

**Initial Statement of Reasons
Title 27, California Code of Regulations
Proposed Amendments to Article 6
Clear and Reasonable Warnings
Adoption of New Sections 25607.34 and 25607.35:
Residential Rental Property Exposure Warnings**

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**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 include additional guidance concerning safe harbor⁴ methods and content for warnings for specific exposure scenarios, also referred to as "tailored warnings."⁵ The new Article 6 regulations become effective on August 30, 2018, at which time the older Article 6 regulations will no longer be operative.

This proposed rulemaking would add Sections 25607.34 and 25607.35 to Article 6 as safe harbor, tailored warnings for exposures occurring at residential rental properties. These amendments would further the "right-to-know" purposes of the statute and provide more specificity regarding the content of safe harbor warnings for exposures to listed chemicals that may occur at residential rental properties, and the corresponding methods for providing warnings for those exposures. Compliance with the regulations enables businesses to avoid litigation concerning the sufficiency of warnings because the content and methods provided in the regulation are deemed "clear and reasonable" by the lead agency for purposes of complying with the Act. Tenants would also receive

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 Section 25249.6 of the Act.

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

more information than they do now about the exposure sources and listed chemicals that they may be exposed to at residential rental properties.

BACKGROUND

During the previous rulemaking for the Article 6 Clear and Reasonable Warnings regulations adopted on August 30, 2016,⁶ the California Apartment Association (CAA) requested that OEHHA develop a “tailored warning” for exposures to listed chemicals that may occur at apartments.⁷ OEHHA did not include a tailored warning in the rulemaking at that time, but agreed to look at the possibility of a future rulemaking for these businesses. Over the course of several months, OEHHA evaluated which warning methods and content would be best suited for the exposure scenarios commonly encountered at residential rental properties. In proposing this regulatory action, OEHHA intends to address the exposures that can occur at residential rental properties and provide safe harbor guidance on message content and warning methods for those exposures. Although OEHHA believes that exposure to listed chemicals at a level that requires a warning is likely to be relatively rare at residential rental properties, the proposed regulations would provide a uniform and consistent method of providing warnings when a business has determined that a warning should be provided. The safe harbor warnings will provide tenants with information on both a source of exposure and the name of one or more chemicals to which they may be exposed. Further, by providing more guidance to affected businesses on how to provide warnings for exposures to listed chemicals, OEHHA is furthering the purposes of the Act. Each provision of the proposed amendments to the warning regulations is discussed below.

§ 25607.34 Residential Rental Property Exposure Warnings – Methods of Transmission

Subsection (a) provides a definition of “residential rental property”. The term “residential rental property” was chosen because the term focuses primarily on

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 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 Oct 11, 2017).

⁷ Letter from Heidi Palutke, Research Counsel, California Apartment Association, to Monet Vela, Office of Environmental Health Hazard Assessment (Jan. 20, 2016).

the character and use of the property, namely a property rented to a tenant for residential use. The definition specifically includes an “apartment”, “house”, “duplex”, “triplex”, and “condominium”, and also includes “other dwelling[s] that a landlord rents to a tenant to live in.”⁸ By way of example, a trailer home offered for rent as a residence by a person subject to the Act could be considered a “residential rental property”. The definition also includes “common areas” where an exposure can occur; as such, the warning is not limited to a specific unit rented by a tenant. The definition of “residential rental property” is not intended to include transient lodging facilities, and specifically excludes “hotels” as defined in the hotel exposure warnings and found in Subarticle 2.⁹ Warnings for hotels are covered in separate sections of the regulations.

Subsection (b) requires that a safe harbor warning must follow the content requirements in Section 25607.35. Subsection (b) also sets forth a two-part safe harbor method that a business may use to provide a warning for exposure to a listed chemical at a residential rental property. Subsection (b)(1) requires a business to provide a warning to each known adult occupant at the time of renting, leasing, letting or hiring out the property. Subsection (b)(2) additionally requires that the warning be provided annually directly to the known adult occupants of the property in hard copy or electronic form, or in any lease, rental agreement, renewal or amendment for the property. The use of the term “adult occupant” is intended to ensure that adults who reside at the property, including those who did not sign a lease or rental agreement, receive a clear and reasonable warning prior to being exposed to a listed chemical at the property.

Article 6 requires that warnings be provided in languages other than English in certain situations.¹⁰ Subsection (c) requires that if the lease, rental agreement, renewal or amendment for the property, or any other disclosures or required notices from the landlord to the tenant are provided in any language other than English, the warning must also be provided in that or those languages. OEHHA believes this safe harbor requirement in the proposed regulation will further the

⁸ California Tenants: A Guide to Residential Tenants’ and Landlords’ Rights and Responsibilities, (2012) California Department of Consumer Affairs, available at <http://www.dca.ca.gov/publications/landlordbook/index.shtml> (last accessed on Oct 11, 2017); defining “rental unit” as “an apartment, house, duplex, or condominium that a landlord rents to a tenant to live in.”

⁹ Section 25607.32.


¹⁰ For examples, see Sections 25602 and 25604.


purposes of the statute by expanding the number of individuals who can understand the warning, thus ensuring it is “clear and reasonable”.

Subsection (d) requires that to the extent such exposures occur at the residential rental property, separate warnings must also be provided for enclosed parking facilities and designated smoking areas. It is likely that these are the most common exposures that occur at residential properties. By incorporating the requirement here, OEHHA intends to ensure that these warning are provided in addition to any other property-specific warning.

§ 25607.35 Residential Rental Property Exposure Warnings – Content

Section 25607.35 describes the safe harbor warning content for residential rental property exposures. Residential rental property exposure warnings must include the warning symbol described in Section 25603(a)(1); the signal word “**WARNING:**” in capital letters and bold print; and the warning message in Section 25607.35(a)(3) – (a)(8) corresponding to the end point(s) for which the warning is being provided. The warning content message must include the name of one or more exposure sources and the name of one or more listed chemicals for which the warning is being provided. The warning content must also include the URL for the Proposition 65 Warnings Website page for residential rental property exposure warnings: www.P65Warnings.ca.gov/apartments. Below are examples of warning content for exposures to listed chemicals at rental properties. The exposure sources and chemicals in these examples are provided only for purposes of illustration and are not intended to be applicable to all rental properties. Exposure scenarios will vary among rental properties, and OEHHA believes that in many cases no warning may be required at all as most exposures are likely too low or of short duration.

 **WARNING:** Fireplaces or unvented gas space heaters on this property can expose you to carbon monoxide, which is known to the State of California to cause birth defects or other reproductive harm. Talk to your landlord or the building manager about how and when you could be exposed to this chemical in your building. For additional information go to www.P65Warnings.ca.gov/apartments.

 **WARNING:** Paint chips and dust from lead-containing paint on this property can expose you to lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. Talk to your landlord or the building

manager about how and when you could be exposed to this chemical in your building. For additional information go to www.P65Warnings.ca.gov/apartments.

⚠ WARNING: Use of lead-containing plumbing materials on this property can expose you to lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. Talk to your landlord or the building manager about how and when you could be exposed to this chemical in your building. For additional information go to www.P65Warnings.ca.gov/apartments.

⚠ WARNING: Imported vinyl miniblinds manufactured prior to 1997 on this property can expose you to lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. Talk to your landlord or the building manager about how and when you could be exposed to this chemical in your building. For additional information go to www.P65Warnings.ca.gov/apartments.

⚠ WARNING: Building materials containing urea-formaldehyde resins, such as insulation, pressed wood materials, finishes, or adhesives, on this property can expose you to formaldehyde, which is known to the State of California to cause cancer. Talk to your landlord or the building manager about how and when you could be exposed to this chemical in your building. For additional information go to www.P65Warnings.ca.gov/apartments.

⚠ WARNING: Asbestos-containing materials, including some ceiling coatings on this property can, if damaged or disturbed, expose you to asbestos, which is known to the State of California to cause cancer. Talk to your landlord or the building manager about how and when you could be exposed to this chemical in your building. For additional information go to www.P65Warnings.ca.gov/apartments.

The phrase “if damaged or disturbed” in the last preceding example additionally illustrates how supplemental information regarding the source of exposure might be incorporated within a safe harbor warning for a residential rental property in a way that is consistent with Section 25601(e).

PROBLEMS BEING ADDRESSED BY THIS RULEMAKING

Over the years, the apartment industry has been the subject of numerous 60-day notice of violation letters and has long expressed concern about what a clear and reasonable warning would entail for the types of exposures they expect to

encounter within their business operations. The industry has asked for clarity as to the acceptable method and content to use in order to comply with the warning requirements of Proposition 65, and have requested that a specific tailored warning regulation be adopted for their industry. This proposed regulatory action is intended to address these requests.

NECESSITY

The apartment industry has stated that the general safe harbor provisions in Article 6 are not workable for their industry and that the lack of a warning specifically tailored to the exposure scenarios in residential rental properties poses a significant barrier to compliance.¹¹ Tailored warnings for residential rental properties are necessary to reduce the number of vague or overinclusive warnings being given for exposures that may or may not be likely to occur at rental properties at a level that requires a warning. The regulations are also needed in order to make warnings more clear and informative to the public, especially tenants of residential rental housing, and to provide certainty for the businesses that operate residential rental properties that must comply with the warning requirements of the Act.

BENEFITS OF THE PROPOSED REGULATIONS

These proposed regulations would benefit the public, specifically tenants of residential rental properties by requiring that more detailed and property-specific information be included in the warnings given for exposure to listed chemicals at rental properties. This furthers the “right-to-know” purposes of the statute and avoids over inclusive warnings for exposures that are unlikely to occur at a particular property. Including the link to the OEHHA website for more detailed information within the warning would further promote public health and safety by better informing the tenants about potential exposures and how to reduce or avoid them. The proposed regulations would benefit businesses by providing clarity concerning how to provide a clear and reasonable warning for exposures that can occur at residential rental properties; businesses would also benefit from the added assurance of a safe harbor from potential enforcement actions.

¹¹ *Letter from CAA, supra.*

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

OEHHA did not rely on any technical, theoretical, and/or empirical studies, 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 and content for these properties; however, many businesses would likely continue providing general and potentially over inclusive warnings for exposures that may or may not actually occur at the given property. This could result in the provision of unnecessary warnings, and may be contrary to the purposes of the Act. OEHHA is not aware of any other reasonable alternatives to the proposed regulation that would better accomplish these goals.

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 provides non-mandatory guidance and a voluntary safe harbor process for providing warnings already required under the Act that businesses could 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.¹²

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 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 businesses that operate residential rental properties 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

¹² Health and Safety Code Section 25249.10(a) (Exempting warnings governed by federal law.)

warning methods and content for businesses that operate residential rental properties 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 businesses that operate residential rental properties 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, especially tenants, and reduce the 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, especially tenants and facilitating the apartment industry's compliance with the Act.