



April 6, 2015

**VIA EMAIL AND OVERNIGHT MAIL
(P65PUBLIC.COMMENTS@OEHHA.CA.GOV)**

Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95812-4010

Re: Clear and Reasonable Warning Regulations – The Art and Creative Materials Institute’s comments on January 16, 2015 OEHHA Proposition 65 proposal

Dear Ms. Vela:

On behalf of The Art and Creative Materials Institute, Inc. (“ACMI”), I am submitting comments on the proposal to revise the Proposition 65 warning regulations, published on January 16, 2015 by the Office of Environmental Health Hazard Assessment (“OEHHA”).

ACMI supports, and is a signatory to, the comments submitted by the California Chamber of Commerce. ACMI’s comments here are intended to add to them. We hope that the comments, some of which were previously submitted to OEHHA in connection with the agency’s prior discussion drafts, will further assist OEHHA in making revisions to the proposed regulations necessary to make them workable and to reduce the risk of litigation.

Background

ACMI is a non-profit international trade association comprised of approximately 190 companies. ACMI’s mission is to create and maintain a positive environment for art, craft and other creative materials usage; to promote safety in these materials; and to serve as an information and service resource on such products. Since 1936, ACMI has sponsored a certification program for children’s art materials, which it expanded in 1982 to include certification of adult art material products as well. In its current form, the certification program incorporates the requirements of ASTM Standard D4236, the federal Labeling of Hazardous Art Materials Act (“LHAMA”) and the acute health hazards provisions of the Federal Hazardous Substances Act (“FHSA”).

Pursuant to ACMI’s certification program, art material products undergo toxicological evaluations for the assessment of acute and chronic health hazards. These evaluations, which take Proposition 65 safe harbor exposure levels into account, are undertaken by a toxicology

consulting team at Duke University Medical Center in Durham, North Carolina. Based on the outcome of these evaluations, member companies are granted the use of the program's seals on the certified products, and the certified products are required to be labeled in accordance with federal law and the certification program's requirements.

Art materials found to contain no materials in *sufficient quantities to be toxic or injurious to humans*, including children, or to cause acute or chronic health problems, are designated with an "AP" seal. The "CL" seal is used for products that are certified to be properly labeled in a program of toxicological evaluation by a medical expert for any known health risks, and that bear information on their safe and proper use.

Art material products bearing the ACMI AP seal are suitable for use by young children. Products bearing the CL seal are suitable for adults and older children who are capable of understanding the precautions necessary for safe use.

Various states, including California, restrict school districts' purchases of hazardous art materials for grades K-6. In 2014, OEHHA published an updated list of hazardous art material products that are prohibited from being purchased by California schools for use by children in grades K-6. Virtually the entire list consisted of CL seal-bearing ACMI member products, even though not all art material manufacturers are ACMI members.

A number of art material products contain Proposition 65 chemicals either as contaminants or as ingredients providing functionality and aesthetics. In the current aggressive private enforcement climate, in which private enforcers discount pre-enforcement toxicological analyses undertaken by businesses, art material manufacturers struggle with the challenges posed by the twin goals of compliance and avoiding enforcement actions.

This tension is magnified by certain realities. The best way to avoid a Proposition 65 enforcement action is to provide a warning. ACMI's certification program currently prohibits the use of the AP seal in connection with a Proposition 65 warning. Instead, products bearing a Proposition 65 warning must either bear a CL seal or no seal at all. This has a significant consequence for art materials containing one or more Proposition 65 chemicals at levels not requiring precautionary labeling under LHAMA. This situation creates the absurd result that in 49 U.S. states, the product may bear the AP seal and be sold to school districts, but in California that same art material either would be prohibited from being sold to school districts (because it bears the Proposition 65 warning, but not the AP seal) or potentially would subject the manufacturer to a Proposition 65 enforcement action (because it bears the AP seal, but no warning).

This absurd result has economic consequences for ACMI and its members. For ACMI, the tension between the ability to use the AP seal and also avoid Proposition 65 enforcement actions means that its longstanding certification program, on which thousands of consumers (including California school districts) rely, may prove less useful to existing and potential members. Members may decide to give up their memberships, and potential new members may decide not to join. Inasmuch as ACMI's revenues come exclusively from member dues, these decisions have real life dollar consequences to ACMI and its mission.

For ACMI members, this tension means that either the member uses the AP seal in order to ensure the broadest market possible for its products and risk being sued by a bounty hunter, or the member gives up the use of the seal in order to place a Proposition 65 warning and avoid an

enforcement action. While the dollar value for a particular product in a particular market certainly can vary from company to company, or product to product, there is one known set of monetary factors: (1) a Proposition 65 settlement can run anywhere from \$25,000 to \$100,000 or more per claim, depending on the claim – and not including the defendant company’s own attorneys’ fees; and (2) a full defense on the merits can easily run into the seven figures.

As a steward of its longstanding certification program, ACMI has a strong interest in ensuring that Proposition 65 is properly implemented and enforced. From the organization’s perspective, OEHHA should focus its regulatory efforts on improving the “when to warn” regulations, not the “how to warn” aspect of Proposition 65 that is the subject of OEHHA’s current proposal. That said, ACMI urges OEHHA to carefully consider these comments and those of the California Chamber of Commerce, and to make the revisions necessary to ensure that any newly adopted regulations are workable and do not increase the risk of litigation.

Section 25600.2

ACMI generally supports the conceptual underpinnings of this proposed section and offers the following recommendations to clarify and improve it.

1. *Supplier communication to retailer (subsection (b))*

ACMI supports the ability of an upstream supplier to provide clear and reasonable warnings by the method described in this subsection. However, not all art material manufacturers and distributors have direct business relationships with retailers. Accordingly, this section should be revised to allow suppliers (manufacturers and distributors) to discharge their warning obligations by complying with subsection (b) as to their *direct customers*.

Subsection (b) also should be revised to clarify that the supplier “may comply with this Article” by undertaking the described actions, not “may comply with this section” as the provision is currently drafted. The language proposed by OEHHA in this regard seems confusingly circular.

In addition, the requirement to provide the required communication and obtain the necessary acknowledgement every 180 days is very burdensome and would require significant time to manage; indeed, as one cycle of acknowledgement ends another would be beginning. There is no rationale for such frequent communication. The requirement should be an annual one at most, or one triggered by a change or addition to the products being sold.

2. *Retailer “knowledge” (subsection (d))*

ACMI, some members of which are retailers, supports this section’s approach. However, given many practical difficulties that retailers face, e.g., communicating instructions to individual stores, determining the specific location of inventory, removing inventory if necessary, placing signs, and seeking information from vendors, ACMI recommends that the time given to retailers in subsection (d)(5)(C) be thirty (30) days from the effective date of service of a 60-day notice.

3. *Supplier identification must be protectable as CBI (subsection (e))*

Subsection (e) would require a retailer to provide the identity of its suppliers upon request by a public enforcer or a private enforcer who has served a 60-day notice. ACMI appreciates the improvement to this provision over the September 2014 draft. Nevertheless, it is critical that the information provided be protectable as trade secret/confidential business information (“CBI”). At a minimum, the regulations should include a subsection stating, “Nothing herein shall limit any party from asserting its rights to protect the requested information from disclosure to third parties under applicable laws, including the California Public Records Act.”

The art material industry is competitive. Many supply chains benefit from having the identity of distributors, i.e., customer account lists, kept confidential vis-à-vis competitors and even retailers, many of which have a keen interest in piggybacking on existing proprietary distribution channels to develop private label products which undercut the market space. As a result, supplier identity information, when not already disclosed on a product label, is considered very valuable confidential business information. This regulation must be revised to address this serious concern.

Section 25602

ACMI has a number of concerns about the “list of 12 chemicals” and associated requirement to identify those chemicals in warnings.

1. *Impermissible burden on businesses*

Section 25602(a) states that the chemical must be identified in a warning, if it is one of the 12 identified in the regulation, “***to the extent that an exposure to that chemical is reasonably calculated to occur at a level that requires a warning.***” (Emphasis added.) The highlighted language could be read to impose a requirement on the business to affirmatively demonstrate and document that an exposure to the chemical is occurring at a level requiring a warning, an interpretation that OEHHA does not appear to intend but which inevitably would be exploited by bounty hunters. Further, as OEHHA knows, the statute imposes the burden on a business to demonstrate that a warning is *not* required. The statute does not require a business to demonstrate that a warning *is* required. Such a burden imposed by regulation would exceed statutory authority under Proposition 65. To ensure that this regulation is not interpreted in a manner inconsistent with the law, OEHHA should revise this regulation to clarify that nothing therein is intended to impose a requirement for a business to affirmatively demonstrate and document that an exposure is occurring at a level requiring a warning.

2. *Label space*

With environmental concerns relating to sustainability and avoiding unnecessary waste, art material manufacturers have moved to reduce packaging materials for a large proportion of their products. Sometimes, too, retailers require that certain art material products, like individual tubes of paints, be capable of being sold individually while displayed in racks, typically provided by product manufacturers. As a result of these

streamlined packaging practices and requirements, label space is at a premium. A requirement to identify specific chemicals in Proposition 65 warnings will further challenge an already limited label area, in which other essential use instructions and cautions also may be required to be placed. The only alternative would be to increase packaging size in order to create more label space. Aside from being an outcome at odds with California, national and international laws and policies driven towards sustainability and reduction of waste, increased packaging means expensive redesign of the display racks, decreased display space and, as a result, decreased product assortment.

Similarly, increasing shelf tags or signage space to accommodate longer warnings may result in overall smaller display areas at retail stores. That means decreased inventory will be available for sale, hurting manufacturers, distributors and retailers. Further, fewer product choices will be available to California consumers.

3. *New enforcement category*

This provision will surely create a new category of enforcement actions for allegedly incomplete warnings, directly contrary to the Governor's and OEHHA's goal to reduce litigation. For this reason alone, OEHHA should strike this section entirely. At a minimum, ACMI urges OEHHA to clarify that failure to identify a specific chemical will not subject a company to an enforcement action, if the warning the company uses also contains a general reference to "chemicals."

Sections 25603 and 25604

ACMI has serious concerns about the workability of many of these provisions. As described above, art material products must comply with the Federal Hazardous Substances Act, which itself imposes certain labeling requirements and use of particular symbols. And, as also described above, label space frequently is at a premium as a result of legal requirements, product stewardship-driven goals to reduce packaging as well as retailer requirements. The combination of these factors means that ACMI members will have an extraordinarily difficult, and perhaps impossible, challenge in complying with these proposed sections.

Defaulting to a non-"safe harbor" warning in these circumstances to accommodate these concerns is not the solution, as it subjects the business to litigation over whether the warning being provided is clear and reasonable. With OEHHA's deletion of a regulatory definition for "clear and reasonable" (i.e., deletion of Section 25601 in the current regulations), the business is without any regulatory guidance on which it may rely. And, with the Initial Statement of Reasons' reference to "minimum elements" required for a clear and reasonable warning, OEHHA is virtually guaranteeing increased litigation over the adequacy of non-"safe harbor" warnings, even if those warnings would otherwise meet the current safe harbor criteria.

1. *On-product warning requirements*

The proposed Section 25604(b) requirement for specific font sizes is impossible for many ACMI member products to meet due to restricted label space. A more flexible approach is required, e.g., a Proposition 65 warning must be in a font size at least as large as the font size of any other safety warning or instruction. That way, companies may

meet legal, product stewardship and retailer requirements to reduce packaging, rather than enlarge packaging simply to create more label space for Proposition 65 warnings meeting certain size requirements.

2. *Symbol*

ACMI supports the concept of using a symbol as part of a Proposition 65 warning. However, the proposed exclamation point symbol raises a number of concerns. Among them:

- The exclamation point symbol is one required to be used for certain FHSA hazard warnings. (See, e.g., 15 U.S.C. section 1278(a)(2)). Some ACMI member products are subject to these specific requirements, and are required to bear such warnings and associated symbol, to alert the user to certain imminent hazards like choking hazards. Use of the same symbol for Proposition 65 warnings likely will confuse product users, and certainly will dilute the symbol's meaning in these other critical safe use contexts. OEHHA should craft another symbol that users will learn to specifically associate with Proposition 65.
- The requirement for the symbol to be in color is a burdensome and expensive one. Even where the label already is in color, adding another color element to the label adds significant additional cost – without any perceptible additional benefit. This requirement should be eliminated.

3. *Translation*

Section 25603(d)'s proposed requirement for a Proposition 65 warning to be translated will add significant burden and expense, again with no perceptible added benefit. And, it will create a new category of litigation over the sufficiency of the translation. It should be eliminated.

Many ACMI member products sold in the U.S. are labeled in English and French. This is because these products also are sold in Canada and must meet certain labeling requirements like translated labels. It is too expensive and burdensome to create special labeling for different North American markets. In these circumstances, there is no rational reason to require French translation of Proposition 65 warnings, which are intended only for California consumers.

Aside from that issue, the limited amount of label real estate places enormous practical challenges for ACMI members. There is simply not enough space to provide translated warnings. The only solution would be to enlarge the packaging to create more label space, adding a significant monetary cost to the company and, worse, thwart California, national and international environmental laws and policies, which are driving towards increased sustainability and decreased packaging and waste.

Finally, the translation requirement virtually guarantees litigation over the sufficiency of the translation. Language experts – and the costs attendant thereto – may even be required to defend against claims of improper translation, increasing the costs of both litigating and settling Proposition 65 claims. For this reason alone, OEHHA should remove the translation requirement entirely. At a minimum, OEHHA should provide translations in the regulation, in all the languages spoken in California. Only in that way is it possible for members of the regulated community, and, indeed, OEHHA and the enforcement community as well, to ensure that defensible translations are being used.

4. *Shelf tags and signs – font size (Section 25603(a))*

The requirement that font size for warnings on shelf tags and signage be no smaller than the largest font size used for other information fails to recognize space limitations (especially on shelf tags), is too rigid, and fails to account for the wide variety of shelf tags and signage used in different circumstances. ACMI recommends that this subsection require Proposition 65 warnings to be no smaller than 40% of the largest font size used.

Overall, the proposed regulations do more to increase the costs and challenges of compliance, and do more to increase the risk and costs of enforcement actions, than the current regulations. We urge OEHHA to reconsider its approach to improving Proposition 65 and to focus on the “when,” rather than the “how,” to warn. Short of that, we urge OEHHA to revise the proposed regulations as ACMI and the California Chamber of Commerce recommend.

Thank you for considering ACMI’s comments.

Sincerely,

Grimaldi Law Offices

By:



Ann G. Grimaldi

On behalf of The Art and Creative Materials
Institute, Inc.