

**Initial Statement of Reasons
Title 27, California Code of Regulations
Proposed Amendments to Article 6
Clear and Reasonable Warnings
Sections 25602, 25607, 25607.1 and 25607.3
January 2020**



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

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Summary

Proposition 65¹ requires businesses to provide a clear and reasonable warning before they knowingly and intentionally cause an exposure to a chemical listed as known to the state to cause cancer or reproductive toxicity.² 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.³ 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.)⁴ that provide safe-harbor warning methods and content intended to make Proposition 65 warnings more informative and meaningful than warnings provided under the previous Article 6 regulations adopted by OEHHA's predecessor entity in 1988. The new Article 6 regulations became operative on August 30, 2018. The regulations provide for general safe-harbor warnings for consumer-product, occupational and environmental exposures, as well as additional safe-harbor warning methods and content, also known as "tailored warnings", for specific types of exposures.

Background - Problem to be Addressed by the Proposed Rulemaking

OEHHA has received a number of inquiries from affected businesses concerning the requirement in the safe-harbor regulations to provide *both* a warning for sales on the internet or through a catalog, *and* a warning with or on products delivered to consumers. There have also been questions whether the internet warning provisions specifically apply to alcoholic beverage sales. Therefore, OEHHA has determined that additional clarification of certain provisions of the safe-harbor regulations would be helpful to the regulated community. In particular, OEHHA intends to clarify the requirements of the tailored safe-harbor warning methods as they apply to internet or catalog sales of consumer products, including alcoholic beverages, and update existing regulatory provisions concerning alcoholic beverages that are sold remotely and then later delivered to consumers.

Additionally, the Attorney General's Office is in the process of settling a

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 25249.6

³ Health and Safety Code section 25249.12(a)

⁴ All further references are to Title 27 of the California Code of Regulations, unless otherwise indicated.

Proposition 65 enforcement action related to alcoholic beverage warnings, including products sold on websites and delivered by package delivery services. OEHHA's proposed amendments would conform the Proposition 65 safe-harbor regulations to the provisions of the Attorney General's settlement, thus allowing businesses that may not be a party to that settlement to use the same processes for providing warnings.

The proposed amendments to the warning regulations are discussed below.

§ 25602. Consumer Product Exposure Warnings - Methods of Transmission

Subsection (a) currently provides that warnings meet the requirements of Subarticle 2 for consumer product exposures if the warnings comply with the content requirements of Section 25603 and the methods in Section 25602, unless the warning is being provided for a specific exposure described in the tailored warnings methods in Section 25607.1, et seq. The phrase, "consumer product exposure" is added to more specifically identify the type of warning described in this section. The specific exposure warnings provisions begin in Section 25607, however, rather than in Section 25607.1. Section 25607 sets forth requirements that are applicable to the tailored warnings within the subarticle and should be referenced in Section 25602; therefore, the proposed amendment to Section 25602 would change the reference from "Section 25607.1" to "Section 25607" in this section and within Section 25607.

Subsection (a)(2) is proposed to be amended to clarify that the product-specific warning provided by electronic device or process is intended to apply to products purchased at the retail location and is separate from those provided online for internet purchases.

Subsection (b) is proposed to be amended to clarify that internet purchases made using a mobile device application are included as "internet purchases" and are therefore also subject to the requirements of subsection (b). The words, "to the warning" are added to clarify the destination of the referenced hyperlink.

In subsection (c), the phrase, "in addition to any other warning provided under this subarticle" is included to clarify that for catalog purchases, any warnings provided under the tailored warning requirements are also required.

§ 25607. Specific Product, Chemical and Area Exposure Warnings

Subsection (a) is proposed to be amended by striking the language "Except as provided in subsection (b)" as the phrase is unnecessary and potentially confusing.

A new subsection (b) is proposed to clarify that the internet or catalog requirements in Section 25602 subsections (b) and (c) also apply to tailored warnings for consumer products exposures.

A new subsection (c) is proposed to clarify that the alternative language requirements for consumer product exposures in Section 25602(d) apply to tailored warnings for consumer product exposures. Similarly, the alternative language requirements for environmental exposures in Section 25604(a)(1)(C), (a)(2)(D), and (a)(3)(E) would also apply to the tailored warnings for environmental exposures in Section 25607, et seq.

With this proposal, the old subsection (b) would be re-numbered to subsection (d). The term “particular” has been added to modify the term “exposure” to clarify that if a person does not cause an exposure to a particular listed chemical required to be identified in a warning set out in Section 25607 et seq., the name of that listed chemical need not be included in the warning in order to meet the requirements of this subarticle.

§ 25607.1. Food Exposure Warnings - Methods of Transmission

Subsection (a) is proposed to be amended by striking the language “Except as provided in subsection (b)” as the phrase is unnecessary and potentially confusing. The term “required” is replaced with “listed” to reduce redundancy.

§ 25607.3. Alcoholic Beverage Exposure Warnings - Methods of Transmission

Section 25607.3 describes the safe harbor methods and content for providing a warning for alcoholic beverage exposures. In subsection (a), the phrase “one or more” is changed to “as specified”.

In subsection (a)(1), the phrase, “For alcoholic beverages sold at a physical location.” is proposed to be added to clarify that warnings are location-specific. Warnings provided on the premises do not satisfy the requirement for providing a warning for products delivered to customers at locations other than the point of sale or for products purchased over the internet or through a catalog.

Subsections (a)(1), (a)(2) and (a)(3) are re-numbered to subsections (a)(1)(A), (a)(1)(B), and (a)(1)(C) respectively.

Subsection (a)(4) is re-numbered to subsection (a)(2). Newly re-numbered subsection (a)(2) provides the method of providing a warning for alcohol delivered through package delivery services. Stakeholders have indicated the phrase, “package delivery services” is vague as to which entities this provision would apply in modern commerce. The phrase is proposed to be deleted and

replaced with “delivered to consumers in California at a location other than the point of sale” to clarify that the focus of subsection (a)(2) is the purchase of alcoholic beverages where the place of purchase is remote or varies from the delivery location, including internet, mobile applications or catalog purchases that are delivered to the customer. In addition, subsection (a)(2) is amended to clarify that a product-specific warning must be provided to the purchaser or delivery recipient prior to or during the purchase of the product.

Newly re-numbered subsection (a)(3)(A) is proposed to clarify that alcoholic beverages sold online or through a catalog must have a warning on the internet site or in the catalog as well as a warning provided to the purchaser or delivery recipient prior to or at the same time as delivery using the warning content for alcoholic beverages in Section 25607.4, rather than the general consumer product exposure warning content in Section 25603.

Some industry stakeholders have questioned how third-party providers (TPPs) may provide Proposition 65 warnings. Some TPPs may facilitate the transaction but will not take physical possession of a product and therefore are unable to provide a warning on or with a package. New subsections (a)(3)(A)1 and (a)(3)(A)2 are proposed to retain the option to provide the warning on or in the shipping container or delivery package, and to add the option of providing the warning by email, text, as part of the written or electronically-delivered receipt or confirmation for the applicable transaction. This is in addition to the internet or catalog warning required in subsection (a)(3)(A). As an example, if a business provides a website warning pursuant to subsection (a)(3)(A), the business would still need to comply with subsection (a)(3)(A)1 or (a)(3)(A)2; the warning provided pursuant to subsection (a)(3)(A)1 or (a)(3)(A)2 would not satisfy the internet warning requirement in subsections (a)(3)(A), or vice versa.

Subsection (b) is amended to clarify that the general alternative language requirement for consumer products also applies to warnings provided on the internet, including mobile device applications, or in a catalog.

Necessity

OEHHA has received inquiries from stakeholders indicating the regulations may lack clarity as they relate to internet and catalog warnings, and warnings for alcoholic beverages that are purchased remotely and later delivered to purchasers. Therefore, the proposed amendments to the regulations would improve compliance. The proposed changes are necessary to address these issues by clarifying key aspects of the safe-harbor regulations. Additionally, the Attorney General’s Office recently settled a Proposition 65 enforcement action

related to alcoholic beverage warnings, including products sold on websites and delivered by package delivery services. OEHHA's proposed amendments would conform the Proposition 65 safe-harbor regulations to the provisions of the Attorney General's settlement, thus allowing businesses that may not be a party to that settlement to use the same processes for providing warnings.

Benefits of the Proposed Regulation

Regulated businesses that choose to follow the safe-harbor provisions of the clear and reasonable warning regulations will likely benefit from the proposed amendments because the amendments provide clarifying guidance concerning the provision of Proposition 65 safe-harbor warnings for consumer product exposures for products purchased via the internet (including mobile applications) or through catalogs. The health and welfare of California residents will likely benefit by increasing the public's ability to understand the warnings they receive for certain consumer products they purchase and the manner by which they receive those warnings.

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

OEHHA has determined there are no reasonable alternatives to the proposed regulatory action that would carry out the purposes of the Act. The action provides clarification and specificity to the existing regulations.

Reasonable Alternatives to the Proposed Regulatory Action that Would Lessen Any Adverse Impact on Small Business and the Agency's Reasons for Rejecting Those Alternatives

OEHHA has determined that no reasonable alternative considered by OEHHA, or that has otherwise been identified and brought to the attention of OEHHA, including alternatives that would lessen any adverse impact on small business, would be as effective or less burdensome on small business. In addition, OEHHA has determined that the proposed regulatory action will not impose any significant requirements on small businesses that already must comply with the

warning requirements in the Act. Further, Proposition 65 expressly exempts businesses with less than 10 employees⁵ from the requirements of the Act.

Evidence Supporting Finding of No Significant Adverse Economic Impact on Business

The proposed regulatory action will not have a significant adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The action does not impose any new requirements upon private persons or businesses. It simply clarifies existing provisions of the regulations.

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 the regulatory action does not duplicate and will not conflict with federal regulations.

Economic Impact Assessment Required by Gov. Code section 11346.3(b)

Creation or Elimination of Jobs within the State of California

The proposed regulatory action will not impact the creation or elimination of jobs within California. The action provides clarification and specificity to the existing regulations concerning the manner by which safe-harbor warnings should be provided for internet or catalog sales of certain consumer products.

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

The proposed regulatory action will not impact the creation of new businesses or the elimination or expansion of existing businesses within California. The action provides clarification and specificity to the existing regulations concerning the manner by which safe-harbor warnings should be provided for internet or catalog sales of certain consumer products.

⁵ Health and Safety Code section 25249.11(b).

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

The proposed regulatory action will benefit California residents by further enabling businesses to better understand how to comply with the warning requirements such that warnings considered to be clear and reasonable are provided to Californians using consistent and uniform methodology. The action furthers the right-to-know purposes of the statute and therefore promotes public and worker health and safety.