



April 26, 2016

[Via email \(PDF\) Only \(P65Public.Comments@oehha.ca.gov\)](mailto:P65Public.Comments@oehha.ca.gov)

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

Re: Clear and Reasonable Warnings Regulation

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 March 25, 2016 Notice of Modification to Text of Proposed Regulation -- Title 27, California Code of Regulations, Proposed Repeal of Article 6 and Adoption of New Article 6, Proposition 65 Clear and Reasonable Warnings.

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.

CRA submitted extensive comments on the January 16, 2015 proposed regulations, and we are grateful that OEHHA incorporated some of CRA's proposed revisions into the November 27, 2015 version of the proposal. CRA is also appreciative of the time that OEHHA personnel spent with CRA representatives in our January 25, 2016 meeting to review CRA's outstanding concerns.

Nevertheless, CRA was disappointed to see that OEHHA made no substantive revisions to the November 27, 2015 version of the proposal as it relates to restaurant warnings (sections 25607.5 and 25607.6 of the proposed regulations). Critical issues remain, including the following items that were all raised in CRA's April 8, 2015 comment letter as well as in our January 25, 2016 meeting, including:

The first sentence of proposed Section 25607.5(a) and the first sentence of proposed Section 25607.6(a) are problematic in part because they use inconsistent wording and more importantly because that wording does not clearly apply to take-away, delivery, or drive-thru services—very common methods of food service and practices of restaurants. Section 25607.5(a) uses the term “intended for immediate consumption” while section 25607.6(a) uses the term “primarily for on-site consumption.” CRA proposes revising the wording of both so that the warnings clearly apply to the foods and non-alcoholic beverages, regardless of where they are consumed. CRA again 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, and it makes sense for OEHHA to harmonize its regulations with the terms used in the statute that OEHHA is implementing.

Proposed Section 25607.5(b), requiring warnings to be provided in two or more languages creates uncertainty and litigation risk. It is therefore necessary to re-write this proposed section to provide greater clarity, and to limit the circumstances in which the warning must be provided in languages other than English. The restaurant industry is uniquely affected by this requirement because the range of cuisine that is popular in California means that many restaurants use non-English words to communicate with clientele who are primarily English speakers. 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 Bourguignon. 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 this proposed section, 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 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 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 "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 continues to propose 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 (as required elsewhere in the proposed regulations). This proposed revision is based on language in court-approved consent judgments in litigation filed by the California Attorney General.

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 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 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). Some have incorporated these signs into custom fixtures that are expensive to modify. 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. There is no reason for OEHHA to restrict the sizing arbitrarily in this manner, particularly when 10 x 10 inch signs have been used for several decades.

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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.

Sincerely,



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

