



April 26, 2016

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, California 95812-4010

Electronic filing via: P65Public.Comments@oehha.ca.gov

Re: Comments of the American Chemistry Council on OEHHA's Modification to Text of Proposed Regulation - Proposition 65 Clear and Reasonable Warnings

Dear Ms. Vela:

These comments¹ are offered on behalf of the American Chemistry Council ("ACC"), which represents the leading companies engaged in the business of chemistry.² We appreciate the opportunity to participate as a stakeholder in this, earlier, and related rulemakings, including the development of the Proposition 65 website regulation. In previous related rulemakings, ACC has submitted several sets of comments, including joining other coalition-filed comments. Our earlier comments, and those to which we have been a signatory, are incorporated by reference here for purposes of the administrative record.³ ACC also joins the separate coalition comments

¹ OEHHA extended the comment period to April 26, 2016. See extension of Public Comment Period, Proposed Repeal of Article 6 and Adoption of New Article 6, Proposition 65 Clear and Reasonable Warnings.

² ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an \$801 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for fourteen percent of all U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

³ See, e.g., June 13, 2014, Comments of the American Chemistry Council on OEHHA's Pre-regulatory Proposition 65 Warning Regulation Proposal, <http://oehha.ca.gov/prop65/warnings/pdf/commentsJune2014/AmericanChemistryCouncil.pdf>; April 8, 2015, Comments of the American Chemistry Council on OEHHA's Proposed Clear and Reasonable Warning Regulation and Website Regulation, http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/ACCcomsLAweb.pdf; June 12, 2014 Comments of the California Chamber of Commerce and Coalition on Prop 65 Warning Regulation, <http://oehha.ca.gov/prop65/warnings/pdf/commentsJune2014/CalChamber.pdf>; April 8, 2015, Comments of the California Chamber of Commerce and Coalition on Prop 65 Warning Regulation, http://www1.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/CalChamberCoalition.pdf; April 8, 2015, Coalition Comments on OEHHA's Proposed Clear and Reasonable Warning Regulation and Website Regulation, http://www1oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/CoalitionPropACCforothers.pdf; [January 25, 2016, Comments of the American Chemistry Council on OEHHA's Clear and Reasonable Warning Regulations Proposed Repeal of Article 6 and Adoption of New Article 6](http://www1oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/CoalitionPropACCforothers.pdf), http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/AmerChemCouncilcomments012516.pdf and attachment to comments, [Evolving Strategies. An Assessment of "Proposition 65 Clear and Reasonable Warning Regulations Study."](http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/Prop65-ResearchCritique022016.pdf) http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/Prop65-ResearchCritique022016.pdf



submitted by the California Chamber of Commerce.⁴ Our comments here seek to avoid substantive duplication of content offered in the Coalition comments.

We recognize that significant effort has gone into this and preceding rulemakings with the stated goal of making Proposition 65 warnings more “effective.” We believe the rulemaking record now makes it clear that OEHHA cannot achieve that result. Proposition 65 was simply not legislatively designed to support an effective warning system for consumer products⁵, and the legislative defect cannot be remedied with the good intentions of the executive branch and regulatory action. To put it plainly, Proposition 65 ignores or rejects an entire field of warning science and risk communication. This includes an understanding of not just when to offer a warning, but how to design an effective warning. Perhaps this legislative shortcoming reflects the advancements in the field of product warnings and risk communication in the thirty years since Proposition 65 was passed. But experts in the field are clear that the need for a warning in the first place, and the design of the contents of the warning, are a function of the severity of the hazard and the likelihood that the hazard will materialize.⁶ The statute only speaks to the first. Proposition 65 demands warnings without regard to the likelihood that use of the product will result in cancer or reproductive toxicity. The ability to invoke a risk-based affirmative defense under Cal. Health & Safety Code Section 25249.10 in an enforcement action does not change the initial compliance obligation.⁷

It is not our intention to engage in a policy discussion through the regulatory comment process. We believe, however, that Proposition 65 does not offer the statutory foundation needed to support an effective warning system for consumer products. It is completely misaligned with the science of warnings and risk communication. The foundation cannot be improved or fixed by regulation; statutory changes would be needed.

The current regulatory proposal continues to suffer from serious practical and legal problems. In our comments dated January 25, 2016, we highlighted several items of particular concern and urged OEHHA to address them: (1) the proposed requirement to include specific chemical names in safe harbor warnings; (2) the proposed limitations on a manufacturer’s right to include

⁴ ACC incorporates the Chamber’s Coalition comments fully herein, except to the extent that if any comments may be deemed inconsistent or contradictory, ACC’s comments herein shall control.

⁵ A “warning” scheme to advise of the mere presence of a chemical in a consumer product, regardless of exposure, lacks the scientific foundation for a health or safety program.

⁶ *Warnings and Risk Communication*, Michael S. Wogalter et al., editors, (1999) at 10. The explanation of the purpose of a warning offered by this treatise also makes clear that a warning cannot claim to be effective merely because it conveys information; it must convey enough information so that consumers can understand what the risk is and make an informed choice about whether to take the risk. Proposition 65 warnings, which do not communicate risk information, thus fail to offer enough information to substantively make an effective warning in those cases where a warning might be warranted. “The purpose of warnings can be addressed at several levels. Most generally, warnings are intended to improve safety, i.e., to eliminate or reduce incidents that result in injury, illness or property damage (e.g., warnings not to use a medication in circumstances where alcohol has been consumed). At a different level, warnings are intended to influence people’s behavior in ways that will improve safety (e.g., warnings to wear protective equipment when playing contact sports or handling a toxic chemical). At still a third level, warnings are intended to provide information that enables people to understand hazards, consequences and appropriate/inappropriate behavior which, in turn, enables them to make *informed* decisions (e.g., warnings on cigarette packages). The emphasis in the third point is on informed decisions or informed choice. People may opt not to follow the instructions provided by the warning, but rather “take the risk.” However, if the warning is effective, the decision will be made on the basis of adequate information.” *Id.* at 8.

⁷ The proposed regulation then compounds the problem by functionally refusing to allow businesses to communicate information regarding the likelihood that the hazard will materialize – a problem the proposed regulation seeks to cement, not remove.



information, outside the actual safe harbor warning, that adds properly substantiated, truthful, and accurate information, including contextual product use, benefit and risk information that helps consumers make informed choices; and (3) the proposed requirement to include an inappropriate “danger/warning/caution” style pictogram in a safe harbor warning. Those issues remain, and OEHHA’s chemical specificity requirement has now been made worse, as we discuss below.

In the meantime, and in advance of the finalization of the proposed warning regulation revision, OEHHA promulgated its companion website regulation and went live with a new Proposition 65 website on April 1, 2016. While the website and warning regulations have been separated, in many respects the two are sufficiently interconnected that it becomes difficult, if not impossible, to consider them as separate regulatory activities. The URL to the website is required under this warning regulation to be included as part of safe harbor product warnings. OEHHA intends to drive the targeted audience for warnings under the warning regulation to the website for “more” information about the warnings themselves. In our view, now that the website is live and the regulated community is able to see and respond to its operation and function, it is clear that the information the agency posts on the website is an extension of and functionally equivalent to the warning itself. Significantly, we see that the website lacks information on product safety, uses and benefits, and risk that would be required to offer meaningful and balanced consumer information.

Our January 25, 2016 comments also submitted a review evaluating the study that OEHHA conducted of purported consumer reactions to the “new” safe harbor warning. OEHHA does not appear to have read or considered this review. As we noted,

[T]he study did not ask, and thus cannot answer, what information the study participants understood was being communicated to them (e.g., what were they being warned of). It essentially limited itself to asking a generic question of which warning was more “helpful” without probing the content of what was being communicated in the first place. It failed to ask questions about what the subjects would do with the information and how they would act on it (e.g., would they use the product or consume the food). And it failed to test the warning language in actual uses – on products, foods, and facility entrances – severely if not entirely limiting the utility of study findings.⁸

OEHHA has no factual or legal basis to support a conclusion that the proposed safe harbor language is “effective” at all, or “more” effective than something else.⁹

For these reasons, the reasons set out in the Chamber’s Coalition comments, and the reasons set out below more specifically, we urge OEHHA to make significant additional modifications to the proposal (with an additional attendant opportunity for public comment) or to withdraw it in full.

⁸ January 25, 2016, Comments of the American Chemistry Council on OEHHA’s Clear and Reasonable Warning Regulations Proposed Repeal of Article 6 and Adoption of New Article 6, at 6, http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/AmerChemCouncilcomments012516.pdf

⁹ For OEHHA to establish that the new proposed safe harbor warning is “more effective” it would have needed to evaluate and establish the effectiveness of current safe harbor warnings as a baseline. It did not do this.



I. Proposed Section 25601(c) – The Chemical Specification Requirement - Should be Withdrawn.¹⁰

A. Proposed Section 25601(c) Creates an Illegal Burden Shift Outside OEHHA’s Statutory Authority.

Proposed Section 25601(c) retains the proposed chemical specification requirement for safe harbor warnings to name “one or more of the listed chemicals.” The provision goes on to explain which listed chemicals may be selected for the warning; it is only those for which the business “has determined a warning is required.”¹¹ But the plain language of Proposition 65 does not require businesses to make such a determination. It does not require businesses to determine that a particular chemical is present in a product. It does not require businesses to determine how much exposure to the chemical may or will occur. It only requires businesses to communicate a warning in advance of exposure. Such a determination would only need to be made under the statute if a business wished to invoke the statutory warning exception provided by Cal. Health & Safety Code Section 25249.10, which is asserted as an affirmative defense in enforcement actions. Then and only then does the business have the burden, as part of its affirmative defense showing, to demonstrate the amount of exposure and that the exposure is below the statutorily prescribed significant risk/no observable effect level. OEHHA cannot create and impose an entirely new obligation on business outside the scope of the statute.

B. Proposed Section 25601(c) Creates New Implications About the Importance and Meaning of Designated Chemicals that is Arbitrary and Divorced from the Statutory Requirement that Warnings be Reasonable.

Many products and even foods contain multiple Proposition 65 listed chemicals. As has been pointed out in this and preceding rulemakings, some may contain dozens or even hundreds; automobiles and electronic equipment are excellent examples. It is easy to see that a product category such as televisions – with dozens of manufacturers – could showcase dozens of different warnings, each highlighting a different chemical. A requirement to add a single chemical to these warning in such cases does nothing to improve the quality or meaning of the information conveyed to consumers.

Listing one chemical implies that it is somehow particularly important or significant information, when this may not be the case. Listing one chemical likewise implies that it is more harmful than other chemical components in the product, when this also may be untrue. Listing one chemical may be misinterpreted in connection with the rest of the warning label, such that users of a product are misled into thinking that any use of the product is unsafe and any use will cause cancer or reproductive toxicity. The relevance and importance of information omitted from the warning may be far more important.

¹⁰ Conforming changes would also need to be made to Proposed Sections 25603, 25605, 25607.2, 25607.13, and 25607.23 to remove any chemical specification requirements.

¹¹ The Chamber’s Coalition comments suggest that the phrase, “for which a warning has been provided” be substituted. We nonetheless believe, as this rulemaking has progressed and stakeholders have weighed in, that Proposed Section 25601(c) should be withdrawn in its entirety.



C. The Newly Proposed Requirement that Warnings include a Chemical for Each Endpoint Makes the Warnings Less Effective.

New language in Proposed Section 25601(c) effectively turns the “single chemical” specification requirement of the last regulatory proposal into a “dual chemical” proposal. Notionally, if a product contains chemicals known to the state to cause cancer, and different chemicals known to the state to cause reproductive toxicity, the warning should now include at least two chemical names, one for each endpoint. We strongly believe that this and the previous proposals to include specific chemical names in warnings will make warnings less meaningful and effective, not more. This provision adds ambiguity regarding a compliance obligation that will likely increase unwarranted litigation. As the Chamber’s comments note, the current safe harbor language at least has the virtue of being consistent and predictable; as long as the precise language set out by the agency via regulation is used, there is little question of compliance and little upon which to base a frivolous suit.

The proposal to add chemical names makes unfounded assumptions that this will improve the effectiveness¹² of the warning. We have already noted that Proposition 65 “warnings” are inherently defective/ineffective because they consider only the severity of the hazard and fail to consider the likelihood that the hazard will materialize. That said, the science of warning and risk communication is well developed, and whether a warning is effective has discrete meaning. A warning is not made more effective merely by adding a single piece of information, nor is it made more effective merely by attracting more attention. Determining a warning’s effectiveness is predicated upon an entire series of intermediate processing stages as the recipient receives the warning, pays attention, comprehends it, remembers it, and is not stopped by existing attitudes and beliefs, and the degree to which recipients comply with the warning/change their behavior.¹³ Each of these stages has sub elements, and there are various research and measurement methodologies and tools available to assess effectiveness at that stage.

Notably, warning failure (a failed warning is an ineffective warning) can occur at any stage. This means that an attempt to gauge effectiveness by considering only that stage – such as whether a warning got initial attention – is inadequate.¹⁴ We have already pointed out many design deficiencies in OEHHA’s focus group study commissioned by UC Davis in our January 25, 2016 comments and attachment. OEHHA’s study did not gauge the effectiveness of its proposed safe harbor warning by measuring effectiveness across processing stages. It also did not measure the effectiveness of warnings including specific chemical names, whether one, two, or more. Among other things it never asked what the chemical names “meant” to people and

¹² We also note that the statutory obligation is for a warning to be “clear and reasonable.” The statute itself does not speak to effectiveness. However, the field of warning science dictates that warnings must be more than just “clear” in order to be effective. If warning is substantively incomplete and confusing, or delivered where no warning is justified in the first place, it will continue to be ineffective – and not reasonable - regardless of how much more “clear” it is made or how much more attention is drawn to it. In our view, OEHHA has focused almost entirely on whether warnings are “clear” rather than whether they are reasonable, and has failed to consider that efforts to make a warning more noticeable could make it less reasonable a number of ways, including adding to the consumer perception that the warning is not credible and should be ignored.

¹³ Of course, this is yet another illustration of the deficiency of Proposition 65 “warnings.” A well-constructed warning would consider behavioral intentions and behavioral compliance.

¹⁴ Or, as a warning expert might say, “The attitudinal, comprehension, and memory benefits afforded by lower level manipulations do not determine, in themselves, whether the entire warning will have an effect on behavior.” *Warnings and Risk Communication, supra*, at 45.



what safety precautions people they should take in response to the warning (including the pictogram). Arguably OEHHA cannot gauge whether safe harbor warnings under the new proposal are effective or not when instead of using uniform, “black letter” safe harbor language (which can be tested) elements of the warning (chemical selection and naming) are left to the businesses to decide. This is a separate reason why the agency has no factual or legal basis for claiming that its proposed new warnings are as effective – or more effective – than before.

II. Specific Chemical References in Facility Warnings Should be Removed.

We continue to object to the inclusion of specific chemical references in facility warnings, such as the reference to carbon monoxide, phthalates and lead in the Proposed Vehicle Exposure Warnings at Section 25607.17 and Recreational Vessel Exposure Warnings at Section 25607.19. For that matter, as we have previously noted, the category “phthalates” does not describe a specific chemical listed on Proposition 65, and as a generic and truncated category/class/family description, it is also over inclusive, sweeping in phthalate esters that are not listed on Proposition 65. It is factually inaccurate and misleading and should be removed.

III. OEHHA’s Proposition 65 Website Should be Taken Down and the Website Regulation Repealed.

We do not agree that the newly launched Proposition 65 website is a solution to the many infirmities of Proposition 65. It is not an appropriate mechanism for “expanded” warnings or supplemental information. For that matter, we do not agree that OEHHA has authority under the statute to mandate that industry provide information to the agency.

While the Chamber’s Coalition comments suggest that OEHHA could address matters regarding environmental exposure warnings on its website, we disagree, and believe OEHHA has no Proposition 65-based authority to do so. The statute places obligations on businesses to provide warnings prior to exposure to listed chemical. The statute does not require businesses to include in warnings the amount of exposure, the source of exposure, or other items included in the website regulation. If the statute does not require this information to be in a warning in the first place or otherwise require regulated businesses to produce it, the agency cannot impose these same obligations merely by creating a separate website. An agency website cannot and should not be used to create new obligations unauthorized by statute, and cannot be used to “fix” otherwise deficient or ineffective warnings.

The use of Proposition 65 as the statutory basis for the website, the joint operation of the website and warning regulations, and the apparent use of the website to extend the content of Proposition 65 warnings themselves suggests that these actions cannot be segregated as a matter of law and the effect and operation must be considered together under California administrative law.¹⁵ We

¹⁵ The inclusion of the “warning” website’s URL in the safe harbor language set out in this warning regulation is a particular example. Our comments here continue to object to the inclusion of this URL on the safe harbor warning. The sufficiency of a clear and reasonable product warning under Proposition 65 – an obligation solely of an affected business - cannot rest on a requirement that a product label include a URL to an agency website. This itself presents a potential compelled speech problem under the First Amendment; OEHHA suggests that a warning is not complete unless it includes the agency’s URL (which directs recipients to the agency’s website, not the manufacturer’s own website, for more information). In this proposed regulation OEHHA is simultaneously prohibiting regulated business from offering supplemental information about product uses, risks, and



note another, independent reason why the website may itself be illegal and outside Proposition 65 statutory authority -- under Proposition 65, only the regulated entity (business) which is responsible for an exposure has the obligation (and right) to issue a warning – the agency has no such authority, cannot assume this role, and cannot step in the shoes of the regulated entity.

IV. OEHHA Should Not Preclude or Inhibit Businesses from Offering Truthful Information about their Products.

As we have made clear, the statutory scheme promotes the delivery of a deficient warning by focusing only on severity of hazard and omitting consideration of the likelihood that the hazard will materialize. From a safety and health standpoint – an effective warning standpoint -- the hazards at issue are the health effects cancer and reproductive toxicity (mere exposure to a listed chemical is not a hazard; this improperly conflates the separate concepts of hazard and exposure in a manner inconsistent with modern toxicology, warning science and risk communication).¹⁶

The newly proposed Section 25601(f) would prohibit businesses from adding truthful (accurate, helpful, relevant, meaningful, complete) information in or adjunct to warnings except for limited information that “explains the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals.” It is assumed, but unclear in the Proposal, whether this language would allow businesses to offer safe use and handling information about the product. It is also unclear, for a product that might contribute an insignificant amount of a daily exposure to a chemical (say, 1%), whether this provision allows businesses to explain that 99% percent of daily exposure to the listed chemical comes from sources other than the product at issue, or to offer information about how to reduce exposure to the chemical from those other sources. Another potential scenario: manufacturer A has reduced the amount of a listed chemical in a product to insignificant levels; manufacturer B has done nothing, and offers a product with 20x concentration of the chemical and 10x the exposure. Would OEHHA’s regulation prohibit manufacturer A from pointing out that its product offers the lowest levels of the chemical available, and that to reduce exposures, consumers should buy the product from manufacturer A and not manufacturer B?

Policy considerations – and the science of warnings and risk communication – indicate that inclusion of additional information by manufacturers can improve consumer decision making. To the extent warnings are needed, it can improve the effectiveness of warnings. The federal Food and Drug Administration has explained its role in, and the value of properly balanced information, this way:

FDA takes care that labeling neither underwarns nor overwarns. FDA works to ensure that approved labeling not omit important risk information that patients and physicians

benefits while forcing businesses to tell their customers and the public about OEHHA’s website. Consumers have no way of knowing that businesses are being forced to provide the URL; to a consumer, it may appear that the agency website has the business’ imprimatur. This proposed regulation would presumably preclude a business from making a simple statement that the inclusion of the URL is required by law and does not constitute the business’ endorsement of the information on the agency website. An internet retailer which wanted to post a “notice” to consumers that there is incorrect information on OEHHA’s website and the retailer has requested a correction could open itself up to suit for an “inadequate” warning. We continue to urge that the proposed requirement to include the URL on safe harbor warnings be withdrawn.



should consider in making healthcare decisions. FDA further works to ensure that less important risks not be presented in a way that detracts from important risk information, and that risk information not adequately supported by scientific information not be presented in labeling, as such unsupported information could deter beneficial use of medical products. [Emphasis added].¹⁷

Beyond this, we urge OEHHA not to get into the business of policing commercial speech, and in particular, suppressing truthful information that manufacturers want to communicate to the public. Government restriction of a business' communication of risk-based information, particularly where this information helps avoid consumer deception and better inform consumer choice, is hard to countenance.

Businesses are already accountable for the truthfulness of commercial claims about the health benefits and risks presented by their products, as well as comparative and superiority claims about their products or disparaging claims about their competitors' products. In California, businesses must also be cognizant of potential liability under the California's Unfair Competition Law Business & Professions Code Section 17200, which protects consumers and competitors from illegal, fraudulent, and "unfair" business practices, and Business & Professions Code Section 17500, which prohibits false advertising. Tort law provides an effective foundation for ensuring the adequacy of warnings against significant risks. And of course consumer products regulated under the Federal Hazardous Substances Act must already deliver compliant warnings for hazardous substances.

As the Chamber explains in the Coalition comments, what constitutes the "warning" itself is so vague as to present due process and constitutional problems. This is no small matter. As drafted, it would be easy for a bounty hunter to argue that any on package communication, or advertising and marketing material, or even website claims or social media claims trigger the supplemental speech prohibition. If a manufacturer were to post a simple tweet announcing a product safety award or health certification for a product next to an online Proposition 65 warning, a private enforcer could argue that this triggers the provision. It is unclear whether website audio or video streaming next to a Proposition 65 warning would trigger the prohibition, or adjacent links to another site. It is unclear whether product testimonials, endorsements, or consumer ratings or feedback might trigger the prohibition. It is unclear how proximate the supplemental information may be, or what form or size it may be in. It is even unclear whether a manufacturer could send a letter or comment about product risk or safety to OEHHA – which would be First Amendment protected political speech – and post that letter immediately adjacent to a Proposition 65 website warning.

Proposed Section 25601(f) violates the First Amendment commercial free speech rights of affected businesses. We urge that the section be removed from the Proposal in full.

¹⁷ The Safety of Medical Products Regulated by FDA, Statement for Randall Lutter, Ph.D, U.S. Food and Drug Administration Before the House Committee on Oversight and Government Reform (May 14, 2008), available at <http://www.fda.gov/NewsEvents/Testimony/ucm101513.htm>.



V. Definitions Should be Aligned and Used Consistently Throughout the Regulation.

As does the Chamber's Coalition comments, we note the continuing inconsistent use of various definitions throughout the regulation. It is essential that definitions be consolidated and aligned, and new definitions added or cross-referenced in Section 25600.1 if needed. For example, "warning" and "warning content" are both used at various places in the regulation. "Information," "consumer information," and "supplemental information" are all used. The term "warning materials" appears at 25600.2(b)(3) but is undefined in the definitions; it should be noted that Cal. Health & Safety Code Section 25249.11 already describes "warning materials" to include labels. "Consumer product" and the unqualified term "product" are both used, with no separate definition offered for "product." "On-product," "on-product warning," and "on-product label" are used, notably in Proposed Section 25602, without a definition offered and without clarification whether "on-product" means printed on to the actual product itself (e.g., on a plastic water bottle) and/or on a sticky label attached or affixed to the product and/or on packaging containing the product.

We also suggest that OEHHA consider adding a definition of "in the course of doing business" given that non-profit organizations may not always realize that they are doing business for purposes of the statute.¹⁸

The Chamber's Coalition comments point out that OEHHA's proposed definition of "consumer information" in proposed Section 25600.1(c) is overly broad and ambiguous, which will invite unnecessary litigation over the meaning of the term. Further, consumer packaging and products often include third party certifications and seals, such as the American Dental Association Seal of Approval on a dental care product. This raises two issues: (1) whether a third party certification or seal counts as manufacturer-provided consumer information (the definition currently does not specify who provides the information) and (2) whether a third party certification placed next to a warning would be deemed supplemental information. We also note that some retailers still use pricing guns or stickers to hand label products with discount, price, or "special" information. Stickers like this can be large. It would be prudent to exempt price, discount, special, coupon, or related information about product price from the definition of "consumer information."

VI. OEHHA Should Remove the ANSI/ISO Pictogram Requirement.

The Chamber Coalition, ACC, and other stakeholders have repeatedly asked OEHHA not to misuse the American National Standards Institute (ANSI) safety alert symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. It is undisputed that a Proposition 65 warning is not a safety warning,¹⁹ and it should not be

¹⁸ See, e.g., *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079 (7th Cir. 2008), "the national organization . . . relates to the councils as franchisor to franchisee" and that "[f]rom a commercial standpoint the Girl Scouts are not readily distinguishable from Dunkin' Donuts."



misunderstood by consumers to be one. The symbol is inappropriately used here, and because it is in wide use elsewhere to denote physical hazards (e.g., slipping, falling) and to convey cautionary warning information to inform action, we believe it will likely confuse consumers further about Proposition 65 communications. We again urge OEHHA to remove the ANSI/ISO pictogram requirement for inclusion in safe harbor warnings.

Thank you for the opportunity to comment.

Sincerely,



Karyn M. Schmidt
Senior Director, Regulatory & Technical Affairs
American Chemistry Council

¹⁹ OEHHA makes clear in its Frequently Asked Questions about Proposition 65 that “[a] Proposition 65 warning does not necessarily mean a product is in violation of any product-safety standards or requirements.”
<http://www.oehha.ca.gov/prop65/p65faq.html>

