LEGAL
& LEGISLATIVE BULLETIN

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NATIONAL PAINT & COATINGS ASSOCIATION

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ROUTE TO
Department
Finance
Administrative
Sales
Technical
Production

TOPICS:

A. Lead in Paint -- Federal, State (Massachusetts and Wisconsin) and New York City
B. Mercury in Paint -- New Jersey regulations
C. Air Pollution Control regulations -- Connecticut, Louisiana and New Jersey
D. Poison Prevention Packaging Act -- "Special-packaging" requirements
E. Consumer Product Safety Commission -- Product hazard list and Spray adhesives ban
F. FHSA regulations
G. Federal legislation -- "Consumer Product Warranties" bill
H. IRS regulations -- "Full absorption" inventory costing

Executive Synopsis

This Bulletin reports recent developments on lead in paint -- Federal bill approved by House and Senate, as reported out of Conference; Consumer Product Safety Commission (CPSC) approves exemption of artists' paints and related materials from Federal lead regulation (Copy appended.) Massachusetts regulations on 2-gallon containers may be amended; Wisconsin lead bill reported by Assembly committee; amendment to New York City ordinance proposed.

Also reports NPCA actions to obtain relief from New Jersey pesticide regulations which would ban mercury uses in that state; to obtain amendments to very restrictive air pollution control regulations in Connecticut, Louisiana and New Jersey; and to acquire by survey information on "special-packaging" requirements of the industry under existing and proposed PPPA regulations.

Includes comments on new Product Hazards List, status of spray adhesives ban, recodification of FHSA regulations by CPSC, and Senate passage of Consumer Product Warranties bill.

And, in addition, promulgates information on IRS regulations which made "full absorption" inventory costing mandatory.

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A. Lead in Paint -- Recent developments

1. Federal

a. House and Senate approve compromise lead bill

"L&L" Bulletin No. 16 reported House passage of the Federal lead bill S. 607 and set forth a comparison of differing provisions in the House and Senate versions. On September [illegible], the conferees met and resolved the differences between the bills. The final, agreed-upon "compromise" version contains the following provisions:

(1) Research. Conferees accepted the House version which requires the Consumer Product Safety Commission to conduct research on multiple layers of dried paint film, containing the various lead compounds commonly used, in order to ascertain the safe level of lead in residential paint products. No later than Dec. 31, 1974, a report of the results of this research must be made to the Congress.

(2) Lead Standard. Conferees adopted a compromise position on this point. The final language provides for a 0.5% standard prior to Dec. 31, 1974; after Dec. 31, 1974, the standard becomes 0.06%, except that, if the Consumer Product Safety Commission, based on the research studies, determines that another level (not to exceed 0.5%) is safe, then that other level becomes effective after Dec. 31, 1974.

(3) Preemption. Conferees accepted the House language which states that it is the intent of Congress to supersede any State or local laws which provide for a requirement, prohibition, or standard relating to the lead content in paint which differs from the provisions of this Act. Any such State or local law purporting to establish such different requirement, prohibition or standard is declared null and void.

The Conferees also included a provision to prohibit the application of "lead based paint" to any toy, furniture, or cooking, drinking or eating utensil. (This is in addition to the existing prohibition against use of lead based paint in residential structures constructed or rehabilitated with Federal assistance.)

* This final version was incorporated in a Conference Report which now has been adopted by the full Senate and House of Representatives and sent to the White House. The President is expected to take action in the very near future.

b. CPSC approves exemption of artists' paints and related materials

On September 28th the Consumer Product Safety Commission approved the exemption of artists' paints and related materials from classification as a banned hazardous substance under the lead regulation of March 11, 1972. This action -- published in the Federal Register on October 4, 1973 (38 F.R.27514) -- provides for the exemption to become effective on December 3, 1973, "except as to any provisions that may be stayed by the filing of proper objections." (Copy appended.)

This latter statement is emphasized because it indicates that a period of time for further comments and objections can be expected when the agency finalizes the regulation covering the critical exemptions requested by NPCA one year ago. (See "L&L" Bulletin No. 7). No action yet has been taken by CPSC (as successor agency to FDA) on the NPCA request, thus the implementation date for the product categories covered by that proposed regulation remains suspended, and -- such products can continue to be marketed, even though the lead content may exceed 0.5 percent.

As explained in an earlier Bulletin, the category for artists' paints and related materials was not included in the NPCA request because such products were not considered by the industry to be "paints and similar surface-coating materials" and thus not subject to the initial ban. Nevertheless, after publishing (on December 5, 1972) the proposed regulation covering the exemptions requested by NPCA, FDA published (on January 4, 1973) a proposed regulation to cover this additional product category. (See "L&L" Bulletin No. 8).

2. State

a. Massachusetts lead regulation may be amended

As reported in "L&L" Bulletin No. 14, NPCA formally requested certain amendments to the "Regulations for Lead Poisoning Prevention Program -- The Commonwealth of Massachusetts" which were appended to "L&L" Bulletin No. 10.

NPCA has not received formal notification and we are unable to confirm that the regulations have in fact, been amended. However, information has been received unofficially that the Director of Massachusetts Lead Poisoning Control Program has reported to the Massachusetts Department of Public Health that the Governor's Advisory Committee to the Lead Poisoning Prevention Program voted unanimously to amend paragraph 4.4 of the regulations, as published on April 6, 1973, by omitting the nine words at the end of the sentence "nor sold in containers of less than 2 gallons." At such time as this amendment may be published, it would have the effect of eliminating altogether the restriction on sales of the exempted products in containers of less than 2 gallons.

Meanwhile, members are reminded that the Massachusetts regulations became fully effective on October 1, 1973. These regulations contain provisions for special labeling; but -- *there still remains an unresolved legal question as to whether these labeling provisions are null and void due to Federal preemption of labeling under the Federal Hazardous Substances Act.*

It is our own legal opinion that such provisions are nullified by Federal preemption, even though no Federal label has yet been finalized for those products for which an exemption from the Federal (0.5 percent) lead level has been requested. While Massachusetts officials have not expressed agreement with this position, they have indicated that they would respect Federal preemption of labeling once the Federal regulation prescribing a lead label for exempted products is finalized.

We have not pursued this matter in court mainly because we believe the burden rests with the state of Massachusetts to demonstrate that their labeling is not preempted and we believe the matter can be successfully resolved without court action once requisite labeling is prescribed by a final, Federal regulation.

a. Wisconsin

After having been dormant for many months, Wisconsin Assembly Bill No. 260 (introduced February 1973) was reported favorably by the cognizant Assembly committee earlier this month.

This bill would require the State Department of Health to adopt regulations within 6 months establishing the lead-content levels in paint. While the Federal preemption provision should control this aspect, the bill does contain several other objectionable provisions, as follows:

1. Would require a label on all paint products exceeding the lead content standard, to state "WARNING -- Contains poisonous ingredients." (Letters not less than 18 point type.)

2. Would prohibit use of paint exceeding the lead content standard on interior surfaces of "any home, apartment building, educational or child-caring institution, hospital, clinic, store, professional office or public gathering place."

3. Would require businesses to display a sign warning purchasers against the use of products hazardous because of lead content.

This measure is being followed closely and, with the invaluable assistance of members in Wisconsin, appropriate action will be taken in an effort to correct the above objectionable requirements.

3. New York City proposes amendment to lead ordinance

Amendments have been proposed to the existing New York City ordinance (presently 1%) with the stated purpose of bringing the ordinance into conformity with the FDA regulation. As written, the proposed amendments would prohibit the possession or sale of any paint containing more than 0.5% lead which is intended or packaged in a form suitable for use in or around the household.

While uniformity with the Federal regulation is desirable, this proposal makes no provision for the seven product categories which have been exempted from the original FDA order pending additional review and the promulgation of a further order. (See "L&L" Bulletin No. 7.). Accordingly, if adopted in its present form, these amendments would have the effect of prohibiting the sale (and even possession) in New York City of the many industrial and special-purpose coatings covered in the seven product categories.

Fortunately, the New York Paint and Coatings Association was alert to this situation and their notification of NPCA has permitted us to file objections to the amendments along with objections filed by the local association. We have argued, among other things, that adoption of these amendments would be premature until final action at the Federal level. An informal meeting with appropriate City officials has been requested in order to resolve the matter in advance of any formal consideration of the amendments.

3. <u>Mercury in Paint -- New Jersey regulations</u>

NPCA has filed comments with the New Jersey Department of Environmental Protection on that state's proposed pesticide control regulations which would, among other things, classify "mercury compounds (except those used as drugs as defined in N.J.S.A. 24:21-2)" as a Prohibited Pesticide. (Refer: Proposed Chapter -2 Pesticide Control Regulations, Section 2.1, Listed Number 105.)

The NPCA comments -- presented at a public hearing in New Brunswick, New Jersey on October 16, 1973 -- supported representatives of the New York and Philadelphia PCA's, the major mercury suppliers and other industry witnesses attending this hearing. NPCA and the industry are seeking to have the proposed regulations amended so as to permit the continued use of phenylmercurials in paints and coatings pending the resolution of the issue by the Federal agency (EPA).

> <u>Note</u>. The administrative proceedings on this issue have been further delayed (see "L&L" Bulletin No. 14) with the granting by the Administrative Law Judge of an additional 30 days (until November 30, 1973) for industry witnesses to answer the pre-trial brief of EPA which was filed on October 1st.

C. <u>Air Pollution Control Regulations</u>

1. <u>Connecticut and Louisiana</u>

The states of Connecticut and Louisiana have adopted air pollution control regulations which include very restrictive solvent emission controls based on earlier EPA direction (EPA Guidelines to the States, August 14, 1971; 36 F.R. 15486). These controls simply do not provide the solvent use flexibility needed to manufacture paints and coatings; and, EPA now recognizes these as unfair and unworkable. The Louisiana regulations already are in effect; but, the Connecticut regulations do not become fully effective until January 1, 1975. It should be noted, however, that -- after January 1, 1974 -- all architectural coatings sold or offered for sale in Connecticut in containers larger than one quart must contain photochemically unreactive solvents in accordance with the <u>acceptable</u> Rule 66 approach.

In view of the foregoing, NPCA currently is seeking a meeting on these matters with appropriate officials, to discuss fair and reasonable alternatives. (A meeting is scheduled with Connecticut officials for October 29, 1973; as yet no meeting has been confirmed with Louisiana officials.)

2. <u>New Jersey</u>

Regarding the New Jersey situation, EPA originally published a proposed transportation control plan for parts of that state which was essentially a Rule-66 approach for organic solvent control. We have learned, however, that these provisions have been modified, perhaps substantially, during the rule-making process. NPCA currently is taking the necessary legal steps to preserve our right to testify, offer comments, and to have a fair hearing on the regulation currently being considered.

As these matters develop and further information is available, it will be reported.

D. Poison Prevention Packaging Act -- Survey of "special-packaging" requirements of industry

On October 17th a Memorandum, with "Child Resistant Packaging Survey" attached, was forwarded to all NPCA members. This is an effort -- by the Association's Packaging Committee -- to obtain information on the industry's present and anticipated requirements for child-resistant packaging for those products now subject to "special-packaging" requirements under the Poison Prevention Packaging Act or expected to be covered by standards already proposed and currently being considered for final publication by the Consumer Product Safety Commission.

Members are urged to complete the aforementioned "Child Resistant Packaging Survey" and return to NPCA Headquarters as soon as practical. This will provide guidance to assist the Association's Packaging Committee in determining additional steps that may be necessary to provide for the industry's needs in this critical area in the near future. (See "L&L" Bulletins 14 and 15.).

E. Consumer Product Safety Commission

1. Product hazard list issued

The Consumer Product Safety Commission has released a comprehensive list of consumer product categories which, because of the threat of injury to the American public, are likely to be the subject of early action for development as product safety standards. (See "L&L" Bulletin No. 14.). The list (Consumer Product Hazard Index) is based on reports of injuries, associated with consumer products, reported by 119 hospitals nationwide participating in the National Electronic Injury Surveillance System (NEISS).

Paints and solvents are lumped together in this report, and ranked 23 out of a total of 369 product ratings. NPCA is attempting to obtain more details on this matter, particularly since "lead poisoning" cases apparently have been included in the total "injuries" for the "paints and solvents" category. Aerosols are ranked 59 under the product description -- "Pressurized Containers, Aerosol Cans." Again, the "injuries" have been lumped together, thus those related to aerosol "paints" cannot be distinguished from other aerosol products.

Commission Chairman Simpson has stated that, while the agency will focus greater attention and resources on products appearing high on the list, it would be a mistake for manufacturers to conclude that products "near the bottom of the listing" would not also be the subject of studies leading to the development of product standards. He challenged industry to initiate actions to develop and adopt voluntary safety standards.

2. Spray adhesives ban continues

The ban on certain spray adhesives (reported in "L&L" Bulletin No. 16) remains effective while the agency (CPSC) continues to conduct a very thorough investigation of the matter. Information available to date indicates that no "causal connection between exposure .... and chromosone damage leading to genetic birth defects" yet has been confirmed.

F. FHSA Regulations recodified by CPSC

The Consumer Product Safety Commission has revised and recodified the regulations implementing the Federal Hazardous Substances Act. This action is similar to that reported in "L&L" Bulletin No. 16 with respect to the standards under the Poison Prevention Packaging Act.)

The FHSA regulations -- formerly contained in Title 21 of the Federal Regulations, Part 191 -- now have been issued as Part 1500 of Title 16, Chapter II, Code of Federal Regulations. The recodification was published in the Federal Register on September 27, 1973 (38 F.R. 27012-38); and, since no new requirements were added, the regulations became effective upon date of publication.

G. Federal Bill on Warranty Standards Passes Senate

Last month, the Senate passed S. 356, a bill designed to provide disclosure standards for written consumer product warranties, to define Federal content standards for such warranties, and to increase the powers of the Federal Trade Commission (FTC) in this area. As stated in the report by the Senate Commerce Committee, the purpose of the bill is to "improve the position of the consumer in the marketplace by making the Federal agency responsible for his economic well being (the FTC) more effective and by delineating with specificity the duties which suppliers of consumer products assume when offering warranties or service contracts in writing on consumer products."

The warranty provisions apply to all "consumer products" which are defined as any tangible personal property normally used for personal, family, or household purposes and which costs the purchaser more than five dollars.

Some of the specific provisions are as follows:

a. In order to make more and clearer information available to the consumer, FTC is given authority to issue rules prescribing the manner and form in which information about any written warranty is displayed. The rules may require the following to be clearly disclosed in the warranty: name and address of warrantor, product or parts covered, statement of what warrantor will do in the event of defect and at whose expense, exceptions and exclusions, procedure to follow when making claim under the warranty, etc., etc.

b. Establishes uniform Federal standards for written warranties which are: to repair or replace any malfunctioning or defective product; within a reasonable time; and without charge.

c. If a warranty meets the above standards and does not limit liability of the warrantor, it shall be designated as "full (statement of duration)" warranty.

d. If the warranty meets the Federal standards but does limit liability as permitted by State law, then it must also include a statement, such as "liability for consequential damages, limited; remedy limited to free repair or replacement within a reasonable time, without charge."

e. Warranties not meeting the Federal standards must be designated in such manner as to clearly indicate the limited scope of coverage afforded.

f. There is also a provision which prohibits an express disclaimer of implied warranties if any written warranty is made.

S. 356 had been referred to the House Interstate and Foreign Commerce Committee for consideration. That committee is also considering several similar measures introduced earlier in the House, the principal one being H.R. 20 (Moss, D.-California). Enactment of a law in this area is anticipated, perhaps before the end of the year. Further significant developments will be reported as occurring.

H. IRS Regulations -- "Full absorption" inventory costing

The Internal Revenue Service published -- in the Federal Register on September 19, 1973 (38 F.R. 26184 - 26189) -- certain amendments of its regulations which will require the use of a "full absorption" method of inventory costing for all taxpayers engaged in manufacturing or production operations. It was stated by the Commissioner of IRS that "such rules should simplify the tax reporting for many businesses and eliminate the uncertainty and controversy of past practices." Specific amendments apply to sections 1.61-3; 1.446-1; 1.471-2; 1.471-3 and 1.471-11.

While "full absorption" has been qualified to some extent by the classification of expenses into three categories, the new method does take into cost a number of items that are not taken into account under either the "direct cost" or the "prime cost" method, neither of which can now be used. These three categories are described briefly below:

1. Category 1 -- These costs must be included in inventory costs, cover utilities (such as heat, light and power), rent, indirect labor and production supervisory wages, indirect materials and supplies, uncapitalized tools and equipment, and costs of quality control and inspection.

2. Category 2 -- These costs, which are not to be included in inventory cost, cover marketing, advertising, selling, and other distribution expenses, interest, research and other experimental expenses, losses listed under section 165 of the Code, percentage depletion in excess of cost depletion, depreciation and amortization taken for federal income tax purposes in excess of the amount taken in financial reports, income taxes attributable to income from the sale of inventory, pension contributions representing past services cost, and general and administrative expenses and officers' salaries incident to the manufacturer's activities as a whole.

3. Category 3 -- These costs may or may not be included in inventory cost depending upon how they are treated in the financial reports), cover taxes other than income taxes, depreciation shown in financial reports and cost depletion, employee benefits, costs attributable to strikes, rework labor, scrap and spoilage, factory administration expenses, officers' salaries and insurance.

Category 3 costs are includable or excludable from the computation of inventoriable costs in accordance with the taxpayers' financial reporting treatment for such costs, but -- only if such treatment is not inconsistent with generally acceptable accounting principles.

Liberal transition rules were established in the final regulations to encourage taxpayers to change their method of inventory costing. Those who choose to switch to the "full absorption" method voluntarily may make a special election by filing Form 3115 during the first 180 days of any taxable year beginning after September 18, 1973 and before September 19, 1975. Substantial benefits will accrue to those taxpayers who make the special election during the allowed transition period.

As evident, this is a complex subject and, while a significant development, NPCA has not attempted to provide further detail in this Bulletin because all manufacturers need to review carefully their present inventory and accounting practices and indicated changes with their own accountants and/or tax attorneys.

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Attachment

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