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June 12, 2014

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P. O. Box 4010
1001 I Street
Sacramento, CA 95812-4010

Sent Electronically to: P65Public.comments@oehha.ca.gov

SUBJECT: P65 WARNING REGULATION

Dear Ms. Vela:

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") pre-regulatory draft proposal to amend warning regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65"). Our Coalition consists of nearly one hundred forty California-based and national organizations and businesses of varying sizes that, collectively, represent nearly every major business sector that would be impacted by OEHHA's proposal.

OEHHA's pre-regulatory draft proposal comes on the heels of the Governor's proposed legislative reforms to Proposition 65. The Governor's proposed reforms, announced in May 2013, sought to achieve three primary goals: (1) end frivolous "shake down" private enforcement actions; (2) improve the scientific underpinnings of Proposition 65; and (3) improve how the public is warned about chemical exposures.

It was the Coalition's expectation that OEHHA's proposal would respond to and be consistent with the Governor's proposed reforms. Indeed, in its Draft Initial Statement of Reasons, OEHHA states that "[t]his regulatory proposal is intended to implement the Administration's vision concerning improving the quality of the warnings being given and providing certainty for businesses subject to the Act." (Draft Initial Statement of Reasons, p.4, March 7, 2014.)

Although we appreciate and agree with the Governor's overall goals to improve Proposition 65, OEHHA's proposal as written actually undermines the Governor's objectives for meaningful reform. To wit, and as we articulate in further detail below, OEHHA's proposal would substantially exacerbate the already abusive Proposition 65 litigation climate, further increase consumer alarm and confusion about Proposition 65 warnings, significantly decrease business certainty, and dramatically increase compliance costs and defense costs for businesses of all sizes. This is precisely the opposite of what meaningful Proposition 65 reform should look like.

The Coalition has serious concerns with the proposal as written. This letter highlights these concerns and explains why increased litigation and consumer alarm and confusion would result. We provide rationale to support our assertions, with the following outline to guide our discussion: (I) An executive summary; (II) a general background to provide basic context on which we base our concerns; (III) overarching issues we see with respect to the existing proposal; (IV) specific issues that will result in increased litigation and increased consumer alarm and confusion; (V) recommendations to establish a potentially workable framework; and

(VI) industry sector-specific issues, relative to small businesses, food (including dietary supplements), restaurants, apartments, hotels and lodging, amusement parks, automobiles, and oil and gas.

I. EXECUTIVE SUMMARY

The current regulations allow businesses to prove that the Proposition 65 warnings they issue are "clear and reasonable" by any means they wish, but also set forth criteria to establish when warnings will automatically be deemed "clear and reasonable" for purposes of Proposition 65. Specifically, the regulations lay out general warning language and methods for consumer product, occupational and environmental exposure warnings that are deemed to comply with the statute. Businesses using these so-called "safe harbor" warnings are thus protected from the threat of litigation and can carry out their business with a sense of certainty.

It is critical to note that under the regulations as they exist today, the vast majority of threatened or actual Proposition 65 litigation relates not to the contents of a given warning, but rather to whether or not a warning is provided. Indeed, because the safe harbor warning thresholds are expressed in terms of amounts of exposure to a chemical per day and not in terms of the amount of a chemical found in a product or facility, in many cases it is extremely problematic for businesses to determine whether a Proposition 65 warning is required for a given product or facility. When businesses conduct a toxicological assessment of a chemical exposure level presented by a product or facility, they may look at, for example, how often consumers use the product or employ a custom on average in order to calculate projected exposure levels, whereas a private enforcer may use an entirely different methodology. Accordingly, under the existing regulatory framework, rather than risk being embroiled in litigation involving a battle of the experts at trial, companies will often instead elect to voluntarily provide a "safe harbor" warning out of an abundance of caution in order to shield themselves from the inevitable threat of litigation that would otherwise exist if they sell a product or own a facility in California and do not warn. This is their right and is consistent with the statute, which requires warnings prior to "exposing" an individual to a listed chemical and, only if a company does not provide a warning, places the burden on that entity to prove that the exposure is below the warning threshold for the chemical.

OEHHA's proposal is extraordinarily problematic because it takes away a business's ability to simply and cleanly prove the approach it has taken to give Proposition 65 warnings is sufficient to meet the requirements of the statute through the "safe harbor" warning. In its stead, OEHHA proposes complicated and burdensome requirements that require warnings to be tailored to specific circumstances, including specific products and their particular contents and use characteristics. Compliance with such new requirements will be infeasible or otherwise financially impossible for many businesses. Even if compliance is feasible, the safe harbor aspect of the regulation has been removed, and right to prove that an alternative warning is clear and reasonable has been eliminated. Indeed, because it makes warnings much more complicated, OEHHA's proposal will open an entirely new frontier of litigation, where litigation related to the contents of a given warning will be on equal footing in terms of frequency as litigation related to whether or not a warning is provided.

As discussed below, the new requirements, even if they could be satisfied, would, according to the proposal, "at a minimum" constitute a clear and reasonable warning. This can be

interpreted to mean that some words or action, beyond what is set out in the regulations, is necessary to render even the mandated warnings "clear and reasonable." OEHHA does not specifically state what type of words or actions may be necessary, and therefore relies on the increased use of the litigation process to fill in the gaps.

As discussed in detail below, eliminating the streamlined "safe harbor" warning upon which so many businesses have relied to comply with the law and to protect themselves against the inevitable threat of litigation is, broadly speaking, the most fundamentally problematic aspect of the proposal. The Coalition also vehemently objects to specific components of the proposal, including the following:

1. **Website**: OEHHA's proposal would exacerbate the major problem with Proposition 65 today – excessive litigation. The website requirement will cause an exponential increase in unnecessary and expensive litigation. Further, the cost and administrative burden for compliance will be extraordinary – it will likely be impossible for small-and medium-sized businesses to handle these added costs.

2. **Grandfathering**: The grandfathering of court-approved settlements provision is crafted far too narrowly and doesn't extend the concept nearly far enough. Unless it is significantly reconstructed and expanded, this section of the proposed regulations will inevitably lead to perverse and inequitable results that will undermine Proposition 65's goals, erode public confidence in the statute, increase unnecessary Proposition 65 litigation, and place increased burdens on many thousands of businesses, especially including those that have effectuated good faith compliance with Proposition 65 warning requirements to date.

3. **GHS Pictogram:** The requirement to include the GHS pictogram on the vast majority of warnings, including consumer products, would be meaningless, and most likely, confusing and misleading. OEHHA provides no evidence demonstrating that California citizens would understand what the pictogram means. The pictogram, often referred to as the exploding chest symbol, symbolizes three outcomes totally unrelated to Proposition 65. Few people know what it means, others will speculate, and some will assume a hazard that is many orders of magnitude greater than the hazard that posed by the particular exposure giving rise to the warning.

4. **12 Specific Chemicals:** The requirement to include one or more of 12 specific chemicals on warnings is unsupported by any scientific basis. In fact, the only basis for the proposal, according to OEHHA, is that the chemicals are commonly used, commonly understood, and are easy to pronounce. Absent any scientific basis, the proposal inappropriately and unjustifiably elevates the perceived significance of certain chemicals in the eyes of the public. Moreover, OEHHA's suggestion that the list "may be changed over time" raises serious practical and implementation concerns. This suggestion implies that a change in the list of chemicals would once again necessitate a change in product warning labels. Frequent product label changes are cost-prohibitive and do not contribute any additional benefit to consumers' right-to-know.

5. **Revised Definition of Exposures:** OEHHA's unprecedented revision of the definitions of "consumer products exposure," "environmental exposure" and "occupational

exposure" do not clarify anything but rather create inconsistencies, confusion, and opportunities for litigation over their meaning.

6. **"Will Expose" Terminology:** The requirement that warnings state "will expose you to" instead of "contains" is unnecessary, unjustified, and sometimes will prove to be untruthful. This proposal will only increases the burden on businesses to perform expensive risk assessments using technical consultants in order to be prepared to defend themselves against Proposition 65 litigation even when businesses are providing warnings. OEHHA's rationale for this change also does little to support the necessity of this change in the longstanding terminology that California consumers have come to recognize and understand over the last quarter century.

7. **Opportunity to Cure:** This aspect of the proposal is so highly constrained and qualified as to make it unlikely to be applicable, even for those few it proposes to cover. A meaningful cure opportunity cannot turn on vague terminology such as "intentional neglect or disregard" or "normal and customary," each of which is ripe for dispute in litigation over their meaning.

8. **Optional Hazard Language:** OEHHA's proposed "short form" warning using the phrases "cancer hazard, "reproductive hazard," or "cancer and reproductive hazard" is problematic and unjustifiably alarmist and confusing. The word "hazard" adds no meaning to the word "cancer" other than to imply that the risk is somehow higher. The proposed longer form warning does not use the word "hazard," which therefore may lead consumers to believe that products bearing the shorter form warning pose a greater risk.

9. **Restrictions on Supplemental Information:** OEHHA's proposal that any supplemental information concerning an exposure not "dilute or negate the warning" will chill and possibly ban speech that is protected by the First Amendment. Equally concerning, it is not clear why OEHHA feels it is necessary to prohibit businesses from providing additional information to consumers. Conventional laws against false and misleading advertising adequately restrict what businesses can say, and businesses must adhere to these standards in providing information to consumers.

10. **Allocation of Responsibility/Liability:** The proposed regulatory language would not meaningfully reduce litigation, as the language is susceptible of interpretation and would undoubtedly be the subject of factual disputes over such terms as whether this is one of "most cases" (section 25606(a)) or what the meaning of the terms "primary responsibility" or "cooperate" are in a particular factual scenario.

11. **Consumer Products Warnings:** OEHHA's proposal will have an extraordinarily adverse impact on the consumer products sector, which is already facing an increased burden under the State's Safer Consumer Products regulation. Manufacturers, importers and retailers—who are already beholden to the warning requirements if there is a chance their product may enter California's stream of commerce—would bear possibly devastating costs and burdens if the proposal is enacted. But these costs will buy minimal, if any, benefits to consumers.

12. **Occupational Exposure Warnings:** OEHHA's proposal makes substantial revisions to the occupational exposure warning regulations that would likely result in confusing messages to workers and increased litigation. The proposal inserts a requirement that even a business complying with the federal or California Hazard Communication Standard must provide a separate Proposition 65 warning. By doing so, OEHHA guarantees increased litigation regarding: (a) the scope of federal preemption; (2) whether warning statements required under the Standards, alone, are "clear and reasonable"; and (3) whether warning statements required under the Standards dilute any accompanying Proposition 65 warnings so as to render those not clear or reasonable.

13. **Environmental Exposure Warnings:** OEHHA's proposal revising the environmental exposure warning regulations will impose burdens on businesses that far exceed any potential benefits, and will further open the door to increased litigation. OEHHA's proposal requires warnings to be delivered personally to each individual, in the language commonly spoken in the affected area, by electronic delivery unless the individual has no access to such delivery – and provides no further guidance for businesses on how to make any one of these determinations. With these impossible burdens, the proposal virtually guarantees increased litigation on the adequacy of the businesses' efforts to comply.

For all of these reasons, and those set forth below, OEHHA's proposal as written is unworkable and will not achieve the Governor's stated goals for meaningful Proposition 65 reform. However, as set forth in greater detail in the "Recommendation" section below, the Coalition believes that the Governor's goals for Proposition 65 reform can be achieved best by (1) maintaining the current "safe harbor" warning; and (2) creating a website apart from the "clear and reasonable" warning requirement that allows businesses to voluntarily provide additional information regarding potential exposure to Proposition 65 chemicals. To be clear, we believe that the entirety of OEHHA's proposed framework must be stricken in favor of the existing "safe harbor" warning requirements and a website created separate and apart from the warning regulations to which businesses and the public may avail themselves if they so desire.

Indeed, businesses are more likely to provide meaningful information for the website regarding exposure to listed chemicals if they are allowed to do so voluntarily without the threat of litigation from private enforcers. Because consumers will know that exposure information is available on the website, companies will be encouraged to explain the context of specific exposure(s) likely to result from use of their products in order to reassure the public of the safety of their products and provide greater context for exposures. A company that fails to provide such information runs the risk in the market (rather than the courtroom) that consumers (rather than plaintiffs' attorneys) will question the safety of its products and choose not to purchase or use them.

The Coalition would very much welcome and appreciate the opportunity to work with OEHHA moving forward to implement our proposed recommendations.

II. BACKGROUND

Proposition 65 is a "right to know" initiative, not a "public health" initiative. It was passed by the voters in 1986 following an initiative campaign that focused on public health and safety –

"Children … have already been exposed to chemicals that may make them sterile or give them cancer." The first ballot argument in support of the measure pleaded: "Keep these chemicals out of our drinking water." Proposition 65, especially in the early years, conferred some meaningful benefit upon the public. However, the ballot initiative also promised as follows: "These new laws will not take anyone by surprise. They apply only to businesses that know they are putting one of the chemicals out into the environment…" This purported promise has not been fulfilled, as witnessed by the ever increasing number and frequency of private enforcement actions against unsuspecting businesses.

In the nearly thirty years that have passed since the adoption of Proposition 65, private attorneys' enforcement lawsuits have moved away from legitimate actions to implement the Initiative consistent with its intent and public policy priorities to "gotcha" campaigns designed to trap businesses for "exposures" that are detectable, but which pose no demonstrable human health or environmental risk. This migration in enforcement activities is rooted in advances in chemical detection technology on the one hand, and a law which monetarily incentivizes lawyers to bring lawsuits of questionable merit, on the other hand, because nearly the entire burden of proof (and cost of litigation) is shifted to the defendant. The trend is borne out in the Proposition 65 statistics maintained by the Office of the Attorney General. Since its inception, the annual rate of issuance of Proposition 65 notice letters has increased by more than 2,200 percent, and the rate of growth is increasing. In the last approximately 20 years, 18,000 notice letters have been issued, but, last year alone nearly 1,100 notice letters issued. Through the first four months of this year, 422 notice letters have issued, which would yield 1,266 notice letters if annualized.

These notice letters lead to unnecessary litigation that burdens our already overtaxed court system, large attorneys' fees payments for the lawyers who bring Proposition 65 cases, and in the large majority of cases very little public benefit. According to the Attorney General's Office, in 2013 there were 352 settlements, the payments of which totaled $17,409,756. Of that total, non-contingent civil penalties accounted for 15 percent ($2,680,059), payments in lieu of penalties accounted for 11 percent ($1,998,435), and, remarkably, attorney fees and costs accounted for 73 percent ($12,731,262). To further underscore the absurdity of these numbers, one individual plaintiff's attorney entered into <u>60</u> settlements in 2013, with total payments amounting to $2,430,101. His attorney costs and fees totaled $2,004,871, which amounted to 83 percent of his total settlement payments.

In the vast majority of these Proposition 65 settlements, the defendant company admits no wrongdoing and the plaintiff concedes that the company has vigorously maintained its innocence. These settlements are not the by-product of a company "caught" doing something wrong, but, rather, reflect the reality that the costs of defense to demonstrate a warning is not required exceeds the cost of settlement. As implemented, Proposition 65 places the burden on the defendant to prove its innocence—in most cases to prove not that an exposure is not harmful but, rather, to prove that the exposure falls well below the hazardous level that it does not require a Proposition 65 warning. This is difficult, not straightforward, and nearly always requires engaging scientific experts at substantial costs.

Even absent litigation, companies bear enormous economic consequences for Proposition 65 compliance. The law is enforced exclusively though litigation, which means the guiding precedent is not set forth in readily available laws and regulations, but in *ad hoc* consent judgments that calculate warning trigger levels and exposures in different ways (per product, per

product category, per ingredient) and by different measures (on a daily basis, as a concentration, averaged over time), respectively. Tracking those developments and implementing the myriad consent judgment requirements have required some companies to retain a full-time Proposition 65 compliance officer, an employee focused on company compliance with one law of one state. That is not a sustainable model to ensure compliance with each of our state's and nation's health and safety laws. Other companies have been compelled to include a Proposition 65 warning on products sold, in California or throughout the country, because they do not control the distribution of their products. This has resulted in consumer confusion outside the state's bounds, often contrary to public policy. Still, other companies have sought to render their products not for sale in California, reducing consumer choice and possibly leaving consumers with alternatives that contain even more of a listed chemical than the option removed from the market.

Despite 30 years of litigation, many fundamental questions about Proposition 65 compliance remain unanswered, including how to test for Proposition 65 compliance, what tests to apply, when to test, how many tests to perform, whether those test results should be averaged, and, if so, over what period of time. As we discuss below, OEHHA's proposal does nothing to address these fundamental questions. OEHHA's proposal, although supposedly intended to resolve and clarify uncertainties surrounding the applicability of existing Proposition 65 requirements, instead makes understanding the requirements more nebulous, leaving disputes about material facts to be adjudicated by the courts. OEHHA's proposal is based on a faulty assumption that businesses "know" (or, alternatively, should know) when a Proposition 65 warning is required. In its Draft Initial Statement of Reasons, OEHHA states: "Since the regulations would create mandatory minimum content for the warnings and also prescribe acceptable warning methods, businesses would be able to rely on their compliance with the regulations, and litigation concerning the adequacy of warnings should be reduced." (Draft Initial Statement of Reasons, p.2, March 7, 2014.) Although we appreciate OEHHA's apparent intent to create certainty to businesses and reduce litigation, the current proposal will increase uncertainty and litigation, not decrease it.

III. OVERARCHING ISSUES

This part identifies several broad-based overarching concerns with OEHHA's proposed framework.

First, OEHHA's proposal completely eliminates a regulated entity's ability to argue to a court that its warning information, however that entity articulates it, is "clear and reasonable" within the meaning of the statute. This removes product-specific and company-specific flexibility, consistent with First Amendment principles, to provide appropriate warnings that still comply with the statute and further voter intent. Indeed, OEHHA's complicated and, in some instances inconsistent, mandated warning requirements will create more compliance pitfalls for enforcers to exploit. Worse, OEHHA's use of the phrase "at a minimum" in proposed Section 25601(a) can be interpreted to mean that some words or action, beyond what is set out in the regulations, is necessary to render even the mandated warnings "clear and reasonable." That "at a minimum" phrase renders the entire proposal vague and ambiguous, provides no guidance to the regulated community and will surely establish the foundation for countless enforcement actions.

Second, several particulars of OEHHA's proposal, and certainly its overall impact, render it fundamentally unworkable. The eleven items of information that must be continuously disclosed to OEHHA, and then to the public, the disparate treatment of similar businesses in the same industry through unduly limited grandfathering, the required waiver of substantial work product and trade secret materials, the exploding chest pictogram, the dartboard approach to selecting 12 chemicals to be specifically identified, the mandate that a warning say a product "will expose" a person to a chemical when some scenarios only "may" expose persons all represent unworkable warning requirements, each of which will create a new potential for unnecessary litigation and each of which will not promote more meaningful warnings.

Third, OEHHA's proposal wrongly presumes that all chemical exposures for which warnings are required warrant avoidance. For example, Proposition 65 requires warnings for exposures to reproductive toxicants that are below, and in some instances well below, the "no observed effect level" for reproductive toxicity. Yet, OEHHA presents no evidence that exposures below the no observed effect level should be avoided. Nor does OEHHA present any evidence that, in all instances (as the proposed regulations would seem to indicate), avoiding the use of a product outweighs any known or perceived harm.

Fourth, OEHHA claims that one of the problems with Proposition 65 today that it is trying to address with the new warning regulations is the problem of "overwarning". Yet, OEHHA has not documented or otherwise established that overwarning is a problem. What are the examples of "overwarning" that concern OEHHA? Moreover, OEHHA's proposal fundamentally cannot address the problem of overwarning because it only provides guidance regarding *how* to warn, not *when* to warn. To the extent that "overwarning" exists, it is created by overzealous Proposition 65 enforcement and the language of the statute, which quickly shifts the burden of proof to the defendant.

Fifth, without addressing frivolous "shakedown lawsuits," the added burdens on business from the new warning regulations are an unfair tax and cost on doing business in California with no counterbalancing action or reform. Without reforming the science underneath Proposition 65, the effort to make Proposition 65 warnings more "meaningful" will be built on a faulty and unstable foundation.

Finally, the Coalition notes that OEHHA does not appear to have an expert in consumer perception of warnings or labels, an expert in public risk perception, or an expert in the analysis of calls that OEHHA receives concerning Proposition 65 warnings (during the April 14 public workshop, OEHHA indicated that the current proposal is based, in part, on phone calls received over the past 28 years). Proceeding with a major policy shift without the benefit of persons with the relevant expertise needed to promulgate and implement a proposal of this magnitude presents significant concerns to the Coalition. In this respect, without consulting experts in the fields of risk communication, the Coalition does not believe OEHHA can promulgate changes to the warning regulations that effectively respond to on-the-ground realities.

IV. SPECIFIC ISSUES

This part identifies thirteen specific issues with OEHHA's proposal, including the following: (1) the website requirement; (2) the grandfathering proposal; (3) the Globally Harmonized System (GHS) pictogram requirement; (4) the "will expose" terminology; (5) the requirement to name

any of twelve specific chemicals in warnings; (6) the revised definition of exposures; (7) the revised allocation of responsibility and liability pertaining to warnings; (8) the opportunity to cure provisions; (9) the optional "hazard" language; (10) restrictions on "supplemental" information; (11) consumer product warnings; (12) occupational exposure warnings; and (13) environmental exposure warnings.

Website

OEHHA proposes, in section 25604, to require that all businesses submit 11 items of information for each of their Proposition 65 warnings. OEHHA, in turn, will post this information on a new website for public review. This proposal turns a blind eye to the major problem with Proposition 65 today – excessive litigation. Rather than address that problem, section 25604 will exacerbate it. The website requirement will cause an exponential increase in unnecessary, but expensive, resource-draining litigation. Litigation will also increase because of the very ambiguity of the regulatory language. Further, the cost and administrative burden to businesses having to comply will be extraordinary. It will likely be impossible for small and medium size businesses to handle these added costs.

As set out below in the "Recommendation" section, OEHHA can avoid adverse consequences while still providing greater information to the public. It can do so by removing the website provision from the warning portion of the regulations, by eliminating it as a required element of providing a clear and reasonable warning, and by providing that businesses may voluntarily submit information for posting on the website without risk of litigation. In fact, OEHHA's Director indicated at the Assembly Budget Subcommittee No. 3 (Resources and Transportation) hearing on May 20th that OEHHA is poised to remove the private right of action hook from the website requirement. However, since the draft regulation remains unchanged, and since it is not yet clear to the Coalition how OEHHA will remove this "hook," these comments address the proposal as it currently stands.

During the recent, pre-regulatory workshop, OEHHA staff asked, "How will the website requirement increase litigation?" This question can best be answered by comparing the potential for litigation today under the safe harbor warnings with the potential for litigation under the draft regulation.

Today, the safe harbor warnings, whether for products or occupational or environmental settings, cover all chemicals and all exposure scenarios. Hence, the potential for litigation arises only when the business fails to warn and the enforcer alleges that the product or the occupational or environmental setting exposes individuals to a listed chemical, albeit, even at infinitesimal levels or trace amounts.

Under the draft regulation, a business is obligated to name in its warnings the specific chemical or chemicals giving rise to the warnings. Then, the website regulation requires the business to provide 11 items of information for each chemical to be posted on OEHHA's website. Businesses have to describe the anticipated routes of exposure, the anticipated level of exposure, and actions a person can take to minimize or eliminate exposure.

Under the draft regulation, the potential for litigation arises not only for failing to warn about a *de minimis* exposure, but it would arise in the following illustrative situations *even when a warning is provided*:

1. A business identifies one or more chemicals listed in section 25605, but the enforcer determines that another chemical is present at a *de minimis* level.

2. A business describes the apparent route of exposure, but a creative enforcer concocts a plausible, but unlikely, exposure scenario. An example will illustrate this situation. The apparent route of exposure to DEHP in plastic sandals is dermal absorption through the feet. The enforcer, however, alleges that the business should also have described ingestion of DEHP through hand to mouth activities occurring after putting on the sandals.

3. A business describes several locations, for example in an occupational or environmental setting, where an exposure may occur, but the enforcer alleges another, perhaps more remote, location where an exposure may occur.

4. The business hires a toxicologist to assess the likely exposure level and submits the report to OEHHA, but the enforcer makes different assumptions and alleges that the business understated the level of exposure.

5. The business provides information of a practical action to minimize or avoid the exposure, but the enforcer alleges that a less feasible action would be more effective. For example, the business may report that consumers should wash their hands after putting on sandals containing DEHP. The enforcer alleges that consumers should wear gloves when putting on sandals.

The situations described above illustrate that the potential for litigation increases with each variable or factor for which a business will be required to provide information to the OEHHA website. Those situations are just some of the obvious ways in which businesses will be exposed to increased litigation. In the hands of creative enforcers, the regulation provides innumerable opportunities to assert that the business failed to provide a clear and reasonable warning.

In addition to the exponential increase in litigation, the burden and cost that would be imposed on businesses to comply with the website regulation are extraordinary. Today, a business, aware of the potential for exposure to a listed chemical and to shield itself from the inevitable threat of litigation, can comply with Proposition 65 by adding a label or posting a sign in reliance on the current “safe harbor” framework. This would no longer be the case under the draft regulation.

In every instance in which a warning is provided, the business, to comply with the website regulation, will need to consult with someone familiar with the allegations that enforcers make concerning the routes of exposure. For example, sandal manufactures do not anticipate ingestion of DEHP because the average consumer does not put sandals in his or her mouth. However, the manufacturer, to avoid a claim that its warning is not clear and reasonable, must be knowledgeable or hire a consultant to advise it of such assertions by enforcers.

Moreover, the ambiguity of the draft regulatory language itself significantly increases the burden on businesses and will undoubtedly result in even more litigation. For example, although proposed section 25606 suggests that a retail seller of consumer goods should not be the entity primarily responsible for providing clear and reasonable warnings, the draft website regulation requires any "person in the course of doing business" to provide the information identified, which as discussed above, is incorporated into the clear and reasonable warning requirements as drafted. Therefore, despite OEHHA's intention to mitigate the burden on retail sellers, private enforcers will continue to pursue legal action against retailers that satisfy the statutory definition of a "person in the course of doing business" if they fail to comply with the onerous provisions of section 25604. Further, because each entity in the supply chain that is a "person in the course of doing business" must submit the information required by section 25604, there is a substantial likelihood that there will be inconsistencies in the information provided to OEHHA, which will again expose those entities to litigation.

In addition, the term "manufacturer," which appears in section 25604(a)(2), is not defined in the statute, the current regulations, or proposed regulations. Yet section 25604(a)(2) would require businesses to provide to OEHHA the "name and contact information for the manufacturer of any product the warning is intended to cover." Businesses will then be forced to anticipate how creatively private enforcers may seek to define "manufacturer," as they consider whether to provide the required information for: (i) any entity supplying a constituent or raw material containing a listed chemical; (ii) any entity that combines constituent or raw materials together to produce bulk product; (iii) any entity that packages bulk product into units for sale to retailers or end users; or (iv) any other entity that may be characterized as a manufacturer for purposes of a private enforcer's lawsuit. In many instances, the actual manufacturer of a product or component is a trade secret. This provision would appear to be an attempt to force the unprecedented disclosure of trade secret information.

After OEHHA has made it clear, over an extended period of time, that only specific product types are necessary for 60-day notices by private enforcers, OEHHA now proposes to burden businesses with a much more substantial "each barcode" requirement in section 25604(a)(3). This proposal, when compared with section 25903, lays bare one of the ways in which OEHHA is more concerned about minimizing burdens on plaintiffs' lawyers than it is concerned about placing burdens on businesses in California.

The phrase "if known," appearing in section 25604(a)(9) is similarly ambiguous. It is not even clear to whom the phrase applies. For example, if a private enforcer "knows" information concerning anticipated level of exposure to a listed chemical in a consumer product, perhaps because the enforcer hired a consultant to study the issue, will that knowledge be imputed onto every business in the product's supply chain? In other words, assuming the relevant information is "known" to somebody, does that make the information "reasonably available" to every business that may be affected? It takes no stretch of the imagination to envision how such an ambiguity will lead to more litigation between private enforcers and business, and even among businesses within a singular supply chain, over what information is considered "known" for purposes of section 25604(a)(9).

Section 25604(a)(9) is further objectionable because it eliminates standard work product protections for defendants, but not for plaintiffs, in Proposition 65 litigation. Once a business receives an expert's analysis of "the anticipated level of human exposure to the listed chemical,"

whether before or during litigation, it will have a duty to disclose that to OEHHA within 30 days. No such duty would apply to a Proposition 65 plaintiff. Once again, OEHHA is proposing to dramatically shift the scales in favor of plaintiffs' lawyers and against businesses.

Further, as noted above, the ambiguity inherent in the requirement of section 25604(a)(10) – that businesses provide "[i]nformation concerning action a person can take to minimize or eliminate exposure to the listed chemical" – will result in more litigation and possibly absurd results. For example, in keeping with the hypothetical sandal manufacturer described above, when threatened with costly litigation, the manufacturer may agree in a settlement to advise its customers to wear gloves when putting on their sandals. As discussed above, the Coalition also vigorously objects to the notion that businesses should be obligated to provide information on product avoidance when no determination has been made that the product is not safe.

The ambiguities identified in the preceding paragraphs are only some of the more obvious ones evident in the information requirements of section 25604(a), and this discussion is in no way intended to suggest that this as an exhaustive list of problematic ambiguities in the website regulation. Indeed, the website regulation as proposed offers endless possibilities for enforcers to exploit unclear language and sue businesses for alleged failures to provide the required information to OEHHA.

Moreover, the update requirement contained in section 25604(c) is devoid of any guidance regarding how a business should determine that it must provide updated information. When, for example, is an update "needed"? Enforcers will undoubtedly interpret the regulation to mean that any change to any information required by section 25604(a)(1)-(11) triggers the update requirement. The resulting burden on businesses would increase dramatically, as each "person in the course of doing business" in a consumer product supply chain would have to constantly keep tabs on every other business in the same supply chain, for fear of running afoul of this regulation.

As discussed further in the "Recommendation" section below, OEHHA should encourage businesses to voluntarily provide OEHHA with helpful information regarding potential exposure to listed chemicals for use on the proposed Proposition 65 website. However, such information should not be part of the warning regulation, and businesses should not be subject to private enforcement actions based on the information they provide for the website. Otherwise, the burden of compliance and costs of litigation on businesses will rise dramatically, in sharp contrast to the stated goals of OEHHA's proposed regulations.

Finally, the Coalition objects to OEHHA placing a permanent, mandatory duty on itself to maintain a website and to speak to various broad issues on that website. The Coalition recommends that the website be a permitted but not a mandated OEHHA task.

<u>Grandfathering of Court-Approved Settlements</u>

In proposed Section 25603 (entitled "Court Approved Settlements"), OEHHA proposes to exclude from the scope of coverage of its amended warning regulations "parties to court-approved settlements prescribing warning content and methods entered prior to January 1, 2015." The Coalition can support this proposed provision so long as it is coupled with a workable regulatory regime, but believes that it is crafted far too narrowly and doesn't extend

the concept of "grandfathering" nearly far enough. Unless it is significantly reconstructed and expanded, this section of the proposed regulations will inevitably lead to perverse and inequitable results that will undermine Proposition 65's goals, erode public confidence in the statute, increase unnecessary Proposition 65 litigation, and place increased burdens on many thousands of businesses, especially including those that have effectuated good faith compliance with Proposition 65 warning requirements to date.

First, as currently framed, this Section merely recognizes what it must – that OEHHA must respect the separation of powers between itself and the courts and cannot, through its exercise of quasi-legislative authority in undertaking rulemaking, undermine the authority of existing court orders and injunctions. OEHHA should go further than the bare minimum in extending the grandfathering concept so as to treat businesses that are equally positioned except as to having entered into a prior Proposition 65 consent judgment more equitably. Consent judgments for product-specific, area-specific or chemical-specific cases should translate and apply to all relevant products, areas, or chemicals, respectively, as applicable. Otherwise, inconsistent warning label requirements among similar products, areas, or chemicals would unduly discriminate against those not previously subject to litigation, placing disproportionate burden on the latter in the marketplace, and creating an unfair competitive advantage to those in prior settlements.

Second, as is underscored in the Draft Initial Statement of Reasons, as currently framed, this Section will only apply to those parties to court-approved settlements prescribing Proposition 65 warning requirements that are directly affected by a mandatory provision of the settlement related to the content or methods of providing warnings, thereby leaving others, even if they are parties to such settlements or directly addressed in their terms, un-grandfathered, including as to the application of the new warning requirements for the same subject product. Hence, under the proposal, in many cases, the exact same goods or services will be subject to dual warning requirements.

Third, as drafted, the proposal could leave those parties subject to older settlements that have not been reviewed and affirmatively approved by a judge un-grandfathered and subject to the amended warning requirements even though their settlements were entered in the court's records pursuant Code of Civil Procedure section 664.6 prior to the enactment of SB 471.

Fourth, this aspect of OEHHA's proposal does not account for many Proposition 65 settlements that have been entered into outside of the context of a court case, but which still have prescribed warning programs that fully comply with the statute's requirements and regulations and often match those that are included in court-approved settlements in substance. To the extent OEHHA is sincere in its Draft Initial Statement of Reasons that "most warnings that have been agreed to in Proposition 65 cases substantially comply with the terms of these proposed regulations," that attribute is also applicable to the vast, vast majority of what has been required in these out of court settlements (and the plaintiff's counsel that have negotiated them will surely be quick to confirm that they would not agree to anything less). While the businesses bound by these types of settlements are not under court order, they still are under contractual obligations that must be adhered to and, hence, their specified warning programs cannot simply be ignored in favor of the new requirements – either dual warnings will have to be issued or the prior out-of-court settlements may have to be modified at significant expense. In essence, OEHHA's proposal poses an impossible choice to businesses bound by out-of-court settlements: either

comply with the new regulations and be sued for breach of contract, or comply with their contractual obligations and be sued for failure to comply with the new regulations.

Fifth, OEHHA's grandfathering proposal provides nothing for the thousands of businesses that have voluntarily implemented Proposition 65 warnings complying with the statute and existing regulations. In this respect, not only does the proposal ironically treat those previously alleged to be "violators" better than those that have volunteered to provide compliant warnings, it also may result in goods and services with the exact same characteristics bearing different types of warnings based on the happenstance of whether the business offering them was previously sued. Consumers facing two different-looking types of warnings for exposures that are substantively the same may be confused or have their choice distorted as the result, thereby undermining the objectives of Proposition 65. In its Draft Initial Statement of Reasons, OEHHA argues that if it extends grandfathering in this manner "this proposal would essentially result in little change . . . for many, many years." However, to the extent that existing warnings currently comply with Proposition 65, that timing concern alone does not justify OEHHA's draconian approach to grandfathering the many businesses that voluntarily provide them and, at a minimum, they should be given significantly more time to transition their artwork, labeling and other methods of warning to the new requirements in due course when there is otherwise cause for them to be updated.

Finally, for products, grandfathering needs to be tied to the date of manufacture of the goods in question so that they can be sold off bearing their existing warnings until the inventory of them has been exhausted. Failure to expand the grandfathering concept to include this "sell-through," means that goods with currently compliant warnings would have to be quarantined or removed from the California market, retrofitted, or destroyed, to the extent that is even possible in today's combined brick and mortar and cyber marketplaces that have goods warehoused nearly anywhere. Not only will this impose large and unnecessary costs on the businesses affected, it will result in adverse environmental impacts (due to increased shipping, transportation, and waste disposal of products).

GHS Pictogram

The proposal to require the addition of the international health hazard pictogram should be eliminated. Today, the pictogram is, at best, meaningless and most likely, confusing and misleading. Moreover, it is redundant on a label or sign that begins with the bolded word "WARNING."

The pictogram, often referred to as the exploding chest symbol, was adopted by the European Union initially to communicate hazards to workers engaged in handling cargo being shipped throughout the 28 countries that make up the EU. The pictogram is intended to communicate a health hazard other than one that poses "acute toxicity," or is "very toxic (fatal)" or "toxic." Those hazards are characterized by a skull and crossbones pictogram. The exploding chest is intended also to communicate a hazard other than "acute toxicity (harmful)," or a "skin and eye irritant," "respiratory irritant," "skin sensitizer," and "narcotic." Those hazards are characterized by an exclamation mark. The exploding chest can mean "carcinogen," "mutagenicity," "reproductive toxicity," "respiratory sensitizer," "target organ toxicity," and "aspiration toxicity." In other words, even if someone recognized the pictogram, it would symbolize three health outcomes totally unrelated to Proposition 65. Of course, the pictogram symbolizes nothing to most people, not even to people in the European Union.

The European Union began implementing the Globally Harmonized System (GHS) of Classification and Labeling of Chemicals in January 2009, to provide information on the hazards and toxicity of chemicals to workers and consumers during the handling, transport, storage and use of chemicals. See Study on the Communication of Information to the General Public, European Chemicals Agency (Jan. 2012). The European Union regulation required the European Chemicals Agency (ECHA) to study the communication of information to the general public.

The communication study was conducted in two parts. First, over 26,000 European citizens were interviewed from all member states. Second, qualitative research was conducted by a team of academics in the field of risk research and consisted of in-depth interviews with 242 citizens. *Ibid*. In the interviews, only 20 percent of EU citizens reported that they were familiar with the exploding chest pictogram. In the qualitative research, conducted nearly one year later, only 12 percent reported they were familiar with the symbol. *Ibid*.

The low familiarity with the exploding chest pictogram contrasts dramatically with the U.S. standard for comprehension acceptability. To be acceptable in terms of comprehension, 85 percent of a sample of 50 people must comprehend the intended concept with no more than 5 percent of the people experiencing critical confusion when the warning is displayed without text. American National Standard Institute, Criteria for Safety Symbols (ANSI Z 535.3, 2007). The ANSI standard was cited by U.S. OSHA in its adoption of the GHS. See Fed. Reg., Vol.77, p. 17589 (Mar. 26, 2012).

Interestingly, only U.S. OSHA has adopted the pictograms of the GHS in the United States. None of the federal agencies generally involved with consumer hazards and public health, such as the Consumer Product Safety Commission, Department of Commerce, Environmental Protection Agency, and Food and Drug Administration, have moved to adopt the GHS pictograms. Hence, the pictogram will have very limited exposure in the United States. Certainly, the exposure here will be nothing compared to its use in Europe where only 12-20 percent of the people surveyed in 2012 were familiar with the exploding chest pictogram. That is a far cry from ANSI's 85 percent comprehension standard.

OSHA recognized that the pictograms are not familiar to workers, and as a consequence, required employers to train workers on the new safety data sheets, including the pictograms. *Ibid*. No such training exists for California consumers. It would take a multi-million dollar campaign to raise Californians awareness of the exploding chest pictogram. Even then, it would add nothing to the Proposition 65 warning. It performs less well because of its ambiguity than the use of the bolded word "WARNING" on every notice. No purpose is served by adding ineffective redundancy.

Furthermore, the pictogram may actually endanger the health of workers in California and elsewhere. OSHA uses this pictogram to communicate very specific occupational health hazards, but that useful occupational safety information is at risk of being swamped and neutered by the appearance of the pictogram everywhere there is currently a Proposition 65 warning. This would be a clear case of overwarning with detrimental effects on the health of California workers, which is counter to OEHHA's stated goal and mission.

At best, the pictogram is meaningless, but it consumes space on product labels and warning signs. Of even greater concern is that the pictogram is most likely confusing and misleading. Few people will know what it means, others will speculate, and some will assume a hazard that is many orders of magnitude greater than the hazard that posed by the particular exposure giving rise to the warning.

The fact that the draft regulation does not require the pictogram for prescription drugs, dental care, and for foods, whether purchased at a store or in a restaurant, including alcoholic beverages demonstrates a recognition that (1) the exploding chest pictogram is likely to overstate the hazard, (2) it could cause confusion in that it could mean that the product, location, or service may have immediate and serious health consequences, and (3) that prescription drugs, dental care, and foods are necessary, and a textual message is more informative than an ambiguous symbol. The same is equally true for all products, work places, and environmental warnings. No pictogram should be added to the requirements of the warning regulation, probably ever, and certainly not unless and until it meets the ANSI standard of 85 percent comprehension.

12 Specific Chemicals

OEHHA's proposal calls for twelve specific chemicals to be expressly identified in warnings. These chemicals include the following: acrylamide; arsenic; benzene; cadmium; chlorinated tris; 1,4-dioxane, formaldehyde; lead; mercury; phthalates; tobacco smoke; and toluene. The Coalition objects to this aspect of the proposal on practical and principled grounds. If OEHHA intends to impose an entirely new and in many ways complicated regulatory burden on businesses, it should, at the very least, provide an objective scientific basis for distinguishing between those chemicals that must be identified and those that need not be. The Coalition is not aware, however, of any objective scientific or other policy basis that would generate a practical, sensible list of chemicals to be specifically mentioned.

The selection criteria for the twelve designated chemicals are not readily apparent. Indeed, the Draft Initial Statement of Reasons provides absolutely no scientific or policy basis for including the twelve chemicals. Instead, the Draft Initial Statement of Reasons merely states that the twelve chemicals "are commonly found in consumer products, including foods, and those that commonly are involved in occupational and environmental exposures" and are also "commonly understood." (Draft Initial Statement of Reasons, p.12, March 7, 2014.) During the April 14 public workshop, it also appeared that OEHHA selected these chemicals because they are easy to pronounce. The Coalition is hard pressed to believe that a significant portion of the population can pronounce chemicals like "phthalates" or "chlorinated tris." But it is impossible to have an accurate measure as to what the public understands or can pronounce, as OEHHA has provided no statistics or other studies to support its proposal.

OEHHA's proposal to specify certain chemicals rather than others in a "right to know" law inappropriately and unjustifiably "elevates" the significance of the specified chemicals in the eyes of the public. Thus, doing so must be scientifically grounded; again, we do not believe there is a practical way to elevate a manageable list of chemicals above others not on the list. Persons in California now have the ability to ask the person responsible for a warning what chemical or chemicals have triggered the need for the warning, and they further have the ability to avoid the exposure in the future if that answer is not satisfactory. That is enough, there is no

need for this further requirement, and the marginal benefit, if any, does not justify the additional burden and expense on business.

OEHHA's selection of the initial twelve chemicals is itself further evidence of the impracticability of this selected pool of chemicals approach: phthalate exposures are among the exposure allegations that, in our members' experience, often are the basis for frivolous "shakedown" lawsuits. To elevate phthalate exposure to the list of the twelve most important exposures is unfounded and highlights the impracticality of this entire endeavor.

Further, it is not unusual for products to contain arsenic, cadmium and lead, as these substances occur naturally in the environment. Accordingly, at least in some instances, this disclosure could become too long and cumbersome for limited space on a product label or otherwise. Of the twenty most recent notice letters identifying arsenic, for example, three identify four or more of the twelve chemicals in proposed section 25605. Thus, it is not clear what the basis is for OEHHA's statement that it "does not anticipate that warnings will contain more than one or two of the listed chemicals," as stated in the Draft Initial Statement of Reasons. (Draft Initial Statement of Reasons, p.12, March 7, 2014.)

Finally, notwithstanding OEHHA's intent to provide certainty to business, its proposal on this issue is anything but certain. According to the Draft Initial Statement of Reasons, "[t]he list of chemicals is not intended to be exhaustive and may be changed over time as the public becomes more familiar with the improved warning format." (Draft Initial Statement of Reasons, p.12, March 7, 2014.) The fact that the list of chemicals could change over time raises serious concerns from a pragmatic standpoint. This suggestion implies that a change in the list of chemicals would once again necessitate a change in product warning labels. Frequent product label changes are cost-prohibitive and do not attribute any additional benefit to consumers' right-to-know. In fact, consumers would likely become increasingly confused as the same product over time would have had different labels highlighting different chemicals potentially.

This provision should be stricken for the aforementioned reasons.

<u>Revised Definitions of Exposures</u>

In draft Section 25602(b), (c) and (e), OEHHA proposes an unprecedented revision in the definitions of "consumer products exposure," "environmental exposure" and "occupational exposure." OEHHA's Draft Initial Statement of Reasons characterizes the revised definitions as "minor modifications" intended to "clarify, rather than change" the existing definitions. (Draft Initial Statement of Reasons, p.7, March 7, 2014.) However, the proposed revisions to the definitions in subjections (b), (c) and (e) are far from minor and do not clarify anything but rather create inconsistencies, confusion, and opportunities for litigation over their meaning.

Most important, by inserting the phrase "requiring a warning" in those definitions, OEHHA creates conflicts and internal inconsistencies with other aspects of the Proposition 65 regulations. Each of these defines a particular "exposure" (consumer, occupational, environmental) in a manner inconsistent with the definition of "exposure" in section 25102, where it means "to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical." OEHHA should not and cannot have different definitions of what an exposure means for different portions of Proposition 65. (The Coalition also questions

whether any change to occupational exposure warnings should be adopted by OEHHA rather than the California Department of Industrial Relations, which has primary jurisdiction over workplace information relating to chemical exposures.)

It is unclear as to what issues OEHHA is intending to clarify with these proposed wording changes. It is very difficult for businesses to determine whether an exposure requires a warning. Indeed, OEHHA's own set of Prop 65 FAQs states, "Determining anticipated levels of exposure to listed chemicals can be very complex." *See* www.oehha.ca.gov/prop65/p65faq.html. OEHHA notes that businesses "are discouraged from providing a warning that is not necessary and instead should consider consulting a qualified professional if you believe an exposure to a listed chemical may not require a Proposition 65 warning." See *id*. As a result, inserting the phrase "requiring a warning" into the definition of exposure for purposes of the warning regulations only might be considered to somehow increase the task for businesses.

Not only is it difficult and expensive to determine the level of exposure resulting from a given product, for many chemicals there is no definitive threshold level to which the exposure level can be compared. OEHHA publishes safe harbor levels (NSRLs and MADLs) for a subset of all listed chemicals. If a chemical does not have a published safe harbor level, the burden will be on the business, in litigation, to prove what level is appropriate using scientific expert testimony. Developing such a number, even outside of litigation, can easily cost in the six figures.

But the proposed revisions appear to be based on the flawed assumption that it is possible to determine with absolute scientific certainty when an exposure occurs that requires a warning. In fact, this is one of the precise reasons that the vast majority of Proposition 65 enforcement actions settle: it is complicated and expensive to demonstrate the level at which an exposure, if any, is occurring, with plaintiffs disputing every assumption used to calculate the level. Exposure assessments and product testing, even when undertaken for pre-litigation compliance purposes, are treated by bounty hunters and activists simply as disputed facts to be adjudicated by a court after great expense and disruption to the company, not as definitive guideposts for when a warning is required. Indeed, the expense to businesses of proving the level of exposure in court provides bounty hunters with great leverage in settlement discussions.

Proposition 65 already imposes substantial burdens on businesses, both in complying with the law and in defending enforcement actions. OEHHA's proposed insertion of the phrase "requiring a warning" in Sections 25602(b), (c) and (e) is contrary to statute, unfairly increases those burdens and will increase litigation, all without any countervailing benefit that OEHHA has even articulated beyond an effort to "clarify" the definitions. OEHHA must refrain from revising those definitions.

<u>"Will Expose" Terminology</u>

For almost 25 years, the standard Proposition 65 warning for consumer products has stated that the product "contains" a listed chemical. And although it is not always simple or straightforward to determine whether a product "contains" a listed chemical, it is far simpler than determining whether "average users of the consumer product" are "exposed" to the chemical based on their "average rate of intake" under 27 Cal. Code Regs. Sections 25721(d)(4) and./or 25821(c)(2).

The combination of defining each type of exposure to be limited to those that require warnings with the change in the standard terminology to "will expose" only increases the burden on businesses to perform expensive risk assessments using technical consultants in order to be prepared to defend themselves against Proposition 65 bounty hunters.

Furthermore, OEHHA's Draft Initial Statement of Reasons does little to support the necessity of this change in the longstanding terminology that California consumers have come to recognize and understand over the last quarter century. For example, OEHHA notes that using "will expose" instead of "contains" for food products "focuses the individual on the route of exposure (oral or ingestion) as opposed to the existing safe harbor language that simply says the product 'contains' a listed chemical." (Draft Initial Statement of Reasons, p.23, March 7, 2014.) But it is obvious to consumers that food is ingested and hence if a food product "contains" a listed chemical, then eating the food product "will expose" the consumer to the chemical.

Similarly, for products that are not ingested, the term "contains" -- in combination with the word "WARNING" is not "potentially meaningless" but instead is accurate and provides the consumer with useful information. For example, if the grip of a tool contains lead, it will not "expose" the user to lead if the user is wearing gloves. A warning that the product "will expose" the user to a listed chemical is therefore inaccurate in some circumstances, whereas a warning that the product "contains" the chemical can be readily determined for most individual consumer products. The same would be true for a "foreseeable" but not certain exposure. Proposition 65, as OEHHA has interpreted it, requires warnings for certain "foreseeable" exposures that are not certain to occur. In those situations, too, a "will expose" warning would not be truthful or accurate.

The exception is for produce and restaurant foods, two categories of products for which the current regulations permit statements that the chemical "may" be present. As noted in the Draft Initial Statement of Reasons for these provisions, the agency believed "that, in these narrow circumstances, stating that the chemicals may be present implies that some foods sold contain listed chemicals, and is sufficient to stimulate inquiry by the persons receiving the warning." *Id.* at 28. OEHHA today has not explained why this longstanding terminology needs to be revised in order for consumers to understand its meaning, and particularly in light of the added burdens and litigation risks for businesses.

<u>Opportunity to Cure</u>

In proposed Section 25607 (entitled "Opportunity to Cure"), OEHHA proposes to allow a retail seller with fewer than 25 employees a limited opportunity to cure a "minor violation" of the statute's warning requirements if the retail seller was "previously in compliance" and the violation is not the result of (1) "intentional neglect or disregard," (2) "not avoidable" using "normal and customary" quality control or maintenance, (3) "corrected" within 24-hours of discovery or notification (or 14 days if software or equipment "must be" repaired or replaced), and (4) not "recurrent."

First, as an initial matter, this aspect of the proposal is so highly constrained and qualified as to make it unlikely to be applicable, even for those few it proposes to cover. A meaningful cure (or "correction" as some have preferred it be called) opportunity cannot turn on the above quoted terms, each of which is ripe for a dispute in litigation over their meaning. OEHHA needs to

substitute simpler, more objective, and far less legally-debatable criteria to make this provision work. If there is evidence that a business has attempted to provide warnings that would comply with the statute under the existing regulations, they deserve at least one meaningful chance of bringing their programs up to what is demanded relative to any new requirements once they are put on notice of specifically what they are expected to do. They also deserve a realistic and meaningful opportunity to do so – given that these warnings are not given for emergencies or acute hazards, 24 hours is not nearly enough time even for replacing a sign in a store, let alone for implementing corrections to on-product or on-package warnings; 14 days is not enough for reprogramming software or repairing hardware used to convey warnings electronically; and, given the scope of information it is proposed to require, 30 days is not enough for providing all types of additional or corrected information to the website OEHHA intends to maintain.

Second, there is no apparent logic to restricting an opportunity to cure a deficiency in compliance with the new requirements to businesses that are "retail sellers." In fact, given that the "primary responsibility for warning will be theirs," it may be more challenging to transition a non-retail business (and especially one which is more likely to be located out of the State or even the United States) to compliance with all aspects of the new requirements. This is particularly the case where the business in question has devoted considerable resources to and has established momentum in implementing a Proposition 65 warning program under the existing regulations. To the extent that a business, whether or not, a retail seller, has previously attempted to warn and is prepared to promptly respond to an allegation that they need to improve or update their existing warning program to bring it up to the level required by the new regulations, they too deserve a reasonable opportunity to implement corrective action without being subject to litigation or penalties.

Third, OEHHA should not tie this aspect of its proposal to a 25-employee demarcation line with respect to its scope of application. Although it may have in part been intended to help smaller businesses, AB 227 (Gatto) did not restrict its application by means of an employment-associated limit and its subject matter limitations did not grow out of the Initiative, but just reflected a particular political choice made by the Legislature last year. Other than as a political matter, the Legislature could easily have included a wider or narrower scope of businesses in the relief mechanism it created or made its enactment applicable to all businesses subject to the Act. Any of these would have enhanced public support and furthered the purposes of the Initiative by helping to reduce shakedown Proposition 65 lawsuits – those kinds of lawsuits have certainly been faced by businesses both large and small, and OEHHA is wrong to assume in its Draft Initial Statement of Reasons that only the latter have quickly settled "to avoid paying potentially greater sums to litigate the matter, even though the alleged violation was inadvertent or is easily corrected." Accordingly, this cure/correction opportunity should be extended to businesses of all kinds and sizes.

Fourth, to avoid litigation over older inventory that may linger in or be available to the California market for some time, coupled with an appropriate grandfathering provision, this section of the regulations should also specify that no cure/correction needs to be implemented for products manufactured prior to the effective date of the new requirements to the extent they bear warnings meeting the requirements of the statute under the existing regulations.

Optional "Hazard" Language

OEHHA has included a provision for an optional "short form" of warning on labels, recognizing that longer warnings sometimes will not fit on a label or otherwise be appropriate. The Coalition does not oppose this concept, but has grave concerns about the terms "Cancer Hazard," "Reproductive Hazard," or "Cancer and Reproductive Hazard," which the proposal would require as a part of the abbreviated warning. *See* proposed sections 25607.2(b) and 25607.4(b).

At the outset, it is not clear why this extra word is necessary in a short form warning if the words "Cancer" and/or "Reproductive Toxicity" already appear. These are terms that are well known to the public and have been used in Proposition 65 warnings for more than 25 years. They are terms used in the statute itself, unlike the term "hazard," which does not appear in the statute.

Furthermore, the word "hazard" adds no meaning to the word "cancer" other than to imply that the risk is somehow higher. The proposed longer form warning does not use the word "hazard," which may lead consumer to believe that products bearing the shorter form warning (and the word "hazard") pose a greater risk. As noted on OEHHA's FAQ page, "The purpose of Proposition 65 is to notify consumers that they are being exposed to chemicals that are known to cause cancer and/or reproductive toxicity." *See* www.oehha.ca.gov/prop65/p65faq.html. As a result, adding the word "hazard" in the short form does nothing to fulfill this purpose that the other aspects of the abbreviated warning don't already do.

Restrictions on "Supplemental" Information

Repeatedly throughout the draft proposed regulations, OEHHA expressly allows businesses to provide supplemental information concerning the exposure but makes clear that such information "shall not be substituted for the warning" and shall not "dilute or negate the warning . . . ." *See* sections 25607.1(c) (consumer products); 25607.3(c) (food); 25607.4(c)(5) (food); 25607.9 (alcoholic beverages); 25607.11(b) (restaurants); 25607.12(c) (occupational); 25607.13(c) (environmental); 25607.16(c) (environmental); 25607.17(c) (apartments); and 25607.17(f)(4) (amusement parks). This provision, if adopted, would violate the guarantees of freedom of speech in both the U.S. and California Constitutions.

At the outset, the proposed regulation is a prohibition on speech by businesses that may well concern lawful activity and not be misleading, i.e., speech that is protected by the First Amendment. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Such speech can only be restricted if the government interest is substantial, the regulation directly advances the governmental interest, and the regulation is no more extensive than necessary to serve that interest. *Id*.

The terms "dilute" and "negate" are very broad and could be read to encompass almost any contextual information provided by a business. For example, the simple, true, and not misleading statement that "California is the only U.S. state requiring this warning" might be regarded as diluting the warning by emphasizing that 49 other states do not require it. Informative, truthful, and not misleading statements about the levels of chemicals commonly found in similar products, or the uncertainty inherent in using animal studies to identify human toxins, are even more likely to be considered to "dilute or negate" the warning. This prohibition therefore chills speech that is protected by the U.S. and California Constitutions.

But more fundamentally, it is not clear why OEHHA feels it is necessary to prohibit businesses from providing additional information to consumers. Conventional laws against false and misleading advertising restrict what businesses can say without running afoul of the First Amendment, and businesses must adhere to these standards in providing information to consumers in conjunction with the sale of products. A public prosecutor or an aggrieved consumer can challenge such statements, and the risk of such actions itself should cause businesses to take care in providing supplemental information to consumers. Furthermore, because one of the goals of the Governor's call for Proposition 65 reform is to provide more useful information to consumers, it seems contrary to that goal to discourage businesses from providing additional information lest they face a claim of violating the prohibition on diluting or negating the required warning.

Allocation of Responsibility/Liability

The Coalition agrees with the notion that responsibility and liability between manufacturers and retailers under Proposition 65 should be clearly allocated. It is not clear, however, how OEHHA's proposal advances this notion. Section 25606 is ambiguous and requires clarification. What practical impacts does OEHHA intend to accomplish by stating "any consequences for failure to comply with this article shall be the primary responsibility of the manufacturer?" What are the specific consequences OEHHA wishes to address? Stating "any" consequences is unduly broad and vague. Section 25606 could be improved so that there is not only more clarity in the supply chain about warning responsibility, but also to minimize if not eliminate abusive litigation brought against entities without knowledge of levels of chemicals in the products as consumed.

Proposed section 25606(a) would provide that the "primary responsibility" for providing Proposition 65 warnings lies with "the product manufacturer, producer, distributor or packager. The retail seller is required to cooperate with the manufacturer, producer, distributor or packager of the product to ensure that the warning is provided to the consumer prior to exposure." The proposed regulatory language would not meaningfully reduce litigation, as the language is susceptible of interpretation and would undoubtedly be the subject of factual disputes over such terms as whether this is one of "most cases" (section 25606(a)) or what the meaning of the terms "primary responsibility" or "cooperate" are in a particular factual scenario. OEHHA can improve its approach by removing qualified and ambiguous language in the regulation, thereby materially reducing litigation.

Consumer Product Warnings

OEHHA's proposal will have an extraordinarily adverse impact on the consumer products sector. Manufacturers, importers and retailers—who are already beholden to the warning requirements if there is a chance their product may enter California's stream of commerce—would bear possibly devastating costs and burdens if the proposal is enacted. But these costs will buy minimal, if any, benefits for consumers.

OEHHA's proposal will confuse consumers about actual exposure risks and punish manufacturers striving to reduce chemical content in consumer products. Consumers will be confused by the different warnings allowed under the grandfathering provisions, which will create the misimpression that some products contain fewer listed chemicals than products not

subject to court orders. The reseller market in California would be gutted by OEHHA's failure to carve out exceptions for resellers of consumer products. Resellers have no means of knowing the chemical content of the individual items they sell absent testing every item. And the removal of flexibility regarding transmitting warnings down the supply chain will likely result in manufacturers adding warnings at the time of manufacture to all of the goods they supply globally, rather than the current practice of providing warnings only to their California distributors. Finally, when compared with the small profit margins on many low cost consumer products, these reforms will likely drive these goods out of California. All told, the reforms will escalate the substantial burdens to consumer product suppliers, but provide minimal additional benefits to the California consumers purchasing these products.

As discussed above, the reforms fail to make distinctions between products posing real exposure risks and those that include miniscule amounts of the same chemical. By imposing additional analysis and disclosure costs on new product formulations, there will be little incentive for manufacturers to reduce chemical levels in their products if it will not be possible to guarantee that the chemicals will be removed entirely. For many manufactured products, this guarantee is not possible due to normal fluctuations in manufacturing processes. And when combined with the continuing obligation to update testing and exposure data with any new information, manufacturers would only be guaranteed more costs if they change their formulations to reduce chemicals once they complete their submissions and labels.

Apparel and soft goods are a prime example. Apparel items frequently have very low levels of listed chemicals, such as phthalates, lead and cadmium. Those include PVC items, vinyl, screen prints, appliqués, metallic coatings, metal and plastic zippers, snaps, buttons, and rivets. Certain Proposition 65 settlements have set limits for lead and phthalate content in apparel items. Those settlements set forth the terms of the warnings that must be given for apparel containing lead and phthalates above a certain level. Because of these settlements, many apparel manufacturers have gone to great lengths to reduce the levels of these chemicals in their products to below these levels so that they do not need to provide warnings. Similar settlements have been reached for a variety of consumer products, such as bibs, bicycles, products containing brass, cookware, cosmetics, exercise mats, ceramic ware and glassware, fake leather upholstery, headphone cables, jewelry, lunchboxes, poker chips, luggage, and accessories.

Yet products that are not subject to court settlements, but contain similar levels of these chemicals, will be required to comply with the new warning regulations. The "exploding chest" pictogram and stronger "will expose" language will give the misimpression that other consumer products bearing the new label pose a greater risk of exposure or harm than those products subject to court orders. Consumers will not understand that a baby seat bearing the new warnings in the proscribed, large font with the "exploding chest" pictogram is addressing the same sort of chemicals—and at the same levels—than an item subject to a court order contains even though that item does not bear a warning. The breadth of the court settlements that apply to certain categories of items, such as vinyl goods or ceramic dishware, will create an unfair marketplace and a misimpression of "safety" regarding which products do and do not contain listed chemicals.

The grandfathering provisions of the proposed reforms will also create additional confusion in the marketplace if these same items contain other listed chemicals. If similar products give

different warnings under existing court settlements, consumers will believe that some products are more "safe" than others when they actually have the same or higher content of listed chemicals. Take for example an item subject to a court order warning limit if it contains lead above 300 ppm. Even if that item contained 299 ppm lead, and high levels of another listed chemical not subject to a court settlement, the manufacturer, under the current regulatory framework, would potentially only have to provide the current "safe harbor" warning. But OEHHA's proposal would require the manufacturer of a similar item with lower levels of both chemicals, but not covered by a court settlement, to provide the new warning language of "will expose" with the large font and "exploding chest" pictogram. Any reasonable consumer would believe the first product to be "safer" with less exposure risk, despite the actual chemical contents. OEHHA's disparate treatment of similar products with similar chemical content will only add to consumer confusion and warning fatigue.

Next, OEHHA's proposal would place resellers in an impossible position and threaten the viability of California's resale industry. Currently, OEHHA's proposal does not exempt consumer goods resellers such as thrift shops and secondhand stores. Although these businesses do not obtain their products directly from the manufacturer, they fall within the purview of "Retail seller", defined as "a person or business that sells consumer products…directly to consumers by any means…even if the business or facility is primarily devoted to non-retail activities." Section 25602(f). As such, resellers will be subject to the same legal obligations as traditional retailers.

But resellers do not have the benefit of receiving products directly from manufacturers that know the chemical content of their products they are making. And testing their inventory is not an option, as most resellers do not have more than one or two pieces of a certain item. Their stock and trade is a diverse inventory of whatever pre-owned items they can procure. Testing, reporting on, and labeling their complete, rotating stock would not be financially viable or feasible. So it is unreasonable to hold resellers to the same obligations as other regulated parties. Without an exemption, California's resale industry will be crushed between the choice of testing every item or litigating failure to warn claims.

Congress recognized the importance of providing such an exemption in the Consumer Product Safety Improvement Act (CPSIA). The statute made it unlawful to sell children's products with more than 600 parts per million (ppm) total lead. But in 2011, a bipartisan group of Congressional members voted to amend the CPSIA's chemical content testing and certification requirements for resellers. Section 1 of Public Law 112-28 made it explicit that the lead limits do not apply to used children's products, with limited exceptions. Congress understood that a reseller does not have sufficient information about its products to make safety certifications, nor was it sensible to require that resellers conduct product testing. Under the proposed reforms, OEHHA has not made similar exceptions for resellers. With the elimination of the safe harbor warning and the new requirements of the reforms, it will be virtually impossible for the resale industry to maintain its niche as a practical and affordable option for consumers of used products. Congress took measures to reflect this reality in its legislation. OEHHA should do the same.

OEHHA's proposal also fails to provide any flexibility in the manner in which entities may transmit warnings down the supply chain. Section 25603(c) of the current regulations requires an entity to "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." The 1988 Revised Final Statement of Reasons for this section recognizes the difficulty – and, frequently, the impossibility – for an upstream manufacturer or supplier with to know whether any particular product actually may be offered for sale in California: "[W]here labels or labeling are not provided, once warning material or information clearly communicating the presence of a listed chemical has been passed on to the transferee, the transferor may have done all that it can to ensure that the warning will reach those who are subsequently exposed." Revised Final Statement of Reasons, 22 California Code of Regulations Division 2, Section 12601 – Clear and Reasonable Warnings (November 1988) at 31; *see also id*. at 30 ("In this way it is ensured that the person who finally distributes the product to the consuming public will have knowledge of the need to warn, and will do so."). Now, supply chains are even more global and complex than in 1988 when Section 25603(c) was promulgated. Companies, especially out-of-state companies, rely on this provision and provide warnings to their distributors to discharge their warning obligations even if they have may have no actual knowledge that their products ultimately are sold in California. By the same token, this provision preserves the integrity of interstate commerce by giving entities the flexibility to lawfully provide warnings only for products destined for the California marketplace. In the absence of this provision, such entities remain vulnerable to Proposition 65 lawsuits unless they label their products nationwide or globally. This provision must be retained in order to avoid unnecessary enforcement actions and disruptions in interstate commerce.

Supply chains are even more global and complex than in 1988 when Section 25603(c) was promulgated. Companies, especially out-of-state companies, rely on this provision and provide warnings to their distributors to discharge their warning obligations even if they have may have no actual knowledge that their products ultimately are sold in California. Furthermore, this provision preserves the integrity of interstate commerce by giving entities the flexibility to lawfully provide warnings only for products destined for the California marketplace. In the absence of this provision, such entities remain vulnerable to Proposition 65 lawsuits unless they label their products nationwide or globally. This provision must be retained in order to avoid unnecessary enforcement actions and disruptions in interstate commerce.

Finally, the cost of implementing these reforms cannot be ignored. While the expense of testing and the costs associated with data collection and submission may be more manageable for a trade association or a manufacturer of an expensive consumer good, most consumer product businesses will not be able to bear these costs and survive. To impose the same testing and data requirements on a $2 pack of holiday ornaments as on a $40,000 consumer product is not reasonable. And as there is no grandfathering provision based on the date of manufacture, businesses involved in seasonal goods, such as deck cushions and holiday decorations, will be forced to liquidate their stock or conduct post-manufacture testing and relabeling on all their products. These costs will either need to be passed onto California consumers, or these businesses will choose to leave the California market. Neither is a service to the California consumer.

<u>Occupational Exposure Warnings</u>

OEHHA's draft proposal makes substantial revisions to the occupational exposure warning regulations that likely would result in confusing messages to workers and increased litigation.

Accordingly, for the reasons articulated below, OEHHA should refrain from revising the current occupational warning regulations.

The Coalition's concerns begin with OEHHA's proposed new definition of "occupational exposure" in Section 25602(e). That definition could have a profound impact on the scope of occupational exposures that may be the subject of an enforcement action. It could be interpreted to require an employer to provide warnings to its own employees for exposures occurring on premises not controlled by the employer, exposures that otherwise may be deemed "environmental exposures," for which warnings (if any) should be provided by the person having knowledge of and control over them. The revised definition also could be interpreted to impose a separate and additional requirement for an employer to directly warn the employees of another employer, for exposures occurring at the second employer's premises, e.g., as by the use of workplace chemicals sold by the first employer.

This latter issue was litigated in the late 1990s in *As You Sow v. Shell Oil* (San Francisco County Superior Ct. Case Nos. 975116 and 980607) and, after a substantial amount of litigation, resolved in Shell Oil's favor: the court concluded that Proposition 65 does not impose such a warning requirement on employers. OEHHA's proposed revision, however, would likely open the door to re-litigating the question. Absent a compelling need, OEHHA should refrain from revising the definition of "occupational exposure" and opening the door to unnecessary litigation over issues that already are covered by other parts of the warning regulations or that already have been resolved. Alternatively, the draft proposal should clarify that the revision is not intended to expand the warning requirement beyond the requirement to provide warnings to workers for exposures occurring in the workplace of the workers' employer.

Turning to Sections 25607.12 and 25607.13, the Coalition is pleased to see that the proposal retains the option for entities to provide occupational exposure warnings by complying with the federal or California Hazard Communication Standards (the "Standards") or the Pesticides and Worker Safety requirements. It is critical to retain this option to allow entities to discharge their warning obligations using a communication vehicle in which their workers already are trained, without the need for additional warnings that may inundate workers with duplicative, or even contradictory information. To this end, it is telling that the only provision with respect to the occupational exposure warning that the Coalition supports is one that OEHHA elected not to revise.

Notwithstanding our support for retaining this option, OEHHA's proposal fails to account for the preemptive scope of the federal Occupational Safety and Health Act and the standards promulgated therein, including the federal Standard. All state laws relating to workplace safety encompassed by a federal standard are preempted unless incorporated into a state standard that is approved by the federal Occupational Health and Safety Administration ("OSHA"). *Gade v. National Solid Wastes Management Ass'n* (1992) 505 U.S. 88; *Industrial Truck Ass'n v. Henry* (1997) 125 F.3d 1305. Even then, federal OSHA may impose conditions on approval, as it did in 1997 when it approved the incorporation of Proposition 65 into the California Standard. 62 Fed.Reg. 31159 (June 6, 1997). Among those conditions is the prohibition on Proposition 65 enforcement against out-of-state manufacturers and the explicit authorization for employers to comply "with the occupational requirements of [Proposition 65] by complying with the measures provided by the [federal] OSHA or Cal/OSHA Hazard Communication Standard, as provided in the State's regulations." *Id*. at 31180.

OEHHA's draft proposal intrudes on preempted territory. It seems to require businesses subject to the federal or California Standard to provide Proposition 65 warnings even if the applicable Standard would not require any specific communication about a cancer or reproductive hazard. *See* Section 25607.12(b). The draft proposal also appears to require specific text on workplace signage and product labels. *See* Section 25607.13. The draft proposal further characterizes safety data sheets as merely "supplemental information." *See* Sections 25607.12(c) and 25607.13(c). OEHHA cannot require businesses to place Proposition 65 warnings on labels or safety data sheets, if the applicable Standard itself does not require such warnings. Nor may OEHHA treat safety data sheets merely as "supplemental" materials. Federal and state law requires manufacturers, importers and employers to comply with the applicable Standard. Both Standards require manufacturers and importers of hazardous chemical substances to label those substances and to prepare and transmit safety data sheets, all in accordance with the Standards' requirements. The Standards require certain statements to be made on labels and safety data sheets. The Standards require employers to train their workers on chemical safety and to make safety data sheets available to workers. Any purported additional requirement intended to address Proposition 65 in the occupational context is preempted by federal law.

Using the phrase "Unless prohibited by federal law" to address potential conflicts between the Standards and Proposition 65 mischaracterizes the expansive scope of this preemption. The question is not whether federal law explicitly prohibits making any particular statement; the issue is that federal law occupies the entire field of "evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees…" *Industrial Truck Ass'n*, 125 F.3d at 1312-14.

Beyond the question of federal law's preemptive scope in this area, OEHHA's proposed requirements would lead to misleading statements and increased litigation. For example, Appendix A of both the federal and California Standards requires carcinogen labeling to use the signal word "Danger" and the hazard statement "May Cause Cancer," when such carcinogens have been classified as Category 1A or 1B in accordance with the Appendix A criteria. Labeling for carcinogens classified as Category 2 under the Standards must use the word "Warning" accompanied by the hazard statement "Suspected of causing cancer." These statements also are required to be placed on the safety data sheets. Appendix A of the Standards further imposes mandatory precautionary statements. Workers are trained under the Standards to understand what these statements mean; OEHHA should explain how the required Proposition 65 warnings would not be confusing and misleading in this context.

Worse, under OEHHA's draft proposal, every one of the statements required by each Standard could be the basis of an enforcement action alleging that the message being conveyed to workers is "unclear" in violation of Proposition 65. Even if a company separately provides a Proposition 65 warning to its workers, an enforcer could file suit alleging that any one of the statements required under the Standards "dilute" the warning message. In other words, a company would be subject to a Proposition 65 enforcement action for simply complying with the Standards requirements. Such an untenable result is directly contrary to OEHHA's stated goal of reducing unnecessary lawsuits.

Finally, we point out the inconsistency of the required text for the "combination" warning set forth in Section 25607.13(a)(5) and (b)(5). Subsection (a)(5) would require the phrase "…cancer, birth defects or other reproductive harm…" and subsection (b)(5) would require the phrase "cancer and birth defects or other reproductive harm…." In other words, one required text uses

a comma, and the other required text substitutes the word "and" at the same location. This inconsistency is the perfect groundwork for the kind of "gotcha" lawsuits that the Governor has indicated he wants to eliminate. The Coalition's concerns in this regard have ample precedent.

OEHHA may know that the use of a comma, rather than the word "and," between the words "cancer" and "birth defect" was the subject of litigation in the late 1990s, including a lawsuit brought by As You Sow against a small California paint manufacturer, Ellis Paint Company, who was sued for using a warning with the comma. In 1999, the U.S. House of Representatives Committee on Small Business invited a representative of the company to testify at a hearing on Proposition 65's effect on small business, at which the company's CEO described the high cost, disruption and adverse economic impact of the lawsuit:

> "To put the cost in perspective, in 1995, my company lost $178,000. There were no raises for my employees, but I had the money to give to Cliff Chanler over a comma."

Testimony of Sandra Skommesa, President and CEO of Ellis Paint Company, U.S. House of Representative Committee on Small Business, Hearing on Proposition 65's Effect on Small Business, October 28, 1999.

OEHHA has not identified a "problem" specific to the current requirements for occupational exposure warnings, which requires any fix. The proposed revisions would be preempted unless incorporated into the California Standard and approved by federal OSHA. Beyond that, the draft proposal would lead to confusion among workers covered by the Standard and to increased litigation. For these reasons, OEHHA should refrain from revising the current occupational exposure warning regulations.

Environmental Exposure Warnings

OEHHA's draft proposal revising the environmental exposure warning regulations in Sections 25607.15 and 25607.16 will impose burdens on businesses that far exceed any potential benefits and will open the door to increased litigation. With no substantive justification of the proposed changes discussed in the Draft Initial Statement of Reasons, OEHHA should refrain from revising the existing regulations.

At the outset, the requirement in proposed Section 25607.15(a)(2) that each notice be "personally delivered" to occupants in the affected area is contrary to statute. Section 25249.11 of the Health and Safety Code explicitly states that warnings "need not be provided separately to each exposed individual and may be provided by general methods." Current Section 25601 of the regulations reinforces this statutory boundary: "Nothing in this section shall be construed…to require that warnings be provided separately to each exposed individual." Rather than establishing a boundary consistent with the statute, OEHHA's draft proposal establishes the complete opposite, creating confusion in the regulated community, imposing substantial burdens on businesses to ensure that warnings are personally delivered to each exposed individual, and leading to increased litigation regarding the proper scope of this regulation and whether any particular individual should have received a warning.

By requiring environmental exposure warnings to be provided "in other languages commonly spoken in the affected area," OEHHA's draft proposal imposes an impossible burden on

businesses seeking to comply with their Proposition 65 obligations. The draft proposal provides no guidance for a business to ascertain what language is "commonly" spoken, leaving the regulated community to guess what may constitute sufficient due diligence. An enforcer could argue that a business must conduct a survey of occupants in a given area in order to make that determination – adding substantial expense and time to Proposition 65 compliance. In addition to that significant burden, some "affected areas" (like amusement parks visited by guests from around the world) would have dozens of languages that one could assert are "commonly spoken." In such circumstances, businesses will face substantial burdens conveying a multitude of warning messages.

Similarly, proposed Section 25607.15(a)(2) could be interpreted to require businesses to conduct a detailed survey of every affected occupant in an area to ascertain whether each occupant has access to electronic delivery – and only when an occupant does not, would an "alternative format" be acceptable. The resources and time necessary to accomplish such a task would be enormous; yet, to avoid being targeted by enforcers on this issue, businesses would have to undertake the exercise. OEHHA must retain the option of providing warnings by other means, without requiring businesses to expend time and resources to determine the technology savviness of occupants in an affected area.

OEHHA also must retain the option for businesses to provide, without restrictions, warnings through quarterly public media announcements. Mailed notices and/or electronic delivery methods have their strengths and weaknesses; public media announcements provide businesses with additional flexibility to meet their Proposition 65 obligations. We also question why the proposal would eliminate as an option the posting of signs in a manner described in Title 3, California Code of Regulations, Section 6776(d).

Finally, we again observe the inconsistency in the carcinogen-reproductive toxin combination warning. Section 25607.16(a)(5) requires the combination warning containing the comma, rather than the word "and," between the words "cancer" and "birth." The combination warning text in other parts of the proposal requires the word "and." This inconsistency has no justification, will cause confusion in the regulated community and will lead to "gotcha" lawsuits that OEHHA is aiming to prevent.

With our overarching and specific concerns in mind, we now provide our recommendation.

V. RECOMMENDATION

For the reasons discussed above, OEHHA's proposal as written is unworkable and does nothing to achieve the Governor's stated goals for meaningful Proposition 65 reform. However, the Coalition believes that the Governor's goals for Proposition 65 reform can be achieved best by (1) restoring/maintaining the "safe harbor" warning; and (2) creating a website apart from the "clear and reasonable" warning requirement that allows businesses to voluntarily provide additional information regarding potential exposure to Proposition 65 chemicals. To be clear, we believe that the entirety of OEHHA's proposed framework must be stricken in favor of the existing "safe harbor" warning requirements and a voluntary website.

If adopted, OEHHA's new warning framework will make it harder for businesses to provide Proposition 65 warnings, as compared to the existing "safe harbor" warning, which has

repeatedly been found by both the Agency and numerous judges to be sufficient to meet the statute's (and hence, the voter's) "clear and reasonable" warning requirement. The more onerous proposed requirements will force businesses to cease providing currently compliant Proposition 65 warnings, and expose them to enforcement lawsuits for failure to warn – lawsuits to which they are not currently exposed when they provide the existing safe harbor warnings. In addition, those businesses that attempt to provide the new warnings will also be exposed to more lawsuits for alleged deficiencies in their implementation since, without meaningful guidance as to when a warning will be required, they will inevitably trip over the new, more complicated requirements.

Under the current framework, if any entity in a consumer product supply chain applies the generic warning, all other entities within that supply chain will be covered by the safe harbor. However, the proposed warning requirements, as drafted, may impose on consumer product companies an additional burden to independently ensure that a warning affixed by any other entity in the supply chain is sufficient. For example, if a manufacturer determines that a warning for lead is required and places a lead warning label on the product, the retailer may still have to determine whether a warning is also required for any of the other 11 chemicals specified in proposed Section 25605, or else face a lawsuit for failure to adequately warn. Also, the proposed warning requirements may create two distinct sets of warnings for similarly situated companies, causing consumer confusion. Businesses that are parties to grandfathered court-approved settlements will be allowed to use warning language addressed in those settlements, while the new warning requirements would apply to all other businesses. Similarly situated businesses may therefore be treated differently under the proposed regulations, confusing consumers and impacting the businesses' relative ability to compete.

Thus, the logical result of the proposed warning's framework will be increased costs of compliance, inconsistent and excess warnings, more confusion for consumers, and greater opportunity for litigation. By contrast, the existing "generic" warning language avoids the complications associated with the proposed requirement, and it should therefore remain available to businesses as a safe harbor from Proposition 65 lawsuits.

Moreover, businesses are more likely to provide meaningful information for the website regarding exposure to listed chemicals if they are allowed to do so on a voluntary basis without the threat of litigation from private enforcers. Because consumers will know that exposure information is available on the website, companies will be encouraged to explain the context of specific exposure(s) likely to result from use of their products in order to reassure the public of the safety of their products and provide greater context for exposures. A company that fails to provide such information runs the risk that consumers will question the safety of its products and choose not to purchase or use them.

The Coalition would very much welcome and appreciate the opportunity to work with OEHHA moving forward to implement our proposed recommendations.

VI. INDUSTRY-SPECIFIC ISSUES

This section identifies specific concerns of the following industries: (1) small business; (2) food; (3) restaurants; (4) apartments; (5) hotels and lodging; (6) amusement parks; (7) automobiles; and (8) oil and gas.

It is important to note that the industry sector-specific issues identified below stem from OEHHA's proposal as currently written. OEHHA can address these issues, however, by agreeing to our Recommendation above.

Small Business

In a number of ways, the proposed regulations change a system whose enforcement process has been painful and damaging to small businesses into one where the compliance process alone would be financially devastating or otherwise impossible to achieve.

First, it is important to recognize the scope of the exposure to small businesses. For manufacturers and importers of consumer products, the "fewer than ten employees" exemption of Proposition 65 is largely illusory due to aggressive plaintiff litigation tactics. Most such companies survive by virtue of their relationships with large retailers. When a retailer is named in and receives a 60 day notice under Proposition 65 for a consumer product, its response almost always is to demand indemnification from its supplier, whether that supplier has ten employees, one thousand employees or one employee. Whether because of indemnification language in the supply agreements or the small business' need to maintain its positive relationship with the retailer, the small business will almost always end up defending and indemnifying the retailer, even if the small business has fewer than ten employees.

Almost no small business can afford the hundreds of thousands of dollars or more in legal fees and expert costs required to defend a Proposition 65 enforcement action. As a result, almost all such businesses negotiate settlements, typically negotiating payment of anywhere from $15,000 to $50,000 in penalties, payments in lieu of penalties and private party enforcer attorneys' fees (as well as the company's own attorneys' fees), and often agreeing to reformulation of the product without the chemical of concern.

The financial impact of these settlements on smaller companies with limited revenues, and often operating at a loss, cannot be understated. The Coalition has seen repeated instances (particularly during the recent recession, but before and after as well) of companies losing their credit facilities, laying off employees, cancelling salary payments to principal owners, and in a number of instances closing their doors as a direct result of the financial blows caused by a Proposition 65 enforcement action.

The proposed changes to the regulations, however, will seemingly shift the financial burden from the enforcement process to the compliance process. Small manufacturers and importers lack the in-house resources to evaluate "the anticipated route, routes, or pathways of exposures" for chemicals. They will invariably lack the expertise to assess "anticipated level of human exposure to the listed chemical," or "actions a person can take to minimize or eliminate exposure." Yet, section 25604(a) will require them to provide all of this information on the proposed OEHHA website, or be deemed not to have provided a clear and reasonable warning regardless of any on-product labeling.

Those who have been involved in the defense of Proposition 65 litigation know that the cost of an exposure assessment as the proposed regulation would require runs in the mid-five figures under the best of circumstances and can be much higher. The cost of this compliance for a small business with multiple products that cannot be manufactured without listed chemicals –

automobile parts and repair, electronics, plumbing, yard and garden products, and many others – will be devastating. And notwithstanding the conditional "if known" language in section 25604(a)(9), we expect that private party enforcers will take the position that level of exposure information is sufficiently available (albeit at considerable cost) that it should be treated as "known."

While we discuss the problems with the "grandfathering" provisions above, we also note that these provisions will competitively disadvantage those small businesses who have endeavored to follow the law. Thus, small company A, who has provided the current safe harbor warning on its labeling from the start, will now have to incur the significant cost of the processes and mechanisms dictated by the new regulations and provide a form of warning with more potential adverse market consequences than the current warning. Meanwhile, A's competitor, Company B, who failed to comply with the law until getting sued by a private party enforcer, was a party to a consent judgment and is required to give the current safe harbor warning, at far less cost and with a less onerous market impact.

We expect there will be many other negative impacts on small businesses that will only become known if the regulations are implemented. But we do know for certain that for the small business, the regulations will significantly increase the cost of compliance and astronomically increase both the amount and the cost of litigation. These increased costs will certainly drive small businesses out of California, out of business, or both.

Food

OEHHA's Draft Initial Statement of Reasons for its pre-regulatory proposal appropriately recognizes that "provision of warnings for foods poses special issues that should be addressed differently," that "the content of some food warnings may need to be more nuanced than warnings for other consumer products," and that, with respect to foods, "a balance between providing useful information to consumers while avoiding unwieldy warnings" is a necessity. The draft Statement also recognizes that longer warning messages will not fit on the labeling or packaging of many food products, that food warnings often present a need for additional contextual information, and that, historically, Proposition 65 warnings have been provided for relatively few food products (i.e., largely only for those that have been the subject of settlement produced under the threat or leverage of litigation).

The Coalition appreciates and agrees with these observations by OEHHA. However, while OEHHA recognizes that foods deserve special treatment due to the above and should be subject to exceptions from Proposition 65's warning requirements or given substantially more flexibility to the extent still subject to them, its current proposals for food-related warnings do not address the main issues the current regulations present with respect to foods and the increasing trend of Proposition 65 litigation arising because of them, and they are otherwise counter-productive.

First, in Section 25606, despite the very limited space available on a food label or a shelf sign or electronic display in a grocery store, OEHHA proposes to require that food warnings be provided in languages in addition to English wherever other languages appear anywhere on or off product labeling or elsewhere beyond labeling. In addition to its location, to trigger this requirement, the additional language need not even concern a warning regarding the food or the

food's health effect. This aspect of the proposal needs to be dropped; at most, at least for foods, this requirement should only apply where all of the information on the product label is in another language.

Second, food and beverage companies and grocers have previously provided OEHHA with considerable input concerning why product labels and shelf signs are poor media for Proposition 65 warnings for foods and suggested alternative systems of warnings that have not been incorporated into the proposal. The methods of communicating food warnings required by section 25607.3 of the proposal are flawed and these prior suggestions should be revisited.

Third, while OEHHA's proposal to allow for shorter warnings for foods and to not require a hazard pictogram for them are welcomed, the warning it proposes to require is still too long and involves language so alarming that it will inevitably confuse consumers and present conflicts with federal law and food labeling requirements. In essence, this is really a non-option. For foods that are not considered adulterated (and, hence, banned from the marketplace) under federal and State food safety laws, the proposal's insistence on use of the signal word "WARNING" in a font larger than the remainder of the warning language and its inclusion of the terms "Cancer Hazard," "Reproductive Hazard," or "Cancer and Reproductive Hazard" as optional language flies in the face of the agency's observations regarding the need for food warnings to be nuanced, balanced, and useful. The inherent disconnect between these types of words and the level of risk associated with an unadulterated food will ultimately undermine the credibility of the warning and cause consumers to discount its value and turn away from any other information presented, which hardly serves the purposes of Proposition 65.

Fourth, OEHHA's proposal to require food warnings to contain the phrase "this product will expose you to" and to list by name certain chemicals not only works directly against its efforts to allow for more succinct warning language for foods, it also fails to recognize the inherent variability of the presence and levels of many chemicals in many foods. Unlike other consumer products, the specific chemical content of many food products cannot be predicted with precision and a single sample may or may not be indicative of the level of exposure and risk presented, if any. This inherent variability was one of the main reasons why the existing regulations allow for the use of the term "may contain" in section 25603.3 and that rationale remains fully applicable and should be extended to allow use of the section 25603.3 warning language formulation to a wider variety of foods, since variation in chemical content is by no means limited to fresh fruits, vegetables and nuts.

The proposal to mandate the phrase "will expose" in warning language is particularly problematic for foods in light of the naturally occurring exception in Section 25501. Some chemicals are naturally ubiquitous in the environment and it is indisputable that some amount of listed chemicals in foods is naturally occurring. Establishing the amount of a listed chemical that is naturally occurring is a potentially expensive and time consuming process that has been the subject of hotly contested litigation. Indeed, a recent Proposition 65 trial was dedicated to determining the basic definition of the word food for purposes of the naturally occurring exception. Eliminating the voluntary "safe harbor" warning eliminates a company's opportunity to avoid litigation by warning about the likely contents of a food regardless of the amount of exposure. This will lead to more litigation and greater burdens on our already overtaxed court system.

Finally, to the extent it is going to try to improve the existing warning program with respect to its application to foods, OEHHA needs to recognize and take steps to give more practical and meaningful effect to the exceptions that were created in the existing regulations for application of the warning requirement to certain types of chemicals in foods when they are not being added to them by those on whom the warning obligation would otherwise fall. The naturally occurring and cooking exceptions in the current regulations are unnecessarily ambiguous and limited in scope of application and have become the subject of repeated litigation that renders them relatively useless. They cry out for clarification and modernization consistent with their originally intended purpose – to limit the number of Proposition 65 warnings consumers would have to face for foods that are not adulterated so as to avoid confusion and conflicts with other food safety and nutritional laws and policies.

Restaurants

OEHHA's draft proposal for restaurant warnings (section 25607.10) is unworkable, burdensome, unnecessary, and far beyond what the voters contemplated when Proposition 65 was enacted. It would place costly burdens on the over 100,000 restaurants in California, most of which are owned and operated as small businesses. Restaurants have been a frequent target of Proposition 65 litigation, and this draft regulation, if implemented, would greatly increase the risk of such litigation.

The primary flaw in the proposal is the requirement that every restaurant not only post signs at every entrance or every point of sale but also make available a paper pamphlet. This pamphlet would duplicate the information to be provided via the website, contain an overwhelming amount of information, and impose impractical and costly burdens on restaurants, leading to increased risk of private litigation.

First, although OEHHA's proposal would revise the safe harbor language for items served in restaurants to include a reference to the website maintained by OEHHA, the proposal nevertheless requires a paper pamphlet to be provided with presumably very similar information. It is hard to imagine any form of mass communication more antiquated than the paper pamphlet, and it will only become more antiquated as consumers use mobile phones in greater numbers. There is simply no basis for this duplication.

Second, the content of the proposed pamphlet is also problematic and not well-considered. The draft proposal requires that the pamphlet include:

- general information on all known exposures to listed chemicals that may occur at the facility;
- the route(s) of exposure;
- the name or names of the listed chemicals for which warnings are being provided;
- whether the chemical causes cancer or reproductive toxicity or both; and
- ways to avoid or minimize exposure, if any.

Given the variety of foods served in restaurants in California, this “pamphlet” would run to multiple pages in length, even in a restaurant with a relatively concise menu, and even longer if, as stated in informal conversations, OEHHA’s idea is that there would be one pamphlet for all restaurants in California. Just a sampling of the recent Proposition 65 notices and lawsuits concerning food and beverages makes this apparent:

Chemical	Food Product
4-MEI	Soft drinks, food extracts, flavors, and coloring
Acrylamide	Baby food products, breakfast cereals, coffee, french fries, frozen potato products, potato chips, snack foods
Arsenic	Rice, powdered protein, bottled water
Cadmium	Canned oysters, powdered protein, rice
Lead	Baby food products, baking mix, canned clams, canned soup, canned fuits, canned shellfish, canned vegetables, coffee, cookies containing molasses or ginger, crystallized ginger, ginger and plum baking ingredients, herbal products, jam and preserves, kombucha, licorice, mandarin oranges, maple syrup, powdered proteins, rice, canned oysters
Mercury	Canned tuna, herbal supplements, fresh fish
PCBs	Salmon, ahi tuna, lobster, whitefish, mackerel, halibut, flounder, fish oil supplements
PhIP	Grilled chicken

It was simply not the intent of Proposition 65, and has never been the policy of the lead agency, to require every restaurant in California to provide this amount of information to their patrons -- to in effect make restaurants the retail providers of information on chemicals commonly found in foods at low levels, often with scant scientific basis for toxicity to humans. Notably, the pamphlet would require the identification of all chemicals, and not just the 12 chemicals called out for other types of warnings.

Furthermore, it is simply not possible for every restaurateur in California to know which of the over 800 listed chemicals might be present (at the low levels that are relevant only under Proposition 65) in the multitude of ingredients, from a multitude of sources, that are mixed together and cooked in a variety ways, to make up their diverse menu offerings. The purpose of the current safe harbor warning specified for restaurants was articulated clearly by the lead agency in adopting the regulation:

> Due to the difficulties associated with determining whether particular foods received from diverse sources and prepared or cooked in such an establishment contain listed chemicals, the Agency believes that it is reasonable for such establishments to warn generally that the foods or beverages sold or served in the establishment may contain listed chemicals.

Revised Final Statement of Reasons, 22 Cal. Code Regs. Div. 2, Section 12601, at 27-28. These considerations are at least as prevalent today as they were 25 years ago, and OEHHA has not explained why it is necessary, or even possible, to determine this information today.

And, as OEHHA is aware, at least one local jurisdiction has required that restaurants providing written warnings under Proposition 65 provide those warnings in Chinese and Spanish as well as in English. San Francisco Health Code, Art. 8, Section 456.6(b). As a result, the statewide pamphlet requirement would be triply burdensome and expensive in San Francisco.

Third, the cost of these pamphlets should not be overlooked. Without performing a precise survey, one can conservatively estimate the number of pamphlets needed each year in the millions. For example, with over 100,000 restaurants in California, if each needs, on average, an annual supply of 1,000 pamphlets (approximately three per day) to account for pamphlets that are taken, discarded, dropped, soiled, etc., then the restaurant industry will need to supply over 100,000,000 pamphlets per year. Even at just 10 cents per pamphlet, that is $10,000,000 in added costs for the restaurant industry, not even counting the costs for labor involved in maintaining a pamphlet display in each restaurant. And more difficult to measure are the environmental costs of using so much paper to communicate such a large amount of information to millions of consumers who are likely to discard the pamphlet moments after receipt.

Furthermore, it is not clear how this pamphlet is to be made available -- on each table, at the hostess stand, at each cash register, or in some other central location. It is clear, however, that restaurants will need to ensure that their stock of pamphlets is replenished regularly, since running out of pamphlets may constitute non-compliance with Proposition 65 and subject the restaurant to suit.

In addition to the pamphlet requirement, the draft proposal also makes changes to the wording at the core of the safe harbor sign that many restaurants have posted for many years:

> <u>Current regulation</u>: WARNING: Chemicals known to the State of California to cause cancer, birth defects or other reproductive harm may be present in the foods or beverages sold or served here.
>
> <u>Proposed language</u>: WARNING: Certain foods and beverages sold or served here will expose you to chemicals known to the State of California to cause cancer, birth defects or other reproductive harm. Please refer to the pamphlet or other materials provided here for more specific information or go to www.P65Warnings.ca.gov.

It is not clear what the change in wording is intended to accomplish: in the context of restaurant food, stating that a chemical may be present in the food is obviously equivalent to stating that the food will expose the person who eats it to the chemical. The cost to restaurateurs of having to change out their existing signage, some of which has been engraved or printed professionally will be significant. And the transition will not be seamless, meaning that restaurants that continue to post the prior language will be subject to Proposition 65 enforcement actions. These costs and risks far outweigh the benefit of tinkering with the longstanding language.

Furthermore, as with the proposed warnings for packaged food, OEHHA's proposal for restaurants also changes the current term "may be present" for the more definitive "will expose you to." But the "may be present" term was not an error by the lead agency; on the contrary, it was intended to recognize the inherent variability in raw materials and the fact that a food

served in a restaurant that contains a listed chemical on one day may not contain it on the next day.

OEHHA's proposal also specifies the size of sign to be used: 8 1/2 by 11 inches. While specificity on this point may reduce the opportunity for litigation in the future, OEHHA should be aware that the California Attorney General has agreed in settlement of enforcement actions, and courts have approved as "clear and reasonable" under Proposition 65, signage that is much smaller in the context of nutritional posters. See, e.g., Consent Judgment as to Defendant KFC Corporation in People v. Frito-Lay, Inc., et al. (2007), available at http://oag.ca.gov/system/files/attachments/press_releases/2007-04-24_KFC_docs.pdf? Similarly, the draft proposal makes no allowance for warnings to be provided on menus, menu boards, or nutritional posters, which some restaurants (and courts) have found to be appropriate means of providing clear and reasonable warnings and which are permitted under the longstanding safe harbor structure of the regulations.

Furthermore, OEHHA's proposal requires a sign at "each public entrance to the restaurant or facility." For some restaurants, this will require multiple signs. For others, such as food courts, food trucks, or drive-thrus, it will be difficult to determine the entrance. Furthermore, there is no requirement that every patron receive a warning on every visit. As former Deputy Attorney General (now Superior Court Judge) Ed Weil, who led the Proposition 65 team in the Attorney General's office for two decades, stated in response to an inquiry from the Los Angeles Superior Court on approval of the KFC Consent Judgment noted above:

> The people who are drive-thru customers do sometimes come into the store to pick up orders. And the law does not require that the warning be provided every single time you purchase it. And there's -- really, as a practical matter, there's nothing that we can do to make sure every person every time they made a purchase saw it. So the point is that in the long run, and not very long run, those people will get the warning because they will be inside.

Finally, OEHHA recognizes in the context of packaged food that "the provision of warnings for food poses special issues that should be addressed differently" and its draft proposed regulation for packaged food allows for specific types of supplemental information to be provided in order to provide context for the warning. See Proposed Section 25607.4(c). There is no comparable provision for restaurant food, and indeed the proposed regulation for restaurants contains the standard prohibition on any additional information that will "dilute or negate the warning . . . ." See Proposed Section25607.11(b). This prohibition not only runs afoul of the free speech rights of restaurateurs; it also is inconsistent with OEHHA's stated policy goals with respect to food warnings.

In sum, although restaurants have been frequent targets of Proposition 65 litigation, the current safe harbor structure of the warning regulations provides them with the flexibility necessary in a dynamic and varied industry, and a means to protect themselves from litigation to a great extent and provides consumers with clear and reasonable warnings without making restaurateurs the agent of the government in providing of all manner of public health information concerning foods and beverages.

Apartments

OEHHA's proposal fundamentally undermines warning methodologies that have been used by apartment owners statewide for nearly a decade and that resulted from litigation.

Beginning in 2000, two groups began serving hundreds of notices of violations of Proposition 65 on various apartment owners or property managers. The plaintiff essentially consisted of straw plaintiffs used to enable a law firm to obtain attorneys' fees in Proposition 65 litigation. In order to avoid prolonged and expensive litigation, many (but nowhere near all) apartment owners and property managers statewide entered into a consent judgment that was submitted to the court for approval. The consent judgment consisted of provisions, including: (1) attorneys' fees; and (2) an agreement by the participating apartment owners and property managers to post agreed upon warnings at the entries to each apartment complex. In addition, and as a result of the litigation, a broader apartment warning strategy was also developed and widely implemented.

The Attorney General, however, opposed the settlement in part based on his determination that the attorneys' fees were unreasonable. The Attorney General's opposition was not related to the warning provisions. Eventually, the trial court approved and entered the consent judgment after some of the fees were reduced. On appeal, among other things, the California Appellate Court reversed, opining that the notices were deficient, the attorneys' fees were excessive and disallowed the plaintiffs to file new notices and judgments were entered dismissing the case. *Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185. Thus, while it reversed the trial courts' approval of the consent judgment, the appeals court did not opine on the adequacy of the agreed upon warning methodology. Accordingly, the trial court's approval of the warning methodology portion of the consent judgment was not further reviewed. The apartment industry continues to promote the use of the warning methodology that came out of this case, and justifiably so.

OEHHA's proposal appears to require apartment owners statewide to completely undo and/or redo the warning signs on which they've relied for so many years. Put another way, OEHHA's proposal would actually penalize good actors who have warned in accordance with an agreement reached after years of litigation, in favor of entirely new warning requirements that, as discussed above, would be both costly and litigation prone. There is no reason to open up an entirely new litigation front on an industry that has acted in good faith and is providing comprehensive and compliant warnings.

The grandfathering concept should be extended to allow all apartment and property owners to rely on this well-established warning methodology. Otherwise, inconsistent warning requirements among apartment complexes would unduly discriminate against those not previously subject to litigation, placing a disproportionate burden on the latter in the marketplace.

Notwithstanding our concerns regarding the court-approved consent judgment, OEHHA's proposal poses significant compliance hurdles and litigation exposure for apartment owners. For example, OEHHA's proposal requires apartment owners to post a sign at each "point of entry" to the building. Clarification and explanation is required in order to understand what this means. Indeed, many apartment complexes consist of multiple buildings on one property, and there may be multiple entrances to each building. Some of the entrances may be from the

public street, whereas other entrances may be located within the private property away from public access and this proposal would require signage in private areas. Entry ways may also include employee entrances, leasing office, clubhouses, exterior common areas, pools, tennis courts, etc. Without additional clarity, apartment owners who fail to warn in any of these entry ways will undoubtedly be subject to threatened bounty hunter litigation.

Additionally, although not contained in the regulation as drafted, it appeared during the April 14 public workshop that OEHHA may be inclined to extend the translation requirements into the apartment context. It should be noted that this requirement would be particularly problematic for apartment complexes, as landlords do not maintain demographic statistics on their tenants. The temporary nature of apartment occupancies, coupled with high tenant turnover rates, would make it practically impossible to properly maintain translated signs, as there are more than 200 languages currently spoken in California. In addition to being problematic, the legal grounds for requiring translation of warning are questionable at best, as the statute itself does not require it. Such a provision would likely require enacting legislation. Accordingly, OEHHA should not require apartment complex warnings to be translated.

From an informational standpoint, OEHHA's proposal requires all apartment warning signs to specifically list lead, formaldehyde and vehicle exhaust. But OEHHA's proposal fails to acknowledge that there may be circumstances in which not all or none of these chemicals are present at a given property. For example, many rental properties in California do not contain lead-based paint (e.g., apartment complexes built after 1978) and do not offer any onsite parking (e.g., older properties in cities such as San Francisco) or enclosed parking. In such circumstances, it does not appear that the reference to lead and/or vehicle exhaust may be omitted. OEHHA's proposal, therefore, mandates the inclusion of chemicals in apartment warnings that may not even be present and the exclusion of some chemicals that may be present. This is the precise opposite of meaningful information.

This section is by no means an exhaustive list of the apartment industry's concerns related to OEHHA's proposal. Additional concerns related to OEHHA's proposed apartment complex warnings are contained in association-specific comment letters.

Hotels and Lodging

During the 1990s, the lodging industry saw the beginning of what turned into an avalanche of Proposition 65 private enforcement actions, and well over a thousand California lodging establishments were eventually hit with these claims and, in many cases, litigation resulting there from. In some situations, individual lodging establishments had failed to post all of the appropriate Proposition 65 warnings appropriate to their operations, failed to post the required warnings in all of the required locations, or posted warnings that were slightly different than the Proposition 65 "safe harbor" warnings then in effect — differing typically in ways that were substantively insignificant, but which the plaintiffs' bar seized upon (e.g., the failure to capitalize certain words, "unauthorized" punctuation," and wording that was completely accurate and informative, but which varied somewhat from the safe harbor language). Depending on the particular plaintiffs' firm(s) and the Proposition 65 chemicals purportedly involved in the alleged violations, the vast majority of the claims were clearly frivolous in that it was obvious that the plaintiffs were simply identifying lodging establishments through websites and various travel-related sources, and subsequently sending notices to them without ever having been to the

properties. Indeed, the plaintiffs' sole purpose was to intimidate lodging operators into paying to settle these frivolous claims.

As a result of the thousands of claims that were asserted against the lodging industry and other types of businesses, the Legislature took a sequence of steps to rein in the rampant ongoing bounty hunter litigation, starting with the enactment of Senate Bill 1269 (Chapter 599, Statutes of 1999) to amend Health and Safety Code Section 25249.7. The intent, and hope, was to impose restrictions on the widespread use of "shakedown" Proposition 65 enforcement actions. Unfortunately, bounty hunters continued to develop new ways to misuse the enforcement process for personal gain, and there were subsequent legislative amendments to Health and Safety Code Section 25249.7 to address these abuses: SB 471 (Chap. 578, Statues of 2001); SB 1572 (Chapter 323, Statutes of 2002); SB 600 (Chap. 62, Statutes of 2003); and, most recently, AB 227 (Chap. 581, Statutes of 2013). There will undoubtedly be a continuing need to deal with legislation and regulations with this continuing enforcement cancer.

Against this background, it became obvious to the lodging industry that the continuing, and expanding, blitz of enforcement actions made it essential that the industry develop a comprehensive mechanism to comply with the warning requirements under Proposition 65. Given the diverse nature of the transient lodging industry — which includes hotels, motels, bed and breakfast inns, resorts, spas, ski resorts, guest ranches, agricultural "homestays," condominiums, timeshares, vacation home rentals, and "sharing" (e.g., www.airbnb.com), among others — crafting a all-embracing warning protocol was a difficult task.

The lodging industry then engaged in extensive litigation with two plaintiffs' firms. This was done in response to hundreds of claims being asserted by those firms. In the course of that litigation, the lodging industry undertook a process to craft a warning mechanism that was designed to give guests and others effective, yet non-threatening warnings that went beyond the Proposition 65 safe harbor warnings. Among other things, the lodging industry, working with an industrial hygienist and other Proposition 65 experts, audited a number of hotels to determine which Proposition 65 listed chemicals are likely to be encountered in various. Based on that work, the industry took the safe harbor warnings and expanded them slightly to let guests know that a brochure was available to them that identified the Proposition 65 listed chemicals most commonly encountered in lodging establishments of all kinds, and provided information as to how and where they might be encountered in various aspects of lodging establishments operations. (That brochure has been cited and reproduced in OEHHA's current process to indicate an appropriate way to provide useful information to guests about these listed chemicals.)

That litigation ultimately resulted in a court-approved settlement and consent judgment. The lodging industry submits that this consent judgment not only qualifies as a "court approved settlement" for purposes of OEHHA's proposed Section 25603 with respect to the hundreds of lodging establishments that were parties to the litigation in question, but, and equally important, the expanded warning mechanism developed by the lodging industry as a result of that litigation is clearly an acceptable, Proposition 65-compliant alternative to the safe harbor warning requirements, in that it meets both the letter and the spirit of Proposition 65, and it gives guests and others expanded and useful information, in understandable and practical terms, as to exactly what Proposition 65 means to them.

This warning mechanism has been used successfully throughout the lodging industry for over a decade. The grandfathering concept should be extended to allow all hotel and lodging owners to rely on this well-established warning methodology. Otherwise, inconsistent warning requirements among transient lodging establishments would unduly discriminate against those not previously subject to litigation, placing a disproportionate burden on the latter in the marketplace. Hence, OEHHA's proposed changes, if any are adopted that affect the lodging industry must grandfather in the agreed upon warning mechanism for all hotels and lodging facilities statewide.

Amusement Parks

The portion of the amusement parks specific regulation that makes explicit that posting signs for visitors to see before they enter parks satisfies the parks' obligation to warn is an improvement over the environmental warning today for amusement parks. Nevertheless, the rest of the regulation needs revisions to achieve a workable regulation, that is, one that does not increase abusive litigation. The revisions that are necessary to a realistic warning approach for amusement parks are set out below.

Other Warnings Required

Paragraph (3), subsection (e), section 25607.17 requires an amusement park to provide, in addition to the warning sign required in paragraph (1), the warnings also "specified for retail sellers of consumer products, alcoholic beverages, and foods where such exposures occur on the premises." It mandates duplicate warnings. It requires warnings for the same exposures that are included in the warning provided to visitors prior to their entering the premises. Paragraph 3 should be removed and all exposures encompassed in the entry warning.

Pictogram

The proposal in paragraph (1), subsection (f), section 25607.1, to require the addition of the international health hazard pictogram should be dropped for the reasons set out in the section of these comments on the pictogram.

Will v. May Expose

Paragraph (3),subsection (f), section 25607.17 requires the warning to state at the beginning, "Entering these premises will expose you to varying levels of chemicals…." This is a significant change from the current safe harbor warning that provides, "This area contains a chemical known to cause…."

The current regulation recognizes that while an area may contain a limited chemical, whether an exposure occurs depends on a person's activities while in that area. That is certainly true for amusement parks.

The draft regulation specified four chemicals to be included in the warning – lead, cadmium, vehicle exhaust, and phthalates. However, a visitor to a park could spend an entire day without ever being exposed to any of those chemicals. A visitor who never touches a brass rail, handles a product containing cadmium or phthalates, or parks in a parking garage would not be

exposed to any of those four listed chemicals. Hence, it is more truthful and accurate to state that a visitor may be exposed to one of those chemicals. In fact, it is an overstatement, to state that a visitor will be exposed to one of those chemicals simply by entering the premises. Requiring a park to make such a statement would violate its First Amendment rights. "Laws that restrict commercial speech remain subject to heightened scrutiny, as do laws that compel a commercial speaker to adopt, endorse, or subsidize a message or viewpoint with which it disagrees." *Beeman v. Anthem Prescription Mgmt., LLC* (21013) 58 Cal.4th 329, 363.
Paragraph (3) should be revised to require the warning to state that, "Entering these premises may will expose you to the listed chemicals."

Pamphlet

Paragraph (3), subsection (f), section 25607.17, requires the warning to include a statement that an informational pamphlet is available at each of the parks' public entrances, and paragraph (4) specifies the information that is to be included in the pamphlet. Both provisions should be removed them the definition of a clear and reasonable warning for amusement parks.
Maintaining and distributing pamphlets as envisioned by this draft regulation is no small task. For example, one park has 27 entrances for visitors. That requires the park to produce and maintain the pamphlet at each entrance. Even more of a significant concern is that it requires the parks to provide staffing, at regular intervals, if not on a full-time basis, to assure that the pamphlets are available and provided to anyone who requests one. The cost of assuring compliance with that requirement would be obscene.

Moreover, experience demonstrates that such pamphlets containing detailed, technical information would hold a visitor's interest for only a short time. Then the pamphlets become litter to be picked up and disposed as solid waste throughout the day. Pamphlets are simply not workable.

Moreover, OEHHA has inconsistently provided for pamphlets in the draft regulations. In some parts of the regulation, pamphlets are permitted but not mandated. No rationale for treating various businesses differently has been provided. Certainly, no sound basis exists for requiring pamphlets at every entrance at amusement parks.

Languages Other Than English

Paragraph (5), subsection (f), section 25607.17, requires the warning sign to be in other languages if languages other than English are used in other signage. California amusement parks host visitors from around the world who speak scores of languages. A park that posts an exit or entrance sign in, for example, just two other languages, would be compelled to triple the number of Proposition 65 warning signs. A park with 27 entrances would be required to produce, post, and maintain 81 signs, imposing a significant burden. Also, the absence of just one of those 81 signs could expose that park to litigation.

In addition, parks provide maps describing the location and nature of the various attractions, often in multiple languages. While those maps are technically not signage, they can be displayed in ways to resemble small signs. Again, that would create an obligation for parks to post dozens of additional Proposition 65 warning signs. To require multiple signs in those visitors' languages is unnecessary and totally unworkable.

Automobiles

OEHHA's drafted Proposition 65 changes will be unreasonably burdensome for manufacturers of complex durable goods. The proposed revisions will be impractical, unworkable, and cost prohibitive to implement, particularly for complex durable goods such as automobiles. Issues with the draft proposal arise with consideration of the availability of information in the supply chain, timing proposed in the draft, and impacts on consumers, confidentiality, service parts, and costs.

Complex durable goods, as the name implies, are products that are assembled from hundreds, or even thousands, of individual components. The average automobile is a complex web of systems and networks, containing more than 3,000 unique components from thousands of suppliers around the world, and the supplier network for these components can be as deep as six to seven tiers. The global nature of the supply chain greatly complicates information-gathering capabilities.

Automobile manufacturers have complied with the current Proposition 65 warning requirements by providing a single, general warning notification in the vehicle's owner's manual. The reason for this is twofold. First, there are numerous Proposition 65 chemicals present in numerous components, and it is more expeditious to provide a single notification. Second, there are already many different labels within a vehicle, providing manufacturing, fuel type, tire pressure, safety systems, other environmental information, etc. Therefore, the single warning in the owner's manual helps to address concerns with an overabundance of labeling on the vehicle. Furthermore, OEHHA's pre-proposal is not clear as to whether this single label will still comply going forward, how to generate the warning notification, when multiple chemicals must be addressed or what exposure threshold levels will be used to determine when a notification is necessary; these concerns are addressed further below.

OEHHA should not require specific labels for complex durable goods and should clarify that a single, general notification, such as a warning in the owner's manual, continues to comply with the Proposition 65 warning requirements.

Replacement Parts

Ensuring that replacement parts remain available for complex durable goods is critical. Numerous unique factors interact to make the supply of replacement parts a challenge in any scenario, and the constraints that warning label changes would impose make those challenges insurmountable. An exemption for replacement parts already in inventory and for replacement parts produced to repair a vehicle as produced is necessary, as described below:

- Replacement parts used in vehicle repairs are available for 20 years or more after the vehicle ceases production, and are often produced early in the vehicle's production period to create stock inventories to service the vehicle throughout its useful life.

- Complex durable goods typically are intended to last several years, even decades. Replacement parts must remain available for years, even for products that are no longer being manufactured.

- As we have seen with the EU Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Program, it is extremely difficult, if not impossible, to determine material content for replacement parts that are no longer in production.

- Frequently replacement parts must meet specific legal requirements and/or regulatory approvals or certifications.

- With the multi-tiered, multi-faceted global supply chain inherent in the manufacture of complex durable goods, information regarding the content of replacement parts may no longer be available depending on when it was manufactured or whether the parts manufacturer is still in business.

- Often, replacement parts cannot be used interchangeably; therefore specific parts must be available to specific models.

Other organizations have recognized the concerns set forth above. For example, broad exemptions for replacement parts can be found in the End-of-Life Vehicle (ELV) Directive allowing vehicles to be repaired as produced. The Restriction of the Use of Certain Hazardous Substances (RoHS) Directive (Article 2(3)) makes it clear that the directive does not apply to spare parts for the repair of electrical and electronic equipment put on the market before July 1, 2006, in order to ensure the availability of spare parts for equipment placed on the market before the entry into force of the substance restrictions. More recently, laws in California (SB 346, “Hazardous Materials; Motor Vehicle Brake Friction Materials,” 2010) and Washington (SB 6557, “Brake Friction Materials – Restrictions on Uses,” 2010) regarding the copper content in brake friction materials both provided exemptions for service and replacement parts in recognition of the above noted concerns.

The long shelf life of replacement parts is, itself, a practical reason for exemption, since many replacement parts that are manufactured today -- prior to the promulgation of new Proposition 65 requirements -- are likely to be on service and repair shop shelves for decades.

OEHHA should provide an explicit exemption from the warning requirements for replacement parts used to repair vehicles as produced, according to the requirements in place at the time the vehicle was produced.

Insufficient Lead Time

The automotive industry has serious concerns about many of the timing issues associated with OEHHA’s proposal.

One problem is the lack of clarity regarding lead time to implement the rule. As drafted, this proposal would require manufacturers to take many new steps to implement the provisions of the rulemaking, yet the draft proposal is silent regarding lead time. OEHHA should provide adequate lead time to implement such significant regulatory changes.

In considering what would be “adequate” lead time, it is important to understand the lengthy and complex product development cycles in the automobile industry. Because automobiles are

highly complex and innovative products, their development -- from the concept to testing and validation to the production phase -- takes anywhere from four to seven years. Decisions regarding vehicle design and development are made several years before manufacture, making last minute changes or information collection regarding components all the more difficult once production decisions have been made.

In addition, some of the information that OEHHA requests, such as exposure routes, pathways of exposure, anticipated exposure levels, or information on actions to minimize or eliminate exposure, may not be available. It could take months or even years to collect, depending on the number of impacted components containing Proposition 65-listed chemicals. Furthermore, where this information has yet to be generated, and testing may take several years.

Sufficient lead time prior to implementing the regulation must be provided, and flexibility must be allotted in instances where manufacturers are making good faith efforts to obtain the information but need additional time.

In addition, the pre-proposal would require a manufacturer to provide available, detailed information to OEHHA within 30 days from the time a warning is provided. Thirty days is an unrealistic and insufficient time to gather such information through a multi-tiered supply chain. Not only would a manufacturer have to send an information request through the supply chain and wait for responses, but the information would have to be analyzed and assessed prior to submittal. As noted earlier in our discussion of the supply chain, the complexity of the supply chain can result in longer time frames to collect information. If this information is not readily available, it may require a set of exposure studies that are both lengthy (taking months to years to complete) and costly to complete.

OEHHA should provide three years lead time to implement any new warning requirement provisions and, assuming the burdensome reporting requirement portion of the proposal is maintained, the timeframe during which one may complete reporting requirements should be expanded substantially.

New Labeling Wording

Section 25607.2 of the pre-proposal would change the current label's wording from "This product contains a chemical known to the State of California to cause…" to "This product will expose you to a chemical [or chemicals] known to the State of California to cause cancer and birth defects or other reproductive harm..." Revising the language to say "will expose" is problematic.

Relying on the wording "will expose" creates unreasonable burden throughout the supply chain to determine whether or not there will be exposure, and therefore whether or not a label is necessary. OEHHA assumes that there will be exposure to the chemical in the product, when the chemical may be present in *de minimis* amounts and/or have limited exposure under normal use and exposure scenarios. Determining potential exposure will be resource intensive, time consuming and costly.

"Will expose' will also likely mislead the consumer. It assumes that the consumer is coming in contact with the product, when in complex durable goods, a component may be contained within

the system, resulting in little to no exposure for the consumer under normal use conditions. How then will a consumer respond to a warning label that states: “This product will expose you to a chemical [or chemicals] known to the State of California to cause cancer and birth defects or other reproductive harm.”? The common sense question that they will ask is “Is this product safe?”

Use of “contains a chemical” is clearer and more representative of potential use scenarios than “will expose”. “Contains a chemical” will also provide more regulatory certainty for manufacturers and the regulators. Finally, “contains a chemical” provides more certainty and has a clearer meaning to the consumer than trying to understand what “will expose” means.

The automotive industry believes the current wording should be maintained since it more accurately characterizes (and will not mislead the consumer about) the potential exposure to the chemical.

Oil and Gas

Shortly after the passage of Proposition 65, the oil and gas industry was one of the first, if not the first, major industry to voluntarily approach the State in an effort to seek out and obtain advance Attorney General approval for its newly developed proposed Proposition 65 warning program. Recognizing that its members’ petroleum products are both critical to, and used widely by, millions of consumers throughout the State, the oil and gas industry worked closely and cooperatively with the Attorney General to craft Proposition 65 warnings that provided sufficiently detailed and easy to understand language to alert consumers of potential exposures from petroleum products.

For example, as part of that effort, members of the oil and gas industry developed warnings for specific posting at production facilities, refineries, bulk terminals, and service stations, and for advertisement in general circulation periodicals to reach the maximum number of Californians. The warnings provide specific information about potential health effects of an exposure, areas of potential exposure, and eventually were amended to add telephone links for consumers to call to obtain more information. While the warnings were implemented decades before the current proposed amendments to Proposition 65 – that warning program includes the very same type of detail proposed by the amendments for future Proposition 65 warnings throughout California. And most notably, these warnings were developed and approved by the State without the need for litigation or court involvement of any kind. It was a voluntary effort by industry and the government.

It is important to note that in the development of the warning program, the Attorney General conducted a careful analysis of the proposed oil and gas warning language in light of the requirements of Proposition 65 and its implementing regulations. This analysis was conducted in only the second year after Proposition 65 was adopted, providing the added benefit of a contemporaneous interpretation of Proposition 65’s meaning and intent at the same time the implementing regulations were being put into place. These regulatory principles formed the basis for the development of the warning. For example, the Statement of Reasons for the original Proposition 65 regulations recognized that the essence of a “clear and reasonable” warning was not only that its method of transmission be reasonable, but that “the message

employed must be sufficiently clear to communicate the warning." Revised Final Statement of Reasons, California Health & Welfare Agency (Nov. 1988), at 2.

It was for this reason that there was consensus to avoid warning for specific names of chemicals involved in the potential exposure, noting that such information would be available from the party responsible for the exposure and that including such information in the warning itself could render the warnings "visually too congested and cumbersome to read and understand." It seemed clear that the warning struck the proper balance between providing sufficient information for consumers while not overwhelming them with so much detail as to confuse or dilute the warning message itself.

After determining that the warning language met all of the applicable requirements of Proposition 65, the Attorney General issued a letter in September 1988 formally approving the proposed Proposition 65 warnings and expressly concluding that "the language of the warnings appears to be consistent with the requirements of Proposition 65." In other words, the letter recognized that the warnings qualified as "clear and reasonable" under the law. The State's conclusion that the warning meets Proposition 65 requirements as a "clear and reasonable warning" remains just as true today as it was in 1988.

Experience has borne out just how effective the approved warning has been. The warning has existed unchallenged for 25 years as a "clear and reasonable" Proposition 65 warning to millions of Californians. Not once has the warning been successfully challenged in court. Proposition 65 warnings are posted on point of entry, point of sale, and point of application signs, all informing users of potential exposure from use of petroleum and petroleum products. Again as an example, while most California consumers typically are warned of possible exposure every time they refuel at a filling station, the development of a published, industry-specific warning was designed to warn consumers of possible exposure even if they were not aware of the point of entry, point of sale or point of application warnings. Today, and for the past decades, the published warning appears quarterly in approximately 80 periodicals statewide in both English and Spanish, ultimately conveying the warning to millions of readers throughout the State.

Yet any reform of Proposition 65 or its regulations must recognize the critical importance of not undermining existing "clear and reasonable" warnings like those of the oil and gas industry that have received Attorney General approval. Warnings approved by the State or a court reflect a considered review of the language used and a careful comparison of that language to the requirements in the statutes and regulations. Approvals of these warnings are given with the understanding by all parties involved that the determinations are final, legally binding and not subject to reopening or further review. Entire legal disputes are resolved or avoided on the assurance that the State's or court's approval finally resolves the question of whether the warning is indeed "clear and reasonable" under the law. To allow wholesale review and rewriting of these warnings – warnings that, like the oil and gas warning, may have been relied on by companies thousands of times over the years to give warnings to millions of Californians – would throw Proposition 65 enforcement into chaos.

The consequences of omitting protection for existing approved warning language will be felt statewide, and would frustrate the goals of the Governor's Office to pass Proposition 65 reforms that provide more certainty for businesses and reduce litigation. On the contrary, plaintiffs'

attorneys could potentially bring a brand new round of litigation over long-settled warnings by arguing that they do not meet the requirements of the new law.

VII. CONCLUSION

Thank you for considering our comments. We appreciate the opportunity to participate in this very important pre-regulatory draft process.

Sincerely,

Anthony Samson
Policy Advocate
The California Chamber of Commerce

On behalf of the following organizations:

Advanced Medical Technology Association (AdvaMed)
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 Forest & Paper Association
American Herbal Products Association
American Home Furnishing Alliance
American Wood Council
Amway
Apartment Association of Greater Los Angeles
Apartment Association, California Southern Cities
Association of Home Appliance Manufacturers
Automotive Specialty Products Alliance
BayBio
Belden
Berk-Tek
Bestway
Betco Corporation
Biocom
Brawley Chamber of Commerce
Breen Color Concentrates
Building Owners and Managers Association of California

Burton Wire & Cable
California Automotive Business Coalition
California Construction and Industrial Materials Association
California Apartment 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 Business Properties Association
California Cement Manufacturers Environmental Coalition
California Citizens Against Lawsuit Abuse
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 Manufacturers and Technology Association
California Metals Coalition
California/Nevada Soft Drink Association
California New Car Dealers Association
California Paint Council
California Restaurant Association
California Self Storage Association
California Travel Association
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
Consumer Electronics Association
Consumer Healthcare Products Association
Consumer Specialty Products Association
Council for Responsible Nutrition
Dow Chemical Company
DuPont
East Bay Rental Housing Association
Fashion Accessories Shippers Association
Federal Plastics Corporation
Flexible Vinyl Alliance
Frozen Potato Products Institute
Fullerton Chamber of Commerce
Grocery Manufacturers Association

Industrial Environmental Association
Information Technology Industry Council
International Franchise Association
International Council of Shopping Centers
International Fragrance Association, North America
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
NAIOP of California, the Commercial Real Estate Development Association
National Association of Manufacturers
National Electrical Manufacturers Association
National Federation of Independent Businesses
National Shooting Sports Foundation
Natural Products Association
NorCal Rental Property Association
North American Home Furnishing Association
OCZ Storage Solutions
Outdoor Power Equipment Institute
Pactiv Corporation
Parterre Flooring Systems
Personal Care Products Council
PhRMA
Plumbing Manufacturers International
Procter & Gamble
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
Society of the Plastics Industry
Southwest California Legislative Council
Styrene Information and Research Center
Superior Essex
TechNet
The Art & Creative Materials Institute
The Association of Global Automakers
The Kitchen Cabinet Manufacturers Association
The Chamber of the Santa Barbara Region
The Vinyl Institute
The Worldwide Cleaning Industry Association
Toy Industry Association

Travel Goods Association
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 State Petroleum Association
Western Wood Preservers Institute
Writing Instrument Manufacturers Association

cc: The Honorable Luis Alejo, Chair, Assembly ESTM Committee
The Honorable Jerry Hill, Chair, Senate Environmental Quality Committee
The Honorable Richard Bloom, Chair, Assembly Budget Subcommittee No. 3
The Honorable Jim Beall, Chair, Senate Budget Subcommittee No. 2
Kristin Stauffacher, Deputy Secretary for Legislative Affairs, CalEPA
Gina Solomon, Deputy Secretary for Science and Health, CalEPA
George Alexeeff, Director, OEHHA
Allan Hirsch, Chief Deputy Director, OEHHA
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Dana Williamson, Cabinet Secretary, Office of the Governor
Wade Crowfoot, Deputy Cabinet Secretary, Office of the Governor
Cliff Rechtschaffen, Senior Advisor, Office of the Governor
Martha Guzman-Aceves, Deputy Legislative Secretary, Office of the Governor
Kish Rajan, Director, Governor's Office of Business and Economic Development
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Leslie McBride, Deputy Director, Governor's Office of Business and Economic Development
Paul Martin, Deputy Director, Governor's Office of Business and Economic Development
Barbara Vohryzek, Deputy Director, Governor's Office of Business and Economic Development
Will Koch, Deputy Director, Governor's Office of Business and Economic Development