CalChamber
CALIFORNIA CHAMBER OF COMMERCE

April 26, 2016

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

Sent electronically to: P65PublicComments@oehha.ca.gov

RE: MODIFICATION TO TEXT OF PROPOSED REGULATION – TITLE 27, CALIFORNIA CODE OF REGULATIONS, PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6, PROPOSITION 65 CLEAR AND REASONABLE WARNINGS

Dear Ms. Vela:

The California Chamber of Commerce and the below-listed organizations (hereinafter, "Coalition") thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's ("OEHHA") Notice of Modification to Text of Proposed Rulemaking to Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65") dated March 25, 2016 ("Proposal"). Our Coalition consists of over two hundred California-based and national organizations and businesses of varying sizes that, collectively, represent nearly every major business sector that would be directly impacted by OEHHA's Proposal.

The Coalition appreciates OEHHA's willingness to work with our organizations throughout this nearly three year regulatory process. In fact, the Coalition was encouraged that the November 27, 2015 proposal, while it contained significant legal and practical issues that required elimination or revision, represented a demonstrable improvement from OEHHA's original pre-regulatory draft.

The current Proposal, however, takes several steps backwards by introducing several new and extraordinarily problematic concepts that had never been contemplated in previous drafts. To wit, OEHHA's Proposal would (1) flip the existing statutory burden on businesses by requiring them to affirmatively demonstrate that a warning is required; (2) substantially increase litigation by creating a new breed of "bad warning," litigation that does not exist today, wherein despite using the precise "safe harbor" warning content provided by OEHHA, businesses would nonetheless be challenged for failing to provide an adequate warning; (3) impose an unworkable, extraordinarily costly and elevated requirement on those providing warnings for environmental exposures; (4) infringe on businesses' constitutionally protected commercial speech and due process rights; (5) require, for the first time since Proposition 65's passage, two warnings for one product; and (6) eliminate the long-accepted method of transmitting warnings via owners' manuals, which typically contain the most significant safety information for many products. Additionally, the Proposal contains several ambiguities and drafting flaws that require clarification.

The problems with the current Proposal render it unworkable. The state of the current Proposal is particularly concerning given the late stage of this regulatory process. Given the significant issues remaining, OEHHA should make modifications to the current Proposal and release a revised draft and revised statement of reasons for an additional round of public comment.

We recognize that the business community will have to make several adjustments, some of them costly, in order to come into compliance with whatever regulatory proposal OEHHA ultimately adopts. That is something the Coalition, in principle, is prepared to accept. As we have stated repeatedly, however, the Coalition is not willing to accept a regulatory proposal that undermines the Governor's calls for Proposition 65 reform in May 2013 by exacerbating the already problematic Proposition 65 litigation climate and by making compliance so difficult that the only protective measure businesses can take to reduce the inevitable threat of litigation is to "overwarn" about exposures that do not even exist. Those results will harm businesses, send the wrong message to consumers, and, more generally, will further worsen the reputation of Proposition 65 as a well-intended law that is overly abused by private enforcers who use the law solely for personal financial gain.

As OEHHA can appreciate, this regulatory process has resulted in the creation of one of the largest and most diverse business coalitions for any California legislative or regulatory proposal to date. Indeed, the Proposal impacts virtually every industry sector, and those impacts extend well beyond the State of California. Due to the interest in this issue and the broad impact it will have on the business community, the Coalition strongly urges OEHHA to seriously consider the practical and legal implications of the issues the Coalition has identified and its proposed recommendations to address them. To this end, the Coalition is not interested in engaging in a policy debate over OEHHA's Proposal; rather, this letter is intended to demonstrate that, notwithstanding OEHHA's policy objectives, the Proposal would result in the very practical and legal outcomes that the Governor sought to avoid when he called for Proposition 65 reform in May 2013.

1. Proposed Section 25601(c): The Chemical Specification Requirement Contains Significant Legal Deficiencies and Continues To Suffer from Drafting Ambiguities

Proposed Section 25601 subdivision (c) requires warnings to name "one or more of the listed chemicals for which the person has determined a warning is required . . . ." The phrase "for which the person has determined a warning is required" has significant legal and practical implications, and represents a fundamental departure from historical Proposition 65 warning guidance. The departure is contrary to the statute, costly and unworkable, and represents an attempt to foreclose legitimate scientific debate. The phrase "one or more" is also ambiguous and must be clarified in the regulatory language.

a. Proposed Section 25601 (c) Imposes an Unlawful Legal Burden on Businesses

By way of background, proposed Section 25601 subdivision (c) of OEHHA's November 27, 2015 proposal stated the following:

> "Except as provided in Section 25603(c), a warning meets the requirements of this article if the name of one or more of the listed chemicals ***for which the warning is being provided*** is included in the text of the warning, ***to the extent***

> ***that an exposure to that chemical or chemicals is at a level that requires a warning***."

(Emphasis added.)

In its comments dated January 25, 2016, the Coalition expressed serious concern with the phrase "to the extent that an exposure to that chemical or chemicals is at a level that requires a warning." Specifically, the Coalition noted that the language imposes an unlawful burden on the defendant that contradicts the Act and the voter's intent in passing it. Under Proposition 65, the warning requirement shall not apply if "[a]n exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity . . . ." (Health & Safety Code, § 25249.10.) In enforcement actions, the burden of showing that an exposure meets this criterion is on the defendant. (*Id*.) In other words, under Proposition 65, the defendant's only statutory burden is to demonstrate that no warning is required. Yet, proposed Section 25601 subdivision (c) would have inappropriately, unnecessarily, and unlawfully required businesses to demonstrate that a warning is indeed required. Accordingly, the Coalition requested OEHHA to eliminate the phrase "to the extent that an exposure to that chemical or chemicals is at a level that requires a warning" in its entirety.

In the current proposed Section 25601 subdivision (c), OEHHA has agreed to eliminate the phrase "to the extent that an exposure to that chemical or chemicals is at a level that requires a warning." But perplexingly, OEHHA has also replaced the phrase "for which a warning is being provided" with substantively identical language to that which the Coalition had objected in its January comment letter. Specifically, proposed Section 25601 subdivision (c) now requires warnings to name "one or more of the listed chemicals for which the person has determined a warning is required . . . ." This new language raises precisely the same legal issues as the phrase "to the extent that an exposure to that chemical or chemicals is at a level that requires a warning." In sum, OEHHA's Proposal eliminated a phrase with significant legal implications, only to insert a substantively similar phrase that poses those very same implications in a different location within the same subdivision.

It is a fundamental premise of Proposition 65 that no entity is required to undertake a risk assessment or an exposure assessment to determine whether a warning is required for a particular exposure. However, proposed Section 25601 subdivision (c) requires an entity to undertake that very assessment and make a legal determination that the Act does not require it to make. OEHHA will exceed its statutory authority if it moves forward with this provision. The Coalition therefore strongly encourages OEHHA to eliminate the phrase "for which the person has determined a warning is required" and replace it with "for which the warning is being provided." Similar changes or deletions should be made in other places where this concept appears, such as proposed sections 25600.1 and 25600.2 subdivision (b)(1).

b. Proposed Section 25601 (c) Deprives Businesses the Option of Providing a Warning Without Prejudice to Their Legal Defenses

In addition to imposing an unlawful legal burden on businesses, OEHHA's proposed language deprives businesses the option of providing a warning without prejudice to their potential legal defenses, whether in a Proposition 65 action or in other legal proceedings. Specifically, today, if

a business provides a warning based on a listed chemical being merely present or detectable, the business maintains the right to prove that the level of exposure in question does not necessitate a warning under Section 25249.10 subdivision (c) of the Act.

Under the Proposal, such legal defenses may be deemed to no longer be available to a business. For example, if a business is warning on "Product X" for exposure to Prop 65-listed "Chemical A," but it turns out that the level of exposure posed, while detectable, is nonetheless minimal and well below the safe harbor level, the Proposal requires the business to make an admission which cannot be later avoided by proving that the level of exposure posed is below the safe harbor level. This is because the business will be deemed to have already made an admission that it has, in fact, exposed individuals at a level above the safe harbor level. The phrase "for which the person has determined a warning is required" must be eliminated to avoid this result.

c. Proposed Section 25601 (c) Exposes Businesses to Toxic Tort Claims

Further, the effect of converting a warning to an admission of an exposure above the NSRL or MADL has other implications. A person who contracts cancer or suffers an adverse reproductive effect may claim that the harm was caused by the chemical exposure, which the business would be admitting is legally above the NSRL or MADL even though, as discussed above, that may very well not be the case. Class actions could therefore be brought on behalf of people claiming to have been exposed but not yet harmed, seeking medical monitoring. The consequences of this regulation cannot be fully defined today, but in the hands of creative plaintiff attorneys, this aspect of the Proposal carries substantial liability risks related to toxic tort claims.

d. OEHHA Recently Eliminated Similar Language from its Recently Finalized BPA Emergency Regulation and OEHHA's Lead Agency Website Regulation Contains the Coalition's Preferred Phrase "For Which a Warning Has Been Provided."

OEHHA's recently finalized emergency regulation on Bisphenol A (BPA) eliminated similar objectionable language from an original draft. Similarly, OEHHA's recently finalized Lead Agency Website Regulation adopts the very phraseology that OEHHA has now proposed to eliminate in the current Proposal.

First, OEHHA's draft emergency safe harbor regulation, which it released on March 17, 2016, required an entity to state in a written notice to retailers that "***a warning is required*** for the canned or bottled food or beverage," and then specifically identify the items "*that require[] a warning*" (i.e. by UPC code). (See proposed Sections 25603.3(f)(1)(B)(i),(ii) [emphasis added]). In response, stakeholders noted that by requiring entities to make such an affirmative statement to retailers, OEHHA was inappropriately limiting the use of this safe harbor warning language to only those entities that either have sufficient resources to perform the exposure assessment, or those that are willing to make a representation they do not necessarily know to be true. Further, stakeholders commented that attempting to make such a fundamental change to Proposition 65 is not only inappropriate, but also directly contrary to OEHHA's statement that the proposed regulation "does not change the existing mandatory requirements," but rather, "is simply a clarification of existing procedures." (See March 17, 2016 Notice, pp. 8-9.) Finally, commenters contested that requiring entities to undertake the time consuming and expensive process of determining whether a warning is "required" prior to providing this new safe harbor warning is

directly contrary to the goal of this "emergency" regulation, namely to allow entities additional time to engage in "a variety of approaches in response to the new warning requirements" and to prevent companies from removing "canned and bottled food items from store shelves to avoid potential enforcement actions." (*Id.*, p. 3.)

In response to stakeholder feedback, OEHHA eliminated the phrases "a warning is required for the canned or bottled food or beverage" and "that require[] a warning." The BPA emergency regulation has since been finalized and approved by the Office of Administrative Law (OAL).

Similarly, OEHHA's recently finalized Lead Agency Website regulation, which is separate from but related to the current Proposal, uses the phrase "for which a warning is being provided" throughout the regulation. First, 27 CCR Section 25205(a) states that "[t]he lead agency will develop and maintain a website to provide information to the public concerning exposures to listed chemicals for which warning is being provided . . . ." Again, in 27 CCR 25205(b)(4) and (8), OEHHA adopted the "for which a warning is being provided" language in describing the types of information that businesses would be required to provide to OEHHA upon request.

To avoid imposing unlawful legal burdens on businesses and depriving them of their legal defenses, and to ensure consistency among OEHHA's recently adopted regulations, OEHHA should eliminate the phrase "for which the person has determined a warning is required" and replace it with the phrase "for which a warning is being provided."

e. Drafting Ambiguities Continue to Suggest that Businesses May Have to Specify More than One Chemical in Their Warnings if Multiple Exposures are Occurring

As the Coalition noted in its January 2016 letter, proposed Section 25601 subdivision (c), specifically the phrase "one or more," can be interpreted to suggest that a warning must specify all of the chemicals for which a warning is being provided if the business determines to warn for exposures to multiple listed chemicals. As the Coalition understands it, however, OEHHA's intent is to allow businesses to specify one chemical in the warning, even if the warning is being provided for multiple chemicals. But given the current drafting ambiguity, some in the private enforcement community may interpret the language to mean that all chemicals must be specified in the warning. Thus, businesses that specify only one chemical when warning for multiple listed chemicals may be targeted for private enforcement actions and be required to defend such litigation in court at significant expense.

To avoid this unnecessary ambiguity, and to make business's obligations clear in the regulation itself, the Coalition had recommended and continues to recommend adding the following sentence to Section 25601 subdivision (c):

> **If a warning is being provided for more than one listed chemical, the warning meets the requirements of this article if the name of at least one of the listed chemicals for which the warning is being provided is included in the text of the warning.**

In an effort to reinforce OEHHA's position that businesses may, at their own election, specify more than one chemical in their warnings if there are multiple exposures present, the Coalition recommended and continues to recommend that the following language be added to the FSOR:

Section 25601 subsection (c) states that if a warning is being provided for one chemical, that chemical must be specified in the warning. If, however, a warning is being provided for more than one chemical, then the person providing the warning may specify any chemical it chooses in the warning or, at its election, may specify more than one chemical if the warning is being provided for multiple exposures. For example, if a warning is being provided for Proposition 65-listed chemicals A, B, and C, the warning may specify chemical A only, chemical B only, chemical C only, a combination of two of the three chemicals, or all three of the chemicals.

2. Proposed Section 25601(c): The Requirement that Warnings Specify Chemicals for Each Endpoint Creates a New Category of "Bad Warning" Litigation and Promotes Overwarning

Proposed Section 25601 subdivision (c) proposes an entirely new requirement that warnings include the name of one or more chemicals for *each endpoint* if the warning is being provided for more than one endpoint (i.e., cancer and reproductive toxicity.) This requirement will make many of the "safe harbor" warnings *unsafe* in practice, exposing businesses to an entirely new category of "bad warning" litigation that does not exist today.[1] To state this more bluntly, in a significant departure from today's practice, under this Proposal, businesses will no longer be able to simply follow the black letter language of the safe harbor warning content requirements to protect themselves from litigation. In light of this reality, in many cases, the only way businesses will be able to protect themselves is to provide a multiple chemical warning, thus resulting in "overwarning," a practice that OEHHA has stated repeatedly it does not intend to promote.

Some procedural background regarding OEHHA's proposed chemical specification requirement and the modifications it has made to date may be instructive to demonstrate why this "safe harbor" warning option must be eliminated in its entirety and replaced with simpler, safer language. In its January 16, 2015 proposal, OEHHA proposed to require warnings to specify the name of one of a list of 12 chemicals, including acrylamide, arsenic, benzene, cadmium, carbon monoxide, chlorinated tris, formaldehyde, hexavalent chromium, lead, mercury, methylene chloride, or phthalates. (Proposed Title 27, Article 6, Clear and Reasonable Warning Regulations, January 16, 2015.)

In the Coalition's April 8, 2015 comment letter, we noted that this aspect of the proposal would create a new category of "bad warning" litigation wherein despite providing a "safe harbor" warning, businesses could nonetheless become targets of 60-day notices because of their decision not to specify a particular chemical in their warning, even if they maintain that the exposure to that chemical did not warrant a Prop 65 warning. The following two examples are illustrative:

> **Example 1:** A company whose product contains listed chemical X (not on the list of 12) and a listed phthalate (on the list of 12) determines that it should provide a warning for exposure to chemical X, but that no warning needs to be provided for exposure to the phthalate. Thus, it provides a compliant Proposition 65 warning identifying no chemicals. Notwithstanding that compliant warning, that company

[1] A we have stated repeatedly, virtually all litigation or threatened litigation relates to the absence of a warning, not whether a warning which has already been provided is adequate.

> may still be sued for failing to identify the phthalate, leaving the company to settle or engage in prolonged, expensive litigation. This example leaves the company especially vulnerable, because its warning would not specify any chemicals at all, thus attracting the attention of the private enforcement community.
>
> **Example 2:** A company whose product contains both a listed phthalate and lead (both on the list of 12) determines that it should provide a warning for lead but that no warning need to be provided for exposure to the phthalate. Thus, it provides a compliant Proposition 65 warning identifying lead only. Notwithstanding that compliant warning, that company may still be sued for failing to identify the phthalate, leaving the company to settle or engage in prolonged, expensive litigation.

As we noted in our letter, the only way to avoid such "bad warning" claims would have been to identify all 12 chemicals, or alternatively, to identify any of the 12 chemicals that the business believed may be present, even if they may have been present at such infinitesimal levels that they would not trigger the warning requirement. This is the exact opposite outcome that OEHHA states it wishes to achieve in that it would have created a new sub-category of "overwarning," wherein businesses would specify chemicals in their warnings out of an abundance of caution, notwithstanding the fact that that they have determined that such chemicals are either not present at all or are otherwise present at infinitesimal levels such that no specification of the chemical is required by law.

In response to the Coalition's comments, OEHHA's November 27, 2015 proposal eliminated the 12 chemical requirement in its entirety, instead requiring warnings to "name one or more of the listed chemicals for which the warning is being provided . . . ." (Proposed Section 25601(c), November 27, 2015.) This requirement, in the Coalition's opinion, was more workable than the 12 chemical requirement from a litigation perspective because it would put all warnings on equal playing field in that *all* warnings would need to identify one chemical (or, in some circumstances, more than one chemical if the business so elected). The shift from the 12 chemical requirement to the "one or more" chemical requirement, notwithstanding our stated objections to the policy objectives, would have substantially reduced the potential for "bad warning" litigation.

The November proposal also provided "safe harbor" warning content language for consumer products. Of relevance here, OEHHA provided the following safe harbor warning language for exposures to listed carcinogens and reproductive toxicants:

> *"This product can expose you to [name of one or more chemicals] a chemical [or chemicals] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.p65warnings.ca.gov/product."*

In the Coalition's January 25, 2016 comment letter, we noted that absent further drafting adjustments, this safe harbor language would require businesses to convey false information about their products and would risk consumer confusion. For example, if an exposure involves both Chemical A (a carcinogen) and Chemical B (a reproductive toxicant) and the business elects to identify only Chemical A in the warning, the warning could falsely suggest to the consumer that Chemical A also causes birth defects or other reproductive harm when it does not (or, alternatively, that the exposure for which the warning is being given involves

carcinogens like Chemical A only). We then provided the following example, which illustrates this problem:

> *This product can expose you to Chemical A, a chemical known to the State of California to cause cancer **and** birth defects or other reproductive harm. For more information go to www.p65Warnings.ca.gov/product. (emphasis added.)*

In this example, the warning suggests that Chemical A, a carcinogen, is also a reproductive toxicant. Accordingly, the Coalition proposed that OEHHA simplify its safe harbor language throughout the Proposal into the following single "and/or" formulation that has previously been embodied in several consent judgments reviewed by the Attorney General's office and approved by state courts and which will be subject to whatever further information OEHHA elects to post on its website to assist the consumer:

> **This product can expose you to chemicals, including [name of one or more chemicals], known to the State of California to cause cancer and/or birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/product.**

In its current Proposal, OEHHA did not adopt the Coalition's proposed "and/or" language, but rather imposed a new requirement that warnings being provided for more than one endpoint (cancer and reproductive toxicity) must include the name of one or more chemicals for *each endpoint*. In other words, notwithstanding OEHHA's previous position that warnings would need to specify only one chemical, the current Proposal would require many warnings to specify at least two chemicals. Setting aside the Coalition's policy objections with this new requirement, we strongly oppose this new requirement because, like the 12 chemical proposal, it will invite "bad warning" litigation and overwarning.

For example, assume a company determines that its product contains listed chemical X (a carcinogen) and listed chemical Y (a reproductive toxicant). The company determines that it should provide a warning for exposure to chemical X, but that no warning needs to be provided for exposure to chemical Y because the chemical is present at infinitesimal levels. Thus, it provides a compliant Proposition 65 warning identifying chemical X, using the "safe harbor" warning content that OEHHA has provided for exposure to carcinogens in proposed Section 25602 subdivision (a)(1)(A). Specifically, the warning would say "This product can expose you to chemicals such as X, which is known to the State of California to cause cancer. For more information go to www.p65warnings.ca.gov/product." Notwithstanding its compliant warning, the company may still be sued for failing to identify chemical Y, leaving the company to settle or defend itself in prolonged, expensive litigation, the cost of which would far exceed the cost of settlement.

This problem is exacerbated by recent trends in private enforcement actions in which plaintiffs are pursuing claims not as to listed chemicals present in the product sold by a business, but rather as to alleged chemicals released during the course of use of the product in combination with other products not sold by that business. Although the Coalition believes that such claims are outside the scope of Proposition 65, we must address the practical reality that such claims exist. With respect to such allegations, the Proposal makes it impossible for a business to anticipate, warn for, and avoid enforcement actions, as to such alleged exposures.

The legal effect of this new requirement would render many "safe harbor" warnings *unsafe*. This is a significant and unwelcomed departure from today's safe harbor warnings, which provide legal proof protections to businesses that use them. This Proposal will *discourage* the use of the safe harbor warnings and will instead result in overwarning wherein businesses will find any way they can to identify both a carcinogen and reproductive toxicant in their warnings, *even if one or the other doesn't even exist in the product at the requisite levels*. Alternatively, businesses will simply offer themselves as litigation targets by using an alternative warning method and defending themselves in court if challenged. Either way, this aspect of the Proposal will result in either more litigation or more overwarning, two results that the Governor expressly sought to avoid when he called for reforms in May 2013.

As OEHHA knows, uncertainties pertaining to when a business must warn, combined with an aggressive enforcement climate, make it impossible to establish with scientific certainty that no exposure is occurring at levels requiring a warning. In OEHHA's own words, "determining anticipated levels of exposure to listed chemicals can be very complex." Given this reality, we once again strongly urge OEHHA to eliminate proposed Section 25603 subdivision (a)(1)(C) and adopt the following safe harbor language for exposures to both carcinogens and reproductive toxicants.

> **This product can expose you to chemicals, including [name of one or more chemicals], known to the State of California to cause cancer and/or birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/product.**

The Coalition prefers this proposed language because it is simpler, avoids "bad warning" litigation, reduces the likelihood of overwarning, and allows businesses to use the safe harbor to protect themselves from litigation. As a second and much less preferred option, the Coalition proposes that OEHHA eliminate this new requirements/safe harbor language and instead restore and adopt the safe harbor language from the November 2015 proposal. We prefer the November 2015 approach over the current approach because the Coalition would rather businesses state in their warnings information that may convey inaccurate information about their products but nonetheless be safe from litigation (i.e., the November 2015 proposal), as opposed to the warning in good faith but nonetheless be leveraged for settlement dollars and embroiled in endless and unnecessary litigation over bad warnings (i.e., the current Proposal).

3. **Proposed Sections 25604(a)(2)(A) and (a)(3)(A) and Section 25605 (a)(3): The Requirement to Identify the Source of the Exposure for Environmental Exposure Warnings is Unworkable, Will Result In Excessive Litigation, and Is An Issue Already Addressed Through OEHHA's Recently Finalized Lead Agency Website Regulation**

Proposed Section 25605 subdivisions (a)(3)-(6) of the Proposal require environmental exposure warnings to identify the "[n]ame of one or more exposure source(s)" in the area that can expose consumers to Prop 65-listed chemicals. This requirement is an entirely new concept on which the public has not yet had an opportunity to comment, and it is also not "sufficiently related to the original text that the public was adequately placed on notice that the change could result" from OEHHA's prior proposal. (See Cal. Gov't Code § 11346.8(c).) This new concept would impose an unworkable and completely unnecessary burden on businesses providing environmental exposure warnings. The requirement is unworkable because, in practice, private enforcers likely would interpret it to require businesses to conduct a comprehensive exposure

assessment of their facilities to identify the source or sources of exposure, notwithstanding OEHHA's assurances that it does not so intend. The requirement is also unnecessary because, under OEHHA's related and recently finalized Lead Agency Website regulation, OEHHA has the express ability to request this very type of information from businesses providing environmental exposure warnings. The information can, in turn, be posted on OEHHA's new Prop 65 website for the public to review.

a. *The Source Identification Requirement is Cost Prohibitive and Will Lead to Frivolous Legal Challenges Over What Constitutes an "Exposure Source"*

OEHHA's newly crafted approach for environmental exposure warnings is vague as to what, exactly, the phrase "exposure sources" means and what a business must do, if anything, to identify such sources in its warnings. This vagueness will lead to expensive litigation to resolve the question. Short of an appellate court judgment on the issue, settlements and trial court rulings likely will result in lack of uniformity in environmental exposure warnings throughout California, a result that does not promote meaningful warnings or benefit California citizens.

In the worst situation, OEHHA's Proposal could be interpreted to require businesses to conduct exposure assessments to evaluate every possible "exposure source" and the level of exposure, if any, to multiple listed chemicals. The Coalition already has discussed that such a burden is beyond OEHHA's statutory authority to impose. Even setting that issue aside, however, such an interpretation is wholly infeasible and would drain business resources to the detriment of the California economy. Indeed, if this is the interpretation OEHHA espouses, the Administrative Procedure Act would require the agency to conduct an economic impact analysis of this Proposal.

The Coalition believes that OEHHA's prior proposal on environmental warnings would establish a feasible foundation for businesses to provide such warnings, which would result in greater consistency and uniformity for individuals receiving them. OEHHA should revert to its prior proposal.

b. *The Source Identification Requirement is Unnecessary Because OEHHA's Recently Finalized Lead Agency Website Regulation Allows OEHHA to Obtain the Very Same Information*

In a separate but related Lead Agency Website regulation, which OEHHA recently finalized, OEHHA has the ability to request information from businesses that are providing Prop 65 warnings to assist OEHHA in developing its newly launched website. Relevant here, upon OEHHA's request, businesses providing environmental exposure warnings must provide OEHHA with "the source of the chemical or chemicals and the area for which the warning is being provided." (27 CCR § 25205(b)(4).) In other words, OEHHA is now proposing to require environmental exposure warnings to contain the very information that OEHHA characterized as supplemental in its Lead Agency Website regulation. Proposed Section 25605 subdivisions (a)(3)-(6) now renders Title 27 CCR Section 25205 subdivision (b)(4) virtually useless because, now that the source of the exposure would be required on the warning itself, there would be no reason for OEHHA to ever request this information unless they were seeking information about a potential source of exposure beyond that which was already identified in the warning.
In response to the Coalition's objections that this new provision would create an "elevated" warning requirement for those providing environmental exposure warnings, OEHHA noted that consumer product warnings need not provide source information because the source of the

exposure is the product itself and not necessarily any component thereof. Not only is this statement false, but it is directly at odds with OEHHA's previous and repeated public statements regarding one of the fundamental purposes for creating the Lead Agency Website regulation. Specifically, during the promulgation of the Lead Agency Website regulation, OEHHA often noted that it receives multiple requests on an annual basis about various products. The example OEHHA often provides is Christmas tree lights. Specifically, OEHHA has stated that during the Holidays every year, it receives multiple inquiries about the location of chemicals in Christmas tree lights, i.e., do the chemical or chemicals for which the warning is being provided exist on the light bulbs, on/in the wire, or on the plug?

In an effort to provide those submitting such inquiries with more information about warnings, the Lead Agency Website regulation allows OEHHA to request from businesses providing consumer product exposure warnings a plethora of information about the warning, including "the location of the chemical or chemicals in the product." (27 CCR § (b)(4). Accordingly, OEHHA acknowledges through its very own Lead Agency Website regulation that, unlike its statements to the contrary, the source of consumer product warning exposures is not necessarily the product itself, but rather a component thereof. The same is true for environmental exposure warnings, i.e., the facility itself may not be the source of the exposure, but rather a particular location or object within the facility.

In light of this reality, OEHHA has provided no justification, nor could it, as to why businesses providing environmental exposure warnings would be subject to the heightened burden of identifying the source of exposure in their warnings, while the source of exposure for consumer products would not be required to be on the warning itself, but rather requested by OEHHA on an as needed basis for use on the Lead Agency Website. OEHHA should treat consumer product exposure warnings and environmental exposure warnings similarly by eliminating the new source identification requirement for environmental exposure warnings and instead reserving such information for the Lead Agency Website.

c. *The Source Identification Requirement, Like the Chemical Specification Requirement, Can Be Interpreted to Require that All Sources of Exposures be Identified in the Warning*

Notwithstanding our strong objections to the new requirement that environmental exposure warnings identify the source of the exposure and our request for that requirement to be eliminated in its entirety, we note that the new requirement suffers from precisely the same ambiguous drafting as the chemical specification requirement in proposed Section 25601 subdivision (c). Specifically, the phrase "[n]ame of one or more exposure source(s)]" in proposed Section 25605 subdivisions (a)(3)-(6) can be interpreted to suggest that an environmental exposure warning must specify all of the exposure sources for which a warning is being provided if the business is warning for multiple exposures. As the Coalition understands it, however, OEHHA's intent is to allow businesses to specify one exposure source in the warning, even if the warning is being provided for multiple exposures. But given the current drafting ambiguity, some in the private enforcement community may interpret the language to mean that all sources must be specified in the warning. Thus, businesses that specify only one source when warning for multiple exposures may be targeted for private enforcement actions and be required to defend such litigation in court at significant expense.

To avoid this unnecessary ambiguity, and to make business's obligations clear in the regulation itself, the Coalition recommends that OEHHA add proposed Section 25605(a)(7):

> **If a warning is being provided for more than one exposure, the warning meets the requirements of this article if the name of at least one exposure source for which the warning is being provided is included in the text of the warning**.

4. Proposed Section 25601(f): The New Supplemental Information Section Violates the First Amendment and Due Process

Proposed Section 25600 subdivision (d) of the November 2015 proposal stated that "[a] person may provide information that is supplemental to the warning" but that such information "may not contradict the warning." The Coalition asserted that the requirement that supplemental information not "contradict" the warning was unconstitutionally vague and violated the First Amendment commercial free speech rights of affected businesses.

The current Proposal eliminates previously proposed Section 25600 subdivision (d). In its stead, the Proposal now states the following:

> "The warning may contain information that is supplemental to the warning content required by this article only to the extent that it explains the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals. Such supplemental information may not be substituted for the warning required by this article."

(Proposed Section 25601(f).)

Proposed Section 25601 subdivision (f) continues to violate the First Amendment commercial free speech rights of affected businesses for two reasons. First, due to an apparent drafting oversight, proposed Section 25601 subdivision (f), as currently drafted, prohibits all warnings, including alternative warnings, from containing supplemental information other than the two substantive restrictions OEHHA has identified. Second, even assuming that drafting oversight is addressed, the supplemental information section is so vague and overbroad that businesses will not reasonably know whether their conduct falls within the bounds of the regulation. Accordingly, in order to ensure their conduct does not violate the new regulation, many businesses will voluntarily choose not to engage in otherwise constitutionally protected commercial speech. While the Coalition prefers that this provision be eliminated in its entirety and allow the public to challenge false and/or misleading speech using existing legal mechanisms, the Coalition nonetheless proposes modifications to the regulation to address these constitutional violations.

a. The Supplemental Information Provision Restricts Constitutionally Protected Commercial Speech for Alternative Warnings in Addition to Safe Harbor Warnings

While previously proposed Section 25600 subdivision (d) was located under Subarticle 1 entitled "General," newly proposed Section 25601 subdivision (f) is located under Subarticle 2 entitled "Safe Harbor Methods and Content." OEHHA's decision to relocate the supplemental information section is significant because the way in which it now interplays with another subdivision within Section 25601 is such that the Proposal can be interpreted to extend the safe harbor's free speech limitations to *all* warnings, and not just safe harbor warnings. Specifically, proposed Section 25601 subdivision (b) states the following:

> Nothing in this subarticle shall be construed to preclude a person from providing a ***warning*** using content or methods other than those specified in this article that nevertheless complies with Section 25249.6 of the Act.

(Emphasis added.)

In other words, under proposed Section 25601 subdivision (b), a business may provide an alternative warning so long as they can defend the warning as clear and reasonable under the Act. Presumably, this would also mean that the alternative warning, unlike the safe harbor warning, can contain supplemental information beyond the limitations identified by OEHHA under proposed Section 25601 subdivision (f). However, as a legal matter, this isn't so. To wit, both proposed Section 25601 subdivision (b) and proposed Section 25601 (f) use the term "warning," meaning the term must carry the same meaning each time it is used. (*People v. Gray* (2014) 58 Cal.4th 901, 906 ["when the same word appears in different places within a statutory scheme, courts generally presume the Legislature intended the word to have the same meaning each time it is used."].) Accordingly, when reading the provisions together, businesses that provide an alternative warning under proposed Section 25601 subdivision (b) may nonetheless be subject to the speech constraints under proposed Section 25601 subdivision (f).

b. *The Supplemental Information Provision is Unconstitutionally Vague and Overbroad*

In addition to what can be interpreted as an outright ban on supplemental information (other than the two items identified in proposed Section 25601 subdivision (f)) on *all* warnings, the new supplemental information section, specifically the phrase "warning may contain," is so vague and overbroad when used in this context that it will discourage businesses from exercising their fully protected free commercial speech rights and due process. (*F.C.C. v. Fox Television Stations, Inc.* (2012) 132 S. Ct. 2307, 2309-2310 ["A fundamental principle in our legal system is that laws which regulate person or entities must give fair notice of conduct that is forbidden or required. . . . When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."].)

Businesses will simply have to speculate as to the meaning of the regulation. For example, if the term "warning" is defined as the warning content itself, such that the regulation restricts what can be added to the warning content, businesses will have sufficient guidance to ensure that they can benefit from safe harbor protection while exercising their free speech rights in a location that is disassociated with the warning text. If, however, the term "warning" is defined as the entire label, package, sign, tag or website on which the safe harbor text appears, then the regulation would essentially prevent businesses from benefiting from safe harbor protection and exercising their free speech rights at the same time. That would be a clear constitutional violation because it would have a chilling effect that unacceptably burdens free expression and is impermissibly vague under the U.S. and California Constitutions. Either way, the Proposal is unclear on this issue, and thus leaves these issues wide open.

The Coalition offers two solutions to address the Proposal's significant First Amendment implications. First, to avoid what can be interpreted as a prohibition on constitutionally protected commercial free speech for alternative warnings, we propose relocating proposed Section 25601 subdivision (b) to Subarticle 1, entitled "General," under proposed Section 25600. This is a more appropriate location because it avoids confusing the guidelines for alternative warnings

and safe harbor warning. Regardless of where under proposed Section 25600 OEHHA decides to relocate Section 25601 subdivision (b), the provision would require the following minor clarification:

> Nothing in ~~this~~ subarticle **2 of this article** shall be construed to preclude a person from providing a warning using content or methods other than those specified in ~~this~~ **subarticle 2 of this** article that nevertheless complies with Section 25249.6 of the Act.

Second, to ensure that the supplemental information section is not unconstitutionally vague and overbroad so as to discourage businesses from exercising their free speech rights, the Coalition proposes the following modifications to proposed Section 25601 subdivision (f):

> The warning **content required by this subarticle** may contain information that is supplemental to the warning content required by this article only to the extent that it explains the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals. Such supplemental information may not be substituted for the warning **content** required by this **sub**article."

The Coalition's proposed modification will eliminate the Proposal's First Amendment implications by clarifying that the "warning," as that term is used in the Proposal, is limited to the warning content itself. In other words, businesses would be free to provide supplemental information beyond the scope of the two substantive restrictions in locations other than the warning content itself, such as the label, package, sign, tag, or website.

5. Proposed Sections 25600.2(b) and (d) and Sections 25602(b) and (c): The Proposal Requires "Double Warning" by Placing an Unlawful Affirmative Burden on Retailers to Provide Online Warnings for Products Already Containing an On-Product Warning

Although there are conflicting provisions on the issue, the Proposal appears to require on-line retailers and cataloguers to provide a warning for products already containing an on-product warning. In other words, notwithstanding the Statute's express intent to minimize the burden on retailers, the Proposal, for the first time in the history of Proposition 65, places an affirmative burden on the retailer to provide a warning and, in doing so, would require that certain products contain *two warnings*.

Proposed Section 25600.2 subdivision (b) states that the manufacturer, producer, packager, importer, supplier or distributor of a product may comply with the regulation either by "affixing a label to the product bearing a warning" *or* by providing a written notice directly to the authorized agent for a retail seller. According to Proposed Section 25600.2 subdivision (d), if the manufacturer or other entity elects to provide written notice that complies with the regulation, then the retail seller is responsible for the placement and maintenance of warning materials, "including warnings for the products sold over the Internet." (Proposed Section 25600.2(d).) That provision does not, however, impose an affirmative burden on the retailer to warn online when the manufacturer or other entity elects to affix a label to the product bearing a warning. In fact, according to the Proposal, a retail seller is *only* responsible to provide a warning for a consumer product exposure if one or more of the following circumstances occur:

1. The retail seller is selling the product under a brand or trademark that is owned or licensed by the retail seller or an affiliated entity.

2. The retail seller knowingly introduced a listed chemical into the product, or knowingly caused a listed chemical to be created in the product.

3. The retail seller has covered, obscured or altered a warning label that has been affixed to the product by the manufacturer or other entity.

4. The retail seller has received warning information and materials for the exposure pursuant to the notice requirements in Proposed Section 25600.2 subdivision (b) and (c).

5. The retail seller has actual knowledge of the potential consumer product requiring the warning, and there is no entity that is otherwise required to provide a warning.

(Proposed Section 25600.2(e)(1)-(5).)

None of the situations outlined in Proposed Section 25600.2(e)(1)-(5) suggest that an online retailer would be required to provide a warning if a manufacturer or other entity decided to warn by "affixing a label to the product bearing a warning" pursuant to Proposed Section 25600.2 subdivision (b). Yet, under the "Methods of Transmission" section for consumer product exposure warnings, Proposed Section 25602 subdivision (b) states that for internet purchases, "[i]f an on-product warning is provided . . . the warning provided on the website may use the same content as the on-product warning." So while the Proposal suggests that an on-line warning may be required for products bearing an on-product warning, the general provisions regarding the duties and responsibilities of retail sellers would suggest this isn't so.

Indeed, the Act itself requires that implementing regulations minimize the burden on retailers to the greatest extent practicable:

> In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, ***except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question***.

(Health & Safety Code § 25249.11 (emphasis added).)

Yet, OEHHA's Proposal would place an *affirmative burden* on retail sellers to warn in situations where the retail seller itself would not be responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question. The burden this Proposal imposes on retail sellers, therefore, exceeds OEHHA's authority under the Act.

To the extent that OEHHA is concerned about post-purchase burdens on internet or mail order purchasers of products bearing on-product Proposition 65 warnings, that is a business transaction issue and a matter of business-consumer relationship and business laws (e.g., warranties and product return policies) completely outside the purview of Proposition 65.

OEHHA has no statutory authority to impose this requirement, which not only imposes an unlawful burden on retailers, but for the first time in the history of Proposition 65, would require two warnings for one product. This is not only objectionable from a policy standpoint, but it was also never contemplated by the Act or the voters' intent in passing it.

Accordingly, the Coalition requests OEHHA to clarify that online and catalogue warnings are *not* required for products already containing an on-product warning.

6. **Proposed Sections 25601(d) and 25602(a)(3): The Proposal is Unclear as to Whether Warnings May Be Provided Using Package Inserts, Pamphlets, or Owners' Manuals**

The Proposal, like previous iterations, is unclear regarding whether a safe harbor consumer product warning may be transmitted using "labeling," which is defined in the Proposal as "any written, printed, graphic, or electronically provided communication that accompanies a product including tags at the point of sale or display of a product." (Proposed Section 25600.1(i).) Today, some of the permissible methods of labeling commonly used are package inserts, pamphlets, or owners' manuals.

The Proposal uses the term "labeling" multiple times throughout Subarticle 2, which provides regulatory guidance for "Safe Harbor Methods and Content." The use of the term "labeling" throughout this particular Subarticle is noteworthy because it suggests that "labeling" is an acceptable safe harbor warning method. For example, OEHHA has added newly proposed Section 25601 subdivision (d), which clearly suggests that "labeling" is an acceptable safe harbor method for consumer products. Section 25601 subdivision (d) states the following:

> "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 read and understood by an ordinary individual under customary conditions of purchase or use."

(Emphasis added.)

Further suggesting that "labeling" may be an appropriate safe harbor method, proposed Section 25603 subdivision (a)(1) requires safe harbor consumer product warnings to contain a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline, and notes that "[w]here the sign, label or ***labeling*** for the product is not printed using the color yellow, the symbol may be printed in black and white." (emphasis added.)

And yet again, proposed Section 25602 subdivision (d), which is located in the section that lists acceptable "methods of transmission" for safe harbor consumer product warnings, states the following:

> "If any label, ***labeling***, or sign that provides consumer information about a product is provided in a language or languages other than or in addition to English, then a warning for that product meets the requirements of this article only if the warning is also provided in the same language or languages on that label, ***labeling*** or sign."

(Emphasis added.)

Despite the Proposal's repeated use of the word "labeling" in Subarticle 2, proposed Section 25602, one of the three sections containing the word "labeling," appears to suggest that labeling may not, in fact, be an acceptable safe harbor warning method for consumer products. Specifically, proposed Section 25602 subdivision (a)(3) lists the following as one of the several allowable methods of transmission for safe harbor warnings for consumer products:

> "A label that complies with the content requirements in Section 25603(a)."

Given the Proposal clearly contemplates the use of labeling as an appropriate safe harbor method multiple times throughout the Proposal, we recommend that OEHHA modify proposed Section 25603 subdivision (a)(3) as follows to ensure consistency throughout the regulation, avoid unnecessary confusion, and preclude the possibility for private enforcers to challenge that labeling is not an appropriate safe harbor method for consumer products:

> A label**, labeling or sign** that complies with the content requirements in Section 25603(a).

7. Proposed Section 25602(d): The Foreign Language Requirement Continues to Suffer from Vagueness, Does Not Give Proper Guidance to Businesses on How to Comply, and Thus Will Directly Lead to More Lawsuits

Proposed Section 25602 subdivision (d) states that "[i]f any label, labeling, or sign that provides consumer information about a product is provided in a language or languages other than or in addition to English, then a warning for that product meets the requirements of this article only if the warning is also provided in the same language or languages on that label, labeling or sign." The Proposal then defines "consumer information" as information "including, but not limited to, warnings, directions for use, ingredient lists, and nutritional information" but does not include "brand name, product name, or product advertising." (Proposed Section 25600.1(c). Both the foreign language requirement and the definition of "consumer information" require clarifications and other changes to ensure that businesses aren't unnecessarily targeted by private enforcers.

a. Drafting Ambiguities Will Result in an Unintentionally Broad Application of this Requirement

The phrase "[i]f any label, labeling or sign ***that provides consumer information***" suggests that the foreign language requirement would be triggered if a label, labeling or sign containing consumer information provided *any other* information in a foreign language, even if that information did not meet the definition of "consumer information." This cannot be OEHHA's intent.

By way of comparison, OEHHA has taken an entirely different (and more workable) approach regarding the foreign language requirement for food exposure warnings. Specifically, Proposed section 25607.1 subdivision (c) triggers the foreign language requirement only "[i]f any consumer information about a specific food product" is provided in a language or languages other than English. The foreign language required for food exposure warnings does not use the phrase "that provides consumer information," and thus its application is limited to consumer information provided in a language other than English, as opposed to non consumer information that may happen to be provided on any label, labeling or sign. To ensure that the foreign

language requirement triggers only when *consumer information* is provided in a language other than English, the Coalition proposed the following changes:

> If any ~~label, labeling, or sign that provides~~ consumer information **on a label, labeling or sign for** ~~about~~ a product is provided in a language or languages other than or in addition to English, then a warning for that product meets the requirements of this article only if the warning is also provided in the same language or languages on that label, labeling or sign.

b. Translated Warnings Must Be Subject to a "Rule of Reason" to Eliminate or Limit Litigation over Adequate Translations

While the Proposal gives detailed and precise requirements for the language to be employed in the English-language warnings, it does not give an indication of how these warnings are to be properly translated. As the safe-harbor warnings have been replaced by these provisions, businesses do not have guidance on the content that must be included in the non-English warnings. Allegedly improperly translated warnings may further prompt suits. Defending such a suit will require engaging linguistic experts to prevail, making a forced settlement inevitable. Accordingly, the regulation should specify precisely what warnings must say when provided in other languages. At the very least, OEHHA should provide that translated warnings are subject to the "rule of reason" so as to reduce the likelihood that private enforcers will pursue frivolous translation lawsuits.

c. The Definition of "Consumer Information" Is Overly Broad and Must Be Modified

OEHHA's proposed definition of "consumer information" in proposed Section 25600.1 subdivision (c) is so broad and leaves open so many questions as to what may or may not constitute "consumer information" that it will result in unnecessary litigation over the meaning of the term. Specifically, the phrase "but not limited to" suggests that virtually anything can be consumer information, with the exception of those items that OEHHA has expressly excluded from the definition. OEHHA should eliminate the phrase "but not limited to" from the definition and instead include within the definition all possible items that it deems to be consumer information so as to avoid unnecessary disputes on the issue.

Further, with respect to those items that OEHHA has expressly excluded from the meaning of "consumer information," the Coalition strongly urges that OEHHA add "company name" and "location of manufacture" to the list of items that do not constitute consumer information. Given OEHHA has already excluded information such as "brand name" and "product name" from the definition, it would follow that these items ought to be excluded as well to avoid the possibility of unnecessary translation and litigation.

d. The Foreign Language Requirement Should Be Limited to Only One Language Other than English

The foreign language proposal does not take space limitations into account. At the very least, the foreign language requirement should, where triggered in the consumer product context (as distinct from the environmental exposure context), be limited to the provision of only one language in addition to English with the additional language being the one most likely to be understood by consumers of that product in California (i.e., Spanish in most cases, except

where the product is targeted predominately for use by a different ethnic subpopulation). In addition, given tri-lingual NAFTA labeling requirements (which indeed require products to provide "consumer information"), there is little sense or upside to requiring Proposition 65 warnings to be printed in French given that very few people in California even speak it. Further, because of space limitations and the heightened need for and importance of nuance and context, there should, at the very least, be an exemption in the multiple languages requirement for food labels.

e. OEHHA Must Clarify Whether Translated Warnings Must Contain a Pictogram

The Coalition has stated repeatedly that OEHHA can eliminate the problems the Coalition has identified with respect to the foreign language requirement by including translated warnings on its website in multiple languages in lieu of requiring businesses to provide them whenever another language is present on a label. This would reduce unnecessary burdens on the regulated community, ensure that businesses aren't targeted with frivolous litigation with respect to this aspect of the Proposal, and further satisfy OEHHA's stated objective of ensuring that non-English speaking members of the public have access to information about chemical exposures in their primary language.

If OEHHA adopts the foreign language requirement in a final regulation, at the minimum, the Coalition encourages OEHHA to clarify that if the warning is being provided in multiple languages, that does not mean multiple pictograms are also required accompanying each foreign language Prop 65 warning. As we understand it, OEHHA has taken the position that if the English and foreign language warnings were provided close to each other, only one pictogram would be required notwithstanding the fact that more than warning is being provided. In contrast, OEHHA has also taken the position that if the English and foreign language warnings are on opposite sides of the label, two pictograms would be required. The Coalition urges OEHHA to outline their expectations in the regulation itself, or at the very least in the FSOR, for the inclusion of a pictogram with a foreign language warning.

8. <u>Proposed Section 25600(f): The Grandfathering Provision Can Be Interpreted to Improperly Allow Third-Parties to Initiate Litigation Against Companies That Are Warning Pursuant to a Court Ordered Settlement or Final Judgment</u>

As currently drafted, proposed Section 25600(e) 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 fully complies with the order or judgment."

The final clause - - "if the warning fully complies with the order or judgment" - - is unnecessary because the Court that ordered the settlement or final judgment retains jurisdiction to enforce the settlement or judgment. Proposed subsection (e) could be interpreted improperly to allow third-parties to the Court-ordered settlement or final judgment to initiate litigation against companies subject to that Court order or judgment in another Court, asking that other Court to adjudicate the company's compliance, or lack thereof, with the rendering Court's order or judgment. Given the complexity of some Proposition 65 consent judgments, such litigation could be time consuming and burdensome which creates perverse incentives for frivolous litigation filed to extract settlement payments that are less than the costs of defense. Frivolous

litigation taxes an already over burdened court system and is inconsistent with the Governor's publically announced goals.

For example, in 2012, the State of California entered into dozens of consent judgments, approved by the Court, regarding certain vitamin products ("Vitamin CJs"). The Vitamin CJs contain a complicated definition of the products covered by the judgments that spans two pages and includes a complex formula that yields 192 different and distinct definitions of products covered by the Vitamin CJs and four broad exceptions. Based on the phrase "if the warning complies with the order or judgment," a private plaintiff may initiate litigation against any company that is providing its Vitamin CJ warning on the grounds that the product at issue is not a product covered by the CJ and therefore the warning does not "comply with the order or judgment" and the warning, which does not match the new safe harbor warning, is not clear and reasonable under the law. Plaintiff's lawsuit could be based on a misunderstanding of the complicated definition of a covered product and its 192 permutations, a disagreement over whether one of the broad exceptions applies, or an alternative reading of the CJ. But it would be perverse for a private plaintiff, based on its own idiosyncratic view of the Vitamin CJs, to litigate the meaning of the Vitamin CJs in a second action, where (i) the terms of the Vitamin CJs were agreed to by the State of California by and through the Office of the Attorney General, as the chief law enforcement officer of the State, (ii) the Court that entered the Vitamin CJs retains jurisdiction to enforce their terms, and (iii) the State has not identified any non-compliance or disagrees with plaintiff's assessment of non-compliance.

More examples exist among the hundreds of consent judgments entered into by private Proposition 65 litigants. Many of those consent judgments also contain complex definitions of the covered products, complicated science based warning trigger levels, testing and reporting requirements, or other diverse terms which determine "compliance" with the consent judgment but which cannot be determined on the face of the warning being provided or on the face of the litigation pleadings. As a result, proposed subsection 25600(e) would open a large litigation loophole, where frivolous claims of non-compliance could only be adjudicated after the merits are developed through discovery, motion practice and other expensive and time consuming litigation. Such a loophole would encourage the proliferation of frivolous claims to extract early monetary settlements that avoid the time and expense of litigation. That result is not consistent with the purpose of Proposition 65 or the Governor's calls for reform in May 2013.

The Coalition therefore reiterates its request that the phrase "if the warning fully complies with the order or judgment" be deleted as unnecessary and harmful. In the alternative, the Coalition requests that the phrase be modified to state the following:

> 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 ~~fully~~ **method or content** complies with the order or judgment.

Whether or not the text of the warning provided for an exposure matches the text of the warning approved by the court for such exposure is not as susceptible to interpretation and can be determined more readily on the face of the warning or the face of the pleadings. The phrase would still be duplicative of existing mechanisms that ensure compliance with a court order, but it would not create the same large loophole described above and, therefore, would not encourage the same proliferation of frivolous litigation intended solely to facilitate the redistribution of funds from defendant companies to private plaintiffs.

9. <u>Proposed Section 25602(a)(2): The Requirement that Product-Specific Warnings Provided via Electronic Devices Provide the Warning Without Requiring the Purchaser to "seek out the warning" Should be Clarified.</u>

Proposed Section 25602 subdivision (a)(2) provides the following as one of several safe harbor warning methods for consumer products:

> "A product-specific warning 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***."

(emphasis added.)

The phrase "without requiring the purchaser to seek out the warning," absent clarification, is unworkable and thus subject to legal challenge because electronic devices and processes by their very nature may only be employed in a manner that requires the consumer to take some degree of affirmative steps, thus leading to litigation over whether the consumer had to "seek out the warning."

The ISOR accompanying the November 2015 proposal lists several methods that may be suitable for providing a warning via electronic devices, including "electronic shopping carts, smart phone applications, barcode scanners, self-checkout registers, pop-ups on Internet websites and any other electronic device that can immediately provide the consumer with the required warning." However, several of these devices would likely require a purchaser to take proactive steps with the device in order to access the warning. For example, barcode scanners would require a consumer to scan a product prior to purchase. Under this aspect of the Proposal, would the scanning of a product amount to seeking out a warning?

Through this vague guidance, the subsection and the ISOR leaves unanswered the question: at what point is a purchaser being required to "seek out a warning?" Due to this lack of clarity about what methods are permitted, many businesses are unlikely to provide warnings under this subsection, even if it may be the most effective method. This vagueness is fodder for frivolous lawsuits and creates uncertainty for businesses, especially given the fact that the proposed regulations considerably limit the available methods of warning.

Accordingly, to avoid needless litigation over these issues, we strongly urge OEHHA to eliminate the phrase "without requiring the purchaser to seek out the warning." Eliminating the phrase will simply restore purpose and plain meaning to the subdivision to ensure that businesses can, in fact, provide warnings using these various methods of transmission.

If OEHHA is intent on keeping this phrase in the Proposal, then we recommend that OEHHA add the following phrase to proposed Section 25602 subdivision (a)(2) to ensure that whatever proactive step or steps are ordinarily associated with using an electronic device are permitted under the Proposal:

> "A product-specific warning 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. **A purchaser shall be deemed to have sought out the warning only to the extent that he or she takes affirmative steps beyond those ordinarily associated with obtaining information via electronic devices or processes. Examples of steps ordinarily associated with obtaining information via electronic devices or processes include, but are not limited to, scanning a QR code with a smart phone and clicking on a hyperlink**."

10. **Proposed Section 25602(a)(4) and (b): The Term "On-Product" is Undefined and Thus Ambiguous**

Proposed Section 25602(a)(4) permits the use of an "on-product label that complies with the content requirements in Section 25603(b)." Proposed Section 25603 subdivision (b) allows for a short-form warning so long as the warning is an on-product label.

Although in context the term "on-product" appears to refer to warnings that are on the exterior packaging of the product or on the product itself, the Coalition believes that the regulations would nonetheless benefit from clarifying that the "on product" warning need not appear on the product itself but can instead appear on its label or other exterior packaging. One simple way to make this clarification would be to add the term "or on-package" after the term "on-product" in proposed Sections 25602 subdivision (a)(4) and 25603 subdivision (b).

11. **Proposed Section 25603(a)(1): The Pictogram Is Associated With Hazards Beyond those That Fall Within Proposition 65's Reach and The Proposed Coloring Scheme Will Result in Unnecessary and Increased Costs**

To comply with proposed Section 25603 subdivision (a)(1), a Proposition 65 warning would need to include an American National Standards Institute (ANSI) symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. It is unclear why any symbol should be included with a Proposition 65 warning, especially one that has been used for other purposes and will not be meaningful to the receiver of the warning. Specifically, this very symbol is associated with more significant or acute hazards than those that fall within Proposition 65's reach, such as choking or allergic reaction risks.

Borrowing the ANSI symbol and pairing it with a "WARNING" in all capital letters will inadvertently and perversely increase consumer confusion. Its widespread appearance on products such as earrings, headphones, and garden hoses will seriously dilute, by overwarning, the ANSI Z535 committee's careful standardization work since 1979 to "promote a single, uniform graphic system used for communicating safety and accident prevention and information." (ANSI Z535.4-2011, Foreword, page vii.) The use of this symbol and "WARNING" is clearly intended for potential accident situations where death or a serious potential injury is possible. (ANSI Z535.4-2011, clause E4.3, page 31.)

Accordingly, it would be more consistent with the statute and make more sense to use within a symbol a "P65" or "65" that associates with the basis for why the warning is being given and provides a URL to go to the website where more explanatory and contextual information will be available.

From a practical standpoint, the proposed requirements for the color scheme of the symbol (yellow with a bold black outline) will be problematic for businesses placing the warning on their products depending on their packaging and color scheme. Businesses that have established

and used product packaging that are known to their consumers should not have to undertake a packaging modification simply for the purpose of adding the yellow and black triangle symbol, particularly given that consumers will not know what the symbol represents. The Proposal is unduly onerous (because printing costs may escalate with the number of separate colors being used or the number of pieces/parts of labeling to which they may have to be applied) and, because the color yellow may itself non-verbally signal a more significant or acute level of risk than that for which the warning (which could be based only a small detectable amount and/or due to a 1,000 fold safety factor) is being given.

Further, while the Coalition appreciates OEHHA allowing businesses to use black and white, the Proposal only allows for this flexibility if the sign, label or labeling for the product is not printed using the color yellow. The Coalition continues to urge OEHHA to eliminate the mandate that the symbol be in yellow color. This is for practical purposes because, as is the case with many businesses, businesses often have pre-printed labels that are shipped to facilities. Product labels are typically printed on a contractual basis in large quantities to reduce the cost per label. Traditionally, the branding on the front of the label is colorful for marketing purposes. Generally, on pre-printed labels the product identifier and hazard communication information is left blank. Then, at the manufacturing facility the product identifier and hazard communication is printed using one or two tone printers.

Additionally, many businesses are subject to the federal revised Hazard Communication Standard ("HCS 2012") and have thus invested in two-tone printers that can only print red and black to accommodate the new requirements for the red border for the Globally Harmonized System of Classification and Labeling (GHS) pictograms. These two-tone printers would be used to print all of the hazard communication information including the Prop 65 warning and cannot accommodate the yellow pictogram.

In practice, OEHHA's proposed color requirement will pose significant costs and burdens for Coalition members and other companies that use pre-printed labels. Using a black and white pictogram would also not go against OEHHA's goal to provide meaningful warnings to consumers because, according to OEHHA's UC Davis Study, the study tested participants' reaction to the proposed warning symbol in both yellow and in black and white. OEHHA states that people interpreted the ANSI symbol to mean "warning" and few expressed confusion. Since OEHHA does not indicate that the study participants expressed a preference for yellow, nor were they more confused by the symbols that were in black and white versus in yellow, that the yellow color is not a necessary component that consumers need to understand the warning, and therefore should not be a requirement in the safe harbor provisions.

The Coalition requests that OEHHA simply allow manufacturers to print the pictogram in black and white option or, alternatively, provide flexibility to businesses subject to the HCS 2012 to provide a symbol of consisting of a black exclamation point in a red equilateral triangle. This is a practical improvement that would not deter from providing a clear and reasonable warning, and it could potentially save companies thousands of dollars.

12. <u>Proposed Section 25601(b): The Proposal Exposes Businesses That Warn Using Alternative Language to Heightened Litigation Risk As Compared to Today's Regulation</u>

Proposed Section 25601 subdivision (b) allows businesses to warn any way they wish so long as the warning "complies" with the Act. However, unlike under existing regulations, the cardinal

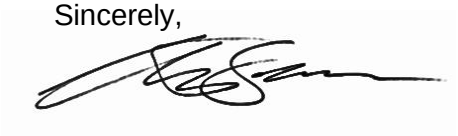
phrase "clear and reasonable" is not given any interpretive guidance. The conclusion to be drawn from eliminating prior "clear and reasonable" guidance is that businesses cannot rely on it going forward.

If the current regulation's language explaining what it means for a warning to be "clear and reasonable" is not retained, businesses will be forced to either use the new safe harbor language or risk being subjected to litigation over whether alternative warnings they use, or warnings that inadvertently miss the "safe harbor" mark, are "clear and reasonable" under that now undefined standard. OEHHA's elimination of this language leaves only a vacuum to replace it, and businesses crafting their own warnings will be far more likely to be attacked by private enforcers who take an expansive view of the statute's "clear and reasonable" requirement in order to use the expense businesses face in the litigation process as leverage to continue to extract settlements. In addition, it will waste precious state court resources, which will necessarily be taxed by a new round of senseless Proposition 65 cases.

If the proposed regulation is truly intended to form a new safe harbor only and to continue to permit businesses to provide alternative warnings—as well as establish the basis for defending a non-safe harbor warning—then restoration of the existing regulation's explanation of what "clear and reasonable" means is required. For that reason, we again ask OEHHA to carry forward unaltered the current regulation's introductory language regarding the meaning of "clear and reasonable" into the newly proposed regulation.

Thank you for considering our comments. We appreciate the opportunity to participate in this very important regulatory process.

Sincerely,



Anthony Samson
Policy Advocate
California Chamber of Commerce

On behalf of the following organizations:

ACH Food Companies, Inc.
Adhesive and Sealant Council
Advanced Medical Technology Association (AdvaMed)
Agricultural Council of California
All-Coast Forest Products, Inc.
Alliance of Automobile Manufacturers
Allwire, Inc.
American Apparel & Footwear Association
American Architectural Manufacturers Association
American Beverage Association
American Brush Manufacturers Association
American Chemistry Council
American Cleaning Institute
American Coatings Association
American Composites Manufacturers Association

American Fiber Manufacturers Association
American Forest & Paper Association
American Frozen Food Institute
American Herbal Products Association
American Home Furnishings Alliance
American Lumber Company
American Petroleum and Convenience Store Association
American Wood Council
Amway
APA – The Engineered Wood Association
Apartment Association of Greater Los Angeles
Apartment Association of Orange County
Apartment Association, California Southern Cities
Associated Roofing Contractors of the Bay Area Counties, Inc.
Association of Home Appliance Manufacturers
AXIALL LLC
Auto Care Association
Automotive Specialty Products Alliance
Basalite Concrete Products
Belden
Berk-Tek
Bestway
Betco Corporation
Bicycle Product Suppliers Association
Biocom
Biotechnology Innovation Organization
Brawley Chamber of Commerce
Breen Color Concentrates
Building Owners and Managers Association of California
Burton Wire & Cable
California Apartment Association
California Asphalt Pavement Association
California Association of Boutique & Breakfast Inns
California Association of Firearms Retailers
California Association of Health Facilities
California Attractions and Parks Association
California Automotive Business Coalition
California Building Industry Association
California Business Properties Association
California Cement Manufacturers Environmental Coalition
California Citizens Against Lawsuit Abuse
California Construction and Industrial Materials Association
California Cotton Ginners Association
California Cotton Growers Association
California Farm Bureau Federation
California Furniture Manufacturers Association
California Grocers Association
California Hospital Association
California Hotel & Lodging Association
California Independent Oil Marketers Association

California Independent Petroleum Association
California League of Food Processors
California Life Sciences Association
California Manufacturers and Technology Association
California Metals Coalition
California/Nevada Soft Drink Association
California New Car Dealers Association
California Paint Council
California Rental Housing Association
California Restaurant Association
California Retailers Association
California Self Storage Association
California Small Business Alliance
California Travel Association
Camarillo Chamber of Commerce
Can Manufacturers Institute
Carlsbad Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
Central Valley Building Supply
Chambers of Commerce Alliance Ventura and Santa Barbara Counties
Chemical Fabrics & Film Association, Inc.
Chemical Industry Council of California
Civil Justice Association of California
Coast Wire & Plastic Tec., LLC
Communications Cable and Connectivity Association
Composite Panel Association
Computing Technology Industry Association (CompTIA)
Consumer Technology Association
Consumer Healthcare Products Association
Consumer Specialty Products Association
Copper & Brass Fabricators Council, Inc.
Council for Responsible Nutrition
Crenshaw Lumber Company
Dow Chemical Company
DuPont
East Bay Rental Housing Association
Economy Lumber
El Centro Chamber of Commerce
Fairfax Lumber & Hardware
Family Winemakers of California
Fashion Accessories Shippers Association
Federal Plastics Corporation
Flexible Vinyl Alliance
Footwear Distributors & Retailers of America
Frozen Potato Products Institute
Ganahl Lumber
Graco Inc.
Greater Bakersfield Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Grocery Manufacturers Association

Halogenated Solvents Industry Alliance, Inc.
Hardwood Plywood Veneer Association
Independent Lubricant Manufacturers Association
Industrial Environmental Association
Information Technology Industry Council
International Crystal Federation
International Franchise Association
International Council of Shopping Centers
International Fragrance Association, North America
IPC – Association Connecting Electronics Industries
ISSA, The Worldwide Cleaning Industry Association
J.R. Simplot Company
Juvenile Products Manufacturers Association
Loes Enterprises, Inc.
Lonseal, Inc.
LP Building Products
Medical Imaging & Technology Alliance
Metal Finishing Association of Northern California
Metal Finishing Association of Southern California
Mexichem
Motor & Equipment Manufacturers Association
NAIOP of California, the Commercial Real Estate Development Association
National Association of Chemical Distributors
National Council of Textile Organizations
National Electrical Manufacturers Association
National Federation of Independent Business
National Lumber and Building Material Dealers Association
National Shooting Sports Foundation
Natural Products Association
NorCal Rental Property Association
North American Home Furnishing Association
North Orange County Chamber
North Valley Property Owners
Nutraceutical Corporation
OCZ Storage Solutions
Orange County Business Council
Osborne Lumber Company
Outdoor Power Equipment Institute
Oxnard Chamber of Commerce
Pacific Coast Producers
Pacific Water Quality Association
Pactiv Corporation
Parterre Flooring Systems
Personal Care Products Council
PGP International, Inc.
PhRMA
Plumbing Manufacturers International
Polyurethane Manufacturers Association
Power Tool Institute
Printing Industries of California

Procter & Gamble
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Reel Lumber Service
Resilient Floor Covering Institute
Roadside Lumber & Hardware Inc.
San Diego County Apartment Association
San Diego Regional Chamber of Commerce
San Joaquin Lumber Company
Santa Barbara Rental Property Association
Santa Maria Chamber of Commerce
Searles Valley Minerals
Sentinel Connector System
Sika Corporation
Simi Valley Chamber of Commerce
Specialty Equipment Market Association
SPI: The Plastic Industry Trade Association
SPRI, Inc.
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI)
Straight-Line Transport
Styrene Information and Research Center
Superior Essex
Taiga Building Products
TechNet
The Adhesive and Sealant Council
The Art and Creative Materials Institute
The Association of Global Automakers, Inc.
The Kitchen Cabinet Manufacturers Association
The Chamber of the Santa Barbara Region
The Vinyl Institute
The Vision Council
Toy Industry Association
Travel Goods Association
Treated Wood Council
USANA Health Sciences, Inc.
USHIO America, Inc.
Valley Industry & Commerce Association
Van Matre Lumber
Visalia Chamber of Commerce
Water Quality Association
WD-40 Company
West Coast Lumber & Building Materials Association
Western Agricultural Processors Association
Western Electrical Contractors Association
Western Growers Association
Western Mining Alliance
Western Plant Health Association
Western Propane Gas Association

Western States Petroleum Association
Western Wood Preservers Institute
Window & Door Manufacturers Association

cc: Matthew Rodriguez, Secretary, CalEPA
Gina Solomon, Deputy Secretary for Science and Health, CalEPA
Lauren Zeise, Acting Director, OEHHA
Allan Hirsch, Chief Deputy Director, OEHHA
Carol Monahan-Cummings, Chief Counsel, OEHHA
Mario Fernandez, Staff Counsel, OEHHA
Keely Bosler, Cabinet Secretary, Office of the Governor
Kim Craig, Deputy Cabinet Secretary, Office of the Governor
Ken Alex, Senior Policy Advisor, Office of the Governor
Cliff Rechtschaffen, Senior Policy Advisor, Office of the Governor
Panorea Avdis, Director, Governor's Office of Business and Economic Development
Poonum Patel, Permit Specialist, Governor's Office of Business and Economic Development
Assemblyman Luis Alejo, Chair, Assembly ESTM Committee
Senator Bob Wieckowski, Chair, Senate Environmental Quality Committee