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CALIFORNIA CHAMBER OF COMMERCE

November 5, 2015

Ms. Trish Gerken
Senior Legal Analyst
Office of the Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

Via email to trish.gerken@doj.ca.gov

SUBJECT: PROPOSED AMENDMENTS TO PROP 65 REGULATIONS

Dear Ms. Gerken:

The California Chamber of Commerce and the below-listed organizations (hereinafter, "Coalition") thank you for the opportunity to submit comments regarding the Department of Justice's (DOJ) proposed amendments to Title 11, Division 4, of the California Code of Regulations concerning Proposition 65 enforcement actions brought by private parties. Our Coalition consists of nearly 200 California-based and national organizations and businesses of varying sizes that, collectively, represent nearly every major business sector that would be directly impacted by DOJ's proposed amendments.

The Coalition supports and appreciates the DOJ's stated objectives to constrain private parties' use of payments-in-lieu-of penalties, increase transparency and accountability in private settlements, and reduce excessive attorney's fees awards. The Coalition also agrees with the DOJ's position that increased scrutiny of the merits of private enforcers' claims is necessary to curb unnecessary lawsuits that do not promote the public interest. The AG's efforts are a welcomed step forward, especially in light of the Office of Environmental Health Hazard Assessment's (OEHHA) recent regulatory and pre-regulatory proposals, which the Coalition believes will substantially worsen the already problematic litigation climate under Proposition 65.

The Coalition is concerned, however, that key aspects of the DOJ's proposal will fall short of its stated objectives and, worse, may *increase* businesses' costs in resolving private enforcement claims. Indeed, an attorney who represents private enforcement groups in Proposition 65 actions has recently been quoted in *Inside Cal/EPA* as predicting that very outcome, noting that the DOJ's proposals are likely to have unintended consequences and fail to accomplish the DOJ's stated objectives. (*Inside Cal/EPA*, "Prop. 65 'Enforcer' Argues A.G.'s Litigation Penalty Reforms Will Hike Fees," October 8, 2015.)

With this in mind, this letter summarizes our concerns with proposed revisions to section 3201(b)(2) (rebuttable presumption of "significant public benefit" for reformulation), proposed section 3204 (additional settlement payments), and proposed revisions to section 3203 (civil penalties). We also offer recommendations that would help avoid unintended consequences while still achieving the DOJ's stated objectives. Finally, we request that the DOJ examine the economic effect of this proposal on the regulated community.

1215 K Street, Suite 1400
Sacramento, CA 95814
916 444 6670
www.calchamber.com

Before turning to that discussion, the Coalition wishes to express its full support for the proposed revisions clarifying the requirement to submit out-of-court settlements to the Attorney General (proposed Section 3003(c) and related revisions), and clarifying the requirement for private enforcers to support claims for cost reimbursement with contemporaneous records (proposed revisions to Section 3201(e)). These clarifications address longstanding ambiguities in the current DOJ regulations regarding plaintiffs' settlement-related obligations and will provide more concrete guidance to such persons.

I. Proposed Revisions to Section 3201(b)(2) – Rebuttable Presumption of "Significant Public Benefit" for Reformulation

Proposed revisions to section 3201(b)(2) would create a rebuttable presumption that changes in a settling defendant's practices that reduce or eliminate the exposure to a listed chemical are presumed to confer a "significant public benefit" justifying an award of fees to the settling plaintiff. In order to establish this presumption, supporting evidence must show that at least some of the products at issue are or at some time were "above the warning level" and, as reformulated, such products will be below the warning level. Otherwise, the mere agreement to reformulate may not establish such a presumption. By way of contrast, current section 3201(b)(2) states that changes in defendant's practices that are mandated by a settlement (such as product reformulation) are deemed sufficient to demonstrate the requisite public benefit.

As the Initial Statement of Reasons ("ISOR") explains, this proposal is intended to curb private enforcement whose settlement outcome confers little public benefit. The Coalition supports this goal. As explained below, however, this goal is more likely to be achieved – and with less costly disruption to the settling parties, the courts and the public – if the AG applies additional scrutiny, makes its views known and takes any necessary action at the outset of a noticed private enforcement matter, *before* the parties begin settlement discussions. Put another way, the presumption determination in this proposal comes too late in the process, when neither party will be inclined to rebut any presumption due to an overarching and pressing desire to finalize a settlement without additional costs or hurdles.

As the DOJ is aware, a significant percentage of Proposition 65 settlements involving consumer product exposures impose reformulation requirements on the settling companies. In some cases, the reformulation standard represents a "bright line" cap on chemical content, above which a Proposition 65 warning would be required. In many cases, the reformulation is a "standalone" requirement; that is, the settlement does not allow nonconforming products to be sold in California, even with a Proposition 65 warning. In addition, virtually all settlements require the settling defendant to "cooperate" with the plaintiff with respect to obtaining court approval and/or responding to the Attorney General's objections, if any.

Because it is difficult and costly to establish the level of exposures to listed chemicals occurring from product use, these reformulation standards are a shorthand way to address those complex scientific issues. The Coalition agrees with the DOJ's assessment that such reformulation standards often represent a compromise between the parties in an effort to avoid litigating costly and highly technical issues requiring scientific expertise.

The proposed amendment, although well-intended, is currently drafted in a way that has the potential to increase the costs of, and to disrupt, the settlement process in the private enforcement proceedings, when both parties are equally invested in ensuring that the settlement is finalized. Absent drafting modifications clarifying the DOJ's intent, the practical

consequence of proposed Section 3201(b)(2) could be that courts will misinterpret this requirement to require the parties to provide "before-and-after" exposure assessments and/or that private enforcers will require settling companies to generate, or at least pay for, the evidence to support the settlement's reformulation requirement. More specifically, the proposal raises the risk that private enforcers, as part of negotiations, will ensure that all of their fees and costs will be covered in the event that additional, high-cost evidence, such as exposure assessments, must be generated to respond to inquiries from the Attorney General or the court. Thus, settling defendants may be put in the untenable position of having to justify the terms of the settlement – at their own expense – by undertaking precisely the same costly exercise they hoped to avoid in the first place.

Additionally, as the DOJ is aware, businesses often agree in settlements to reformulate their products even when they maintain that product exposures to a listed chemical had never occurred at levels requiring a warning. In such circumstances, the company is simply making a business decision to settle the case notwithstanding these disputed facts. The Coalition understands and appreciates that the DOJ is attempting to avoid that outcome. However, the practical reality is that the cost of meeting the plaintiff's demands is almost always far less than the cost of proceeding with expensive and prolonged litigation. Further, the requirement to support reformulation with evidence showing that at least some of the products at issue either are or at some point were above the warning level is equivalent to an admission of liability, an admission that from a settling company's perspective would be at odds with and directly contrary to the "no admission of liability" recitations in settlements, which are necessary for companies to agree to forego the option of litigating their defenses and to protect them from other claims as a result of a decision to settle a Proposition 65 claim. (To be clear, in these circumstances neither party has conceded that other party's position regarding the level of alleged exposures is correct. Rather, the parties have elected to compromise and resolve their differences through the settlement, an outcome that our judicial system strongly encourages for any dispute.)

Worse, such evidence in many cases will be directly at odds with exposure assessments previously undertaken by a defendant concluding that exposure levels were *below* warning levels. With some products, it may not even be possible to find a qualified toxicologist who would opine, consistent with scientifically valid principles, that the unreformulated product required a warning at all. The settling parties may be left in limbo; the plaintiff will not likely walk away from its claim, and both parties will be required to litigate the complicated and expensive issue of exposure – the very exercise the parties sought to avoid through settlement – as the only option moving forward.

If the DOJ proceeds with this proposal, the risk of this inadvertent outcome may be reduced if it and/or the Final Statement of Reasons clarify that an exposure assessment is not necessarily required to support a finding of significant public benefit, and that other forms of evidence may establish it.

Beyond this, the DOJ's goal and the public interest would be best served by imposing increased scrutiny early in the private enforcement process, and requiring plaintiffs at the 60-day notice stage, with their Certificate of Merit, to provide some degree of evidentiary support that use of a product presents a level of exposure likely to exceed the relevant warning level. This "up-front" approach would be more likely to deter private enforcers from pursuing unnecessary actions in the first place, since they would have no opportunity to later shift the burden of generating the necessary evidence to the settling company in the context of settlement negotiations. That

timing also would encourage a substantially more robust engagement by the alleged violator, who has yet to become invested in ensuring that a settlement is finalized.

The Coalition understands that the DOJ believes this proposal will provide it with additional tools to probe the basis for private enforcement claims early in the private enforcement proceeding, even at the Certificate of Merit stage. The Coalition certainly supports the use of any additional tools to scrutinize private claims as early as possible and particularly before litigation is commenced. If the DOJ proceeds with this proposal, the Coalition urges the DOJ to explain in the final guidelines and/or the Final Statement of Reasons how the proposal would support the DOJ's efforts in this regard.[1]

II. Proposed Section 3204 –Additional Settlement Payments

Proposed section 3204 would require that payments-in-lieu of penalties, also referred to as "Additional Settlement Payments" (ASPs), should not be a component of any out-of-court settlement and, in court-approved settlements, should not exceed the amount of any non-contingent civil penalty. A "non-contingent" civil penalty is one that must be paid by the business irrespective of what additional actions that entity may take; a "contingent" civil penalty is one that may be waived if the business undertakes additional, specified actions under the settlement.

As the ISOR observes, ASPs have been components of Proposition 65 settlements for many years. These payments are not specifically authorized by Proposition 65 and are not subject to the statutory allocation of 25 percent to the named plaintiff and 75 percent to OEHHA, since they are not civil penalties subject to that allocation. Accordingly, a fairly significant amount of settlement payments are not allocated to OEHHA to support its Proposition 65 implementation duties. Further, settlements containing these payments frequently are vague about the purpose to which they will be put, and/or what third party grantees may receive these funds (and for what purpose).

The revisions proposed in this section are an attempt to enhance transparency and accountability in ASPs and ensure that those payments further the intent of the law. To the extent that ASPs are allowed to continue (addressed below), the Coalition strongly supports these goals. Even so, the Coalition is concerned that some of the proposed revisions will inadvertently result in increased settlement costs.

Specifically, capping ASPs so as to not exceed non-contingent civil penalties may cause plaintiff attorneys to seek additional attorneys' fees to cover the "shortfall" or to simply increase the amount demanded for civil penalties. Regardless of whether plaintiffs increase their attorney fee demands or civil penalty demands, they will look to defendants to cover the difference.

In fact, an attorney for a private enforcer already has predicted this outcome in an October 9, 2015 *Inside/CalEPA* article, "Prop. 65 'Enforcer' Argues A.G.'s Litigation Penalty Reforms Will Hike Fees." In that article, the attorney stated the following regarding this aspect of the proposal:

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[1] If the DOJ intends to proceed on this aspect of the proposal, one clarifying amendment is critical. Specifically, the proposal must be revised to refer to "exposures" above the warning levels, rather than "products" above the warning level. This change would align the provision to the statute's focus on exposures rather than products, would reflect the DOJ's intent as expressed in the ISOR, and would be clearer to the regulated community and private enforcers.

> "This may affect how some Prop. 65 enforcers do business under the act.... Some enforcer groups rely on the payments in lieu of civil penalties to fund their operations.
>
> "They should be able to continue doing so, but the 'cap' on these payments will either cause them to decrease funding to their operations, or, because the 'cap' is a percentage of civil penalties, will motivate them to demand more civil penalties. That could drive up the cost of settlements."
>
> "[Private enforcement groups] will respond to the AG's 'cap' on payments in lieu of civil penalties by demanding (and in most cases getting) more civil penalties in settlements."

This prediction, issuing directly from an active private enforcer's attorney, reinforces the Coalition's concern about post-amendment private enforcement tactics and plaintiffs' settlement pressure, the goal of which would be to ensure their own continued operations, to the settling company's financial detriment and with no discernible benefit to the public interest. The Coalition urges the DOJ to examine carefully the high potential for this unintended but entirely predictable consequence.

That said, the Coalition recognizes that most Proposition 65 settlements do ***not*** include ASPs, and concludes from this fact that they are not tools needed to ensure continuing enforcement of the statute by private plaintiffs. The Coalition also observes that nothing in Proposition 65 or in the 1986 ballot pamphlet reveals any legislative or voter intent that ASPs be awarded either to plaintiffs or third-party recipients.

Taking these observations together, the Coalition believes that the best and most effective course of action for the DOJ to take at this time would be to prohibit ASPs in ***any*** Proposition 65 settlement, whether court-approved or out-of-court. If the DOJ elects to continue to allow ASPs in Proposition 65 settlements, the proposal should be revised to require private enforcers receiving ASPs to demonstrate, as a threshold matter, why they are necessary and in the public interest given the availability of statutory penalties.

Whether the DOJ proceeds with its current proposal, or with the Coalition's recommended alternative, or with some other approach, the Coalition urges the DOJ to carefully monitor future settlements to evaluate if there is an emerging trend in increased settlement values, and to take appropriate action if it determines that such trends are manifesting themselves.

III. Proposed Revisions to Section 3203 – Reasonable Civil Penalty

Proposed revision to section 3203 describes the DOJ's expectations regarding the imposition of civil penalties in Proposition 65 settlements. The DOJ proposes revisions to this section to, among other things: (1) clarify that the appropriateness of low or no civil penalties in a settlement is a fact-dependent question; and (2) require that any waiver of civil penalty payment be supported by a verifiable mechanism. The Coalition generally supports the goals underlying these revisions and offers suggestions to further enhance their clarity and effectiveness.

Before turning to those specific issues, the Coalition points out that the ISOR's discussion of the revisions to this Section seems to "mix and match" Subsections (c) and (d). (ISOR at p. 6

[second paragraph]). Subsection (c) deals with "contingent" civil penalties, and Subsection (d) deals with ASPs. Yet the ISOR's discussion of Subsection (d) refers to "these nexus requirements" contained in Subsection (c). This creates confusion about what "nexus" requirements are being discussed in connection with ASPs. If this proposal is finalized in its current form, the Coalition recommends that this discussion be clarified in the Final Statement of Reasons.

A. Subsections (a) and (b)

Current Subsection (a) states that a "settlement with little or no penalty may be entirely appropriate." As revised, this subsection would clarify that the appropriateness of low or no penalties is to be "based on the facts or circumstance of the particular case."

At the same time, Subsection (b) would be revised to state that recovery of civil penalties "serves the purpose and intent of Proposition 65." This revision could be interpreted to undermine Subsection (a), by implying that settlements with low or no civil penalties might *not* serve the purpose and intent of Proposition 65. Such an interpretation would disincentivize private enforcers from imposing low, or no, penalties, even in appropriate circumstances, due to concerns that the Attorney General or the court would challenge such a provision as not serving the law's purpose. Indeed, some private enforcers currently insist that they *must* recover civil penalties, or their settlements will incur objections from the Attorney General.

The Coalition recommends that Subsection (a) clarify that a settlement with little or no civil penalty, in the appropriate circumstances, also "serves the purpose and intent of Proposition 65," as follows (the DOJ's deletions in strikethrough; the DOJ's additions in underline; and the Coalition's proposed addition in double underline):

> (a) A settlement with little or no civil penalty may serve the purpose and intent of Proposition 65 and may be entirely appropriate~~. Civil penalties, however (75% of which must be provided to the Department of Toxic Substances Control) should not be "traded" for payments of attorney's fees.~~ , or not, based on the facts or circumstances of a particular case.

B. Subsection (c)

As the DOJ is aware, a number of settlements impose "contingent" civil penalties, i.e., penalties that may be waived (and not paid) if the settling company undertakes additional specified conduct. The DOJ points out that such unpaid civil penalties "runs the risk of defeating the voters' intention that penalty funds be used to 'implement and administer' Proposition 65." (ISOR at p. 5). In its proposal, the DOJ has expressed concerns about the ensuring a nexus between the purpose of the litigation and benefits to Californians, on the one hand, and the company's conduct, on the other, to support such contingent penalties.

Subsection (c) thus would impose certain requirements on contingent civil penalties. Among the proposed requirements is that the company's conduct, supporting the waiver of the contingent civil penalty, provide a "clear mechanism for verification."

Given the number and variety of private enforcers, it would not be surprising to find a number and variety of interpretations of this verification requirement. The Coalition urges the DOJ to

consider the significant burdens that may be imposed on settling companies due to the requirement of a "clear mechanism of verification," absent further guidance on what this term means.

For this reason, the Coalition recommends revising the proposal to state (with the DOJ's proposal in underline and the Coalition's addition in double underline):

> Section 3203. Reasonable Civil Penalty
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> * * *
>
> (c) Where a settlement provides that certain civil penalties are assessed, but may be waived in exchange for certain conduct by the defendant, such as, for example, reformulating products to reduce or eliminate the listed chemical, the conduct must be related to the purposes of the litigation, provide environmental and public health benefits within California, and provide a clear mechanism for verification that the qualifying conditions have been satisfied. The appropriate mechanism for verification depends on the facts or circumstances of a particular case, should not be burdensome and may be established by the submission to the private enforcer of a certification that the settling entity has undertaken the necessary conduct.

IV. **Economic Impact Analysis**

The DOJ's Economic Impact Statement (EIS) focuses solely on the economic impacts to the private enforcement community. Specifically, in describing the types of businesses that will be impacted by the proposal, the EIS notes that the proposal will exclusively impact "nonprofit corporations and consumer and environmental groups that receive funding through ASPs."

As described in this letter, the Coalition believes there may well be impacts on the regulated community as well as the private enforcement community adjusts to these new rules. The EIS should address these potential impacts.

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The Coalition strongly urges, again, that the DOJ carefully monitor emerging trends in the monetary component of Proposition 65 settlements and to take appropriate action if such trends reveal increasing civil penalty payments and/or attorneys' fees, without a discernible connection to the public interest.

Thank you for considering our comments. The Coalition appreciates the DOJ's efforts to clarify and improve important aspects of Proposition 65 private enforcement.

Sincerely,

Anthony Samson
Policy Advocate
California Chamber of Commerce

On behalf of the following organizations:

Advanced Medical Technology Association (AdvaMed)
Agricultural Council of California
Alliance of Automobile Manufacturers
Allwire, Inc.
Alpha Gary
American Apparel & Footwear Association
American Architectural Manufacturers Association
American Beverage Association
American Brush Manufacturers Association
American Cleaning Institute
American Coatings Association
American Composites Manufacturers Association
American Fiber Manufacturers Association
American Forest & Paper Association
American Frozen Food Institute
American Herbal Products Association
American Home Furnishing Alliance
American Wood Council
Amway
APA – The Engineered Wood Association
Apartment Association, California Southern Cities
Apartment Association of Greater Los Angeles
Apartment Association of Orange County
Associated Roofing Contractors of the Bay Area Counties, Inc.
Association of Home Appliance Manufacturers
AXIALL LLC
Automotive Specialty Products Alliance
Belden
Berk-Tek
Bestway
Betco Corporation
Bicycle Product Suppliers Association
Biocom
Biotechnology Industry Organization
Brawley Chamber of Commerce
Breen Color Concentrates
Building Owners and Managers Association of California
Burton Wire & Cable
California Apartment Association
California Asphalt Pavement Association
California Association of Boutique & Breakfast Inns
California Association of Firearms Retailers
California Association of Health Facilities
California Attractions and Parks Association
California Automotive Business Coalition
California Building Industry Association
California Business Properties Association
California Cement Manufacturers Environmental Coalition
California Citizens Against Lawsuit Abuse
California Construction and Industrial Materials Association

California Cotton Ginners Association
California Cotton Growers Association
California Farm Bureau Federation
California Furniture Manufacturers Association
California Hospital Association
California Hotel & Lodging Association
California Independent Oil Marketers Association
California Independent Petroleum Association
California League of Food Processors
California Life Sciences 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 Retailers Association
California Self Storage Association
California Travel Association
Can Manufacturers Institute
Chambers of Commerce Alliance Ventura and Santa Barbara Counties
Chemical Fabrics & Film Association, Inc.
Chemical Industry Council of California
Civil Justice Association of California
Coast Wire & Plastic Tec., LLC
Communications Cable and Connectivity Association
Composite Panel Association
Computing Technology Industry Association (CompTIA)
Consumer Electronics Association
Consumer Healthcare Products Association
Consumer Specialty Products Association
Copper & Brass Fabricators Council, Inc.
Council for Responsible Nutrition
Dow Chemical Company
DuPont
East Bay Rental Housing Association
Family Winemakers of California
Fashion Accessories Shippers Association
Federal Plastics Corporation
Flexible Vinyl Alliance
Footwear Distributors & Retailers of America
Frozen Potato Products Institute
Greater Bakersfield Chamber of Commerce
Grocery Manufacturers Association
Halogenated Solvents Industry Alliance, Inc.
Hardwood Plywood Veneer Association
Independent Lubricant Manufacturers Association
Industrial Environmental Association
Information Technology Industry Council
International Crystal Federation

International Franchise Association
International Council of Shopping Centers
International Fragrance Association, North America
IPC – Association Connecting Electronics Industries
ISSA, The Worldwide Cleaning Industry Association
J.R. Simplot Company
Juvenile Products Manufacturers Association
Loes Enterprises, Inc.
Lonseal, Inc.
Medical Imaging & Technology Alliance
Metal Finishing Association of Northern California
Metal Finishing Association of Southern California
Mexichem
Motor & Equipment Manufacturers Association
NAIOP of California, the Commercial Real Estate Development Association
National Association of Chemical Distributors
National Council of Textile Organizations
National Electrical Manufacturers Association
National Federation of Independent Businesses
National Lumber and Building Material Dealers Association
National Shooting Sports Foundation
Natural Products Association
NorCal Rental Property Association
North American Home Furnishing Association
North Orange County Chamber
North Valley Property Owners
Nutraceutical Corporation
OCZ Storage Solutions
Orange County Business Council
Outdoor Power Equipment Institute
Pacific Water Quality Association
Pactiv Corporation
Parterre Flooring Systems
Personal Care Products Council
PhRMA
Plumbing Manufacturers International
Polyurethane Manufacturers Association
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Resilient Floor Covering Institute
San Diego Regional Chamber of Commerce
Santa Barbara Rental Property Association
Searles Valley Minerals
Sentinel Connector System
Sika Corporation
Simi Valley Chamber of Commerce
Specialty Equipment Market Association
SPI: The Plastic Industry Trade Association
SPRI, Inc.
Southwest California Legislative Council

Styrene Information and Research Center
Superior Essex
TechNet
The Adhesive and Sealant Council
The Association of Global Automakers
The Kitchen Cabinet Manufacturers Association
The Chamber of the Santa Barbara Region
The Vinyl Institute
Toy Industry Association
Travel Goods Association
Treated Wood Council
USANA Health Sciences, Inc.
USHIO America, Inc.
Visalia Chamber of Commerce
Water Quality Association
WD-40 Company
West Coast Lumber & Building Materials Association
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association
Western Propane Gas Association
Western State Petroleum Association
Western Wood Preservers Institute
Window & Door Manufacturers Association

cc: Sue Fiering, Supervising Deputy Attorney General, California Department of Justice
Harrison Pollack, Deputy Attorney General, California Department of Justice
Matt Rodriguez, Secretary, CalEPA
Gina Solomon, Deputy Secretary for Science and Health, CalEPA
Lauren Zeise, Acting Director, OEHHA
Allan Hirsch, Chief Deputy Director, OEHHA
Carol Monahan-Cummings, Chief Counsel, OEHHA
Mario Fernandez, Staff Counsel, OEHHA
Dana Williamson, Cabinet Secretary, Office of the Governor
Ken Alex, Senior Policy Advisor, Office of the Governor
Cliff Rechtschaffen, Senior Policy Advisor, Office of the Governor

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