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VIA E-MAIL and HAND DELIVERY

Carol Monahan-Cummings, Chief Counsel
Fran Kammerer, Staff Counsel
Office of Environmental Health Hazards Assessment
1001 I Street, MS-23B
Sacramento, California 95812-4010

Re: Comments of the California Restaurant Association
Proposition 65 Regulatory Update Project: Warnings for Food Exposures

Dear Ms. Monahan-Cummings and Ms. Kammerer:

The California Restaurant Association represents over 88,000 eating and drinking establishments. California's restaurant industry provides 1.4 million jobs, and expects to add 1.9 million more jobs by 2016. Each year, California's restaurant industry generates revenues over \$54 billion, and pays more than \$4.5 billion in taxes.

CRA and the restaurant industry are committed to Proposition 65 compliance. That is why CRA urges OEHHA to preserve the safe-harbor text for restaurants adopted in 14 CCR §12601(b)(4)(C). The safe-harbor provision is good for our patrons and good for our members. The reasons for it are as valid today as they were twenty years ago.

The Final Statement of Reasons for Section 12601 relied on the ballot arguments for Proposition 65 to determine the voters' intentions. Those intentions -- rather than, for example, the profit motives of professional plaintiffs -- should continue to govern Proposition 65's interpretation and implementation.

1. Proposition 65 Warning Regulations Should Provide Safe Harbors.

When the existing regulations for Clear and Reasonable Warnings were adopted in 1988, OEHHA's predecessor Health and Welfare Agency recognized that reasonable people will "differ on what is clear, and what is reasonable." See Revised Final Statement of Reasons, 22 Cal. Code of Regs. Division 2, §12601, p. 7-8:

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Even with the minimum requirements set for in subsection (a), a business may not be certain that its warning, as a matter of fact, will protect it from liability. Since the Act imposes civil liability where a warning is found not to be clear and reasonable, the Agency has concluded that it is necessary to provide businesses with an opportunity to be certain that the warning which they give is reasonable or clear, or both.... The "safe harbor" [provides] the businesses choosing to use them reasonable certainty that they will not be subjected to an enforcement action over the warning they provide."

This reasoning is correct: since Proposition 65 is enforced only through civil litigation, businesses must know how to prevent litigation by complying. The Court of Appeal for the Third District recognized, in *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 343, that every business faces a "Hobson's choice" when deciding how to comply with Proposition 65: "provide a stigmatizing warning ... or risk having to defend itself against being slapped with an injunction and costly civil penalties." It would be manifestly unjust to take away even this choice between evils by requiring businesses to provide stigmatizing warnings *without* any relief from litigation.

If Proposition 65's warning requirements were enforced through state inspections or trade-group certifications, a restaurant could rely on inspectors' guidance to experiment with various warnings tailored to its menu and clientele. But Proposition 65 is enforced instead by plaintiffs' attorneys, whose motives and opinions differ dramatically. To take the advice of one private plaintiff cannot protect a business from litigation by other private plaintiffs -- or even by the original plaintiff when it develops a new opinion as to what is "reasonable." Thus, California's appellate courts recognize the safe-harbor warning regulations as a proper exercise of the regulatory power. *See, e.g., In re the Vaccine Cases* (2d Dist. 2005) 134 Cal.App.4th 438; *Environmental Law Foundation v. Wykle* (1st Dist. 2005) 134 Cal.App.4th 60.

Safe-harbor warnings also carry out the voters' intentions for Proposition 65. The argument in favor of Proposition 65, included in the ballot materials at p. 54, promised that Proposition 65 would deliver "action, with requirements that are clear, simple, and straightforward." Businesses can act on Proposition 65 only with the help of clear, simple, and straightforward safe harbors.

Unpredictable enforcement, based on the various opinions of various plaintiffs undermines confidence in Proposition 65. Unpredictable enforcement also undermines compliance. There is no reason for a business to post a stigmatizing warning if it cannot be assured that, by doing so, it is complying with the law. Restaurant owners who want to comply with Proposition 65 must overcome their natural reluctance to post a warning that suggests to many patrons that their food is unsafe. How much more difficult that would be, if there were no particular reason to think that the warning meets the law's demands!

2. The Current Restaurant Safe-Harbor Warning Is Accurate.

The current regulation allows for a short, generally-stated warning about foods in restaurants. Given the variety of foods and food sources, and the wide range of inconclusive data about the foods and the listed chemicals that may be in them, the current safe-harbor warning provides the most accurate warning possible.

A healthy diet is a varied diet. The first “key recommendation” of the *Dietary Guidelines for Americans* (U.S. Dept. Health and Human Services, U.S. Dept. of Agriculture, 2005) is to consumer a *variety* of foods.

California’s restaurateurs provide an unimaginable variety of meals and cuisines for their patrons. Restaurant menus may change daily based on what is fresh at the market, or may provide a menu that is reliable through the seasons by obtaining out-of-season foods from different locations. Section 12601 therefore provides a “special ‘safe harbor’ warning for restaurants.” See 1988 Revised Final Statement of Reasons (FSOR), pp 27-28:

Due to the difficulties associated with determining whether particular foods received from diverse sources and prepared or cooked in such an establishment contain listed chemicals, the Agency believes that it is reasonable for such establishments to warn generally that the foods or beverages sold or served in the establishment may contain listed chemicals.

Moreover, “[C]ases of produce from different, wide-ranging and even international sources, some of which may require a warning and others not, are frequently mixed at the point of sale.” FSOR, *supra*. Because foods and menus vary so widely, there is no effective way to determine which meals, or which dishes, may require Proposition 65 warnings.

Therefore, the current regulation allows restaurants to post this warning where patrons are reasonably likely to see it: “WARNING: Chemicals known to the State of California to cause cancer, birth defects or other reproductive harm may be present in the foods or beverages sold or served here.” The current, general warning is the only way to make an accurate statement about the presence of listed chemicals in any particular dish, and the likelihood that those listed chemicals are present at a significant level. They may be present, and they may be significant. We don’t know.

For this reason, the current warning regulation does not require specific warnings about specific levels of specific listed chemicals in specific foods. That information is voluminous and hotly contested. As an example, in over 20 years OEHHA has never adopted a MADL for methyl mercury. OEHHA’s draft MADL has been at issue in litigation for 11 years and is still on appeal. When OEHHA’s crackerjack team of toxicologists have not had the information necessary to establish specific information about specific listed chemicals, how could a Mom-and-Pop café be expected to do it? The current warning is as accurate as it can be, not only because of the variety of foods but because of the variety and inconclusiveness of the data.

3. The Current Restaurant Safe-Harbor Warning Is Within OEHHA's Authority And Expertise.

Some litigants in Proposition 65 cases have proposed warnings that include information about the nutritional benefits of foods, as well as the possible presence of listed chemicals. OEHHA at one time considered proposing acrylamide warnings that would include "balanced" information about whole grains and cooking methods, as well as notice of the possible presence of acrylamide in toasted cereals, fried potatoes, and prune juice.

The California Restaurant Association recognizes the good intentions of this proposal. It is good for everyone to have information about health eating. However, nutrition science is as varied and contested as toxicology. OEHHA has the expertise to evaluate the toxicological data. But OEHHA has neither the expertise nor the authority to regulate nutritional information generally.

4. The Current Restaurant Safe-Harbor Warning Is Best For Consumers

The patrons of California's restaurants are even more diverse than the menus and the science. They vary not only in their level of interest in Proposition 65 chemicals, but also in their desire for additional information about their food. Even among those with strong interest, the relevant information varies widely. An overweight, 60-year-old man with a family history of heart disease will have very different concerns from a pregnant woman in her 20's. People with diabetes will have different concerns from people with asthma -- or celiac disease, or a vegan diet. All of them will take the steps they find appropriate to obtain the information they want about their food.

The current safe-harbor regulation does not, and cannot, provide all the information people want or need. The regulation was wisely intended "to stimulate inquiry by the persons receiving the warning." *See* FSOR, pp. 28.

The information now available to consumers is more voluminous, more easily searchable, and more readily accessible than anyone imagined in 1988. These changes only make the reasoning of the current regulation more persuasive.

5. Conclusion

Restaurants cannot comply with Proposition 65 if they don't know how. For twenty years, OEHHA has provided specific guidance for the text and placement of warning signs that comply. There is no reason to stop now.

That safe-harbor warning should be accurate. Given the variety of foods and cuisines available in California's restaurants, and the wealth of conflicting and inconclusive data about that food, the current warning is the most accurate possible. Adding nutritional information to "balance"

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the warning cannot answer the varied concerns of California's diverse population, and is outside OEHHA's expertise and authority.

The California Restaurant Association urges OEHHA to preserve the safe-harbor warning provided in existing Section 12601.

Respectfully submitted,

GREENBERG TRAURIG LLP

By: 

Lisa L. Halko

Attorneys for the California Restaurant Association

cc: Matt Sutton
Lara Dunbar