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VIA FACSIMILE AT (559) 488-7387 AND EMAIL AT Trish.Gerken@doj .ca.gov
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Re: Comments on Proposed Amendments to Title 11, Division 4, Chapter 1

Dear Ms. Gerken:

On behalf of our client, Consumer Advocacy Group, Inc., we hereby submit written comments to the proposed amendments to Title 11, Division 4, of the California Code of Regulations (CCR) concerning Proposition 65 enforcement actions brought by private parties. We respond to each of the proposed amendments in turn.

§ 3201(b)(2) – Attorneys Fees

First, for a private enforcer plaintiff to have to prove with specific evidence that some of the products exceed the warning level in order to establish that a standard for reformulation would not require a warning is akin to forcing the enforcer to go to trial and rebutting a presumption established by the defendants under *HSC* § 25249.10(c) that the level of exposure does not require a warning. This effectively shifts the burden to the enforcer when it should remain with the defendant and discourages settlement. See *HSC* § 25249.10(c).

Second, this particular regulation would most likely only come into play in settlements and not post trial, since the law does not provide enforcers with the ability to obtain injunctive relief forcing violators to reformulate their products. Without trial, many times cases will settle before expert discovery under *CCP* § 2034 et seq. and analysis costs are substantially incurred or at least completed. This provision would force enforcers to incur additional expert costs before even reaching the stage of expert discovery, and even conflicts with the Certificate of Merit requirement which does not require the certifier to have a basis to conclude that it will be able to negate all affirmative defenses, such as the level in question defense under *HSC* § 25249.10(c). See 11 *CCR* §3101(a). In other words, many cases may settle before the certifier incurs the costs of additional experts to negate the defendants' level in question affirmative defense. In fact, the goal should be to encourage out of court settlements before litigation, which will decrease the expense and burden on the parties as well as the overburdened courts. Otherwise, this change will only serve to increase settlement costs and amounts and decrease incentives for enforcers to seek reformulation and instead increase settlements calling for only a warning, which is not as beneficial for the public as reformulation.

Third, creating a rebuttable presumption is simply unnecessary when evaluating a settlement, since by definition the defendant has already agreed to the reformulation standard by virtue of entering into said settlement and would not be providing evidence to rebut the presumption. Third, the reformulation standards for many violations that most private enforcers use (ie. 100ppm for lead, and 0.1% for phthalates) are adopted following the Attorney General's lead and consultation, and such levels have already been adopted by many other authorities, including Federal and California law. In fact, in California the law allows for even higher levels of lead in certain products. See *HSC* § 25214.1-25214.2 (prohibiting lead at concentrations above 200 ppm). However, a trier of fact may still not be persuaded that if such reformulation standard in one setting is proper, it should be followed in a different setting, and may interpret the new regulations as requiring an enforcer to produce evidence in every particular matter. That being said, CAG recognizes that if the regulation requires the private enforcer to show that the new reformulation standard in the settlement is below the level that the private enforcer tested, it would benefit the public and add legitimacy to that enforcer's claims.

§ 3201(e) – Documentation

First, the costs of private enforcement of even a single Proposition 65 Notice of Violation are very high due to the Certificate of Merit requirement which requires intensive investigation and consultation with the appropriate experts. See *HSC* § 25249.7(d)(1). The costs are incurred regardless of whether a case is filed or not. It is also not always the case that an enforcer recovers its expert or investigation costs, so it does not follow that enforcers should be required to itemize their investigative costs when seeking the court's evaluation of the reasonableness of "attorneys fees" under *HSC* § 25249.7(f)(4)(B) or upon a motion for attorneys' fees after trial.

Second, there are substantial investigative costs involved before a lawsuit is filed under Proposition 65. Most if not all of this information should be subject to the certificate of merit and work-product privileges. See *HSC* § 25249.7(h)(1) (indicating the basis of the certificate of merit is not discoverable); See also *CCP* § 2034 (not requiring disclosure of expert consultants until 50 day before the initial trial date). Requiring disclosure of these specific costs and describing the nature of the work performed by such consultants and investigators would risk waiving these important privileges.

§ 3204 - Additional Settlement Payments.

First, requiring Additional Settlement Payments to be only in settlements subject to judicial approval and ongoing judicial oversight will promote more lawsuits, which will ultimately cost more in fees and costs for enforcers and defendants, and increase the litigation load on the court system. In fact the California Supreme Court has encouraged and required private enforcers to try to settle the matters out of court in order to obtain attorneys fee should defendants refuse to settle.

Second, in the past your office has consistently treated the out-of-court settlements as private settlements between two private parties, even expressly stating that private enforcers have no authority to resolve a Proposition 65 violation and to release claims "***in the public interest without filing a case and securing a judgment of the court***" thereby drawing a distinction between an enforcer's authority to release claims "in the public interest" between in-court and out-of-court settlements. Accordingly, if out-of-court settlements are private agreements/contracts between two private parties, then how can these regulations prohibit that Additional Settlement Payments from being negotiated in these private contracts? Such a regulation also threatens the rights of parties to the freedom to contract guaranteed by the California Constitution. See California Constitution Article 1 Declaration Of Rights, Sec. 9.

Third, the additional time involved with meeting these requirements will ultimately be passed down to the alleged violators, which will make settlements more costly and expensive and more difficult. This will only serve to delay the public benefit that violators would be willing to provide by agreeing to reformulate their products via early settlement, before fees and costs become too high. The difference between an out-of-court settlement calling for reformulation within 30-60 days versus 5-6 months if not more for in-court settlements should be sufficient indication that out-of-court settlements should not be discouraged because they provide a more immediate, faster way of effecting change which ultimately benefits the public.

Fourth, § 3204(b)(4) appears to require too much specificity, as an enforcer may not always know the specific detailed description of the expense that has a nexus to the litigation. Therefore, the description should only require the type of activity or expense which will show a "clear and substantial nexus." For instance, the specificity should only require such descriptions as "testing products for compliance with Proposition 65" and "exposure analysis by experts," which is a necessity since private enforcers cannot always recover these at trial.

Fifth, Section 3204(b)(6)(A-C) is vague, and does not provide sufficient guidance on what "economic interest" is. Arguably, any payment to an enforcer as Additional Settlement Payments can be called an "asset" to pay future debts incurred which have a nexus to the litigation. In other words, there is no guidance on to what constitutes an appropriate Additional Settlement Payment with a "clear and substantial nexus" versus what part of that payment could be considered to be an "economic interest."

Sixth, the Certificate of Merit requirement also serves a filter to ensure only cases that have sufficient investigation and merit are brought by private enforcers. The proposed regulations on the other hand do not have the intended effect of reducing the financial incentives for private plaintiffs to bring and settle Proposition 65 cases that do not confer substantial public benefit. See Initial Statement Of Reasons, Division 4-Proposition 65 Private Enforcement Revision Of Chapters 1 And 3 Title 11, California Code Of Regulations, p.1 ('ISOR"). As noted above, it only acts to increase the expense in resolving violations, which ultimately (at least some of it) is passed down to the alleged violators.

Lastly, we feel the proposed regulations will have significant broad reaching negative impacts causing more cases to be taken to trial either due to the requirement of enforcers now having to make a full scientific analysis that the reformulation level does not require a warning, or through the incentive for enforcers to take cases to trial knowing there is no real advantage to early settlement based on the additional hurdles to settlement approval. The State of California has a strong policy in favor of settlements, and the proposed regulations will discourage rather than encourage speedy settlements.

Should you have any questions or comments regarding the foregoing, please do not hesitate to contact the undersigned.

Very truly yours,

Peter T. Sato