) There are many years’ worth of existing short-form labeled products still in stock.

**Response:** The proposed amendments include an unlimited sell-through period for products that were manufactured and properly labeled prior to the effective date of the new provisions in subsection 25603(c). Thus, no relabeling is required by the proposed amendments.

No changes to the proposed amendments were made based on this comment.

### **Sections 25601 - 25603. Comments Pertaining to Multiple Sections**

#### **Signal words “CA Warning” or “CALIFORNIA WARNING”**

**Comment 37:** (HCPA, MONARCH, SWH) Commenter SWH states that the current regulations are clear, and that for internet and catalog sales, adding “California” as an option will not make it any easier for manufacturers or distributors to place these warnings on all of their products worldwide. This is because most manufacturers and distributors cannot differentiate their California-destined product from products destined for other states and other parts of the world. HCPA comments that there are too many warning options, and the addition of “CA WARNING” or “CALIFORNIA WARNING” is “particularly confusing to consumers for products sold via the internet or outside the State of California.” MONARCH states that OEHHA is backtracking by adding the options for California specific signal words because this only benefits industry and the listed chemicals are toxic to consumers everywhere.

**Response:** Stakeholders have requested the addition of California-specific signal words for added flexibility to allow a business that is selling products on the internet to target the warning to California consumers and to make it clear that the warning is being given pursuant to California law. Businesses can choose which proposed signal word or phrase they want to provide to consumers. The proposed regulations have included the signal word choices for several years. OEHHA has not had any indication that consumers are confused about why the signal word options are included in some warnings. The addition of the signal word choices is consistent with other Proposition 65 warnings, therefore allowing consistency in choices for businesses, and warnings for consumers.

No changes to the proposed amendments were made based on these comments.

### **Costs to businesses and economic impact of the proposal**

**Comment 38:** (CBA/Cal Chamber Coalition, SEMA) The commenters request that OEHHA withdraw the proposal or substantially modify it to lessen its detrimental impacts on businesses.

**Response:** OEHHA has considered the commenters' request but finds it is inconsistent with the objectives of this rulemaking and the purposes of the Act. For the reasons discussed in the ISOR for this action, and other responses to comments in this document, there is a need to improve the existing short-form warnings to provide consumers with sufficient information to enable them to make informed decisions. The proposal may also reduce the use of unnecessary warnings, which would also further the purposes of the Act. On the other hand, based on these and other comments, OEHHA has modified the proposal by increasing the period for transitioning to the new safe harbor short-form warnings, which should lessen any significant impacts on businesses.

No changes to the proposed amendments were made based on this comment.

**Comment 39:** (ACA, ACC, ACC Coalition, AHRI, Anonymous 1, Anonymous 2, CBA/CalChamber Coalition, CRA, Fluidra, HPCA, MIC/SVIA/ROHVA, PHTA, SEMA, Seymour, Simply Sound Consulting) The commenters state that the cost of the proposal is high because of the number of label changes and the number of products involved. The commenters also expressed the following related concerns:

- Short-form warnings would need to be redesigned and translated. Label templates would require re-programming. This would affect not only labels but also other warnings on those labels.

- Existing software, hardware, and labeling stock for warnings may not be appropriate for the proposed warnings.
- Websites would have to be re-programmed.
- Label redesign may need to consider the requirements of other jurisdictions or other labeling laws and regulations.
- Label redesign is expensive and requires input from marketing, regulatory, purchasing, and customer service fields.
- OEHHA's estimate of the proportion and number of products using the short-form warning is incorrect.

**Response:** In response to these and other public comments, OEHHA increased the implementation time for businesses from two years to three years to allow for time for businesses to change labels, including translations, software, and hardware changes. The proposal also contains an unlimited sell-through period for all products manufactured and labeled prior to the now-extended implementation time. OEHHA also revised the initial proposal to include a 60-day transition time for online retailers to change their online short-form warning content, once provided to them by a manufacturer, to allow for things like website re-programming.

OEHHA acknowledges that this proposal may impose costs on businesses that currently provide the short-form warning and that the cost and effort involved in revising a label will vary between individual products. OEHHA conducted an economic impact analysis to evaluate those costs.<sup>38</sup>

Some of the commenters appear to be concerned with costs incurred by non-California companies doing business only outside the state, and, in some cases outside of the United States. For the purposes of economic impact analysis, OEHHA's cost estimates do not include those entities, as OEHHA is not required to evaluate costs to those entities.<sup>39</sup>

Because Proposition 65 does not include a reporting requirement, OEHHA is unable to determine the number of products requiring a Proposition 65 warning, or the proportion of those products with short-form warnings. OEHHA is not aware of any study or data source for this information. In the absence of that information, OEHHA relied on a 2015 economic analysis that included consultation with other state agencies and interested parties.

The 2015 analysis provided an estimated average per-product cost for warning revisions, including the costs of design, printing, translation, etc. It also provided a

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<sup>38</sup> See ISOR pages 45-46.

<sup>39</sup> Gov. Code section 11346.3(b); see, e.g., Cal. Code Regs. tit. 1 section 2000(e) [definition of "economic impact" for major regulations].



method for estimating the number of products by industry that might provide a Proposition 65 warning. As part of the current rulemaking, OEHHA updated the 2015 analysis to reflect the most recently available information about the number of business establishments in California, by size and industry, adjusted for inflation.

OEHHA estimated costs directly related to the proposed short-form warning amendments. Companies may choose to provide additional information or context about revised Proposition 65 warnings to their customers or the public through product materials, presentations, or other means, but that is not required by these amendments and has not been included in the cost estimates.

No additional modifications to the proposal were made based on these comments.

**Comment 40:** (ACA, HCPA, MEMA) HCPA states OEHHA's estimate of the cost of changing a label is "arbitrary," and the commenter's members think a label redesign costs between \$600 and \$7,500 per product.

ACA comments that one medium-sized member business has documented label revision costs for 500 products of \$800,000 plus the cost of 3,000 hours in employee time. Another member estimates costs at \$3,000,000, excluding labor, an amount that includes updating plating templates at \$250 per template, across thousands of products.

MEMA member companies "estimate that the proposed changes to the Proposition 65 short-form warning on their product labels could cost a company as much as \$12 million - depending on how many products are produced by the company.... [J]ust producing revised pre-printed product labels alone could cost each company as much as \$800,000. Member companies estimated implementation of the Proposition 65 2016 revisions required a minimum of 3,000 hours of labor - depending on how many products a company produces."

**Response:** OEHHA thanks the commenters for the information. In general, OEHHA's economic analysis falls within the range of the data provided by the commenters. OEHHA's economic analysis considers the costs incurred by companies doing business in California, during a specific timeframe. Comparisons between OEHHA's data and different types of data that do not comply with these requirements are not feasible. For example, ACA's comment that their member estimates \$3 million in costs does not provide the total number of products involved, within what timeframe the changes are being made, or whether the affected companies are in California. The estimate that label revisions for 500 products will cost \$800,000 is \$1,600 per product, which is close to OEHHA's estimate of \$1,330 per product. OEHHA also understands that costs for individual products may vary significantly.

Although OEHHA appreciates the information about the 2016 rulemaking, MEMA has not identified the parts of that rulemaking that required the stated employee hours. Unlike the 2016 rulemaking, the present proposal concerns only changes to the existing short-form warning and the new vehicle/marine part warnings. While not included in the economic analysis calculations, this rulemaking also includes tailored warnings for MEMA member businesses that may decrease their costs over the long term.

The unlimited sell-through for products that are manufactured and labeled within the implementation timeframe decreases costs, since businesses will not have to relabel products that have already been manufactured. The 15-day amendments increased the proposed implementation time from two years to three years and provided a grace period for retailers to update online warnings, which provides businesses with extra time to absorb any costs associated with the proposal.

No changes to the proposed amendments were made based on these comments.

**Comment 41:** (CBA/CalChamber Coalition) The commenters state that the burden, expense, and unpredictability of proving a negative in enforcement actions leads many businesses to provide warnings prophylactically, as a litigation-avoidance tactic. The solution to this problem is not to further increase the burden of compliance on businesses; instead, the solution should be to make it harder on private enforcers because they do not act in the public interest.

**Response:** OEHHA is aware that some businesses provide unnecessary warnings as a litigation-avoidance strategy. This practice is not endorsed by OEHHA. Reducing such over-warning is one of the reasons the current proposal requires businesses to provide the name of at least one chemical to which a person can be exposed in the short-form safe harbor warning. Warnings should not be given for non-existent or insignificant exposures. Such warnings do not further the purposes of the Act.

Enforcement reforms are beyond the scope of the current rulemaking. Proposition 65's burden-shifting provisions are set out in the statute.<sup>40</sup> Changes to those provisions require legislative action, including a two-thirds majority vote as well as a finding that the change furthers the purposes of the law.<sup>41</sup>

No changes to the proposed amendments were made based on this comment.

**Comment 42:** (CBA/CalChamber Coalition, CRA, HBCA) Commenter CBA/CalChamber Coalition states that OEHHA's focus on manufacturers in its economic impact analysis excludes other businesses, including retailers, distributors,

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<sup>40</sup> Health and Saf. Code section 25249.10.

<sup>41</sup> Gov. Code section 11342.600 et seq.

and those “located overseas and one or more steps removed from the retailer who sells the product.” The commenter also noted that both online retailers and “brick and mortar” retailers will have to communicate the new, proposed warning language to their suppliers.

CRA stated that “retailers will bear a disproportional share of the burden” of the cost of changing internet warnings.

HCBA noted that a manufacturer might have to have a warning changed on multiple retailers’ sites, which might involve review and proofing by the manufacturer or might be handled exclusively by a retailer or distributor.

**Response:** Regarding communication about warnings between retailers and suppliers, is true that OEHHA did not isolate the cost of communications with other companies about revised short-form warnings. OEHHA instead estimated a per-product cost of revising a warning. The commenters have not suggested an alternate mechanism for evaluating costs. OEHHA estimated the cost of changing online warnings in a similar fashion. The respective burden on consumer retailers, compared to importers/distributors/manufacturers, would likely vary by industry. Additionally, this proposal does not require retailers to take new or different steps to communicate with their suppliers. Indeed, under existing subsection 25600.2(c), manufacturers, producers, packagers, importers, suppliers, and distributors have an obligation to provide the revised warnings for the retailer’s use.

OEHHA also made two modifications to alleviate some of these cost concerns by increasing the implementation time for short-form warnings from two years to three years, and for internet retailers, providing a 60-day grace period to change existing short-form warnings for products sold on the internet from the time they are notified by the manufacturer of the need to change the warning. To the extent that a warning might need to be changed on multiple internet sites, such as national and international shopping websites, costs will primarily be incurred outside California. For costs incurred by companies doing business within the state, OEHHA has estimated that four online short-form warnings could be revised per hour. A cost has thus been attributed to each individual product, even though, for many websites, warnings could be revised for *groups* of products/warnings. Thus, in practice, OEHHA’s aggregated time estimate would likely cover revisions to more than one product per website.

No additional changes to the proposed amendments were made based on these comments.

**Comment 43:** (CBA/CalChamber Coalition) OEHHA’s cost estimates are incorrect because they assume that businesses with fewer than 10 employees do not have to

comply with the proposal even though “larger businesses in the stream of commerce require that smaller businesses indemnify and defend them against Proposition 65 claims.”

**Response:** Businesses with fewer than 10 employees are exempt from Proposition 65 warning requirements, by statute. The commenter is describing a situation in which a small company contractually agrees to assume a larger company’s liability. That does not affect whether or not the smaller company is liable for its *own* activities.

In the situation described by the commenter, a smaller business may wish to assist the larger business with warning information to ensure warnings are provided to consumers, but that indemnity cost is a business decision, and not something Proposition 65 requires.

No changes to the proposed amendments were made based on this comment.

**Comment 44:** (CBA/CalChamber Coalition) Commenter states OEHHA’s cost estimates are incorrect because OEHHA has assumed the proposal “does not impose regulatory requirements on businesses, but instead provides businesses with an option for safe harbor compliance.”

**Response:** Although businesses are not required to rely on the safe harbor warning regulations to comply with Proposition 65,<sup>42</sup> OEHHA has included estimated costs to private businesses to update their existing short-form warnings to comply with the proposed amendments.

No changes to the proposed amendments were made based on this comment.

**Comment 45:** (CBA/CalChamber Coalition, Fluidra, Seymour) OEHHA’s estimate of costs fails to include employee time, the time of “outside consultants such as regulatory professionals and attorneys,” and “the expense of communicating new warning language to each of a company’s online retailers.”

Some commenters provided cost estimates. Seymour stated, “A change to the current Prop 65 Warning regulation would result in over a million dollars of cost to our company.” Fluidra states that it has employees in California and throughout the United States and manufactures thousands of unique product SKUs. The commenter offers a conservative estimate of its costs for this proposal of \$225,000, not including the cost of label/packaging scrap, capital equipment, or opportunity cost. MEMA stated that it estimated a cost of \$12,000,000 per business. AHPA stated that the cost of this proposal to the dietary supplement industry would be millions of dollars.

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<sup>42</sup> Subsection 25600(f).

**Response:** OEHHA has estimated a per-product average cost to revise a warning, rather than estimating the costs associated with specific tasks or job titles, which would vary depending on the business and product at issue. For purposes of OEHHA's economic impact assessment, OEHHA based the number of products on business establishments in California. A single business may have multiple establishments in the state; each one was counted in the analysis. However, business establishments outside the state were not included. OEHHA acknowledges that some entities doing business outside the state will incur costs resulting from this proposal.

No changes to the proposed amendments were made based on these comments.

**Comment 46:** (HCPA) The commenter stated that the NAICS codes used in OEHHA's economic analysis "significantly underestimate[] the economic impact." In particular, the commenter believes these NAICS codes are missing: 3256 - Soap, Cleaning Compound, and Toilet Preparation Manufacturing, 325998 - All Other Miscellaneous Chemical Product and Preparation Manufacturing; 32532 - Pesticide and other agricultural chemical manufacturing; and "likely additional NAICS codes....in other industries...."

**Response:** A significant majority of products listed in NAICS codes 325998 [misc. chemicals] and 32532 [pesticides] are used in an industrial or agricultural setting, not sold for consumer use. Although there are some exceptions, most exposures to listed chemicals would therefore occur among workers rather than members of the public. The current proposal does not amend occupational warning regulations.

Under existing law, businesses must warn employees about occupational exposures to hazardous substances under California's Hazard Communication Standard, Cal. Code Regs. tit. 8, section 5194, which corresponds to the U.S. standard 29 Code of Federal Regs. section 1910.1233. For pesticide exposures, the relevant requirements are stated in Cal. Code Regs. tit. 3, section 6700 *et seq.* If businesses comply with these warning regulations, they have met their obligations to warn for occupational exposures under section 25606 of the implementing regulations. Revised short-form warnings are not needed for occupational exposures.

Some of the products included in NAICS code 3256 are also industrial, for instance agents used in fabric and leather finishing. For consumer products in that code, the 2015 analysis indicated that products associated with these NAICS codes generally do not include warnings, so they were not included.

No changes to the proposed amendments were made based on these comments.

**Comment 47:** (ACC, PHTA) The commenter states, "OEHHA's proposed changes are not mere clarifications to non-binding guidance," and asks that various costs be taken

into account. The commenter contends that the proposal will require all businesses to change the short-form warning they are currently using to the new content.

**Response:** To the extent that the commenters believe that OEHHA did not estimate costs for this proposal because safe harbor warnings are not legally mandatory, the commenter is incorrect. OEHHA conducted an economic impact analysis to evaluate the costs associated with this proposal.<sup>43</sup>

If a business is currently using a short-form warning that does not include a chemical name, then following the implementation time period of three years, a business would need to provide a warning that complies with the content in proposed subsection 25603(b) if it would like to claim safe harbor protection for that warning. Businesses are not legally required to use the safe harbor warning language. Subsection 25600(f) states: “Nothing in Subarticle 2 shall be construed to preclude a person from providing a warning using content or methods other than those specified in Subarticle 2 that nevertheless complies with Section 25249.6 of the Act.” However, many businesses choose to use the regulatory warning language in order to benefit from safe harbor protections and reduce the risk of litigation.

It is a business decision whether to use the safe harbor warnings, including the short-form warnings.

No changes to the proposed amendments were made based on this comment.

**Comment 48:** (CRA) One of CRA’s members estimates that it has 100,000 items on its ecommerce platform which have short-form warnings. The member estimated that it takes seven minutes per warning to change the current online short-form warning to one that is compliant with this regulation, at a cost of \$192,000 for all 100,000 items.

**Response:** OEHHA thanks the commenter for the information. In its economic impact analysis, OEHHA estimated that a change to one product’s short-form warning would require 15 minutes, a slightly more conservative value, but consistent with OEHHA’s existing assessment.

No changes to the proposed amendments were made based on this comment.

### **Liability and litigation**

**Comment 49:** (Anonymous 2, BKaminski, CalChamber, Fluidra, HCPA, NAIMA, Quadratic, PHTA, SEMA, SWH) The proposal will increase liability for businesses and increase lawsuits by private enforcers. It will also increase payments to enforcement

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<sup>43</sup> See ISOR pages 45-46.



lawyers (Quadratec). A possible solution for less enforcement is to restrict private enforcement (SWH).

**Response:** This proposal does not affect when a warning is or is not required, does not change any enforcement-related provisions, and has no effect on the availability of attorneys' fees in enforcement actions. Rather than increase litigation, the existence of safe harbor warnings protects businesses from claims that their warnings are insufficiently "clear and reasonable."

OEHHA has considered the commenter's concerns, but Health and Safety Code section 25249.7, not this proposal, sets out the specific requirements for enforcement actions. Changing those requirements would require a statutory amendment. The comment is beyond the scope of the proposed amendments.

No additional modifications to the proposal were made based on this comment.

**Comment 50:** (AAFA, AHPA, CalChamber) AAFA states that that while OEHHA does not recommend using warning labels on products that do not require a warning, businesses that sell unlabeled products are open to litigation and potential financial penalty. Thus, they allege that over-warning is required. AHPA comments that manufactures may warn when they are unsure if a product may result in an exposure above the safe harbor level or when businesses want to avoid testing their products. CalChamber stated that businesses are basically required to provide a warning so they are not sued, even if they think that exposure levels for their products are not significant enough to require a warning.

**Response:** One of the goals of this rulemaking is to reduce the number of unnecessary warnings being provided without regard to whether a knowing and intentional exposure to a Proposition 65 listed chemical can or is likely to occur. Many of the comments received during this rulemaking, including those provided here, admit that businesses use the short-form warning precisely because it does not require a chemical name, so they can apply it indiscriminately to all or most of their products sold in California without investigating whether any actual listed chemical exposure might occur. This practice does not further the purposes of Proposition 65 and results in businesses incurring unnecessary costs for labeling all kinds of consumer products that likely do not need a warning. While OEHHA does not enforce Proposition 65, there also are many safeguards in the law that aim to prevent frivolous lawsuits including requiring plaintiffs to prove the merits of their action, and over 350 OEHHA established safe harbor levels for when the exposure "poses no significant risk" (No Significant Risk Levels for

carcinogens) or “will have no observable effect assuming exposure at 1000 times the level in question” (Maximum Allowable Does Levels for reproductive toxicants).<sup>44</sup>

No changes to the proposed amendments were made based on these comments.

**Comment 51:** (JSmith) Commenter requests that OEHHA keep the existing short-form warning and in a short comment says, “There are too many bounty hunters out there and small business have very little resources. Please do not burden small businesses.”

**Response:** Proposition 65 expressly exempts businesses with fewer than 10 employees from the requirements of the Act. And to the extent that a business has to expend funds to comply with the proposal, the increased implementation timeframe should allow businesses, smaller and larger, to spread these costs out over time as their business needs dictate.

No additional changes to the proposed amendments were made based on this comment.

**Comment 52:** (NAIMA) The commenters state that change creates uncertainty and creates potential liability for businesses attempting to comply with Proposition 65. The commenters state they are frustrated that the earlier regulatory process, which culminated in the current regulations, including the short-form warning, are being modified two years later. As a point of clarification, the current short-form warning amendments were proposed in 2023, five years after the prior regulations were fully effective, and as written will not become fully effective until 2028, or later, some 10 years after the 2018, effective date of the previous regulations.

Regulatory uncertainty makes businesses more vulnerable to Proposition 65 litigation. Data provided by the California’s Attorney General’s office shows that the number of lawsuits and settlements is trending upward. Many of these enforcement actions are situations where the business is caught in an error because of confusion over the regulations and requirements. These changes will provide more opportunities for enforcers to allege violations of the Act.

**Response:** OEHHA included two provisions in the proposed amendments intended to address the issues raised by the commenter. First, the proposed amended regulations include an unlimited sell-through period in subsection 25607(c). This means that all products that are manufactured and properly labeled when the regulation goes into effect do not have to comply with the updated warning content, including a chemical name for which the warning is being given. Therefore, current products produced and labeled during the transition period do not have to be re-labeled. Second, based on comments received during the 45-day comment period, the proposed amended

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<sup>44</sup> Sections 25705 and 25805.

regulation now provides a transition period of three years to allow businesses to transition to the new warning content. This is more time than was provided for the more substantial 2016 changes to the safe harbor warning regulations, and it should be more than enough time for businesses to transition to the new content.

OEHHA is not aware of any significant litigation concerning the content of the safe harbor warnings proposed in 2016 and adopted in 2018, and the commenter did not provide any examples of such cases. Most 60-day notices filed since 2018 allege that businesses failed to warn at all. Thus, OEHHA contends the proposed changes to the safe harbor warning content for the short-form warnings are unlikely to generate significant new litigation.

The proposed modifications are in line with the results from the UC Davis Extension Collaboration Center's 2015 study discussed in earlier responses to comments relating to the effectiveness of Proposition 65 warnings that showed that most survey respondents preferred warnings with at least one chemical name.

No additional modifications to the proposal were made based on these comments.

**Comment 53:** (HCPA) The revised short-form warning requiring only one chemical per endpoint “appears to lack safe harbor protection...leaving manufacturers vulnerable to legal action for non-specified chemicals.”

**Response:** Proposition 65 requires a warning for significant exposures to listed chemicals. The law does not further differentiate among listed chemicals. Subsection 25601(b) provides, “a warning meets the requirements of this subarticle if the name of *one or more* of the listed chemicals in the consumer product or affected area for which the warning is being provided is included in the text of the warning” (italics added). A business can include the names of all listed chemicals the consumer will be exposed to from use of the product, if it so chooses, but it is only required to list one chemical for each endpoint for the safe harbor protection to apply.

No changes to the proposed amendments were made based on this comment.

### **Requests or suggestions for further amendments**

**Comment 54:** (CBA/CalChamber Coalition) The commenters request clarification that Court-approved warnings are unaffected by the proposed amendments. In past rulemakings, OEHHA has explained that “[t]o the extent warnings are being provided pursuant to a consent judgment, the terms of that judgment supersede the [new] regulations. Final Statement of Reasons (09/01/2016).”

Additionally, the commenters note that subsection 25600(e) of the implementing regulations states “[a] person that is a party to a court-ordered settlement or final

judgment establishing a warning method or content is deemed to be providing a ‘clear and reasonable’ warning for that exposure for purposes of this article, if the warning complies with the order or judgment.” The commenters also request a clear statement from OEHHA affirming that this provision applies to the short-form warning amendments.

**Response:** Such a statement is unnecessary because pursuant to subsection 25600(e), court-approved warnings established in judgements or settlements are not affected by the proposed amendments. A short-form warning given pursuant to a court-ordered settlement or final judgment, is unchanged by this proposal.

No changes to the proposed amendments were made based on this comment.

**Comment 55:** (SWH) Commenter states that OEHHA should allow the warning to be placed in the product instructions and not be required on a website page for the item or on the packaging, as there is not sufficient space. Commenter states that it makes more sense to include the warning with the instructions, and the instructions have enough space for the longer warning.

**Response:** Proposition 65 requires businesses to provide a clear and reasonable warning before exposing consumers to listed chemicals. Providing a warning in the instructions to a package requires the consumer to purchase the product, open it, and read the instructions before they receive the Proposition 65 warning. This is inconsistent with the statutory requirements.

In the original 2016 rulemaking, OEHHA responded to similar comments requesting standalone warnings in an owner’s manual as follows:

While an owner’s manual may indeed “accompany a product” in a broad sense, it is unlikely a consumer will read the manual prior to most types of exposures that commonly occur via consumer products. For example, if a person is being exposed via touching a product, the exposure will begin as soon as the person opens the package or touches the product. Similarly, if an exposure occurs through inhalation of vapors from a product, the exposure would likely occur as soon as the person comes into contact with the product, well before he or she has time to review the accompanying material. Therefore, a more visible and immediate warning is needed for most types of exposures to chemicals from consumer products.<sup>45</sup>

Product use instructions similarly may not be read prior to exposure. Where the short-form warning does not fit directly on the product, other safe harbor warning methods are

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<sup>45</sup> See FSOR 2016 page 75.

provided in the regulations.<sup>46</sup> The safe harbor regulations do not prevent a manufacturer or seller from placing a warning on the instructions. However, that cannot be the sole warning method, if the business wishes to benefit from safe harbor protections. OEHHA disagrees that the short-form warning with the additional words will not fit on a webpage.

No changes to the proposed amendments were made based on this comment.

**Comment 56:** (JClemens) Commenter supports the proposed amendments to short-form warnings and states that “citations would help strengthen the effect of Proposition 65 warnings.”

**Response:** It is not clear where the commenter believes citations should be placed. The safe harbor warnings include a reference to the Proposition 65 warnings website at <https://www.p65warnings.ca.gov/>, which provides information concerning the chemicals that are the subject of warnings, including citations to relevant authorities, scientific information, and general information about Proposition 65. See for example: <https://www.p65warnings.ca.gov/fact-sheets/chromium-hexavalent-compounds-chromium-6-chromium-vi>. It is not practicable to include such information in the warnings.

No changes to the proposed amendments were made based on this comment.

**Comment 57:** (MBurns) Commenter states she is concerned by the lack of *de minimis* levels for Proposition 65 chemicals or any reference to intentionally-added chemicals. Other regulatory programs that are designed to promote ingredient transparency and disclosure provide these. OEHHA also does not address thresholds or product contamination. Commenter states this is why businesses are using the short-form warning, which should remain available. Commenter requests that if companies must use the full-length warning, then they should be allowed to explain where the contaminant came from.

Commenter notes the following specific concerns:

- The commenter wonders what a business should do when using raw materials if the full ingredient list is not disclosed by a third-party company. For example, under the OSHA Hazard Communications Standards, if a carcinogen is present at less than 0.1%, or 1% for other hazardous materials, the manufacturer does not need to include that chemical on the Safety Data Sheet. Since Proposition 65 doesn't allow for *de minimis* levels, purchasing companies could be liable for exposures below those *de minimis* levels without any knowledge the chemical was present.

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<sup>46</sup> See section 25602.

- Under this regulatory proposal, companies will assume worst-case scenarios and use the full form language of "may contain" to their advantage. "The final product may or may not contain that chemical, but since Proposition 65 makes no allowances on thresholds, intentionality, or source", the business will need to provide a chemical name to avoid enforcement.
- The proposal does not fit with Proposition 65's intention of providing transparency for consumers.
- Companies should be allowed to provide their own caveat language. The commenter provides for example, "This product may contain [insert full language on chemical examples for both carcinogens and reproductive toxin]." These ingredients are not present at levels above OSHA's minimum concentration reporting requirements," or, as an alternative ending, "These ingredients are not present at levels above OSHA's minimum concentration reporting requirements and/or are not intentionally added."
- Commenter asks what a business should do about water received from a public water supply that is contaminated with a chemical such as PFAS.

**Response:** While it is true that a *de minimis* standard for exposures to listed chemicals is not consistent with the requirements of Proposition 65, there are several existing regulations that can address the commenter's concerns without encouraging the use of the existing short-form warning as a litigation-avoidance strategy.

Proposition 65 requires businesses to provide a warning when they knowingly and intentionally expose individuals to significant amounts of chemicals listed as causing cancer or reproductive toxicity. OEHHA has adopted safe harbor levels for many chemicals on the Proposition 65 list that can help businesses determine when a warning is required for a given exposure.<sup>47</sup>

It should be noted that the short-form warning option will continue to be available for use by businesses with the amendments included in this proposal. Businesses are free to use the modified short-form warning, the full-length warning, or any other warning they deem to be "clear and reasonable." as defined in section 25601. To the extent a business wishes to take advantage of the safe harbor protection provided by the warnings OEHHA has adopted, adding additional information to the warning is limited to information on the route of exposure to the chemical and ways to reduce or avoid the exposure.<sup>48</sup>

OEHHA does not support the practice of providing a warning if there will be no significant exposure to the listed chemical. Proposition 65 is a right-to-know law that

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<sup>47</sup> See section 25705 for No Significant Risk Levels for Carcinogens, and section 25805 for No Observable Effects Levels for reproductive toxins. The regulations in Articles 7 and 8 provide guidance on how to calculate levels when no safe harbor has been adopted.

<sup>48</sup> Subsection 25601(e).



requires warnings for significant exposures to listed chemicals so consumers and others can make informed decisions about their exposure to chemicals that can cause cancer or reproductive toxicity. The proposed changes to the short-form warning fully support that goal.

The Proposition 65 regulations also provide an exception to the warning requirement for contaminants in drinking water that is received from a public drinking water source, a commercial drinking water supplier, or certain other sources of drinking water.<sup>49</sup>

To the extent that a given exposure is occupational in nature, following the OSHA Hazard Communications Standards can usually be substituted for a Proposition 65 warning.<sup>50</sup> For other exposures from consumer products, the business would need to determine whether the resulting product can cause an exposure to a listed chemical at a level that requires a warning. One way to determine this is through product testing and exposure assessment (although this is not mandated). A qualified laboratory or toxicologist familiar with Proposition 65 can assist in making this determination.

No changes to the proposed amendments were made based on this comment.

**Comment 58:** (AHRI) Commenter requests an exemption for heating, ventilation, air conditioning and refrigeration (HVACR) equipment, which is usually operated in confined spaces. AHRI states this situation is like the concept of internal components to which consumer will never be exposed. OEHHA previously acknowledged that for internal components to which the consumer will not be exposed, there is no need to include a Proposition 65 warning label.

**Response:** It appears that the commenter is concerned about warnings for products located in confined spaces that are not normally installed or serviced by consumers. In such cases, if the exposures at issue were exclusively to employees, then the commenter would likely need to comply with relevant federal and California Occupational Safety and Health hazard communication standards to avoid providing a separate Proposition 65 warning for occupational exposures to listed chemicals. These exposures are addressed by section 25606 of the regulations. Further, where an exposure cannot occur, for example from listed chemicals that remain exclusively within internal or inaccessible parts, no warning is required by Proposition 65.

No changes to the proposed amendments were made based on this comment.

**Comment 59:** (AHRI) Commenter requests an exemption for replacement parts for heating and air conditioning products. AHRI appreciates that components currently have an exemption under the amendments when sold as part of the fully-assembled product

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<sup>49</sup> Section 25502.

<sup>50</sup> Subsection 25606(a).

or equipment. However, an exemption for replacement component parts is necessary when these parts are sold and packaged separately. Manufacturers often do not have packaging specifically for components. If a label is required, manufacturers must develop specific packaging for these component parts.

In addition, the commenters request that this exemption be applied to commercial appliances and commercial appliance service parts. This is because service parts for commercial appliances are only available to those trained to handle them and the short-form warning is therefore not necessary.

**Response:** Where products or replacement parts are not normally used, handled, installed, or serviced by consumers, the commenter need only comply with relevant federal and California Occupational Safety and Health standards to avoid providing a separate Proposition 65 warning for occupational exposures to listed chemicals covered by those regulations. These exposures are addressed by section 25606 of the regulations.

Although regulations do not contain an explicit exemption to Proposition 65 for all component parts, where an exposure cannot occur because the listed chemicals remain exclusively within internal, inaccessible parts, no warning is required by Proposition 65. If consumers will have contact with the parts or products, and that causes a significant exposure to a listed chemical, the business will need to comply with the consumer product warning regulations to claim safe harbor protection. Note that on-product warnings are only one method for providing a warning. The business may provide a warning via shelf signs, for example. Further, the commenter can request that OEHHA develop a tailored warning for these products or parts to the extent the existing regulations don't adequately address their situation. Such requests are beyond the scope of the current proposed amendments.

No changes to the proposed amendments were made based on this comment.

**Comment 60:** (MONARCH) Commenter urges OEHHA to have more accessible forms of Proposition 65 warnings to be more inclusive to people with vision impairment and to people whose native language is not English. Consumers, especially those who are already at a higher risk of exposure to chemical harm should not have to seek out a warning, and OEHHA is in a position to provide more accessible clear and reasonable Proposition 65 warnings.

**Response:** The regulations in section 25602(d) currently require translations of warnings into other languages and the amendments in the underlined words, expand where translations are required. “Where a sign, labeling, or label, as defined in Section 256001.1, is used to provide a warning includes consumer information about a product

in a language other than English, the warning must also be provided in that language in addition to English.” OEHHA may look into other methods of providing a warning in future rulemakings, as appropriate.

No changes to the proposed amendments were made based on this comment.

### Other comments

**Comment 61:** (ACC Coalition) The commenter states that many products have a warning because of their composition, thus businesses need clear guidance about how to comply with the rules given that few Safe Use Determinations (SUD) have been issued, and they are also limited in scope.

**Response:** The comment is beyond the scope of the current rulemaking. The proposed amendments are separate from the regulations setting out the SUD process. To the extent the commenter wishes to request a SUD for a given chemical exposure, there is information available on the OEHHA website that describes the process.<sup>51</sup> Other existing regulations provide guidance on how to determine if a warning is required, such as safe harbor levels for certain chemicals.<sup>52</sup>

No changes to the proposed amendments were made based on this comment.

**Comment 62:** (CBA/CalChamber Coalition) Commenter suggest that OEHHA strengthen its regulations on SUDs.<sup>53</sup> Although OEHHA has encouraged the use of SUDs and has improved its internal procedures for consideration of SUDs to improve efficiency and timeliness, the SUD regulations need to be reformed in several respects. Commenter provides its suggestions in this regard.

**Response:** This comment addresses separate regulatory provisions outside the scope of this rulemaking. No response is required.

**Comment 63:** (MIC, ROHVA, SVIA) The commenters state that OEHHA’s proposed amendments “require manufacturers to generate considerable waste through reworking and disposing of numerous previously printed labels, packaging materials, catalogs, and other printed materials,” and so the short-form warning language should remain the same.

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<sup>51</sup> OEHHA, Proposition 65 Safe Use Determinations (SUDs) <<https://oehha.ca.gov/proposition-65/proposition-65-safe-use-determinations-suds>>

<sup>52</sup> See the list of safe harbor levels here: <https://oehha.ca.gov/proposition-65/general-info/current-proposition-65-no-significant-risk-levels-nsrls-maximum>.

<sup>53</sup> See 27 Cal. Code Regs. section 25204.

**Response:** The proposal should not require any business to throw away materials that it has printed with existing short-form warning language since those can still be used during the three-year implementation period. Further, there is an unlimited sell-through provision for any product that is manufactured and properly labeled prior to the three-year effective date. This is more time than was provided for businesses to transition to the new warning language when it was first adopted in 2018. Some commenters stated that catalogs are planned and printed far in advance. Thus, three years should provide sufficient time for businesses to make the transition. At the end of three years, there could be some waste, but as discussed, many provisions are also in place to minimize waste.

No changes to the proposed amendments were made based on these comments.

### **Sections 25607.50 – 25607.53 – Passenger and Off-Highway Motor Vehicle Parts and Recreational Marine Vessel Parts Exposure Warning**

#### **Scope of materials covered**

**Comment 64:** (Sriebel) Commenter states that the new sections related to Passenger or Off-Highway Motor Vehicle Parts as well as Recreational Marine Vessel Parts appears to duplicate the amendment's requirements for lubricant products. Commenter requests that lubricants be excluded from these sections, like other chemicals, tires, etc. The commenters request that if OEHHA rejects their request, the rule should provide some latitude for producers and brands to use their standard precautionary language if it is substantially like the new language in the proposed amendments.

**Response:** The ISOR for the proposed rulemaking, OEHHA explained the scope of materials that are *not* covered by the new safe harbor tailored warnings for vehicle and vessel parts:<sup>54</sup>

Packaged service chemicals, such as engine oil, brake fluid, coolant (antifreeze), and transmission fluid, are excluded from the definition as well. These chemical mixtures or fluids are unlikely to cause exposure to lead or phthalates, the example chemicals in the warning. Many such products already carry the names of other Proposition 65-listed chemicals such as ethylene glycol or methanol on the product label.<sup>55</sup>

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<sup>54</sup> See ISOR, page 35.

<sup>55</sup> See ISOR, page 35.

Lubricants include products such as oil and grease.<sup>56</sup> These products would not be considered “parts” for purposes of the proposed regulations but are rather part of the packaged service chemicals exclusion. Therefore, there is no conflict between the proposed new regulations and the changes to the short-form warning or other amendments included in this rulemaking. The commenters are free to choose other warning methods and content that address exposures to listed chemicals from their products. The proposed amendments supplement, but do not supplant, the existing, unamended provisions of the regulations. To the extent the commenter is already providing full-length warnings for its products when necessary, that practice need not change. However, to claim safe harbor protection, where the commenter is providing a short-form warning, it will need to modify that warning to include the name of at least one chemical for which the warning is being given, within three years after the adoption of the regulations.

No changes to the proposed amendments were made based on these comments.

**Comment 65:** (OPEI/OPPA) The commenters request that the tailored warning for vehicle parts be expanded to include outdoor power equipment (OPE). The commenters state that the industry shares a common supply chain with the motor vehicle industry, and must similarly provide warnings for thousands of disparate, and many times small, replacement and spare parts stocked and sold by a vast network of retailers and dealers. The OPE industry also manufactures products that are durable, have extended service periods, and are commonly serviced, repaired, and re-sold. For these reasons, OPEI/OPPA request that OEHHA revise the scope of the proposed safe harbor tailored warnings to include off-road equipment, small off-road engine parts, small off-road equipment, and small zero-emission off-road equipment.

**Response:** This comment is outside the scope of the current rulemaking. The commenters stated they represent manufacturers of non-road gasoline powered engines, personal transport and utility vehicles, golf carts, and consumer and commercial outdoor power equipment. OPE includes lawnmowers, garden tractors, trimmers, edgers, chain saws, snow throwers, tillers, leaf blowers and other related products. While parts for these products may share some similarities with the motor vehicle parts covered by the proposed tailored warnings, it is not clear that the proposed warnings and methods to deliver them would be appropriate as applied to the products described in the comment. For example, the products may cause exposures to different listed chemicals and the ways to avoid exposures may be different. OEHHA is willing to work with the industry to explore adding these products to an existing tailored warning

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<sup>56</sup> Bus. and Prof. Code section 13400(l): “Lubricant” means a lubricating oil or other substance that reduces friction and wear between moving parts within an engine and other motor vehicle components.

or to develop a tailored warning and warning methods specific to this class of products to propose in a future rulemaking, as appropriate.

No changes to the proposed amendments were made based on this comment.

**Comment 66:** (AEM) Off-road equipment manufacturers trade group requests that OEHHA include parts for off-road equipment, which includes large-scale fixed installations, large scale stationary industrial tools, alternative power applications, attachments, and implements, in proposed section 25607.50 and 25607.51, to give off-road Original Equipment Manufacturers the same safe harbor protection as manufacturers and retailers of passenger car and off-road vehicle parts.

According to the commenters, off-road equipment means any non-stationary device, powered by an internal combustion engine or motor, used primarily off the highways to propel, move, or draw persons or property, including any device propelled, moved, or drawn exclusively by human power, and used in, but not limited to, any of the following applications: Marine Vessels, Construction/Farm Equipment, Locomotives, Small Off-Road Engines, Off-Road Motorcycles, and Off-Highway Recreational Vehicles. Large-scale fixed installations cover a combination of several types of machines which include, but are not limited to, tower cranes, light towers, crushers, and screeners, combinations of several types of apparatus and, where applicable, other devices that are assembled, installed and de-installed by professionals with the intention to be used permanently in a pre-defined and dedicated location. They can include large-scale stationary industrial tools including cranes and blow-out preventers, alternative power applications intended to power off-road equipment, such as batteries, battery packs, and recharge equipment.<sup>57</sup>

**Response:** Adding regulatory provisions covering parts for the types of equipment described by the commenter is beyond the scope of the current proposal, which only covers consumer product exposures from passenger vehicles, certain off-road vehicles, and marine vessels that are considered consumer products. The listed chemicals involved in exposures from the above-described equipment are likely very different from those covered by the current proposal.

To the extent these exposures are not adequately addressed by existing safe harbor regulations, OEHHA may consider a separate rulemaking to adopt a tailored warning for this industry in the future.

No changes to the proposed amendments were made based on this comment.

### Other comments

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<sup>57</sup> See Title 13 Cal. Code of Regs., section 2431(29).



**Comment 67:** (SWH) Regarding subsection 25607.51(b), the commenter states he is assuming that since the examples of lead and phthalates are used in the tailored warning for motor vehicle parts, those chemical names can be used by all vehicle parts manufacturers and retailers in their warnings. Therefore, no product testing is required.

**Response:** Proposition 65 does not require businesses to test their products. The regulations provide safe harbor warning methods and content for businesses that have already determined they are causing an exposure to a listed chemical and need to provide a warning. As stated in the ISOR, the tailored warning for passenger or off-highway motor vehicle parts uses lead and phthalates as examples “because handling of some parts may cause significant exposures to these chemicals, and they are likely familiar chemicals to the general public.”<sup>58</sup> The tailored warning for passenger or off-highway motor vehicle parts specifically states, “[n]otwithstanding Section 25607(b), for a posted warning sign using the method in Section 25607.50(a)(3), the chemicals identified in subsection (a)(3) may not be added to, removed, or substituted.” When using the tailored warning content on a sign, the chemicals may not be changed. However, when using any other method for providing this tailored warning, the regulation allows but does not require a business to include or change the reference to lead and phthalates. Section 25607.51 provides, “[f]or all other methods of providing the warning described in subsection 25607.50(a)(1), the product manufacturer or importer may substitute a chemical name in the warning if the product will not expose a consumer to lead or phthalates at a level that requires a warning.”

No changes to the proposed amendments were made based on this comment.

**Comment 68:** (AEM) The commenter stated that the proposed tailored warning for vehicle parts “does help the [off-road equipment] industry simplify the task of warning their customers,” but the process of applying the proposal’s changes is complex. The commenter noted that the industry “has supply chains that run 20 layers deep” with ten thousand unique suppliers around the world, with a likely cost of hundreds of thousands of dollars per manufacturer.

**Response:** Companies are not required to use the new tailored warning content. As explained in the ISOR: “products that have warnings that are compliant with sections 25602 and 25603 need not be changed. This regulation simply allows additional tailored warning options for businesses.”<sup>59</sup> Vehicle parts manufactures are not obligated to incur costs associated with this tailored warning, which is voluntary. Additionally, for all portions of the proposed regulations, OEHHA only estimated costs for entities doing business in California, not the entirety of the global manufacturing process chain.

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<sup>58</sup> See ISOR, page 35.

<sup>59</sup> See ISOR page 34.

No changes to the proposed amendments were made based on this comment.

**Comment 69:** (MEMA) Vehicle aftermarket suppliers have long and complex supply chains and “often have tens of thousands of SKUs to review, re-design packaging, or re-label.”

**Response:** The tailored warning option can be used in more places than labels and packages. The ISOR explains in detail the methods that are allowed for the tailored warning in addition to a product label.<sup>60</sup> The methods allow for maximum flexibility and include signs at each retail point of sale or display (cash register or checkout stand), and shelf tags.

Companies are also not required to use the new tailored warning content. As explained in the ISOR: “products that have warnings that are compliant with sections 25602 and 25603 need not be changed. This regulation simply allows additional tailored warning options for businesses.”<sup>61</sup>

No changes to the proposed amendments were made based on this comment.

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<sup>60</sup> See ISOR pages 32-33.

<sup>61</sup> See ISOR page 34.

## Summary and Response to Comments on the June 2024 Proposed Modifications

After carefully reviewing the comments received during the initial comment period and public hearing, OEHHA modified the proposed amendments, as described below. The Notice of Proposed Rulemaking was published on OEHHA's website and sent to stakeholders and all members of the public who commented on the original proposal on June 13, 2024. This initiated a 15-day public comment period that closed on June 28, 2024.

The proposed regulatory amendments were revised as follows:

- In subsection 25602(a) remove the phrase “subsections (b) for internet purchases or (c) for catalog purchases or.”
- In subsection 25602(b) add the subsection title “Internet purchases,” and move (1) from below for better organization.
- Remove the following language that was added with the 45-day notice, “or Section 25607 et seq.” and “complies with subsections (1) and (2) below: (1) T” and add back in “also be” and remove “by” to revert to the original regulation text.
- In subsection 25602(b)(1)(C) delete “made” and insert “provided” for consistent word choice and add back the sentence “If the 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.” This is to revert to the original regulation text.
- Remove the language in subsection 25602(b)(2) “In addition, the warning must also be included: on or with the product when delivered to the consumer using one or more of the methods in Section 25602(a)(3) or Section 25602(a)(4); on labeling accompanying the product as defined in Section 25600.1(j); or as otherwise specified in Section 25607 et seq.” and replace with:

(2) For internet purchases made before [Office of Administrative Law to insert date that is three years after the effective date of the 2023 amendments], a retail seller is not responsible under Section 25600.2(e)(4) for conspicuously posting or displaying the new warning online until 60 calendar days after the retailer receives a warning or a written notice under Section 25600.2(b) and (c) which updates a short-form warning compliant with Section 25603(c) with content compliant with Section 25603(b).

The purpose of this is to include a new provision which would provide internet retailers a 60-day transition period, from the date they receive a warning or

written notice changing to the new warning content, to update their online short-form warnings during the three-year implementation period for the amendments.

- In subsection 25602(c), remove the following language that was added with the 45-day notice: “or Section 25607 et seq., and complies with subsections (1) and (2) below: (1) The warning” and add back “also” and “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.” This is to revert to the original regulation text.
- Subsection 25602(c)(2) was deleted to revert to the original regulation text.
- In subsection 25602(d) “that” was removed for grammatical reasons.
- In subsection 25603(c) “two” was replaced with “three” to increase the time for implementation of revised short-form warning content from two years to three years.

In this section of the FSOR comments received during the comment period and OEHHA’s responses are summarized. However, some comments during this comment period were not directed at the 15-day Notice of modification of the proposal or procedures followed in the regulatory process. OEHHA is not required under the APA to respond to such comments in the rulemaking and therefore is not providing responses to all comments made during the 15-day Notice of modification period that are not directed to the specific modifications proposed.<sup>62</sup> Lack of a response does not mean OEHHA agrees or disagrees with the comment.

Listed below are the organizations and individuals that submitted comments on the June 13, 2024, proposed modifications to the amendments.

- Adhesive and Sealant Council (ASC)
- Alliance for Automotive Innovation (Auto Innovators)
- American Apparel and Footwear Association (AAFA)
- American Heating and Refrigeration Association (AHRI)
- American Herbal Products Association (AHPA)
- Anonymous 3
- Anonymous 4
- BariatricPal
- Brecher, Alex (ABrecher)
- Association of Equipment Manufacturers (AEM)
- California Chamber of Commerce Coalition (CalChamber Coalition)
- California Retailers Association (CRA)

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<sup>62</sup> Gov. Code section 11346.9 (a)(3) states, “The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is “irrelevant” if it is not specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action” (italics added).

- Cole, Jason (JCole)
- Concerned Gas Station Owner (Owner)
- Cumberland Products, Devin Amos (Cumberland)
- Diamond Sports
- Fluidra
- Han, Jay (JHan)
- Hansen, Steve (SHansen)
- Household and Commercial Products Association (HCPA)
- MEMA, The Vehicle Suppliers Association (MEMA)
- National Marine Manufacturers Association (NMMA)
- Mother's Oversight Network for Actionable Response to Contaminant Harm, LLC (MONARCH)
- The Outdoor Power Equipment Institute and Outdoor Power Parts & Accessories Association (OPEI/OPPAA)
- Pool and Hot Tub Alliance (PHTA)
- Sankster, Ed (ESankster)
- Seymour of Sycamore (Seymour)
- Sidley Austin, LLP (Sidley)
- Thermo Fisher Scientific Inc. (TFS)
- Van De Pol, Tom (TVDPol)
- Quadratic
- Dianne, MSN (DWoelke)
- Wolff, Joe (JWolff)

Note that the American Coatings Association submitted a public comment over 30 days late. OEHHA has received and reviewed the late comment but under the APA is not required to summarize or respond to untimely comments.

### **Subsections 25602(b) and (c). Internet and catalog purchases**

**Comment 70:** (CRA, Sidley) CRA appreciates the reversion to the existing regulatory language for internet warnings. However, commenters state that the proposed modification that provides a 60-day period for retailers to modify their existing short-form warnings with new content provided by product manufacturers does not sufficiently address this concern. Commenters request that OEHHA clarify that retailers may continue to provide the current safe harbor short-form warning during the entire three-year transition period, even if their suppliers ask them to change to the new short-form warning content. Sidley further states that OEHHA's Economic Impact Analysis did not account for the phased adoption of the new warning content.

**Response:** As proposed, the regulation would provide as follows:

(2) For internet purchases made before [Office of Administrative Law to insert date that is three years after the effective date of the 2023 amendments], a retail seller is not responsible under Section 25600.2(e)(4) for conspicuously posting or displaying the new warning online until 60 calendar days after the retailer receives a warning or a written notice under Section 25600.2(b) and (c) which updates a short-form warning compliant with Section 25603(c) with content compliant with Section 25603(b).

In addition to extending the proposed transition period from two to three years, the above-quoted provision was added in the 15-day modifications to address a stated concern that retailers could not immediately update their online content when product manufacturers provide them with new short-form warning language and requested that the retailers post language that is consistent with the proposed amendments. The three-year transition period for the amendments to the regulations is intended to allow product manufacturers, and suppliers enough time to gradually update their short-form warnings so that they are all compliant within three years from the effective date of the amendments. And the 60-day grace period allows retailers time to update their online content.

It appears that commenters are requesting that retailers be allowed to wait until the end of the three-year period (36 months) to make any changes to their websites. They further state that in addition to waiting three years, they will need more than 60 days to changed begin using the warnings that product manufacturers have provided them over a three-year period, thus, commenters are seeking to extend the 36-month transition period for an additional, unknown period greater than 60-days. This approach would be inconsistent with the purpose of the transition period.

During the three-year phase in period, if a manufacturer changes from a short-form warning compliant with existing law to one complaint with the new short-form safe harbor in this proposal, and the retailer does not change the internet warning within 60 days after notice of the revised warning, the retailer will not have followed existing subsection 25600.2(e)(4) This means the retailer will not be protected from potential liability by the limitations on retailer liability granted by 25600.2(e)

Product manufacturers and retailers should work together to ensure that the retailers' websites are updated with the new warning content by the time the three years expires. This is consistent with the existing regulations covering manufacturer/retailer responsibilities for warning found in Subarticle 1, section 25600.2, that require retailer cooperation with product manufacturers to avoid liability for warning violations.

As was stated in the ISOR for this rulemaking,



“... As discussed above, proposed new subsection (c) would include the existing short-form warnings with a phase-out provision. This section would include *the date by which businesses must have transitioned* to the amended short-form warnings in order to claim the safe harbor: two years after the effective date of the amendments. This is an unlimited sell-through period for products manufactured before the date that is two years after the effective date of the amendments.”

“... [proposed Section 25603(c)] would provide a two-year period during which the current short-form warnings may be used. Comments received during the prior rulemaking stated that businesses would need more than the one-year proposed phase-in period to transition to the new warning language. Thus, new subsection (c) would provide a two-year phase in period to allow businesses time to make the necessary changes to their short-form safe harbor warnings if they choose this method of warning. During this two-year phase-in period, businesses would have the option of using either the current short-form warning or the new amended language in proposed subsection 25603(b).”<sup>63</sup>

No additional changes to the proposed amendments were made based on these comments.

**Comment 71:** (NMMA) supports the proposed safe harbor regulations for marine parts and accessories. These provisions effectively balance the protection of the health and safety of consumers with the need for workable requirements for marine manufacturers and small businesses. NMMA also supports the proposed language for internet purchases, including the newly-proposed language allowing for a transition period of 60 days to come into compliance for retailers who receive a warning or written notice for an out-of-date warning label.

**Response:** Comment of support acknowledged. OEHHA notes, however, that the 60-day grace period added to the regulatory amendments is intended to allow retailers time to update their websites with new text product suppliers provide to them to replace existing warning language. The provision does not relate to potential future enforcement action that may occur after the three-year transition period.

No changes to the proposed amendments were made based on this comment.

**Comment 72:** (MONARCH) Commenter opposes the deletion of the following language in the 15-Day modifications:

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<sup>63</sup> See ISOR page 22.

“...the warning must also be included: on or with the product when delivered to the consumer using one or more of the methods in Section 25602(a)(3) or Section 25602(a)(4); on labeling accompanying the product as defined in Section 25600.1(j); or as otherwise specified in Section 25607 et seq.”

Commenter states it is important for consumers to receive a warning prior to purchase and prior to exposure – such as on a product receipt.

**Response:** Although OEHHA removed the provision quoted above from subsections 25602(b) and (c), that language was merely a clarification of the existing language and did not change existing law. Existing language already requires two warnings for internet purchases– one prior to purchase and one “also” prior to exposure.” Further, OEHHA explained its intent regarding the internet and catalog warnings in the FSOR for the original regulation:

“The Act requires a warning prior to exposure to a listed chemical. OEHHA is sympathetic to concerns about the difficulty of receiving warnings post-purchase and recognizes that the circumstances of some transactions such as internet and catalog sales are particularly challenging to a consumer who has made a purchase online and has received the item. In this situation, a person may be faced with the difficulty of returning an item through the mail if they do not wish to keep it. For these reasons, OEHHA has established safe harbor warning methods for internet and catalog sales wherein a warning must be provided on the webpage or in the catalog as well as on the product.”<sup>64</sup>

OEHHA intends to revisit the issue of internet and electronic warnings in a future rulemaking and may address this requirement further at that time.

No changes to the proposed amendments were made based on this comment.

**Comment 73:** (Auto Innovators, BariatricPal) Auto Innovators requests that OEHHA clearly state in its FSOR whether products sold over the internet with electronic warnings would also require a label. Commenter does not support having both an electronic warning and a label requirement as labeling for products is burdensome and believes the electronic warning is sufficient. BariatricPal states that requiring both on-product and online warnings creates an unnecessary redundancy. For businesses that do not have physical points of sale and rely entirely on ecommerce, the digital warnings already serve the purpose of informing consumers before they make a purchase. Implementing on-product warnings would involve significant logistical challenges and costs without providing additional benefits to consumers.

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<sup>64</sup> See FSOR 2016 page 77.

**Response:** While OEHHA reverted to the existing regulatory language in this 15-day modification, the language in the 45-day amendments to this section was intended to clarify the existing language to specifically state that more than one warning is required for safe harbor protection for internet purchases. The existing language was intended to require two warnings – one prior to purchase and one prior to exposure. OEHHA intends to revisit this section of the warning regulations in a future rulemaking and may adjust this requirement further at that time.

No changes to the proposed amendments were made based on this comment.

**Comment 74:** (ESangster) Commenter states the newly-proposed language in subsection 25602(b)(2) is unintelligible and confusing. Commenter suggests providing a diagram to explain the meaning of the provision. Commenter states that the legal and regulated community will have substantial difficulty understanding and complying with the provision.

**Response:** The addition of subsection 25602(b)(2) provides a 60-day period during which an internet retailer can update the content of the existing short-form warnings online with new short-form warning content provided by the product manufacturer. This provision is intended to assist internet retailers with the transition to the new short-form warning content. The cross references in the provision are intended to clarify which version of the warning is being provided to the retailer, since there will be a period of three years in which both the older warnings and the new warnings are covered by the safe harbor. Given this explanation, OEHHA does not see a need for a diagram.

No changes to the proposed amendments were made based on this comment.

**Comment 75:** (CalChamber) Commenter states it appreciates certain aspects of the modified proposal, including the following:

- increased time allowed to transition to the new short-form warnings,
- reversion to the existing regulations for internet and catalog warnings,
- clarification of the retail seller's obligation to update short-form warning content.

**Response:** Comment of support acknowledged; no response required.

#### **Subsections 25602(b) and 25603(c). Extension of full implementation of short-form warning from two to three years**

**Comment 76:** (DWoelke) Commenter objects to the extension of the implementation period from two to three years because manufacturers are not purchasing and amassing packaging stock three years in advance. They instead wish to delay implementation. In the meantime, consumers will continue to be exposed to toxins and

carcinogens that are costing them their health, increasing healthcare costs and burden, and increasing expenses to taxpayers, particularly in the case of vulnerable populations and those living in social, environmental, and redlined communities.

**Response:** OEHHA agrees that unwarned exposures to listed chemicals prevent individuals from making informed decisions about those exposures. However, OEHHA has determined that providing a phase-in period for businesses to switch to the new warning content is reasonable and needed for a smooth transition. The amended regulations add to the content of existing short-form warnings. Therefore, the existing warnings will still be provided during the phase-in albeit in a manner that provides less useful information than the new warning content.

No changes to the proposed amendments were made based on this comment.

**Comment 77:** (AHPA, HCPA) Commenters state the extension of the implementation period to three years will help ensure that businesses can exhaust their inventory of any labeling materials already purchased by the effective date and that contain warnings compliant with the current short-form warning format. HCPA says three years is important for “slower-moving products for which companies have labels printed by external suppliers and need additional time to consumer existing label inventories.” AHPA states the extended implementation period will assist businesses, especially small businesses, in making the proposed changes to labeling at a time of challenging and complex supply chains and help to manage the overall financial impacts of the proposed changes.

**Response:** Comment of support acknowledged; no response required.

**Comment 78:** (OPEI/OPPAA) Commenters appreciate and support the proposed modifications included in the 15-day modifications because they appropriately respond to stakeholder comments, particularly the extension of the transition period to three years.

**Response:** Comment of support acknowledged; no response required.

**Comment 79:** (Auto Innovators) Commenter states it appreciated the opportunities that OEHHA provided to engage in developing a tailored warning for automotive replacement parts and continues to offer its support for the Passenger or Off-Highway Motor Vehicle Parts Exposure Warnings proposal. The approach put forward in this notice is workable and will not only accomplish OEHHA’s goals for consumer awareness but also address the realities of applying Proposition 65 requirements to hundreds of thousands of automotive replacement parts. Commenter states that the proposed regulations reflect the common ground that can be found when regulators and

representatives from the industrial sector work together to craft approaches that address environmental concerns and workability issues for the regulated community.

Auto Innovators also supports the three-year timeframe proposed for compliance with the new requirements found in the new subsection (b)(2) as this will allow adequate time to transition to the new warning content.

**Response:** Comment of support acknowledged; no response required.

**Comment 80.** (CalChamber). Among a number of comments, commenter stated its appreciation of the increased time allowed to transition to the new short-form warnings,

**Response:** Comment of support acknowledged; no response required.

**Comment 81:** (AHRI) The commenter requests a five-year implementation period.

**Response:** Five years is more than double the original implementation time and more than double the original safe harbor regulation timeframe which was far more extensive. Many commenters also indicated that three years was sufficient for implementation of the proposals. See also response to comment number 35.

No additional changes to the proposed amendments were made based on this comment.

### **Outside of the Scope of the modifications to the proposed amendments**

**Comment 82:** (ASC, AHPA, AHRI, ABrecher, CalChamber Coalition, Consumer Brands, Cumberland, Diamond Sports, Fluidra, SHansen, JHan, MEMA, PHTA, JWolff)

Commenters restate their objections to the original proposed amendments to the regulations, including but not limited to the following points:

- Remain opposed to the requirement to name at least one chemical in the short-form warning.
- OEHHA's rationale for the modified proposal is insufficient and does not address the root causes of over-warning.
- The proposed warnings are unconstitutional.
- The modified proposal does not address the significant costs and disruption to businesses of the original proposal.
- OEHHA can address its concerns about over-warning in other ways.
- OEHHA should develop analytical test methods for listed chemicals.
- Businesses need at least five years to transition to the new warning content.

- Small businesses cannot afford to test products. Small businesses will be unable to compete with large businesses.
- Request for clarification of the number of chemicals that must be named in the short-form warning.
- Request for clarification that the amended regulations do not apply to court-approved warnings.

**Response:** These comments are outside the scope of the 15-day modifications to the proposed amendments to the regulations. Responses to the same or similar comments can be found in the responses to comments on the original 45-day Notice of Proposed Rulemaking.

No changes to the proposed amendments were made based on this comment.

**Comment 83:** (HCPA, Seymour, TFS) Commenters reiterate their prior objections to the proposed amendments including, but not limited to:

- There is insufficient label space for longer warning,
- Information provided pursuant to the Federal Hazardous Substances Act, OSHA Hazard Communication Standards, and US EPA's right-to-know laws' warning requirements, and FDA labeling requirements, should be sufficient for purposes of Proposition 65.
- Pertinent information about specific chemicals is available on the SDS for a product.
- A change to the current Proposition 65 short-form warning regulation would result in over a million dollars of cost to Seymour.
- Addition of a Proposition 65-listed chemical to a label would not add to a consumer's understanding of risks associated with formulated products.
- The new requirements should not apply to formulated products (Seymour).
- The proposed amendments do not comply with the APA.
- Two years is not enough time to implement the new requirements.
- Supplier of chemical substances and mixtures into solely industrial and professional markets for laboratory research and applied applications in life science should not be subject to the proposed regulatory amendments. (TFS)

**Response:** Except for the request to extend the time for implementation beyond two years, these comments are outside the scope of the 15-day modifications to the proposed amendments to the regulations. Responses to the same or similar comments can be found in the responses to comments on the original 45-day Notice of Proposed Rulemaking. Further, OEHHA extended the transition period from two to three years in



the 15-day modifications to address concerns raised by commenters on the original proposal.

No changes to the proposed amendments were made based on these comments.

**Comment 84:** (DWoelke) Commenter stated that consumers will benefit tremendously from enhanced labeling. Allowing consumers to benefit from enhanced labeling is a form of education that will support consumers' right to make informed choices about the products they purchase and mitigate social injustice under current labeling practices. It will also drive manufacturers to make necessary changes to improve product safety, which will ultimately improve their bottom lines. Commenter also states that:

- Permalinks must be provided for warnings.
- not all consumers have access to the internet.
- Not all consumers are able to read English.
- Consider consumers who do not speak English.
- In Section 25603, commenter suggests deleting Subsection (a)(2)(D) because it is duplicative of (C), and suggests deleting (E) as it is unnecessary and only adds confusion.
- Section 25607.2, Subsection (6) is unnecessary and only adds confusion. Commenter suggests deleting the sentence in (c)(2), "Many factors affect your cancer risk, including the frequency and amount of the chemical consumed."

Regarding the new vehicle parts exposure warnings, the commenter objects to the limitation in Section 25607.50 that excludes packaged service chemicals, tires, parts containing asbestos, carpeting, upholstery including fillings and coverings, textiles, or fabrics from the new tailored warning.

**Response:** Comment of general support acknowledged. The specific comments are outside the scope of the 15-day modifications to the proposed amendments to the regulations. Responses to the same or similar comments can be found in the responses to comments on the original 45-day Notice of Proposed Rulemaking.

OEHHA notes, however, that in the ISOR for this proposed rulemaking it stated:

"Packaged service chemicals, such as engine oil, brake fluid, coolant (antifreeze), and transmission fluid, are excluded from the definition as well. These chemical mixtures or fluids are unlikely to cause exposure to lead or phthalates, the example chemicals in the warning. Many such products already carry the names of other Proposition 65-listed chemicals such as ethylene glycol or methanol on the product label. Directly associating the named listed chemicals with the Proposition 65 warning, pursuant to proposed amended sections 25602 and 25603 above, would better inform the consumer. Thus, product-specific

warnings rather than the general tailored warning are preferred for packaged service chemicals.”<sup>65</sup>

No changes to the proposed amendments were made based on this comment.

**Comment 85:** (ASC) Commenters state that OEHHA must conduct a California Environmental Quality Act (CEQA) process before adopting the proposed regulatory amendments. Commenter refers to comments submitted on an earlier regulatory proposal from 2021 that was not adopted.

**Response:** ASC provides no basis for its allegation that OEHHA must conduct an analysis of the impact of the regulatory amendments on the environment under CEQA. Proposition 65 is exclusively focused on warning people about human exposures to chemicals that can cause cancer or reproductive toxicity. Nothing in the law or the proposal impacts the environment in a manner covered by CEQA, and the commenter has not provided any authority for its assertion that CEQA applies to this rulemaking. ASC’s earlier comment on the withdrawn regulation was equally conclusory.

No changes to the proposed amendments were made based on this comment.

**Comment 86:** (AAFA) Commenter reiterates its prior comments on the proposed rulemaking, including:

- The modified proposal would expose manufacturers, distributors, and sellers to litigation based on the businesses’ choice of a chemical to name in the warning.
- The proposal lacks guidance on how to select a chemical to name in the warning.
- The modified proposal would create confusion among consumers.
- The existing short-form warning provides sufficient information to consumers.
- The modified proposal would mislead consumers and giving them a false sense of security.

**Response:** These comments are outside the scope of the 15-day modifications to the proposed amendments to the regulations. Responses to the same or similar comments can be found in the responses to comments on the original 45-day Notice of Proposed Rulemaking.

No changes to the proposed amendments were made based on this comment.

**Comment 87:** (AHRI) Commenter states its members appreciate the response by OEHHA to stakeholder comments during the 45-day portion of the rulemaking process

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<sup>65</sup> See ISOR page 35.

and its having made changes to the regulatory text in response to stakeholder comments.

Commenter reiterates general concerns about the amended regulations and adds the following specific issues:

- Request that OEHHA exempt from the warning requirements replacement component parts, and service parts for commercial appliances.
- Since it cannot trace where equipment will be installed, commenter must label all products with Proposition 65 warnings, regardless of the location in which the products or equipment is installed, which increases costs and burdens for smaller manufacturers.
- Proposal requires significant investments of time and resources.

**Response:** These comments are outside the scope of the 15-day modifications to the proposed amendments to the regulations. Responses to the same or similar comments can be found in the responses to comments on the original 45-day Notice of Proposed Rulemaking.

No changes to the proposed amendments were made based on this comment.

**Comment 88:** (MONARCH) The commenter objects to the option for an internet retailer to provide a hyperlink to the warning on the product display page.

**Response:** This comment is outside the scope of the 15-day modifications to the proposed amendments to the regulations and is also responded to in the response to 45-day comments.

No changes to the proposed amendments were made based on this comment.

**Comment 89:** (AEM, OPEI/OPPAA) The commenters renew their requests for OEHHA to expand the regulation for vehicle parts in proposed sections 25607.50 and 25607.51 to include non-road equipment sectors.

AEM requests inclusion of off-road equipment, including mobile off-road equipment, large-scale fixed installations, large-scale stationary industrial tools, alternative power applications, attachments, and implements, in sections 5601-25607.50 & 25607.51, providing off-road Original Equipment Manufacturers the same requirements as passenger cars and off-road vehicles.

**Response:** These comments are outside the scope of the 15-day modifications to the proposed amendments to the regulations. Responses to the same or similar comments can be found in the responses to comments on the original 45-day Notice of Proposed Rulemaking.

No changes to the proposed amendments were made based on this comment.

**Comment 90:** (NMMA) The commenters renew their request for guidance concerning how to provide compliant warnings in paper catalogs.

**Response:** These comments are outside the scope of the 15-day modifications to the proposed amendments to the regulations. Responses to the same or similar comments can be found in the responses to comments on the original 45-day Notice of Proposed Rulemaking.

No changes to the proposed amendments were made based on this comment.

**Comment 91:** (Anonymous 3, Anonymous 4, JCole, Owner, TVDPOI) The commenters request a 30-day transition period or 30-day right to cure for all Proposition 65 warning violations. Some commenters requested this right-to-cure apply to first-time violations (TVDPol), but most requested a blanket 30-day right-to-cure period.

**Response:** These comments are outside the scope of the modification to the proposed regulation.

No changes to the proposed amendments were made based on this comment.

### **Local Mandate Determination**

OEHHA has determined this regulatory action will not impose a mandate on local agencies or school districts and will not require reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. Local agencies and school districts are exempt from Proposition 65.

OEHHA has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from this regulatory action.

### **Alternatives Determination**

In accordance with Government Code section 11346.9(a)(7), OEHHA has considered available alternatives, including those suggested by public commenters,<sup>66</sup> to determine whether any alternative would be more effective in carrying out the purpose of the regulations. The alternatives suggested by commenters are addressed by each specific suggestion above.

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<sup>66</sup> Specific responses to proposed alternatives are provided in the above summary and response sections of this FSOR.

OEHHA also considered implementing a proposal to limit the label size on which a short-form warning could be used. This proposal was released on January 8, 2021. OEHHA received public comments that the proposal to limit the label size was impractical and burdensome for businesses. OEHHA did not include a label size limit in the current proposal because of the previous comments from stakeholders that indicated that the calculation of label size for the wide variety of consumer products would be too complicated to be feasible. The proposal was withdrawn on May 10, 2022, because it could not be completed in the required timeframe.

OEHHA further considered but rejected other modifications to the regulations suggested by stakeholders such as requiring the inclusion of the names of all listed chemicals to which a consumer could be exposed through use of the product. Such a requirement would be inconsistent with the current structure of the regulations and could result in unwieldy and confusing warnings.

Another option considered was to repeal the short-form warning provisions entirely. However, OEHHA determined that taking away the short-form warning option would be unduly burdensome to businesses, and unnecessary because the short-form warning can be amended to satisfy the minimum requirements for a “clear and reasonable” warning.

OEHHA has determined the alternatives are not reasonable in comparison to the proposed regulatory action and will not carry out the purposes of the Act. OEHHA has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose of the proposed regulation, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be both more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. OEHHA considered taking no action but finds that taking no action is inconsistent with the intent of the Act and its implementing regulations.

### **Alternatives that Would Lessen the Adverse Economic Impact on Small Business Determination**

There were no alternatives proposed that would lessen any adverse economic impact on small businesses as defined in Government Code section 11342.610 that were rejected by OEHHA.

OEHHA considered the potential impact of the proposed amendments on small businesses and initially determined that a two-year period for businesses to transition to the new short-form warnings, including an unlimited sell-through period for products manufactured and properly labeled up to two years after the effective date, would

adequately address the issues likely to impact small businesses. After considering public comments, OEHHA amended the proposal to increase the transition time for businesses to three years, but maintains that the initial economic analysis for the two-year transition time is reasonable.

OEHHA has determined that no reasonable alternative considered by OEHHA, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the proposed action, or would be as effective and less burdensome to small business, or would be more cost-effective and equally effective in implementing the statutory policy or other provision of law to small business. The current proposal furthers the purposes of Proposition 65 by providing non-mandatory guidance for businesses concerning how safe harbor warnings can be provided for exposures to listed chemicals and for exposures to chemicals like lead and phthalates from passenger and off-highway vehicle and recreational marine vessels. In addition, OEHHA has determined that the proposed regulatory action will not impose any mandatory requirements on small businesses because the regulations are non-mandatory guidance that businesses may but are not required to use to comply with Proposition 65's "clear and reasonable" warning requirement. It should be noted that Proposition 65 expressly exempts businesses with fewer than 10 employees from the requirements of the Act.<sup>67</sup>

### **Non-duplication Statement**

Proposition 65 is a California law that has no federal or state counterpart. OEHHA has determined that the regulation does not duplicate and will not conflict with federal law or regulations. OEHHA has further determined that the regulation does not serve the same purpose as a state or federal statute or another regulation.

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<sup>67</sup> Health and Saf. Code section 25249.11(b).



## **Appendix 1 - Signatory Organizations for Coalition Comments and Association Members**

### **ACC Coalition**

American Chemistry Council  
 Air-Conditioning, Heating, and Refrigeration Institute  
 Association of Home Appliance Manufacturers  
 Chemical Fabrics & Film Association  
 Color Pigments Manufacturers Association, Inc.  
 Communications Cable & Connectivity Association  
 Flexible Packaging Association  
 Frozen Potato Products Institute  
 Lighter Association, Inc.  
 Outdoor Power Equipment Institute, Inc.  
 Plastic Pipe and Fittings Association  
 Plastics Industry Association  
 Pool & Hot Tub Alliance  
 Printing United Alliance

### **CBA/CalChamber Coalition**

Consumer Brands Association  
 The California Chamber of Commerce  
 Adhesive and Sealant Council  
 Air-Conditioning, Heating, and Refrigeration Institute  
 Alliance for Chemical Distribution  
 American Apparel & Footwear Association  
 American Bakers Association  
 American Chemistry Council  
 American Cleaning Institute  
 American Coatings Association  
 American Herbal Products Association  
 American Lighting Association  
 American Sportfishing Association  
 American Supply Association  
 Art and Creative Materials Institute, Inc.  
 Asian Food Trade Association  
 Association of Home Appliance Manufacturers  
 Auto Care Association

California Automotive Wholesalers' Association  
 California Business Properties Association  
 California League of Food Producers  
 California Manufacturers and Technology Association  
 California Retailers Association  
 Can Manufacturers Institute  
 Carlsbad Chamber of Commerce  
 Chemical Industry Council of California  
 Chemical Fabrics & Film Association  
 Consumer Healthcare Products Association  
 Council for Responsible Nutrition  
 Dental Trade Alliance  
 Diving Equipment & Marketing Association  
 Flexible Packaging Association  
 The Food Industry Association  
 Fragrance Creators Association  
 Hands on Science Partnership  
 ISSA  
 Lighter Association, Inc.  
 Lodi District Chamber of Commerce  
 MEMA, The Vehicle Suppliers Association  
 National Association of Music Merchants  
 National Confectioners Association  
 National Shooting Sports Foundation  
 Oceanside Chamber of Commerce  
 Outdoor Power Equipment Institute, Inc.  
 Outdoor Power Parts & Accessories Association  
 Peanut and Tree Nut Processors Association  
 Personal Care Products Council  
 Plumbing Manufacturers International  
 Pool and Hot Tub Alliance  
 Power Tool Institute  
 Printing United Alliance

SNAC International  
 Specialty Equipment Market  
 Association  
 Sporting Arms and Manufacturers'  
 Institute  
 The Toy Association  
 The Vision Council  
 Torrance Area Chamber of Commerce  
 West Ventura County Business  
 Alliance  
 Western Growers Association  
 Writing Instrument Manufacturers  
 Association

### **CEH Coalition**

Center for Environmental Health  
 Alaska Community Action on Toxics  
 Asbestos Disease Awareness  
 Organization  
 Black Women for Wellness  
 Central California Asthma Collaborative  
 Clean Production Action  
 Clean Water Action  
 Consumer Attorneys of California  
 Elavo Mundi Solutions LLC  
 Environmental Law Foundation  
 Environmental Working Group  
 Ethical And Respectful Treatment of  
 Humans  
 Green Action for Health and  
 Environmental Justice  
 Green Dentistry  
 Mamavation  
 Pesticide Action Network  
 Seventh Generation  
 West Berkeley Alliance for Clean Air  
 and Safe Jobs  
 Women's Voices for the Earth

### **SEMA Association Members**

\* Commenters noted by an asterisk  
 submitted several identical comments.  
 OEHHA is treating this as an error and  
 counting the comment once.

302 Motorsports

Accelerate New World Business  
 Acme Chop Shop  
 Aero Auto Repair  
 Aftermarket Performance Group  
 AJE SUSPENSION  
 American Camper Shells and Van  
 Apollo Optics  
 Apollo Sprayers International, Inc.  
 ARP Inc  
 Association of California Car Clubs,  
 Inc.  
 AWE  
 Awezoom Motorsports  
 Scot Hallaway Bar  
 Bartec USA (3)\*  
 Battle Motors  
 Baumann Electronic Controls, LLC  
 Bill Mckee American Honda Motor Co  
 Bimmer Motor Workshop PhD  
 Motorsports  
 Bimmer PhD Motorsports  
 Bodyguard Bumpers  
 Bowler Performance Transmissions  
 Brown Auto Design, Inc  
 BT Western  
 C&C Car Worx Corp.  
 Carpenter Industries  
 Challenger Consulting  
 Chrismans Garage  
 Classic Industries  
 Classic Performance Products  
 Cognito Motorsports, Inc.  
 Combat Off Road  
 Cumberland Products, Inc  
 CWA Distribution  
 Daniel Carpenter Mustang  
 Reproductions, Inc.  
 DC Cougar Restoration parts  
 Dee Zee Inc.  
 Dennis Carpenter Bronco  
 Dennis Carpenter Cushman  
 Reproductions  
 Dennis Carpenter Ford  
 Dennis Carpenter Ford Restorations  
 Design Engineering Inc.  
 DG Manufacturing

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Divers Street Rods, Inc. (2)*	Southern Diesel Truck co
Harvey Belling	Specialty-Z
NPD LOGISTICS	Standard Motor Products
ORBA	Steve Hopper
OX Racing Supply	Stillwater Designs & Audio Inc.
Paul Spornitz	Summit
Paul Williams Specialties	Summit Racing Equipment
Performance Race Engineering	The Carlstar Group
Perma-Cool, Inc. (B Middleton)	The Caswell Agency
Perma-Cool, Inc. (T Wood)	Tilbury Ent
Po	Titan Motorsports
Powermaster Performance	Tow Smart Custom, LLC
ProCharger	Trick Flow Specialties
PRP	Trim Illusion
QA1 Precision Products, Inc.	Turbosmart
Rad Powersports & Auto Inc.	Turn 5, Inc.
RDMBUILDS	Vance
Real Truck Inc.	Viking Performance
RECARO NORTH AMERICA	Vintage Air
Red Line Oil	Voxx Products
Retro Manufacturing, LLC	Waldoch Crafts Inc.
Ringbrothers	Ward Service
Rolling Audio	YSR USA LLC
Schwartz Performance	Z1 Motorsports
Scosche Industries Inc.	Zompers
Silver Service	

## Appendix 2 - Examples of consumer inquiries concerning a short-form warning.

The following are quoted excerpts from inquiries received by OEHHA. This is not an inclusive list of all inquiries about short-form warnings and is not a scientifically based sample of those inquiries. The examples are included for illustrative purposes only in response to comments received on the proposal.

- “Why is this warning in my GE refrigerator. It's about 5 years old. Because I can't find anything relating to this warning on this site of yours about my refrigerator.” Bob, June 2024
- “I bought a zipper lunch keeper, and one of the tags mentions Harmful exposure to toxic chemicals. What do I do now? Will airing it out be sufficient?” Marie, June 2024
- “I brought a pen from Staples, and it had this warning on it, it's one of those jewel pens with the crystal on the top of it, could you please let me know if it's safe to keep.” Floria, June 2024
- “Is it safe to wear clothing (a tee shirt), that has a tag indicating it has been tested for harmful substances, followed by a warning indicating Reproductive Harm? ... Is there a potential risk to wear this tee shirt? if this is potentially harmful, why can it be sold in a clothing store?” JoAnn, June 2024
- “Why would a 30-pound dumbbell/free weight I just bought from Wal-Mart have this warning label? Is there a chemical in the rubber or metal that is known to have at least one of these detrimental effects?” Bobby, May 2024
- “Why is there a prop 65 warning on "Reliance 50 gal 40000 BTU Natural Gas Water Heater"?” Bill, April 2024
- “I just bought a cutting board made from acacia and coming from China... it has the warning on the label and I wondered what causes that label on a cutting board?” Julia, March 2024
- “I just bought a Pur Steam 1700 iron, at the bottom of the box there is a warning that reads " WARNING: Cancer and Reproductive Harm" It does not go into details, I would like to know and get information.” Dina, March 2024
- “I'm trying to find out why an appliance, the GE dishwasher model #GDT650SYVFS includes a Prop 65 Warning, specifically what material/chemical is used in the appliance that warrants the Prop 65 Warning.

GE says it doesn't know the answer. How do I find out this information? Thank you!" Jeanne, March 2024

- "I was looking into buying a bottle of D'Arbo raspberry syrup made in Austria and was surprised to find it was listed as containing possibly cancer-causing elements. Could you please tell me exactly what it is that is potentially harmful in this innocent sounding syrup?" Michaela, February 2024
- "I'd like to ask about a warning label on a KitchenAid food mixer. Label says California Residents only-warning Cancer and reproductive harm. Could you give me more information about this?" Ilse, February 2024
- "I only just noticed a product I bought a while ago came with a cancer and reproductive harm warning on the box. I was wondering what chemicals/ingredients of concern would be in this product if possible please." Paul, February 2024
- "...how do I find out what part of this product [appliance] they are referring to and if it's causing us exposure every time we're using it?" Meredith, January 2024
- "Is there any way to look up the product and determine why/ for what reason it has a Prop 65 label?" CK, January 2024
- "I purchased a new child's toy and found a warning for cancer and reproductive harm on the bottom of the box. Just wondering if this is a concern and if children's toys should even have a need for dangerous chemicals". Steven, December 2023
- "When I opened [the vinyl mattress] up, the overwhelming smell of chemicals gave me an instant headache. I looked on Amazon and they did not list the chemicals it was made with. I also contacted the Manufacturing company ... for a list of the chemicals in it to no avail of them responding to me. I put it outside to air out, but it still has a bad chemical smell. Since it had your sticker on it, you must know the chemicals it is made with. Can you please send me the list of chemicals in it so I make a determination as to keep it or send it back?" Cindy, December 2023
- There is no indication in the warning of the level of the threat or what the problem chemical is. I would really like to know the answers to these questions so that I can make better choices in the future. Susan, December 2023