CalChamber
CALIFORNIA CHAMBER OF COMMERCE

CALIFORNIA RESTAURANT ASSOCIATION
PREPARE TO BE INSPIRED.

P&G

AMERICAN BEVERAGE ASSOCIATION

Amway

DOW

AUTO ALLIANCE
DRIVING INNOVATION

CALIFORNIA HOSPITAL ASSOCIATION

AHAM
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

TechNet

CNCDA

AAFA
american apparel & footwear association

DUPONT
The miracles of science

WD-40 COMPANY

GMA
The Association of Food, Beverage and Consumer Products Companies

PARTERRE
FLOORING SYSTEMS

LONSEAL

American Chemistry Council

GlobalAutomakers

CALIFORNIA HOTEL & LODGING ASSOCIATION

CALIFORNIA FARM BUREAU FEDERATION

Toy Industry Association, Inc.

Agricultural Council of California

FDRA
FOOTWEAR DISTRIBUTORS AND RETAILERS OF AMERICA

CAA
California Apartment Association

California Business Properties Association

BIOCOM

ASPA
AUTOMOTIVE SPECIALTY PRODUCTS ALLIANCE

PhRMA
RESEARCH PROGRESS HOPE

CALIFORNIA ATTRACTIONS AND PARKS ASSOCIATION, inc.

CSPA
Representing Household & Institutional Products

cnsda

WSPA

american cleaning institute
for better living
aci

CIPA

CalABC
California Automotive Business Coalition
Representing Industry in Government since 1992

NFIB
The Voice of Small Business.

BAYBIO

NEMA
Setting Standards for Excellence

cjac
CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

WESTERN GROWERS
Fresh produce from our families to yours

CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION

CIOMA

CALIFORNIA RETAILERS ASSOCIATION

CALIFORNIA ASSOCIATION OF REALTORS

CEA
Consumer Electronics Association

BOMA California

PACTIV

THE APARTMENT ASSOCIATION GREATER LOS ANGELES
Founded 1917
AAGLA
www.aagla.org

PAINT COUNCIL NETWORK

IEA
INDUSTRIAL ENVIRONMENTAL ASSOCIATION
Promoting Industry and Protecting the Environment

CHPA
CONSUMER HEALTHCARE PRODUCTS ASSOCIATION

Personal Care Products Council

C·H·I
CALIFORNIA HEALTHCARE INSTITUTE

Searles Valley Minerals

AmericanCoatings ASSOCIATION℠

Information Technology Industry Council

APARTMENT ASSOCIATION CALIFORNIA SOUTHERN CITIES, INC.

EBRHA
EST. 1939 .com
EAST BAY RENTAL HOUSING ASSOCIATION

NCRPA
Nor Cal Rental Property Association

SBRPA

ifra
NORTH AMERICA

NAIOP
COMMERCIAL REAL ESTATE DEVELOPMENT ASSOCIATION
NAIOP OF CALIFORNIA

CALIFORNIA ASSOCIATION OF HEALTH FACILITIES
CAHF

CCCA
Communications Cable & Connectivity Association

Green Color Concentrates
An ISO 9001-2008 Registered Company

WEST COAST LUMBER & BUILDING MATERIAL ASSOCIATION

pmi
PLUMBING MANUFACTURERS INTERNATIONAL

BETCO
Cleaning Innovations That Matter.

COAST

Bestway

More To Sea
redondo BEACH
Chamber of Commerce & Visitors Bureau

AdvaMed
Advanced Medical Technology Association

CFFA
CHEMICAL FABRICS & FILM ASSOCIATION, INC.

ISSA
Advancing Clean. Driving Innovation.

CICC

Berk-Tek
A NEXANS COMPANY

American Forest & Paper Association

The Vinyl Institute

CALCIMA
California Construction and Industrial Materials Association

BRAWLEY CHAMBER OF COMMERCE

100 Years AHFA
American Home Furnishings Alliance

CALIFORNIA LEAGUE OF FOOD PROCESSORS

california TRAVEL ASSOCIATION

AMERICAN WOOD COUNCIL

FEDERAL

SWCLC
Southwest California Legislative Council

MFASC
Metal Finishing Association of Southern California, Inc.

FULLERTON CHAMBER OF COMMERCE

CSSA
CALIFORNIA SELF STORAGE ASSOCIATION

Simi Valley CHAMBER OF COMMERCE and Visitor Center
"The HeartBeat of Business"

STOP LAWSUIT ABUSE
California Citizens Against Lawsuit Abuse

CALIFORNIA COALITION METALS

MFANC
Metal Finishing Association of Northern California, Inc.

TGA Travel Goods ASSOCIATION

SAN DIEGO™ REGIONAL CHAMBER OF COMMERCE

AHPA
AMERICAN HERBAL PRODUCTS ASSOCIATION

Mexichem.
CHLORO-VINYL

Sika®
BUILDING TRUST

WPHA
Western Plant Health Association

Chamber Visalia of Commerce

FPP
FROZEN POTATO PRODUCTS INSTITUTE

SENTINEL®
Connector Systems Inc.
Tel: (717) 843-4240
Fax: (717) 848-1949

CALIFORNIA CEMENT MANUFACTURERS ENVIRONMENTAL COALITION

OCZ STORAGE SOLUTIONS | A Toshiba Group Company

SUPERIOR ESSEX

BURTON WIRE & CABLE

AlphaGary
Formulating solutions. Multiplying possibilities.
A Mexichem Company

USHIO
Lighting—Edge Technologies

JPMA

spi the plastics industry trade association

NORTH AMERICAN HOME FURNISHINGS ASSOCIATION

Simplot

WESTERN WOOD PRESERVERS INSTITUTE

RFCi
Resilient Floor Covering Institute

The Chamber
OF THE SANTA BARBARA REGION
Helping Business Succeed Since 1899

CALIFORNIA FURNITURE MANUFACTURERS ASSOCIATION
100th YEAR ANNIVERSARY

Council for Responsible Nutrition
The Science Behind the Supplements

International Council of Shopping Centers

Wima
WRITING INSTRUMENT MANUFACTURERS ASSOCIATION

ABMA AMERICAN BRUSH MANUFACTURERS ASSOCIATION

cabbi CALIFORNIA ASSOCIATION of BOUTIQUE & BREAKFAST INNS

Natural Products ASSOCIATION™

WAPA
WESTERN AGRICULTURAL PROCESSORS ASSOCIATION

OPEI
OUTDOOR POWER EQUIPMENT INSTITUTE

QUALITY. ADVOCACY. LEADERSHIP.
KCMA
KITCHEN CABINET MANUFACTURERS ASSOCIATION

IFA INTERNATIONAL FRANCHISE ASSOCIATION
Franchising
Building local businesses, one opportunity at a time.

AAMA

USANA HEALTH SCIENCES

ACMA
AMERICAN | COMPOSITES | MANUFACTURERS | ASSOCIATION

ART & CREATIVE MATERIALS INSTITUTE
CERTIFYING SAFETY & QUALITY SINCE 1940

Flexible Vinyl Alliance

National SHOOTING SPORTS Foundation
NSSF • ALWAYS SHOOTING FOR MORE

California Association of Firearms Retailers

INTELLIGENT CHOICES TODAY & TOMORROW
ALLWIRE INC.

FASA

CALIFORNIA COTTON GINNERS ASSOCIATION

CALIFORNIA COTTON GROWERS ASSOCIATION

naccd
National Association of Chemical Distributors

ASSOCIATED ROOFING CONTRACTORS OF THE BAY AREA COUNTIES, INC.

CompTIA

INTERNATIONAL CRYSTAL FEDERATION

CHAMBER
GREATER BAKERSFIELD CHAMBER OF COMMERCE

SPECIALTY EQUIPMENT MARKET ASSOCIATION
SEMA
Serving the Motor Vehicle Aftermarket

SIRC Styrene Information & Research Center

Can Manufacturers Institute

June 15, 2015

Mr. Mario Fernandez
Office of Environmental Health Hazard Assessment
1001 I Street, 22nd Floor
Sacramento, CA 95814

Via email

SUBJECT: LEAD AGENCY WEBSITE

Dear Mr. Fernandez:

The California Chamber of Commerce and the below-listed organizations (hereinafter, "Coalition") thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's ("OEHHA") Notice of Modification to Text to add Section 25205 to Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65"). Our Coalition consists of over one hundred seventy California-based and national organizations and businesses of varying sizes that, collectively, represent nearly every major business sector that would be directly impacted by OEHHA's proposed regulation.

This letter focuses on two issues that the Coalition raised in its April 8, 2015 comment letter, but that OEHHA has not yet addressed. Specifically, this letter reiterates that (1) the lead agency website regulation exceeds OEHHA's statutory authority and (2) OEHHA is not authorized by statute to require businesses to produce information subject to legal privilege. This letter also identifies several new issues that the Coalition has not previously raised, including that: (1) subdivision (a)(7) requires clarification; (2) OEHHA has not adequately explained how it intends

to use the information it may request under subdivision (b); (3) newly proposed subdivision (c) is ambiguous and requires clarification; (4) newly proposed subdivision (c) will not reduce any costs associated with the testing that will result from complying with the separate but related "clear and reasonable" warning regulation; and (5) OEHHA should provide businesses with notice prior to posting product specific or company specific information on the website.

The Lead Agency Website Regulation Exceeds OEHHA's Statutory Authority

In addition to allowing OEHHA to compile its own information on the website for public consumption, the proposed website regulation, under Section 25205 subdivision (b), empowers OEHHA to *require* manufacturers, producers, importers and distributors of products bearing a Proposition 65 warning to provide the agency with a plethora of complicated and highly technical information. (Proposed Section 25205(b) ["The manufacturer, producer, distributor, or importer of a product . . . must provide the following information."].) Such information may include the identities of the chemicals in the product for which a warning is being given, the location or components of a product in which such chemicals are present, the concentration of those chemicals, and "any other information the lead agency deems necessary."

Proposition 65 does not empower OEHHA to require manufacturers, producers, importers and distributors to provide it with information related to their products (*cf*. Health and Safety Code §§ 25251 *et seq*. [providing similar authorities to the Department of Toxic Substances Control]), or regarding their decisions to provide Proposition 65 warnings for listed chemicals. (*Cf*. Health and Safety Code § 25249.7(c) [delegating Proposition 65 enforcement authority to the Attorney General and other public prosecutors, but not to OEHHA].) The Coalition urges OEHHA to stay within the statutory boundaries of Proposition 65.

We note that, in contrast, OEHHA's warning regulation proposal expressly *permits*, but appropriately does not *require*, businesses to provide consumers with supplemental information in their warnings. (Section 25600(d) ["A person may provide information to the exposed individual that is supplemental to the warning required by Section 25249.6 of the Act, such as further information about the form or nature of the exposure and ways to avoid exposure."].) If OEHHA wishes to give businesses the further option to provide such supplemental information to OEHHA for potential use on the agency's website, then proposed Section 25600(d) can expressly be modified in this rulemaking process to permit businesses to do so.

OEHHA Is Not Authorized to Require Businesses to Produce Information Subject to Legal Privilege

As noted in our April 8 letter, businesses may possess confidential information developed under the attorney client communications privilege and/or the attorney work product doctrine that is not publicly available and entitled to legal privilege under applicable law provided that no waiver of that privilege claim occurs as the result of disclosure to a third party. OEHHA is not authorized to compel businesses to waive an applicable legal privilege by providing privileged information to OEHHA. Accordingly, information subject to any applicable legal privilege should not be required to be produced to OEHHA in response to a request under subdivision (b) in the first instance regardless of whether OEHHA intends to protect it from public disclosure once the information is in OEHHA's possession.

OEHHA can resolve this issue rather simply. Specifically, in newly proposed subdivision (c), OEHHA should add the following provision:

> ***This section does not require a manufacturer, producer, distributor, or importer of a product to provide information to the lead agency that is subject to an applicable legal privilege.***

Subdivision (a)(7) Requires Clarification

Subdivision (a)(7) states that OEHHA will provide a disclaimer indicating that OEHHA cannot assure the accuracy of information it has received under subsection (b). It is important to note, however, that subdivision (a)(2) also allows OEHHA to receive information from "[a]ny person" and post that information on the website. OEHHA provides no justification as to why the public would receive a disclaimer regarding the accuracy of information provided by businesses under subdivision (b), but not by any person under subdivision (a)(2). Accordingly, to ensure that OEHHA provides the same disclaimer for all information received, whether by a business, interest group, or a member of the public, subdivision (a)(7) should be modified as follows:

> *Provide a disclaimer indicating that OEHHA cannot assure the accuracy of information it has received under* ***subsection (a)(7) and*** *subsection (b).*

OEHHA Must Explain How it Intends to Use the Information Requested in Subdivision (b) and Restrict its Potential Use of the Information it Receives Accordingly

Neither the regulation itself nor the ISOR explain with any specificity the purpose for which the information requested under subdivision (b) will be used or how use of the information will be limited to those purposes accordingly. The regulation and ISOR should make this express and assure businesses the due process protections to which they are entitled.

Subdivision (c) Requires Clarification

The Coalition appreciates newly proposed subdivision (c), which clarifies that a business need not conduct testing for the purpose of responding to a request made by OEHHA pursuant to subdivision (b). However, as drafted, the provision contains ambiguities that may render it ineffective or, at the very least, will result in litigation concerning its application. For example, the terms "sole" and "solely" are ripe for litigation. They are unnecessary and the regulation would have the same intended meaning if those terms were stricken.

Additionally, to ensure consistency among the various subdivisions under proposed Section 25205, the term "business" under subdivision (c) should be changed to "manufacturer, producer, distributor, or importer of a product . . . ."

Subdivision (c) does not Reduce the Costs Associated with Testing Products

While we appreciate that OEHHA has clarified that no additional testing will be required for purposes of providing information to the Lead Agency website, it should be noted that proposed subdivision (c) will not reduce any costs associated with the testing that will result from complying with the separate but related "clear and reasonable" warning regulation. (Proposed Health & Safety Code §§ 25600 *et seq.*) As noted in an April 8, 2015 economic report by Andrew Chang & Co., LLC, entitled "The Business Cost of Proposed Changes to Article 6 of Proposition 65," the new and substantial costs associated with testing products can be attributed almost solely and exclusively to the proposed Section 25602, which requires

businesses to specify certain chemicals on product labels if the product contains those chemicals at a level requiring a warning. Specifically, the report notes the following:

> *[F]ulfilling the [regulation's] requirements would implicitly require new and/or additional testing. Under the current regulation, businesses are required to provide a warning if there is an exposure to any listed chemical above certain levels. Once a business has determined that a warning is necessary, either from testing or other means, no additional testing is necessary. Under the new regulation, which requires specific chemicals to be listed if they exist at levels requiring a warning, businesses would need specific tests for any pertinent chemicals rather than providing a more generic warning that does not specify particular chemicals.*

(The Business Cost of Proposed Changes to Article 6 of Proposition 65, pp. 21-22.)

Businesses will therefore need to incur these costs as the result of proposed Section 25602 despite newly proposed subdivision (c) in the website regulation.

In addition, other costs associated with the website proposal will still exist even with the adoption of proposed subdivision (c). These include the time and resources needed to compile information requested by OEHHA and to monitor the website to ensure that the posted information is accurate. Any inaccuracies could create significant economic burdens in the form of impacts to businesses' sales and reputations.

OEHHA Should Provide Businesses with Notice Prior to Posting Product Specific or Company Specific Information on the Website

Although subdivision (a)(2) allows members of the public, including businesses, to request a correction of inaccurate material provided on the website, the Coalition believes that OEHHA can establish a simple process that will reduce the number of requests for corrections OEHHA receives and will further avoid unnecessarily confusing consumers. Specifically, OEHHA should incorporate into the regulation a process wherein OEHHA would provide notice to individual businesses or trade associations prior to posting product specific, company specific, or industry specific information on the website. The recipient of the notice would, in turn, have an opportunity to review the information prior to posting and assert whether any of the information is materially inaccurate.

Importantly, the concept of providing businesses notice prior to posting product specific or company specific information on a website is not new. The Consumer Products Safety Commission (CPSC), for example, established a publicly available, searchable database that includes specified information about certain consumer products pursuant to the Consumer Product Safety Improvement Act (CPSIA). Within five business days after the CPSC receives a report indicating injury, illness, death or risk associated with a product, CPSC must, to the extent practicable, transmit the report to any manufacturer and/or private labeler identified therein and provide an opportunity to comment or to assert that information in the report is materially inaccurate. Under the CPSIA, posting of the information can be delayed if CPSC determines that the report or comments were materially inaccurate.

The Coalition submits that adopting a similar notification process to that adopted on the federal level would reduce the number of requests for correction and, perhaps more importantly, would

ensure that otherwise inaccurate or misleading information would be corrected before being made available for public consumption.

Thank you for considering our prior and current comments. We appreciate the opportunity to participate in this very important regulatory process.

Sincerely,

Anthony Samson
Policy Advocate
The California Chamber of Commerce

On behalf of the following organizations:

Advanced Medical Technology Association (AdvaMed)
Agricultural Council of California
Alliance of Automobile Manufacturers
Allwire, Inc.
Alpha Gary
American Apparel & Footwear Association
American Architectural Manufacturers Association
American Beverage Association
American Brush Manufacturers Association
American Chemistry Council
American Cleaning Institute
American Coatings Association
American Composites Manufacturers Association
American Fiber Manufacturers Association
American Forest & Paper Association
American Frozen Food Institute
American Herbal Products Association
American Home Furnishing Alliance
American Wood Council
Amway
APA – The Engineered Wood Association
Apartment Association of Greater Los Angeles
Apartment Association of Orange County
Apartment Association, California Southern Cities
Associated Roofing Contractors of the Bay Area Counties, Inc.
Association of Home Appliance Manufacturers
AXIALL LLC
Automotive Specialty Products Alliance
BayBio
Belden
Berk-Tek
Bestway
Betco Corporation

Bicycle Product Suppliers Association
Biocom
Biotechnology Industry Organization
Brawley Chamber of Commerce
Breen Color Concentrates
Building Owners and Managers Association of California
Burton Wire & Cable
California Apartment Association
California Asphalt Pavement Association
California Association of Boutique & Breakfast Inns
California Association of Firearms Retailers
California Association of Health Facilities
California Association of REALTORS®
California Attractions and Parks Association
California Automotive Business Coalition
California Business Properties Association
California Cement Manufacturers Environmental Coalition
California Citizens Against Lawsuit Abuse
California Construction and Industrial Materials Association
California Cotton Ginners Association
California Cotton Growers Association
California Farm Bureau Federation
California Furniture Manufacturers Association
California Healthcare Institute
California Hospital Association
California Hotel & Lodging Association
California Independent Oil Marketers Association
California Independent Petroleum Association
California League of Food Processors
California Manufacturers and Technology Association
California Metals Coalition
California/Nevada Soft Drink Association
California New Car Dealers Association
California Paint Council
California Restaurant Association
California Retailers Association
California Self Storage Association
California Travel Association
Can Manufacturers Institute
Chambers of Commerce Alliance Ventura and Santa Barbara Counties
Chemical Fabrics & Film Association, Inc.
Chemical Industry Council of California
Civil Justice Association of California
Coast Wire & Plastic Tec., LLC
Communications Cable and Connectivity Association
Composite Panel Association
CompTIA
Consumer Electronics Association
Consumer Healthcare Products Association
Consumer Specialty Products Association

Council for Responsible Nutrition
Dow Chemical Company
DuPont
East Bay Rental Housing Association
Family Winemakers of California
Fashion Accessories Shippers Association
Federal Plastics Corporation
Flexible Vinyl Alliance
Footwear Distributors & Retailers of America
Frozen Potato Products Institute
Fullerton Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Grocery Manufacturers Association
Halogenated Solvents Industry Alliance, Inc.
Hardwood Plywood Veneer Association
Independent Lubricant Manufacturers Association
Industrial Environmental Association
Information Technology Industry Council
International Crystal Federation
International Franchise Association
International Council of Shopping Centers
International Fragrance Association, North America
IPC – Association Connecting Electronics Industries
ISSA, The Worldwide Cleaning Industry Association
J.R. Simplot Company
Juvenile Products Manufacturers Association
Loes Enterprises, Inc.
Lonseal, Inc.
Metal Finishing Association of Northern California
Metal Finishing Association of Southern California
Mexichem
Motor & Equipment Manufacturers Association
NAIOP of California, the Commercial Real Estate Development Association
National Association of Chemical Distributors
National Council of Textile Organizations
National Electrical Manufacturers Association
National Federation of Independent Businesses
National Lumber and Building Material Dealers Association
National Shooting Sports Foundation
Natural Products Association
NorCal Rental Property Association
North American Home Furnishing Association
North Valley Property Owners
OCZ Storage Solutions
Orange County Business Council
Outdoor Power Equipment Institute
Pactiv Corporation
Parterre Flooring Systems
Personal Care Products Council
PhRMA

Plumbing Manufacturers International
Polyurethane Manufacturers Association
Procter & Gamble
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Resilient Floor Covering Institute
San Diego Regional Chamber of Commerce
Santa Barbara Rental Property Association
Searles Valley Minerals
Sentinel Connector System
Sika Corporation
Simi Valley Chamber of Commerce
Specialty Equipment Market Association
SPI: The Plastic Industry Trade Association
SPRI, Inc.
Southwest California Legislative Council
Styrene Information and Research Center
Superior Essex
TechNet
The Adhesive and Sealant Council
The Art and Creative Materials Institute
The Association of Global Automakers
The Kitchen Cabinet Manufacturers Association
The Chamber of the Santa Barbara Region
The Vinyl Institute
Toy Industry Association
Travel Goods Association
Treated Wood Council
USANA Health Sciences, Inc.
USHIO America, Inc.
Visalia Chamber of Commerce
WD-40 Company
West Coast Lumber & Building Materials Association
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association
Western Propane Gas Association
Western State Petroleum Association
Western Wood Preservers Institute
Window & Door Manufacturers Association
Writing Instrument Manufacturers Association

cc: Matt Rodriguez, Secretary, CalEPA
Lauren Zeise, Acting Director, OEHHA
Allan Hirsch, Chief Deputy Director, OEHHA
Carol Monahan-Cummings, Chief Counsel, OEHHA
Gina Solomon, Deputy Secretary for Science and Health, CalEPA
Dana Williamson, Cabinet Secretary, Office of the Governor
Ken Alex, Senior Policy Advisor, Office of the Governor
Cliff Rechtschaffen, Senior Policy Advisor, Office of the Governor

Panorea Avdis, Chief Deputy Director, Governor's Office of Business and Economic Development
Poonum Patel, Permit Specialist, Governor's Office of Business and Economic Development

AS:mm