November 9, 2015

Via electronic mail (trish.gerken@doj.ca.gov)
Ms. Trish Gerken
Senior Legal Analyst
Office of the Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

Re: Proposed Amendments to Proposition 65 Regulations

Dear Ms. Gerken:

The American Chemistry Council (ACC)[1] appreciates the opportunity to submit comments on the Department of Justice's (DOJ) proposed amendments to Title 11, Division 4, of the California Code of Regulations concerning Proposition 65 (Prop 65) enforcement actions brought by private parties. ACC has on previous occasions expressed concerns that Prop 65 itself is fundamentally flawed and that regulatory changes alone are insufficient to fix the many problems and abuses that stakeholders routinely experience. Nearly thirty years after voters passed this experimental initiative, we believe the results are in and it is time for legislative reform. We noted in our June 13, 2014 comments to the Office of Environmental Health Hazard Assessment (OEHHA) that Prop 65 "was not originally intended to regulate the safety of consumer products, nor was it designed to do so" and it "was simply not designed to support a risk-based, public health program. Legislative changes would be needed to reform Proposition 65 into a risk-based warning program."[2]

That said, in the regulatory arena, ACC has been an active stakeholder in efforts to improve the implementation and operation of the Prop 65 scheme, however modest or incremental. With regard to DOJ's proposal, ACC welcomes the effort to ensure that settlements align with statutory requirements. In particular, ACC is supportive of the stated purpose of the rulemaking to reduce the financial incentives for private plaintiffs to bring and settle Prop 65 cases that do not confer significant public benefit.

Nevertheless, we believe this current "incremental" proposal could be substantially improved. The continued reckless conduct of bounty hunters, amply documented in DOJ's annual reports over the last 15 years, calls for a more dramatic and comprehensive proposal, including those set forth below.[3]

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[1] ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an $801 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for fourteen percent of all U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

[2] http://oehha.ca.gov/prop65/warnings/pdf/commentsJune2014/AmericanChemistryCouncil.pdf

[3] We support 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 costs with contemporaneous records (proposed revisions to Section 3201(e)).

I. "Additional Settlement Payments" are Not Authorized by Prop 65.

DOJ's proposed Section 3204(b)(1) provides that payments-in-lieu of penalties, also referred to as "Additional Settlement Payments" (ASPs), should not exceed the amount of any non-contingent civil penalty. The statute, however, authorizes only civil penalties up to $2,500 per day in enforcement actions.[4] Neither a state enforcer nor a private enforcer may seek or obtain additional settlement payments. "Side" payments other than the civil penalties authorized by statute necessarily operate to invalidate the 75/25 apportionment scheme established by statute. DOJ readily acknowledges that the private bar is diverting "large amounts of **what should be statutory penalty payments** to Additional Settlement Payments…."[5] and that "any agreement to forgo all or a portion of this penalty runs the risk of defeating the voters' intention that penalty funds be used 'to implement and administer' Proposition 65."[6]

Pursuant to Government Code § 11346.5(a)(13), DOJ must determine that no alternative would be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome, or would be more cost-effective and equally effective.[7] Yet the proposal does not identify nor discuss a single alternative. ACC believes the most obvious and most effective alternative is to eliminate the ASP provisions entirely, rather than simply curtailing ASPs as currently proposed.

The ASP provisions also add a new and time-consuming layer of oversight and review onto DOJ and the courts, which are already stretched thin in supervising private enforcement of Prop 65. DOJ already reviews, but should bolster its oversight of, pre-filing settlements, motions for settlements, and Certificate of Merit filings to weed out frivolous claims and settlements. DOJ also intervenes in underlying cases. DOJ should clearly articulate the budget and staff ramifications for monitoring and supervising the proposed ASP provisions. Similarly, it is unclear whether courts have the resources to provide "ongoing judicial supervision" of ASP settlement provisions.[8] Moreover, courts have demonstrated a reluctance to disturb a settlement agreement that both parties fully endorse.

Therefore, the regulations should clearly and unambiguously disallow financial ASPs (payments) in any form. Eliminating the ASP provisions will "effectuate Proposition 65's purpose of directing penalty funds primarily to … OEHHA to be used for Proposition 65-related activities."[9]

II. Mere Agreement to Reformulate to Remove or Reduce a Prop 65 Listed Chemical in a Consumer Product is Factually and Legally Insufficient to Demonstrate "Public Benefit."

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 attorney's fees to the settling plaintiff. While this is an improvement over current Section 3201(b)(2) (which 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), Section 3201(b)(2) should go further and require the plaintiff to bear the

[4] Health and Safety Code § 25249.7(b).

[5] Initial Statement of Reasons (ISR), at 1-2 (emphasis added).

[6] Id. at 5.

[7] Notice of Proposed Rulemaking (NPR) at 5.

[8] See id. at 3.

[9] Id.

burden of demonstrating that a reformulated product is "better" or "safer" for human health, and this demonstration cannot be made merely by pointing to reduction or elimination of a particular chemical.

With respect to consumer products, an agreement to reformulate a product to remove or reduce the presence of a Prop 65 listed chemical alone is neither factually nor legally sufficient to demonstrate a public benefit, let alone a significant one. Chemicals in consumer products generally are present for a reason. Chemicals serve functional purposes. The notion that a chemical can simply be "removed" without consequence is often wrong. If the purpose of a reformulation agreement is to seek to achieve a "safer" consumer product as the putative benefit, there must be a demonstration that the reformulated product is in fact safer (e.g., reduces health risk in a quantifiable and meaningful way), and this demands an examination of the replacement chemical. For that matter, it also demands an examination of the consumer product itself – because if a reformulated product is not fit for its intended purpose, does not deliver the same consumer benefits, introduces new safety issues (such as a physical safety hazard), costs more, has increased adverse environmental impacts, or otherwise fails to perform as well, then the reformulated consumer product does not confer a public benefit. Instead, by trading one purported negative effect for multiple others, the reformulation confers a net public detriment.

The perils of uninformed reformulation – simply eliminating or reducing one chemical without regard to consequences – is already recognized in California's Safer Consumer Products program. When chemicals contained in consumer products are addressed "on an individual, case-by-case basis," such as through "different formulations" or prohibiting use of a particular chemical in certain products, the Department of Toxic Substances Control observes that "the result of a quick replacement approach may not be preventative or protective. A hastily substituted alternative is not always completely evaluated and can cause regrettable substitutions."[10]

Accordingly, there should be no presumption that reformulation of or removal of a listed chemical from a consumer product provides a significant public benefit. Public benefit can only be shown by demonstrating that a reformulated product is superior – better for human health and the environment, with equivalent or better product performance at the same cost – and that the improvement is significant – quantifiable and consumer meaningful. This proof necessarily requires examination of the substitute chemistry and new formulation.

III. The Offering of a Compliant Prop 65 Warning Cannot Be Presumed to Provide a Significant Public Benefit.

Section 3201(b)(1) provides that "a settlement that provides for the giving of a clear and reasonable warning, where there had been no warning provided prior to the sixty-day notice, for an exposure that appears to require a warning, is presumed to confer a significant benefit on the public." We believe that in the vast majority of cases where a Prop 65 label is placed on a consumer product, the "warning" offered does not provide a public benefit, and the warning itself acts as a net public detriment. As we noted in our comments to OEHHA on the proposed revisions to the warning regulations, a statutory scheme that conveys hazard-only, incomplete information and communicates a health "warning" where none is justified is in fact a net public detriment.[11] In short, the fact that a "warning" complies with statutory requirements does not mean that it conveys useful, meaningful, actionable information for a public benefit. There are numerous well-known examples of this phenomenon: a current example is the recent World Health Organization announcement that red meats "cause cancer." The broad

[10] Department of Toxic Substances Control, Draft Stage 1 Alternatives Analysis Guide, September 2015, at 8.

[11] See http://oehha.ca.gov/prop65/warnings/pdf/commentsJune2014/AmericanChemistryCouncil.pdf

communication of this headline – which is functionally equivalent to a Prop 65 warning (warning: x causes cancer) – illustrates how destructive and counterproductive such a "warning" is with respect to public health. It does not communicate product specific health risk; it does not communicate relative risk compared to alternative products; it does not communicate safe use instructions or cautions. As a consequence, the public is left confused and ill-equipped to make an informed decision that will benefit health.[12]

Therefore, the mere offering of a compliant Prop 65 warning cannot, by definition, be presumed to provide a significant public benefit because a hazard-only "warning" of a chemical's presence is by definition deficient.

IV. While Authorized by Statute, Private Enforcement is Not "Necessary" Pursuant to California Code of Civil Procedure §1021.5.

The California Code of Civil Procedure § 1021.5 allows, on motion, award of attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. While Prop 65 authorizes private enforcement actions, it is clear that these were intended, at best, to supplement state agency enforcement. In fact, private enforcement of Prop 65 has become counterproductive and destructive.

To be effective and fair, citizen enforcement must be properly incentivized – but not inappropriately incentivized. The idea is to remove the financial barrier to letting public interest groups take action without creating an incentive to be able to sue as a money-making enterprise. The design of citizen suit provisions at the federal level is instructive. While most federal environmental statutes include citizen suit provision,[13] these provisions do not let citizens sue for damages or receive shares of fines and penalties. Rather, they authorize attorney's fees for the prevailing party (but notably, also discourage frivolous suits by also awarding fees to prevailing defendants). It is critically important that the balance is right:

> Due to the nature of citizen suits and the structure of the [federal] citizen suit provisions in environmental legislation, citizens do not benefit financially from bringing suit. Instead, relief is usually limited to obtaining an injunction, which prevents a defendant from performing harmful and/or illegal actions in the future. This ensures that citizens bring suit with altruistic, not financial, motivation. In performing this public service, a citizen can only be reimbursed for her costs and for attorneys' fees.[14]

In short, no other federal environmental citizen suit provision awards both attorney's fees and a "bounty hunter's" cut of penalties. Current Prop 65 settlement practice is to allow attorney's fees and costs as well as the allocated share of a civil penalty (and often additional payments). This goes well

[12] See, e.g., Joseph Perrone, "Will meat come with a warning label in California?," Sacramento Bee (Nov. 2, 2015), available at http://www.sacbee.com/opinion/op-ed/soapbox/article42182355.html.

[13] A notable exception is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

[14] Kerry D. Florio, Attorney's Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?, 27 B.C. Envtl. Aff. L. Rev. 707 (2000), http://lawdigitalcommons.bc.edu/ealr/vol27/iss4/4, at 713 (citations omitted).

beyond the boundaries of what the statute expressly allows. The result is excessive reward to private plaintiffs – who are being improperly incentivized to bring frivolous suits with excess recovery opportunities, harming the public interest.[15]

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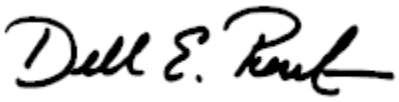
ACC appreciates DOJ's consideration of our comments. Should you have questions, please feel free to contact us.

Respectfully submitted,



Dell E. Perelman
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[15] We further note that, due to the original burden-shifting design of Prop 65, a plaintiff would not be expected to have significant costs, either. The statute does not appear to have contemplated that protracted litigation over the presence or adequacy of warnings would ensue, or that plaintiffs would hire teams of expensive experts and "need" to be reimbursed for these costs.