



MEMORANDUM

16 January 2009

**TO: Dr. Joan Denton
Carol Monghan-Cummings**

FR: James Wheaton

RE: Food Warning Task Force

I have given much thought to potential problems with the currently circulating proposals for warning programs. In doing so I find that there is much potential useful instruction from a real world example of a warning program currently in place, that specifically deals with a food.

That food is vinegar, specifically red wine and balsamic vinegars. Our experience working with manufacturers, importers and retailers is instructive, and provides some real world experience to draw on as you move forward with your proposals. I will explain the basic facts below, but as always welcome the chance to talk with you further if you have questions.

Background

Beginning in 2002, ELF authorized a testing program for vinegar sold at retail. Scores of vinegars were identified, and a forensic program to buy, ship and test them was undertaken. To our surprise, the number and varieties of vinegars on the market is enormous. We knew it was both a mass marketed product (inexpensive domestic red vinegars from wine, and white vinegars made from various items) and a very high end product (small bottles of imported, aged balsamics). What we did not know as we started was the wide range of both in the markets, with individual manufacturers and importers often having several varieties within their brands.

ELF ultimately tested approximately 60 distinct items, in several waves. Of those approximately 47 red wine or wine balsamic vinegars had lead. Generally speaking, white vinegars and vinegars not made from grapes did not have any detectable, or at least actionable, amounts of lead. Conversely all vinegars made from red wine or labeled "balsamic" did have significant levels of lead, requiring (in our view) a warning.¹

Importantly, many of the violating vinegars were imported, most from the Modena region of Italy. Those growers and manufacturers did not, for the most part, have any actual presence in California or indeed in the United States. They operated through domestic importers. While we do not know ourselves, we were informed that most of the overseas manufacturers were small and both ignorant of and understandably indifferent to California law.

¹ Manufacturers' and importers' testing confirmed the results. Some of them disputed the need for a warning, however, largely on the basis the lead was "naturally occurring."

The litigation

ELF filed notices of violation and subsequent lawsuits in San Francisco against all the manufacturers/importers and retailers whose products had lead. Several waves of lawsuits were filed, but all were related and they were jointly litigated and, happily, eventually settled with essentially identical terms. A standard for what concentration of lead would henceforth require a warning and a testing protocol were adopted, and a warning program was agreed to. The settlements were largely driven by the retailers, who wanted to resolve the matter. Some, perhaps most, of the manufacturers wanted to mount a substantial scientific defense centered largely on whether and to what extent the lead in Italy was naturally occurring. Importantly, a uniform warning program applicable to all manufacturers, importers and retailers was adopted, with signage on shelves in retailers where any of the violative products were sold.

I can provide a sample of the settlements if you wish.

The Attorney General's office was consulted on essential terms – particularly the shelf sign as a means to warn – frequently and well before any settlement was finalized. While at first concerned about “over-warning” the Attorney General's office eventually agreed that because the presence of lead was essentially ubiquitous in the red and balsamic vinegars, a non-product specific warning could be used here (instead of a label).

The settlements were approved by the Court and are now in place.

We have identified 45 distinct products that require the warning. They are arrayed on Exhibit 1, along with some of the retailers at which we found each items for sale. The retailer data is dated and was not comprehensive; it is provided to show that some vinegars are sold at multiple locations, others at just one. Similarly, some retailers carry a wide variety, others carry only a few. Hence there is substantial variability amongst and between manufacturers/importers and amongst and between retailers.

Since the entry of the settlement, two companies have tested some or all of their products against the standard, and some of their products no longer need to be displayed on the warning shelf. One manufacturer company had a single product. Conversely the other is a supplier or a single vinegar to other resellers who rebrand that vinegar, so that some 47 distinct brands no longer require a warning. They are arrayed in Exhibit 2.

Lessons learned and to be applied

Several lessons can be learned about what will, and will not, work with food warnings.

1. Uniformity of warning

It is critical in any consumer education, warning or notification program that it be uniform across different retailers and different products. It is well known that some consumer messages can be understood on the first viewing, depending on its prominence and urgency. Other (perhaps most?) messages must be viewed or received at least three times to be effective. But if the message is wildly different in form, location or appearance across products or across retail establishments, the salience is lost.

Thus it was important in these settlements that, for the warnings to be effective for the scores of products involved, the warning program be absolutely uniform across the manufacturers and importers). But the warning sign could not appear in one place for one manufacturer, elsewhere for another; or have different content from one importer to another. Similarly, within the constraints of the physical location of the sign, the signs are generally uniform for every retailer (allowing only for variance if a retailer used a particular font, for or design for all in-store signage, for instance).

This repetition and uniformity greatly aid the goal of getting to the message to the consumer, wherever they may shop and whatever choices they may have at that venue.

2. Proximity of warning

As noted and for reasons stated below, these settlements departed from the long established preference of ELF and the Attorney General's office for warnings that appear on or accompany the specific product requiring a warning.

However, it was and remains critical that the information appear in immediate proximity to the place where the consumer exercises choice: where the product is in the store and not some other location.

Any other location – at the entrance (for a sign or pamphlet), a customer service desk (for a notebook), or a kiosk – defeats the purpose of the warning.

This is particularly vital if some brands of an otherwise generally fungible product require the warning and others do not. Anything that requires the customer to inquire of a reference that is not part of the product display is designed to fail.

If a warning is to mean anything, it must be given where the consumer can do something with the information, such as exercise choice.

3. Simplicity of program for the retailers who administer it

Notably, the design for the shelf warning program came from the retailers, not the manufacturers. Retailers apparently realized that given the wide variety of products, individualized warning programs from manufacturers and importers would put an intolerable burden on the retailers to manage it. (Of course, a program that required a label warning in every instance would alleviate that, but the international nature of this product meant that labeling would have to occur on-shore, and so alternatives were sought.)

But a single program that applies to all manufacturers and importers (and retailers) ensured that the program was simple and cost-effective to administer. There is a single sign; retailers need not depend on manufacturers or importers providing materials or information; the retailer puts up one sign for all.

Notably, the manufacturers and importers need do nothing. Only if they test their product using the protocol and find it meets the standard do they act to inform retailers to move the product to a shelf that does not carry the warning. Understandably, this reverses the statutory preference that those highest in the chain of distribution perform the task, but in this case it turns out better to reverse it.

This fact illustrates why choosing, in the regulatory setting, to favor one actor in the chain over another (for instance preferring retailers' choices over manufacturers) so that one end of the chain always controls the preferred warning mechanism, is in error. The agency should not insinuate itself into the market between the actors. Rather it should set a standard that must be met by all actors – the provision of a warning – and make it clear that no one has fulfilled their obligations unless all have done so.

4. Simplicity of program for the consumers

Some of the alternatives currently being circulated have inherent faults that this experience with vinegar counsels should be abandoned.

The idea of using a single pamphlet to provide warnings about all specific products will fail immediately. Take a look at Exhibit 1. That is an alphabetic list of products requiring a warning.

A moment's reflection shows why a single pamphlet won't work just for vinegar alone. It will be far worse for every specific product in every store.

First, there will quickly be far too many listed items to fit and still be readable.

Second, because the program envisioned contemplates a single pamphlet for *all* retail establishments, there would necessarily be far too much information about irrelevant products at any single retail store. From the retailers' perspective, they would be required to distribute warning information about many, many products they do not offer. From the consumer perspective, they are getting a pamphlet which, in whatever store they are in, clouds and obscures

the information about what is in fact in that store. Either way the problem of “too much information” is paramount.

Third, many products have deceptively similar names (indeed in one of the vinegar settlement meeting the attorneys were taken up just with trying to differentiate one companies products from another’s, since all used the appellation “Balsamic Vinegar of Modena” in the name.) If the lawyers have trouble finding their own clients on a list, imagine the poor consumer in the aisle with a lengthy list trying to parse the different products on the shelves.

Fourth, the pamphlet cannot as an alternative simply reference all red wine or balsamic vinegars any longer because many no longer require a warning. Differentiating between those that do and do not require a warning has long been the *sine qua non* of OEHHA’s warning program. (Indeed, the proliferation of compliant products without excessive lead suggest that it may be wise to revisit the warning program in these settlements, but so far no manufacturer, importer or retailer has expressed any need or desire to do so.) Only an actual lable or markers on the product (or, as with vinegar) physical placement on the warning shelf or the shelf without warnings achieves the purpose of informing the consumer.

Fifth, it is not just the sheer size of the pamphlet required that will defeat it. Note that for balsamic vinegar alone there remain some 45 separate and distinct items to be listed. Even in 10 point type it takes two pages. And this is a single relatively limited product. Even if, as some suggest, the total number of product lines that will require warnings is not large, the universe of separate products will be enormous. When and if warning requirements for acrylamide fully kick in, no pamphlet will be able to large enough. As a related matter, products and product lines change constantly. For instance, potato chips change flavors that are offered seasonally; te vinegar companies offer subtle variations on the same name. In any case, the dynamism of the food marketplace makes any effort to craft a universal pamphlet for all items a fool’s errand.

Similar problems befall other suggestions.

The idea of the notebook in the front of the store as a reference guide is self-evidently gong to be a disaster. Again, looking just a vinegar, the consumer is no better able to find and compare information about brands in a notebook than from a pamphlet, just given the sheer size of the choices. Moreover, the physical distance of the notebook from the comparative products makes the list worthless; who among us could possibly memorize the names of scores of products and remember which has the warning and which does not? Not to mention the administrative load. If one does the math just for vinegar to multiply the number of manufacturers and importers listed by the number of retailers represented, it would require a blizzard of paper and endless administrative work for the retailers to keep the notebook up date.

Last, cash register notification has all of its own pitfalls. Even assuming it was adopted, how is a consumer who cares about lead to choose? Should they take five or ten random choices to the checkout stand, reject those that generate a warning and accept the first one that does not trigger a warning?

6. Relative responsibilities

The vinegar example also illustrates the pitfalls of having any regulatory regime preferring one responsible actor over another in every case, whether it be the manufacturer or the retailer.

In this particular case, most of the brands come from small, off-shore providers, operating through importers who can switch brands with relative ease. Moreover, there was wide fungibility between products (both as to use and lead content, at least until recently). Therefore in this instance it turned out that the retailers – not manufacturers – were best able to craft a solution. In other situations, however, clearly the manufacturer will be better suited and positioned to do so (for example, when labels are the best means).

But it certainly makes plain that the current draft – which contains an immunity provision for retailers if they in effect turn in a solvent responsible party – will never work to advance the purpose of the statute. In the vinegar case, the retailers were relatively large, certainly as against the manufacturers and importers. Moreover they had an incentive to solve the problem with a uniform program. Under the current draft proposal, if retailers can absolve themselves by turning over distant, small and changeable upstream suppliers, no solution will be forthcoming. Furthermore, whenever the product is an import, the ability to impose a solution that fits California's unique laws is diminished.

The point remains that whatever situation is posited to support empowering one set of actors over another (protect the small retailer: let them stick the manufacturer) has an equally compelling counterfactual (WalMart sells items from small overseas concerns).

It is true that in other, even most, situations the manufacturers may be the best party to ensure compliance. The point is not that one or the other is best; the point is which is best may change, and no regulatory program should put its finger on the scale in favor of either.

Impose the burden of getting a uniform, universal and understandable warning on product that needs one. Dictate the language and means of placement. But let the actors in the market choose the means that ensures all of them comply and the warning in fact gets to the consumers.

Conclusion

As OEEHA moves forward, this real world example is not offered as the only model for the future warning program. Far from it. Indeed the vinegar experience relies entirely on the existing safe harbor architecture, since that was all the parties had at the time. And it had unique features suggesting one solution that may not work elsewhere. But the experience does point with clarity at what OEHHA should *not* consider in any future program.

As always, we hope this is helpful and stand ready to assist.