

**Initial Statement of Reasons
Title 27, California Code of Regulations
Proposed Amendments to Article 6
Clear and Reasonable Warnings
Adoption of Sections 25607.32 and 25607.33:
Hotel Exposure Warnings**

July 21, 2017



**California Environmental Protection Agency
Office of Environmental Health Hazard Assessment**

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SUMMARY

Proposition 65¹ requires that persons in the course of doing business give a “clear and reasonable” warning to individuals before knowingly and intentionally exposing them to a chemical listed as known to cause cancer or reproductive toxicity. The Office of Environmental Health Hazard Assessment (OEHHA) is the lead agency that implements Proposition 65. OEHHA maintains the list of chemicals known to the state to cause cancer or reproductive toxicity and has the authority to promulgate and amend regulations to further the purposes of the Act.² On August 30, 2016, OEHHA adopted a new set of Article 6 Clear and Reasonable Warnings regulations (Title 27, Cal. Code of Regs., section 25600 et seq.)³ intended to make Proposition 65 warnings more informative and meaningful than the previous Article 6 regulations adopted by OEHHA’s predecessor entity in 1988. The new Article 6 regulations become effective on August 30, 2018, at which time the older Article 6 regulations will no longer be operative. The new Article 6 regulations include additional guidance concerning safe harbor⁴ warning methods and content warnings for specific exposure scenarios, i.e., “tailored warnings.”⁵

This proposed rulemaking would add Sections 25607.32 and 25607.33 to Article 6 as safe harbor, tailored warnings for exposures to listed chemicals that may occur at hotels and other transient lodging establishments. These new sections would further the “right-to-know” purposes of the statute and provide more specificity regarding the content of safe harbor warnings for exposures that can occur at hotels and other transient lodging establishments, and the corresponding methods for providing those warnings. The public would receive more information about the listed chemicals, as well as the sources of exposure to those listed chemicals, at hotels. Compliance with the regulations by hotels and other transient lodging establishments will reduce the potential for litigation concerning the sufficiency of warnings, because the content and methods

¹ Health and Safety Code Section 25249.5 *et seq.*, The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as “Proposition 65”. Hereafter referred to as “Proposition 65” or “the Act”.

² Health and Safety Code Section 25249.12(a)

³ All further references are to Title 27 of the California Code of Regulations, unless otherwise indicated.

⁴ The term “safe harbor” is used throughout to refer to non-mandatory guidance provided by OEHHA for the methods and content of warnings the agency has deemed to meet the “clear and reasonable” standard required by the Section 25249.6 of the Act.

⁵ Title 27, Cal. Code of Regs., section 25607.1, *et seq.*

provided in the regulation are deemed “clear and reasonable” by the lead agency for purposes of the Act.

BACKGROUND

During the rulemaking for the Article 6 Clear and Reasonable Warnings regulations adopted on August 30, 2016,⁶ the California Hotel and Lodging Association (CH&LA) requested that OEHHA consider adopting safe harbor regulations setting out the methods and content for warnings for exposures to listed chemicals that can occur at hotels and other transient lodging establishments.⁷ CH&LA stated that without a hotel-specific safe harbor mechanism, the general safe harbor provisions in Article 6 would present unique hurdles and barriers to compliance for the hotel industry.⁸ OEHHA carefully considered the request, but declined to add the requested provisions pending the availability of additional information required for the development of a tailored warning for hotels and other transient lodging establishments. Over the course of several months, OEHHA considered the warning methods and content for exposures at hotels that can require a warning. OEHHA believes that exposure to listed chemicals at a level that requires a warning is likely to be relatively rare at hotels and other transient lodging establishments, but the guidance in this section is provided in the event that the business does need to provide a warning. In proposing this regulatory action, OEHHA intends to provide safe harbor guidance on warning content and methods for providing the warnings. These provisions will provide more information that is useful to Californians about their potential exposures to listed chemicals at these types of establishments by providing more guidance to affected businesses on how to provide warnings for exposures to listed chemicals, thereby furthering the purposes of the Act. This provision does not provide guidance on whether or not a warning is required under the Act because such a determination must be made by the business itself. Each provision of the proposed amendments to the warning regulations is discussed below.

⁶ Office of Administrative Law file no. 2016-0719-04S, approved by OAL and filed with Secretary of State on August 30, 2016. A copy of the Article 6 regulations that will be operative on August 30, 2018 are available in the following location: [https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I498B7BC4FCC04E1FA663C4E3EC97D6A5&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)&bhcp=1](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I498B7BC4FCC04E1FA663C4E3EC97D6A5&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)&bhcp=1) (accessed March 15, 2017).

⁷ Letter from Lynn Mohrfeld, President & CEO, California Hotel and Lodging Association, to Monet Vela, Office of Environmental Health Hazard Assessment (Apr. 25, 2016).

⁸ *Id.*

§ 25607.32 Hotel Exposure Warnings –Methods of Transmission

Subsection (a) provides a definition of “hotel” that is primarily derived from the California Building Code⁹ and the federal Americans with Disabilities Act Guidelines¹⁰. The focus of the definition is “transient lodging” that is generally intended for short-term stays of 30 days or less. In a separate rulemaking, OEHHA intends to address warnings for exposures that can occur at apartments and other longer-term residential rental properties.

Subsection (b) sets forth the two safe harbor methods a business may choose from to provide a warning for exposure to a listed chemical at a hotel. The method described in subsection (b)(1) allows a business to provide a warning at the hotel’s registration desk in no smaller than 22-point type in a location where the warning is likely to be seen, read, and understood by a hotel guest. Because many reservations, and in some instances check-in, are now made online by hotel guests, subsection (b)(2) offers the option for a business to provide the warning to the hotel guest in electronic form or in a hard copy printout prior to or during the registration or check-in process. In order to ensure the hotel guest can see, read, and understand the warning, the type size must be the same type size as other consumer information provided during the check-in or registration process. Currently, many hotels provide a point of entry sign with a Proposition 65 warning that generally states the area contains chemicals known to the state to cause cancer or reproductive toxicity. OEHHA believes that this is not an appropriate or informative method for providing warnings for exposures to listed chemicals that can occur at these establishments. Further, the warning is not consistent with the new Article 6 safe harbor warning content and methods adopted in 2016. Providing the warning at the registration desk or with electronic check-in materials is more likely to ensure that the warning is seen and understood prior to exposure and is less likely to result in unnecessary warnings.

Consistent with the other safe harbor requirements to provide warnings in languages other than English in the new regulations, subsection (c) requires that when a hotel gives written (including in electronic form) “consumer information”¹¹ to guests in any language other than English during the registration or check-in process, the warning must be given both in that language and in English. Thus,

⁹ 2016 California Building Code, p. 86, available at <http://codes.iccsafe.org/app/book/content/2016%20California%20Codes/Building%20Volume%201/Chapter%202%20Definitions.pdf>.

¹⁰ 2010 ADA Standards for Accessible Design, available at <https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm> (last accessed Mar. 15, 2017).

¹¹ See Title 27, Cal. Code of Regs., section 25600.1(c)

an alternative language warning would not be required simply because the name of the hotel includes a Spanish word. However, if other warnings or consumer related information such as directions is provided at check-in in a language other than English, the warning must be provided in that language in addition to English.

Subsection (d) requires that to the extent such exposures occur at the hotel, warnings must also be provided for designated smoking areas, alcoholic beverages, food, consumer products offered for sale at the facility, and enclosed parking facilities.

§ 25607.33 Hotel Exposure Warnings – Content

Section 25607.33 describes the safe harbor warning content for exposures to listed chemicals that can occur at hotels. The safe harbor warning must include the warning symbol described for safe harbor consumer product exposures in Section 25603(a)(1); the signal word “**WARNING:**” in capital letters and bold print; and the warning message in Section 25607.33, subsections (a)(3)-(a)(8) corresponding to the end point(s) for which the warning is being provided. The warning message must include the name of one or more listed chemicals for which the warning is being provided, and one or more exposure sources for each chemical identified in the warning. These safe harbor content requirements are intended to increase the information available to a person prior to being exposed to the listed chemical at a hotel, and to allow the person an opportunity to decide whether and how to avoid exposure to that listed chemical from the identified source.

PROBLEMS BEING ADDRESSED BY THIS RULEMAKING

Over the years, the hotel and lodging industry has been the subject of numerous 60-day notice of violation letters. To avoid potential litigation, many hotels and other transient lodging establishments currently post a generic Proposition 65 warning outside the entrance of the hotel that provides no specific information about the chemicals involved or the source of exposure, and provide a brochure which contain an extensive list of potential exposure sources that may or may not require a warning under the Act. During the recent rulemaking process to develop updated guidance concerning clear and reasonable warning methods and content for safe harbor warnings, the industry asked OEHHA to adopt a specific regulation addressing exposures that can occur at these businesses. This proposed regulatory action is intended to respond to this request by providing specific safe harbor warning methods and content as well as other

guidance concerning providing meaningful warnings for exposures that can occur at hotels.

NECESSITY

The hotel and lodging industry has stated that the general safe harbor provisions in Article 6 are difficult to apply to the industry and that the lack of a warning tailored to exposures that can occur at hotel and other transient lodging establishments poses a significant barrier to compliance.¹² Tailored warnings for hotels and other transient lodging establishments are necessary to reduce the number of unnecessary warnings for listed chemicals, to make warnings more clear and informative to the public, and to provide certainty for the hotels and other transient lodging establishments that must comply with the warning requirements of the Act.

BENEFITS OF THE PROPOSED REGULATIONS

These proposed regulations would benefit the public by requiring more detailed and specific information in warnings for exposures to listed chemicals at hotels. This furthers the “right-to-know” purposes of the statute. Access to more detailed information within the warning and via the provided hyperlink would further promote public health and safety. The proposed regulations would benefit businesses by providing clarity on how to provide a clear and reasonable warning for exposures that can occur at hotels and other transient lodging establishments; businesses would also benefit from the added assurance of a safe harbor from potential enforcement actions.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

OEHHA did not rely on any technical, theoretical, and/or empirical study, reports, or documents as part of this rulemaking.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES

One alternative considered would be to not propose safe harbor warning methods, however, many hotels and other transient lodging facilities would likely continue providing general environmental warnings and an informational brochure that includes information about many potential exposures to listed chemicals that may or may not actually require a warning. This could result in the provision of unnecessary warnings, and may be contrary to the purposes of

¹² *Letter from CH&LA, supra.*

the Act. OEHHA is not aware of any other reasonable alternatives to the proposed regulation that would better further the purposes of the Act.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed regulatory action will not adversely impact very small businesses because Proposition 65 is limited by its terms to businesses with 10 or more employees (Health and Safety Code Sections 25249.5, 25249.6, and 25249.11(b)).

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed regulation does not impose any new requirements upon private persons or businesses because it primarily provides non-mandatory guidance and a voluntary safe harbor process for providing warnings already required under the Act that businesses can choose to follow. A business still has the option of providing the warnings required by Section 25249.6 of the Act in any manner and with any content it can show is “clear and reasonable” under the law.

EFFORTS TO AVOID UNNECESSARY DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS CONTAINED IN THE CODE OF FEDERAL REGULATIONS ADDRESSING THE SAME ISSUES

Proposition 65 is a California law that has no federal counterpart. OEHHA has determined that, as drafted, the proposed regulations do not duplicate and will not conflict with federal regulations. In fact, the statute specifically provides that warnings are only required to the extent they do not conflict with federal law.¹³

ECONOMIC IMPACT ASSESSMENT

Gov. Code section 11346.3(b)

OEHHA finds there will be no significant economic impact related to this proposed regulatory action. The proposed regulations would not impose any significant costs because businesses are already subject to the warning

¹³ Health and Safety Code Section 25249.10(a) (Exempting warnings governed by federal law).

requirements of Proposition 65. The proposed regulations do not impose any mandatory requirements that would significantly increase costs for businesses. The proposed regulations interpret and make specific certain provisions of the Act and provide guidance for safe harbor warnings that a business may use. A business may also choose not to take advantage of the safe harbor provisions and provide an otherwise “clear and reasonable” warning that complies with the Act.

Creation or Elimination of Jobs within the State of California

This proposed regulatory action will not impact the creation or elimination of jobs within the State of California. The proposed regulation provides more specific and detailed guidance for safe harbor warning methods and content for hotels and other transient lodging establishments that decide to take advantage of this guidance.

Creation of New Businesses or Elimination of Existing Businesses within the State of California

This proposed regulatory action will not impact the creation of new businesses or the elimination of existing businesses within the State of California. The proposed regulation provides more specific and detailed guidance for safe harbor warning methods and content for hotels and other transient lodging establishments that decide to take advantage of this guidance.

Expansion of Businesses Currently Doing Business within the State of California

This proposed regulatory action will not impact the expansion of businesses within the State of California. The proposed regulation provides more specific and detailed guidance for safe harbor warning methods and content for hotels and other transient lodging establishments that decide to take advantage of this guidance.

Benefits of the Proposed Regulation to the Health and Welfare of California Residents, Worker Safety, and the State’s Environment

The proposed regulations will further the purposes of Proposition 65 by providing more informative warnings to the public and reduced uncertainty for businesses that must comply with the warning requirements of the Act. These proposed changes will benefit the health and welfare of California residents by providing more information to the public and facilitating the hotel and lodging industry’s compliance with the Act.