



April 8, 2015

Via email (PDF) Only (P65Public.Comments@oehha.ca.gov)

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

Re: Proposed Revisions to Proposition 65 Regulations on 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 January 16, 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 January 16, 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 are not all alike 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.

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.

OEHHA's current proposal for the methods and wording of the safe harbor warning for restaurants is a good start, but there is room for improvement. In particular, it is important that restaurants be allowed multiple methods for providing the warning. OEHHA has proposed a few methods, but more are needed to take into account the many ways in which restaurants and other food facilities serve foods and beverages and communicate with their customers. This will not only help relieve some of the burden placed on restaurants that seek to comply with Proposition 65, but it will also help ensure that consumers at restaurants receive the appropriate warning by facilitating restaurants' ability to comply.

Our specific comments follow:

1. Comments On Proposed Sections 25608.5 and 25608.6

CRA has a number of concerns with the current draft of proposed Section 25608.5. Below are proposed revisions to Section 25608.5 with proposed deletions shown in strikethrough text, and proposed additions underscored. Following the proposed revisions are explanations of each proposed change. Thereafter, we provide some additional comments for your consideration.

1.1 Proposed Revisions

§ 25608.5 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Methods of Transmission

(a) A warning ~~at restaurants or other facilities that sell food for~~ foods or non-alcoholic beverages sold or served by restaurants or other food facilities primarily for ~~on-site consumption~~ immediate consumption on or off premises, not including alcoholic beverages, meets the requirements of this Article if it contains the minimum elements specified in Section 25608.6 and is provided using one or more of the following methods. All signs or notices must be displayed so that they are clearly visible under all lighting conditions normally encountered during business hours.

(1) An 8½ 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 as they enter ~~each public entrance to the restaurant or food facility~~ or before they place an order ~~printed in no smaller than 28-point type~~.

(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 adjacent or parallel to the counter so as to assure that it is readable and conspicuous to customers placing orders ~~printed in no smaller than 20-point type~~.

(3) On a menu, in type no smaller than the largest type size used for the names of general menu items, so long as each customer or party is customarily offered a menu.

(4) On a menu board, in type no smaller than the largest type size used for the names of general menu items, so long as the menu board is readable and conspicuous to customers placing orders.

(5) 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 throughout on other signage written communications on the premises.

§ 25608.6 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Content

(a) ~~A warning at restaurants or other facilities that sell food~~ For foods or non-alcoholic beverages sold or served by restaurants or other food facilities primarily for on-site consumption immediate consumption on or off premises, not including alcoholic beverages, the warning message meets the requirements of this Article if it is provided using one or more of the methods required in Section 25608.5 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 acrylamide or mercury~~ that are known to the State of California to cause cancer or 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 25608.5(a) and the first sentence of proposed Section 25608.6(a) are problematic because, by using the phrase “primarily for on-site consumption,” they arguably apply only to dine-in services and do not cover take-away, delivery, or drive-thru services—very common methods of food service and practices of restaurants. By using the term “primarily,” the OEHHA proposal also may not apply to certain food facilities, such as pizza parlors who may deliver food to more customers than they serve on their premises. CRA proposes revising this wording so that the warnings clearly apply to the foods and non-alcoholic beverages, regardless of where they are consumed. CRA proposes the phrase “immediate consumption on or off premises” to ensure that the safe harbor warning covers restaurants and food facilities that offer other methods for the sale of foods and beverages intended for immediate consumption. This is the term used in the statute, as recently amended, at Section 25249.7(k)(1)(B) of the Health & Safety Code.

The first sentence of proposed Section 25608.5(a) and the first sentence of proposed Section 25608.6(a) can also be improved from a readability standpoint by deleting the clause, “not including alcoholic beverages,” and replacing it with the adjective “non-alcoholic” to modify the noun “beverages” appearing earlier in those sentences.

The first sentence of proposed Section 25608.5(a) and the first sentence of proposed Section 25608.6(a) can also be improved by referring to “food facilities,” a term that is defined in Health & Safety Code Section 113789.

Proposed Section 25608.5(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 x 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.

Proposed Section 25608.5(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 that are used primarily by employees 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 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. Without such reasonable revisions, California’s restaurants would be cluttered with Proposition 65 warning signs placed in many unnecessary locations.

Proposed Section 25608.5(a)(1) would also benefit from relocating the phrase “printed in no smaller than 28-point type” as shown above for clarity and readability.

Proposed Section 25608.5(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 “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 be construed as referring to 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, 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 25608.5(a)(2) would also benefit from relocating the phrase “printed in no smaller than 20-point type” as shown above for clarity and readability.

New Section 25608.5(a)(3), which would permit the warning to be printed on a menu, provides additional flexibility to restaurants that customarily offer menus to customers. For example, both casual dining and fine-dining establishments may prefer not to clutter their entrances with signage and instead provide warnings on the main piece of written material—the menu—that is handed to each customer or party of customers.

New Section 25608.5(a)(4), which would permit the warning to be printed on a menu board, 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.

New Section 25608.5(a)(5), 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. 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 25608.5(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. A few examples demonstrate the point.

Imagine a French restaurant that primarily serves English-speaking customers and whose menu lists Soupe du Jour, Salade Maison, and Boeuf Bourginon. The menu items are followed by English descriptions of the ingredients used in dishes on the menu. French is used not because customers speak French, but because it helps create the atmosphere English-speaking patrons of a French restaurant would expect. It is unlikely that many patrons of the restaurant would be able to understand a French-language Proposition 65 warning, whereas most customers would be able to read and understand an English-language warning. It would thus be unduly burdensome to require the warning to be provided both in English and French. Although likely not intended by OEHHA in drafting proposed Section 25608.5(b), the result of the proposed language is to give creative enforcers of Proposition 65 an argument that the sign should be in French, even though such a sign would serve no purpose.

Next imagine a Mexican restaurant that, for the sake of atmosphere, has decorative signs, posters, and other artwork with wording in Spanish. The menu items are listed in Spanish, but the descriptions are in English because the clientele is primarily English-speaking. It would thus be unduly burdensome in this circumstance to require the warning to be provided both in English

and Spanish. But OEHHA's proposed Section 25608.5(b) would give creative enforcers of Proposition 65 an argument that the sign should be in Spanish.

And then imagine a restaurant that serves both Vietnamese-speaking and English-speaking clientele and prints its menus (including descriptions of the items) and signage in both Vietnamese and English. CRA does not disagree that in such circumstances it would be appropriate to provide a Proposition 65 warning in both English and Vietnamese. There, the additional language is used throughout the restaurant's written communications on the premises.

Ultimately OEHHA must reevaluate the foreign language requirement such that (1) it is triggered by clearly defined criteria so as to provide businesses with certainty that they have complied with the requirements necessary to take advantage of the safe harbor, thereby avoiding frivolous litigation; and (2) it does not impose unnecessary burdens on restaurants and result in the littering of restaurant walls and menus with warnings in multiple languages when an English language warning will be understood by most customers.

Proposed Section 25608.6(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.

First, the two chemicals called out in the proposed warning language—mercury and acrylamide—do not occur in foods served at all restaurants. It is therefore potentially confusing and misleading to customers to provide a warning that notes these chemicals.

Second, although mercury is found in a few species of fish and other seafood, there are widespread government communications about mercury in these products that consumers are aware of, such that the Proposition 65 warning mentioning this chemical is unnecessary. Furthermore, in one of the few Proposition 65 enforcement actions litigated to conclusion, and in which the Attorney General was a party, the trial court determined, and the Court of Appeal concurred, that mercury in canned tuna was naturally occurring and therefore exempt from Proposition 65's warning requirements.

Third, although acrylamide is found in a wide variety of food products, including coffee, breads, cereals, grilled asparagus, and fried potatoes, there are substantial issues about whether a warning is required at the levels in which it is found and because the acrylamide is not added to the foods but is created through cooking. OEHHA already presents substantial information on acrylamide in food on its website and will presumably do so on the concurrently proposed lead agency website. As a result, it is unnecessary to call out this chemical in the safe harbor restaurant warning.

Fourth, the current safe harbor warning for restaurants, which has been in widespread use for decades, appears in thousands of eating establishments in California, and has been seen by millions of Californians, does not specify any individual chemical. OEHHA has presented no rationale for why the status quo on this issue needs to be altered, particularly given the proposed reference to the OEHHA-maintained website. Furthermore, as OEHHA acknowledges—notably

in the naturally occurring and cooking provisions of the regulations—food is different from other consumer products. Risks and benefits of consuming certain foods need to be communicated to consumers in a nuanced and comprehensive manner in order to avoid unnecessarily altering nutritional intakes and diets, which could have health consequences. CRA believes that this information is best communicated to consumers through the OEHHA-maintained website and other more comprehensive communications as opposed to a necessarily brief warning sign.

2. Comments on Other Proposed Sections

2.1 Proposed Sections 25608.3 and 25608.4

Proposed Sections 25608.3 and 25608.4, which relate to alcoholic beverages, are similar in structure to—and should be harmonized with—proposed Sections 25608.5 and 25608.6, which relate to foods and non-alcoholic beverages sold at restaurants.

Many restaurants in California serve alcoholic beverages. The Association 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.

2.2 Proposed Sections 25608 through 25608.27 and Proposed Section 25602

Proposed Section 25602 could benefit from a small clarifying edit. It essentially provides that a person may claim a safe harbor if it provides a warning that includes the name or names of any of twelve different chemicals if an exposure to that chemical is reasonably calculated to occur at a level that requires a warning. Proposed Section 25602 contains only one exception via an explicit cross-reference to Section 25604(c) (relating to on-product warnings).

Proposed Section 25608.6(b), in contrast, permits restaurants to provide a warning with text specified by OEHHA that names only the chemicals acrylamide and mercury. And proposed Section 25608.4, which specifies the content of warnings for alcoholic beverages, does not require the naming of any chemicals.

CRA therefore proposes, should OEHHA maintain a requirement for identifying specific chemicals in certain consumer product warnings, OEHHA should revise Section 25602 by inserting the underscored text as follows: “Except as provided in Section 25604(c) and Sections 25608 through 25608.27, a warning meets the requirements of this Article if”

2.3 Proposed Section 25608.5 and 25608.6 and Proposed Sections 25608.1 and 25608.2

Proposed Sections 25608.1 and 25608.2 should be revised to clarify that they do not apply to foods or non-alcoholic beverages sold at restaurants or other food facilities.

2.4 Proposed Section 25600(b)

Proposed Section 25600(b), which provides that Proposed Article 6 will become effective “two years after the date of adoption,” is an improvement over the one-year period in OEHHA’s September 2014 discussion draft, but it remains inadequate, and it also lacks sufficient clarity for many restaurants.

The transition to a new safe harbor warning needs to consider the commercial and business realities faced by restaurants. Many restaurants are small and family-run businesses. Although Proposition 65 was amended in 2013 to provide for a 14-day notice and cure period for restaurants (*see* Health & Safety Code § 25249.7(k)), OEHHA’s proposed changes to Article 6 nevertheless present restaurants with an increased risk of litigation. Absent a concerted public information campaign by OEHHA directed at restaurants, many of whom are not necessarily members of CRA, many restaurants may never learn of the new regulations and may therefore continue to rely on their existing and currently compliant warnings but face litigation risks after the effective date. CRA therefore believes a longer period of time is necessary for the transition and proposes that the effective date be made at least *three* years after the date of adoption.

* * *

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