January 25, 2016

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

**Re: <u>Proposition 65: Clear and Reasonable Warnings Regulatory Proposals</u>**

Dear Ms. Vela:

On behalf of the Wine Institute, the Beer Institute and the Distilled Spirits Council of the United States, beverage alcohol trade associations representing the producers of wine, beer and distilled spirits sold within the State of California and across the country, we appreciate the opportunity to comment upon the Office of Environmental Health Hazard Assessment's (OEHHA) proposed regulations regarding the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") concerning the November 27, 2015 Clear and Reasonable Warnings regulatory proposals.

Regarding this rulemaking docket, we have three substantive builds that pertain to (1) the "grandfathering" of pre-existing court-ordered settlements or final judgments; (2) the ability of non-parties to such settlements or final judgments to petition OEHHA to abide by the provisions of such settlements/final judgments; and (3) revising the proposal regarding the retailer receipt/confirmation of Proposition 65 warnings to reflect marketplace realities and to be in sync with the other proposed provisions in this rulemaking docket.

We respectfully submit that our suggested revisions to OEHHA's proposals not only will better effectuate the objectives of Proposition 65, but also better reflect the economic impact of OEHHA's proposed rules. In that latter regard, we believe that OEHHA's proposals (1) will have a major impact upon the creation/elimination of jobs in California; (2) will have a negative impact upon the creation of new businesses in California and create various barriers of entry in that marketplace; (3) will have a major impact upon the expansion of existing businesses (that would like to grow beyond 10 employees); and (4) will not benefit the health, safety and welfare of California residents, for example, apropos of the beverage alcohol Proposition 65 signage program that has been recently approved by the Court and the Office of the Attorney General as "in furtherance of the public interest."

Significantly and regarding the points made above, OEHHA states in its November 27, 2015 Notice of Proposed Rulemaking the following about the results of its economic impact analysis: "[m]any business costs frequently attributed to Proposition 65 such as defending lawsuits, paying attorney's fees and penalties, determining the chemical exposures from products, reformulating products to avoid the need to provide warnings, etc., fall outside the scope of this regulation." (Notice of Proposed Rulemaking at page 5.) We submit that our suggested builds to OEHHA's rulemaking fall within the "etc." caveat to their Economic and Fiscal Impact Analysis.

**Executive Summary**

We commend OEHHA for its "open door" and "listening ear" in considering the substantive points made by stakeholders concerning the various iterations of this rulemaking proposal. Our coalition comments are proffered from the perspective of how the current proposals respond to and are consistent with Governor Brown's proposed Proposition 65 reforms in the context of the beverage alcohol industry. Announced in May 2013, the Governor's proposed reforms sought to achieve three primary goals by: (1) ending frivolous "shake-down" lawsuits; (2) improving how the public is warned about dangerous chemicals; and (3) strengthening the scientific basis for warning levels.

We commend OEHHA for including an express provision in proposed rule Section 25600(f) recognizing that parties to a pre-existing Consent Judgment are exempt from any and all parts and/or portions of these rulemakings that are inconsistent with or would alter the terms of any pre-existing Consent Judgments.

It is true that OEHHA in its January 16, 2015 Initial Statement of Reasons (at page 13) regarding court-approved settlements recognizes "the fact that businesses who are parties to a settlement or judgment must comply with the provisions of the court's order, regardless of whether this regulation states that fact;" nevertheless, an explicit rule reflecting this self-evident proposition will deter "bounty hunter" lawsuits and provide the regulated community with the requisite assurance of their relevant Proposition 65 obligations.

As described below, we do, however, have suggested revisions to proposed Section 25600(f) to more fully and better effectuate the intent of that provision to ensure that it is understood by "bounty hunter" lawyers, as well as all stakeholders, in terms of the fact that the "proposed regulations will not impact the existing settlement." (November 27, 2015 Initial Statement of Reasons footnote 43 at page 37.)

OEHHA appropriately recognizes that a non-party to a Consent Judgment should have the option of petitioning the Agency for inclusion in court-approved settlements. To that end, OEHHA references proposed Section 25600(c) (November 27, 2015 Initial Statement of Reasons at pages 13 and 14); however, that referenced Section in the rulemaking package does not specifically identify this option.

To ensure robust compliance systems, such as the Proposition 65 sign distribution program mandated by the beverage alcohol industry's recent Consent Judgment, we urge that OEHHA amend its proposed rule to explicitly allow industry members to opt-into these settlements via a petition to OEHHA. A streamlined process to accomplish this result furthers the objectives of Proposition 65, the goals of any proposed reforms and serves the public interest, including the interest of California's business community.

With such actions, the beverage alcohol industry as a whole would not be confronted with two sets of requirements—compliance obligations pursuant to a Court Order and regulatory provisions that are inconsistent with the provisions of the Consent Judgment. It is difficult, if not impossible, to envision how the public interest would be served under such circumstances. To that end, we have proposed language below to accomplish these goals which presumably are shared by OEHHA based upon their rulemaking record.

For all of these reasons, we also urge OEHHA to "rethink" its proposed provisions set forth in Section 25600.2 regarding the allocation and division between producers and retailers regarding the furnishing of Proposition 65 signage. As recognized throughout this rulemaking docket, producers—despite their best efforts—confront many challenges in the furnishing of required Proposition 65 signage. OEHHA has recognized these obstacles/challenges and we urge that the currently proposed provisions of Section 25600.2 be revised to reflect the business and marketplace realities to reasonably accommodate all interests.

## I. Section 25600(f): Grandfathering Prior Court-Approved Consent Judgments

We greatly appreciate OEHHA's proposal to add a new subsection (f) to proposed Section 25600 to make clear that court-ordered settlements or final judgments are exempt from any and all parts of OEHHA's proposals. This provision is consistent with OEHHA's January 16, 2015 Initial Statement of Reasons in its Clear and Reasonable Warnings rulemaking proposal (where OEHHA recognizes "the fact that businesses who are parties to a settlement or judgment must comply with the provisions of the court's order, regardless of whether this regulation states that fact"), as well as OEHHA's September 23, 2014 draft regulation. An explicit rule reflecting this self-evident proposition will deter "bounty hunter" lawsuits and provide the regulated community with the requisite assurance of their relevant Proposition 65 obligations.

Nevertheless, we respectfully submit that the proposed provisions of Section 25600(f) do not clearly meet OEHHA's objective of ensuring that the "proposed regulations will not impact pre-existing settlements," a goal that we share. First, the proposed language in subsection (f) refers to establishing a method or content of providing a Proposition 65 warning. As OEHHA has noted, the beverage alcohol Consent Judgment reaffirmed and embraced the existing beverage alcohol Proposition 65 warning requirements in terms of the current warning language, the current type size and font of the message, and the current posting/placement of signage at a retail establishment. In light of these facts, the proposed language in Section 25600(f) regarding "establishing" a method or content for a Proposition 65 warning may be misinterpreted in terms of the full scope of the settlements and final judgments that OEHHA intends to preclude/exempt from its current regulatory proposals.

Further, the phrase "if the warning fully complies with the order or judgment" could unintentionally be interpreted as opening the door to third-party enforcement of court-ordered settlements or final judgments. This phrase could suggest that a third-party private enforcer, in its sole discretion, may unilaterally determine whether or not the warning "fully complies" with the order or judgment. Such an interpretation is at odds with the *res judicata* protection afforded by court-approved settlements. Only the Court that presided over the settlement or judgment has the authority to make a compliance determination, after appropriate legal proceedings pursuant to such settlement or judgment have reached their conclusion. Accordingly, the phrase "if the warning fully complies with the order or judgment" should be eliminated in its entirety.

For these reasons, we strongly suggest that the proposed provision in subsection (f) of Section 25600 be revised accordingly:

> The provisions of this Article do not apply to court-approved settlements or judgments since businesses that are parties to such a settlement or judgment must comply with the provisions of the Court's Order. Any provision of this Article inconsistent with a pre-existing court-approved settlement or judgment has no application to parties subject to that Court's Order.

## II. Ability of Non-Parties to Abide by Court Settlements/Judgments

We support OEHHA's intent as stated in its November 27, 2015 Initial Statement of Reasons that: "[n]on-parties to settlements or final judgments wishing to use warning content or methods specific to a product, chemical or type of exposure, including warning methods or content contained in a court settlement, may petition the Agency under proposed Section 25600(c) to adopt the warning content or methods into the regulations." (Initial Statement of Reasons at pages 13 and 14.)

As relayed on many occasions, we respectfully submit that non-parties to a consent judgment should have the ability to petition OEHHA for inclusion in a court-approved settlement. Such an "opt-in" ramp for the approximately 4,000 non-parties to the alcohol community's Consent Judgment avoids two different, conflicting warning signs, which would cause undue retailer and consumer confusion. (The parties to our Consent Judgment, which represent about 90% of the volume of all beverage alcohol products sold in California, have distributed to date more than 94,224 Proposition 65 signs to California retailers since Q2 2014 pursuant to the Consent Judgment.) Additionally, it is only equitable to provide a "safe harbor": a) to alcohol companies entering the California marketplace in the future; b) to very small California businesses that grow to employ 10 or more employees; and c) to businesses where a notice of violation could not be found to qualify as a party to the Consent Judgment.

We respectfully submit that the proposed language set forth in Section 25600(c) does not accomplish this goal insofar as the proposed language only would pertain to when OEHHA has not adopted a warning method or content specific to a Proposition 65 listing, which obviously is not the case for beverage alcohol. For these reasons, we urge that the provisions of subsection (c) of Section 25600, at a minimum, be amplified as follows:

> (c) A non-party to a court-approved settlement or judgment pursuant to subsection (f) may petition the lead agency to adopt such settlement or judgment provisions into the operative subarticles of this Article with a notarized affidavit that obligates such party to abide by and be subject to the terms, obligations and sanctions of such a court-approved settlement or judgment and consent to enforcement action by the Office of the Attorney General in the event of non-compliance.

## III. Appropriate Allocation of Providing Proposition 65 Warnings

Throughout the discussion in OEHHA's November 27, 2015 Initial Statement of Reasons document, OEHHA appropriately and responsibly recognizes how best to allocate obligations between a producer and a retailer for any Proposition 65 warnings. For example, OEHHA at page 20 of that document states: "[u]nder subsection (d)(4), the retail seller is responsible for providing a warning if it has received the notice described in subsection (b), whether or not it has provided an confirmation of receipt pursuant to subsection (b)(4) or (5). If the retail seller has received such a notice from the manufacturer, producer, packager, importer or distributor, then the retail seller has the responsibility to either pass on the warning or to provide a legally adequate warning of its own."

Similarly, in the same document at page 20, OEHHA states: "[t]he intent of subsections (d)(5)(A) and (B) is to require the retail seller to provide a warning when it has actual knowledge of the exposure and the manufacturer, producer, packager, importer or distributor cannot readily be compelled to provide it. This will ensure that the consumer will receive a warning as required by the Act."

Despite these provisions, OEHHA would require in its proposed Section 25600.2(b)(4) and (5) the following:

> (b) The manufacturer, producer, packager, importer or distributor of a product may comply with this section either by affixing a label to the product bearing a warning that satisfies Section 25249.6 of the Act, or by providing a written notice directly to the authorized agent for a retail seller who is subject to Section 25249.6 of the Act, which:
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> (4) Has been sent to the retail seller and the manufacturer has obtained confirmation of receipt of the notice; and

> (5) Has been renewed and receipt confirmed by the retail seller at least every 180 days for the first year after the effective date of the regulation, then annually during the period in which the product is sold in California by the retail seller.

The practical effect of requiring manufacturers to obtain confirmation of receipt of the notice with renewed confirmation of receipt at least every 180 days is that OEHHA is making it effectively impossible for manufacturers, producers, packagers, importers, and distributors of beverage alcohol products to comply with the requirement to provide consumer product exposure warnings. OEHHA readily acknowledges that warnings cannot be affixed to beverage alcohol products, which means that signage is the only reasonable option. Indeed, Section 25607.3 provides that a warning for exposures to alcoholic beverages meets the requirements of the article if it is provided in the form of an 8.5x11 or 5x5 sign.

There are over 83,000 beverage alcohol licensees in the State of California with almost 1,000 new and transfer licensees approved by the California Department of Alcoholic Beverage Control (ABC) each month. While some beverage alcohol producers may be able to pinpoint where their products are sold, many do not have that certainty. This means that more than 4,000 producers selling in the state must prepare to blanket over 83,000 retailers with signs and plan to continue sending them to almost 1,000 more each month. It currently costs 49 cents to send a first class letter, $4.60 for a USPS certified mail letter with electronic delivery confirmation, and $6.74 for a USPS certified mail letter with return receipt (Green Card).

These costs are prohibitive for many small and medium-sized manufacturers, and may prompt some beverage alcohol producers to remove their products from California. Retailers will likely resist repeated requests to confirm receipt of warning signs, leaving the manufacturer, producer, packager, importer, or distributor vulnerable to claims of non-compliance (as OEHHA has recognized in its rulemaking docket). In fact, OEHHA, in its March 7, 2014 draft Initial Statement of Reasons (at page 14), stated the following regarding the difficulties beverage alcohol producers regularly encounter when attempting to furnish Proposition 65 warning signage and the goal of the eventual reform: "…alcoholic beverage manufacturers or distributors have provided and posted warning materials only to have the retail seller remove or obscure them. This proposed regulation is intended to rectify that situation. Under this proposed regulation, responsibility for posting and maintaining the warnings would be the primary responsibility of the retail seller so long as the manufacturer or distributor has made a good faith effort to provide the warning materials."

It is more reasonable to provide that a manufacturer, producer, packager, importer, or distributor of beverage alcohol products may comply with, or establish a rebuttable presumption of compliance, the reasonable warning requirements with a sworn declaration that a notice was sent by U.S. mail to a retailer utilizing the contact information in the ABC's online database found at http://www.abc.ca.gov/datport/SubscrMenu.asp. In order to maintain a valid ABC license, a licensee must maintain a valid address.

This fact makes the ABC online database highly reliable and obviates the need to also establish the fact/confirmation of delivery. Likewise, by well-established and black letter law, there is a presumption of delivery upon transfer to the U.S. Postal Service: "[t]he rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884).

It also would be helpful to provide that notice may be sent by email, but as the California ABC currently does not require email addresses from licensees, it is wrong to assume that email is automatically an option.

Finally, whether the notice is mailed or emailed, it would be reasonable to provide that warning materials may be included or instructions provided on where and how a warning sign may be downloaded from the Internet or ordered free of charge. It equally is reasonable to provide that a smaller manufacturer, producer, packager, importer, or distributor (those with revenues of less than $50,000 in California) may comply with the reasonable warning requirements by posting a notice on its website advising retailers that a warning sign is available, free of charge and/or providing a link to a downloadable file with a warning sign.

For all of these reasons, we urge that OEHHA strike the proposed provisions of Section 25600.2(b)(4) and (5) as unnecessary, inappropriate and unduly burdensome upon California businesses with no commensurate purpose. Instead, to reflect the California marketplace and the business interests that operate within this marketplace, we also urge OEHHA to make appropriate amendments by requiring a sworn declaration from a manufacturer, producer, packager, importer, or distributor of beverage alcohol products to demonstrate compliance.

## Conclusion

On behalf of the beverage alcohol community, we very much appreciate the opportunity to provide our thoughts regarding OEHHA's November 27th rulemaking package and welcome the opportunity to discuss these issues with representatives of OEHHA and Cal/EPA.

With best regards,

Mr. Wendell Lee
Wine Institute

Ms. Mary Jane Saunders
Beer Institute

Ms. Lynne J. Omlie
Distilled Spirits Council