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January 22, 2016

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 November 27, 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 November 27, 2015 by the Office of Environmental Health Hazard Assessment ("OEHHA").

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"). These laws impose health and safety-related obligations and, in the case of LHAMA requirements, the requirement for toxicological evaluations of art materials conducted by certified toxicologists. These laws also impose specific labeling requirements on art materials.

ACMI appreciates many of the revisions OEHHA has made to its January 2015 proposal. In particular, ACMI appreciates the elimination of the "list of 12" requirement of that earlier proposal, which we believe would have made compliance much more difficult and would have increased unnecessary litigation.

The current proposal, while representing a distinct improvement over the January 2015 proposal, nevertheless suffers from deficiencies that will not achieve OEHHA's goals of

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improving Proposition 65 warnings and reducing unnecessary litigation. For that reason, ACMI supports, and is a signatory to, the comments submitted by the California Chamber of Commerce. ACMI's comments herein supplement those comments. We hope that these comments together will further assist OEHHA in making revisions to the proposed regulations necessary to make them workable and to reduce 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 upstream suppliers to discharge their warning obligations by providing notifications to retailers. However, as ACMI previously has explained in its comments to the January 2015 proposal, 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***.

The first sentence of proposed Subsection (b) also retains the confusing and circular reference to "this section" that appeared in the January 2015 proposal. This sentence 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. In the absence this clarification, there will be ambiguity about whether compliance with this Subsection discharges a supplier's obligation to warn, leading to unnecessary litigation over the question.

In proposed Subsection (b)(5), ACMI appreciates OEHHA's revision reducing the frequency of renewing the retailer notification from every 180 days to every 180 days in the first year after the regulation takes effect, and then annually thereafter. Nevertheless, there appears to be no rationale for requiring that frequency of notification in the first year after the regulation takes effect. We recommend that this subsection require annual notification at most.

Proposed Subsection (b)(5) also would require a supplier to notify the retailer within 90 days if "a new chemical name or endpoint" is required to be included in the warning. The reference to "new chemical name" is at odds with OEHHA's revised approach to identifying chemicals in Proposition 65 warnings. The phrase could be interpreted to mean that warnings must identify ***all*** chemicals being warned for, i.e., the warning must identify the "new" chemical in addition to the chemical already the subject of the warning, thereby requiring the warning to identify more than one chemical. This is precisely what the proposed regulations do ***not*** require. (See proposed Section 25601(c) and Initial Statement of Reasons at 23.) Therefore, ACMI recommends that this phrase be revised to say "different" (not "new") chemical name.

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. 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."

As ACMI previously has explained to OEHHA in its comments to the January 2015 proposal, 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 appreciates OEHHA's revisions and clarifications regarding font size. In this proposal, OEHHA uses as a font size reference point the font size of "other consumer information." Thus, for example, a Proposition 65 warning on a shelf tag or shelf sign must be in a font at least half of the font size for "other consumer information." ACMI recommends that the reference point be the font size of other health and safety-related information, not the ambiguous reference to "other consumer information."

Section 25602(d) would impose the requirement for a Proposition 65 warning to be translated. This requirement will add significant burden and expense out of proportion to limited added benefit. The limited amount of label real estate places enormous practical challenges for ACMI members. On the majority of products, 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 thwarting California, national and international environmental laws and policies, which are driving towards increased sustainability and decreased packaging and waste. Worse, this requirement will create a new category of litigation over the sufficiency of the translation. It should be eliminated.

Sections 25603

ACMI appreciates the greater flexibility provided in this proposal regarding the font size of the optional, abbreviated on-product warning (proposed Section 25603(b)). However, ACMI still has serious concerns about the workability of many of the other provisions in this section. Although the Calfornia Chamber of Commerce's comments, which ACMI supports, address the majority of ACMI's concerns, we address one aspect separately here: the proposed 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.

  ACMI acknowledges that these safe harbor regulations do not impose mandatory obligations and that therefore a company may provide a warning without any symbol, or with another symbol altogether. However, a company acts at its peril if it does not implement the safe harbor warnings, opening the door to litigation as to whether the warnings it does provide are "clear and reasonable." Especially with OEHHA abandoning a regulatory definition of "clear and reasonable," this part of the proposal virtually guarantees litigation over the use of this symbol and the FHSA's preemptive effect on its use, or a company's warning that does not contain it.

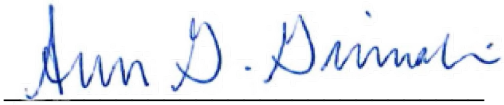
- The requirement for the symbol to be in color is a burdensome and expensive one. Even where the label already is in color, adding another color element to the label adds significant additional cost – without any perceptible additional benefit. This requirement should be eliminated.

The proposed regulations represent a significant improvement over the January 2015 proposal. Still, they present substantial compliance challenges and still increase the risk and costs of enforcement actions. 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.