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January 22, 2002

Reuben Yeroushalmi, Esq.
3700 Wilshire Boulevard, Suite 480
Los Angeles, CA 90010

RE: Proposition 65 Sixty Day Notice

Dear Mr. Yeroushalmi:

The Attorney General recently received a sixty-day notice from your office, on behalf of the Consumer Advocacy Group, Inc., in which you allege that Beiersdorf Inc. and Beiersdorf North America Inc. have failed to provide required Proposition 65 warnings for certain products alleged to cause exposures to aniline, nickel, and formaldehyde.

These notices were served on December 31, 2001, some of roughly 3,500 notices served on the Attorney General between December 21, 2001 and December 31, 2001.

As you know, the Legislature passed, and the Governor approved, SB 471, which adopted certain changes in Proposition 65. These changes include the new requirement that notices alleging violations of the warning requirement include a certificate of merit, which provides certain information substantiating the claims made in the notice. This requirement took effect for notices served on or after January 1, 2002. The Attorney General supported this legislation, because it helps assure that noticing parties have adequately investigated their claims before providing the notice.

In our experience, we have found that responsible groups doing this type of work had engaged in an investigation similar to that required by SB 471, and therefore would not be especially burdened by the new requirements. Unfortunately, some groups have not always performed sufficient investigation before providing these notices. You have provided a large volume of notices very shortly before the effective date of the new certificate of merit requirements. We certainly hope that this was not done in an effort to avoid conducting the type of investigation that would be necessary to provide an adequate certificate of merit, but the timing and volume of your notices could support that inference.

Although the Certificate of Merit requirement was not in effect on the date of your

notices, the provisions of the Code of Civil Procedure and other legal remedies already exist to address an civil actions that are filed without adequate basis to proceed. For example, Code of Civil Procedure section 128.7(b)(3) provides that your signature on a complaint constitutes certification, among other things, that the “allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Any actions filed pursuant to the notices in question must meet all applicable legal standards.

Moreover, if actions are filed pursuant to these notices, they will be subject to the newly-required settlement review procedures. Under these provisions, no settlements can be approved unless the court finds that any warning complies with the law, any civil penalty is reasonable, and any award of attorney’s fees is reasonable under California law. Any settlements must be provided to the Attorney General for review, and the Attorney General may appear in court concerning the settlements. In addition, the Attorney General has authority to investigate matters within his jurisdiction through administrative subpoenas promulgated pursuant to Government Code section 11181 et seq.

We have a number of questions concerning the support for the allegations in your notice, the answers to which are important to our ability to evaluate whether the Attorney General should commence enforcement action on them. We trust that you have obtained this information as part of your investigation, and will provide it to us:

Regarding the consumer exposures alleged, are the chemicals listed ingredients of the products?. If they are not listed ingredients, do you have test data showing that the products contain the chemicals and will you provide that test data to us? If there is no test data, please provide us with the evidence on which you have based your claim of exposure.

In addition to the above, we have reviewed the notice to determine whether it complies with the regulatory requirements for notices, set forth in the Code of California Regulations, Title 22, section 12903. We believe that there are certain problems with the notice.

1. One of the chemicals noticed is not a Proposition 65 chemical. The notice states that “formaldehyde” is one of the chemicals in question. The listing under Proposition 65 is only for “formaldehyde (gas).” Furthermore, the notices state that the exposure is caused in a variety of ways including ingestion, application, and dermal. These routes of exposure would not apply to a gas.
2. The regulations require that where the alleged violator has a current registration with the California Secretary of State that identifies a Chief Executive Officer,

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President, or General Counsel, the notice must be addressed to one of those persons. In one case the notice above was served on “CEO/President/Owner” of the company, without designating a named individual. If the noticed company has identified names on file with the Secretary of State, the notice must be served on the named individual.

The above list of problems in the notice is not intended to be exhaustive or to imply that all other aspects of the notice are adequate.

We would appreciate receiving answers to the questions set forth above. If you wish to discuss any of the above, please feel free to call me.

Sincerely,

SUSAN S. FIERING
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: Noticed Companies

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NOTICED COMPANIES

CEO/President/Owner
Beiersdorf Inc.
187 Danbury Road
Wilton, CT 06897-4122
Att: James Kenton

CEO/President/Owner
Beiersdorf Inc.
360 Dr. Martin Luther King
Norwalk, CT 06854-4648

CEO/President/Owner
Beiersdorf North America, Inc.
187 Danbury Road
Wilton, CT 06897-4122
Att: Ronald B. Gordon