

**BEFORE**  
**THE STATE OF CALIFORNIA**  
**CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY (Cal/EPA)**  
**OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT (OEHHA)**

**COMMENTS OF THE**  
**AMERICAN HERBAL PRODUCTS ASSOCIATION**

**ON**

**OEHHA's JANUARY 16, 2015 REGULATORY PROPOSAL TO**  
**ADD SECTION 25205 TO TITLE 27, ARTICLE 2, OF THE**  
**CALIFORNIA CODE OF REGULATIONS**

**April 8, 2015**

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## 1.0 General comments

California's Office of Health Hazard Assessment (OEHHA) on January 16, 2015 issued a notice of proposed rulemaking to add section 25205 to Title 27, Article 2, of the California Code of Regulations (CCR). As described by OEHHA, this regulation would establish the framework for a website operated by OEHHA that would provide supplemental information to the public about potential exposures to Proposition 65 listed chemicals.

In a pre-regulatory proposal issued on March 7, 2014 OEHHA had identified a similar idea for an OEHHA-operated website but had incorporated this idea into a broader proposed amendment to 27 CCR, Article 6, the regulation for clear and reasonable warnings under Proposition 65. The January 2015 proposed rulemaking instead proposes to create a separate regulation; numerous modifications were made to the website idea between the March 2014 pre-regulatory proposal and the January 2015 proposed rulemaking.

The American Herbal Products Association (AHPA) is the national trade association and voice of the herbal products industry. AHPA is comprised of domestic and foreign companies doing business as growers, processors, manufacturers and marketers of herbs and herbal products. AHPA serves its members by promoting the responsible commerce of products that contain herbs. Many AHPA members do business in California and thus are subject to Proposition 65.

AHPA therefore submits the comments herein to identify specific concerns in regard to the OEHHA proposal to add section 25205 to 27 CCR, Article 2 and to make specific suggestions and requests for changes to this proposal. These comments follow on AHPA's June 13, 2014 comments to the original preregulatory proposal.

AHPA appreciates that OEHHA has significantly revised its proposal for the lead agency website. In particular, AHPA appreciates that OEHHA has moved the proposed regulations pertaining to the website to a separate Article and has clarified that compliance with Article 2 is not subject to lawsuit by private party plaintiffs.

## 2.0 Comments regarding proposed § 25205(a)

### 2.1 Intended scope of the website

It is unclear whether the website is intended to provide general information about categories of products and exposures or whether it may contain specific information about specific brands of products. OEHHA's Statement of Reasons<sup>1</sup> implies that the website will focus on general information, insofar as it states that the "information will be obtained primarily from public sources or be developed by OEHHA" and will be only "occasionally" obtained from industry sectors or businesses providing warnings. Presumably, OEHHA will not have the resources to develop accurate and comprehensive information on individual brands of products, so the fact that information will be requested from businesses only "occasionally" would seem to indicate that brand-specific information is not intended.

On the other hand, the fact that proposed § 25205(a)(1) states that the website will "display the information provided pursuant to subsection (b)" – i.e., an extensive set of data obtained from individual businesses – implies that the website is indeed intended to present brand-specific information. This impression is reinforced by 25205(d) which states that an individual firm's compliance with the website requirements shall not be deemed to constitute compliance with the requirement to provide "clear and reasonable" warning.

AHPA opposes a general practice of including brand-specific information on the proposed website. AHPA is even more strongly opposed to the prospect of "occasionally" singling out specific businesses for special treatment and public disclosure on the website separately from their peers in the marketplace. If brand-specific information is to be included, it is imperative that all brands with similar products be treated similarly.

If brand-specific information is to be made public on the website, AHPA hereby reiterates the concerns expressed in its comment # 4.5(d) to OEHHA's March 7, 2014

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<sup>1</sup> Initial Statement of Reasons, Title 27, California Code of Regulations Proposed Adoption of Article 2, Section 25205 Lead Agency Website, January 16, 2015.

pre-regulatory proposal that the person most highly motivated to ensure the accuracy of brand-specific information presented on the website will be the brand owner itself.<sup>2</sup> AHPA furthermore objects to the provision in proposed § 25205(a)(2) that “any person” may provide information to be posted on the website: only the manufacturer or brand owner will have sufficient data to provide accurate and complete data regarding the brand’s products; test results based on testing one or a few samples or by a laboratory that is not aware of the product’s intricacies and what matrix-specific analytical methods may be required for it,<sup>3</sup> will not be reliable indicators of exposures caused by the product and such data must not be presented to the public with the inevitable implication that the data is reliable and representative.<sup>4</sup>

However, based on the description provided in the Statement of Reasons, AHPA believes that OEHHA does not intend to publish brand-specific information on the website as it is currently envisioned, but rather intends to publish general and/or aggregated information. AHPA therefore requests that proposed § 25205(a)(1) be revised as follows for clarity:

Develop an interactive web-based portal to collect and display ~~the~~ aggregated information provided pursuant to subsection (b) and other information compiled by the lead agency. No brand-specific or company-specific information will be made public in the web-based portal.

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<sup>2</sup> Comments of the American Herbal Products Association on OEHHA’s March 7, 2014 Pre-Regulatory Proposal to Amend Title 27, California Code of Regulations, § 25601 et. seq. – Clear and Reasonable Warnings.

<sup>3</sup> See comment # 2.3 below for additional discussion of this point, and footnote #10 for an example of the problems that may occur when analytical testing is performed without proper understanding of the product.

<sup>4</sup> AHPA acknowledges that OEHHA proposes in § 25205(a)(7) to include a disclaimer on the website, but believes such a disclaimer will not be able to counteract the public’s assumption that the data is reliable and representative. See comment # 2.3 below and footnote # 9.

## 2.2 Scope of the information to be provided regarding routes of exposure

Proposed § 25205(a)(3) lists a number of common routes or pathways of exposure that may be discussed on the website. AHPA notes that a significant common route of exposure, drinking water, is absent from this list. AHPA is aware that most public and private drinking water is exempt from the Prop 65 warning requirements, due to the provisions both of existing § 25502(a) (which provides that listed chemicals in drinking water generally do not cause an individual to be “exposed” for purposes of Section 25249.6 of the Act<sup>5</sup>) and of existing § 25711(a)(2) (which establishes no significant risk levels equivalent to contaminant levels accepted in drinking water by the State and by Regional Water Quality Control Boards), as well as to the provisions of the Act itself (such as Section 25249.11(b) of the Act, which excludes operators of public water systems from the definition of a “person” who is required to provide Prop 65 warnings).

However, the human body does not distinguish between listed chemicals present in drinking water vs. the same listed chemicals present in another food matrix. To the extent that the listed chemical causes deleterious health effects, it will cause the same effects whether delivered to the body in the form of drinking water, orange juice, rib roast, or peanut butter. Indeed, insofar as water requires no digestion to liberate listed chemicals from the food matrix, the listed chemicals in drinking water may be more bioavailable, and hence more deleterious, than the same listed chemicals in another food matrix.

Furthermore, it is known that drinking water frequently contains listed chemicals at levels that would trigger a Prop 65 warning were they to occur in any food other than drinking water. For example, drinking water often contains measurable levels of trihalomethanes such as chloroform, a listed chemical “known to the State of California” to cause both cancer and reproductive toxicity.

If OEHHA’s intention as identified in the Statement of Reasons is “to provide supplemental, contextual information” in order to “allow the public to make informed choices” then it is essential that the levels of listed chemicals provided in drinking water

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<sup>5</sup> Ballot Proposition 65, Restrictions on Toxic Discharges into Drinking Water; Requirement of Notice of Persons’ Exposure to Toxics. Initiative Statute, 1986, also known as “Prop 65.”

be discussed on the website. Without this information, the data provided with respect to other sources of exposure are inherently misleading. For example, chloroform occurs in California drinking water at levels up to a dozen or more  $\mu\text{g/L}$ <sup>6</sup>, which is significantly above the levels that trigger a Prop 65 warning for other sources of exposure. Since chloroform is listed as a reproductive toxin for which no Maximum Allowable Dose Level (MADL) has been established, businesses are (in practical effect) required to provide a Prop 65 warning for *any* exposure to chloroform, no matter how small.<sup>7</sup> This means that products causing chloroform exposures of 1  $\mu\text{g/day}$  or 0.1  $\mu\text{g/day}$  or 0.01  $\mu\text{g/day}$

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<sup>6</sup> As summarized in the Draft Public Health Goal for Trihalomethanes in Drinking Water (OEHHA, September 2010), one study of California drinking water found a mean chloroform concentration of 6.2  $\mu\text{g/L}$  in samples that contained the analyte; another found median chloroform concentrations of up to 15  $\mu\text{g/L}$ ; a third study found a mean chloroform concentration of 2.5  $\mu\text{g/L}$  with zero values and non-detects treated as half the nominal detection limit (a practice which would artificially lower the reported mean compared to the first study which simply excluded those data points). Since these numbers represent averages, it is clear that the levels of chloroform in some samples must be much higher than the reported average. These studies indicate that where chloroform occurs in drinking water, the daily exposure may be dozens of  $\mu\text{g/day}$  based on a daily water intake of 2 to 3 liters per day. For purposes of the Act, OEHHA uses a standard drinking water consumption estimate of 2 L/day for adults and children (§ 25721(d) of the current regulations), but AHPA believes the actual amount may be closer to 3 L/day at least for adults. Using data from the National Health and Nutrition Examination Survey (NHANES), others have found that actual consumption of plain tap water among adults averages 0.6 L/day; that plain (tap + bottled) water consumption among adults aged 20-50 years (the adult population most likely to be affected by exposures to substances listed under Prop 65) averages 1.3 L/day; that water consumption from all beverages among adults aged 20-50 years averages 2.9 L/day; and that total (foods + beverages) water consumption among adults aged 20-50 years averages 3.6 L/day. ("Water and beverage consumption among adults in the United States: cross-sectional study using data from NHANES 2005–2010." Drewnowski et al. BMC Public Health 2013, 13:1068.) AHPA believes the first two numbers to drastically underestimate public drinking water consumption insofar as they do not include coffee, tea, soda, soup, etc. made with tap water, and the first number is even less accurate since it excludes unpurified water sold in bottled form. The final number should be higher than actual public drinking water consumption insofar as it includes unreconstituted fruit juice, milk, purified bottled water, moisture contained naturally in food, etc. The third number (water consumption from beverages = 2.9 L/day) may be the closest to an accurate estimate of public drinking water consumption, since it both includes items that should be excluded (e.g. fruit juice not from concentrate, milk) and excludes items that should be included (e.g. soup prepared with public drinking water). Thus, AHPA believes the estimate of 2 L/day assumed by OEHHA for purposes of the Act may significantly underestimate daily consumption of public drinking water.

<sup>7</sup> AHPA acknowledges that under the letter of the law, businesses are not required to provide the Prop 65 warning if they can show that the exposures poses no significant risk of cancer and no observable reproductive toxicity effect (Section 25249.10(c) of the Act). In practice, however, this option may not be used due to the high costs involved in performing such an analysis, combined with the fact that even companies who have performed the analysis remain susceptible to lawsuits by private plaintiffs if they choose not to provide the warning.

may be providing the Prop 65 warning despite the fact that these exposures may be trivial compared to the levels of chloroform provided in drinking water. This situation is inherently misleading to consumers: the warning implies that the consumer will derive some health benefit from avoiding the exposure warned by the business, but in fact there is no clear benefit in avoiding a chloroform exposure of (say) 0.1 µg/day from a commercial product while consuming (say) 10 µg/day from drinking water.

AHPA believes that similar analysis would apply to a variety of Prop 65-listed chemicals found in drinking water, such as heavy metals, radioisotopes, and pesticides. Therefore, in order to provide consumers with an accurate, non-misleading perspective on the exposures caused by commercial products, it is essential that any web portal provide similar information on the exposures caused by drinking water. Furthermore, consumers must be provided the means to identify the levels of these chemicals that occur in their own drinking water supply, in a manner that is directly comparable to the Prop 65 level data (i.e., by reporting the mean and/or range of each chemical, as opposed to obfuscating the relevant data by reporting total trihalomethanes rather than individual ones, or reporting lead levels “at the 90<sup>th</sup> percentile”).

AHPA therefore requests that proposed § 25205(a)(3) be revised as follows for completeness:

Provide information to the public concerning exposures to listed chemicals, including common routes or pathways of exposure such as:

(a) Ingesting foods and drinking water;...

AHPA furthermore requests that the web portal include a database in which consumers may look up historical data for listed chemicals in the drinking water provided by their water supplier (including public and private sources of drinking water as well as bottled water<sup>8</sup>), with the data presented in a format that will facilitate direct comparison of the drinking water levels of individual chemicals with the exposure levels caused by other commercial products.

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<sup>8</sup> Bottled water has frequently been found to be a source of listed chemicals; see for example “Bottled Water: Pure Drink or Pure Hype?” Natural Resources Defense Council, available at <http://www.nrdc.org/water/drinking/bw/bwinx.asp>.

### 2.3 Comments regarding proposed § 25205(a)(7)

Proposed § 25205(a)(7) requires the web portal to include a disclaimer that “OEHHA cannot assure the accuracy of information it has received under section (b) from manufacturers, producers, distributors, or importers of consumer products.”

AHPA appreciates that the web portal will include a disclaimer to indicate that the data presented may not be accurate. However, AHPA cautions that no disclaimer will be sufficient to avoid the consumer perception of the data as accurate and reliable; consumers typically assume that health-related information presented by the government is authoritative.<sup>9</sup>

AHPA furthermore objects to the proposal to single out information “received under section (b) from manufacturers, producers, distributors, or importers of consumer products” for a special disclaimer of accuracy. Data from any source can, and often is, inaccurate due to use of analytical methods that are not valid for the matrix in question; laboratory error; unrepresentative sampling; and other problems. Often, a commercial entity associated with the product is precisely the person with the most accurate and complete data concerning a product and who is in the best position to choose appropriate analytical methods and compile comprehensive data.<sup>10</sup> To the extent that some may fear commercial entities have an incentive to provide data that understates the levels of listed chemicals in their products, AHPA notes that environmental groups, private plaintiffs, and others may have a countervailing incentive to erroneously

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<sup>9</sup> See for example J Med Internet Res. 2003 Jul-Sep; 5(3): e21, "Trusted Online Sources of Health Information: Differences in Demographics, Health Beliefs, and Health-Information Orientation." M. Dutta-Bergman, finding that government is among the most trusted sources of health information.

<sup>10</sup> A notable recent example demonstrating this fact can be seen in the controversy caused by the New York Attorney General's use of invalid DNA testing, which led the Attorney General (AG) erroneously to allege that herbal products marketed by GNC Holdings Inc. (GNC) failed to contain the ingredients listed on the label; a position from which the AG was subsequently forced to retreat after GNC was vindicated through use of appropriate analytical methods. (See the March 27, 2015 agreement between the AG and GNC, available at <http://www.ag.ny.gov/pdfs/NYAG-GNC%20AGREEMENT.%20FINAL%20AGREEMENT.%203.28.2015..pdf>.) While this instance had nothing to do with Prop 65 listed chemicals, it exemplifies the errors that may occur through an inadequate understanding of product matrices and the inappropriate choice of analytical technologies and laboratories.

overstate the levels of listed chemicals. Absent a comprehensive, multi-party data collection exercise using multiple laboratories and analytical methods, there is no scientific justification to assume that any particular set of data is more accurate than another.

AHPA therefore requests that proposed § 25205(a)(7) be revised as follows for accuracy:

Provide a disclaimer indicating that OEHHA cannot assure the accuracy of information provided on the web portal ~~it has received under section (b) from manufacturers, producers, distributors, or importers of consumer products.~~

### **3.0 Comments regarding proposed § 25205(b)**

#### **3.1 Lack of authority**

AHPA can find no language in the Act that envisions, much less requires, extensive data regarding Prop 65 exposures to be submitted to OEHHA. The Act requires only that businesses provide the Prop 65 warning prior to exposing an individual to a listed chemical. AHPA therefore believes that proposed § 25205(b) exceeds OEHHA's statutory authority, and requests that the word "must" be replaced with "may," "should," or similar language to indicate that providing the information to OEHHA is optional.

#### **3.2 Lack of clarity in the introductory sentence**

AHPA is concerned that the introductory sentence of proposed § 25205(b) lacks clarity in two areas.

Firstly, in the initial sentence it is unclear whether the phrase "that is providing a warning" applies only to "a particular business" or also applies to "[t]he manufacturer, producer, distributor, or importer of a product." AHPA understands based on the Statement of Reasons that OEHHA intends to collect information only from businesses

(including manufacturers, producers, distributors, and importers) that are providing the warning, and believes the regulatory language should unambiguously reflect this.

Secondly, AHPA notes that OEHHA stipulates in the Statement of Reasons that a business will not be expected to obtain or develop new data in order to respond to a request for data under § 25205(b). OEHHA states, “This section does not confer any responsibility on a business to do new testing or analysis in response to a request from OEHHA. If the business does not have the requested information, then it would be sufficient for it to respond to an information request by providing the responsive information that it does have and informing OEHHA that it does not possess the other requested information.” However, these stipulations are not explicitly included in the language of the regulation itself, which merely states that the information must be provided “when reasonably available.” AHPA believes that the phrase “when reasonably available” is ambiguous; for example, it might be interpreted to mean that the firm should perform testing or perform a literature review in order to obtain the information requested. Particularly in view of the extensive list of information that may be included in the request, AHPA believes such a requirement would be onerous and unjustified as well as inconsistent with OEHHA’s economic analysis in the present Notice of Proposed Rulemaking.

Therefore, if OEHHA proceeds to implement data collection exercises as described in proposed § 25205(b) (see AHPA’s alternate suggestions in comment 3.4 below), AHPA recommends the initial sentence be revised for clarity as follows:

The manufacturer, producer, or distributor, ~~or importer~~<sup>11</sup> of a product, (including food) for which a warning is provided, or a particular business that is providing a warning, ~~must~~ may be requested to provide the following information, ~~when reasonably available~~ if known to the firm at the time the request is made, upon the lead agency’s request, and within the timeframe specified in the request:

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<sup>11</sup> In comment 4.1 of AHPA’s April 8, 2015 comments to proposed Article 6, AHPA discusses why it is inappropriate and unnecessary to include “importers” in these regulations.

### 3.3 List of data items

AHPA has a number of concerns regarding the data items listed in § 25205(b)(1) through (10).

Firstly, AHPA notes that the list is quite long and, even so, remains open-ended (paragraph (10) includes “[a]ny other related information that the lead agency deems necessary”). AHPA is concerned that the length of the list may make gathering the requested information quite onerous, especially if OEHHA does not make the adjustments and clarifications recommended in comment 3.2.

Secondly, AHPA is concerned that several of the items in the list will often be unknown to the firm that receives OEHHA’s request for information. For example, many products pass through a number of brokers’ and distributors’ hands prior to reaching California, and it may therefore be impossible to determine the “name and contact information for the manufacturer of the product.” Furthermore, there are likely to be cases where a firm lacks information about the “location” of the listed chemical or its presence in “component parts” or the “matrix.” To ensure clarity, AHPA therefore requests that paragraphs (2), (5) through (7), (9), and (10) be amended to include “if known” at the end of each item.

Third, AHPA is concerned that the differences between paragraphs (5), (6), and (7) are unclear. It appears that paragraph (7), which mentions “the matrix, as defined in subsection 25900(g) of this chapter,” is directed toward the materials of construction or ingredients in the product (in other words, if cream of tomato soup is made from milk, tomatoes, water, and spices, in which of these ingredients does the listed chemical occur, and at what concentrations?). However, paragraph (6) may also be read as referring to the materials of construction or ingredients insofar as it mentions “multiple component parts.” To avoid a redundant interpretation, AHPA assumes that the “component parts” in paragraph (6) are intended to be discrete physical components that comprise the product (such as a garden hose consisting of a flexible tube and a solid fitting at each end) rather than ingredients or materials of construction. However, this interpretation in turn appears to be duplicative of paragraph (5), which refers to

“the location of the chemical or chemicals in the product.” AHPA strongly encourages OEHHA to clarify the precise meanings of paragraphs (5), (6), and (7) and to ensure the regulatory language in each paragraph accurately reflects the intended meaning.

### **3.4 General concerns and alternate suggestions**

Overall, AHPA has a number of concerns regarding OEHHA’s intended collection of data for the web portal.

Firstly, insofar as it appears that data will be collected selectively from those firms that are providing Prop 65 warnings, it is likely that the resulting information provided on the website will not be representative of the full range of products in the marketplace and, by inherently biasing the sample towards products that cause higher exposures, will be erroneously skewed towards alarming the public about the products in question. For example, if several brands of colored paint bearing the Prop 65 warning are polled by OEHHA, OEHHA may be provided with information to indicate the products contain 0.1 to 2.0 ppm of a listed chemical that may be absorbed through the skin. If OEHHA were to present this information on its website, consumers might be left with the erroneous impression that all colored paints cause similar exposures, when in fact there may be many paints that do not cause the exposure. This inherent bias in the data would be rectified by including a broad range of companies in the information request (both those that provide the warning for their colored paint and those that do not). AHPA notes, however, that OEHHA has no authority to require any company to respond to its information request, much less to impose this burden on companies that do not provide the Prop 65 warning.

AHPA therefore suggests that OEHHA should undertake anonymous, voluntary surveys of entire product sectors, rather than singling out the “occasional” private entity for information requests.

AHPA also requests OEHHA to engage a consumer-oriented market research firm to aid in the design of the web portal and the language it will use. AHPA doubts whether OEHHA has the expertise and experience necessary to create a consumer-friendly

website that will succeed in communicating complex scientific ideas to the public in a simple, accurate, not misleading manner. For example, the existing Prop 65 warning language recommended by OEHHA is unnecessarily inflammatory, alarmist, and misleading to the public as shown in research by AHPA member companies and others.<sup>12</sup>

Finally, AHPA requests that the content of each webpage in the web portal be published for comment by interested knowledgeable parties, including industry, academia, and others, prior to being finalized and made available to the general public.

#### **4.0 Comments regarding proposed § 25205(c)**

In order to encourage participation by private firms and to preclude inconsistent treatment of individual firms, AHPA requests OEHHA to revise § 25205(c) as follows to clarify that no data or information related to any individual brand or company will be disclosed on the web portal or elsewhere:

All brand-specific and company-specific information collected or developed under this Article will be considered Confidential Business Information and will be withheld from public inspection under the Public

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<sup>12</sup> For example, AHPA's members and others have found that the word "chemical" in and of itself is unusually alarming to consumers. The word "chemical" leads the consumer to believe the material in question is unnatural, artificial, synthetic, highly processed, and quite dangerous, none of which is what a consumer wants in a food and none of which is an accurate description of most consumable items (except perhaps drugs). Studies have repeatedly found the public has strong negative attitudes toward "chemicals" and the risks they pose. ("Intuitive Toxicology: Expert and Lay Judgments of Chemical Risks," N. Neil et al, *Toxicol Pathol* 1994 22: 198 Nancy Neil, Torbjörn Malmfors and Paul Slovic; also "Intuitive Toxicology. II. Expert and Lay Judgments of Chemical Risks in Canada," Paul Slovic et al, *Risk Analysis*, Volume 15, Issue 6, pages 661–675, December 1995.) In addition, the words "cancer," "birth defects," and "reproductive harm" are inherently alarming to consumers. Studies have found that consumers do not understand the importance of dose and exposure; generally view chemicals as either categorically safe or dangerous; and equate even small exposures to toxic or carcinogenic chemicals with almost certain harm. ("Intuitive Toxicology: Expert and Lay Judgments of Chemical Risks," N. Neil et al, *Toxicol Pathol* 1994 22: 198 Nancy Neil, Torbjörn Malmfors and Paul Slovic; also "Intuitive Toxicology. II. Expert and Lay Judgments of Chemical Risks in Canada," Paul Slovic et al, *Risk Analysis*, Volume 15, Issue 6, pages 661–675, December 1995.) Less than a quarter of US consumers understand that exposure to a carcinogenic chemical does not make one likely to get cancer later in life. ("Intuitive Toxicology: Expert and Lay Judgments of Chemical Risks," N. Neil et al, *Toxicol Pathol* 1994 22: 198 Nancy Neil, Torbjörn Malmfors and Paul Slovic.) Market research and anecdotal reports from AHPA members confirm these points.

Records Act (Government Code Section 6250 *et seq.*), Evidence Code 1040, and/or Evidence Code section 1060. In addition, if the lead agency requests information from a business pursuant to subsection (b) that the requester claims should not be available for public inspection under the Public Records Act (Government Code Section 6250 *et seq.*), Evidence Code 1040, Evidence Code section 1060, or that is otherwise exempt from disclosure, the response shall specifically identify the information and the basis for the claim that the information should be considered Confidential Business Information. All information submitted in response to a request from the lead agency under this section shall be open for public inspection, except as otherwise specifically identified by the business under this section. All such material shall be clearly marked as "Confidential Business Information". If the lead agency determines that the information that a business claims should not be available for public inspection must be released to the public under the Public Records Act or other law, it will promptly notify the business in writing at least 15 days prior to disclosure, in order to provide the business with the opportunity to submit additional justification for the claim or to contest the determination in an appropriate proceeding.

AHPA emphasizes in the strongest possible terms the importance of these revisions. If businesses are not assured that their information will be maintained in confidence by OEHHA, the provisions of § 25205(c) combined with § 25205(b) – especially if OEHHA persists in claiming the latter to be “required,” notwithstanding its lack of authority to do so under the law – will actively discourage firms from collecting data and information regarding the occurrence and sources of listed chemicals in their products, especially beyond the minimum data necessary to determine that a Prop 65 warning is required. Such an outcome would be contrary to the purposes of the Act.