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VIA FACSIMILE AT (559) 488-7387 AND EMAIL AT Trish.Gerken@doj.ca.gov

Trish Gerken
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2550 Mariposa Mall, Rm. 5090
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Re: Additional 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. Thank you for the opportunity comment on the proposed regulations.

Request to Clarify Relationship Between § 3203(d) and § 3204(b)(2) - Additional Settlement Payments.

The proposed language of Section 3203(d) provides:

(d) Where a settlement requires the alleged violator to make any Additional Settlement Payments to the plaintiff or to a third party, such Additional Settlement Payments are viewed as an "offset" to the civil penalty. The plaintiff must demonstrate to the satisfaction of the court that it is in the public interest to offset the civil penalty required by statute.

This appears to create a new requirement that the "Additional Settlement Payments" ("ASP") must now be "in the public interest" to offset the civil penalty.

The next section, 3204, identifies guidelines that the Attorney General will consider in determining whether to object to an ASP. However, it is currently unclear as to what a court should consider when evaluating whether an ASP is "in the public interest." One suggestion would be to clarify specifically that courts may consider § 3204(b)(2) (requiring a clear and substantial nexus to the violation alleged i.e., the activities should address the same public harm

as that allegedly caused by the defendant(s) in the particular case) in determining whether an ASP is “in the public interest.”

Reasonable Administrative Costs as Part of Activities Funded by ASPs

Section 3204(b)(2) provides:

(2) The activities funded by Additional Settlement Payments should have a clear and substantial nexus to the violation alleged, i.e., the activities should address the same public harm as that allegedly caused by the defendant(s) in the particular case. For the purposes of this paragraph, a “clear and substantial nexus” requires that the funded activity be designed to have a direct and primary effect within the State of California.

In light of the more stringent record keeping requirements for how ASPs are spent (See Section 3204(b)(5), (c)(6), there will be costs associated in keeping these records, documenting and administering how the ASPs are spent. Accordingly, we would propose additional language or clarification in the final statement of reasons which allows for a reasonable amount of the ASPs to be allocated for the costs of said administration.

Request to Clarify § 3204(b)(5) and § 3204(b)(6)(C)

Section 3204(b)(5) provides:

(5) The settlement should require the plaintiff to obtain and maintain adequate records to document that the funds paid as an Additional Settlement Payment, whether to the plaintiff or to a third party, are spent on the activities described in the settlement. The settlement should require the plaintiff to provide to the Attorney General, within thirty days of any request, copies of all documentation demonstrating how such funds have been spent.

Section 3204(b)(6)(C) provides:

(C) The mechanism by which the plaintiff will track any expenditures of Additional Settlement Payments to ensure that the money is spent consistent with the requirements of the settlement.

Due to the specificity in describing the use of ASPs in § 3204(b)(4), we would request clarification of the extent of the records and documentation required to show how the ASPs are spent. These sections could be read to mean that separate trust accounts may be required in order to adequately track how ASPs are spent. This could result in an unnecessary additional cost of maintaining a separate account for each settlement in which ASPs are provided for.

Request to Clarify The Applicability of § 3203(d) and § 3204

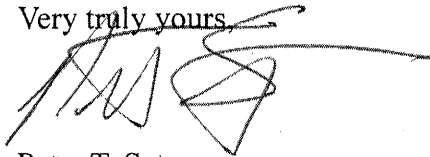
We understand that Section 3203(d) requires the plaintiff to demonstrate to the court that it is in the public interest to off-set any civil penalty by allowing an Additional Settlement Payment. Further, Section 3204 provides guidelines that the Attorney General will consider in determining whether to object to any Settlement that provides for an Additional Settlement Payment. However, we would like clarification as to the extent and applicability that any of the requirements under these Sections would have outside the context of the in-court settlement approval process (in aiding the Attorney General's decision on whether to object to any such settlement providing for an Additional Settlement Payment). It would appear that this Section would only apply in said context, and we would request clarification as to the limit and scope of application of this Section.

Request to Clarify § 3204(b)(6)(B)

We would also like clarity on the provisions of § 3204(b)(6)(B). First, the language could be read to require a private enforcer receiving ASPs to identify in every Consent Judgment or settlement who the entity is that would be receiving ASPs that are paid to that private enforcer. The identity of any consultants, testing laboratories, or experts that the Private Enforcer may choose to pay in the future with ASPs for purposes of evaluating future violations of Proposition 65 may conflict with HSC § 25249.7(h)(1) protection of information that serves as the basis of the certificate of merit. Further, the identify of such consultants or laboratories may not be known at the time the settlement is executed, and would unintentionally hinder the Private Enforcer's ability to change consultants or laboratories in the future. We would propose clarifying language that indicates whether this section only applies to Consent Judgments or settlements where there is a third party expressly identified in the settlement document to receive ASPs (besides the Private Enforcer bringing the action.)

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

Very truly yours,

A handwritten signature in black ink, appearing to read 'Peter T. Sato', with a long horizontal flourish extending to the right.

Peter T. Sato