



June 6, 2014

Monet Vela, Associate Governmental Program Analyst
Office of Environmental Health Hazard Assessment
P. O. Box 4010
Sacramento, California 95812-4010
P65Public.Comments@oehha.ca.gov

Re: California Apartment Association Comments on the March 7, 2014, Pre-Regulatory Draft of Changes to Title 27, Article 6, Clear and Reasonable Warnings

Dear Ms. Vela:

The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA has the goal of promoting fairness and equality in the rental of residential housing and aiding in the availability of high quality rental housing in California. CAA advocates on behalf of rental housing providers in the legislative, regulatory, judicial, and other forums.

Starting in 2000, many of CAA's members were targeted with notices of violation of Proposition 65 for failure to warn regarding environmental tobacco smoke and automobile exhaust. In response, CAA conducted a number of educational sessions, coordinated joint representation for its members, and promoted compliance methodology developed in the course of the litigation for use by all of its members. Copies of our compliance materials are attached. While the trial court's order approving the consent judgment, incorporating that methodology, was reversed by the court in *Consumer Defense Group v. Rental Housing Industry Members*, (2006) 137 Cal. App. 4th 1145, CAA's position has been that the compliance method and message are still appropriate for its members' use, where warnings are required, and CAA has continued to promote it.

CAA supports OEHHA's efforts to create a consistent rental housing industry-specific warning method and language and to provide clarity to the regulated community generally. While CAA recognizes that OEHHA has already considered and dismissed the idea of allowing all existing warning schemes to continue, CAA requests that special consideration be given to its members, since the method and content were approved by the trial court and the reversal of the judgment was based only on deficiencies in the notices and excessive attorney's fees to the plaintiffs. At this time, CAA's members have at least 73,000 metal and plastic warning signs produced by CAA posted at their properties, in addition to those printed from CAA's website or produced by the members themselves.

CAA and its members' primary interest with respect to Proposition 65 is to have a clear and practical way to comply with the law. The OEHHA proposal states repeatedly that it applies "where warnings are required." That is a difficult, if not impossible, evaluation for a property owner or manager to make, due to the variety of building materials, interior finishes, carpeting, and other items present at each apartment building (or individual unit), or rental house. In addition, the current owner/manager was generally not involved in, or even necessarily alive, when the building was constructed. If a listed chemical is present, the owner/manager has three choices: (1) do nothing and wait for a notice of violation, (2) provide a warning, or (3) conduct testing to determine the actual level of exposure and if there is not a predetermined level, conduct a study to determine how much exposure is too much. Even if the industry were to conduct some studies on "model" buildings, interior finishes, and carpeting, these results would not necessarily be applicable to every type and age of building. Given the huge expense and uncertainty of such an approach, our members have been counseled by their attorneys to provide warnings when listed chemicals in any amount are likely to be present.

CAA agrees with the Attorney General, as quoted in *CDG v. RHIM* that "it does not serve the public interest to have almost the entirety of the State of California 'swamped in a sea of generic warnings.'" Notably, the *CDG v. RHIM* opinion states that a notice of violation is only appropriate for exposures that do not occur in "every building in this state" and suggests that for buildings and exposures that are indistinguishable from others, the public interest does not require a Proposition 65 warning. While CAA approves of this interpretation, it would mean that the type of warnings in the proposed regulatory draft and also CAA's existing compliance methodology are not necessary. For this reason, there is a tremendous need for clarification of whether or not a warning is required at all for residential rental properties, commercial buildings, hotels, and other types of buildings that contain the same chemicals and materials as every other building in the state.

CAA recognizes that the question of what is "knowingly and intentionally" in the rental housing context and whether warnings are required at all, is beyond the scope of this rulemaking and that the "proposed regulation becomes effective only after a business determines that the exposure to a listed chemical it knowingly and intentionally causes requires a warning." However, this broader issue is the background against which CAA's comments and suggestions below are set. The section by section comments below assume that a warning is, in fact, required.

Specific Comments by Section:

- **25601 Clear and Reasonable Warnings**

Subsection (b) states a party may request warning method or message if there isn't a specific one provided in the regulation. Can a business request an alternative if the standard warning is not workable? For example, if this were the final proposal, could a property management company request a different warning method to be used for single family homes that they manage?

Specific Comments by Section (Continued):

- **25602 Definitions**

There is inconsistency between the definitions in the references to exposures. The definition of “affected area” refers to a place where an exposure that requires a warning “will occur.” Similarly, the definitions of consumer products and occupational exposures refer to an exposure “that results” and “that occurs.” However, in the context of environmental exposures requiring a warning, the reference is to exposures that “*may foreseeably occur*,” rather than exposures that are certain.

- **25603 Court-Approved Settlements**

As discussed above, the warning message and method in the rental housing industry case was approved by the trial court, but the order approving the consent judgment was overturned by the Court of Appeal. CAA requests that OEHHA allow CAA’s members to continue to provide the warnings pursuant to that settlement. While CAA supports a consistent warning message/methodology scheme for the rental housing industry, the proposed scheme is not substantially different, with respect to apartment buildings. Both contain limited information in a sign and direct the reader to a website where more information can be found, although under CAA’s methodology, every tenant would automatically have received additional information beyond what appears in the sign at the time they sign their rental contract, and annually thereafter.

- **25604 Lead Agency Website**

This section describes a website that will be created by OEHHA to provide additional information regarding exposures. Every business providing a warning is required to provide 11 categories of information regarding each exposure and update it within 30 days of a change. For some of the categories, it is unclear what must be provided and what an owner/manager should do, if the answer to the question is unknown or unknowable. For example:

- a. Is the Owner/manager required to provide the manufacturer of a consumer product that may result in environmental exposure? i.e., who made the lead paint; who made the carpeting and shower curtain in each apartment?
- b. Is “I don’t know” an acceptable answer for information regarding the “anticipated level of human exposure to listed chemical, if known.” If it is not known – is there a “knowing and intentional” exposure?

It may be helpful for OEHHA to provide an online form with menus for each question – and have many of them include a “don’t know” option. The initial statement of reasons at page 9 states that “this provision clarifies that a business should have a good faith belief that a warning is required for a given exposure when it provides a warning, thereby reducing the warnings that are provided where businesses have no reasonable belief that one is required.” It would be very helpful if a statement in the regulation itself were provided that a good faith or reasonable belief that no warning is required is a defense to liability, would be very helpful.

Specific Comments by Section (Continued):

- **25604 Lead Agency Website**

Page 9-10 of the initial statement of reasons suggest that this information can be collected by trade groups. While CAA is certainly willing to assist in collecting this type of information from our members to the extent we have the resources, it is unclear what level of detail OEHHHA is seeking. When helping develop compliance methodology during the CDG litigation, several of our members sent us binders of information regarding their properties. For each property there was at least one thick binder containing Material Safety Data Sheets, descriptions of construction materials, activities, and other conditions at the property – a private beach, arts and crafts activities, dining facilities, etc. Some members provided multiple 3-4 inch binders of information for a single property. The warning brochure we currently make available to our members is the end product of that process. CAA does not have the resources to coordinate that volume of information from all of our members with 10 or more employees, regarding each of their properties, or to update it whenever a new brand of carpeting is used. In addition, many of our smaller members would likely find it easier to hire a management company with fewer than 10 employees, than to assemble this information.

While it is extremely onerous to collect this information from a property management company's standpoint, it is difficult to imagine the resources on OEHHHA's part that would be required to turn that information into something both manageable and useful to the individuals being warned. CAA welcomes the opportunity to develop a workable solution with OEHHHA that provides meaningful information, where a warning is required.

It is also unclear whether this information is part of the warning that must be provided prior to exposure. Can a private enforcement action be based on deficiencies in the background information provided to OEHHHA? Given the nearly impossible burdens on the defendant to prove no warning is necessary and to compile and update information about all possible chemicals on the property, this would be profoundly unfair.

- **Section 25605 Chemicals, Substances or Mixtures that must be Disclosed in Warnings**

CAA supports the limitation on the chemicals that must be listed on the sign, assuming that the law requires the listing of specific chemicals. However, the provision states that the list of twelve chemicals that must be named – may be changed over time. Does this mean mandatory warning language for residential rental properties may change, even if nothing on the property has changed?

Specific Comments by Section (Continued):

- **Section 25607.15 Environmental Exposure Warnings –Method of Transmission**

This section requires warnings to be provided in “languages commonly spoken in the area.” It is unclear whether this requirement applies to the location-specific warning for rental housing. This would be a very difficult provision for the rental housing industry to comply with, considering the hundreds of languages spoken in California. In addition, inquiries by management into the languages spoken by applicants or residents could raise fair housing concerns.

This section also provides for a personal delivery, mail, or email option to occupants. CAA prefers this option (or distribution with application/leases) to posting for providing warnings to applicants and tenants (discussed below).

- **Section 25607.17 Warnings for Specific Environmental Exposures**

(b) Apartments, Hotels, and other Lodging Facilities - Method of Transmission

The proposal requires a sign at each “point of entry” to the building. In the rental housing context, does this mean OEHHA is assuming that casual visitors, delivery people, meter readers, etc. are exposed at levels requiring a warning? If that is not the case, CAA proposes that warnings be provided to applicants and tenants only, at the time of application, through lease paperwork and/or at regular intervals during the tenancy. Information is already provided to tenants in this way regarding lead-based paint, asbestos, mold, bedbugs, pest control activities, etc. This is the methodology CAA currently recommends for properties with 4 or fewer units. (Discussed below).

It is unclear what is considered a “point of entry” to the building. Does this include: entrances to each tenant’s unit where entry is direct from the exterior (i.e., townhouse or garden style)? Re-entry from exterior areas of individual units? Employee entrances, leasing office, clubhouses, exterior common areas: pools, tennis courts, etc.? CAA’s current warning methodology contains more examples of entry points.

It is also unclear where warning signs would go for single family homes? Duplexes, fourplexes? Vacation rentals? A single condominium that is rented by a property management company in a complex with no other rentals? Many smaller properties and single units are managed by property management companies that have enough employees to be covered by Proposition 65. In the CDG case, many of the defendants managed multiple properties with 4 or fewer units. For example, one management company in San Francisco, in addition to many larger properties, manages seven four-plexes, twelve tri-plexes, eleven duplexes, and thirteen single units/single family homes, all of which were involved in the CDG litigation. CAA’s current recommended warning methodology contains a different approach for providing warnings at smaller properties. This is the approach CAA would like OEHHA to consider for all residential rental property.

Specific Comments by Section (Continued):

- **(b) Apartments, Hotels and other Lodging Facilities-Content**

As indicated above, CAA supports clear consistent warning language for use by the entire rental housing industry, where warnings are required.

If one of more chemicals of the three on the sign is not present on the property, may the chemical simply be omitted? For example, many rental properties in California do not contain lead-based paint (because they were built after 1978) and do not offer any onsite parking (older properties in cities such as San Francisco) or enclosed parking. For these, can the references to lead or vehicle exhaust simply be omitted from the sign?

Thank you for your consideration of our comments and suggestions. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

California Apartment Association



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INSTRUCTION SHEET

PROPOSITION 65

Posting Requirements

Purpose of Warning

Proposition 65 requires the provision of “clear and reasonable warnings” by businesses prior to exposing any person to a chemical known to the state of California to cause cancer or birth defects or other reproductive harm.

Proposition 65 only applies to businesses with 10 or more employees.

The regulations provide warning messages and transmission methods that are deemed clear and reasonable for environmental exposures, but do not preclude a person from providing warnings other than those specified as long as the message is “clear” and the warning method is “reasonable.” These instructions are for the CAA recommended procedure for complying with the warning requirement using a combination of a brochure and warning signs. The procedures are designed to provide warnings to residents, guests and any other persons coming onto the property.

Depending on the size of the rental housing complex, different requirements apply. For larger complexes (those complexes with **5 or more** separate rental units) there is one compliance methodology. For smaller rental housing facilities (those complexes with **4 or less** separate rental units) there is a different compliance methodology.

- 1. Larger Complexes:** Rental properties that have **five (5) or more** rental units.
- 2. Smaller Facilities:** Rental properties with **four (4) or less** rental units.

The **first step** in implementing the CAA recommended compliance methodology at each property is to determine if the particular property is a larger complex **or** smaller facility. Once you determine the category of property you are dealing with, follow the guidelines below.

Compliance Guidelines for Larger Complexes (5 or more units)

Introduction: The compliance methodology for larger complexes has two key components: (i) posting warning signs at various locations throughout the complex, and (ii) distributing an informational brochure to existing and new tenants. In addition, the warning language refers people to a website (www.prop65apt.org), which contains the same information as the informational brochure and makes the brochure available to print.

1. Posting Warning Signs at Entrances and Other Locations

- **First**, the warning sign must be placed outside each **primary public entrance**, including entrances to parking garages (both vehicular and pedestrian), i.e., by entrance(s) to building, driveway(s), gate(s) to parking garage, door(s)/gate(s) providing access from parking garage to building, etc.).
- **Second**, if entrances to individual apartments are reached through pathways or other open areas (as opposed to through a common public entrance to the building), then the warning sign should be posted at each of the nearest points to these open areas, i.e., on walls or fences nearest the pathways providing access to the apartments.
- **Third**, if public areas such as pools, open spaces, playgrounds, or community buildings, can be accessed from a point other than a common public entrance to the building, then a warning sign should be posted near such areas (i.e., on a gate to a pool, and on a fence/wall nearest a playground). If these areas are accessed through a common public entrance, then no sign is needed near these public facilities/areas.
- **Fourth**, the warning sign must be placed on every employee bulletin board or in employee handbooks, if they exist. In addition, warning signs must be placed outside entrances to administrative offices, if any.

CAA members may print a copy of the warning sign from CAA's website (www.caanet.org). You should not alter the **size** and **format** of the attached sign or the **warning language** (i.e., 8.5 x 11 inches; the word “WARNING” in all capital letters, underlined, and in Garamond 48pt.; the remaining text of sign in Garamond 40pt.; all text is bold), except you may enlarge the warning sign and text if you choose. Pre-printed plastic and metal signs may be ordered from your local association or by going on line to www.caanet.org/caastore.



2. Distributing the Informational Brochure to Each Existing and New Tenant

- **First**, you must distribute the informational brochure to (i) all existing tenants, and (ii) all new tenants at the time each tenant executes the initial rental/lease agreement. This is an additional requirement beyond posting the warning sign in the locations discussed above.
- **Second**, the informational brochure must be placed on every employee bulletin board or in employee handbooks, if they exist. This is to ensure employees in particular receive the warning.

A copy of the brochure is attached. CAA members also may print a copy of the information brochure from CAA's website (www.caanet.org). The brochure also is available for viewing and printing at www.prop65apt.org.

Compliance Guidelines for Smaller Facilities (4 or less units)

Introduction: The compliance methodology for smaller facilities involves distributing the informational brochure only. No warning signs are required to be posted at these smaller facilities.

Distributing the Informational Brochure to Each Existing and New Tenant

- **First**, you must distribute the informational brochure to (i) all existing tenants, and (ii) all new tenants at the time each tenant executes the initial rental or lease agreement.
- **Second**, the informational brochure must be placed on every employee bulletin board or in employee handbooks, if they exist. This is to ensure employees in particular receive the warning.
- **Third**, by the end of each calendar year, you must mail one additional (1) informational brochure **via first class mail** to each individual apartment or dwelling unit. The mailed envelope **shall** be labeled: **TO ALL OCCUPANTS/GUESTS**. The brochure may be mailed with other materials, but the envelope must be addressed "TO ALL OCCUPANTS/GUESTS."

Pitfalls and Precautionary Notes:

1. Proposition 65 only applies to businesses with 10 or more employees. In many cases this means that a management company will have a duty to provide the warnings, while the owner of the property does not. If you are not sure whether an individual is an employee, please contact your attorney.
2. This form has been prepared by the California Apartment Association to help members comply with applicable California and Federal law. The California Apartment Association, its local Chapters, and Divisions do not make any representation or warranty about the legal sufficiency or effect of this form. Consult with an attorney if you require assistance in completing the form or to determine if use of the form is appropriate or changes to the form are necessary in any particular situation.
3. The California Apartment Association does not sanction any CAA form which has been altered or changed in any way.



Sources of Chemical Exposures

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 with 10 or more employees 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 warning and information regarding exposures to these chemicals that occur in this facility. In many instances, we do not have information specific to this facility. Instead we have relied upon experts in this field to tell us where and to which chemicals these 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 residential rental property 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.

Foods and Beverages – 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.



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California's 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.

Second Hand Tobacco Smoke and Tobacco Products.

Tobacco products and tobacco smoke and its by-products contain many chemicals that are known to the State of California to cause cancer, and birth defects or other reproductive harm. Smoking may occur in certain common and private areas.

Furnishings, Hardware, and Electrical Components.

Room furnishings and building materials contain formaldehyde, which is known to the State of California to cause cancer. Furniture, foams, brass keys, electrical power cords, carpeting, carpet padding, wall coverings, wood surfaces, and vinyl, contain a number of chemicals, including lead, and formaldehyde, known to cause cancer, and/or birth defects or other reproductive harm. Their presence in these materials can lead to exposures.

Pest Control and Landscaping.

Pests control and landscaping products used to control insects and weeds contain resmethrin, mycobutanol, triforine and arsenic trioxide which are known to the State to cause cancer and/or birth defects or other reproductive harm.

Mold and Fungi.

Certain molds and fungi contain chemicals, including sterigmatocystin, known to the State of California to cause cancer.

Construction and Maintenance Materials.

Construction and maintenance materials contain Proposition 65-listed chemicals, such as roofing materials manufactured with vinyl chloride monomer, benzene and ceramic fibers, which are known to cause cancer, or birth defects or other reproductive harm. Construction materials used in walls, floors, ceilings and outside cladding contain chemicals, such as formaldehyde resin, asbestos, arsenic, cadmium and creosote, which are released as gases or vapors during normal degradation or deterioration, and as dust or particulate when disturbed during repairs, maintenance or renovation, all of which can lead to exposures.

Certain Products Used In Cleaning And Related Activities.

Certain cleaning products used for special cleaning purposes such as graffiti removal and spot and stain lifters contain chlorinated solvents including perchloroethylene and urinal odor cakes contain paradichlorobenzene which are Proposition 65-listed chemicals known to cause cancer or birth defects or other reproductive harm.

Swimming Pools and Hot Tubs.

The use and maintenance of a variety of recreational activities and facilities such as swimming pools and hot tubs where chlorine and bromine are used in the disinfecting process can cause exposures to chloroform and bromoform which are chemicals known to the State of California to cause cancer.

Paint and Painted Surfaces.

Certain paints and painted surfaces contain chemicals, such as lead and crystalline silica, that are known to the State of California to cause cancer, and/or birth defects or other reproductive harm. Lead-based paint chips may be ingested and crystalline silica may be released into the air and lead to exposures.

Engine Related Exposures.

The operation and maintenance of engines, including automobiles, vans, maintenance vehicles, recreational vehicles, and other small internal combustion engines are associated with this residential rental facility. Motor vehicle fuels and engine exhaust contain many Proposition 65-listed chemicals, including benzene, carbon monoxide and, for diesel engines, diesel exhaust, which are known to the State of California to cause cancer, and/or birth defects or other reproductive harm. In parking structures and garages, exhaust fumes can concentrate, increasing your exposure to these chemicals.

Combustion Sources.

Combustion sources such as gas stoves, fireplaces, and barbeques contain or produce a large number of chemicals, including acetaldehyde, benzene and carbon monoxide, known to the State of California to cause cancer, and/or birth defects or other reproductive harm which are found in the air of this complex. Any time organic matter such as gas, charcoal or wood is burned, Proposition 65-listed chemicals are released into the air.

WARNING

**This Area Contains
Chemicals Known To The
State Of California To
Cause Cancer and Birth Defects
Or Other Reproductive Harm.**

**More Information On Specific
Exposures Has Been Provided
To Tenants And Is Available At
www.prop65apt.org**