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Standard Interpretations - Table of Contents

• **Standard Number:** 1910.1200

September 17, 1987

Mr. Martin J. Neville
Fanelli, Neville, Varian & Staker
Attorneys at Law
277 North Avenue
New Rochelle, New York 10801

Dear Mr. Neville:

This is in further response to your letter of July 17, concerning the application of the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard to the art materials industry.

As stated in your letter, the Hazard Communication Standard does not require the Labeling of products subject to Labeling under Consumer Products Safety Commission (CPSC) standards. The CPSC exemption applies only to labels; employers must comply with all remaining provisions of the Hazard Communication Standard.

The current scope of the Hazard Communication Standard is limited to chemical manufacturers, importers and distributors who sell chemicals to employers in Standard Industrial Classification (SIC) Codes 20-39. Manufacturing employers must have and maintain material safety data sheets for all hazardous chemicals used in their workplaces to which employees may be exposed. The standard does not apply to "office workers" who encounter hazardous chemicals in non-routine work situations. For example, an employee who uses a solvent to clean a typewriter once or twice a year does not have to be provided with a material safety data sheet.

The format and appearance of a material safety data sheet may be decided by the preparer. The inclusion of the statement "OSHA opinion that a material safety data sheet is not necessary for non-toxic products" may be misleading. We suggest the following alternative language be considered; "This product is not considered to be or contain hazardous chemicals based on evaluations made by our company under the OSHA Hazard Communication Standard, reference 29 CFR 1910.1200."

Chemical manufacturers and importers are responsible for hazard determinations and the development of material safety data sheets for hazardous chemicals under the Hazard Communication Standard. Trade associations would not be party to OSHA citations issued to specific manufacturers for violations of the Hazard Communication Standard. Material safety data sheets may be prepared for non-hazardous chemicals, however, care must be taken to ensure that inapplicable generic warnings are not used on such forms.

On August 24, 1987, a revised Hazard Communication Standard was published in the Federal Register effectively expanding the scope of the standard's coverage to include all employees exposed to hazardous chemicals. By May 23, 1988, remaining employers must have in place complete hazard communication programs. The expanded rule will directly effect ACMI members. Members will be required to create or obtain material safety data sheets for all hazardous chemicals and transmit them to their customers along with or prior to shipment.

Retail suppliers of chemicals are only required to provide a material safety data sheet upon request from an employer covered by the standard. A retail supplier must post a sign or otherwise inform commercial customers of the availability of material safety data sheets. Additionally, chemical manufacturers are not required to transmit material safety data sheet to distributors who do not sell to commercial customers.

A cursory review of the ACMI's draft "Guidelines for Material Safety Data Sheet" indicates that it should prove helpful to members using it. Since most of the material in this document comes from the Hazard Communication Standard we do not expect members using it correctly to be out of compliance with the standard. We suggest, however, in view of the promulgation of the expanded rule, that you consider making the necessary changes to reflect the broadened coverage of the standard. We would be happy to review your document again in more detail at that time.

OSHA would be glad to participate in an ACMI sponsored seminar by providing a representative. If I can be of further assistance, please feel free to contact me again.

Sincerely,

John A. Pendergrass
Assistant Secretary

July 17, 1987

Mr. John A. Pendergrass
Assistant Secretary
U.S. Dept. of Labor OSHA
200 Constitution Avenue, N.W.

Washington, D.C. 20210

Re: ACMI - Request for OSHA Advice on MSDS Preparation

Dear Mr. Pendergrass:

I represent the Art and Craft Materials Institute, Inc. (ACMI) an association of 80 member companies that certifies the health labeling of member manufacturers' products to consumers. Recently, I contacted Mr. John Martonic at OSHA's Washington headquarters to discuss several issues of concern to the art material industry regarding the OSHA Hazard Communication Regulation, 29 CFR 1910.1200 and particularly the Material Safety Data Sheet. He suggested that I contact you.

ACMI certifies that art material products are either non-toxic or if toxic, that appropriate health labeling appears on the product as required by the Federal Hazardous Substances Act, (FHSA) 15 USC 1261 et seq. The Consumer Product Safety Commission has recently advised that FHSA covers chronic hazard labeling of art supplies and that ASTM D-4236, a voluntary standard for chronic toxicity labeling of art supplies developed in 1983, is consistent with FHSA for labeling chronic hazards (Ex. A).

Some background information relating to the ACMI Certification Program and the regulatory context affecting art materials follows.

ACMI employs an independent toxicologist, Dr. Woodhall Stopford, M.D., affiliated with Duke University, and sponsors a Toxicological Advisory Board consisting of three eminent toxicologists to review program procedures. Formulas of art material products are submitted by members in confidence to the toxicologist who reviews the formula and product size to determine the appropriate category of required health labeling, e.g. non-toxic or acutely and/or chronically toxic for foreseeable product use under FHSA and ASTM D4236, a voluntary standard for chronic hazard labeling of art materials. He has discretion to require the submission of MSDSs from suppliers to the manufacturers and to conduct tests where he believes tests to be required. A copy of the ACMI lists of certified products is enclosed as Exhibit B.

There is a Certification Committee of ACMI which includes representatives of art product manufacturers, representatives of artists, representatives of art educators and school officials. The Committee can submit questions to the toxicologist and can approve the addition of new product categories to the program.

ACMI led in the development of what is the first voluntary standard for chronic toxicity labeling of consumer products, ASTM D-4236. At the time of its development, under FHSA there were no standards in the sense of federal regulation for chronic toxicity labeling of household or consumer products. Parenthetically, the ASTM standard development project occurred at about the same time the OSHA Hazardous ASTM Standard, similar to the OSHA Regulation, is performance oriented. Under the ASTM Standard, literally thousands of art product formulas have been evaluated from 1983 to the current date.

Notwithstanding the ASTM Standard, there has been public controversy concerning the toxicity of art supplies over the last six years or so. Some States have passed statutes relating to chronic hazard labeling of artists' supplies and statutes relating to purchasing art materials for use in grades K-6 and 7-12. Enclosed is a copy of the California, Oregon, Illinois, Tennessee, Florida and Virginia H). In addition, there may be other recent statutes passed that also apply, eg. "Proposition 65" in California (Ex. I). Some of these State laws: require that MSDS forms be provided to State Health Departments for art supply products, eg. Illinois.

In turn, there has been confusion in the industry regarding Material Safety Data Sheets under the OSHA Regulation and State OSHA/"Right-to-Know" Laws. Generally, the industry, SIC Code 39, is comprised of small companies.

There are some with annual sales in excess of \$20 million but the vast majority of art material manufacturers are companies whose sales may not exceed that amount. They are generally limited in their staff. Some companies have chemical expertise to a degree. Many may only have one or two chemists. But the product lines of the companies are broad. A line of artists paints may include many different colors. In addition a number of member companies are foreign companies, some without domestic subsidiaries in the United States.

As a result of the public controversy, customers of manufacturers are demanding MSDSs for virtually any product that may be regarded as an art material including paper, easels, etc.

Virtually all art material products are "mixtures" under the OSHA Regulation definition.

In an effort to provide assistance to our members, we would appreciate OSHA's advice, or suggestions as to several legal questions and also OSHA's recommendations regarding our draft MSDS guidelines.

I. OSHA Regulation - Coverage of Art Material Products

Art material products are marketed either to the schools or children (if children's products) or to commercial or professional artists or to crafts-persons or to hobbyists. They are not generally used in an industrial environment nor are they generally used in manufacturing operations. It is possible that some customers may use some art materials products in industrial or manufacturing operations but the industry has no knowledge of it, if it is true, with some limited exceptions as indicated under Section IV.

The products are packaged as consumer products and shipped to distributors for resale to retailers and ultimately to consumers. Packages may include multiple products, eg. a box of differently colored crayons, paints in tubes, etc. The size of the product packages ranges from 1 ounce to one gallon, although generally the gallon size is an exception.

The OSHA Hazard Communication Regulation, 1910.1200(b)(4) states:

"This section does not require labeling of the following chemicals:

(iv) Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission."

The art materials industry has always considered that its products were subject to both cited statutes and recently the CPSC issued an advisory opinion to the effect that art materials labeling is subject to acute and chronic labeling requirements under FHSA.

The stated purpose of the OSHA regulation "is to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the "manufacturing sector," 1910.1200 (a)(1). The last "manufacturing sector" appears to us to be the member manufacturers' plants.

A "manufacturing purchaser" is defined in the regulation to mean "an employer with a workplace classified in SIC Codes 20 through 39 who purchases a hazardous chemical for use within that workplace, 1910.1200(c).

The OSHA Instruction CPL 2-2.38A states:

"As of November 25, 1985, chemical manufacturers, importers, and distributors are required to label shipped containers of hazardous chemicals, and to provide Material Safety Data Sheets (MSDS) to manufacturing purchasers of these chemicals (i.e., employers in Standard Industrial Classification (SIC) Codes 20-39, the manufacturing sector."

Customers of member companies of ACMI are not "manufacturing purchasers," with a few exceptions. There are some commercial purchasers who may purchase in bulk and who repack the products as consumer products under their own name. In that case, an MSDS would clearly be required for a

hazardous product. Member companies for the most part sell to art supply distributors - who in turn resell to schools, to retail art supply or stationary stores, or to retail chains. Products in the program do not include industrial coatings.

The products are generally used in classrooms, studios, households, art departments of advertising agencies, offices, out-of-doors, etc.

We recognize that some art material products may be that art material product manufacturers' plants or factories are themselves subject to OSHA regulations since they are in SIC Code 39. But it is not at all clear that the OSHA Regulation requires "end-line" art material manufacturers to prepare or provide MSDSs for their customers and ultimate consumers for products sold to the general public and which may only be incidentally purchased by "manufacturing purchasers" for the office environment at their plants for office workers.

Manufacturers of these art material products will provide information in the nature of MSDSs to their customers irrespective of whether the regulation applies because the customers as for it and because the industry is committed to provide information on the products and the safe use of their products. Beyond that, some States have adopted art material labeling laws which involve the review of MSDSs by State authorities as discussed above.

Does an art material product - packaged for consumer use - require an MSDS under the OSHA Hazard Communication Regulation if the product is only acquired incidentally by "manufacturing purchasers" in SIC Codes 20-39 for office use? Does the OSHA Regulation require the preparation of Material Safety Data Sheets at all for art material products?

Even if the regulation does not apply, art product manufacturers appear to be subject to State OSHA and "Right-to-Know" laws which in some cases may require MSDS preparation and art product manufacturers are providing MSDSs for non-hazardous, as well as hazardous, art materials.

II. MSDS - Non-Toxic Products

Dr. Woodhall Stopford, ACMI's toxicologist, has advised that the vast majority of art material products do not require an MSDS under the OSHA Hazard Communication Regulation (Ex. J), even assuming that the Regulation is applicable to art material products.

Can ACMI lawfully advise its members to prepare MSDSs in the form enclosed, Ex. K, L, M, so that Section II of the form can contain a depiction of the certification mark of the Institute, and the language as indicated, and if a non-toxic product one with no hazardous chemical and "no physical hazard", a statement that no MSDS is required by reason of the OSHA regulation? Please refer to page 28 of the Guidelines. Other variants of this statement appear in the draft "Guidelines."

If the MSDS form is used, manufacturers recognize that the form must be completed as to all elements of required information.

III. MSDS - Products Considered Hazardous under FHSA, ASTM or the OSHA Standard

Some art material products do present health or physical hazards of one kind or another. There are some paints, solvents, etc. which present acute or chronic health hazards or which may be flammable.

Can ACMI legally advise members to use MSDSs for hazardous art material products, even if MSDSs are not required under the OSHA regulation? We assume that it is permissible but would appreciate OSHA's guidance. A draft MSDS incorporating the HL mark for which health warnings are required is also enclosed (Ex. N). Also please refer to Guidelines page 29.

IV. Art Material Products Known To Be Used In Both School, Household and Industrial Environments

There are some art material products used in the industrial environment as well as in schools, household and studios. Some manufacturers sell turpentine, for example, and as a solvent, it is known to have wide-spread usage to include the industrial environment, although the turpentine used in an industrial environment would probably not be purchased from an art material product manufacturer but from some other supplier of industrial products. The turpentine sold by art material manufacturers is generally of a higher quality than industrial turpentines or what would be typically available in a hardware store.

Does the OSHA Hazard Communication MSDS apply to these products irrespective of the identity of the purchasers and ultimate users?

V. Guidelines for MSDS

ACMI has prepared in draft "Guidelines for MSDS" (Ex. O) We regard this as a first step in providing member companies with guidelines for satisfying the various regulations, federal and state. Over time, we plan to expand it to include additional information relevant to art material products. We will seek to provide member companies with guidance to prepare MSDSs so that they will be generally acceptable nationwide by taking into account state standards that may be stricter than the federal standard.

We would also appreciate OSHA's comments on the draft guidelines. We understand that OSHA has assisted other industries on similar projects. If OSHA has any additional pertinent guidelines or explanations of the MSDS regulations, they could also be included.

Should OSHA desire comments on the issue of extension of its Regulation to other sectors which was one of the issues in *United Steelworkers of America v. Aucther*, our industry would generally favor one single comprehensive MSDS standard of widespread application and failing that, would urge OSHA to take the lead to develop with the States a comprehensive document that explains existing requirements of both the federal and state standards. The situation is so complicated at present that it is difficult to advise a manufacturer doing interstate business of his obligations in this area, even given unlimited legal or technical resources, which our industry (and I am confident many others) does not have. Hon. John T. Dunlop, former Secretary of Labor, wrote in 1978:

"It is an open question as to how many regulations a business, particularly one: of small or medium size, can absorb The country needs to acquire a more realistic understanding of the limits to the degree to which social change can be brought through legal compulsion Government has more regulations on its plate than it can handle."

By virtue of our industry's active involvement in the development of the chronic hazard labeling standard, we managed to obtain general uniformity for the product label. If other industries are finding it difficult to comply with all of the MSDS requirements, as we do, then OSHA should seek to develop, with the States participation and perhaps industry as well, a comprehensive Guideline in this area which no industry on its own could afford to do. The present situation is an intolerable burden under the interstate commerce clause for small business companies. Our small industry "has more regulations on its plate than it can handle" in this area.

ACMI may consider sponsoring a seminar on the subject, and we would appreciate participation by an appropriate OSHA representative. It is a subject of continuing interest on the part of members and given the current legislative and regulatory background, one that member companies find to be a source of confusion.

We would be pleased to meet with appropriate OSHA staff to discuss this in greater detail or to provide additional information. We look forward to an opportunity to meet with you or your staff. Our toxicologist can also attend if needed or be available for a conference telephone call.

Sincerely,

Martin J. Neville

Standard Interpretations - Table of Contents

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