June 13, 2014

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Office of Environmental Health Hazard Assessment
P. O. Box 4010
1001 I Street
Sacramento, California 95812-4010

VIA EMAIL ONLY

RE: P65 WARNING REGULATION

The Grocery Manufacturers Association\(^1\) (GMA) and its more than three hundred members appreciates the opportunity to comment on the Office of Environmental Health Hazard Assessment’s (“OEHHA”) pre-regulatory proposal of potential revisions to the regulations regarding “clear and reasonable” warnings under Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986.

Ensuring the safety of our products -- and maintaining the consumers’ trust and confidence -- is paramount. Product safety is the foundation of consumer trust, and our industry devotes enormous resources to ensure that our products are safe and otherwise meet or exceed local, state and federal safety requirements. Our companies continuously review and monitor all emerging science and scientific studies and incorporate these as warranted into our manufacturing practices to help ensure we are always producing the safest possible product for consumers. In short, product development and improvement is iterative.

Nevertheless, GMA members have been central targets of Proposition 65 litigation for many years, including some of the most significant Proposition lawsuits ever brought.

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\(^1\) Based in Washington, D.C., the Grocery Manufacturers Association is the voice of more than 300 leading food, beverage and consumer product companies that sustain and enhance the quality of life for hundreds of millions of people in the United States and around the globe.

Founded in 1908, GMA is an active, vocal advocate for its member companies and a trusted source of information about the industry and the products consumers rely on and enjoy every day. The association and its member companies are committed to meeting the needs of consumers through product innovation, responsible business practices and effective public policy solutions developed through a genuine partnership with policymakers and other stakeholders.

In keeping with its founding principles, GMA helps its members produce safe products through a strong and ongoing commitment to scientific research, testing and evaluation and to providing consumers with the products, tools and information they need to achieve a healthy diet and an active lifestyle.

The food, beverage and consumer packaged goods industry in the United States generates sales of $2.1 trillion annually, employs 14 million workers and contributes $1 trillion in added value to the economy every year.
These cases have often involved claims against retailers or restaurants as well as against food processors and packagers. A relative sampling of recent cases shows their breadth:

<table>
<thead>
<tr>
<th>Chemical</th>
<th>Food Product</th>
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</thead>
<tbody>
<tr>
<td>4-MEI</td>
<td>Soft drinks; food extracts, flavors, and coloring</td>
</tr>
<tr>
<td>Acrylamide</td>
<td>Baby food products; breakfast cereals; coffee; french fries, frozen potato products, potato chips, snack foods</td>
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<tr>
<td>Arsenic</td>
<td>rice, powdered protein, bottled water</td>
</tr>
<tr>
<td>Cadmium</td>
<td>Canned oysters, powdered protein, rice</td>
</tr>
<tr>
<td>Lead</td>
<td>Baby food products, baking mix, canned clams, canned soup, canned fruits, canned shellfish, canned vegetables, coffee, cookies containing molasses or ginger, crystallized ginger, ginger and plum baking ingredients, herbal products, jam and preserves, kombucha, licorice, mandarin oranges, maple syrup, powdered proteins, rice, canned oysters</td>
</tr>
<tr>
<td>Mercury</td>
<td>Canned tuna, herbal supplements, fresh fish</td>
</tr>
<tr>
<td>PCBs</td>
<td>Salmon, ahi tuna, lobster, whitefish, mackerel, halibut, flounder, fish oil supplements</td>
</tr>
</tbody>
</table>

Given the expansive litigation against foods that are otherwise safe, GMA is keenly interested in proposals to revise the Proposition 65 warning regulations. Indeed, several years ago, GMA was actively and centrally engaged in an initiative by OEHHA to revise the agency’s “safe harbor” warning regulations as they relate to food products. GMA was actively involved in the Governor’s Proposition 65 reform efforts last summer and GMA continues to focus a disproportionate amount of its limited resources on California issues, primarily Proposition 65, because of its potential impact on consumer perceptions of the safety of our products.

As GMA and its representatives have expressed to OEHHA many times in the past, food is different from other consumer products regulated under Proposition 65. Food is necessary to sustain human life. It also comes in almost infinite varieties. Therefore, if one food is disparaged, another will be eaten in greater quantities, potentially increasing the supposed hazard or another potential hazard. The safety of a food product is a function of many different factors, some of which are in tension with each other (e.g., cooking meat kills pathogens but can create listed animal carcinogens). Furthermore, consumers are uniquely receptive to health information concerning food products, and the consequences of that information can ripple through the population very rapidly, for better or worse. It is for these reasons that the U.S. Food & Drug Administration, the U.S. Department of Agriculture, and state and local food regulatory agencies -- including in California -- are extremely careful about providing accurate and informative information to consumers regarding the safety of food.
OEHHA’s Draft Initial Statement of Reasons for its pre-regulatory proposal seems to recognize some of these factors, noting that “provision of warnings for foods poses special issues that should be addressed differently.” And OEHHA has done so in its draft proposal, for example by not applying the GHS pictogram to food products. Nevertheless, for the reasons described in detail in the California Chamber of Commerce comments, to which GMA has subscribed, GMA does not believe that the draft OEHHA proposal, if adopted, will result in any more or any more informative warnings for food products. Additionally, the draft proposal will increase litigation exposure to a food company that is providing warnings for not having provided warnings consistent with the more onerous draft proposed regulations.

As stated previously, GMA believes that OEHHA’s efforts at improving warnings, avoiding so-called over-warning, and reducing frivolous litigation would be better spent by focusing on the key issues of “when you warn” rather than “how you warn.” For food products, there are very few examples of warnings being provided voluntarily, or even following extensive litigation, such that issues of how warnings are to provided are not particularly relevant for most food producers. Furthermore, to the extent that OEHHA’s draft proposal would prohibit supplemental information that may “dilute or negate” the warning, GMA believes there will be even fewer warnings for food products, given the nuanced and technical nature of the information at issue and the need to provide this information in context.

GMA continues to believe, again echoing the Chamber letter, that OEHHA needs to give more practical, substantive effect to the exceptions that were created in the existing regulations regarding the need for warnings for naturally occurring chemicals in food and for chemicals created during cooking. These exceptions could be written in a far more clear and broader manner to ensure that they are indeed available to food producers, large and small, so as to reduce repeated litigation that has plagued the industry. As a practical manner, we do not believe the exceptions, as currently written, are generally helpful to the average food producer because of the excessive cost (often millions of dollars) to exercise their protections during litigation. We stand ready to work with the agency to address these issues, which GMA believes would go a long way toward improving the California business climate while also reducing unwarranted warnings and providing more useful and authoritative information to consumers.

Again, thank you for the opportunity to provide our comments. We look forward to working with OEHHA staff in implementing the Governor’s initiative on Proposition 65 reform.

Sincerely,

John Hewitt
Director, Western Region