



January 25, 2016

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

**Re: PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6 -
CLEAR AND REASONABLE WARNINGS**

Dear Ms. Vela:

The California Restaurant Association ("CRA") appreciates the opportunity to provide comments to the Office of Environmental Health Hazard Assessment ("OEHHA") regarding its November 27, 2015 Notice of Proposed Rulemaking and proposed repeal and replacement of the Proposition 65 regulations on Clear and Reasonable Warnings found in Title 27, Article 6 of the California Code of Regulations.

CRA is the oldest restaurant association in the nation. California is home to more than 90,000 eating and drinking places that ring up more than \$58 billion in sales and employ more than 1.4 million workers, making restaurants an indisputable driving force in the state's economy. OEHHA's November 27, 2015 proposed revision of the Proposition 65 warning regulations would impact one of the largest and most important sectors of the California economy.

Because most restaurants in California are owned and operated as small businesses, and because they have been regularly targeted by private enforcers of Proposition 65, OEHHA's proposal also has the potential to increase the litigation risk that restaurants face. Moreover, restaurants vary significantly in their settings and services, and the regulations should take a broader view of compliance options. CRA's comments and proposed revisions are intended to address uncertainties in the proposed language, provide appropriate flexibility for restaurants to achieve safe harbor compliance, and thereby reduce the risk of unnecessary and costly litigation.

CRA is simultaneously submitting more general comments on the proposed regulations as part of the California Chamber of Commerce coalition. We write separately to provide additional comments specific to the restaurant industry in California.

As we noted in our comments on the prior OEHHA proposal dated January 16, 2015, the current safe harbor language for restaurants found in Section 25603.3(a) of the California Code of

Regulations has served the restaurant industry well, despite some challenges. Based on many years of experience under the current regime, however, we think a more detailed safe harbor warning regulation—and in particular, multiple optional methods for communicating the warning—would help restaurants ensure that they are in compliance with the law and provide useful information to consumers.

We believe that OEHHA's current proposal for the methods and wording of the safe harbor warning for restaurants is a good start, and we appreciate the revisions made to the draft pre-regulatory proposal in response to CRA's comments. That said, there is still room for improvement. Our specific comments follow:

1. Comments On Proposed Sections 25607.5 and 25607.6

CRA has a number of concerns with the current draft of proposed Sections 25607.5 and 25607.6. Below are proposed revisions to these sections with proposed deletions shown in strikethrough text, and proposed additions underscored. Following the proposed revisions are explanations of each proposed change.

1.1 Proposed Revisions

§ 25607.5 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants - Methods of Transmission

(a) A warning for foods or non-alcoholic beverages that are sold or served by restaurants or other food facilities, as defined in Health and Safety Code Section 113789, and that are intended primarily for immediate consumption on or off premises, meets the requirements of this article if it complies with the content requirements in Section 25607.6 and is provided using one or more of the following methods:

(1) An 8 1/2 by 11 inch or 10 by 10 inch sign, printed in no smaller than 28-point type placed so that it is readable and conspicuous to most customers before they place an order or as they enter each public entrance to the restaurant or facility where food or beverages may be consumed are sold or served.

(2) A notice or sign no smaller than 5 by 5 inches, printed in no smaller than 20-point type placed at each point of sale at or on the counter or on a wall behind, adjacent to, or parallel to the counter where consumers place orders or pick up food or beverage items so as to assure that it is readable and conspicuous.

(3) On any menu or list, including a menu board, describing food or non-alcoholic beverage offerings, in a type size no smaller than the largest type size used for the names of general menu items.

(4) On a poster providing the nutritional content of foods served in the restaurant, in a bordered box no smaller than 5 by 5 inches, so long as the poster is placed in accordance with subsections (1) or (2), above.

(b) The warning must be provided in English and in any other language used consistently to provide consumer information (as opposed to names of individual foods or preparation styles, ambiance or decor, or employee information) on other signage or menus provided on the premises.



§ 25607.6 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Content

(a) A warning at restaurants or other facilities that sell food or beverages intended primarily for on-site immediate consumption on or off premises, not including alcoholic beverages, meets the requirements of this article if it is provided using one or more of the methods required in Section 25607.5 and includes all the following elements:

- (1) The word “WARNING” in all capital letters and bold print.
- (2) The words, “Certain foods and beverages sold or served here can expose you to chemicals such as (for example, acrylamide in many fried or baked foods, and mercury in certain fish) that are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/restaurant.”

1.2 Explanation of Proposed Revisions

The first sentence of proposed Section 25607.5(a) and the first sentence of proposed Section 25607.6(a) should be harmonized to refer to food or beverages intended primarily for immediate consumption, whether on or off the premises of the restaurant. Indeed, the phrase “primarily intended for immediate consumption on or off premises” is used in the Proposition 65 statute, as recently amended, at Section 25249.7(k)(1)(B) of the Health & Safety Code, and so the regulations should be clear that this is the category of potential exposures to which these safe harbor methods and content apply. We do not see the reason for the different formulations of the same concept that are used in these two sections. As you know from CRA’s prior comments, we believe it is important to cover take-away, delivery, or drive-thru services—very common methods of food service and practices of restaurants. Whether the foods and beverages are consumed at the restaurant or elsewhere, these methods of transmission and the same warning language should apply.

Proposed Section 25607.5(a)(1) is unnecessarily restrictive with respect to the dimensions of the sign. Many restaurants have existing Proposition 65 warning signs that are 10 by 10 inches, which actually provides for a larger area (100 square inches) than an 8.5 by 11 inch sign (93.5 square inches). The 8.5 by 11 inch dimension should be retained because it is easy for restaurants to produce using standard paper and printers, but flexibility should also be provided for those restaurants that wish to use the 10 by 10 inch format that is already in wide use. Many restaurants have built fixtures or frames that fit a 10 by 10 inch sign and should not have to redesign these or purchase new fixtures or frames to fit an 8.5 by 11 inch sign.

Proposed Section 25607.5(a)(1) requires a warning sign to be placed at “each public entrance to the restaurant.” Many food facilities have more than one public entrance. Some, such as in food courts or stands, have no discernible entrances. OEHHA’s proposal also creates uncertainty around what constitutes a “public” entrance. For example, some restaurants may have infrequently used back doors or secondary means of egress that are used primarily by employees, delivery personnel, and individuals other than restaurant customers but that are occasionally used by some customers.

Section 25249.11(f) of the Health & Safety Code recognizes that warnings “need not be provided separately to each exposed individual.” This principle is restated in proposed Section 25600(e) of the proposed regulations. Customers frequent many restaurants, and with great regularity, such that it is unnecessary to provide a warning to every customer on every visit. To strike a more appropriate balance, CRA proposes revising subsection (1) to require that the sign be placed so that it is readable and conspicuous to “most” customers, and by permitting flexibility such that the sign is made readable and conspicuous as most customers either “enter the restaurant” or “before



they place an order.” This helps solve the problem of overkill by eliminating the requirement that signs be placed at emergency exits, or at pick-up windows where customers receive food they have already ordered after being provided with a warning. Without such reasonable revisions, California’s restaurants would be cluttered with Proposition 65 warning signs placed in many unnecessary locations.

CRA also proposes that, for the sake of consistency and for the reasons noted above concerning foods consumed off premises, the term “may be consumed” should be replaced by “are sold or served.”

Proposed Section 25607.5(a)(2) is unnecessarily burdensome with respect to the placement of the warning. By using the phrase “placed at each point of sale,” OEHHA is creating the

potential for litigation over the precise meaning of the term “each point of sale.” It could be construed to mean the location where orders are taken, it could mean the location where payment is made (e.g., each cash register), or it could mean each table in a restaurant with table service, or even the entire restaurant in general where orders can be taken by roaming servers. To increase certainty, to reduce the potential for litigation over sign placement, and to provide restaurants with needed flexibility, CRA proposes allowing the sign to be placed on or adjacent to a counter where food is ordered or picked up by customers, with the touchstone being that the sign is conspicuous and readable. CRA’s proposed revision is based on language in court-approved consent judgments in litigation filed by the California Attorney General.

Proposed Section 25607.5(a)(3), appears to permit the warning to be printed on a menu board, which also provides needed flexibility, in particular to those restaurants that locate a menu board somewhere other than at the counter or on a wall parallel or adjacent to the counter. Nevertheless, this needs to be stated more clearly so that restaurants will be aware that this is an option.

New Section 25607.5(a)(4), which would permit the warning to be printed on a poster providing nutritional content of foods served in the restaurant, provides one more necessary option to restaurants. Many restaurants provide nutritional content information to customers and may be required to do so by law. Proposition 65 warnings are similar in nature to nutrient content information in that they provide detailed information about foods to the customer in order to permit the customer to make informed dietary decisions. By placing all such information together, the restaurant can ensure that those customers who are particularly interested in this information can find it all in one location. The concept of including the warning language on a nutritional poster has also been approved in court-approved consent judgments resolving litigation filed by the California Attorney General.

Proposed Section 25607.5(b), requiring certain warning signs to be in two or more languages creates uncertainty and litigation risk. It is therefore necessary to re-write proposed Section 25608(b) to provide greater clarity, and to limit the circumstances in which the warning must be provided in languages other than English. CRA appreciates OEHHA’s understanding of this issue, which in the context of private enforcement of Proposition 65, could lead to absurd requirements based on the presence of “Pad Thai” or Boeuf Bourguignon” on a menu, a sign in the restroom saying “Empleados: Lavase Sus Manos,” a sign pointing to the restrooms saying “Toilettes,” or a sign above the kitchen entrance saying “Cucina”. We therefore feel strongly that this requirement needs to be clear that the use of languages other than English to identify foods, to provide ambiance or decor, or to communicate with employees do not trigger a requirement to provide Proposition 65 warnings in a language other than English. We also believe that this approach of stating what is excluded from “consumer information” is less likely to lead to disputes, at least for



restaurants, than attempting to define “consumer information” more generally.

Proposed Section 25607.6(a)(2) does not need to identify any specific chemicals in the warnings for foods and non-alcoholic beverages because the new warning language refers customers to the OEHHA-maintained website, where far more detailed information will presumably be found. CRA sees no justification for calling out any specific chemicals in the standard warning language.

CRA nevertheless understands that the identification of such chemicals is intended to harmonize this warning with the “at least one chemical” requirement of proposed section 25601(c). Should OEHHA believe this is still necessary and appropriate, CRA therefore proposes that these items be identified clearly as examples and that the language be made more accurate in stating that mercury is found in “certain” fish, since it is generally not found in freshwater or anadromous fish or in some species of ocean fish at levels requiring a Proposition 65 warning.

2. Comments on Proposed Sections 25607.3 and 25607.4

Proposed Sections 25607.3 and 25607.4, which relate to alcoholic beverages, are similar in structure to—and should be harmonized with—proposed Sections 25607.5 and 25607.6, which relate to foods and non-alcoholic beverages sold at restaurants.

Many restaurants in California serve alcoholic beverages. CRA therefore incorporates by this reference all of its comments above with respect to the methods of providing warnings for foods and non-alcoholic beverages sold in restaurants. Restaurants, just like bars, should be provided with flexibility in the methods they may use to provide warnings. And the requirements for alcoholic beverages should be harmonized with the requirements for foods and non-alcoholic beverages so that restaurants that serve alcohol are not subject to two different sets of requirements in order to comply with Proposition 65 by using the prescribed safe harbors.

Thank you for considering these comments. CRA and its members would appreciate the opportunity to continue this dialog with OEHHA as the agency considers comments on the proposed regulations and hopes you will not hesitate to contact CRA with any questions concerning these comments or CRA’s positions.

Sincerely,



Matt Sutton
Vice President, Government Affairs & Public Policy
California Restaurant Association

