



October 19, 2009

Ms. Fran Kammerer
Staff Counsel
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

RE: Proposition 65 Warnings for Exposures to Listed Chemicals in Food

Dear Ms. Kammerer:

These comments are jointly submitted by the California Retailers Association (“CRA”) and the California Grocers Association (“CGA”) in response to the draft pre-regulatory proposal by the Office of Environmental Health Hazard Assessment (“OEHHA”) dated August 28, 2009.

As the primary trade associations for the retail food industry in California, CRA and CGA together represent more than 6,000 food retailers, including chain and independent supermarkets, convenience stores and mass merchandisers.

Like other food industry organizations, CGA, CRA and our member companies made a commitment nearly two years ago to work with due diligence and in good faith to support OEHHA’s goal of developing a new regulation that would create safe harbor options for the sale of foods in retail stores. Our associations have devoted significant resources to this end.

In order for our associations to support the food warning regulation, it first and foremost must be workable for all manufacturers and retailers, the very parties charged with the warning obligation. While we do *not* support OEHHA’s current draft, we believe the proposal could be modified in a way that would enable us to continue to support OEHHA’s regulatory goal. The purpose of this letter is to provide more specific details regarding the modifications we feel must be implemented in order for our associations to support the proposed food warning regulation.

1) Warning Mechanisms

Compendium/Handbook

The draft provides a list of optional warning mechanisms for communicating the warnings to consumers: via cash register receipt, on the shelf price tag, a brochure provided at checkout, an electronic device or communication that must be approved by the agency, or any other warning method approved by the agency. However, the only viable option for the majority of food retailers at this time is missing: that is, the option of a written compendium as a vehicle for making the warnings available to consumers in hard copy in the store. Without such an option, the regulation is not currently feasible for most retail sellers. In addition, a compendium is the only method a retailer could currently use to pass through to the consumer detailed or nuanced food warning information.

Ultimately, emerging technologies such as “smart labels”, “smart carts” and RFID chips (radio frequency identification devices) will likely solve this struggle over mechanisms to communicate warnings. Central electronic kiosks, which are currently in the experimental phase, may be able to receive a complete electronic feed from the website. However, a standard written warning is the only warning method that *all* retail stores can employ *now*.

Electronic Devices

The existing regulations already recognize that the warning message need only be made *available* to the consumer.¹ Draft Section 25603.4(c)4 requires the electronic device or process to *provide* the warning to the customer while the customer is in the store “*without requiring the consumer to seek out the warning.*” This is not required under existing law and is wholly unworkable. Even when and where stores are able to utilize an electronic message center or kiosk to communicate the warning, the consumer will still need to *come to* the kiosk to access the warning. This is consistent with the statute and its implementing regulations, which allow for general warning methods, and require the warning to be *made available* to the consumer.

The *ICC v. Lungren* case does not compel a different result. That case cautioned against warning methods that require considerable effort by the consumer, which led the court to conclude that the warnings were not really being made *available* to consumers. Industry adoption of the system we are proposing – including a warning sign that was not present in the *ICC* system, and specific information in a compendium, kiosk or other central location – would indeed make warnings “*available*” to consumers.

¹ Cal Code Regs., tit. 27 § 25601 Clear and Reasonable Warnings. (“Whenever a clear and reasonable warning is required... the method must be reasonably calculated...to make the warning message *available* to the individual prior to exposure.”)

Accordingly, we recommend the wording in Section 25603.4 (c)4 referenced above be deleted from the draft.

Brochure

Draft Section 25603.4(c)2 sets out the requirements for use of a brochure as a warning option. The brochure would be required to contain the brand name for every product that requires a warning “*and full product specific warnings for each named product.*” The comprehensive nature of this requirement means any brochure would become a voluminous document, too big to simply sit at checkout, out-of-date within a matter of days after printing, and costly to update. The draft also requires this tome, if used as the warning method, be provided “to each customer at the checkout counter *prior to purchase of the product.*” Compliance with this would mean the clerks must *hand* the brochure to every customer, *every time* they come into the store – as frequently as daily for some – *before* the clerk picks up the very first item to scan across the point of sale device. This is unworkable in the retail environment, will be redundant for many customers, will slow down the checkout time, will anger some customers, will be a source of disciplinary action against clerks, and will create litter as customers toss out the information.

Shelf Tags

Shelf tags already exist as an option in the current regulations, as do product labels and specific product signs. It is unnecessary and redundant in the draft regulation. The proposed regulation need only state that all existing warning methods remain as options within the safe harbor and on their own.

In addition, for operational reasons, a majority of our members tell us they would not utilize this option for warning purposes. Ensuring that the shelf tags are correctly located so that the warnings are properly posted and associated with the correct product poses significant logistical difficulties and unacceptable labor costs. Retailers have found that they are often subject to Prop 65 enforcement actions over claims that their point of sale warning programs are inadequate when signs are not properly posted due to human error, misplacement, damage or theft.

Thus, we do not find this method particularly viable, at least until electronic shelf tag technology advances, but since on-shelf signage is currently a safe harbor method, it should not be repeated in the proposed regulation.

Register Receipts

This may be a workable option for some retailers. However, the specifications in the draft need to be revised and clarified. The 12-point type is too large for receipts. We suggest a requirement that the warning typeface size be no smaller than the product listing on the receipt. Also, it is not clear whether product warnings will be required to be reprinted/repeated for each item purchased. Without additional clarification, the

length of customer receipts could become ridiculously long and unacceptable for both retailers and the consuming public.²

Summary

In summary, warnings via electronic devices or by the use of some other form of in-store technology are not technologically feasible now, although they will likely be available in the future. The retail industry does not find the use of shelf tags or brochures to be practical options. Thus, the only potentially feasible warning method currently in the draft proposal is the use of cash register receipts – with the clarifications we proposed, and with the understanding that not all retailers have point of sale systems that can accommodate the warnings. This further emphasizes the need for a hard-copy warning method to be added.

2) Language and Concepts That Require Modification

The Law Requires Only that the Warning be Made “Available” to Consumers

The draft in many instances references *providing* the warnings to consumers. In all cases this language should be changed to “*make available*” to the consumer to be consistent with California Code of Regulations Section 25601.³

All Foods Must be Included in the Safe Harbor

The draft exempts fresh fish from the safe harbor regulation. In order to avoid consumer confusion and to maintain consistency with the food warning regulation, all foods should be subject to the new food warning program.

There is no basis for excluding any food product from the regulation. Whether a specific food has been subject to litigation in the past or present, the food warning regulation is not impacted and should not make exceptions. For example, canned tuna and balsamic vinegar are foods not excepted, although they were subject to litigation. Potato chips have been and continue to be subject to litigation, but were not excepted.

The only food product excepted is fresh fish, purportedly because that food continues to be subject to litigation. There is no basis for discriminating between foods. The regulation should cover all foods in order to maintain consistency and avoid consumer and retailer confusion. The food warning program will not be comprehensive if retailers are left with liability for *some* foods.

² *Tale of the Tape: Retailers Take Receipts to Great Lengths*, Wall Street Journal article, Sept. 2, 2009: <http://online.wsj.com/article/SB125175363135673825.html>.

³ Cal Code Regs., tit. 27 § 25601 Clear and Reasonable Warnings. (“Whenever a clear and reasonable warning is required... the method must be reasonably calculated...to make the warning message *available* to the individual prior to exposure.”)

The Regulation Must Not Create a New Legal Burden

Draft Section 25603.4(c)2 should be deleted, since it attempts to create a new legal burden for retailers that is not contemplated by the statute. OEHHA has no authority to create a new burden by regulation. This section would allow a manufacturer/supplier to send a letter to a retailer or put a notice in a case of product stating that the food requires a warning and thereby shift the manufacturer's burden to the retailer. It completely destroys any incentive for a manufacturer or retailer to implement the new food warning program conceived by the proposed regulation. It further defeats the goal of a safe harbor for food sales which was intended to implement the statutory proscription that the implementing regulation should "...minimize the burden on retail sellers of consumer products, including foods..."⁴

Annual Updating of Warnings is Practicable for Retailers

The draft places unrealistic burdens on retailers to update the content of signage, brochures or any other warning method within 30 days of knowledge that a new product requires a warning, or within 90 days of an updated warning being placed on the web. This is unrealistic and cost-prohibitive.

Regardless of when manufacturers place their product information on the web, retailers should only be required to download or update their warnings on an annual basis.

Participating Retailers be Should Given a Notice and Allowed to Cure

While retailers and manufacturers that choose to implement the proposed safe harbor food warning program will pay the required fee and participate in good faith, there will be unavoidable human and technological error in the implementation. A reasonable notice and cure provision is needed to avoid enforcement of unintended violations.

Contractual Relations Should Not be Affected

Nothing in the regulation should affect or supersede contracts between manufacturers and retailers and should be so stated.

Compliance Should be Available at Different Warning Levels for Different Trade Styles

Food is different from other consumer products as it is purchased by shoppers on a daily basis. This is recognized by the statute and implementing regulations.⁵ What the food

⁴ Health & Saf. Code, §25249.11, subd. (f).

⁵ Final Statement of Reasons for Cal. Code Regs., tit. 22 § 12501 (warnings on a basic necessity like food would cause consumer confusion); Cal. Health & Safety Code § 25249.11(f); 27 Cal. Code Regs. § 25601(b)(1) ("Warning' within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods ...").

retailers want to accomplish is a balance between a workable regulation where compliance is achievable for both manufacturers and all food retailers while still providing consumers access to meaningful warning information.

The average supermarket carries over 30,000 food products. We recognize that it will not be workable for manufacturers to determine which retailers sell any or all of their products and which retailers opt in to the food warning program. Particularly with reference to small and medium size stores, manufacturers will likely have no direct relationship with those retailers to know whether that retailer even carries the manufacturer's products. These stores are often serviced by wholesalers and distributors, which leaves manufacturers in an "un-knowable" position and thus unable to comply with the regulation as written. Likewise, retailers cannot discern which of their 30,000 items require a warning. For this program to work, there must be an easy method for retailers to download the manufacturers' warnings from a single website and, acting as a conduit, make them available to the consumer.

Retail industry data for the 52-week (one year) period ending September 12, 2009, demonstrates that the largest 15 food retailers account for nearly \$19 billion of the \$26 billion in food sales in California, that 99.3% of all households shopping for food do so at one or more of these retailers, and that 71.4 cents of every food dollar is spent on food in these large retail premises.⁶ The 12.9 million households shopping in these large stores made an average of 54 trips per year to those stores – more than once a week. These figures demonstrate that consumers will be exposed many times to the warnings available at the large food retailers, thus alleviating the need for all stores to participate in the full warning program.

This data further supports our recommendation for an alternative compliance mechanism for the mid-to-small size food retailers. These retailers could be required to post only one general sign, directing consumers to the OEHHA food warning website, and doing so would deem those retailers to be in compliance with the safe harbor food warning program. This option provides the consumer within those stores with more information than they are now receiving – how to access product-specific warnings. It simplifies compliance for manufacturers, and it simplifies compliance for the smaller retailers.

We also recommend that the regulation be amended to permit non-food retailers, such as electronic, home improvement, book or auto stores, that sell a *de minimis* amount of food, such as candy and sodas, to post a similar general warning sign and be deemed in compliance. Allowing participation in the food warning program through an alternative mechanism as we suggest would provide consumers with additional information in settings where they currently receive none while providing those retailers with a safe harbor.

The proposed food warning safe harbor program should: 1) be tailored to the unique issues surrounding the purchase of food; 2) recognize the fact that consumers repeatedly purchase the same foods at multiple locations and primarily through the largest retailers

⁶ See Market Statistics compiled by Information Resources, Inc. for GMA, attached.

in the state; and 3) provide for the warning requirements to be tailored to the breadth of a retailer's food sales.

We would be happy to work jointly with you to develop specific language to achieve these goals by refining the applicability of the draft more narrowly than the current application to "those who sell food in a retail setting."

Thank you for your consideration of all of our comments.

Sincerely,



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