

# CONSUMER DEFENSE GROUP ACTION

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March 21, 2006

## Second 60 Day Notice of Intent to Sue WORLD SAVINGS BANK, FSB AND GOLDEN WEST FINANCIAL CORPORATION Under Health & Safety Code Section 25249.6

Consumer Defense Group Action, a California corporation (hereinafter "CDG" or the "Noticing Party") hereby provides a Second Notice of Intent to Sue Under Health & Safety Code Section 25249.5 (the "Notice"), following the provision of a prior Notice, to Herbert Sandler, Chairman and CEO of Golden West Financial Corporation and Marion O. Sandler Chairman of the Board and CEO of World Savings Bank, F.S.B (a wholly owned subsidiary of Golden West Financial Corporation) (hereinafter referred to collectively as "WORLD SAVINGS" or "the Violator" or "YOU" or "YOUR"), as well as the individuals and governmental entities on the attached proof of service. The Noticing Party may be contacted through its counsel, Anthony G. Graham, at the above address.

This Second Notice is intended to inform WORLD SAVINGS that it has violated and continues to violate, despite the prior Notice, Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with Health & Safety Code Section 25249.5) (hereinafter "Proposition 65") by failing and refusing to post clear and reasonable warnings at each of the facilities listed on Exhibit A hereto (which are owned/leased by WORLD SAVINGS ) (hereinafter individually as "the Facility" or collectively as "Facilities") that the smoking of tobacco products occurs at the Facilities, which may foreseeably expose customers, visitors and employees to tobacco smoke in the areas where smoking occurs and/or is permitted.

### Summary of Violation:

This Second Notice concerns YOUR failure to warn YOUR customers, employees and visitors to YOUR facilities, **prior to any potential exposure**, that tobacco smoking occurs at the facilities and thus any such person "may foreseeably" be exposed to tobacco smoke while using the facility. Under Proposition 65 YOUR duty is to provide a clear and reasonable warning, **prior** to exposure, to all persons who "may foreseeably" be exposed if they come onto the property when someone is smoking on the property. *See, e.g., Tit. 22, Div. 2, section 12601* ["An 'environmental exposure' is an exposure which may foreseeably occur as the result of contact with an environmental medium. . ."].

Proposition 65 requires that when a party, such as YOU, has been and is knowingly and intentionally exposing its customers, the public and/or its employees to chemicals designated by the State of California to cause cancer and reproductive toxicity ("the Designated Chemicals") it has violated the statute unless, prior to such exposure, it provides clear and reasonable warning

of that potential exposure to the potentially exposed persons (Health & Safety Code Section 24249.6). Tobacco smoke is one of the Designated Chemicals.

**The Violation:**

In the ordinary course of business YOU control much of the conduct and actions of YOUR customers, visitors and employees at each of the facilities listed on Exhibit A to this Notice (hereinafter, "the Facilities"). One of the actions YOU control is whether or not to prohibit YOUR customers, visitors and employees at each of the Facilities from smoking cigarettes and cigars, something which would be easily accomplished by the posting of "No Smoking" or "Smoking Prohibited Signs". In fact, at certain designated areas at each of the Facilities YOU have prohibited smoking and have posted signs barring smoking in those areas, which are the interiors of the Facilities. However, YOU have also chosen to permit YOUR customers, visitors and employees at each of the Facilities to smoke cigarettes and cigars in certain areas. Those areas are the entrances to the Facilities, where persons are allowed to congregate and smoke, and the areas surrounding the partially-covered/uncovered ATM machines where YOU conduct business at the locations in the attached Exhibit A. In those areas YOU have chosen to allow YOUR customers, visitors and employees to expose each other and to be exposed to tobacco smoke via the breathing of second hand tobacco smoke and via contact with their skin and clothing.

YOU have however ignored the requirements of Proposition 65 and have failed to post clear and reasonable warnings at those areas so that YOUR customers, visitors and employees, who may not wish to be exposed, can be warned that, upon entering and/or using the bank facilities in those areas, they may foreseeably be exposed to tobacco smoke. This Notice is limited to those areas where the statute can be enforced by YOU, which are the identified areas at the Facilities, and to those tobacco smoke exposure which may foreseeably occur to individuals on the premises from tobacco smoke emitted by persons in the identified areas at the Facilities.

There is nothing complicated about this claim. As anyone would testify, it is a commonplace experience of every Californian, be they an office worker, YOUR defense counsel or even a trial judge, that one must often walk through a cloud of tobacco smoke before entering a commercial building or business, especially in the morning or at lunchtime. Given the universal knowledge of this fact, there is no excuse for allowing such conduct without a warning for those areas where such conduct is known to occur.

Persons representing CDG have investigated YOUR Facilities during December, 2005 and January, 2006 (hereinafter referred to as the "Investigation Period"). Those investigations showed the following;

1. YOU own and/or lease the Facilities;
2. YOU have more than nine employees;
3. The smoking of tobacco products occurs in the areas identified in this Notice, that is, the entrances to the Facilities, and the areas surrounding the ATM machines where YOU conduct business at the locations in the attached Exhibit A ("the Noticed Areas").
4. When smoking occurs in the Noticed Areas other persons in the Noticed Areas, such

- as customers, employees and visitors may foreseeably be exposed to tobacco smoke at the Facility;
5. YOU know that such activity occurs because YOU provide janitorial services and/or cigarette disposal containers in the Noticed Areas for the clean up of cigarette butts/waste, and YOU monitor the Noticed Areas with security and other personnel as well as film the Noticed Areas with YOUR security cameras;
  6. YOU do not have and have never had in place a Proposition 65 warning for the Noticed Areas.

The lead agency for Proposition 65 enforcement is OEHHA. OEHHA has conducted monitoring tests at various outdoor locations, including the outside entrances to commercial properties and businesses. The report prepared by OEHHA and after full and complete testing of relevant outdoor tobacco smoke exposures, in support of its recent determination that tobacco smoke (or "ETS") is a "toxic air contaminant," a report and findings which have been highly publicised in the media, concludes as follows,

**"Non-smokers are exposed to ETS in several different environments, such as outside office buildings, schools, businesses, airports and amusement parks. The ARB monitored outdoor nicotine (a marker for ETS) concentrations in those environments and found that some of the highest nicotine monitoring results are comparable to those found in smoker's' homes."**

In the areas noted YOUR customers, visitors and employees therefore may foreseeably be exposed to tobacco smoke via the breathing of second hand tobacco smoke and via contact with their skin and clothing. For YOUR assistance I have enclosed the California EPA Air Resources Board "Fact Sheet" as to "Environmental Tobacco Smoke as a Toxic Air Contaminant". A full copy of the OEHHA report is available at [www.arb.ca.gov/homepage.htm](http://www.arb.ca.gov/homepage.htm).

The investigation by CDG at the Facilities showed that YOU have failed to either prohibit smoking or to post clear and reasonable warnings in the areas noted above where smoking occurs so that YOUR customers, visitors and employees, who may not wish to be exposed, can be warned that, upon entering any of those areas, they may be exposed to tobacco smoke, a chemical known to the State of California to cause cancer and/or reproductive toxicity, and which is emitted by smokers in those areas.

It is clear therefore that for the entire period of time that YOU have owned and/or leased the Facilities prior to the Investigation Period, YOU failed to either prohibit smoking or to post clear and reasonable warning signs at the Facilities in compliance with Proposition 65. Given that the maximum period of potential liability pursuant to Proposition 65 is four years, this Notice is intended to inform YOU that YOU have been in violation of Proposition 65 from the time period from four years prior to the last date of the Investigation Period noted above, for every day upon which YOU owned and/or lease any listed Facility.

The written reports prepared by the investigators for CDG, prepared contemporaneously with the investigations conducted during the Investigation Period, together with supporting scientific data as to outdoor tobacco smoke exposures, have been provided to the Office of the Attorney General responsible for Proposition 65 enforcement.

**Environmental Exposures:**

While in the course of doing business, at the locations in the attached Exhibit A, for up to four years prior to 03/01/2006, YOU have been and are knowingly and intentionally exposing its customers and the public to tobacco smoke and other chemicals listed below and designated by the State of California to cause cancer and/or reproductive toxicity without first giving clear and reasonable warning of that fact to the exposed persons (Health & Safety Code Section 24249.6). The source of exposures is tobacco smoke from persons on YOUR property who smoke thereon in the Noticed Areas. The areas where exposures occur are the entrances to the Facilities and the areas surrounding the ATM machines where YOU conduct business at the locations in the attached Exhibit A.

### **Occupational Exposures:**

While in the course of doing business at the locations in the attached Exhibit A, for up to four years prior to 03/01/2006, YOU have been and are knowingly and intentionally exposing its employees to tobacco smoke and other chemicals listed below and designated by the State of California to cause cancer and/or reproductive toxicity without first giving clear and reasonable warning of that fact to the exposed person (Health & Safety Code Section 25249.6). The source of exposure is tobacco smoke from persons on YOUR property who smoke thereon in the Noticed Areas at the locations in Exhibit A. Employees include and are not limited to security personnel, maintenance workers, janitorial personnel, service personnel and administrative personnel. Such exposures take place in the areas where exposures occur are the entrances to the Facilities and the areas surrounding the ATM machines where YOU conduct business at the locations in the attached Exhibit A.

The route of exposure for Occupational Exposures and Environmental Exposures to the chemicals listed below has been inhalation, ingestion and dermal contact with tobacco smoke in the Noticed Areas at the locations in the attached Exhibit A. In other words, via the breathing of tobacco smoke and contact with the skin at those locations. For each such type and means of exposure, YOU have exposed and are exposing and continue to foreseeably expose the above referenced persons to:

**SEE ATTACHED LIST OF CARCINOGENS/TOXINS**

### **Legal Support for This Notice:**

Although unnecessary for purposes of fulfilling the Notice requirements under the regulations promulgated under Proposition 65, CDGA believes it reasonable to make clear its legal and factual support for serving YOU with this Notice, so as to facilitate YOUR understanding of the violation as well as to facilitate, if possible, a potential resolution of that violation, or at minimum to assist YOU in YOUR discussions with counsel of YOUR choice.

This Notice concerns YOUR failure to warn YOUR customers, employees and visitors to YOUR facilities, **prior to any potential exposure**, that tobacco smoking occurs at the facilities and thus any such person “may foreseeably” be exposed to tobacco smoke while using the facility. Under Proposition 65 YOUR duty is to provide a warning, **prior** to exposure, to all persons who “may foreseeably” be exposed if they come onto the property when someone is smoking on the property. *See, e.g.,* Tit. 22, Div. 2, section 12601 [“An ‘environmental exposure’ is an exposure which may foreseeably occur as the result of contact with an environmental

medium. . .”].

CDGA can fulfill its burden as to its *prima facie* case. The burden on a Plaintiff in a Proposition 65 case is to prove that “defendants had knowingly and intentionally exposed employees and [others] to [a designated chemical] without a warning.” *Consumer Cause, Inc. v. Smilecare et al.* (2001) 91 Cal. App. 4th 454, 460 (citing *People ex rel. Lungren v. Superior Court* (1996) 14 Cal. 4th 294, 314). **“Because Proposition 65 [is] a remedial statute intended to protect the public ... [a court must] construe the statute broadly to accomplish that protective purpose.”** *Id.*<sup>1</sup>

Thus, in this case, CDGA would need to prove the following: First, that YOU have more than nine employees; Second, that tobacco smoke is a Designated Chemical; Third, that tobacco smoke is present at YOUR business and YOU know of that presence; Fourth, that persons (such as employees or customers) “may foreseeably” be “exposed” to (i.e. come into physical contact with) tobacco smoke when using the business or being at the business location; and, Fifth, that YOU do not have a compliant Proposition 65 warning sign informing YOUR employees and customers of such potential exposure prior to such exposure. That is CDGA’s burden of proof in any such “failure to warn” action. YOU will not be able to rebut any element of CDGA’s *prima facie* case:

First, YOU have more than nine employees.

Second, “tobacco smoke” is a Designated Chemical (as are many of its constituent chemicals listed in this Notice) by operation of law.

Third, YOU cannot dispute that the smoking of tobacco products occurs at the Facilities. YOU know that such activity occurs because YOU monitor those Facilities. YOU provide janitorial services in all noticed areas and/or provide containers for cigarette disposal at the ATMs and at the entrances. YOU have security and other personnel who patrol those areas. YOU also have security cameras in all noticed areas and thus know, because YOU have observed it, that such exposures occur. In other words, YOU have **actual** knowledge of the referenced activity. **[In this regard, please ensure that the security camera tapes herein referenced are not destroyed, since they will be subject to discovery during litigation should YOU choose to deny such knowledge.]** YOU intend that such conduct occur (i.e. foreseeable exposures without a warning) because, although YOU could choose to either prohibit smoking in the Noticed Areas or provide a Proposition 65 warning, YOU have chosen to do neither.

Fourth, since it is undisputed, as OEHHA itself has found, that people in fact do smoke in the noticed areas, it is equally indisputable that other persons (such as customers and employees) who enter onto YOUR Facilities “may foreseeably” be exposed to tobacco smoke in the Noticed Areas from a source in the Noticed Areas. Our use of the word “may” in the Notice is not to suggest we are not sure that such exposure will occur. The use of the word “may” is intended to reflect the intent of the statute, which is to provide a warning **prior** to exposure, that is, to all persons who “may” be foreseeably exposed if they come onto the property when someone is smoking thereon. *See, e.g.,* Tit. 22, Div. 2, section 12601 [“An ‘environmental exposure’ is an exposure which may foreseeably occur as the result of contact with an environmental medium. . .”]. Moreover, in this case, as already noted, YOU in fact **know** that

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<sup>1</sup> “‘Knowingly’ refers only to knowledge of the fact that a discharge of, release of, or exposure to a chemical listed ... is occurring.” *See, Cal. Code Regs., tit. 22, § 12201, subd. (d).*

such exposures occur. Thus, a Proposition 65 warning is required.

Fifth, as you know, YOU have never provided a Proposition 65 warning for the noticed areas, nor prohibited smoking.<sup>2</sup>

These indisputable facts are sufficient for CDGA to be granted summary judgment on the liability issue under Proposition 65. The remaining issue will be the extent of the civil penalty to be imposed (up to \$2500 per day per violation at each Facility operated by the bank) and the amount of our attorneys fees and costs (including expert witness costs). At that time the number of potential exposures, the size and sophistication of the Violator, as well as the Violators' response to our prior and this Notice, would be relevant factors for the court to consider in determining the extent of that penalty.

The only remaining question is whether YOU have an available viable defense. YOU do not.

The only potentially available defense is the so-called "exposure exemption" under section 25249.10 of the Health & Safety Code. As to this, YOU would have to prove that any and all tobacco smoke exposures at the Facilities will fall below the significant risk level for carcinogens, or 1,000 times below the No Observable Effect Level ("NOEL") for reproductive toxins. Tobacco smoke is both a carcinogen and a reproductive toxin.

California law expressly provides that the Plaintiff (in this case CDGA) in a Proposition 65 action has no burden to prove the precise "level of exposure" to tobacco smoke. In the seminal case of *Consumer Cause, Inc. v. Smilecare et al.* (2001) 91 Cal. App. 4th 454, the California Court of Appeal expressly found that it is the defendant (i.e. YOU) which has the burden of proof and production on this issue:

[Plaintiff] did not have to fund scientific studies or collect medical data to establish the NOEL or to gauge the level of exposure at defendants' offices. Nor did it have to hazard a guess. Under the Act, defendants, not [Plaintiff], had to contend that the exposure was at a specific level -- 1,000 times below the NOEL . . . Under the Act, a defendant relying on the exposure exemption at trial would have to establish the NOEL, the level of exposure in question, and, ultimately, that the level of exposure was 1,000 times below the NOEL.

*Id.*, at 469, 474.<sup>3</sup>

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<sup>2</sup> YOU may decide to provide such warning or ban smoking **after** receiving our Notice. While under the Federal Clean Water Act a violation may be "cured" during the Notice period, and thus a lawsuit is barred, no such defense exists under Proposition 65.

<sup>3</sup> As the *Smilecare* Court noted, the burden lies with the defendant because the Act itself specifically so provides: "The Act's warning requirement (§ 25249.6) is subject to statutory exemptions, one of which applies to "an exposure for which the person responsible can show that the exposure ... will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity ...." (§ 25249.10, subd. (c), italics added.) "In any action brought to enforce [the warning requirement,] **the burden of showing that an exposure meets the criteria of this subdivision shall be on the defendant.**" *Id.*

The Court concluded that therefore **“plaintiff has no evidentiary burden”** on the level of exposure. *Id.* at 455. “The plaintiff need only prove that the defendant has knowingly and intentionally exposed individuals to listed chemicals without providing a warning. The plaintiff need not prove, nor even introduce evidence, of the amount of this exposure or whether it is above the threshold level.” *Id.* That burden lies solely with YOU, which we know, based upon the available data and our own experience, YOU will not be able to satisfy.

First, in addition to the work done by the Federal EPA and other national agencies, we rely upon the work accomplished by the State of California through OEHHA, the lead agency for Proposition 65 enforcement. OEHHA has conducted monitoring tests at various outdoor locations, including the outside entrances to commercial properties and businesses. The full report prepared by OEHHA in support of its determination that tobacco smoke (or “ETS”) is a “toxic air contaminant” concludes, after full and complete testing of relevant outdoor tobacco smoke exposures, as follows,

**“Non-smokers are exposed to ETS in several different environments, such as outside office buildings, schools, businesses, airports and amusement parks. The ARB monitored outdoor nicotine (a marker for ETS) concentrations in those environments and found that some of the highest nicotine monitoring results are comparable to those found in smoker's' homes.”**

Naturally the level of exposure depends, as OEHHA noted, on the number of smokers in the area, the amount of time smokers and non-smokers spend there, the size of the smoking area and weather conditions. However, based on the work done by OEHHA, it is indisputable that there are exposures to ETS in the areas identified in this Notice which result in significant human exposure. We will thus be relying initially upon the data collected and conclusions drawn by the relevant scientific arm of the State of California on the precise issue at hand. YOU of course can hire YOUR own expert to attempt to overcome that data and the conclusions of the lead agency for Proposition 65 enforcement for the State of California.

Second, there is no NOEL or minimum “no significant risk” level, for tobacco smoke. Any competent (and honest) expert will confirm that fact.

Third, there is no way to calculate a NOEL for tobacco smoke (because of the complexity of the chemical compound of constituent chemicals, including arsenic and lead). Any competent (and honest) expert will also confirm that fact.

As such, the “exposure exemption” defense is simply not viable in any action (like the present one) where it will be shown and YOU will have to admit that ETS is present at the business. Because there is and can be no NOEL or minimum “no significant risk level” identified for tobacco smoke, we believe Proposition 65 essentially provides for “strict liability” in any case where a business (with more than nine employees) exposes people to ETS without a warning.

Some defense counsel have informed us they believe they could defend such an action on the grounds that a bank which leases the facility cannot have sufficient “control” over the premises to be liable for the alleged violations.<sup>4</sup> There is no such requirement in the statute. It

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<sup>4</sup> Even if “control” were an issue, it is moot for any violator which owns the relevant facility.

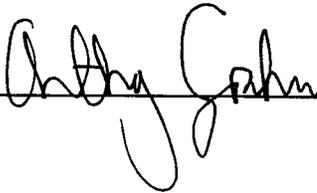
imposes liability whenever "in the ordinary course of business" a business with more than nine employees exposes people to a Designated Chemical without a warning.

The issue is whether during the ordinary course of business an activity occurs at the business, of which the business operator is aware, which will foreseeably result in an exposure. YOU know that smoking occurs in the Noticed areas and thus, irrespective of whether YOU can "control" that activity, YOU must provide a clear and reasonable warning. Moreover, even if it were an issue, if YOU lease the Facilities YOU indisputably "control" the activities of individuals at the business sufficiently for purposes of the statute. As a lessee YOU are required to maintain a premises liability insurance policy for each area where YOUR business is conducted. The relevant areas include not only the interior but also the outside walkways maintained by YOU as well as the areas in and around the inevitable parking lot. That is why YOUR security guards make their rounds in those areas, and also why security cameras are used (and can be lawfully used) in those noticed areas. That is also why YOU are insured for "slip and falls" which may occur on the walkways around the Facilities, including the entrances and the ATM areas.

Proposition 65 requires that notice and intent to sue be given to the violators (60) days before the suit is filed. With this letter, Consumer Defense Group Action gives notice of the alleged violations to YOU and the appropriate governmental authorities. This notice covers all violations of Proposition 65 that are currently known to Consumer Defense Group Action from information now available to them. CDG will continue to investigate other Facilities owned and/or leased by YOU and reserves the right to amend this Notice to include additional Facilities and/or exposures. If YOU believe YOU have the legal right to impede those investigations please inform CDGA through its counsel immediately and provide legal support for that view. With the copy of this notice submitted to YOU, a copy is provided of "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary."

Dated: March 21, 2006

By:



A handwritten signature in black ink, appearing to read "Anthony Gahn", is written over a horizontal line. The signature is cursive and somewhat stylized.

## **EXHIBIT A**

1. 6902 Warner Ave.  
At Golden West St.  
Huntington Beach
2. 3880 Michelson Dr.  
Irvine
3. Woodbridge Center  
4505 Barranca Pkwy  
Irvine
4. 18351 Irvine Blvd.  
At Newport Avenue  
Tustin
5. Old Ranch Town Ctr.  
12310 Seal Beach Blvd.  
Seal Beach
6. 3820 S. Bristol St.  
N. of S. Coast Plaza  
Santa Ana

**CERTIFICATE OF MERIT**  
**Health and Safety Code Section 25249.7(d)**

I, Anthony G. Graham, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice(s) in which it is alleged the parties identified in the notices have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.

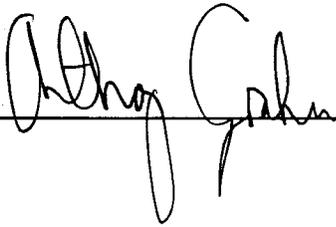
2. I am member of the State Bar of California, a partner of the law firm of Graham & Martin, LLP, and attorney for noticing party Consumer Defense Group Action.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposures to the listed chemicals that are the subject of the action.

4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiffs’ case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Costa Mesa, California on March 20, 2006.



A handwritten signature in black ink, appearing to read "Anthony Galan", is written over a solid horizontal line. The signature is cursive and somewhat stylized.

## LIST OF CARCINOGENS

Acetaldehyde	Acetamide
Acrylonitrile	4-Aminobiphenyl
(4-Aminodiphenyl)	Aniline
Ortho-Anisidine	Arsenic (inorganic arsenic compounds)
Benz[a]anthracene	Benzene
Benzo[b]fluoranthene	Benzo[j]fluoranthene
Benzo[k]fluoranthene	Cadmium
Captan	Chromium (hexavalent compounds)
Chrysene	Dichlorodiphenyltrichloroethane (DDT)
Bibenz[a,h]anthracene	7H-Dibenzo[c,g]carbazole
Dibenzo[a,e]pyrene	Dibenzo[a,h]pyrene
Dibenzo[a,i]pyrene	Dibenzo[a,l]pyrene
1,1-Dimethylhydrazine (UDMH)	Formaldehyde (gas)
Hydrazine	Lead and lead compounds
1-Naphthylamine	2-Naphthylamine
Nickel and certain nickel compounds	2-Nitropropane
N-Nitrosodi-n-butylamine	N-Nitrosodiethanolamine
N-Nitrosodiethylamine	N-Nitrosomethylethylamine
N-Nitrosomorpholine	N-Nitrosornicotine
N-Nitrosopiperidine	N-Nitrosopyrrolidine
Ortho-Toluidine	Tobacco Smoke
Urethane (Ethyl carbamate)	

## LIST OF REPRODUCTIVE TOXINS

Arsenic (inorganic Oxides)	Cadmium
Carbon disulfide	Carbon monoxide
Lead	Nicotine
Toluene	Tobacco Smoke
Urethane	



# Fact Sheet

California Environmental Protection Agency

 **Air Resources Board**

## Proposed Identification: Environmental Tobacco Smoke as a Toxic Air Contaminant

### What is Environmental Tobacco Smoke?

- Environmental Tobacco Smoke (ETS) is a complex mixture of thousands of gases and fine particles emitted by the burning of tobacco products (sidestream smoke) and from smoke exhaled by the smoker (mainstream smoke).
- Many of the gaseous compounds react in the atmosphere within a relatively short period of time. But, under certain conditions, the particulate matter component of ETS has been shown to persist in the atmosphere for hours.

### How did ARB identify ETS as a TAC?

- In 1997, the Office of Environmental Health Hazard Assessment (OEHHA), with input from Air Resources Board (ARB) staff, prepared a comprehensive report on the exposure and health effects of ETS that served as a starting point for developing the present toxic air contaminant (TAC) identification report.
- In 2001, the ARB entered ETS into the identification phase of the program.
- In December 2003, the first draft report was released for a 100 day public comment period.
- A public workshop was held in March 2004.
- Four Scientific Review Panel (The SRP is an independent 9-member group of scientific experts who review ARB reports scientific accuracy as required by Health and Safety Code section 39670) meetings were held from November 2004 through June 2005 to discuss and approve the ETS report.

### What are the exposure and resulting health effects associated with ETS?

Despite an increasing number of restrictions on smoking and increased awareness of health impacts, exposures to ETS, especially of infants and children, continue to be a public health concern. Approximately 16% of the adult and adolescent California population smoke as compared to 23% for adults and 28% for adolescents, nationwide. ETS exposure is causally associated with a number of health effects, including effects on infants and children. ETS has a number of serious impacts on children's health including sudden infant death syndrome (SIDS), cause and exacerbation of asthma, increased respiratory tract infections, increased middle ear infections, low birth weight, and developmental impacts.

## Health Effects that Result from ETS Exposure

- **Developmental Effects:** fetal growth, sudden infant death syndrome, and pre-term delivery
- **Respiratory Effects:** Acute lower respiratory tract infections in children (*e.g.*, bronchitis and pneumonia), asthma induction and exacerbation in children and adults, chronic respiratory symptoms in children, eye and nasal irritation in adults, middle ear infections in children
- **Carcinogenic Effects:** lung cancer, nasal sinus cancer, breast cancer in younger primarily pre-menopausal women
- **Cardiovascular Effects:** heart disease mortality, acute and chronic coronary heart disease morbidity, altered vascular properties

## Health Impacts of ETS Exposure Each Year in California

- Over 400 additional lung cancer deaths
- Over 3,600 cardiac deaths
- About 31,000 episodes of childrens asthma
- About 21 cases of SIDS
- About 1,600 cases of low birthweight in newborns
- Over 4,700 cases of pre-term delivery

## Why is ETS public exposure of concern?

- Several studies have documented indoor levels of ETS. A comparison of studies indicates smokers' homes have indoor nicotine levels averaging about 30 times higher than a non-smokers' home.
- Even higher levels are found in vehicles where average particulate concentrations are up to 10 times higher than the average particulate concentrations found in the homes of smokers.
- Many of the substances found in ETS have already been identified as toxic air pollutants and have known adverse health effects such as 1,3-butadiene, acetaldehyde, acrolein, arsenic, benzene, benzo[a]pyrene, cadmium, hexavalent chromium, and formaldehyde.
- Approximately 40, 365, and 1,900 tons per year of nicotine, respirable particles, and carbon monoxide, respectively, from tobacco smoke, are emitted into California's air each year.
- Non-smokers are exposed to ETS in several different environments, such as outside office buildings, schools, businesses, airports and amusement parks. The ARB monitored outdoor nicotine (a marker for ETS) concentrations in these environments and found that some of the highest nicotine monitoring results are comparable to those found in some smoker's homes.

- Overall, estimated average exposure concentrations for adults and children who live with smokers are several hundred times higher than those who live in non-smoking environments. Such exposures are especially of concern for young children because they are likely to recur daily and may adversely affect their physiological development.

## What will happen as a result of identifying ETS as a TAC?

- Upon identification as a TAC, the ARB will develop a risk reduction report on the potential actions to reduce ETS exposures in California.
- The risk reduction report will review state and local anti-smoking programs, public education efforts regarding the effects of exposure, and identify additional opportunities to reduce risk.
- In addition, the ARB will obtain additional data to better characterize the public's exposure to ETS and associated effects.

## For More Information

Please contact the ARB toll-free at (800) END-SMOG (California only) or (800) 242-4450 (outside California).

If you are handicapped, you may obtain this document in an alternative format. Contact ARB's ADA Coordinator at: (916) 322-4505 (voice); (916) 324-9531 (TDD, Sacramento area only); or (800) 700-8326 (TDD, outside Sacramento).

**The energy crisis facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of sample ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>**

OFFICE OF ENVIRONMENTAL HEALTH  
HAZARD ASSESSMENT  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

THE SAFE DRINKING WATER AND TOXIC  
ENFORCEMENT ACT OF 1986  
(PROPOSITION 65): A SUMMARY

The following summary has been prepared by the Office of Environmental Health Hazard Assessment, the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and its implementing regulations (see citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 22 of the California Code of Regulations, Sections 12000 through 14000.

#### WHAT DOES PROPOSITION 65 REQUIRE?

**The "Governor's List."** Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 550 chemicals have been listed as of May 1, 1996. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release or otherwise engage in activities involving those chemicals must comply with the following:

**Clear and reasonable warnings.** A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of listing of the chemical.

**Prohibition from discharges into drinking water.** A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of listing of the chemical.

#### DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts:

**Governmental agencies and public water utilities.** All agencies of the federal, State or local government, as well as entities operating public water systems, are exempt.

**Businesses with nine or fewer employees.** Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees.

**Exposures that pose no significant risk of cancer.** For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "no significant risk" levels for more than 250 listed carcinogens.

**Exposures that will produce no observable reproductive effect at 1,000 times the level in question.** For chemicals known to the State to cause birth defects or other reproductive harm ("reproductive toxicants"), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level (NOEL)," divided by a 1,000-fold safety or uncertainty factor. The "no observable effect level" is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

**Discharges that do not result in a "significant amount" of the listed chemical entering into any source of drinking water.** The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" "no observable effect" test if an individual were exposed to such amount in drinking water.

#### HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuits may also be brought by private parties acting in the public interest, only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 22, California Code of Regulations, Section 129). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

#### FOR FURTHER INFORMATION...

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900.

**§ 14000. Chemicals Required by State or Federal Law Have Been Tested for Potential to Cause Cancer or Reproductive Toxicity, but Which Have Not Been Adequately Tested As Required.**

(a) The Safe Drinking Water and Toxic Enforcement Act of 1986 requires the Governor to publish a list of chemicals formally regulated by state or federal agencies to have testing for carcinogenicity or reproductive toxicity, but that the state's qualified experts have not found to be adequately tested as required (Health and Safety Code 25249.5).

Chemical	Data Requirements
Dodine	onc, repro, tera
Endothal and salts	onc, repro, tera
Ethofumesate	onc
Ethoxyquin	tera
Fenitron	tera
Fenvalerate	onc, repro, tera
Fluralinate	repro, tera
Hydroxy-methylthiocarbamate	tera
Imazalil	onc
Inorganic chlorates	onc, repro, tera
Inorganic sulfites	onc, repro, tera
Iodine-potassium iodide	tera
Iprodione	tera
Irgasan	onc, repro, tera
Lampicide	onc, repro
Magnesium phosphide	onc
Malathion	onc
Maneb	onc, tera
MCPB and salts	tera
Melfluidide and salts	tera
Mepiquat chloride	tera
Metaldehyde	onc, tera
Methoxychlor	onc, repro, tera
Methyl isothiocyanate	tera
Methyl parathion	tera
Methylthiocarbamate	repro
MKG 264	tera
Molinate	repro
Naphthalene	onc
Naphthaleneacetic acid	onc, repro
Naphthamate salts	tera
Napropamide	repro
Niclosamide	onc, tera
Nicotinic and derivatives	onc, tera
Nitrapyrin	onc, repro, tera
4-Nitrophenol	tera
Octhilinone	tera
Oil of Pennyroyal	tera
Omadine salts	onc, repro, tera
Oxadiazon	repro
Oxyfluorfen	onc
Pebulate	tera
Perfludone	tera
Phenmedipham	onc
Phenol and salts	tera
2-Phenylphenol and salts	onc, tera
Pine oils	tera
Piperonyl butoxide	tera
Poly (hexamethylene biguanide)	onc, repro
Polyethoxylated aliphatic alcohols	onc, repro, tera
Prometon	tera
Propachlor	onc

Chemical	Data Requirements
Propanil	onc, repro
Propetamphos	tera
Propiconazole	onc
Propylene oxide	tera
Pyrazon	onc, repro
Pyrethrin and derivatives	onc, tera
Pyrimidinone	onc, tera
Sechoxydim	onc
Siduron	onc, repro, tera
Sodium fluoride	tera
Sulfometuron-methyl	onc, tera
TBT-containing compounds	onc, tera
TCMB	onc, repro, tera
Temephos	onc, tera
Tetrachlorovinphos	onc
Tetramethrin	onc
Thiabendazole and salts	onc, repro, tera
Thidiazuron	onc, repro, tera
Thiodicarb	tera
Thiophanate-methyl	onc, tera
Thiram	onc
Triadimefon	onc, repro
Triclopyr and salts	onc
Vernolate	onc, repro

Revised: January 1, 1998

#### HISTORY

1. New section submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 89, No. 17).
2. Amendment submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 90, No. 2).
3. Amendment submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 91, No. 17).
4. Editorial correction of subsection (d) (Register 91, No. 31).
5. Editorial correction of printing error (Register 91, No. 43).
6. Editorial correction instituting inadvertently omitted amendment. Submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 93, No. 20).
7. Editorial correction of printing errors (Register 93, No. 45).
8. Amendment of subsection (d) filed 8-1-94. Submitted to OAL for printing on (Register 94, No. 31).
9. Amendment of subsections (b), (c), and (d) filed 12-23-94. Submitted to OAL for printing only (Register 95, No. 1).
10. Amendment submitted to OAL for printing only pursuant to Government Code section 11343.8 (Register 95, No. 52).
11. Amendment filed 1-30-97; operative 1-30-97. Submitted to OAL for printing only pursuant to Health and Safety Code section 25249.8 (Register 97, No. 5).
12. Amendment of subsections (b), (c) and (d) filed 2-13-98; operative 2-13-98. Submitted to OAL for printing only pursuant to Health and Safety Code section 25249.8 (Register 98, No. 7).

[The next page is 201.]

**CERTIFICATE OF SERVICE**

I am over the age of 18 and not a party to this case. I am a resident of or employed in the county where the mailing occurred. My business address is 950 South Coast Drive, Suite 220, Costa Mesa, California 92626.

**I SERVED THE FOLLOWING:**

- 1.) Second 60-Day Notice of Intent to Sue Under Health & Safety Code Section 24249.6;
- 2.) The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary (*only sent to violators*)

by enclosing a true copy of the same in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid:

Date of Mailing: March 21, 2006  
Place of Mailing: Costa Mesa, California

**NAME AND ADDRESS OF EACH PERSON TO WHOM DOCUMENTS WERE MAILED:**

Herbert M. Sandler  
Chairman and CEO,  
Golden West Financial  
1901 Harrison St. Oakland, CA 94612

Counsel for Violator  
William Funderburk  
Stanzler Funderburk et al  
520 S Grand Ave #390  
Los Angeles, CA 90071-2600

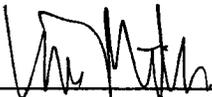
Marion O. Sandler  
Chairman and CEO  
World Savings Bank, F.S.B  
1901 Harrison Street  
Oakland, CA 94612

California Attorney General  
(Proposition 65 Enforcement Division)  
1515 Clay Street, 20th Floor  
Oakland, CA

Orange County District Attorney  
700 Civic Center Dr. W., 2<sup>nd</sup> Fl.  
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 21, 2006

  
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