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FROM: Advanced Medical Technology Association (AdvaMed)
American Composites Manufacturers Association
Associated General Contractors of California
Associated Roofing Contractors of the Bay Area Counties, Inc.
Phylmar Regulatory Roundtable - OSH Forum
California Chamber of Commerce
California Framing Contractors Association
California Manufacturers & Technology Association
California Professional Association of Specialty Contractors
Chemical Industry Council of California
Consumer Specialty Products Association
California Construction and Industrial Materials Association
International Fragrance Association, North America
Residential Contractors Association
SPI
Styrene Information and Research Center
Western Steel Council

DATE: May 10, 2013

SUBJECT: Globally Harmonized System Update to Hazard Communication

Ms. Widess:

Thank you for providing this opportunity to comment on Globally Harmonized System (“GHS”) updates to the Hazard Communication Standard (“HCS”). We are a coalition representing employers, distributors and manufacturers impacted by the proposed rule and in full support of conformance with the new federal standard (“HCS 2012”).*

The Occupational Safety and Health Standards Board (“board”) adopted substantial differences in a temporary rule over objections expressed in coalition letters to the board dated November 9, 2012, and March 21, 2013. Those letters stand as our comment to the Division of Occupational Safety and Health (“division”) and the board regarding the permanent adoption of those temporary differences. We maintain that harmonization is an important protective measure and that the temporary differences are not more protective. They also raise legal issues, articulated in those letters, regarding preemption under the “product clause” of the OSH Act and delegation of authority.

The division released alternative language in a discussion draft for consideration at the April 9 advisory committee meeting in Oakland. This is our response to those suggestions and other issues discussed at the advisory meeting.

Source lists (floor of chemicals)

Temporary sections 5194(d)(3) and 5194(d)(4) retain lists of source lists that defer to other agencies and organizations (such as the American Conference of Governmental Industrial Hygienists list of Threshold Limit Values) for hazard classifications. This “floor of chemicals” was deleted in OSHA HCS 2012 in favor of detailed classification criteria for each health hazard in Appendix A. The April 9 discussion draft proposes revised language we cannot support as it perpetuates the problems created by the temporary rule. Among these problems are the sometimes vague or conflicting determinations reached by source agencies.

Some of the problems created by deference to source lists could be solved by giving leeway to resolve vague or conflicting determinations by the application of HCS 2012 classification criteria. To that end, we recommend the following language applied to both cancer and non-cancer listings. It would replace the opening paragraphs of temporary sections 5194(d)(3) and 5194(d)(4).

“There shall be a rebuttable presumption that chemical listing determinations by the following sources met the weight of evidence criteria established in Appendix A for classification of the health hazards upon which the source listings are based.”

Please note that this language may not avoid an unlawful delegation of authority created by continuing deference to source lists no longer mandated by OSHA. That concern would be limited by reducing the referenced source lists to those specified in California Labor Code 6382 for the director’s list of hazardous workplace chemicals.

One positive study rule

Temporary section 5194 retains the legacy one-study rule by which “one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect...” Under HCS 2012, “positive and negative results are considered together in the weight of evidence determination” that “may justify classification”. The April 9 discussion draft proposes revised language we cannot support, with one exception. Provided the one-study rule is removed from the definition of “health hazard,” the following suggested amendment to temporary section 5194, Appendix A.0.3.5 would significantly reduce the concerns associated with requirements based on a single study. It adds:

“Where available studies of possible health effects of a hazardous chemical are deemed by the SDS preparer to not provide sufficient weight of evidence for classification of the

chemical, the SDS preparer shall nonetheless note on the safety data sheet the identity of the chemical and the health effect for those chemicals for which there are studies conducted in accordance with established scientific principles and which report statistically significant findings regarding a potential health effect.”

Otherwise, the California standard should conform to OSHA 2012. In particular, the one positive study rule must be removed from the definition of a health hazard to avoid conflict with HCS 2012 classification criteria.

Deadline to ship revised labels

Temporary section 5194(f)(11) permits just three months to update and ship new labels based on newly discovered hazard information. We continue to urge the HCS 2012 standard of six months. The process required to ship new labels involves 1) hazard evaluation and determination, 2) label design, approval, and production, 3) manufacturing process to apply the label to product, 4) product segregation and distribution through one or more warehouses, and 4) inventory sell through. A shorter timeline simply cannot be met. It would undoubtedly require product recalls, in some cases before replacement product is ready, to assure that downstream distributors don't intentionally or accidentally deliver mislabeled product into California. This is an unacceptable disruption of commerce to meet a California-only deadline.

Other issues

We again urge conformance to HCS 2012 on all other issues, including testing requirements and mixture criteria. Different classification criteria that would require the creation and distribution of California-only labels and SDSs would not enhance worker health or safety and are likely to be incompatible with the “product clause’ of the OSH Act.

* *The desire for conformance with HCS 2012 should not be interpreted as complete satisfaction with HCS 2012. The American Tort Reform Association and several major trade associations have challenged parts of HCS 2012 in federal court. Nevertheless, harmonization is an overriding consideration in the context of state rulemaking. One of the issues being litigated concerns preemption.*