



# AmericanCoatings

ASSOCIATION<sup>SM</sup>

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Submitted via E-mail: [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov) and [mario.fernandez@oehha.ca.gov](mailto:mario.fernandez@oehha.ca.gov)

## **Re: Proposed Modification of Lead Agency Website Regulation**

Dear Mr. Fernandez:

The American Coatings Association (“ACA” or “Association”) submits these comments to the California Environmental Protection Agency, Office of Environmental Health Hazard Assessment (“OEHHA” or “Agency”) on the proposed California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Prop 65”) reforms. ACA testified on March 25, 2015 and submitted written comments to OEHHA on April 8, 2015, in response to its proposal to repeal and adopt a new Article 6 (“Clear and Reasonable Warnings”) and its proposal to create a website under Article 2, Section 25205 (“Lead Agency Website”).<sup>1</sup> ACA has remained actively involved in providing OEHHA with meaningful input as the Agency has made a number of the revisions to its proposal. ACA appreciates the opportunity to comment on OEHHA’s “notification of modification of text” of its Lead Agency Website proposal.<sup>2</sup>

ACA is a voluntary, nonprofit trade association representing approximately 250 paints, coatings, adhesives, sealants, and caulks manufacturers, raw materials suppliers to the industry, and product distributors. The manufacture, sale, and distribution of paints and coatings are a \$20 billion dollar industry in the United States. ACA’s membership represents over 90% of the total domestic production of paints and coatings in the United States. The state of California currently represents approximately 18% of our domestic coatings market. ACA represents over 20 paint and coatings companies with locations in California. The paint and coatings industry, including manufacturers and retailers, employs over 31,000 workers in California.

ACA supports the changes to the Lead Agency Website since this process began in July of 2013—the most significant change being the removal of the regulations from Article 6, Clear and Reasonable Warnings, and the creation of Article 2, Lead Agency Website. Additionally, ACA applauds the following changes made between the January 16, 2015 proposal and the May 22, 2015 proposal:

- The expansion of the disclaimer to all information on the Lead Agency Website rather than just information submitted by industry;

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<sup>1</sup> Proposed Regulation, “Title 27, California Code of Regulations Article 2 Section 25205 Lead Agency Website.” January 16, 2015. [http://www.oehha.org/prop65/CRNR\\_notices/pdf\\_zip/P65WebsiteRegTextJan2015.pdf](http://www.oehha.org/prop65/CRNR_notices/pdf_zip/P65WebsiteRegTextJan2015.pdf).

<sup>2</sup> Proposed Regulation, “Title 27, California Code of Regulations Article 2 Section 25205 Lead Agency Website.” May 22, 2015. [http://oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/LeadAgencyWebModtext.pdf](http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/LeadAgencyWebModtext.pdf).

- Placing a reasonable limitation on the type of additional information the Lead Agency can request to information related to the exposure to chemicals on the Prop 65 list; and
- The addition of subsection (c) which clarifies the intent of OEHHA that this Lead Agency Website regulation does not require a business to perform any new or additional testing or analysis for the sole purpose of responding to an information request from the Lead Agency.

ACA sincerely appreciates the Agency's consideration of its comments and numerous requests from businesses, both large and small, to make those necessary changes. However, ACA strongly urges OEHHA to consider and respond to the remaining concerns our industry has over certain provisions that are unchanged in this new draft. If these issues remain unchanged, they will create significant challenges for manufacturers. ACA respectfully requests that OEHHA carefully consider the following recommendations:

## **ARTICLE 2, SECTION 25205: Lead Agency Website**

### **OEHHA's Lack of Statutory Authority**

ACA reiterates its position that the Lead Agency Website should be *voluntary* for manufacturers, producers, distributors and importers of products regulated under Prop 65. Earlier in the rulemaking process, OEHHA stated in stakeholder meetings that it had intended to give businesses providing warnings the *option* of submitting information for a new public website. Instead, the Agency has opted to impose a mandatory requirement on manufacturers to respond to OEHHA's information requests. OEHHA explains in its Initial Statement of Reasons for this section ("Article 2 ISOR") that the purpose of these information requests is to "supplement" the basic information conveyed by Prop 65 warnings, and to "[aid] interested individuals who receive a warning to learn about the chemicals involved in a potential exposure..."<sup>3</sup>.

Compliance with the requirements for a Lead Agency Website will have a new element of complexity beyond providing clear and reasonable warnings under Prop 65. Businesses will have the legal obligation to submit an array of information for OEHHA at its request, and see this information posted on a website for the public to scrutinize. While violations of the Lead Agency Website regulations would not be subject to private enforcement actions, the product- specific information will be readily available to plaintiffs' attorneys. The practical consequence of this Lead Agency website would be that it would become a "database" of information for potential Prop 65 lawsuit targets, where attorneys could compare the information published on the website with the products in commerce to see if they have corresponding warnings. This presents significant concerns for businesses, particularly small businesses, who may not be able to update the products on their shelves as quickly as updating information on a website.

In addition to the burdens and litigation problems that this Lead Agency Website creates with the new obligations on manufacturers, ACA questions OEHHA's statutory authority to impose these obligations in the first place. OEHHA justifies this Lead Agency Website under the "right-to-know" purposes of the statute so that OEHHA can provide more detailed information about exposures to listed chemicals for which warnings are being provided. Further, the Article 2 ISOR states that the Agency has the authority under Section 25249.11 of the Act to "require a given business or industry to provide it with certain information related to the warnings business may be providing, should that become necessary."<sup>4</sup>

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<sup>3</sup> Article 2 ISOR at pg. 4.

<sup>4</sup> Article 2 ISOR at p. 10.

Section 25249.11 states that in section (f), defining warnings, “[w]arning’ within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable.”. This section does not translate to authority to require that businesses provide supplemental information for a public website. In fact, no provision in the Prop 65 regulations explicitly gives OEHHA the authority to require businesses to provide supplemental information beyond what is already provided in a Prop 65 mandated warning. Furthermore, in the proposed new Article 6 regulations, Section 25600 (d) (General provisions) states that a person *can* provide supplemental information to the warnings required under Section 25608 (“Specific Product, Chemical and Area Exposure Warnings”). ACA reiterates that OEHHA should use this provision it has already proposed in Article 6 to obtain the same kind of information it seeks under the Lead Agency Website regulations without going outside of its authority and making these information submissions truly voluntary.

If OEHHA continues to pursue the Lead Agency Website, ACA has a number of practical concerns with the proposed regulations as well:

### **1. Lack of Opportunity to Review Web Content Made Public**

Section 25205(a)(1) allows OEHHA to: 1) develop and maintain the Lead Agency Website to publish warning information provided under subsection (b); and 2) publish information provided that OEHHA determines is relevant. Section 25205(a)(2) allows manufacturers to request that information be corrected *after* OEHHA publishes it to the website. ACA asserts that manufacturers should be provided the opportunity to review and respond to OEHHA prior to publication. This opportunity should be explicitly included in subsection (b) of the proposed regulation for businesses that supply information to the Agency to be able to review and comment on the information before publication.

During ACA’s meeting with OEHHA staff on March 24, 2015, OEHHA stated that the Agency plans to develop fact sheets on chemicals in products based upon publically available information. ACA urges OEHHA to carefully consider the information it posts. Although OEHHA does not consider the publication of this information to be a “regulation,” the Agency is an authoritative body in California. When OEHHA releases information on the Lead Agency Website, it will be considered accurate and will carry great weight with the public. Since the purpose of the Lead Agency Website is to provide the public with “valuable supplementary information...regarding warnings that are being provided to the public,” it is critical to the purpose of the regulation that OEHHA work with industry to ensure the information published is accurate and a fair depiction of a products containing certain chemicals.

For reference, ACA encourages OEHHA to speak with the Department of Toxic Substances Control (DTSC) to review the stakeholder input DTSC received after the initial public release of the first three Priority Products under the Safer Consumer Products regulations. The release of potentially inaccurate or misleading information, as was the case with DTSC, about chemicals in certain products without allowing affected entities to review the information for inaccuracies can have unwarranted negative market impacts and undermine the program’s credibility.

ACA suggests adding a part (e) in Section 25205 to say the following:

(f) The manufacturer, producer, distributor, or importer of a product, including food, or a particular business that is providing a warning and that provides information pursuant to a lead agency request under subsection (b) shall have the opportunity to review and provide input on the information the Lead Agency intends to publish on the Lead Agency Website before publication.

## **2. Difficulty of Obtaining Information OEHHA can Request from Businesses**

While the lead agency does not intend that this website be onerous on industry and will look to information already available before requesting additional information from companies, ACA has a number of suggestions to address the practical challenges businesses will face in managing these requests. ACA presented safety data sheets (SDSs) to OEHHA staff on March 24, 2015 from a member company that demonstrated that downstream formulators often receive limited information provided via SDSs from their upstream suppliers. This information often contains either incomplete or inconclusive information regarding the residual levels of Prop 65 listed chemicals. If OEHHA wants to increase the relevancy of warnings, it should provide a de minimis threshold because manufacturers cannot adequately determine the exposure to residual Prop 65 chemicals based on the limited information provided by upstream suppliers. To develop exposure information to prove a residual chemical does not require a warning would require extensive testing.

If OEHHA does not provide de minimis reporting threshold for its website, manufacturers will be forced to list each and every Prop 65 chemical in their products, regardless of if there is exposure to the chemical. ACA reiterates the argument that since this website is intended to better inform the public of chemical exposures so individuals can make “informed decisions about those exposures,” this information will further confuse the public and mislead the public to thinking there are high risks of exposure to chemicals that are only residuals or that have no exposure upon use of the product.

Therefore, to strengthen the quality of supplemental information on the Lead Agency Website, ACA suggests the following change:

(3) The name of the listed chemical or chemicals for which a warning is being provided that are present above 0.1% concentration.

At the minimum, ACA strongly encourages OEHHA, when posting information about chemical exposures in products, to make clear to the public which chemicals pose the most significant risks and which chemicals are unintentionally-added or byproducts.

Regarding sections 25205(b)(6) and (9), the limited information regarding chemical ingredients on the SDS often either comes in ranges or is incomplete. This makes it unreasonably difficult for downstream formulators to develop meaningful, quantitative estimates of exposure. Although the Agency has clarified in subsection (c) that businesses do not need to generate new information solely to respond to a request by the Lead Agency, OEHHA should acknowledge, in the regulations, that downstream formulators may not have the exposure information that Agency may request from their suppliers. In section 25205(b)(7) OEHHA makes this concession stating that that the information only needs to be provided if it is known; ACA requests that this qualification be provided to subsection (b)(6). Further, subsection (9) should be combined with subsection (8) to allow manufactures to provide appropriate exposure information.

ACA suggests amending these subsections to state the following:

(6) For product warnings, the concentration (mean, minimum, maximum) of the chemical or chemicals in the final product, if known or can be determined based upon information from upstream suppliers. The product contains multiple component parts the business must provide the concentration (mean, minimum, maximum) of the chemical or chemicals in each of the components, if known or can be reasonably determined based upon information from upstream suppliers.

(8) A description of the anticipated routes and pathways, and estimated level of exposure to the listed chemical(s) for which the warning is being provided, if known or can be reasonably determined based upon information from upstream suppliers.

### 3. Necessity of Limits on Time frame

The proposed regulation also gives OEHHA the discretion to mandate short timelines, stating that manufacturers must supply certain information within a “timeframe specified in the request.” While OEHHA has stated it will be flexible with businesses it requests information from, this flexibility must be made explicit in the text of the regulations.

ACA suggest that this section be amended to:

The manufacturer, producer, distributor, or importer of a product, including food or a particular business that is providing a warning must provide the following information, when reasonably available, upon the lead agency’s request, and within ~~the~~ a reasonable timeframe specified in the request of six months or more.

### CONCLUSION

ACA remains hopeful that with continued collaboration between OEHHA and all interested stakeholders, Prop 65 reform will alleviate the large number of frivolous lawsuits crippling the system, while continuing to protect and inform the people of the state of California. For additional information or questions, please contact Javaneh Nekoomaram at (202) 719-3715 or at [jnekoomaram@paint.org](mailto:jnekoomaram@paint.org) or Stephen Wieroniey at (202) 719-3687 or at [swieroniey@paint.org](mailto:swieroniey@paint.org).

Respectfully Submitted,



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