



January 3, 2024
Ms. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
Sacramento, CA 95812-4010

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

Dear Ms. Vela:

The American Chemistry Council (ACC)¹ and the below listed organizations (hereinafter, “Coalition”) appreciate the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment’s (“OEHHA”) Notice of Proposed Rulemaking: Amendments to Article 6, Clear and Reasonable Warnings Short-form Warnings dated October 27, 2023 (“Proposed Rulemaking”). ACC is also a signatory to the coalition comments filed by the California Chamber of Commerce and the Consumer Brands Association and incorporates those comments in full by reference here.

Our additional comments follow.

1. The Proposed Rulemaking is a Change that is Highly Disruptive to Businesses.

OEHHA’s proposed changes are not mere clarifications to non-binding “guidance.” OEHHA is proposing changes that would require all businesses currently using the short form warning to change that form everywhere it is used. This could potentially be hundreds of thousands of discrete “displays” of the warning on products and packaging, including online content. Analysis of regulatory impacts should take these compounded costs and burdens on business into account.

The potential burden of making the short-form label changes themselves is substantial. For example:

- For on-demand labels, a manufacturer would need to reprogram labeling templates to accommodate the new requirement.

¹ The American Chemistry Council (ACC) represents the leading companies engaged in the multibillion-dollar business of chemistry. ACC members apply the science of chemistry to make innovative products, technologies and services that make people’s lives better, healthier and safer. ACC is committed to improved environmental, health, safety and security performance through Responsible Care®; common sense advocacy addressing major public policy issues; and health and environmental research and product testing. ACC members and chemistry companies are among the largest investors in research and development, and are advancing products, processes and technologies to address climate change, enhance air and water quality, and progress toward a more sustainable, circular economy.

- For pre-printed labels, all labels would need to be revised. If chemical names are also added, this adds another layer of complexity to the process of managing labels, because it is not just a function of adding a chemical name. A manufacturer will also then need to monitor for changes to those names (both due to formulation changes, as well as to chemicals added to the Proposition 65 list).

Clarity and consistency with respect to the warning regulation is important. Many chemistries on the Proposition 65 list are essential or inherent to products and cannot simply be formulated out of them, meaning that the only de facto compliance option is to issue a warning. To be able to issue a compliant warning, the rules must be clear upfront. This is basic due process: a person or business who will be affected by a government decision, or enforcement action, must be given advance notice of what the government plans to do – in other words, what the government requires and how to comply with that requirement. In the case of Proposition 65, there is no other readily available option to businesses to achieve compliance certainty; to date, few Safe Use Determinations have been issued, and when they have, they are limited in scope. OEHHA has acknowledged the need for warning requirements to provide certainty for businesses who must comply with Proposition 65.

2. OEHHA Does Not Justify the Proposed Change with Respect to the Content of the Short-Form Warning.

In its regulatory proposal, OEHHA concludes that the addition of a specific chemical exposure for which a warning is given will deliver meaningful improvements to the information conveyed. It appears, however, that the agency is making mere assumptions without any underlying fact-based review or analysis. The agency has undertaken no analysis to evaluate whether consumers will pay more attention to the newly proposed short-form warning; better understand the information; gain actionable information in a manner that will support better decision making; and actually act on that information.

In our view, including the name of a specific chemical in a hazard-based warning does not by itself provide meaningful or actionable information to consumers where the risk presented from the chemical is in fact insignificant. Providing the name of a specific chemical may be misleading and counterproductive, as it could imply that there is a significant risk presented from the chemical where no such risk is in fact presented. A given product could present actual significant risks from composition, assembly, or use that are then disregarded or not recognized by a consumer. Given that specific chemicals have been included in long-form warnings for several years now, OEHHA should survey against the long-form warning language 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 actually more effective in gaining attention, comprehension, or driving consumers to request more information about specific products. This work should be conducted in accordance with accepted principles and best practices in the fields of consumer risk perception and decision making prior to finalizing the proposed changes to the short form warning.



3. Additional Labeling Requirements Can be Restrictive on Small Packaging.

The proposal to add a requirement to identify a specific chemical exposure on the short form label would be prohibitive to companies that market their products in small packaging. The current font size regulations limit companies in the amount of information they can display on outer packaging. Adding an additional statement to these labels while also complying with font size regulations may not be possible.

In addition, the proposed changes to remove the safe harbor for font size in Section 25602(a)(4) are vague and may be difficult to quantify. Industry has previously relied on the ability to align with the size of “other consumer information” on the label. The reference to “...likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use” may be difficult to quantify. OEHHA should continue to allow industry to align with the size of “other consumer information.”

4. If OEHHA Proceeds with Changes to the Short-Form Warning, the Sell-Through Date Should Also Apply to Pre-printed Label Stock.

Many manufacturers purchase an advanced supply of pre-labeling. It is very costly, and environmentally wasteful, to dispose of them every time a regulation changes. If OEHHA ultimately proceeds with changes to the short-form warning, manufacturers should be allowed a period to be able to use, rather than discard, existing labeling. This is of particular importance to labeling that has been pre-applied to packaging and would therefore lead to additional waste following a change to the regulation. The sell-through period should apply to not only products manufactured and labeled before the effective date, but also to labeling printed before the effective date.

5. If OEHHA Proceeds with Changes to the Short-Form Warning, the Compliance Timeframe Should Be Extended from Two to Three Years.

The proposed revisions to section 25603(c) allow for the use of existing short-form warnings with a two-year phase-out provision. This section would include the date by which businesses must transition to the amended short-form warnings in order to claim the safe harbor. OEHHA should consider the many factors that go into modifying a product label to comply with the proposed regulations. If OEHHA ultimately proceeds with the changes to short form labels, the compliance timeframe should be extended to three years to allow companies enough time to redesign and manufacture labels to the new standard. This change may be particularly burdensome on small businesses and may take a significant amount of time due to many factors, including the labor shortages that some companies are experiencing. Oftentimes changing a label is not a simple action and can be complex for companies with diverse portfolios of products and vary widely depending on their position in a complex supply chain. Consideration must also be given to companies making changes to varying package sizes and designs, artwork, and often hundreds of templates. These changes also often require complex updates to labeling software. Allowing a longer period between the regulation going into effect and it being enforceable would be beneficial.



6. If OEHHA Proceeds with Changes to the Short Form Warning, Consideration Should be Given to the Current Language Concerning Internet Sales.

Some online sellers proactively add Proposition 65 warnings regardless of the product's Proposition 65 status. 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.

The Coalition requests that the Proposed Rulemaking amending the short form warning requirements under Article 6 be withdrawn or modified. If you need additional information about these comments, please feel free to contact me at joseph_daniels@americanchemistry.com or Tim Shestek, Senior Director, State Affairs, at tim_shestek@americanchemistry.com.

Sincerely,



Joseph Daniels
Director, Chemical Management
American Chemistry Council

cc. Tim Shestek, Senior Director, State Affairs

On behalf of ACC and the following organizations:

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

