MORRISON | FOERSTER

425 MARKET STREET
SAN FRANCISCO
CALIFORNIA 94105-2482

TELEPHONE: 415.268.7000
FACSIMILE: 415.268.7522

WWW.MOFO.COM

MORRISON & FOERSTER LLP

BEIJING, BERLIN, BRUSSELS, DENVER, HONG KONG, LONDON, LOS ANGELES, NEW YORK, NORTHERN VIRGINIA, PALO ALTO, SACRAMENTO, SAN DIEGO, SAN FRANCISCO, SHANGHAI, SINGAPORE, TOKYO, WASHINGTON, D.C.

November 6, 2015

Writer's Direct Contact
+1 (415) 268.6294
RFalk@mofo.com

By Email to Trish.Gerkin@doj.ca.gov

Trish Gerken
Senior Legal Analyst
Office of the Attorney General
2550 Mariposa Mall, Rm. 5090
Fresno, California 93721

Re: Proposed Changes to Attorney General's Proposition 65 Regulations/Settlement Guidelines

To Whom It May Concern:

I write on behalf of myself and the numerous clients and trade associations I have represented in Proposition 65 enforcement matters and settlement negotiations over the past 25 years to offer comments on the September 25, 2015 proposed changes to the Proposition 65 regulations and settlement guidelines appearing in Title 11, Division 4 of the California Code of Regulations.

General Comments. The Attorney General's effort to try and reign in and increase plaintiff's counsel's accountability for pre- and post-litigation Proposition 65 settlements and stem the inappropriate diversion of penalties that would otherwise flow to the Office of Environmental Health Hazard Assessment (OEHHA) is a positive development worthy of encouragement. Care must be taken, however, not to make changes in the regulations and guidelines that will impede the ability for litigants to reach approvable settlements without having to make adverse admissions or first have to invest in and develop expert testimony and/or undertake substantial discovery. Care must also be taken to avoid creating requirements and guidelines that will end up making settlements more expensive rather than providing for consistency with the statute as written and ensuring that OEHHA is getting its fair share of proceeds accordingly without further increasing current generally accepted levels of Proposition 65 settlement valuations.

Specific Comments.

Proposed Changes to Section 3201(b)(2): A requirement for a plaintiff to provide evidence that should show that products are or previously were "above the warning level" and that reformulation will render them "below the warning level" is not tenable given that "the warning level" is not readily ascertainable and is, along with the level of exposure, often the central subject of disagreement in the litigation sought to be settled. It is one thing to show that a level of a chemical in a product or component was significantly higher prior to reformulation than after it, but that is quite different than quantifying levels of exposure, let alone making a comparison between levels of exposure and a "warning level" (especially where a published NSRL or MADL does not exist or is not likely to be relied on). While settlements may contain language about not making admissions against interest, defendants also can hardly be expected to embrace settlement terms that, to gain approval, essentially require implicit findings of violations or a court's tacit endorsement of a plaintiff's view on the exposure issues in an enforcement case. Even if this were not the case, approval of settlements that enjoin defendants to significantly reduce and control chemical concentrations in products should not necessitate engagement of experts to construct and justify exposure assessments as such additional investment and associated fees will end up increasing the cost of settlements at defendants' ultimate expense.

Proposed Changes to Section 3204: There is simply no voter or legislative authorization for Additional Settlement Payments and the Attorney General should not continue to tacitly endorse their continuing viability.[1] Prior Attorney General efforts to control and increase accountability for such non-authorized payments have not been particularly successful, resulting in the current proposal, which is inevitably destined to the same fate. Capping Additional Settlement Payments at the level of non-contingent civil penalties is inherently an inflationary recipe that will incentive plaintiffs to increase both forms of payments (and likely their attorney's fees as well) and thereby cause defendants to have to pay even more to settle these cases. A more strongly-worded California nexus requirement and enhanced accountability, conflict of interest, specificity of use of funds, grantee qualification, recordkeeping and transparency criteria all sound good in theory but will end up largely being paperwork exercises that make little difference in fact, and the expense of them will inevitably end up being priced-into settlement valuations and forced to be borne on defendants' shoulders. A much better and more legally appropriate solution would be to simply put a period after the word "Settlement" in Proposed Section 3204(a) and delete the remained of the proposed Section in its entirety. (This would also logically give rise to deletion of Proposed Section 3203(d) in its entirety.)

[1] Additional Settlement Payments were originally incorporated in Proposition 65 settlements as a remedy for accompanying Business and Professions Code Section 17200 claims prior to amendment of the private enforcement provisions of that statute by voter initiative. The continuation of such payments flies in the face of the voters' intent both relative to Proposition 65 and relative to Section 17200 enforcement.

Thank you in advance for this opportunity to share my thoughts and experience.

Sincerely yours,

Robert L. Falk
Morrison & Foerster LLP

cc: Deputy Attorney General Harrison Pollak