MEMORANDUM

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DATE: October 10, 2014

RE: CalChamber Comments re September 23 Warning Regulation Discussion Draft

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This follows-up to our meeting on October 1, 2014 and provides you with preliminary comments on OEHHA's Preliminary Discussion Draft Warning/Website Regulations dated September 23, 2014.

It is critical to note that the comments below do not constitute an exhaustive list of the issues CalChamber has identified with OEHHA's latest draft. To this end, CalChamber, its coalition, and the members thereof reserve the right to submit formal comments in the future related to these issues and others.

Additionally, because OEHHA has only provided a two-week window during which to submit informal comments on the September 23rd draft, these comments have not been reviewed by the entire 150-entity coalition. Accordingly, these comments should be attributed to the California Chamber of Commerce only. It is important to note, however, that I have informed the coalition of the issues and proposals identified in this memorandum, and the feedback I have received thus far has been supportive.

The balance of this memorandum identifies issues, offers suggestions and proposes language, where appropriate, regarding the following aspects of OEHHA's September 23rd draft: (1) Safe Harbor; (2) 12 Specific Chemicals; (3) Grandfathering/Transition; (4) Pictogram; (5) Cure for Retailers; (6) Consumer Products Issues; (7) Occupational Exposure Warning; and (8) the Website.

Safe Harbor

The Chamber appreciates OEHHA's willingness to reintroduce the "safe harbor" warning concept. As written, however, the revised proposal, unlike the current regulations, would not provide guidance to businesses and courts as to the criteria for determining whether a warning that differs from a prescribed safe harbor warning is nevertheless "clear and reasonable". Those criteria have existed for over two decades and have been useful for evaluating alternative warnings. Consistent with our discussion last week, section 25601 subsection (a) should be revised to include existing regulatory language as follows:

(a) A warning is "clear and reasonable" for purposes of Section 25249.6 of the Act if the warning complies with all applicable requirements of this Article. Nothing in this section shall be construed to preclude a person from providing warnings other than those specified in this Article ~~that satisfy the requirements of this Article.~~ if (1) the method employed to transmit the warning is reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to the exposure and (2) the message clearly communicates that the chemical in question is known to the state to cause cancer and/or reproductive harm. A person is not required to provide separate warning to each exposed individual.

12 Specific Chemicals

The Chamber continues to have serious concerns about the approach of specifically identifying certain chemicals. In addition, as currently drafted the requirement to identify up to 12 specific chemicals in a warning needs further qualification to keep the warning statement succinct and avoid the requirement becoming unmanageable for a business, a source of more rather than less litigation[1] and a lengthy list that will either turn consumers off or over-saturate them.

- There should be an exemption to the requirement for levels of these chemicals that the Lead Agency or courts have determined do not warrant Proposition 65 warnings.

- The requirement should also address the disincentive, which exists in the current enforcement climate, for a business to undertake an exposure assessment to inform its decision to provide warnings or not. This disincentive is at least partly to blame for any perceived overwarning -- there simply is no benefit for an entity to invest the resources to evaluate whether an exposure is below a level requiring a warning if the only response from a plaintiff is the threat to litigate the issue anyway. For that reason, the requirement should establish that the business need not include in a warning a chemical identified in subsection (a) if: exposure to the chemical has been evaluated by a qualified toxicologist; the toxicologist has concluded that the exposure is below the warning level established for that chemical; and the toxicologist's evaluation and conclusion are summarized in a written report that is in the possession of the entity causing the exposure.

- Where present and the above do not apply, a business should not have to designate multiple chemicals under this section and should instead be permitted to use an illustrative example by referring to one of the relevant 12 chemicals by saying: "can expose you to chemicals, such as *X*, known to the State . . . ."

Grandfathering/Transition

After considering Section 25603(a) of the draft in more detail following our meeting, we concur that, in general, the safe harbor structure of the draft regulations means that there is no need to grandfather in any prior consent judgments since the warnings they prescribe are approved by the court as "clear and reasonable" and can continue to be used by the defendants despite the change in the safe harbor warnings set out in the regulations. The Chamber nevertheless believes that (1) OEHHA needs to make its intent on this point clear; (2) the general criteria for clear and reasonable warnings stated in the current regulations at Section 25601(a) need to be maintained (as discussed above); and (3) the language needs to recognize that courts can approve warnings outside the context of a settlement (i.e., in a judgment). We propose that draft Section 25603(a) be replaced with the following provision:

> Nothing in this Article shall affect warnings for specific exposures that are approved by courts as compliant with the Act or require that such warnings be revised.

[1] As emphasized in our June 13 comment letter, 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. This aspect of the proposed regulation, however, would open up a new frontier of litigation over the content of warnings when the warning may or may not be required to specify one of the twelve designated chemicals. Specifically, our concern stems from the following likely scenario: a business provides the prescribed consumer product warning but appropriately elects not to specify lead in its warning because a toxicology report indicates only infinitesimal levels of lead exist in its product (presumably, OEHHA would not want a business to specify a chemical in a warning unnecessarily). A plaintiff's attorney would then issue a 60-day notice indicating that the warning should have specified "lead" based on a competing toxicology report, and the business would be left with an option to settle or to engage in expensive, prolonged litigation. If it is indeed OEHHA's goal not to introduce new avenues of litigation such as the one identified above, then this aspect of the proposal must be changed to provide more certainty to the business community.

In addition, there are two other transition issues about which the Chamber has significant concerns.

First, Section 25603(b) of the draft, which is addressed to companies who are not parties to consent judgments but who follow their requirements, merely states what is already the law—that anyone can petition the lead agency for a change in the implementing regulations. But in doing so, it may imply that parties to court-approved settlements cannot petition OEHHA, even though they may well want to establish a level playing field among competitors who are not parties to the consent judgment at issue. We also think OEHHA needs to give more credibility to the warnings that courts have approved -- many of which have become de facto industry standards, and all of which have been found to comply with the Act -- by indicating that OEHHA will start from the assumption that court-approved warnings are appropriate as alternative safe harbors. The Chamber therefore would suggest that OEHHA replace the current draft Section 25603(b) with the following:

> Any interested party may petition the lead agency to adopt into this Article as an alternative warning for specific exposures the warnings content and methods approved by a court for such exposures. In considering such a petition, the lead agency will weigh heavily the finding of the court that such specific warning content and method complies with the Act.

Second, because there are many signs posted and many products labeled with the current safe harbor language, which will no longer be a safe harbor upon the effective date of the revised warning regulations, we urge the agency to consider a transitional provision that provides businesses with time to revise their current signage and labeling if they want to continue to provide an agency-approved safe harbor. As the agency knows, many of the businesses posting signs are small businesses, and many of the products that are labeled with warnings are made or distributed by small businesses who have no presence in California or any great likelihood of learning of changes in long-standing California regulations. While we would urge OEHHA to undertake an effort at publicizing the new regulations, perhaps via a mailing to past recipients of Proposition 65 notices of violation, we do not believe this will be sufficient to prevent many businesses from being named by private enforcers for continuing to use the old safe harbor. Likewise, many categories of products that have already been packaged with the prior safe harbor warning will be on the shelves for longer than a year after adoption of these regulations. For these reasons, and because the current safe harbors, which have been in use for more than two decades, are not made "unclear and unreasonable" just because OEHHA has overhauled the safe harbors, we would suggest that OEHHA adopt the following transition provision as part of Section 25601(d):

> (d) This Article shall become effective one year after date of adoption. For a transition period of two years after date of adoption of this Article, warnings that were deemed to be clear and reasonable under the provisions of this Article that were in effect on the day prior to the date of adoption of this Article shall be deemed to be clear and reasonable notwithstanding the adoption of this Article. Warnings on consumer products that are manufactured or packaged during this two-year transition period and that were deemed to be clear and reasonable under the provisions of this Article that were in effect on the day prior to the date of adoption of this Article shall be deemed to be clear and reasonable regardless of the date on which they are sold or delivered to consumers in California. Following this two-year transition period, warnings that were deemed to be clear and reasonable under the provisions of this Article that were in effect on the day prior to the date of adoption of this Article may still be considered clear and reasonable should they meet the criteria of Section 25601(a).

Pictogram

Although an improvement from that in the previous proposal, the Chamber believes that the revised proposed yellow triangle/explanation point designated symbol is still problematic in several respects:

- To better serve its intended purpose and make it useful to both businesses and consumers as it comes to be recognized for what it stands for, at least for consumer product warnings, a designated Proposition 65 warning symbol should be made an alternative to providing the narrative part of the warning (except, perhaps as to the URL – see below);

- The explanation point will be confusing to consumers and, since it is otherwise associated with more significant or acute hazards (e.g., choking or allergic reaction risks), it may often be misleading. It would be more consistent with the statute and make more sense to use within a symbol something like "P65" or "65" that associates with the basis for why the warning is being given and provides a cue to using the URL to go to the website where more explanatory and contextual information will be available;

- The requirement to have a symbol appear in yellow if any other colors are used in signage or labeling is both unduly onerous (because printing costs may escalate with the number of separate colors being used or the number of pieces/parts of labeling to which they may have to be applied) and, because the color yellow may itself non-verbally signal a more significant or acute level of risk than that for which the warning (which could be based only on a small detectable amount and/or due to a 1,000 fold safety factor) is being given.

Cure for Retailers

The Chamber endorses the concept of a cure provision for retailers set forth in section 25605(c) of the current draft and believes it is completely consistent with the Act's language regarding retailers. The one substantive concern the Chamber has is that the 48-hour time period is far too short for a retailer of any scale or with multiple locations and multiple products within a product category to take sufficient action to investigate the merit of the allegations contained in a 60-day notice and to avoid being sued. We also think the language could be made more precise. For example, it should be more clear that the "potential exposure" occurs when the consumer receives the product, and not some later point when the consumer is using or consuming the product. And, as you recognized in our meeting, it should be more precise about how time is computed, as it is set out in Section 25903. The Chamber therefore proposes the following (deletions in strikeout; additions underlined):

> (c) A ~~retail seller~~ retailer is deemed to have knowledge of a potential exposure resulting from the delivery of a consumer product that occurs more than ~~48 hours~~ 10 business days after the completion of sercice of notice of that alleged exposure pursuant to Section 25249.7(d) of the Act and Section 25903 of these regulations. The retail seller shall thereafter be responsible for providing clear and reasonable warnings with respect to the retail sale of the product alleged to result from ~~for~~ that exposure.

Consumer Products

The Chamber has several concerns related to consumer products, which are identified and discussed below:

Box Enclosure

- The requirement that the warning message for consumer products must be enclosed in a box absent a prohibition on such imposed by federal law is also problematic for several reasons:

    - As with an exclamation point or yellow-colored symbol, the boxing-in requirement may often confuse and mislead consumers by signaling a more significant or acute level of risk than that being presented by the exposure at issue;

- The boxing-in requirement could cause consumers to think that other protective or precautionary warnings being given which are not required to be boxed-in are less significant or concern less significant risks than that for which the Proposition 65 warning is being given;

- A boxing-in requirement for Proposition 65 warnings may undermine or conflict with the purposes of other federally mandated warnings or disclosures even where the federal government has not expressly prohibited a boxed-in warning from being used on an on-product label;

- At a minimum, as they do relative to the designated symbol already, the regulations concerning any boxed-in warning requirement should be clarified to expressly exclude its application to food products, prescription drugs and dental services.

Foreign Languages

- The requirement for consumer product warnings to be provided in languages other than in English where any other labeling is provided in another language is also overly broad and problematic:

    - The multiple languages requirement should only be triggered if other health-related warnings for a product are given in multiple languages, not based on the use of alternative languages in labeling in other regards;

    - Because of potential space limitations, the multiple languages requirement should, where triggered in the consumer product context (perhaps as distinct from the environmental exposure context), be limited to the provision of only one language in addition to English with the additional language being the one, besides English, most likely to be understood by consumers of that product in California (i.e., Spanish in most cases, except where the product is targeted predominantly for use by a different ethnic subpopulation). (In addition, given tri-lingual NAFTA labeling requirements that apply to a broad array of products traded within North America and the very small portion of the California population that speaks French as a primary language, there is little sense or upside to requiring Prop 65 warnings to be printed in that language.)

    - Because of space limitations and the heightened need for and importance of nuance and context, there should be an exemption in the multiple languages requirement for food labels (although the OEHHA website's food-related content could certainly be presented in multiple languages to address this).

Receipts

The Chamber strongly supports retaining cash register receipts as a method of providing warnings for consumer products. The Chamber recognizes that the circumstances when retailers rather than manufacturers will provide Proposition 65 warnings are limited, however, in those situations, a cash register receipt offers a very reasonable method of providing the required warnings.

The sophistication of technology today allows product ingredient data to be included with inventory data and tied in with electronic cash registers. The fact that a product contains a Proposition 65 listed chemical that can result in an exposure to a consumer can be combined with the information embedded in the Universal Product Code for that product such as its description and price. When the CPU is scanned at the cash register, the Proposition 65 information is downloaded along with the product description and price. Electronic cash registers can be programmed to print the Proposition 65 warning for exposures that can result from the use of a consumer product with the description and price.

Consumers can be advised by a sign at the checkout point to examine the cash register receipt for a possible Proposition 65 warning. The warning can be provided only for products that contain a listed chemical that can result in an exposure. Under these circumstances, a cash register receipt may well be a more effective warning method than, for example, a warning printed on the product label. Indeed, a warning on a register receipt helps enable a consumer to immediately return the item if they do not wish to use or consume a product that can expose them to a Proposition 65-listed chemical. Since Proposition 65 itself calls for warnings *prior to exposure* to a listed chemical and consumers will be fully warned prior to exposure when the warning is printed on a receipt, this method should be deemed to comply with the statute.

The Chamber therefore urges OEHHA to adopt the following language authorizing the use of cash register receipts to provide Proposition 65 warnings:

§25606.1 Warnings for Consumer Products other than Foods, Prescription Drugs and Dental Care – Methods of Transmission

(a) For consumer products sold in a retail setting, other than foods, prescription drugs, and dental care, the warning required under Section 25249.6 of the Act must comply with the content requirements in Section 25606.2 and must be provided using one or more of the following methods:

* * *

(5) A product-specific warning may be provided via a cash register receipt if the receipt includes the name of the product; specific identifying information for the product, Universal Product Code or other identifier, or other manner of clearly identifying the product, and the retail seller posts a sign at the point of purchase, such that it can be seen and read by the consumer prior to exposure, that states:

WARNING: This establishment sells products that can expose you to chemicals known to the state of California to cause cancer and reproductive toxicity. Consult your cash register receipt for additional information.

Pamphlets and Other Systems of Warning

Also, in addition to receipts, pamphlets, public advertisements, and other systems of providing Proposition 65 warnings may be appropriate warning mechanisms, and OEHHA has so stated in the past (*see e.g.*, 27 CCR § 25603.1(d)). Proposed Sections 25606.1 and 25607.1 should be revised to continue to reflect this so that no inference might be drawn that pamphlets, advertisements and other systems of communicating warnings are not appropriate warning mechanisms.

Practical Issue

The required warning content for consumer product warnings when the product contains one or more of the twelve chemicals listed under section 25604 is unnecessarily confusing and should be clarified. For example, according to Section 25606.2 subsection(a)(2)(A), consumer product warnings must include the word "WARNING" in capital letters and bold print and must read as follows for exposures to carcinogens:

"This product can expose you to a chemical [or chemicals] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov."

According to Section 25606.2 subsection (a)(3), where the name of chemicals are required to be included in the consumer product warning or the businesses wishes to include the name of other chemicals, the following words must be used in the warning:

> "such as [name of chemical or chemicals]"

It is unclear precisely where the phrase "such as [name of chemical or chemicals]" should be inserted into the warning language as specified above in subsection (a)(2)(A). For example, if a product contains lead, the warning can read in different ways:

1. "This product can expose you to chemicals such as lead, which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov."

2. "This product can expose you to chemicals known to the State of California to cause cancer, such as lead. For more information go to www.P65Warnings.ca.gov."

Finally, it is unclear how draft Section 25604 is to apply to the more truncated on-product warning label text set forth in Section 25606.2(b). It would appear that a business cannot comply with both: if it identifies a chemical listed in Section 25604(a) in the warning required by Section 25606.2(b), it is violating the latter section; if it does not identify the chemical, it is violating the former. Consistent with the agency's goal of a streamlined warnings for on-product warning labels, Section 25604 must be revised to clarify that it does not apply to the warnings required by Section 25606.2(b) and other similar warnings (see, e.g., Section 25607.2(b)).

The Chamber understands that this issue may seem inconsequential, but these are the types of issues that can and indeed will breed insignificant and unnecessary lawsuits over nothing more than terminology. These are the types of lawsuits OEHHA should seek to avoid if within its regulatory authority. Accordingly, Section 25606.2 subsection (a)(3) should be revised to specify exactly how a consumer warning product should read when it contains one of the twelve chemicals that must be specifically identified in the warning.

Occupational exposures

The Chamber appreciates the significant changes made to the occupational exposure warning sections, changes that represent a vast improvement over the March 2014 discussion draft and that alleviate many of the concerns previously expressed by the coalition. However, OEHHA's latest draft still does not resolve important issues as we discuss below, and we offer recommendations to address them.

Based on statements made by OEHHA representatives at the recent Prop 65 Clearinghouse conference and other communications regarding the occupational exposure section of the March 2014 discussion draft, we understand OEHHA intends to create no changes to the occupational exposure warning *status quo*. Yet the September draft does contain revisions to the current regulations. Many of these revisions, however innocuous they may appear on the surface, likely will suggest to the enforcement community that OEHHA intends to revisit well-established rules governing occupational exposure warnings. For this reason, we strongly recommend that OEHHA revise these sections only for the limited purposes of reinforcing its intent of retaining the *status quo* and making the regulations consistent with other sections of the draft.

1. The Chamber urges OEHHA to make no revisions to the current definition of "occupational exposure." Although the September draft definition is far more aligned with the current regulatory definition than the March draft, there appears to be no substantive reason for any changes at all, and making those changes will invite litigation over their meaning.

2. To minimize any suggestion that the proposed regulatory provisions represent an intentional departure from the *status quo*, the draft should be revised to retain the basic structure of current Section 25604.1. The Chamber provides below its suggested revisions to draft Section 25611 (additions in underline; deletions in strikeout):

(a) Each of the following methods to transmit the warning shall be deemed to be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure:

(~~a~~1) A warning to the exposed employee about the chemical in question which fully complies with all information, training and labeling requirements of the federal Hazard Communication Standard (29 C.F.R. §1910.1200), the California Hazard Communication Standard (Cal. Code Regs., tit. 8, §5194), or, for pesticides, the Pesticides and Worker Safety requirements (Cal. Code of Regs., tit. 3, §6700 et seq.) authorized in Food and Agricultural Code section 12981. Compliance with such Standards or requirements shall be ~~is~~ deemed clear and reasonable and need not comply with any other method set forth herein ~~subsection (b)~~ or Section 25612.

(~~b~~2) ~~Where a warning is not provided pursuant to subsection (a), the warning must be provided using one or both of the following methods:~~

~~(1)~~ A warning on the label or labeling of a product or substance ~~causing the exposure~~ present or used in the workplace ~~place of employment~~. The labeling must be prominently displayed on the product or substance where it is likely to be seen prior to exposure.

(~~2~~3) A warning on a sign no smaller than 8 1/2 by 11 inches posted in a conspicuous place and under conditions that make it likely to be read and understood by employees and other individuals prior to exposure.

3. The September draft of Section 25612, perhaps inadvertently, provides no warning text for the product labeling method of transmission. The Chamber suggests the following revisions:

~~Where subsection 25611(a) does not apply, t~~The following warning message shall be deemed to clearly communicate that an individual can be exposed to a chemical known to the state to cause cancer or reproductive toxicity.

a. For warnings on labels or labeling:

(1) For exposure to a chemical known to the state to cause cancer: "WARNING: This product can expose you to a chemical [chemicals] known to the State of California to cause cancer."

(2) For exposure to a chemical known to the state to cause reproductive toxicity: "WARNING: This product can expose you to a chemical [chemicals] known to the State of California to cause reproductive toxicity."

(3) For exposure to a chemical known to the state to cause both cancer and reproductive toxicity: "WARNING: This product can expose you to a chemical [chemicals] known to the State of California to cause cancer and reproductive toxicity."

b. For warnings on signs:

(1) For exposure to a chemical known to the state to cause cancer: "WARNING: Entering this area can expose you to a chemical [chemicals] known to the State of California to cause cancer."

(2) For exposure to a chemical known to the state to cause reproductive toxicity: "WARNING: Entering this area can expose you to a chemical [chemicals] known to the State of California to cause reproductive toxicity."

(3) For exposure to a chemical known to the state to cause both cancer and reproductive toxicity: "WARNING: Entering this area can expose you to a chemical [chemicals] known to the State of California to cause cancer and reproductive toxicity."

Website

The Chamber appreciates the significant revisions OEHHA has made to the website and information submission provisions of its proposal. In its current form, the proposal contains certain elements of continuing concern, however. We discuss three of them below:

1. Protection of confidential business information. The latest draft proposal does not address the protection of confidential business information. The Chamber urges OEHHA to make the following revisions to the draft regulation, to protect such information from disclosure to the public and to establish the process of such protection (deletion in strikeout; additions in underline):

   (b) The manufacturer, producer, distributor, or importer of a consumer product, including food, or a particular industry sector, must provide the information below, upon the Lead Agency's request, within the timeframe specified in the request~~:~~. Any person submitting to the Lead Agency any information claimed to be "trade secret" or otherwise exempt from disclosure under Government Code Section 6254 or 6254.7 or under other applicable provisions of law shall, at the time of submission, identify in writing the portions of such information as "confidential" and shall provide the name, address and telephone number of the individual to be contacted if the Lead Agency receives a request for disclosure of or seeks to disclose the information claimed to be confidential. The Lead Agency shall not disclose data identified as confidential, except: Upon receipt of a request for the release of information that has been claimed to be confidential, the Lead Agency shall immediately notify the person identified as the contact for the person who submitted the information, and shall determine whether or not the information claimed to be confidential is to be released to the public. The Lead Agency shall make its determination within 60 calendar days after receiving the request for disclosure, but not before 30 calendar days following the notification of the person who submitted the information. If the Lead Agency decides to make the information public, it shall provide the person who submitted the information 10 business days' notice prior to public disclosure of the information.

2. Under subsection (a)(2)of the draft regulation, OEHHA will provide a process for a person to request correction of information provided on the website. This draft subsection identifies "inaccurate" information as the grounds for such a request. The Chamber believes that other grounds for making such a request should be added as follows (additions in underline):

   (a)(2) Provide a process for a person to request a correction of information provided on the website. The person making such a request shall provide information showing that such material is inaccurate, misleading or otherwise contrary to public policy.

3. Finally, the Chamber is concerned about OEHHA providing information on the proposed website about "strategies for reducing or avoiding exposure to those chemicals…" (See draft subsection (a)(3)). This function has potential for stigmatizing certain products or industries, and is more properly addressed by agencies having expertise, resources, and well-developed processes concerning the regulation of products and business activities (e.g., FDA, CPSC, OSHA, CA-DTSC). Other than by perhaps providing links to these agencies, we urge OEHHA to eliminate this concept relative to its website altogether.