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Via Electronic and First Class Mail

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Re: Comments regarding OEHHA’s Proposed Amendments to Proposition 65’s Warning Regulations – Section 25600.2

These comments are respectfully submitted on behalf of the Center for Environmental Health (“CEH”) regarding the Office of Environmental Health Hazard and Assessment’s (“OEHHA’s”) proposed amendments to Section 25600.2 of Article 6 of Title 27 of the California Code of Regulations (“Section 25600.2”). While CEH appreciates OEHHA’s effort to clarify Section 25600.2, the proposed amendments exceed the agency’s statutory authority, will exacerbate the problems CEH has previously identified in connection with OEHHA’s original adoption of Section 25600.2,¹ and are likely to result in substantial gaps in Proposition 65 enforcement and an increase in unwarned exposures to listed chemicals. Therefore, while specific flaws are discussed below, CEH urges OEHHA to use this opportunity to scrap Section 25600.2 altogether as unworkable and contrary to Proposition 65.

1. OEHHA’s Promulgation and Amendment of Section 25600.2 Violates Proposition 65.

Section 25600.2 exceeds OEHHA’s statutory authority in at least 3 different aspects. First, Proposition 65 directs that the warning regulations should “to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller.” Health & Safety Code § 25249.11(f). However, section 25600.2 flips this burden-shifting preference by minimizing the burden on upstream suppliers while making it more challenging for retailers to comply. In particular, Section 25600.2 allows a manufacturer, producer, packager, importer or distributor to choose whether to provide the warning itself or provide the required notice to a retailer. This essentially allows a manufacturer, producer, packager, importer or distributor to shift the

¹ See, e.g., **Comments by CEH and others, dated April 8, 2015, Jan. 25, 2016 and April 26, 2016. CEH incorporates by reference each of these prior comments on Section 25600.2.**

burden onto the retailer. Worse yet, the proposed revisions would allow producers to meet their Proposition 65 duty by providing a written notice to either “the authorized agent for the business to which they are selling or transferring the product” or “the authorized agent for a retail seller.” Thus, the proposed amendments authorize producers to comply with Proposition 65 by simply providing a written notice to intermediate distributors, whether the warning ever makes it to the retailer or the consumer. The proposed amendments exceed OEHHA’s regulatory authority because they do not in any way minimize the burden on retail sellers of consumer products, as required by section 25249.11 of the Act, but rather only benefit producers.

To address this problem, CEH suggests adding language that requires the manufacturer, producer, packager, importer or distributor to provide the warning itself to consumers unless it is not feasible to do so. This change would prevent entities higher up in the production chain from shifting the burden down the line without making any showing of infeasibility. It would also comport with Proposition 65’s directive that, “regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question.”

Second, by creating loopholes in enforcement, Section 25600.2 virtually ensures that there will be unwarned exposures to Proposition 65 that cannot be addressed by public or private enforcers. For instance, the proposed amendments authorize a producer to discharge its legal obligation to provide a Proposition 65 warning simply by providing a written notice to the next downstream business, or intermediate buyers, without requiring the producer to ensure that the ultimate retail seller is subject to Proposition 65. Under the proposed amendments, a producer who is subject to Proposition 65 can escape Proposition 65 enforcement so long as it has provided the necessary materials and obtained written confirmation from an intermediate buyer, even if the product is ultimately passed on to a small distributor or sold to consumers via a small retail seller who are not subject to the Act, and have no legal duty to provide any warning. This creates a significant loophole from Proposition 65 compliance, in violation of Proposition 65.

In a few instances, Section 25600.2 properly recognizes that, in order for an upstream manufacturer or distributor to pass along the responsibility to provide a warning to a downstream entity, that downstream entity must be “subject to Section 25249.6 of the Act.” *See, e.g.*, Proposed 27 Cal. Code Regs. § 25600.2(b)(4). However, in some places it is unclear whether this limiting language applies only to retail sellers, only to other downstream entities, or both. *Compare* 27 Cal. Code Regs. § 25600.2(b) (limiting language

after “retail seller” but not after “the business to which they are selling or transferring the product”) with §§ 25600.2(b)(4), 25600.2(c), and 25600.2(c)(1) (limiting language after “the business to which they are selling or transferring the product” but not after “retailer seller”). OEHHA should clarify that a manufacturer or distributor can still be held responsible if a small downstream entity with fewer than 10 employees fails to pass along warning materials provided by that manufacturer or distributor irrespective of whether that downstream entity is an intermediate distributor or a retail seller. Otherwise, consumers could be exposed to listed chemicals without a warning and have no recourse to pursue the manufacturer or supplier that would otherwise be responsible for such exposures.

In particular, CEH suggests that the following change be made to proposed Section 25600.2 to eliminate this potential ambiguity:

- Section 25600.2(b): “The manufacturer, producer, packager, importer, supplier or distributor of a product may comply with this article either by providing a warning on the product label or labeling that satisfies Section 25249.6 of the Act, or by providing a written notice directly to the authorized agent for the business to which they are selling or transferring the product or to the authorized agent for a retailer seller, so long as the business to which they are providing the written notice ~~who~~ is subject to Section 25249.6 of the Act, which”

With this edit, the language “who is subject to Section 25249.6 of the Act” could then be eliminated from Sections 25600.2(b)(4), 25600.2(c), and 25600.2(c)(1).

Third, while Proposition 65 expresses a general preference for OEHHA to minimize the warning burden on retailers, the statute does not authorize OEHHA to excuse retailers from liability for knowingly and intentionally exposing individuals to listed chemicals without a warning depending on the size of a product’s supplier or that supplier’s amenability to jurisdiction in California state courts. Yet this interpretation has been asserted by some defendants based on the language of Section 25600.2(e)(5), which provides that the retail seller is responsible for providing the warning for a consumer product exposure only if: (1) the retail seller “has actual knowledge” of the exposure; “and” (2) there is no upstream entity in the chain of distribution who is both a “person in the course of doing business” under Proposition 65 and has a designated agent for service

of process or a place of business in California. 27 Cal. Code Regs. § 25600.2(e).² Under the interpretation espoused by some defendants, a large retailer can continue to knowingly and intentionally expose its customers to listed chemicals in consumer products without a warning so long as there is a single entity in the upstream supply chain with 10 or more employees and a California agent or business address. Because this interpretation runs contrary to the plain language of the statute and would render the regulation invalid, OEHHA should clarify that a retailer with knowledge of an unwarned consumer product exposure has an obligation to provide a warning irrespective of the identity of the product's manufacturer, importer, distributor or supplier.

Besides being contrary to law, this overly broad interpretation of the law also leads to innumerable practical problems. For instance, what if the retail seller does not know whether any of the upstream entities in the supply chain of a product employ 10 or more individuals and have a California agent or business address? What if the status of the upstream suppliers in this regard changes over time?

2. Section 25600.2 Should Be Revised To Make It Consistent With OEHHA's Regulation Governing Pre-Suit 60-Day Notices.

OEHHA is proposing changes to section 25600.2(f) to clarify the meaning of the phrase "actual knowledge" as used in the current regulatory text. First, OEHHA proposes amending section 25600.2(f) to clarify that, a retail seller is deemed to have "actual knowledge" of a potential consumer product exposure requiring a Proposition 65 warning, and may be liable under Proposition 65, when the retail seller has "specific knowledge of the consumer product exposure *with sufficient specificity for the retail seller to readily identify the product that requires a warning.*" (OEHHA's proposed amendment in italics). Second, OEHHA is proposing amending section 25600.2(f) to say that a retail seller is deemed to have "actual knowledge" where information concerning a potential consumer product exposure is "received by the authorized agent or a person whose knowledge can be imputed to" the retail seller.

Defendants may use OEHHA's proposed amendment to section 25600.2(f) to argue for a heightened level of specificity to enforce Proposition 65 against a retail seller. OEHHA's

² Section 25600.2(e) enumerates other instances in which the retail seller is responsible for providing a consumer product exposure warning, but none of those situations addresses the problem with defendants' over broad interpretation of Section 25600.2(e)(5).

existing regulations state that a notice of violation alleging a consumer product exposure only needs to provide “sufficient specificity to inform the recipient of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged.” (27 CCR § 25903(b)(2)(D)). OEHHA’s proposed amendment, requiring information with “sufficient specificity for the retail seller to readily identify the product,” could be read to set a higher bar, thus creating inconsistent application of the Act.

Accordingly, CEH requests that OEHHA withdraw the proposed amendment to section 25600.2(f) defining “actual knowledge” as specific knowledge of the consumer product exposure “with sufficient specificity for the retail seller to readily identify the product that requires a warning,” or replace that language with the current language set forth in (27 CCR § 25903(b)(2)(D).

Thank you for your consideration of these comments.

Best,

A handwritten signature in cursive script that reads "Caroline Cox".

Caroline Cox