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October 20, 2015

Danielle Fugere
As You Sow
1611 Telegraph Ave., Suite 1450
Oakland, CA 94612

James Wheaton
Environmental Law Foundation
1736 Franklin Street, 9th Floor
Oakland, CA 94612

Donna Solen
Center for Food Safety
660 Pennsylvania Ave., SE, # 302
Washington, DC 20003

RE: Response to Letter Dated January 23, 2015

Dear Ms. Fugere, Mr. Wheaton, and Ms. Solen:

I am responding to your letter of January 23, 2015 which presented several questions about the letter sent by then-Deputy Attorney General Edward G. Weil to Roger Lane Carrick and Michele Corash dated September 28, 2001 concerning the Attorney General Office's evaluation of the amount of naturally occurring lead in chocolate. ("2001 Letter" (Copy attached hereto).)

You have asked the Attorney General's Office to provide a response to certain statements you make concerning the 2001 Letter. You state:

- (1) that the 2001 Letter is limited to the facts of the case before the Attorney General at the time of its investigation including facts available concerning the source of lead in chocolate;
- (2) that additional studies concerning the source of lead in chocolate have been released since the 2001 Letter, such that the naturally occurring level for chocolate stated in the 2001 Letter is no longer supported; and
- (3) that the 2001 Letter is not a de facto regulation or legally binding opinion on other plaintiffs and defendants concerning levels of "naturally occurring" metals in chocolate products.

Our response is set forth below.

(1) As the 2001 Letter indicates, after receiving a sixty-day notice under Proposition 65 in May, 2001 concerning lead in chocolate, the Attorney General's Office conducted its own investigation to determine the amount of lead that it believed was naturally occurring in chocolate pursuant to Title 22, California Code of Regulations, section 12501 (now Cal. Code Regs., tit. 27, § 25501.) The investigation included our own research, consultation with independent experts, analytical testing of numerous products, and the review of substantial information provided by the representatives of both the noticing party and the alleged violators. The 2001 Letter states explicitly that its conclusions were "[b]ased on the information we have obtained." The 2001 Letter and its conclusions were necessarily based on the information available to us at the time, and reviewed as part of our investigation, and our conclusions are limited to the information we reviewed at the time.

(2) You state in your letter that additional studies concerning the source of lead in chocolate have been released since the 2001 Letter. You enclose a copy of two such studies. We agree that Proposition 65 is designed to accommodate developing science, and that there has been additional research on the source of lead in chocolate that was not available to us when we issued the 2001 Letter. Without doing a complete investigation of the information you provided, as well as any additional information available, we are not in a position to offer an opinion as to whether the levels stated in our Letter continue to represent an appropriate naturally occurring level for lead in chocolate. This is an issue that would have to be determined based on all of the currently available information.

(3) Our 2001 Letter was an evaluation by our Office based on the information we reviewed at the time. We issued the letter to explain the Attorney General's exercise of prosecutorial discretion not to commence a civil action at that time. The letter does not constitute a regulation and does not control subsequent litigation.

Sincerely,



SUSAN S. FIERING
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

EXHIBIT

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE



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September 28, 2001

Roger Lane Carrick
The Carrick Law Group
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Los Angeles, CA 90071-3406

Michele Corash
Morrison & Foerster
425 Market Street
San Francisco, CA 94105-2482

RE: Proposition 65 Notices Concerning Hershey and Mars Chocolate

Dear Mr. Carrick and Ms. Corash:

In May of this year, we received sixty-day notices under Proposition 65 from the American Environmental Safety Institute, alleging that certain chocolate products made by Hershey Foods Corporation and Mars, Incorporated, require warnings under Proposition 65 due to the presence of lead and cadmium. Because these products are consumed by millions of Californians, we determined that the matter should be investigated especially carefully. Our investigative efforts have included our own research, consultation with independent experts, analytical testing of numerous products, and the review of substantial information provided by the representatives of both the noticing party and the alleged violators.

As you know, Proposition 65 does not apply to low levels of chemicals in foods that are deemed "naturally occurring" within the meaning of California Code of Regulations, Title 22, section 12501. Under this regulation, the company providing a food product is not responsible for "naturally occurring chemicals" in food if certain criteria are met. This regulation was designed to avoid ubiquitous warnings on many foods due to the existence of small quantities of some chemicals in the air, ground, and water, which results in their being present in food. The validity of the regulation was upheld in *Nicolle-Wagner v. Deukmejian* (1991) 230 Cal.App.3d 652. To fall within the terms of this regulation, however, the chemical cannot be present in the food as the result of any "known human activity," and it must be reduced to the "lowest level currently feasible" through processing, handling, or other techniques.

Roger Lane Carrick
September 28, 2001
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Based the information obtained in this investigation, we have concluded that the lead present in the products is not present due to known human activity, as that term is used in section 12501. In considering whether lead is present at the "lowest level currently feasible" within the meaning of section 12501, we note the recent lead levels proposed by the Committee on Cocoa Products and Chocolate of the Codex Alimentarius Commission of the World Health Organization. That committee proposed a standard of 1 ppm for cocoa power, 1 ppm for chocolate liquor and 0.1 ppm for cocoa butter. Although that standard was not adopted by the full Codex Commission, we believe that products meeting those strict levels qualify as being within the "lowest level currently feasible" under the regulation. Accordingly, based on the information we have obtained, lead levels falling under those levels would qualify as "naturally occurring" under the regulation.

In addition, the notices we received alleged that the products required warnings based on the presence of cadmium. While cadmium is a listed carcinogen, regulations specifically provide that it poses no significant risk of cancer where the exposure is through ingestion. (22 CCR § 12707(b)(3).) Cadmium also is a listed reproductive toxicant, and the Office of Environmental Health Hazard Assessment has proposed a regulatory safe-harbor level, i.e., the level deemed to be 1-1,000th of the No Observable Effect Level (for reproductive toxicity), of 4.1 micrograms per day. (See June 8, 2001 Notice of Proposed Rulemaking.) Based on the information we have obtained, the products in question fall well below this level, even before determining whether the chemical is "naturally occurring."

It is unusual for the Attorney General to publicly state that he has reviewed a matter under Proposition 65 and determined that it is not appropriate to proceed on the claim. We expect such public statements to continue to be extremely rare. Nonetheless, because these products are consumed by so many Californians, we think it is important for the public to be aware that the Attorney General's decision not to commence a civil action in this matter is based on a conclusion that the action would lack merit, after thorough consideration by this office.

Sincerely,



EDWARD G. WEIL
Deputy Attorney General

For BILL LOCKYER
Attorney General