ADDENDUM TO FINAL STATEMENT OF REASONS
DIVISION 4-PROPOSITION 65 PRIVATE ENFORCEMENT

REVISION OF CHAPTER 1
ADOPTION OF CHAPTERS 2 AND 3
TITLE 11, CALIFORNIA CODE OF REGULATIONS

1. Chapter 1: Reporting Requirements

One commenter (C-5) recommended that the term "Subject to a Settlement" in section 3003 be defined to specifically require "either a copy of the signed written settlement agreement or a certified copy of the court reporter's transcript documenting the terms of the settlement entered during judicial proceedings." Another commenter (C-19) stated that the term "the settlement" is ambiguous. The regulation defines settlement as the "agreement" between the parties (section 3001(e)), and the Report of Settlement form (Appendix A), requires that a copy of the agreement be attached. Accordingly it is already sufficiently clear that written proof of the agreement must be submitted, and this proposal was not adopted. These provisions should eliminate any ambiguity concerning the issue. (See also the response to C-41, contained in the Final Statement of Reasons at page 6.)

One commenter (C-34) suggested that plaintiffs should not have to wait until settlements are actually final and signed before submitting them to the Attorney General for review. Given the volume of settlements, however, as well as the likelihood that "draft" settlements might subsequently be changed, it is extremely inefficient for the Attorney General to review draft settlements that have not yet been (and may never be) agreed to by the parties, so this change was not adopted. Outside the context of the mandatory reporting obligations under the regulation, some parties request review of draft settlements, and the Attorney General occasionally reviews them. (See also Final Statement of Reasons at page 24.)

One commenter (C-34) suggested that the 30-day and 45-day periods for review by the Attorney General should be waivable. The 30-day notice period for Other Actions Alleging Violations of Proposition 65 (which do not require statutory settlement approval motions), has been retained. No similar feature has been adopted for the 45-day period for Private Proposition 65 Actions, because experience has indicated that, based on the volume of the settlements and the need to review the supporting documentation, there are few situations in which such a waiver would be appropriate. Of course, a court retains its authority to order that the motion be heard in a shorter time. Accordingly, this change was not adopted.

2. Chapter 2: Certificates of Merit

One commenter (C-5) suggested that the Certificate of Merit should include a statement by the consultant relied on by the certifier stating that the consultant has determined that there is a reasonable basis to proceed. The statute requires only that the noticing party or its attorney

make such a determination. Thus, this change is beyond the scope of the enabling statute.

One commenter (C-19) suggested that the requirement of section 3101(b)(4) that the certifier state that he or she "believes" that there is a reasonable and meritorious case be replaced with language stating that the certifier "has reviewed information which establishes" that the case has merit. The term "believes that there is a reasonable and meritorious case" is taken directly from the statute, and it is appropriate to simply follow that language. Accordingly, this suggestion was not adopted.

One commenter (C-19) suggested that section 3102(c)(2) and (3), concerning the information supporting the certificate of merit be amended to specifically require that the information refer to "each alleged exposure" and "each route of exposure." The existing language already clearly requires appropriate documentation for each exposure identified in the notice, so this suggestion was not adopted.

One commenter (C-41) suggested that section 3103, concerning documentation supporting the certificate of merit, should provide that failure to comply prohibits the party from commencing an enforcement action. The statute already provides that sixty-day notices must meet the statutory certificate of merit requirement, and Chapter 2 is a binding regulation, not a guideline. The extent or manner in which failure to provide underlying documentation supporting the certificate of merit, which is confidential, will be enforced, should be determined by the courts. Accordingly, this suggestion was not adopted.

One commenter (C-48) suggested that section 3101(a), concerning the contents of the certificate of merit, should be clarified to require the certifier provide documentation that no warning has been given and that the defendant has at least ten employees. The same commenter stated this comment in the public hearing. (Exhibit G, p. 491.) The regulation already provides that the certificate must address all elements of the cause of action on which the plaintiff would have the burden of proof, which would include the two issues raised by this commenter. Specifying those and the other elements on which the plaintiff bears the burden of proof is not necessary.

3. Chapter 3: Settlement Guidelines

a. Section 3201: Attorney's Fees

One commenter (C-34) suggested that section 3201(c), concerning the necessity of private enforcement as a component of entitlement to attorney's fees, should be deleted. This suggestion was not adopted. This issue is a critical part of the determination whether a plaintiff is entitled to fees, which the court must make to approve the settlement. Providing guidance as to how the Attorney General will consider that issue provides helpful guidance to the public.

One commenter (C-34) recommended that the guidelines for attorney's fees should state

that they are designed to interpret "but not change" existing law. The Proposed Regulation already stated that the attorney's fee guidelines "are not binding on litigants or courts, but provide the Attorney Generals view as to the legality and appropriateness" of fees. In addition, the Revised Proposed regulation added language that the guidelines are not comprehensive, but address particular issues that occur frequently. These provisions were retained in the Final Regulation, and sufficiently address this issue.

Similarly, another commenter (C-5) stated that the guidelines are inappropriate, because they would "freeze" evolving case law on the subject. The guidelines are written in fairly flexible language, and in a manner consistent with a large body of case law developed over a long period of time, thus is it unlikely that developments in cases law actually would conflict with the guidelines. If this occurs, case law would prevail over the guidelines, and the guidelines could be amended.

One commenter (C-43) suggested that the provision of section 3103(d) that "fees should not be awarded based on additional time spent in response to the Attorney General's inquiries or participation in the case unless specifically identified and approved by the court" should be deleted. As explained in the Final Statement of Reasons at page 27, the section doe not preclude an award of fees based on such time, but merely requires that the expense be found to be reasonable. This is entirely appropriate, and this change was not adopted.

One commenter (RP-9) suggested that the provision concerning determination of "public benefit" for attorney's fees should be a balancing test, in which the claimed benefit is weighed against any public detriment, based on harm to the business climate. This would appear to establish a new legal test, and therefore is not consistent with the purpose of the guidelines, which is to provide guidance concerning the application of existing law to situations that commonly arise under Proposition 65. Accordingly, this suggestion was not adopted. This same commenter suggested that where a settlement results in removal of a product from the market, as distinct from a warning or reformulation of a product, there is no public benefit. While this argument may have merit in some cases, it might not in others, and accordingly, it was not included in the guidelines.

One commenter (Hearing Exhibit F-1) suggested that it is not appropriate for the guidelines to state that a plaintiff is not successful if it achieved only "minor or technical" changes in a warning (section 3201(b)(1), or where the defendant had posted tobacco smoke warnings complying with sections 3202(c)(1) and (2), but obtained only additional warning signs in guest rooms where smoking is permitting, or hallways leading to those rooms. This commenter suggested that these are factual issues better left to a court. Indeed, the court ultimately decide the matter, but the sections properly set forth the Attorney General's view, which will be considered in reviewing settlements, that minor changes in warnings do not, in and of themselves, justify significant attorney's fee awards.

b. Section 3202: Clear and Reasonable Warnings

As explained in the Final Statement of Reasons, at page 24, the warning guidelines are needed to provide additional guidance concerning the application of the existing warning regulations to commonly occurring situations, and to assist those negotiating settlements and courts reviewing them in crafting warnings that comply with the statute. The requirements of section 3202(a) address commonly occurring problems in warning language, about which the Attorney General has been asked for guidance on numerous occasions. Section 3203(c) addresses premises warnings for tobacco smoke, which have been the subject of sixty-day notices of violation alleged against literally thousands of businesses. The guidelines concerning environmental exposure warnings set forth in section 3202(d) are set forth because the proper application of the existing warning regulations to warnings for environmental exposures caused by facility air emissions into surrounding communities has been the subject of substantial litigation, and the Attorney General has applied these criteria in numerous enforcement cases that he has brought.

One commenter (C-5) suggested that the fact that the guidelines are non-binding is "illusory" and that they will "take on a life of their own." While the guidelines are expected to be used by the public and the courts, they clearly state that they are not binding, and the possibility that some people will give them substantial weight is not a reason to deprive the public of the value of needed additional guidance.

One commenter (C-5) stated that the guidelines are in some respects similar to a previous "failed regulatory proposal," which should not be resurrected through the guidelines. Some provisions of the warning guidelines are similar to a regulation proposed by the Office of Environmental Health Hazard assessment in 1991. To the extent that some of the provisions of those proposed regulations accurately reflect the Attorney General's views as to the proper application of the warning requirements to specific fact situations, however, they are appropriate to include in the guidelines.

One commenter (C-19) suggested that section 3201(b), which provides that a "public benefit" is presumed where a warning is given for "an exposure that appears to require a warning" should be modified to apply only where a warning is given for an exposure "that requires a warning," arguing that there is no public benefit to giving a warning unless the hazard caused by the exposure is sufficient to actually require a warning. Requiring the plaintiff to prove that a warning actually is required, however, would require the plaintiff to prove that it will win the case, when the purpose of the settlement is to avoid undertaking that burden. The existing language should be sufficient to assure that public benefit is not presumed in cases in which there is no plausible evidence that a warning is required. Accordingly, this suggestion was not adopted.

One commenter (C-48) suggested that the language from environmental exposure warning sign (see section 3202(b)), should state that the chemicals "may include" certain specific

chemicals. Another commenter at a public hearing (Exhibit G, page 518), specifically suggested that any request to allow the word "may" in a regulation be rejected. The Lead Agency, in adopting its regulations, specifically refrained from using such language, and we think that such a reference in these guidelines would be inconsistent with that view.

One commenter (C-48) suggested that the warning guidelines be expanded to provide guidance for posting tobacco smoke warnings at a wider variety of types of hotels and apartment complexes. While this could be considered in the future, at this time, the guidelines can address only the most common types of apartment and hotel complexes.

One commenter (C-48) suggested that the settlement guidelines address warning language for multiple chemical exposures, supplemental notices of violation as part of a settlement, and certificate of merit requirements for notices issued in the context of settlement. These suggestions could be the subject of future rulemaking, but at this point have not occurred with enough frequency for a guideline to be needed. Accordingly, these suggestions were not adopted.

c. Section 3203: Civil Penalties

This section is necessary because the vast majority of Proposition 65 settlements contain some type of payment in lieu of penalties, and numerous businesses and courts have expressed concern about the uses of these funds. The Attorney General expects to review such provisions, and the guidelines advise the public of standards that will be applied in that review.

One commenter (C-34) stated that the section 3203(b)(3), concerning the manner in which recipients of payments in lieu of penalties are selected, is an inappropriate attempt to apply standards that the Attorney General applies to himself to other parties. These standards are based on governing law concerning the recovery of funds in such cases (see Final Statement of Reasons at 26-27), which appears to apply to private parties as well. Accordingly, this suggestion was not adopted.

One commenter (C-41) suggested a number of changes to section 3103 in order to provide more specific guidance concerning appropriate use and distribution of payments in lieu of penalties. As indicated in the Final Statement of Reasons at page 27, the focus of the guideline is to assure that a "nexus" requirement is met, and that the plaintiff is publicly accountable for the use of the funds. Additional specific criteria are better left to individual settlement review.

d. General

One commenter (C-25) suggested that new provisions be added to the regulations to prevent "pseudo-plaintiffs" from entering into collusive settlements with defendants, by providing that the "first-in-time" plaintiff's sixty-day notice of violation should supercede any subsequent sixty-day notice of violation covering the same violations. It is not clear whether

there is legal authority to adopt such a rule, and it certainly is beyond the scope of this rulemaking. Moreover, there may be other ways of addressing this issue, such as litigation case management through consolidated or coordinated proceedings, as well as review of any settlement entered into by a "pseudo-plaintiff" to determine whether it complies with the law. Accordingly, this suggestion was not adopted.

One commenter (Exhibit F-1) stated that the entire regulation is contrary to the purpose of Proposition 65, which is to enable citizen plaintiffs to enforce warning requirements, that the regulation undermines efforts to educate the public about tobacco smoke, both by allowing defendants to delay matters and by discouraging settlements. The Attorney General considers the regulation consistent with Proposition 65, both before and after it was amended by the Legislature in 2001. While the statute does impose new requirements on private plaintiffs, these requirements are specifically designed not to interfere with the prosecution of meritorious cases or negotiation of settlements that benefit the public. The regulation has been written in the same manner, and should not undermine legitimate efforts to enforce the statute.