

RETAIL FOOD WARNING PROGRAM
PRE-REGULATORY DRAFT
FOR DISCUSSION PURPOSES ONLY

INTRODUCTION

This is a pre-regulatory proposal provided for stakeholder discussion and comment. It may change significantly prior to any formal regulatory proceeding. Possible amendments are shown in underline/strikeout format, the existing regulation is not duplicated here.

These draft amendments would be added to the existing “safe harbor” warning regulations found in Title 27, Cal. Code of Regulations, section 25601 so that any manufacturer/retailer that chooses to participate in the warning program may do so. These are voluntary actions and all food manufacturers or retailers are still free to provide a warning via any other “safe harbor” method or any other method that provides a clear and reasonable warning.

OEHHA intends for these draft amendments to generate more and better information for the public and provide additional safe harbor warning content and methods for manufacturers and retailers of foods sold at the retail level. The draft amendments create a food warning program that allows manufacturers to comply with the Proposition 65 warning requirement by communicating the necessary product-specific warning information to participating retailers through a central web-based system. The draft amendments provide retailers with a source for obtaining product-specific warning content and a “menu” of warning methods from which they can choose one or more methods for communicating the warning message that best suits their business need. In addition to the warning materials that would be provided in the retail stores, the public would also have access to the web-based database, which would contain product-specific warning information that is easily searched by product name, manufacturer, retailer, or chemical name.

Note: These draft amendments are intended to comply with *Ingredient Communication Council v. Lungren et al.* where the court determined that in order to comply with the Proposition 65 warning requirement, a consumer must not have to seek out a warning message: “An invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning about a specific product.”¹

¹ *ICC v. Lungren et al.* (1992) 2 Cal. App. 4th, 1480, at pg. 1494

California Environmental Protection Agency
OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT
Possible Amendments to
TITLE 27, CALIFORNIA CODE OF REGULATIONS
ARTICLE 6. Clear and Reasonable Warnings

§ 25602 Definitions

... (d) "Food Provider" means a manufacturer, producer, processor or distributor of a food, other than a restaurant or other facility as defined in Health and Safety Code Section 113789(a).

(e) "Food Retailer" means a person or business that sells food directly to consumers in a retail setting, not including a restaurant or other facility as defined in Health and Safety Code Section 113789(a).

(f) "General information sign" means a sign that is posted in one or more locations within a retail food store that is likely to be seen by customers prior to purchase of a food. Locations may include, but are not limited to, the point of sale, checkout counter, floor display or at store entrances, as long as such locations ensure that the sign is likely to be seen by customers prior to purchase of a food. The content of the General Information Sign is established by the lead agency pursuant to subsection 25603.4(e)(1)(d) and is available for download from the Retail Food Warning Program Website....

...(j) "Retail Food Warning Program" means the food warning program established in Section 25603.4. ...

(l) "Small Food Retailer" means, for purposes of this Article only, any retailer with less than 1500 square feet of retail space devoted to the sale of food.

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Section 25249.6, Health and Safety Code

§ 25603.4 Warning Program for Foods Sold at Retail Establishments

(a) This section establishes a voluntary pilot program (hereafter referred to as the “Retail Food Warning Program” or the “Program,”) that persons subject to the Act may choose in addition to existing methods authorized under Section 25603.3, for providing warnings for exposures to listed chemicals in foods sold at the retail level. Existing methods of providing a warning may also be used by participants in this program, to the extent that they comply with the provisions of this section. This food warning program may be used by Food Providers and Food Retailers, Small Food Retailers, and others in the chain of distribution to more easily provide and access information concerning the content of warnings that are required for exposures to listed chemicals that occur through foods. This section also establishes certain methods of providing warnings for exposures to listed chemicals in food that are deemed “clear and reasonable” for purposes of the Act.

(b) Section 25603.4 will become effective on the date the lead agency publishes a Notice in the California Regulatory Notice Register and on its website announcing that the database established pursuant to subsection (e)(1) of this section is operative and publicly available.

(c) Section 25603.4 will become inoperative on January 1, 2014 unless it is readopted or amended by the lead agency prior to that date.

(d) Food Provider:

1. A Food Provider, as defined, shall be deemed to have satisfied its warning obligations under Health and Safety Code Section 25249.6, as to foods that require a warning under the Act, if such Food Provider completes ALL of the following steps prior to the alleged exposure:

(A) Register to participate in the Retail Food Warning Program on the website established by the lead agency or its designee,

(B) Provide all the information requested on the website, including, but not limited to;

i. the name and address of the Food Provider; name, brand, Universal Product Code (UPC) or other identifying code or similar information for all of its foods that it believes in good faith require a warning under the Act; AND

ii. EITHER the names and Chemical Abstracts Service(CAS) numbers, if available, for each listed chemical known to be present in the food at a level that the Food Provider believes in good faith may require a warning under the Act; OR

iii. The Food Provider may provide the names and CAS numbers of three chemicals in the food that it believes in good faith may require a warning under the Act. The Food Provider shall select the three chemicals with the lowest daily intake levels established in regulation, or when no such intake level has been provided, the Food Retailer shall list the three chemicals with the highest concentrations in the food

(C) Update its information on the website at least annually;

(D) Update its information on the website within 30 days of becoming aware that any of its foods requires a warning under the Act that it had not previously identified on the website,

(E) Upload to the Retail Food Warning Program website proposed product-specific warning message content for each of its foods that require a warning under the Act.

i. All food warnings must prominently and clearly state that the food contains a listed chemical and must provide a clear and reasonable warning consistent with the provisions of this Article.

ii. Food warning content may include explanatory information provided by the U.S. Food and Drug Administration or any other appropriate state or federal regulatory agency, or any other information approved by the lead agency.

iii. The lead agency reserves the right to disapprove any product-specific warning other than as set forth in Section 25603.2 and Section 25603.3, by providing written notice to the person submitting the proposed warning message explaining the reason for the disapproval.

iv. Receipt of such a disapproval notice may not be used as evidence of non-compliance with this section where the person receiving such notice modifies the warning message to correct the insufficiencies identified in the notice and resubmits the modified warning to the lead agency within thirty (30) days.

v. Food Providers may not propose product-specific warning content for exposures to mercury in fresh fish. The Food Provider must use the exact warning content that will be made available by the lead agency.

(F) Certify that it has notified, in writing, each Food Retailer, distributor or other person to which it **directly** sells a food subject to the warning requirements of the Act, that:

i. a warning is required for the food, AND

ii. it has provided that person with the warning message for the food and the Retail Food Warning Program website address,

(G) Timely pay any fees established by the lead agency to participate in the Retail Food Warning Program.

2. A distributor or other business in the chain of distribution for a food product shall be deemed in compliance with this section and Health and Safety Code Section 25249.6 for an exposure caused by any food product sold at a retail facility for which the manufacturer or any other business in the chain of distribution has provided warnings in compliance with Section 25603.4(d) unless it takes actions that render the product-specific warning inapplicable, inaccurate, or incomplete, including:

(A) Cooking, reprocessing, or otherwise altering the product such that the chemical composition of the product has changed after the product has left the control of the manufacturer;

(B) Repackaging the product after it has left the control of the manufacturer so that the product is no longer as described by the manufacturer and/or does not match the product-specific warning materials provided by the manufacturer to the lead agency; or

(C) Altering, omitting, destroying, removing, or otherwise making the product-specific warning information unavailable or inaccessible to consumers.

3. Pursuant to Health and Safety Code Section 25249.11(f), to the extent practicable, the costs of developing, printing and distributing warning materials such as signs, notices, software, pamphlets or shelf-tags shall be paid by the Food Provider rather than by the Food Retailer. In the alternative, Food Providers may reimburse retailers for reasonable and actual costs incurred in producing such materials.

4. Where a Food Provider fails to comply with any of the requirements in this subsection for participating in the food warning program, but a clear and reasonable warning has been provided to the consumer for that food prior to exposure, no violation of the warning requirements of Health and Safety Code Section 25249.6 has occurred.

(e) Food Retailer:

1. A Food Retailer shall be deemed to have satisfied its warning obligations under Health and Safety Code Section 25249.6 for all foods sold by the Food Retailer if such Food Retailer completes ALL the following steps:

(A) Register to participate in the Retail Food Warning Program on the website established by the lead agency,

(B) Check the Program website at least once every three months following the effective date of this section to determine if there are any foods sold by the Food Retailer that require a warning, or any new food-specific warnings that have become available;

(C) Update its in-store information within 30 days after determining that any new warnings are required,

(D) Conspicuously post a General Information Sign, as defined, in one or more locations within the retail establishment where it is reasonably expected to be seen by consumers prior to purchase of any food product requiring a warning.

i. The General Information Sign must be no smaller than 8 1/2 inch by 11 inch and printed in no smaller than 28 point type.

ii. The content of the General Information Sign must be obtained from the Retail Food Warning Program website. The version used must be consistent with the method of warning chosen by the Food Retailer in subsection 25603.4 (e)(1)(E).

iii. The Food Retailer must post any new or revised General Information Sign within 60 days after it becomes available on the Retail Food Warning Program website

(E) Provide to its customers all product-specific warning messages available for download from the Retail Food Warning Program website, that apply to foods sold by the Food Retailer, using one or more of the following approved methods:

i. A product-specific warning provided with or on the cash register receipt.

a. The entire warning message must be in a legible print font no smaller than the largest type size used anywhere on the receipt.

b. Each food subject to the warning requirement must be separately identified on the face of the cash register receipt.

c. The printed warning message must contain the Retail Food Warning Program website address and either the warning language established in Section 25603.2, OR, product-specific warning language available on the Retail Food Warning Program website.

d. Identical warning messages for different food products purchased by a consumer need not be repeated on the cash register receipt.

ii. A product-specific warning provided on or with the shelf-tag for the product at each point of display of the product.

a. The entire warning message must be in a print font no smaller than the largest type size used for other information on the shelf-tag.

b. The printed warning message must contain the Retail Food Warning Program website address and either the warning language established in Section 25603.2, OR, product-specific warning language available on the Retail Food Warning Program website.

iii. A product-specific warning in a pamphlet offered to each customer at the checkout counter prior to purchase of the product.

a. The pamphlet must contain the brand name or other similar identifying information for each product sold by the Food Retailer that requires a warning under the Act and full product-specific warnings for each named product.

(1) The pamphlet should include background information concerning Proposition 65, safe harbor warning messages and food or chemical-specific warning messages where appropriate, with an appendix listing all affected products either alphabetically, or grouped alphabetically under product categories.

(2) Where all foods of in a particular category require a warning, such as alcoholic beverages, the pamphlet need not identify each and every product that requires a warning but must state that all products in the category require a warning.

b. Where a Food Provider includes a Proposition 65 identifier on the label of a food or the Food Retailer includes such an identifier on a shelf-tag at each point of display of the food product, that identifier may be used in lieu of the appendix listing all affected products, with this method of transmitting the warning message to assist consumers in identifying foods requiring a warning. To ensure clarity and consistency and avoid consumer confusion, all on-product or shelf-tag Proposition 65 identifiers must be approved in advance by the lead agency.

c. An adequate number of pamphlets must be made readily available to the consumer in a conspicuous location at each point of sale or check-out counter within the retail store. Store employees need not hand a pamphlet to each consumer.

d. To ensure clarity and consistency and avoid consumer confusion, the content and format of any pamphlet must be approved in advance by the lead agency.

iv. A product-specific warning provided via any electronic device or process that automatically provides the warning to the consumer while the consumer is in the store, without requiring the consumer to seek out the warning.

a. Where a Food Provider includes an on-product or shelf-tag Proposition 65 identifier, that identifier may be used in conjunction with this method of transmitting a warning message to assist consumers in identifying foods requiring a warning. To ensure clarity and consistency and avoid consumer confusion, all on-product Proposition 65 identifiers must be approved in advance by the lead agency.

b. Electronic device warning methods must be approved in advance by the lead agency.

v. Product-specific warnings provided via an in-store compendium of the warning information downloaded from the Retail Food Warning Program website in conjunction with an on-product or shelf-tag identifier for each food.

a. The compendium must be easily accessible to a consumer seeking to access the information.

b. More than one copy of the compendium must be provided in large stores or where the level of public interest in the information warrants the provision of additional copies to avoid unnecessary delays for consumers seeking to access the information.

vi. Product-specific warning content or methods required by a court order or settlement for that product.

vii. A product-specific warning provided via any other method approved in advance by the lead agency.

(F) Timely pay any participation fees established by the lead agency.

2. For the purpose of this section, where a Food Retailer or Small Food Retailer as defined, substantially complies with all the provisions of this section, a limited opportunity to cure exists where there is a minor deviation from the requirements of this section such as the short-term absence of a required sign, icon or other warning materials, or interruption of an electronic device such as software problems or internet connectivity issues, which:

(A) Is not the result of intentional neglect or disregard for the requirements of this section, and

(B) Is not avoidable using normal and customary quality control or maintenance, and

(C) Is corrected immediately upon discovery or notification, or within a reasonable time if software or equipment must be repaired or replaced, and

(D) Is not recurrent.

3. Where a Food Retailer fails to comply with any of the requirements for participating in the Retail Food Warning Program, but a clear and reasonable warning is provided to the consumer for a food product, no violation of the requirements of Health and Safety Code Section 25249.6 has occurred.

4. Notwithstanding the foregoing, a Food Retailer will not be deemed to comply with Health and Safety Code Section 25249.6 as to products it does not manufacture, where it takes actions that render the product-specific warning for such food product inapplicable, inaccurate, or incomplete, including:

(A) Cooking, reprocessing, or otherwise altering the product such that the chemical composition of the product has changed after the product has left the control of the manufacturer, processor, producer or distributor;

(B) Repackaging the product so that the product is no longer as described by the manufacturer and/or does not match the product-specific warning materials provided by the manufacturer, processor or producer to the lead agency; or

(C) Altering, omitting, destroying, removing, or otherwise making the product-specific warning information unavailable or inaccessible to consumers.

(D) A Food Retailer that has taken any of the actions described above with regard to a food product that requires a warning under Health and Safety Code Section 25249.6 will nonetheless be deemed to have satisfied its warning obligations if the retailer has provided the General Information Sign described in subsection 25603.4 (e)(1)(D) above and provides a product-specific warning for such food product in compliance with subsection 25603.4(e)(1)(E).

(E) Where food is prepared in accordance with manufacturer direction, and the manufacturer has provided a product-specific warning in accordance with this section for food so prepared (e.g., the addition of water to a concentrated soup or drink mix), then this section shall not apply to the retailer, who complies with 25603.4(e)

5. Nothing in this section releases a Food Retailer from its duty to provide a clear and reasonable warning for an exposure to a listed chemical in a food when one is required and the Food Retailer has received actual, written notice from a Food Provider that a warning is required for that food and thereafter fails to provide a clear and reasonable warning.

6. **Small Food Retailers** – Notwithstanding the foregoing, a “Small Food Retailer” as defined, shall be deemed to have satisfied its warning obligations under Health and Safety Code Section 25249.6 for all foods sold by the Small Food Retailer if such Small Food Retailer completes ALL the following steps:

(A) Register to participate in the Retail Food Warning Program on the website established by the lead agency,

(B) Conspicuously post a General Information Sign, as defined, in one or more locations within the retail establishment where it is reasonably expected to be seen by consumers prior to purchase of any food product requiring a warning,

(C) The General Information Sign must be no smaller than 8 1/2 inch by 11 inch and printed in no smaller than 28 point type,

(D) The content of the General Information Sign for Small Food Retailers can be obtained from the Retail Food Warning Program website

(E) The Small Food Retailer must post any new or revised General Information Sign within 3 months after it becomes available on the Retail Food Warning Program website.

(f) Lead Agency Responsibilities:

1. The lead agency or its designee shall, to the extent that funds are available and have been appropriated by the Legislature develop and maintain a website capable of containing the Retail Food Warning Program information described in this section and make all such information available at no cost to the general public.

2. The lead agency shall to the extent that funds are available and have been appropriated by the Legislature:

(A) Approve, approve with conditions requiring specific modifications, or reject requests for lead agency approval described in this section.

i. All requests submitted to the lead agency under this section shall be made in writing.

ii. For any response other than unconditional approval, the lead agency shall provide the requester with an explanation, and allow the requester 30 days to modify and resubmit the request or to seek reconsideration of the response.

iii. Requests for approval and lead agency responses, other than unconditional approval under this section, and all communications related to such requests, shall remain confidential unless confidentiality is waived by the requesting party and shall be inadmissible in any enforcement action arising from an assertion that warnings provided pursuant to this section are not clear and reasonable under Health and Safety Code Section 25249.6.

iv. The lead agency must respond to all requests for approval under this section within 90 days of receipt, which may be extended by the lead agency for good cause, with written notice to the requester.

v. Food Providers, Food Retailers will not have safe harbor protection under this Program for any items that have been submitted to, but not approved by the lead agency.

(B) Develop appropriate content, format and placement guidance for General Information Signs.

(C) Establish fees to defray costs for all lead agency functions described in this section.

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.6 and 25249.11, Health and Safety Code