



MEMORANDUM

TO: Fran Kammerer, Staff Counsel
Office of Environmental Health Hazard Assessment
fkammerer@oehha.ca.gov

FROM: Jim Abrams, President & CEO

DATE: March 28, 2008

SUBJECT: Comments Regarding Possible Amendments to Title 22, California Code of Regulations, Section 12601, Pertaining to Warnings for Listed Chemicals in Food

Dear Ms. Kammerer:

I am writing to you on behalf of the California Hotel & Lodging Association (**CH&LA**) to offer our preliminary thoughts regarding OEHHA's efforts to consider whether to amend Title 22, California Code of Regulations, Section 12601, pertaining to the method and content for warnings under Proposition 65 for exposures to listed chemicals in foods (**Section 12601**). (For your reference, CH&LA is the largest statewide lodging industry trade association in the country, with more than 1,840 member representing more than 176,000 guest rooms in bed and breakfast inns, hotels, motels, guest ranches, resorts, spas, condominiums, timeshares, agricultural homestays, and vacation home rentals located throughout California.)

CH&LA and I have been involved in the implementation of Proposition 65 since its approval by the voters in 1986. One of the most challenging problems that the lodging industry has faced has dealt with the permissible methods for providing the required warnings related to listed chemicals in food. As you can appreciate, the breadth of food and beverage operations in different types of lodging establishments creates significant problems in this regard. Not only do lodging operators face the same issues as all other foodservice businesses face in terms of knowing what the appropriate content of such warnings should be, but they have to consider the methodology of providing the warnings in a variety of settings, such as: traditional restaurant operations, room service, mini-bars, private banquets, outdoor parties, and retail (i.e., grocery) outlets, among others.

As articulated in OEHHA's notice of its intent to consider amending Section 12601 relative to warnings for listed chemicals in foods, businesses of all types have

experienced considerable frustration and confusion since Proposition 65 was first approved knowing exactly what they can and cannot do to provide meaningful, effective warnings for exposures to listed chemicals in foods and beverages. The lodging industry has particular problems in that regard: not only must lodging operators determine what the content of the warnings should be, they have to ascertain what the permissible means of providing the warnings might be in different operational settings.

One particular aspect of the problems which businesses face with respect to food/beverage-related warnings that I would like to bring to your attention has to do with the specific content of the warnings that are legally acceptable. At the present time, Section 12601 provides "safe harbor" warning content that states: "WARNING: Chemicals known to the State of California to cause cancer or birth defects or reproductive harm might be present in foods and beverages sold or served here." (I am doing this from memory and am omitting to worry about the safe harbor capitalization, punctuation, etc.) The problem with the safe harbor warning language is that it doesn't provide patrons or guests with any information whatsoever as to what listed chemicals might be present and what the dangers related thereto might be.

We have been told numerous times by OEHHA and many lawyers that Section 12601 clearly provides that the safe harbor language is not meant to preclude the right of businesses to use other language. However, the clear collective wisdom of the legal profession is that any business that dares deviate even one iota from the safe harbor language is risking unacceptable liability. The willingness of bounty hunter enforcers to challenge each and every alteration from the safe harbor "norm" that any business might wish to use in its warning language has made it impossible for businesses to do anything but stick strictly with the safe harbor language.

But this defeats one of the core goals of Prop. 65 in that consumers get no meaningful information that will help guide their purchasing and eating choices. CH&LA's members are frequently asked by concerned guests and patrons what the warning means and what they should be concerned about – what specific foods, what specific listed chemicals, what specific risks, and so on. Lodging staff are totally unprepared to offer any answers to these questions, and even if they were prepared to answer the questions, they will almost certainly have been instructed to say nothing at all at the risk of saying either too much or too little and having the operator face liability for providing a warning that is not clear and reasonable.

This dilemma was highlighted most vividly when the Attorney General sued a number of hotels, restaurants, and grocery stores to compel them to provide warnings that specifically referenced the presence of methyl mercury in seafood. CH&LA tried to develop warning language to suggest to its members that took the safe harbor content and expanded it slightly to refer to methyl mercury and its presence in most seafood, and to caution the population at particular risk of harm for this exposure. However, our legal counsel told us that our members would

face an unreasonable risk of liability if they took any such action. In other words, the lodging industry wanted to be flexible and provide its customers with information they wanted and should have, but the Proposition 65 enforcement environment is such that this is not possible.

In light of this conundrum, which is compounded when one considers all of the other listed chemicals that are typically found in lodging establishments (e.g., cleaning compounds, pesticides, pool chemicals, chemicals found in furniture and furnishings, engine exhaust, and so on), CH&LA embarked on a multi-year effort to develop what we consider to be an acceptable warning program for lodging establishments to use. This methodology expands upon the safe harbor warnings in the Proposition 65 regulations by providing a brochure which CH&LA developed in conjunction with legal counsel and an industrial hygienist.

More specifically, the warning methodology which CH&LA developed involves two different signs (one which utilizes the safe harbor language for facilities generally, and another which utilizes the safe harbor language for foods and beverages), and a brochure that provides easy-to-understand information about the types of listed chemicals that are commonly found in lodging establishments. The program also contemplates that the food/beverage-related warnings will be provided in conjunction with hotel room service, as well as in common restaurant operations.

I am attaching to this memorandum the signs, brochure, and instructions which CH&LA has developed and makes available to all California lodging establishments. Please note that we update the brochure as needed to incorporate information dealing with developments involving newly listed chemicals, newly identified exposure issues relating to listed chemicals, and other such factors. For example, when it was realized that the paint on gaming chips contain lead and that this was an exposure situation that required a warning under Prop. 65, we amended the brochure to include this exposure risk.¹ CH&LA has distributed thousands of these compliance kits to lodging establishments throughout California.

CH&LA feels that it is very important to achieving the key objectives of Proposition 65 that businesses be allowed the maximum flexibility possible to provide meaningful, correct information to patrons and consumers about exposures without being fearful that every miniscule departure from the safe harbor content and methodologies will result in substantial liability. We believe that the compliance program that we have developed for the lodging industry – utilizing signage and a

¹ The compliance program that CH&LA developed was approved by a superior court in Los Angeles. During the court hearings on this issue, the Attorney General's representative acknowledged to the court that the AG did not object to the use of a brochure per se to provide the warnings required by Prop. 65; the AG's representative did object, however, to CH&LA's brochure on the ground that it made reference to listed chemicals that might or might not be found in every lodging establishment, and that the brochure might involve impermissible "over warning" in some cases. The trial court's consent judgment was voided on appeal.

brochure – should be one, but certainly not the only, mechanism permitted. CH&LA looks forward to working with you and OEHHA as you move forward with this important project.

Please let me know if you have any questions or need any additional information prior to the next meeting. You can reach me at 916-554-2676 (direct) or jim@calodging.com.

Thank you for your consideration of the foregoing.

Attachments (4)

Guidelines for Complying with Proposition 65's Warning Requirements Using CH&LA's Global Settlement*



Complying with the warning requirements of the court-approved California Hotel & Lodging Association's Global Proposition 65 Settlement will protect you from claims with respect to the numerous chemicals which are likely to be used at various lodging establishments in a manner which could create an "exposure" for which a warning is required under Proposition 65. Please carefully review and implement the following compliance procedures, as applicable to your operations.

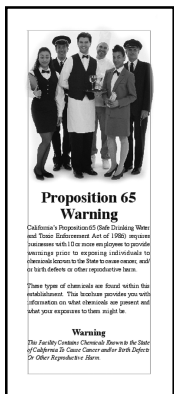
Warning Signs at Entrances

The warning sign at the right must be placed outside each *primary public entrance* into those buildings comprising the lodging establishment to which guests or members of the public are permitted. This includes entrances into and from parking structures. The placement of the sign at each of these entrances must be such that it is clearly visible.

The *size* and *format* of the sign, as well as the *warning language* in it, must be the same as the signs provided by CH&LA (i.e., 8.5 x11 inches; 8" square border, the word "WARNING" in all capitals, underlined, and in Arial 48pt.; the remaining text in Arial 36pt. or larger).

Warning Signs on Employee Bulletin Boards

The same warning sign that you post outside your entrances must also be placed on every employee bulletin board.



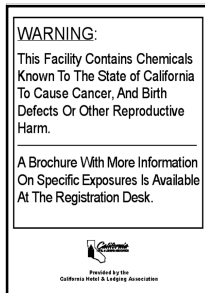
Informational Brochures

In addition to posting the warning signs discussed above, innkeepers must make available the informational brochure specified in the Global Settlement. These brochures can be obtained from CH&LA, which will update and distribute them as appropriate.

These brochures are to be made available by placing them in a stand or by means of other appropriate placement at the registration desk such that they are visible. If there is no registration desk at a hotel or inn, the brochures must be made available at the establishment's administrative office.

Alcoholic Beverages

If you sell or serve alcoholic beverages of any kind in your operations, you must continue to post the specified warnings that have been required for over a decade. These warnings can be obtained either from your alcoholic beverage distributor(s) or CH&LA.

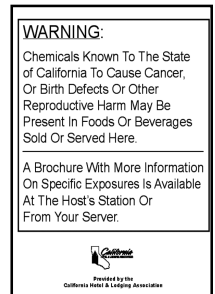


Tobacco Products

If you sell or provide *tobacco products* of any kind (cigars, cigarettes, pipe tobacco, or smokeless tobacco), you will continue to post the specified "point-of-sale" warnings that have been required for several years. These warnings are available through CH&LA.

Warning Signs and Brochures Regarding Foods & Non-Alcoholic Beverages

If you provide food and non-alcoholic beverages in your operations, the special warning sign at the right must be posted near the host's station in each food establishment open to the public (or in your lobby or other public space if you only serve a continental or similar breakfast).



The *size* and *format* of the sign, as well as the *warning language* in it, must be the same as the signs provided by CH&LA (i.e., 8.5 x11 inches; 8" square border, the word "WARNING" in all capitals, underlined, and in Arial 48pt.; the remaining text of sign in Arial 36pt. or larger).

The same brochures must also be available at the host's station, or from the guest's server or the restaurant's manager, as well as at the registration desk or administrative office (as stated above).

Room Service

If your property provides in-room food service, you have a choice regarding how to provide the required information. Please refer to "CH&LA Global Proposition 65 Settlement: Room Service Warnings" on the reverse for specific compliance details.

Staff Training Recommended

The California Hotel & Lodging Association recommends that you advise all employees of the CH&LA Global Proposition 65 Settlement's warning requirements and provide them with a copy of these guidelines and the informational brochure.

*If you have any questions regarding compliance requirements, please refer to the Consent Judgment, which is the final authority.
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Room Service Warning Requirements Under CH&LA's Global Proposition 65 Settlement

Properties which provide foods and non-alcoholic beverages in individual guest rooms **must provide a specified warning in or on the room service menu**. There are two options as to what the warning language must be, and the decision as to which option to use is solely in the discretion of the innkeeper.

Option 1 (Place the following warning in or on the room service menu):

WARNING:

Chemicals Known To The State of California To Cause Cancer, Or Birth Defects Or Other Reproductive Harm May Be Present In Foods Or Beverages Sold Or Served Here.

Foods such as french fries and potato chips cooked in oil at high temperatures can produce Proposition 65-listed chemicals such as acrylamide, which is known to the State to cause cancer. Broiling, grilling, and barbecuing fish and meats can produce Proposition 65-listed chemicals such as benzo-a-pyrene, which is known to the State to cause cancer. Nearly all fish and seafood contain some amount of mercury and related compounds, chemicals known to the State of California to cause cancer, and birth defects or reproductive harm. Certain fish contain higher levels than others. Pregnant and nursing women, women who may become pregnant and young children should not eat swordfish, shark, king mackerel, or tilefish. They also should limit their consumption of other fish, including tuna.

Option 2 (Place the following warning in or on the room service menu):

WARNING:

Chemicals Known To The State of California To Cause Cancer, Or Birth Defects Or Other Reproductive Harm May Be Present In Foods Or Beverages Sold Or Served Here.

A Brochure With More Information On Specific Exposures Is Included Along With This Menu.

NOTES:

1. If you use **Option 1**, you **do not have to include** the Proposition 65 Warning Brochure in, or along with the room service menu.
2. If you use **Option 2**, you **must include** the Proposition 65 Warning Brochure in or along with the room service menu.
3. If you provide alcoholic beverages through room service, the Consent Judgment expressly allows you to include the required alcoholic beverage warning language (i.e., Title 22, California Code of Regulations, Selection 12601(b)(1)(D)) as part of the warnings in Options 1 and 2 above, if you wish.

WARNING:

This Facility Contains Chemicals Known To The State of California To Cause Cancer, And Birth Defects Or Other Reproductive Harm.

A Brochure With More Information On Specific Exposures Is Available At The Registration Desk.



**Provided by the
California Hotel & Lodging Association**

WARNING:

Chemicals Known To The State
of California To Cause Cancer,
Or Birth Defects Or Other
Reproductive Harm May Be
Present In Foods Or Beverages
Sold Or Served Here.

A Brochure With More Information
On Specific Exposures Is Available
At The Host's Station Or
From Your Server.



**Provided by the
California Hotel & Lodging Association**

Sources of Chemical Exposure

California's Proposition 65 has identified hundreds of chemicals known to the State of California to cause cancer, and/or birth defects or other reproductive harm. The law requires that businesses warn you prior to knowingly and intentionally exposing you to any of these chemicals when the exposure is over a certain level. While many exposures are associated with industrial activities and chemicals, everyday items and even the air we breathe routinely contain many of these chemicals. This brochure provides information regarding exposures to these chemicals that occur in this establishment. In many instances, we do not have information specific to this establishment. Instead we have relied upon experts in this field to tell us where and to which chemicals exposures might occur. For other exposures to listed chemicals, enough is known to identify specific areas of exposure.

The regulations implementing Proposition 65 offer warnings for various circumstances. Some of those warnings you may see in this lodging establishment include the following:

General — Warning: This Facility Contains Chemicals Known To The State of California To Cause Cancer, And Birth Defects Or Other Reproductive Harm.

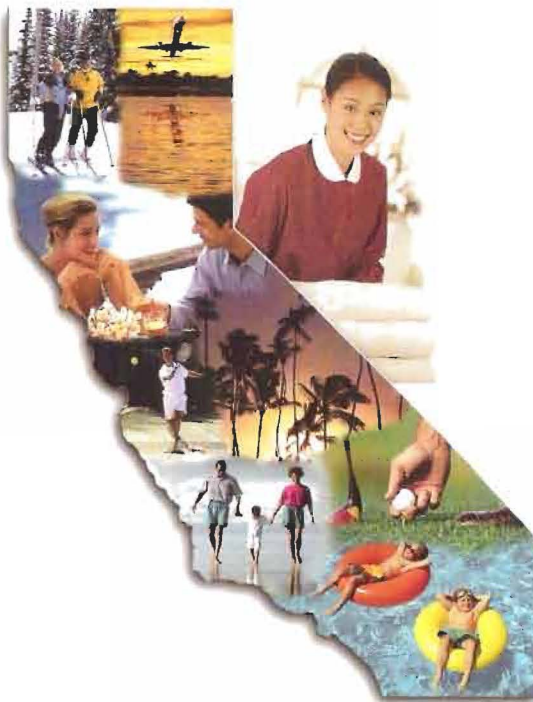
Food and Beverage — Warning: Chemicals Known To The State of California To Cause Cancer, Or Birth Defects Or Other Reproductive Harm May Be Present In Foods Or Beverages Sold Or Served Here.

Alcohol — Warning: Drinking Distilled Spirits, Beer, Coolers, Wine, And Other Alcoholic Beverages May Increase Cancer Risk, And, During Pregnancy, Can Cause Birth Defects.

Health Information — Pregnant women, nursing mothers, women trying to become pregnant, those with small children, and others wanting more information about food products can obtain additional information at the U.S. Food and Drug Administration website at: <http://www.cfsan.fda.gov/>. For more information on Fish and Seafood, you can also call the FDA at 1-888-SAFEFOOD (1-888-723-3366).



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The law firm of Jeffer, Mangels, Butler & Marmaro LLP assisted in preparing this brochure. For more information about JMBM go to www.jmbm.com or call (310) 203-8080 or (415) 398-8080.

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Proposition 65 Warning

California's Proposition 65 (Safe Drinking Water and Toxic Enforcement Act of 1986) requires businesses with 10 or more employees to provide warnings prior to exposing individuals to chemicals known to the State to cause cancer, and/or birth defects or other reproductive harm.

These types of chemicals are found within this establishment. This brochure provides you with information on what chemicals are present and what your exposures to them might be.

Warning

This Facility Contains Chemicals Known To The State of California To Cause Cancer And/Or Birth Defects Or Other Reproductive Harm.