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DEPARTMENT OF JUSTICE

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March 14, 2006

Anthony G. Graham
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950 South Coast Drive, Suite 220
Costa Mesa, CA 92626

RE: Bank/ATM Proposition 65 Notices Concerning Second-Hand Smoke

Dear Mr. Graham:

In the past six months, we have received 45 sixty-day notices of violation that you have sent to banks and property managers and owners on behalf of Consumer Defense Group Action. The notices allege violations of Proposition 65 based upon exposures to second-hand smoke at or near bank entrances and ATM machines. We understand from a number of notice recipients that you have offered to settle claims through pre-litigation settlements that would not be subject to review by our Office or to court approval, although you would be required to report them to our Office. We also understand that you have not filed any complaints as a result of the notices. We have some serious concerns about representations you made in the sixty-day notices and the accompanying certificates of merit. We want to bring them to your attention before you enter into any settlement based upon the notices or file a complaint.

The notices allege that each recipient has violated Proposition 65 by failing to post clear and reasonable warnings that the recipient "permits the smoking of tobacco products at the Facilities, which exposes customers, visitors and employees to tobacco smoke in the areas where smoking is permitted." According to the notices, each recipient "controls much of the conduct and actions of its customers, visitors and employees at each of the facilities listed on Exhibit A to this Notice." The recipients allegedly prohibit smoking at certain designated areas, but in other areas, namely, the entrances to the facilities and the areas surrounding ATM machines, each recipient has "specifically chosen to allow its customers, visitors and employees . . . to smoke cigarettes and cigars." This purportedly results in environmental and occupational exposures. Therefore, according to the notices, each recipient has violated Proposition 65 by failing to warn its customers, visitors and employees that "upon entering and/or using the bank facilities in those

areas, they may be exposed to tobacco smoke."[1]

Each notice is accompanied by a certificate of merit that you executed under penalty of perjury. Proposition 65 requires sixty-day notices to include a certificate of merit stating that the person executing the certificate has consulted with one or more experts who has reviewed facts, studies, or other data regarding the exposure that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious basis for the private action. (Health & Saf. Code, § 25249.7, subd. (d)(1).) The certifier must have a basis to conclude that there is merit to each element of the action on which the plaintiff will have the burden of proof, and that the information relied upon does not prove that any affirmative defense has merit. (Cal. Code Regs., tit. 11, § 3101(a).) Additionally, factual information sufficient to establish the basis of the certificate of merit must be attached to the copy that is served on the Attorney General. (Health & Saf. Code, § 25249.7, subd. (d)(1).)

We are concerned that there may not be an adequate basis for the statements in the sixty-day notices and the accompanying certificates of merit in several respects. First, it is not clear whether the recipients have sufficient control over the premises to be liable for the alleged violations. We question the inference that the failure to prohibit smoking near bank entrances and ATM machines means that the bank has "specifically chosen" to allow smoking. We also question whether the banks *could* prohibit smoking, or, for that matter, post warnings, since they may lease the space where they operate and not have such authority. If you do not have a reasonable basis to allege that the banks have sufficient control over the premises to (a) prohibit or allow smoking, and (b) to post warnings, then you may not be able to establish liability for the alleged violations.[2]

Second, we are aware of no evidence that exposures actually have occurred. The notices allege exposures to second-hand smoke, that is, exposures to persons other than those who are smoking in the first place.[3] They identify the route of exposure as inhalation of second-hand smoke and contact with skin and clothing. According to the notices, however, your investigators

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[1]Three of the notices also identify alleged exposures to diesel and gasoline fumes from cars that operate on the premises. In this letter, we focus on the second-hand smoke allegations, but we have similar concerns about the allegations of exposures to diesel and gas fumes.

[2]The failure to address the issue of ownership or control may in fact render the notices invalid. According to the regulations, a notice that alleges an environmental exposure must state whether the exposure occurs beyond the property owned or controlled by the alleged violators. (Cal. Code Regs., tit. 22, § 12903(b)(2)(F).) We do not see such a statement in the notices.

[3]The notices do not allege that the banks are responsible to warn the smokers themselves about exposure to listed chemicals from smoking cigarettes and cigars. Presumably the cigarette and cigar manufacturers and entities that sold the products to the smokers must warn about these "consumer product exposures." (See Cal. Code Regs., tit. 22, § 12601(b).)

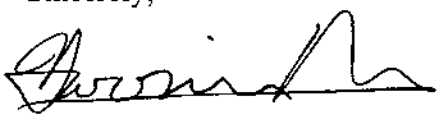
observed only persons smoking, cigarette butts on the ground, and ashtrays in the areas of concern. There is no indication that the investigators observed anyone actually come into contact with the second-hand smoke. The fact that one person smokes while at or near an ATM machine or walking past a building entrance does not establish that someone else has been exposed to the smoke. (Cal. Code Regs., tit. 22, § 12102(i); see also *Yeroushalmi v. Miramar Sheraton* (2001) 88 Cal.App.4th 738, 747 [sixty-day notice must state facts describing how contact occurred].) This may explain why the notices allege a failure to warn that persons "*may* be exposed to tobacco smoke," but Proposition 65 requires – and it would be your burden to prove – that the exposures in fact occur.

A third, related, concern, is that even if persons do come into contact with second-hand smoke at the facilities, there will not have been an exposure if the alleged violator can prove that the listed chemical was contained in the ambient air, or is a carcinogen present at levels below state or federal regulatory levels. (Cal. Code Regs., tit. 22, §§ 12504, 12711(a)(1).) The Final Statement of Reasons for section 12504 explains that the "ambient air" exception protects businesses who "are not in a position to control the quality of the ambient air which enters their property, or to avoid exposing people to ambient air." As we noted earlier, we are not aware of evidence that the notice recipients *can* control smoking on the premises. Moreover, it is not clear whether you have tested the levels of any of the listed chemicals in the air. While it would not be your burden initially to disprove these defenses, we believe they are defenses that likely would be raised, and which you must consider before filing any lawsuit.

In addition to our concerns about the merits of your allegations, we believe that you made a material misrepresentation in the notices. The notices state that you provided the Attorney General with written reports prepared contemporaneously with the investigations, supporting photographic evidence, and other evidence. We have received no photographs or what we would consider to be other evidence of the nature that you describe. It is important to correct this statement so that recipients of the notices do not evaluate their litigation risk, or negotiate a settlement, under false pretenses. In fact, as you are aware, a court may review the supporting documents that you did provide to the Attorney General at the conclusion of any lawsuit. If the court determines that they do not provide a credible factual basis for the action, then it may deem the action to be "frivolous" and order sanctions. (Health & Saf. Code, § 25249.7, subd. (h)(2).) Moreover, while the supporting documents are not discoverable, the Attorney General is obligated to maintain them in confidence only "to the full extent authorized in Section 1040 of the Evidence Code." (Health & Saf. Code, § 25249.7, subds. (h)(1), (i).) Evidence Code section 1040 is not a complete bar to disclosure. Rather, it affords the official (the Attorney General, in this instance) a privilege to refuse to disclose information and requires the official to engage in a balancing of the public interest for and against disclosure. (Evid. Code, § 1040, subd. (b)(2).) While we have not yet engaged in such balancing, if you bring litigation in this case, the interest in disclosure may outweigh the interest in secrecy, in which case the privilege against disclosure would not apply.

In sum, while do not express a view on whether the violations alleged in the sixty-day notices in fact are occurring, we question whether at this stage you have established a reasonable basis to conclude that they are. Further, we caution you that sending sixty-day notices that contain misrepresentations, and filing lawsuits without an adequate basis, could constitute unlawful business practices and subject you to action by our Office. (See, e.g. *People v. Brar* (2004) 115 Cal.App.4th 1315.) We hope that you will consider the points we have raised before you proceed with negotiations or file any lawsuit based upon the notices.

Sincerely,



HARRISON M. POLLAK
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc Sixty-Day Notice recipients (see attached list)

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