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Dear Joan and Carol,

Thank you once again for providing an opportunity to comment on the concepts you presented regarding Prop. 65 warnings for food. Although we have presented some of these ideas in the workgroup meetings, it's always good to be able to put them in writing.

I. CLARIFY FOOD RETAILER AND MANUFACTURER RESPONSIBILITY

The central "clearinghouse" for manufacturers is a practical idea. However, the manufacturers must provide the warning messages and materials in several prescribed forms from which the retailer can choose. In other words, the manufacturer does not know whether any given retailer is going to choose the pamphlet or the three-part process or a shelf sign, so the manufacturer must provide warnings that can be used in any of those options.

Although the most recent discussion draft did not include some of the more specific language proposed in the Oct. 9 document, we want to emphasize our strong opposition to some of those concepts, and hope that we will not see them again. For example, we reject the proposal that a retail seller can claim a "safe harbor" if he provides identity and contact information for a manufacturer and distributor of a product for which that manufacturer and distributor have not provided warning materials. Given the global marketplace and the ability to switch manufacturers, distributors or importers, this is a toothless component.

This plan also undervalues the power of a retailer – particularly a large retailer such as Home Depot or Cost Plus – in forcing a manufacturer to reformulate a toxic product or to stop producing it. Several CLEEN coalition members have used the power of a retailer in this way. For example, in two cases involving beverage dispensers (the kind of "lemonade jars" you see filled with lemons slices and lemonade at a wedding reception), *Mateel v. Cost Plus, Inc.* (SF Case No. 461734); and *Mateel v. Home Essentials* (SF Case No. 469271), it was because the retailers faced liability on their own that it was relatively easy to persuade them to stop selling the jars, which featured brass spigots that leached lead at relatively high levels into lemonade. The threat of substantial civil penalties gave the impetus for demanding that they stop selling these toxic jars instead of just posting a warning. Mateel also was able to use the threat of substantial civil penalties to persuade the retailers to contact their customers and offer replacement (not leaded) spigots and to conduct limited recalls. These actions would have been impossible if the retailers had been insulated from Prop. 65 liability simply by offering up the tiny "manufacturers" of the jars.

II. ESTABLISH SPECIFIC SAFE HARBOR METHODS

We strongly support what you describe as the “three-part process” as the most clear and reasonable “safe harbor” program. This would adhere to the statute, and would be most likely to provide warnings to consumers in a consistent and practical manner. Retailers and manufacturers serious about wanting to warn the consumer will invariably agree.

While we understand that the cash-register receipt idea is only one of a menu of options that a retail seller might select, we believe that it is impractical for the consumer and would create undesirable “traffic jams” at the check-out line. A consumer who discovered that he/she had selected a product that carried a Prop. 65 warning might hold up the line by requesting a refund for that product or by dashing back into the shopping aisles to grab a product by a different manufacturer that is warning-free. Retailers are very sensitive to delays at the front ends of their stores, so few are likely to select this option. Small retailers probably would not have cash registers sophisticated enough to provide this information.

We are uncertain about the efficacy of a pamphlet. One of the concepts behind Prop. 65 is that it enables the consumer to distinguish between similar products that require and do not require warnings. Therefore, the pamphlet would need to list very specifically each product requiring a warning. While there are relatively few product groups that require warnings, there might be a lot of different brands within each of those product groups. So the pamphlet might be overly thick if printed in type size big enough to be considered clear and reasonable. Also, the issue of how often the pamphlet would need to be reprinted is unclear. Once again, although the pamphlet would be one of several options that a retailer might select, it seems unlikely that anyone will choose it.

III. SPECIFYING WARNING MESSAGE CONTENT

We believe it makes sense for OEHHA to develop approved content for general warnings and to establish required elements for specific warning messages.

Thank you once again for the opportunity to comment. If the task force reconvenes to consider these comments and proposals, I plan to attend.

Yours truly,

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