

From: "Caroline Cox"
To: <fkammerer@oehha.ca.gov>
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Subject: comments about pre-regulatory draft amendments to safe harbor warning regulations

Fran Kammerer
Staff Counsel
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95812

Dear Fran Kemmerer:

The Center for Environmental Health and the Mateel Environmental Justice Foundation are pleased to provide the following comments about the 08/28/09 pre-regulatory proposed draft amendments to the Proposition 65 "safe harbor" warning regulations found in Title 27, Cal. Code of Regulations, section 25601.

We offer our comments from the perspective of California food consumers. We strongly believe that consumers deserve the "clear and reasonable warnings" required by law, and that the definition of "clear and reasonable" from the point of view of consumers is that the information is easily available to consumers and enables them, before they purchase food, to make informed decisions that enable them to protect their own health and the health of their families.

We fully support OEHHA's statement in the introduction to the pre-regulatory draft proposal that the agency intends for all regulatory changes to "generate more and better information for the public." All proposed language in any amendments to existing regulations should be judged against that standard.

We support OEHHA's proposals that ensure that all parties in the chain of food distribution retain responsibility for passing clear and reasonable warnings about toxic chemicals in food to consumers. We also have specific comments about the four proposed methods that food retailers may choose to provide warnings to customers:

1. A product-specific warning provided with or on the cash register receipt.

This method flies in the face of the underlying purpose of Proposition 65 - to empower consumers to make informed decisions about the safety of the food they put on their family dinner tables before they purchase that food. For this reason, the cash register receipt has serious drawbacks. By the time consumers receive the warning, they will have already purchased the toxic chemical-containing food that requires the warning. If they don't wish to purchase food containing carcinogens or reproductive toxicants they will need to get back in line to return the product, and go back to select an alternate product. They will then need to go through the checkout line again and pay for the alternate product before they can determine whether or not it also contains a harmful

chemical. If it does, they will need to repeat the process until they find a food product that doesn't contain a carcinogen or reproductive toxicant. It is hard to see how this process can be called "reasonable." It is certainly likely to cause frustration, confusion, and delays at the checkout lane.

It is true that many food consumers purchase the same items week after week, so that consumers theoretically would need to experience this frustrating process only once for each of their typical purchases. However, many food items come in a staggering variety of flavors and types. We do not believe it is reasonable for consumers to have to remember, for example, which brand and flavor of potato chips they purchased in the past when they received a Proposition 65 warning. In addition, many people like trying new foods, and they should not be penalized.

2. A product-specific warning provided on or with the shelf price tag for the product at the point of display of the product.

Provided that the warnings are accurate, keyed to a specific product, and legible, we believe this is an excellent method for providing warnings to customers. Most consumers look at the price tag prior to purchase of product. Stores routinely provide announcements of sale prices, coupons, and information about new products this way, so we believe that any criticisms that this proposal is not practical are weak.

3. A product-specific warning in a brochure offered to each customer at the checkout counter prior to purchase of the product.

We believe that this proposal shares some of the serious shortcomings of the first option (warnings on cash register receipts). While customers would receive the warnings prior to purchase, customers would not receive the brochure until they have already waited in line. As with the cash register receipt warnings, customers who wished to protect their family's health would need to leave the line, find an alternative product (with the brochure's assistance), and return to the checkout counter to wait in line again.

In addition, it seems likely that the brochure would identify products requiring warnings with UPC codes, since other identification is often ambiguous. This would be difficult for the average consumer, as most consumers will not be willing to spend the time to read the brochure and cross-reference all of the items they are purchasing.

Taken as a whole, the burden put on a consumer who wished to avoid consumption of toxic chemicals by this warning method is not reasonable.

4. A product-specific warning provided via any electronic device or process that automatically provides the warning to the customer while the customer is in the store, without requiring the consumer to seek out the warning.

This option is intriguing, but given the lack of detail in the proposed language it is hard to judge whether or not this option will "generate more and better information for the public." We recommend that OEHHA more

fully develop this option with a goal of making it as consumer-friendly as possible.

At the public workshop about this pre-regulatory proposal, many of the representatives of the food industry voiced their support for what they called the "binder" or "compendium" option. Since this option would require consumers to actively seek out the binder or compendium in order to find out whether any of the items they planned to purchase contained toxic chemicals, it does not meet the standard identified in *Ingredient Communication Council v. Lungren et al.*, in which "the court determined that in order to comply with the Proposition 65 warning requirement, a consumer must not have to seek out a warning message."

Thank you for this opportunity to improve the health of Californians.

Sincerely,

Caroline Cox
Center for Environmental Health

Bill Verick
Mateel Environmental Justice Foundation

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