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T97787-00001

Ms. Susan Luong
Office of Environmental Health Hazard Assessment
Proposition 65 Implementation Program
1001 I Street, 19th Floor
Sacramento, CA 95814

Re: *Comments: Proposed Changes in Title 22, Section 12601*

Dear Ms. Luong:

This is submitted on behalf of Whole Foods Market California, Inc. and Mrs. Gooch's Natural Foods, Inc. (collectively, "Whole Foods"). These companies operate Whole Foods Market stores in California.

Whole Foods concurs completely in the comments submitted by the California Grocers Association in its June 1, 2005 letter on this subject. The proposed regulation for acrylamide is vastly preferable to any other short-term solution for providing a warning regarding that chemical.

I wish to address a larger issue – how OEHHA should authorize "safe harbor" warnings for grocery retailers in the context of the proliferation of governmentally mandated warnings that is becoming both a burden on retailers and a confusing and ineffective cacophony for customers.

As I indicated in my oral comments at the May 24 hearing, there needs to be a comprehensive re-examination of how grocery retailers should be permitted to deliver Proposition 65 warnings. Acrylamide is not the only, nor will it be the last, chemical for which the warning burden will fall on the retailer. Retailers are already posting signs requested by the

Attorney General regarding mercury in certain fish. Those signs contain much more information than Proposition 65 requires, just as the proposed acrylamide warning regulation will mandate. Private "bounty hunter" litigation regarding the alleged presence of lead in wine vinegars is in process, and may well result in posting of signage at the shelving of those products. Sixty day notices of intent to sue have been issued to retailers regarding the alleged presence of PCBs in farm-raised salmon. Since January 1, 2004, a number of other notices of intent to sue have been issued regarding products commonly carried by grocery retailers. These include foot powder products, multi-vitamins, candy, tomato ketchup, glassware, ceramic mugs, tableware, ground beef and beef liver, herbs and herbal products, soft food and beverage containers, canned tuna, skin cream and Coca Cola. Just this month, a notice of intent to sue was issued to 18 toothpaste manufacturers alleging the presence of lead in 159 different oral care products. While this last notice did not go to retailers, they could have been targeted. Furan and other chemicals are sure to come.

We believe it is time for OEHHA to revisit the whole issue of how Proposition 65 warnings should be conveyed in retail grocery establishments. We agree with CGA that a "clear and reasonable" warning program for grocery items calls for centralized availability of Proposition 65 warnings in a visible and accessible way. Moreover, the medium chosen for the message should be able to be updated quickly and without undue cost. As CGA has suggested, the form of the regime should be flexible, with several options. CGA has suggested:

1. A kiosk or other customer information center where literature, pamphlets, electronic media, signs, or other methods could convey the necessary warnings;

2. A prominent wall or door sign or signs visible to all customers; or

3. Handouts supplied to all customers on checkout upon request.

Warnings could also be provided by window posters visible from outside the stores.

Finally, we think OEHHA should consider integrating a Web-based alternative as a part of a "safe harbor" warning regulation, perhaps in conjunction with a prominent in-store reference to the availability of the information in this way and a handout summarizing the material. Many governmental agencies, including FDA and OEHHA, use web sites to convey important health information, and there is no reason the regulated community should not be able to use the same means.

Whole Foods' "core values", published on its website[1], include the following:

> **"Education**
> We can generate greater appreciation and loyalty from all of our stakeholders by educating them about natural and organic foods, health, nutrition and the environment."

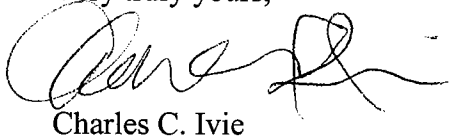
Whole Foods supports providing meaningful and appropriate information to food consumers regarding health issues. Indeed, Whole Foods was, we believe, the only significant grocery retailer to provide handouts to customers nationally regarding the "mercury in fish" issue ***before*** the California Attorney General or any other public authority sought to require any such communication. Whole Foods simply believes that if the present trend continues unchecked, the warning communication program envisioned by Proposition 65 will become an incoherent babble.

The unreasonably disparate treatment of grocery retailers and restaurants should also be addressed. The irrational difference is seen most obviously where grocery retailers offer food for consumption on-premises. If a customer buys a food product (say, a can of tuna) and takes it home to eat, the customer is subject to a different warning requirement than if he or she purchases exactly the same product (say, a tuna sandwich), and consumes it on the premises.

We strongly urge that OEHHA begin considering a complete re-evaluation of the "safe harbor" warning provisions for retail grocers. In that regard it would be helpful to convene a workshop so that all interested parties would be able to present their views.

Thank you for all of your work on this issue. We appreciate having the opportunity to comment.

Very truly yours,



Charles C. Ivie

CCI/d
cc: Dr. Joan Denton, Office of Environmental Health Hazard Assessment (by mail)
Val Siebel, Office of Environmental Health Hazard Assessment (by mail)
Paul A. Smith, California Grocers Association (by email)

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[1] www.wholefoodsmarket.com/company/corevalues.html