Congress of the United States

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Committee on Small Business

The Honorable James M. Talent, Chairman

Testimony on behalf of California Department of Justice
Bill Lockyer, Attorney General

Presented by Edward G. Weil, Deputy Attorney General

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Mr. Chairman and Honorable Members of the Committee:

My name is Edward Weil, and I am a Deputy Attorney General for the State of California, and have both enforced and defended it since it took effect in 1988, under three Attorneys General. On behalf of California’s Chief Law Officer, I appreciate the opportunity to testify before the committee on this important state law and its effect on small businesses. I respectfully present this testimony on behalf of the California Department of Justice.

For consumer products, the use of warnings—rather than government-set content standards—has created a market incentive to reformulate products in order to reduce the use of toxic chemicals, without driving needed products out of the market, and without awaiting years long product-by-product standard setting. In industrial facility air emissions, the requirement to warn neighbors of exposure has created an incentive for businesses to reduce use of toxic chemicals, or to install better technological control equipment.

In many instances, we have found that Proposition 65 has filled gaps in regulatory networks. It also has prodded federal government into action on many occasions. Whether the issue is lead in plumbing products, trichloroethylene in typewriter correction fluids, or lead in ceramic dishes, Proposition 65 has enabled California to act on levels of toxic chemicals in consumer products that could not be defended as acceptable, safe products, but merely had fallen through gaps in the federal regulatory system. Moreover, this has been accomplished without establishing a large bureaucracy, or voluminous technical regulations. It not only is the right of states to enact such laws to protect the health and safety of their citizens, but any federal action to prevent states from doing so ultimately would reduce the level of protection provided to the consuming public.

Unfortunately, a few unscrupulous private attorneys have made this law unduly burdensome for small business because of the manner in which they have sought to enforce it. We have made substantial efforts to address this problem, and, in particular, we think that recent amendments to Proposition 65, which
require full public disclosure of the litigation activities of private plaintiffs, will help to assure that any abuse is limited.

In order to best assist the committee, my testimony will first address the actual substantive requirements of Proposition 65, the history of its many successes in protecting the public from exposure to toxic chemicals, why any further federal preemption of Proposition 65 would be contrary to principles of federalism and lessen government’s ability to protect public health and safety, and our efforts to curb abuses of some irresponsible plaintiffs’ groups.

**Summary of Proposition 65:**

California’s Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known by its ballot designation "Proposition 65," is an initiative statute passed by a vote of the People of California in November, 1986, receiving 63% of the votes cast.

**Proposition 65 creates a list of chemicals known to the state to cause cancer or reproductive toxicity.** It does not include other forms of toxicity. Over six hundred chemicals are included on the list, the vast majority of which also have been identified as causing cancer or reproductive toxicity by other government agencies such as the U.S. Food and Drug Administration, the National Toxicology Program, the Environmental Protection Agency, or respected international groups such as the International Agency for Research on Cancer.

The "listed" chemicals are subject to two requirements:

- **Warnings:** Any business knowingly and intentionally exposing persons to the listed chemicals must first give "clear and reasonable warning."

- **Discharge:** Knowing discharges of listed chemicals into sources of drinking water are prohibited. "Sources of drinking water" includes everything from groundwater to the point of the tap.
Carcinogens are exempt where the exposure or discharge poses "no significant risk." This flexible term is defined by regulation as a 1 in 100,000 lifetime risk of cancer. This is not an especially strict standard. In fact, this standard is significantly less strict than standards applied by EPA and FDA for carcinogens in food additives and for pesticide residues.

Reproductive toxins are exempt where the exposure is less than one-thousandth of the No Observable Effect Level. This statutory standard is controversial, because while virtually all regulatory agencies apply an "uncertainty" or "safety" factor necessary to protect the public, many agencies vary the size of the factor to account for the degree of scientific uncertainty concerning particular chemicals.

The law is enforced by civil actions in superior court. They may be filed by the Attorney General, District Attorneys and some city attorneys. Private citizens may sue, if they give notice of the violation to the AG and DA’s and none of the government enforcers sue within sixty days.

Lead Agency. A department within California’s Environmental Protection Agency, the Office of Environmental Health Hazard Assessment, is designated by the Governor to implement the law. This Office has developed the list of chemicals subject to the law, in consultation with a distinguished panel of scientific experts, and has set "no significant risk" standards for over 200 chemicals on the Proposition 65 list, many of which are based on standards set by federal agencies.

Critical features of the statute:

- Once a chemical is listed, the law takes effect (after a grace period), regardless of whether the state set specific no significant risk levels. This assures that health protection cannot be delayed by interminable regulatory processes, but also means that requirements take effect before specific guidance has been developed.
• **The standards are relatively general.** Even where "no significant risk levels" have been set by regulation, they are still not specific to particular products or emissions, which is typical in other health and environmental regulation. Thus, they do not provide the degree of specificity to which industry is accustomed.

• **Enforcement is not done administratively, but through litigation, the majority of which is brought by private parties.** Initially, sixty-day notices totaled a few dozen a year, but now over 1,000 per year are filed, and most enforcement litigation is filed by private parties. The Attorney General files major cases, but very few DA’s bring them. Some private litigation is filed by "mainstream" environmental groups such as NRDC and EDF, but much of it is filed by small "on paper only" organizations through private law firms. The variety of firms and tactics has resulted in some cases that create substantial public benefit, and others that appear to be abusive.

**Significant Areas of Enforcement:**

• **Tableware:** The Attorney General—at the time, Dan Lungren, a former member of this House—and the Environmental Defense Fund sued makers of ceramic dishes because their products leached lead into food and drink. These products complied with outdated federal standards, but our action resulted in major reductions in lead exposure from these products. Indeed, this matter came to our attention largely because FDA had proposed substantially tightening its lead standards in 1989, after finding that under its then-existing standards, a child drinking orange juice that had been stored in a ceramic pitcher overnight that complied with all FDA standards nonetheless could be exposed to as much as 450 micrograms per day. This amount of exposure to lead is acutely hazardous, and cannot be justified by any contemporary analysis of lead toxicity. In the face of industry opposition—claiming that the proposed standards were technically infeasible—FDA completely dropped its proposal. After the state filed suit,
the industry members agreed to reduce lead in their products over a five year period and to provide clear warnings of lead content to consumers. Soon afterward, FDA adopted new informal lead guidelines at substantially lower levels. Due to this settlement, and the market incentives created by the provision of visible warnings in retail stores, all companies agreeing to the settlements in fact reduced lead in their product by more than required, and the public is exposed to significantly less lead from this source than in the past.

- **Drinking water faucets:** The Attorney General and the Natural Resources Defense Council brought actions against makers of drinking water faucets containing lead, permissible under existing exemptions from federal law. While Congress in the federal Safe Drinking Water Act grandly declared that all plumbing shall be "lead free," it then defined "lead free" to mean up to 8% lead, the maximum and commercial brass plumbing makers used in any event, and enough to create lead levels significantly above safe levels. The suits resulted in favorable court rulings and a major reduction of lead-leaching from faucets into drinking water.

- **Ambient air emissions:** Cases have been brought by public and private litigants against numerous industrial facilities for failing to warn surrounding communities of toxic air emissions. This has resulted in community warnings, and substantial pressure to reduce the emissions.

- **Calcium Supplements:** The Attorney General brought actions against companies that make calcium supplements that contain lead, resulting in reduction in lead levels in these products to levels that do not require a warning. This accomplished the important objective of lead reduction without alarming the public about calcium supplements generally, which continue to have important health benefits, particularly to women.

- **Typewriter correction fluids.** These products, such as Wite-Out and Liquid Paper, were found to result in exposures to average users of several
hundred times the no-significant risk limit of trichloroethylene, a carcinogen. After the State and the Environmental Defense Fund took action, the companies changed solvents to a less toxic material. At that point, they began advertising the product as "new and improved."

• **Mini-blinds.** In 1996, the Arizona and North Carolina Health Departments found that plastic mini-blinds, made with lead as an intended constituent, disintegrated over time, forming a "lead dust" on the surface of the blind, which could be spread throughout a household, and ingested by children. The health departments linked these blinds to numerous cases of acute lead poisoning in children. The U.S. Consumer Product Safety Commission negotiated a voluntary agreement with the industry, under which the blinds would be changed to eliminate added lead, but all old leaded blinds could continue to be sold, with no disclosure to consumers. In California, however, because of Proposition 65, an action was brought that resulted in retailers in California either immediately posting signs warning customers of the leaded blinds, or removing the blinds from the shelves. Ultimately, under the Attorney General’s actions, the industry paid penalties, agreed to a lead reduction standard even stricter than the CPSC’s, and adopted an extensive public education program concerning the old blinds, which included the opportunity for consumers to receive rebates on the purchase of new, unleaded blinds.

**Proposition 65 and federal regulation**

Proposition 65 has provided a useful supplement to federal regulation, by addressing issues that had not been addressed by federal agencies, where federal standards were outdated, or where federal action had been delayed. In the examples given above, federal agencies did not defend the existing product contents as being justified by an appropriate standard setting process, but simply had no existing standard, or had not revised existing standards in the light of currently available information.
The State has worked with federal agencies wherever possible in order to harmonize federal labeling requirements and Proposition 65. In one instance, the Consumer Product Safety Commission authorized the use of a warning for methylene chloride in paint strippers as in compliance with both the FHSA and Proposition 65. In another instance, U.S. EPA authorized the inclusion of a Proposition 65 warning on the label of a FIFRA-registered product, after California agreed to modifications in "safe harbor" Proposition 65 language in order to accommodate EPA’s concerns.

Finally, as the courts have held uniformly, Proposition 65 allows warnings to be provided through point-of-sale signs, which may be provided in stores within California only, thereby allowing manufacturers to continue to market a product with a single nationwide label.

In the past, the California Attorney General, of either party, has opposed efforts to include language preempting Proposition 65 in the Food, Drug and Cosmetic Act, and we think the balance cast by Congress and the courts under the Federal Hazardous Substances Act as written is appropriate.

**Small Business Concerns**

Unfortunately, a few plaintiffs’ law firms have used Proposition 65 to bring cases of questionable significance against small out-of-state businesses that may not have been aware of Proposition 65’s requirements. Of course, the great benefits of Proposition 65 clearly outweigh these problems, but we nonetheless are addressing them in several ways.

First, in a number of cases, involving nail polish, lead wine bottle caps, and crystalline silica in building products, the Attorney General has effectively taken over particular matters to assure that they are handled appropriately. In these instances, the Attorney General’s action has resulted in a fair, uniform resolution of the legal and public health issues.
Second, by filing *amicus curiae* briefs in certain cases, the Attorney General has helped assure that the courts reach a result on important issues that is consistent with the requirements of the law. For example, in recent litigation concerning the application of Proposition 65 to workplace chemicals, the Attorney General filed briefs explaining and following Federal OSHA’s "approval conditions" placed on Proposition 65 in that context.

Finally, a recent statutory amendment to Proposition 65—the first substantive amendment to the statute since it was adopted—and one supported by Attorney General Bill Lockyer, will require private parties to report to the Attorney General on the events of their cases, as well as the terms of the settlements. In turn, the Attorney General will be required to make that information available to the public. We think this change in the law has great potential to further the purpose of the law by allowing responsible private enforcers to continue unimpeded, while providing information to the public and the Attorney General needed to detect any abusive practices.