



AmericanCoatings
ASSOCIATIONSM

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Office of Environmental Health Hazard Assessment
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E-mail: P65Public.Comments@oehha.ca.gov

Re: Clear and Reasonable Warning Regulations

Dear Ms. Vela:

The American Coatings Association¹ (“ACA”) submits these comments to the California Environmental Protection Agency, Office of Environmental Health Hazard Assessment (“OEHHA” or “Agency”) in response to the proposed amendments to Article 6: Clear and Reasonable Warnings regulations under the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Prop 65”). ACA once again appreciates the opportunity to comment on OEHHA’s latest proposal to repeal Article 6 and adopt a new Article 6, Clear and Reasonable Warnings regulations.²

ACA appreciates OEHHA’s continued efforts to reform Prop 65 in order to provide businesses with more clarity as to what constitutes clear and reasonable warnings. ACA also appreciates that OEHHA has released these revisions and provided stakeholders with another comment period. While this draft is an improvement over the March 2016 proposal,³ there are still important issues that OEHHA must address prior to finalizing the regulations, including:

1. Responsibility to provide internet and catalog warnings for consumer product exposure warnings
2. Lack of clear safe harbor for industrial products
3. Sell through period applicability
4. Font size and foreign language requirement for consumer product exposure warnings safe harbor

¹ACA 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 approximately 15 paint and coatings manufacturers with locations in California. The paint and coatings industry, including manufacturers and retailers, employs over 31,000 workers in California.

² Proposed Regulation, “Title 27, California Code of Regulations, Adoption of New Article 6,” May 20, 2016, http://oehha.ca.gov/media/downloads/crn/05182016art_62ndmodtextmarked.pdf.

³ Proposed Regulation, “Title 27, California Code of Regulations, Adoption of New Article 6,” March 25, 2016, <http://oehha.ca.gov/media/downloads/crn/art6modifiedtextmarked032516.pdf>.

5. Color and pictogram requirement for consumer product exposure warnings safe harbor
6. Chemical specific warnings

1. Responsibility to Provide Internet and Catalog Warnings for Consumer Product Exposure Warnings

ACA maintains its position that OEHHA does not have the authority to require warnings on the internet or in catalogs for products sold online or in catalogs when the product already contains an on-product warning.⁴ However, because OEHHA appears intent on maintaining Internet and catalog warning requirements for products, OEHHA must clearly state what is required to provide adequate notice to retail sellers and what retail sellers' responsibilities are in terms of posting warnings for products sold online and in catalogs once they have received notice.

In the March 2016 proposal, OEHHA was clear that once a company affixes a label to the product bearing a compliant Prop 65 warning, then companies have satisfied their responsibility under Article 6 and the responsibility to post the Prop 65 warning language on the Internet when the product is sold online falls on the retail seller.⁵ While that language remains in this new draft, OEHHA has made changes in this new draft to Section 25600.2(e)(4)⁶ that may be interpreted as conflicting with the text in section 25600.2(b). Section 25600.2(b) indicates that manufacturers, producers, packagers, importers, suppliers and distributors can comply with Article 6 by simply providing a compliant Prop 65 warning on a product label, *or* by providing written notice to the retailer (with warning materials, including warning language for products sold on the Internet, certain required statements, and confirmation of receipt of notice from retailer).⁷ However, revised section 25600.2(e)(4) seems to suggest that a retailer must receive not only notice but also "warning materials," which causes confusion because there is no description of the required notice in section 25600.2(e)(4), and under Section 25600.2(b), warning materials are only required if a business is providing *written notice* to the retailer, not when notice is provided to retailers by affixing a Prop 65 label onto a product.

⁴As stated in ACA's previous comments, ACA believes OEHHA does not have the authority to require warnings for products sold online or in catalogs. The original ballot initiative states in 25249.6. Required Warning Before Exposure To Chemicals Known to Cause Cancer Or Reproductive Toxicity: "No person in the course of doing business shall knowingly and intentionally **expose** any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10" (emphasis added). While OEHHA has the authority to adopt regulations to further the purposes of Prop 65, this authority is not without limits. The purpose of Prop 65 is to provide warnings to individuals prior to exposure, not prior to *purchase*. Therefore, an on-product warning would be legally sufficient even if the consumer make the purchase on the internet or from a catalog, and a second warning online or in the catalog would not be legally required to meet the "clear and reasonable warnings" regulations.

⁵"The retail seller is responsible for the placement and maintenance of warning materials, including warnings for products sold over the Internet, that the retail seller receives pursuant to subsection (b) and (c)." Proposed section 25600.2(d), Title 27, California Code of Regulations, Adoption of New Article 6," March 25, 2016, <http://oehha.ca.gov/media/downloads/crn/art6modifiedtextmarked032516.pdf>.

⁶ Section 25600.2(e)(4) now states in the new markup draft: (e) The retail seller is responsible for providing the warning required by Section 25249.6 of the Act for a consumer product exposure only when one or more of the following circumstances exist: (4) The retail seller has received **a notice and** warning **information and** materials ~~(or an offer to provide warning materials)~~ for the exposure pursuant to subsections (b) and (c) and the retail seller has sold the product without conspicuously posting or displaying **the those** warning **materials**; or

⁷ Section 25600.2(b)(1)-(4)

In the context of internet and catalog warnings, this is significant because if a company affixes a label to a product, the label itself already has the warning language the retailer needs to post the warning on a website. Because OEHHA's proposal allows the *same* warning language provided on a product label to be used on the website or catalog in which the product is sold, then retailers can easily look at the product label's warning language and post that identical warning language on their website or catalog if the retailer chooses to sell the product online. ACA urges OEHHA make these remaining clarifications so that it is clear, as ACA interprets the proposal, that once a manufacturer has *affixed a compliant Prop 65 on-product label*, then they have satisfied their responsibilities to provide notice to the retailer under Article 6 and are not required to send the retailer additional "warning materials," as it would if it were to have provided *written notice* under Section 25600.2(b)(3).

ACA suggests the following language for the purposes of consistency with the regulations and to clarify the manufacturers' et. al. responsibility to give retailers proper notice:

Section 25600.2(e)(4) The retail seller has received *written notice and warning materials or a label affixed to the product bearing a warning that satisfies Section 25249.6 of the Act* pursuant to subsections (b) and (c) and the retail seller has sold the product without conspicuously posting or displaying the warning; or

Similarly, ACA recommends OEHHA clarify in the regulations that once the retail seller receives written notice (and warning materials) *or* a product with a label bearing a compliant Prop 65 warning, the retailer is responsible for the placement and maintenance of the warnings, including for Internet sales:

25600.2(d) The retail seller is responsible for the placement and maintenance of warning materials, including warning *language* for products sold over the Internet, that the retailer receives *on a product label, or from receiving written notice* pursuant to subsections (b) and (c).

These simple clarifications in the language will provide significant clarity for businesses that provide Prop 65 warnings on the product label.

2. Lack of Clear Safe Harbor for Industrial Products

Section 25606 of the proposal prescribes the safe harbor warning for occupational exposures. OEHHA explained in a phone call with ACA on April 5, 2016, "if you are compliant with OSHA, you are compliant with Prop 65."⁸ OEHHA has stated a number of times that the safe harbor for occupational exposures is intended to cover both occupational exposure *area* warnings provided by employers to employees as well as industrial *product* exposure warnings provided by a manufacturer to downstream users of chemical products. OEHHA also expressed in the Initial Statement of Reasons for its November 27, 2015, draft that the occupational exposure warnings provisions are meant to incorporate by reference existing federal and state law and

⁸ OEHHA explained that because OSHA establishes extensive warning, training and labeling requirements, products that provide warnings compliant with the requirements of HCS 2012 are deemed "clear and reasonable warnings." OEHHA in effect intends to "grandfather" Prop 65 into HCS 2012 to avoid federal preemption issues.

regulatory requirements related to warnings for occupational exposures, eliminating any preemption concern.

However, OEHHA's intent is currently unclear in the current proposed text given that "occupational exposure warnings" are defined as simply "an exposure to any employee at his or her place of employment."⁹ It is unclear if the occupational exposure warnings safe harbor can be used for exposures coming from the occupational *area* as well as the *industrial products*.]

OEHHA can simply address our concerns by allowing industrial products and occupational exposures to comply with Article 6 by fully complying with the Federal Hazard Communication Standard (HCS 2012) or the California Hazard Communication Standard. ACA suggests the following text:

§ 25606 Occupational Exposure **and Industrial Product Exposure** Warnings

- (a) **Any product compliant with the federal Hazard Communication Standard (29 Code of Federal Regulations, section 1910.1200), the California Hazard Communication Standard (Title 8, California Code of Regulations section 5194), or, for pesticides, the Pesticides and Worker Safety requirements (Title 3, California Code of Regulations section 6700 et seq.) meets the requirements of this Article.**

In the alternative, if OEHHA does not adopt a policy so that all industrial products compliant with HCS 2012 are compliant with Article 6, OEHHA can build upon the amendments the Agency has made in this draft to the occupational exposures section. OEHHA has added amendments in this draft with the intent to allow industrial products that are compliant with HCS 2012 but do not carry a GHS warning (but would require a Prop 65 warning) to take advantage of the consumer product safe harbor provisions. While ACA appreciates that OEHHA's new subsection (b) of section 25606, it does not clearly address exposure from industrial products. Manufacturers placing industrial products into California need a safe harbor warning provision, just as consumer products do.

It is worth noting that the new subsection (b) references section 25601, Safe Harbor Clear and Reasonable Warnings – Methods and Content. Section 25601(c) states, "Consumer product exposure warnings must be prominently displayed on a *label, labeling, or sign*, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign...". Subsection (c) does not make it clear that warnings are allowed on SDSs. Industrial product manufacturers often warn on SDSs because the downstream industrial users are properly trained on the nature of hazard communication.

If OEHHA wants to allow industrial products that do not, as drafted, fall under the Section 25606(a) occupational exposure safe harbor to use the consumer product safe harbor provisions, companies must have clarity that this provision covers industrial products and that warning on an SDS is compliant with the safe harbor warning provisions. In order to clarify OEHHA's intent

⁹ Proposed Regulation, "Title 27, California Code of Regulations, Adoption of New Article 6" March 25, 2016, Section 25600.1(k).

for industrial products and provide necessary certainty for businesses, ACA suggests the following changes to Section 25606:

§ 25606 Occupational Exposure and **Industrial Product Exposure** Warnings

- (a) A warning **from an industrial product exposure or occupational area warning** to an exposed employee about a listed chemical meets the requirements of this article if it fully complies with all warning information, training and labeling requirements of the federal Hazard Communication Standard (29 Code of Federal Regulations, section 1910.1200), the California Hazard Communication Standard (Title 8, California Code of Regulations section 5194), or, for pesticides, the Pesticides and Worker Safety requirements (Title 3, California Code of Regulations section 6700 et seq.).
- (b) For occupational exposures to chemicals, **and from industrial products** not covered by subsection (a), warnings may be provided consistent with sections 25601, 25602, 25603, 25604, and 25605, and 25607 et seq. of this article. **In addition to the method of warnings cited in section 25602, warnings may also be provided on Safety Data Sheets.**

ACA urges OEHHA to adopt this clarification in the regulatory text. In the alternative, ACA encourages OEHHA to clarify its intent for industrial products in the Final Statement of Reasons.

3. Sell-Through Period Applicability

Section 25600(b) states that the sell-through period applies to “consumer products.” In light of OEHHA’s new, narrow definition of “consumer products,” the effectiveness of this sell-through provision has been limited because an entire class of products will not be allowed to utilize the sell-through period. This represents a major departure from the original intent of the sell-through period. When OEHHA added the sell-through period to the draft regulations in November 2015, it intended to apply the provision to products broadly, as evidenced in the Initial Statement of Reasons (ISOR) that only makes reference to “products” and not just consumer products.¹⁰ As discussed, some industrial product manufacturers also use on-products Prop 65 warnings. ACA recommends that OEHHA make clear in the Final Statement of Reasons that the sell-through period applies to all products and not only consumer products.

¹⁰ “This provision allows for a ‘sell through’ of **products** that may use the old warning language, and allows businesses time to replace existing signage or implement new technology....In order to avoid the difficulties involved for manufacturers and retailers to locate all **products** bearing the old warnings, the proposed regulation allows the old safe harbor to remain and be considered compliant if the **product** was manufactured prior to the effective date of the new regulation. Specifically, during the earlier phases of the development of this regulation, many stakeholders expressed concern over anticipated logistical and economic costs associated with changing the warnings on **products** already produced and distributed to the marketplace; this was of particular concern to businesses dealing in durable goods with compliant warnings and a long shelf-life. In order to address these concerns and mitigate potential cost impact on businesses, subsection (b) provides that a warning provided on **products** manufactured prior to the effective date of the revised Article 6 is deemed to be clear and reasonable if it complies with the September 2008 version of Article 6.” Initial Statement of Reasons, “Title 27, California Code of Regulations, Adoption of New Article 6,” November 27, 2015, at page 11.

4. Font Size and Foreign Language Requirement for Consumer Product Exposure Warnings Safe Harbor

ACA reiterates its arguments made in previous comments that OEHHA must take a holistic view of the new proposal's impacts on the limited space on labels, particularly if the Agency wants to encourage the use of on-product warnings for Prop 65. The proposed new font requirements in addition to the new foreign language requirement would create significant challenges for manufacturers that are already struggling to fit all required components on a product warning label. It is important to ACA members that OEHHA provide the necessary flexibility, both in content and type size, to manufacturers who warn on product labels so that the new requirements are technically feasible, particularly for small packages.

ACA also reiterates its objection to the new foreign language requirement. While ACA understands OEHHA's interest in accommodating to non-English speakers, OEHHA must also consider manufacturers' concerns about providing warnings that will not fit on or will crowd labels, which are already being pushed to their limits. Furthermore, OEHHA's new foreign language requirement creates a new risk for businesses being sued due to, arguably, not properly translating warnings in foreign languages in a way that is "clear and reasonable." This new foreign language requirement would undoubtedly open the door to new Prop 65 lawsuits based on the *translation* of Prop 65 warnings into foreign languages. Unless OEHHA creates safe harbor warning content for all possible languages that can be on a Prop 65 warning, businesses face more uncertainty of what translations are "clear and reasonable warnings."

Additionally, in this latest draft, OEHHA has added to the uncertainty by indicating that the foreign language requirement applies to consumer product signs, labels or shelf tags, but makes no mention of on-product warnings even though on-product warnings are explicitly listed as a method of warning under the same section of the proposed regulations.¹¹ ACA urges OEHHA to eliminate the foreign language requirement to Prop 65 warnings—especially for on-product warnings or small packages. OEHHA can satisfy its interest in educating the public about warnings by supplying translations of warnings on its new Prop 65 website, which consumers will be directed to.

If OEHHA adopts the foreign language requirement in a final regulation, at the minimum, ACA encourages OEHHA to exempt the requirement from on-product warnings, adopt the language recommendations of the Cal Chamber, and only require one Prop 65 pictogram per warning if both English and additional languages are required.

5. Pictogram and Color Requirements for Consumer Product Exposure Warnings Safe Harbor

ACA would like to reiterate its previous objections to the use of the American National Standards Institute (ANSI) symbol. As recommended in the Cal Chamber's comments, if OEHHA intends to include a pictogram at all in a warning requirement, ACA supports the creation of a Prop 65-specific pictogram that would be in black and white color.

¹¹ Section 25602(d).

With regard to the color requirement, while ACA continues to urge the Agency to eliminate the mandate that the symbol be in yellow color. This is for practical purposes because, as is the case with many ACA members, businesses often have pre-printed labels that are shipped to facilities. Product labels are typically pre-printed on a contractual basis, by a 3rd party, in large quantities to reduce the cost per label. Traditionally, the branding on the front of the label is colorful for marketing purposes. On pre-printed labels, there is an area left blank for the product's specific hazard communication information, including Prop 65 warnings. Then, at the manufacturing facility, the hazard communication information and Prop 65 warning is printed using one tone (black) or two tone (red and black) printers.

In practice, OEHHA's proposed color requirement will pose significant costs and burdens for ACA members and other companies that use pre-printed labels. Also, as previously discussed, it is still unclear if industrial products with compliant HCS 2012 or Cal OSHA HCS warnings would fall under the occupational exposure warning safe harbor (which would mean no additional Prop 65 warning or yellow pictogram would be required). As currently drafted, the regulations require any product with yellow on the label, even if it was pre-printed by a 3rd party, to have a yellow P65 pictogram. However, this requirement cannot be met without manufacturers purchasing new printers that can print red, black *and* yellow as the hazard communication information and P65 warnings are printed at the manufacturing facility as the product is produced. This would essentially make printers that were specially purchased for the transition to HCS 2012 or Cal OSHA HCS obsolete in less than 2 years. ACA requests that OEHHA simply allow manufacturers to print the pictogram in black and white option. This is a practical improvement that would not deter from providing a clear and reasonable warning, and it could potentially save companies thousands of dollars.

6. Chemical Specific Warnings

ACA would also like to reiterate to its objection over the inclusion of its chemical specific warning requirements under Section 25601(c). ACA has argued in its previous public comments and continues to argue that OEHHA's proposed chemical-specific warning approach—whether it is the formerly proposed list of 12 chemicals, or the current proposal in which companies must select chemicals to put on Prop 65 warnings—will go against the goals of Prop 65 reform. The purposes of Prop 65 reform were to reduce the flood of frivolous litigation from private parties under the statute, provide more certainty to businesses regulated under Prop 65, and to provide more meaningful warnings to the public. This proposal will go against all three of these goals.

Overall, chemical specific warnings will be contradictory to OEHHA's goal of providing certainty for businesses regulated under Prop 65 and will not reduce bounty hunter lawsuits. ACA reinforces its previous position and urges OEHHA to abandon chemical specific warning requirements altogether; in the alternative, ACA supports the language recommendations of the Cal Chamber to make the chemical specific warnings less burdensome and ambiguous.

CONCLUSION

ACA remains hopeful that with continued collaboration between OEHHA and all interested stakeholders, Prop 65 reform will accomplish the goals of the Governor to alleviate the large number of frivolous lawsuits, 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 or Stephen Wieroniey at (202) 719-3687 or at swieroniey@paint.org.

Respectfully Submitted,



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