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March 28, 2008

Via E-mail: fkammerer@oehha.ca.gov

Fran Kammerer
Staff Counsel
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

Re: Proposition 65 Warnings for Exposures to Listed Chemicals in Foods

Dear Ms. Kammerer:

On behalf of the California Grocers Association ("CGA"), thank you for the opportunity to provide input on Proposition 65 Warnings for Exposures to Listed Chemicals in Foods. We would like to work cooperatively with OEHHA and other interested parties to address the unique issues posed by the increasing Proposition 65 litigation over foods, and the accompanying risk of confusion caused by proliferating and varied Proposition 65 warnings in supermarkets and other retail establishments.

Proposition 65 Recognizes That Food Should Be Treated Differently

The average supermarket carries over 30,000 products and can be the subject of multiple Proposition 65 lawsuits against the many different types of food items commonly sold. From its passage and the adoption of its initial regulations, however, Proposition 65 has recognized that food, an essential element of health and nutrition, must be treated differently from other consumer products subject to the statute. *See* 22 Cal. Code Regs. § 12501 (exception for naturally occurring chemicals in food); Final Statement of Reasons, 22 Cal. Code Regs. § 12501 (recognizing that a multiplicity of warnings on a basic necessity like food would cause consumer confusion); 22 Cal. Code Regs. § 12703(b)(1) (the so-called "cooking" exception for prepared food). These exceptions recognize that alarming consumers with Proposition 65 warnings about listed chemicals in many basic food products is not in the best interests of the consumer or the retail food industry.

Accordingly, consistent with the statute, CGA supports new regulations which would give retail grocers the option of providing a global, centrally located safe-harbor warning for food (similar to the warnings allowed

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for restaurants),[1] which refers consumers to more detailed information that can be accessed at an OEHHA (or manufacturer) maintained website containing product information provided by manufacturers and any health and safety information supplied by the State.

Proposition 65 Emphasizes Manufacturer Obligations And Seeks To Minimize The Burden On Retailers

Proposition 65 clearly recognizes the manufacturer's knowledge of the contents of the products it supplies and favors a product package warning. *See, e.g.,* 22 Cal. Code Regs. § 12601(b)(5).[2]

Given the product mix and thousands of items on supermarket shelves, grocery retailers cannot and should not be charged with knowledge of the chemicals contained in the vast array of food items offered for sale.

> *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 is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question.

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[1] 22 Cal. Code Regs. § 12601(b)(4)(C) provides the following safe-harbor warning for restaurants: "WARNING: Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here."

[2] 22 Cal. Code Regs. § 12601(b)(5) provides that: "A person in the course of doing business, who manufactures, produces, assembles, processes, handles, distributes, stores, sells or otherwise transfers a consumer product which he or she knows to contain a chemical known to the state to cause cancer or reproductive toxicity in an amount which requires a warning shall provide a warning to any person to whom the product is sold or transferred unless the product is packaged or labeled with a clear and reasonable warning."

Health & Safety Code § 25249.11(f) (emphasis supplied).

The implementing regulations make clear that warning materials, through a variety of methods, are to be provided by the manufacturer:

> To the extent practicable, warning materials such as signs, notices, menu stickers, or labels shall be provided by the manufacturer, producer, or packager of the consumer product, rather than by the retail seller.

22 Cal. Code Regs. § 12601(b)(2).

However, too frequently, Proposition 65 litigation has resulted in manufacturers passing on their obligation to retailers by sending them point of sale signs to post. This is not reasonable or practical for retailers, and is particularly detrimental in the Proposition 65 food litigation context where varied and nuanced health and safety warnings are sought by manufacturers, private interests and state agencies.

Generic Centralized Food Warnings Which Motivate Consumers To Access Specific Information Are Practical And Authorized By Law

CGA and its members favor a centralized warning option that would contain both the Proposition 65 safe-harbor warning and additional language directing the consumer to a centralized repository of information that the manufacturers and the state wish to convey. This concept would provide protection to the retailers from suits which they cannot otherwise avoid, not knowing the chemical make up of the foods they sell, and would act as a conduit for those entities with the obligation and desire to provide warnings or nuanced health and safety information to consumers.

Centralized generic warnings that allow consumers to access specific information comply with the law. The statute and regulations do not mandate individualized warnings or pre-purchase access to product specific

data. Cal. Health & Safety Code § 25249.11(f); 22 Cal. Code Regs. § 12601(b)(1).[3]

Shopping for food, by its nature, is a repetitive undertaking. The same consumer who goes to the grocery store today to buy groceries will go again next week and the week after. A grocery shopper who is alerted to the existence of the repository or clearinghouse of Proposition 65 information on a website on one trip to the grocery store will be able to access that information as they prepare their grocery list in anticipation of the next visit. This is particularly true if there is an effort to publicize information on the website in the media and marketplace through manufacturer and/or OEHHA-sponsored advertisements.

Under this approach, the purpose of the centralized warning in the retail store is that of a conduit, to motivate consumers to access the website repository or clearinghouse. The basic Proposition 65 safe-harbor warning will need to be part of the notice and the remainder could be an encouragement to access the website to obtain additional information about particular foods. Ultimately, this is the "meaningful" warning that the Attorney General's Office and other interested parties are concerned with.

Given the number of food products sold in the retail grocery store, CGA believes it is clear and reasonable to provide information at a single source which directs consumers to a central point for additional

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[3] Cal. Health & Safety Code § 25249.11(f) provides: "'Warning' within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods . . . ."

22 Cal. Code Regs. § 12601(a) provides: "Nothing in this section shall be construed . . . to require that warnings be provided separately to each exposed individual."

See also Final Statement Of Reasons, 22 Cal. Code Regs. § 12601 at p. 4: "If the exposed individual desires information about the chemical, it appears preferable that the information be obtained from the party responsible for the exposure *after the warning, rather than through the warning.* Otherwise, the warnings may become visually too congested and cumbersome to read and understand."

information on both the food products requiring warnings and the chemicals contained in the products.

Proposed Method And Content For Centralized Food Warning

Conceptually, CGA believes the best way to achieve this goal is to:

1. Maintain the obligation on manufacturers to identify food products that require a Proposition 65 warning consistent with the statute (*see* Cal. Health & Safety Code § 25249.11(f); 22 Cal. Code Regs. § 12601(b));

2. Provide an OEHHA/manufacturer created and maintained website through which additional information about food exposures can be communicated and by which links can be provided to other websites such as FDA;

3. Implement a program that permits (but does not require) retailers to be a conduit to direct consumers to more detailed information on a website through a simple, in-store centralized warning similar to the restaurant safe-harbor but with additional minimal language advising the consumer that many foods contain chemicals that are naturally occurring or caused when food is cooked and that risks vary;

4. Permit the retailers a menu of options for providing the centralized warning (including how they direct consumers to the website) to accommodate different retailer operating models, including options such as a centralized sign, kiosk, poster, brochure, scan device or other method; and

5. Provide retailers a safe-harbor from lawsuits if they comply with any of the menu of options, including permitting them to direct consumers to the OEHHA/manufacturer maintained website.

Whatever mechanism is chosen, it should seek to minimize the burden on retailers consistent with Cal. Health & Safety Code § 25249.11(f) and Cal. Code Regs. § 12601(b), and be easy and practical to implement. CGA believes that consumers utilize the internet or other sources to obtain information about diet and health, such that this proposed warning program would be both clear and reasonable under the law, and help to relieve retailers from the proliferation and variety of in-store warnings that consumers will find confusing and ignore. If publicized and implemented by the manufacturers and OEHHA, the program will act as an incentive for consumers to investigate food content and nutrition before their purchase. Rather than a punitive mechanism, this focuses finite energy and effort on helping real consumers make the right decisions for themselves as they plan what food they will buy when they make their next trip to the grocery store.

We look forward to working with interested parties to craft regulatory reforms which embrace the spirit of Proposition 65, balanced with a commonsense approach to providing meaningful information to consumers about the food products which are essential to their life and health.

Sincerely,

KRISTIN POWER
Vice President, Government Relations