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DEPARTMENT OF JUSTICE



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June 11, 2010

By electronic transmission and U.S. mail
Carol Monahan-Cummings
Chief Counsel
Office of Environmental Health Hazard Assessment
California Environmental Protection Agency
1001 I Street, 23rd Floor, MS # 25B
Sacramento, CA 95814

RE: Draft Food Regulation

Dear Carol:

Below are the Attorney General's comments to the Draft Food regulation:

We recognize the difficulty of reconciling the interests and positions of the different groups in connection with promulgating a food regulation, and we appreciate the time and effort that OEHHA has put into drafting this regulation. We look forward to continuing to work with you in this effort. Our comments below address general issues and do not attempt to craft or critique specific language. The comments do not necessarily address every issue that presents problems.

1. 25602 definitions: We believe that the regulation should clarify that a Food Retailer selling a house brand product is treated as a "Food Provider" for purposes of this regulation. The Food Retailer should retain responsibility for insuring that the products sold under its own name, and represented by it to be of high quality, are in compliance with the law. Further, it is impossible for Proposition 65 enforcers to determine who manufactures the house brand product for the Food Retailers, and they would therefore be unable to serve a notice or file a suit against the manufacturer. We suggest that the definitions of Food Provider and Food Retailer be revised to make clear that the Food Retailers are treated as Food Providers for their house brand products.

Related to the above, the regulation should similarly exclude all unpackaged items where it is impossible to identify the Food Provider. This would include fresh produce, fresh meat, fish, chicken, and bulk food items, unless the Food Retailer provides on the website the name and address of the Food Provider for these items. If that information is not provided, it will be impossible for the public to identify the Food Provider who should be sued.

2. 25603.4 (d): The regulation as written states that the Food Provider has complied with the warning requirement if it provides information about foods that “it believes in good faith require a warning under the Act. . .” This is inconsistent with the statutory language, which requires that the business provide a warning when it knowingly and intentionally exposes individuals to a listed chemical. By drafting the language in this manner, you are adding a subjective “good faith” defense that is not present in the statute. The language should be revised to state that the Food Provider must provide the required information for “each listed chemical present in the food that requires a warning under the Act.” If the Food Provider does not believe the chemical requires a warning, it retains the burden of proving that the exposure meets one of the statutory exemptions.

The Food Provider should be required to identify all chemicals that require a warning, not just the three chemicals with the lowest daily intake level or highest concentration. The latter provision could result in a Food Provider identifying only carcinogens when reproductive toxins are also present, or identifying less toxic chemicals, rather than more toxic chemicals. The provision can be amended to provide that the Food Provider cannot be sued for violation of Proposition 65 if it fails to identify all of the chemicals in the product, as long as consumers obtain the necessary warnings.

The regulation states that the Food Provider shall upload its warning to the website, but does not explain whether the uploading is done directly by the Food Provider, or by OEHHA after review. We believe that warnings should not be directly uploaded by the Food Provider until OEHHA has had an opportunity to review and approve or disapprove the warning.

As the regulation reads now, the Food Provider can automatically include “explanatory information,” which is undefined, provided by state and federal agencies. Such language should not be added to the website until OEHHA has had an opportunity to review and approve or disapprove. Otherwise it is entirely possible that Food Providers will upload information that is irrelevant to, or undermines the goal of the warning.

Regarding the warning for mercury in fish, we assume that OEHHA intends to post mercury in fish warning language automatically, without waiting for fish Food Providers to sign up for the website, thus requiring the Food Retailers to include the warning to their customers. If this is not correct, we would object to the provision and request that the warning regulation explicitly exclude warnings for mercury in fresh and frozen fish.

The regulation states that, to the extent practicable, the costs of providing the warning materials shall be paid by the Food Provider rather than the Food Retailer. There is no mechanism for shifting these costs, however.

The last subsection states that where a Food Provider has not fully complied with the regulation, but a warning was given, there is no violation of the warning requirement. This provision is unnecessary. Anytime the warning is properly given, there is no violation.

3. 25603.4(e): The requirements for posting the General Information sign should be better defined to state that they must be clearly visible under all lighting conditions, shall be sufficient in size and posted with such conspicuousness, as compared with other signs and displays, to render them clearly visible and easily read by consumers under customary conditions of purchase, etc. Further, the regulation shall state that a General Information sign must be posted at each entrance and exit and each checkout point.

The regulation states that the cash register receipt warning must contain either the safe harbor warning language or the product-specific warning language available on the website. Because the safe harbor warning by itself is not adequate for some foods, the regulation should state that the receipt must contain the warning language available on the website. The website can incorporate the safe harbor warning language where appropriate.

We agree that the warning need not be repeated for every food that requires the warning, but the cash register must make absolutely clear which foods are being warned about. As it stands the language in the regulation is unclear.

Because the cash register receipt does not provide the warning until after the product has been purchased, we believe that those Food Retailers who choose to use the cash register receipt method of warning must also provide a compendium of warnings available at the Customer Service desk or some other area of the store, so that customers who wish to obtain the warning prior to purchase, may check the compendium, in addition to getting the warning automatically after purchase.

It is not clear why the regulation states that the warning can be provided through a point of sale shelf-tag. This is already a safe harbor warning method that is available to the Food Retailers.

The pamphlet requires that the Food Retailer use an appendix. This may not be the best method for warning and there is no reason for OEHHA to specify its use now. It may be better for a pamphlet to provide the specific warning statement and then list the foods that are subject to the warning directly under the warning statement. The foods may be listed alphabetically, under certain categories, or by manufacturer. If an appendix is a better method for providing a warning, OEHHA can approve it as appropriate.

The regulation has included a compendium method of providing a warning, if coupled with a shelf sign or product identifier. This is only adequate if the General Information sign actually provides the warning and states, for example, "Items marked with a yellow triangle contain chemicals known to the state of California to cause cancer. For more specific information, check the compendium at the Customer Service desk." A method of warning that requires the consumer to check the compendium before obtaining the warning is not adequate.

The opportunity to cure provision should make clear that the burden is on the Food Retailer to demonstrate that it exercised normal quality control and maintenance procedures, corrected the deviation immediately upon discovery, the deviation is not recurrent, etc.

June 11, 2010

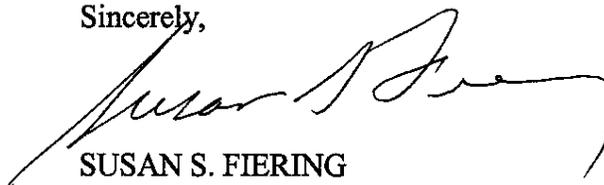
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As above, there is no need to state that if the warning is given, there is no violation.

Again, these are major areas of concern and do not necessarily address all of the proposed provisions and the language of those provisions. We reserve our right to provide additional comments to later versions of the regulation.

We appreciate OEHHA's efforts in drafting this regulation and look forward to working cooperatively with you in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan S. Fiering", written over a horizontal line.

SUSAN S. FIERING
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

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