



IN WASHINGTON
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BCI Comments Regarding the Proposition 65 Proposed Rule

Battery Council International (BCI) appreciates the opportunity to provide input on the California Office of Environmental Health Hazard Assessment's (OEHHA) proposed modifications to the Proposition 65 implementing regulations. BCI is a non-profit trade association whose members are engaged in the manufacture, distribution, sale, and recycling of lead-acid batteries. Those products are subject to Proposition 65. BCI members account for over 98% of U.S. lead battery production and over 97% of its recycling (*i.e.*, secondary lead smelting) capacity. BCI members operate manufacturing and secondary lead smelting facilities in California, and employ several thousand California workers. All BCI-member lead-acid battery manufacturers today include Proposition 65 compliant warnings on batteries sold in California.

BCI Supports Proposed § 25600(f)

BCI strongly supports OEHHA's decision to include in the November 24, 2015 discussion draft a provision explicitly recognizing that parties to a court-ordered settlement or final judgment are "deemed to be providing a 'clear and reasonable' warning" in compliance with the statute. § 25600(f).

As BCI has explained in previous comments to OEHHA, without this clear "grandfather" clause there is likely to be significant confusion among industry, public, and private enforcement litigants. This clause will help prevent unnecessary, duplicative, and wasteful private litigation that might be pursued based on a misapprehension of a court-approved warning language's compliance with the new regulations. OEHHA should include this clause in the final rule.

BCI Supports § 25600(c) Streamlined Non-Party Methods

BCI supports OEHHA's inclusion in § 25600(c) of more streamlined methods for receiving OEHHA approval of specific warning language. Prior drafts of the rule would have required non-parties to request OEHHA engage in formal rulemaking in order to obtain assurance that settlement agreement language would be deemed compliant for substantially

identical products of entities not party to that litigation. In response to comments from BCI, OEHHA's November 24, 2015 discussion draft now includes the option for such parties to "request guidance from the lead agency pursuant to Article 2, section 25203 (Interpretive Guideline Request) or Article 2, section 25204 (Safe Use Determination)."

BCI supports this addition to § 25600(c), but believes further clarifications are needed. BCI understands that OEHHA intends for a party to be able to rely on either a section 25203 Interpretive Guideline or a section 25203 Safe Use Determination as a defense to private enforcement litigation. However, BCI is concerned that the regulations do not explicitly provide such a defense, significantly reducing the ability of industry to rely on such agency guidance. Therefore, OEHHA should modify the text of proposed 25600(c) as follows:

25600(c) If the lead agency has not adopted a warning method or content specific to a consumer product, area, or chemical in Section 25607, an interested party may request that the lead agency adopt one pursuant to Government Code Section 11340.6 et seq. (Petition for Rulemaking), or may request guidance from the lead agency pursuant to Article 2, section 25203 (Interpretive Guideline Request) or Article 2, section 25204 (Safe Use Determination). Agency guidance issued under this section shall create a presumption that the activity described in the guidance, when conducted as described, is in compliance with the Act and all related regulations.

BCI believes that it is important for OEHHA to assist manufacturers to ensure their continued compliance with Proposition 65 in years to come, to avoid consumer confusion by encouraging similar products to bear the same warnings, and to reduce the likelihood of unnecessary litigation. BCI supports OEHHA's proposed § 25600(c) with BCI's suggested additions. OEHHA should adopt this proposed clause in the final rule.

BCI thanks you for your time and attention to our concerns.

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If you have questions about these comments, please contact David Weinberg, BCI's legal counsel, at 202-719-7102 or dweinberg@wileyrein.com.