April 13, 2016

Via Electronic Mail

Reference Attorney
California Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4439
staff@oal.ca.gov

Re: Proposed Emergency Regulation - California Office of Environmental Health Hazard and Assessment Warnings for Exposures to Bisphenol A From Canned and Bottled Food and Beverages, OAL File No. 2016-0408-02E

Dear Reference Attorney:

We write on behalf of the Natural Resources Defense Council and the Breast Cancer Fund. The proposed emergency regulations for Bisphenol A (BPA) warnings do not address an emergency and fail to provide clear and reasonable warnings to consumers about known toxicants as intended by Proposition 65. Therefore, while we appreciate the improvements to the proposed regulations that the Office of Environmental Health Hazard Assessment (OEHHA) has made since their initial proposal on March 17, 2016, we urge the Office of Administrative Law (OAL) to reject this proposal and direct OEHHA to conduct a regular notice and comment rulemaking to address BPA warnings and to ensure within that proposed rule that manufacturers give consumers truly clear and reasonable warnings about their exposure to BPA.

We Support the Improvements to the Language of the Proposed Warning and the Removal of the Environmental Justice Justifications for the Proposed Emergency Regulations

We thank OEHHA for the improvements to the language of the proposed warning so that the warning does not minimize the risks of BPA. We also appreciate OEHHA's decision to remove the inadequately supported environmental justice justifications for the proposed emergency regulations from its Notice of Emergency Action (Notice).[1] However, we continue to have concerns about the proposed regulation, particularly its failure to inform consumers about which specific products contain the chemical, and therefore oppose its adoption.

BPA Warnings Should Be Addressed Through Regular Notice and Comment Rulemaking

According to the Notice, OEHHA's finding of an emergency is based on three factors: 1) products that contain relatively high amounts of BPA may have no warning at all; 2) some retailers may put warnings on all products with BPA, while others warn selectively; and 3)

[1] Available at http://www.oehha.ca.gov/prop65/CRNR_notices/040116BPAEmergencyAction.html.

currently there is no statutory or regulatory requirement for Proposition 65 warnings to name the chemical of concern or the health effect associated with it.

While we agree that businesses may fail to warn and that variations in warnings may create consumer confusion, these problems are present with any Proposition 65 chemical warning because a business can always choose to provide a different warning than the safe harbor warning, to provide no warning at all, or to provide a warning for all products. Nothing about this scenario is abnormal and thus this situation could have been anticipated in advance and does not require an emergency regulation.

Moreover, the proposed emergency regulation does nothing further to require that products containing a high level of BPA carry a warning or to require uniformity and prevent the selective application of warnings. In other words, the proposed regulation does not address either of the first two factors. Allowing a generic sign rather than calling for product-specific warnings could provide even less information than the inconsistences anticipated by the Notice.

As for the third factor, we agree that a requirement to name the chemical of concern and the health effects associated with it would be an improvement over the status quo. However, the proposed emergency regulation does not impose such a requirement. It creates a "safe harbor" for businesses that choose to use the warning that OEHHA proposes, but it does not require the use of the proposed warning. Businesses may still choose to use less informative warnings.

In addition, there is no reason that a warning that provides more information on the chemical or its health effects could not also identify which products contain the chemical. In fact, that is precisely what OEHHA has put forward in its proposed general regulations for Proposition 65 warnings.[2, 3]

In effect, we do not agree that an emergency exists or that the proposed emergency regulation addresses the problems OEHHA identifies. In this context, curtailing the time for public comment is not justified. We urge the Office of Administrative Law to reject the current emergency regulation and direct OEHHA to commence a regular rulemaking to address the following shortcomings in the proposal.

The Safe Harbor Warnings Should Be Product Specific (as Required by Existing Regulations)

OEHHA has not explained why the safe harbor warnings cannot and should not be product specific. OEHHA's existing regulations for safe harbor warnings require that the warning

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[2] Available at: http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715WarningRegText.pdf.

[3] Ensuring consistency with the pending general regulations to provide more information about the chemical and health risks would be a better justification for the proposed emergency regulations. Even so, the proposed emergency regulations are not consistent with the requirement in the pending general regulations to identify the specific products which contain the chemical.

identify the specific products which contain the chemical that is on the Proposition 65 list, even though the warning is generic in that it does not specify the chemical or the health effects. *See* 27 Cal. Code Regs. § 25603.2(a)(2). The proposed update to those general regulations is similarly product specific, while additionally providing for the identification of the chemical and health effects. Proposed 27 Cal. Code Regs. §§ 25602(a) - (c), 25607.1(a), 25607.2(a)(3). As such, the proposed emergency regulation is inconsistent with both the existing and proposed general warning regulations.

In addition, the proposed emergency regulations require that manufacturers provide retailers with the information about which products contain BPA. Proposed Section 25603.3(f)(1)(B)(ii). There is no reason not to provide this information to consumers. As the existing and proposed safe harbor regulations implicitly acknowledge, this information is essential for consumers to make informed choices and is a critical element of the clear and reasonable warnings required by Proposition 65.

We urge OEHHA to follow its own proposed general regulations for the safe harbor warnings for BPA and provide both more meaningful information on the chemical and its health effects as well as information on which specific products contain BPA.

The Safe Harbor Warnings Should Inform Consumers *Before* They Make a Purchase

The proposed emergency regulation requires signs at the point of purchase, after a consumer has likely already made a shopping decision. However, to be a clear and reasonable warning to the consumer, the information should be provided before the point of purchase while the consumer is more likely to purchase a different product.

The Opportunity to Cure Violations Should Be Eliminated

There is no reason to treat the opportunity to cure violations differently in this proposed emergency regulation than in the existing and proposed general regulations. OEHHA has not explained why this is appropriate here when it does not exist under the general regulations and is not contemplated in Proposition 65.

The Emergency Regulations Would Set a Troubling Precedent

While we appreciate the language in the Notice to explain that “the emergency regulation should not be used as a precedent for future regulatory actions,” we are concerned that, in fact, they will create a troubling precedent for what counts as a clear and reasonable warning. This is all the more reason to ensure that the warnings are consistent with OEHHA’s proposed general warning regulations.

In closing, we thank OEHHA again for its consideration of our concerns and the improvements that have been made to date, but we strongly oppose the current emergency regulation and urge the agency issue a new proposed rule, which goes through the regular notice and comment rulemakings, that is consistent with current and proposed standards of "clear and reasonable warnings," and address the issues we raise above.

Sincerely,

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