Exhibit A

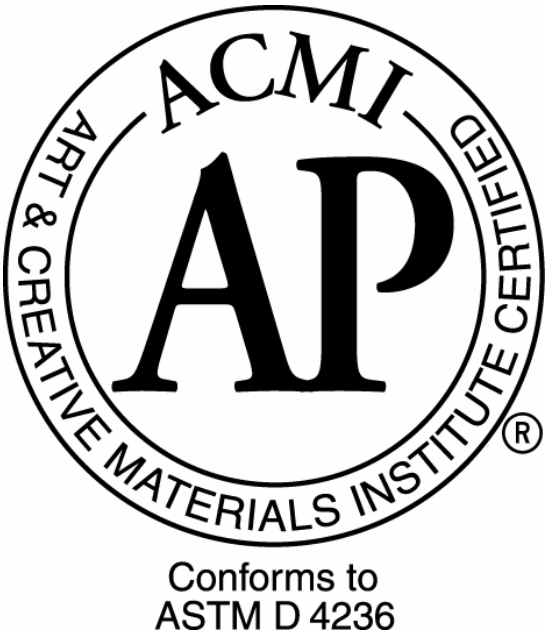
ACMI
AP
ART & CREATIVE MATERIALS INSTITUTE CERTIFIED
Conforms to
ASTM D 4236

Exhibit B


ACMI
CL
ART & CREATIVE MATERIALS INSTITUTE
CERTIFIED
Conforms to
ASTM D 4236

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October 4, 1995

Our File: 101-01

By Federal Express
Secretary
Federal Trade Commission
Room H-159
Sixth and Pennsylvania Ave., N.W.
Washington, DC 20580

Re: 16 C.F.R. Part 260 - Comment -
FTC Environmental Marketing Guides

Dear Sir:

Enclosed is an original and six copies of comments on behalf of The Art and Creative Materials Institute, Inc. (ACMI), as well as six copies of the following: ACMI Manual of Procedure; ACMI Booklet, "What You Need to Know About the Safety of Art Materials"; and ACMI Exhibits to which reference is made in the comments.

I telephoned Mr. Kevin Bank of the FTC prior to September 29 and understand that these materials will be accepted for consideration even though submitted after the September 29 date specified in the Notice.

Very truly yours,

Martin J. Neville

MJN:cmg
encls.

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October 4, 1995

Our File: 101-01

Secretary
Federal Trade Commission
Room H-159
Sixth and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: 16 CFR Part 260 - Comment - Guides for the Use of Environmental Marketing Claims (60 Fed Reg. 38978)

Dear Sir:

These comments are submitted in connection with the Federal Trade Commission's Request for Public Comments on certain issues relating to The FTC's Environmental Marketing Guides ("EMG") on behalf of The Art and Creative Materials Institute, Inc. ("ACMI"), an organization of some 180 manufacturers, 69 licensees and 10 associate member companies, now worldwide in scope. These comments briefly address the FTC environmental claims issues generally and, more specifically, the term "nontoxic".

Background:

For more than fifty years, ACMI has sponsored a certification program that originally was confined to children's art materials, but now encompasses a huge array of products and manufacturers. ACMI licenses certification marks, some of which include the term "nontoxic" for children's and adult art materials.

Generally the member companies tend to fall into the category of "small business" manufacturers with some exceptions, both in children's and adult product lines. Small manufacturing companies tend to have limited staff and virtually none of the member manufacturers have "in-house" toxicological expertise.

The origins of the ACMI program reflect the foresight that founding members had in an industry generally characterized as small (although in the aggregate today it may not be a "small

industry"), to sponsor a program that assured consumers and art educators that products bearing the ACMI marks were suitable and appropriate for use by children. Even today, the adult products in the program are evaluated as if used by children. Thus, any products that bear the ACMI nontoxic designation can be used by children. Naturally those products that are hazard labeled for a variety of hazards (toxicity, flammability, etc.) are only suitable for adult use.

Because of its certification program, ACMI is described by the Consumer Product Safety Commission as an association "National Safety Partner". (Exhibit.)[1]

The General Environmental Claims Issues:

As the "environmental claims" issue emerged in the late 1980's, ACMI attempted to keep its members abreast of regulatory and other developments. With a product range as broad as "art and craft" materials or products, it has been as if ACMI has had to deal with the entire range of issues from the appropriate use of the chasing-arrows symbol, to the recycled plastic container symbols, changing laws and regulations dealing with product content, product packaging, VOCs, international developments, and a host of related issues in a relatively compressed time period. Given what was fast emerging as a welter of conflicting environmental laws and regulations within and without the United States, ACMI made available to its members the Green Reports I and II, the draft FTC EMG and other materials as they were obtained. ACMI was hard-pressed to keep up with developments, and the mass of regulatory information was a significant burden for its members.

Some members supported the addition of "environmental claims certification" to the ACMI program, but given the uncertain state of the law and regulations and considerations of the cost of product life-cycle analysis, ACMI declined to do so as it was simply beyond its current expertise and resources. It also noted the conflict developing between public interest environmental claims certifiers, as it was reported in the media from time to time.

The Report "Trends in Environmental Marketing Claims Since the FTC Guides: Technical Report (1995)" notes that in its survey, "references to certifying and standard-setting bodies are rare within environmental claims, perhaps explaining the absence of any reference of this type of claim in the FTC Guides." Until the environmental or green claims area becomes more settled as to the

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[1] References to Exhibits are to those contained in the accompanying ACMI Exhibits.

meaning of such claims in the law in the United States, it almost exceeds the ability of any certifying organization to certify such claims without incurring enormous cost and exposure to significant liability. National consensus is the hallmark for standards-setting and certifying organizations. National consensus as to what is "meant" by the many green claims used must precede certification activities. Once consensus in this area is achieved, certification then becomes possible. No certifier can undertake a true "green" claims certification at this time without significant internal costs to the certifier and significant external costs to the company, whose products are being "certified".

The result in general is that ACMI supports the FTC's efforts to bring order from the environmental claims legal chaos. It may be observed that "conservative" companies are not making claims that may be justified, since the cost of evaluating such claims in terms of legal, staff, testing and other requirements can involve significant expenditures. A few do in a limited context in this industry. For some art material products in limited production, the cost probably represents the annual aggregate product sales.

Less "conservative" companies in the industry or other industries have probably profited from claims that may not be adequately "substantiated." Either they do not realize what "substantiation" means or may mistakenly think a claim is adequately supported, even if it is not. And there are, at base, some companies that are responsible for misleading and, in some cases, false environmental marketing claims.

ACMI supports the FTC's efforts to promote national uniformity in this area. A small company simply cannot afford to evaluate an environmental claim, first under the FTC Guidelines, then under fifty state laws or regulations (some of which are obscure as enacted), and possibly regional and even municipal codes dealing with the terms, without considering international labeling issues. Manufacturers resources should be put to better use. While larger companies may have the resources, legal and otherwise, the environmental claims issue remains very complicated even for larger companies. Some of the largest consumer product companies have been respondents in FTC and state and other enforcement proceedings related to environmental claims.

Use of the Term "Nontoxic" in Connection with the ACMI Program:

Under federal law and regulations, Congress has given the Consumer Product Safety Commission (CPSC) oversight of toxicologists by virtue of the fact that the law requires manufacturers to have a toxicologist review art and craft material product formulae for every product marketed in the United States, The Labeling of Hazardous Art Materials Act of 1988 ("LHAMA"), 15

U.S.C. §1277, and implementing regulations, 16 C.F.R. §1500.14(b)(8). Every formula change requires review. Under the ACMI certification program, it has, since the early 1980's, relied upon toxicologists on the staff of Duke University Medical Center, whose toxicological criteria and protocols are on file with CPSC, as required by law. Many other toxicologists are also on file with CPSC for art material evaluation.

As used by ACMI, a finding that a product is "nontoxic" means that at core -- the product (e.g. crayon, chalk, pencil, eraser, etc) will not, in a "chemical" sense harm a child who uses it. But beyond that, additional precautions are observed in the program. The toxicologist has great discretion to refuse to certify a product. A recent example concerned glue or adhesive products marketed as novelty items in containers shaped as baby bottles and cola bottles. While the glue may have in fact been evaluated as "nontoxic" glue or adhesive, encouraging small children to consume glue by reason of product packaging was judged to be not appropriate for certification, even though there may not be any law or regulation to prohibit the sale of nontoxic glue in miniature baby bottles or cola bottles. The perceived risk was that a child might be encouraged to consume, in other situations, toxic adhesives or glues, even if the baby bottle glue was nontoxic.

Perhaps the most telling test of the program in recent years came in 1994, when CPSC engaged in what may have been the most highly publicized CPSC recall of products -- crayons -- which were found to contain lead in demonstrably unacceptable and toxic amounts imported from the Orient. ACMI cooperated with CPSC and was able to provide lead test data for all crayons in the ACMI program from member companies within and without the United States. All crayons in the ACMI program were "rated" acceptable. (Exhibit)

It is our understanding that the toxic crayons did not have "lead" intentionally added as such, but that the manufacturing process and pigment sources were susceptible to high levels of lead contamination. Many of the crayons recalled were labeled "Nontoxic", and even one brand labeled "Conforms to ASTM D4236", when in fact they were dangerously toxic and clearly did not conform to ASTM D4236, a now federal regulation pursuant to LHAMA originally drafted by the industry with the cooperation of CPSC staff, art educators, experts and consumer interest groups.

Essentially, a product intended for use by children should and must be "safe". But the case law is replete with liability actions against manufacturers whose products were advertised as "safe" and may have been "safe," but were used or employed in totally unanticipated ways. Many of the art material products are intended for children. They are basic to the educational process. But no one can certify they are wholly "safe" in all respects. To the best of our knowledge, no known certifier

will simply certify a product as "safe".

Does this mean that use of an art material product certified "nontoxic" will not in any way ever be associated with any harm? No. First, children are known to stick crayons or chalk in their ears, noses, and obviously their mouths. The product "shape" and foreseeable misuse may lead to injury, but not the product ingredients. Sharpened pencils can be (and unfortunately have been) used as weapons by children. If a swimming pool were filled with "nontoxic" paints, a child could drown in nontoxic paints. Secondly, anything can be toxic in excess such as salt, or even water. However, when the "nontoxic" term is appropriately qualified as it is and has been by ACMI, the ACMI nontoxic certification mark provides the typical consumer with a "shorthand" term and symbol to identify art material products as safe from chemical hazard for use by children -- e.g., no product is in itself "poisonous" or harmful if ingested, inhaled, or absorbed through skin for children or adults. No acute or chronic health hazard is presented by the product. An ACMI "nontoxic" product is not an eye irritant or a skin sensitizer. This is the core program analysis of products in the program. ACMI does certify children's and adult art materials to be "nontoxic" and it gives content to the term, as it is used by ACMI, unlike many companies in the industry or in other industries who use or misuse the term in a variety of ways.

ACMI does not certify the packaging materials to be "nontoxic". As far as it is aware, no consumer understands the mark to apply both (1) to the product and (2) to the product packaging.

Consumers expect, and in many cases, demand "nontoxic" art material products for adult, as well as children's use. The environmental and consumer movement, along with enlightened corporate self-interest for new or improved products, has exerted pressure upon art material manufacturers in the industry in many areas to produce less "toxic" products or those requiring no hazard warning labels in general. This is not an inexpensive effort, but the ultimate result is likely to be safer products in general for the industry to its benefit and that of all consumers. But there are some adult art product performance attributes requiring hazardous components for which no safer equivalent substitute has been found.

Public authorities, particularly as can be expected in the children's art product area, demand by contract specification "nontoxic" art material products. Enclosed are a variety of recent public or other school Requests for Bids for "nontoxic" art material products from California, Florida, Indiana, Kansas, Michigan, New Mexico, Nevada, Tennessee, Texas and Virginia. These illustrate the significance attached to art material products that are "nontoxic" for school systems in the United States. Many of

them specifically refer to ACMI and to its nontoxic marks. They were obtained on short notice from two member companies. While perhaps not representative of every state, they are generally believed to be nationally representative in terms of language and product specifications used, particularly as to the term "nontoxic" (Exhibit).

FTC "Nontoxic" Standard:

The only known precedent found to relate to the use of the term "nontoxic" appears in a recent FTC Consent Decree, In the Matter of Orkin Exterminating Company, Docket No. C-3495, in which the respondent agreed not to represent that its pesticide products (a product by definition intended to "kill" some organism, bacterial, viral or other) would not be represented as "practically nontoxic" unless:

> "...[It] possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this Order 'competent and reliable scientific evidence' shall mean tests, analyses, research, studies or other evidence that has been conducted and evaluated in an objective manner by persons qualified to do, using procedures generally accepted by others in the profession or science to yield accurate and reliable results."

This criteria is generally consistent with the FTC's "Advertising Substantiation Guidelines" (1983). ACMI in 1994 urged CPSC to adopt this criteria as to the proper use of the term, a matter apparently still under review at CPSC. If both agencies adopt the standard, ACMI believes it will reduce or eliminate the improper use of the term by companies subject both to CPSC and also FTC requirements.

Usage of the term "nontoxic" is even reflected in federal regulations. For example, the Fish and Wildlife Service, Department of the Interior, adopted as a final rule on January 3, 1995 to provide for conditional approval of "bismuth-tin shot" as nontoxic for the taking of waterfowl and coots, 60 F.R. 61 (January 3, 1995). While it may be observed that designating ammunition as "nontoxic" may be a stretch, similar to Orkin's pesticide stretch, it means that spent shot, if ingested, will not be harmful to waterfowl. This is no doubt of some significance to ducks that it misses in the air, or fish, or frogs, or clean water (Exhibit).

Review of the "Cope Survey Results/September 1993" indicates that the survey respondents considered the term "non-

toxic" (standing alone) to mean everything from the conclusion that a product was "completely safe", "somewhat safe", "somewhat unsafe" to "completely unsafe" with most of the responses clustered in the "somewhat safe" area (60%). The "Cope Survey Results (Preliminary) December 1994" indicated that the term nontoxic meant "Harmless/Safe/Not Toxic", 27%, "Won't harm people or animals", 24%; "Non-poisonous", 18%; "Won't harm environment", 11%; Dangerous/harmful", 2%; "Other", 12%' "Don't know", 6%. "Trends in Environmental Marketing Claims Since The FTC Guides: Technical Report" (1995) featured some discussion of toxicity-related claims for laundry detergents, dishwashing detergent, toilet paper, coffee filters, batteries, breakfast cereals, plastic trash bags and disposable diapers but not art or craft materials.

As to the claims reviewed in the Technical Report, the majority refer to the absence of phosphates, etc., in detergents specifically, with only a few general claims of "nontoxicity".

The ACMI certification mark for "nontoxic" art materials, standing alone, may appear to be a general claim of "nontoxicity". But it is not, and never has been, intended to be a general claim. It amounts to a referral to its source -- ACMI, for content of the claim in its particulars, as it applies to the product on whose label it typically appears. Just as a product label for an electrical product with the UL certification mark cannot include complete reference to the electrical code or standards to which it refers (but serves as a source indicator), so too with the ACMI mark's applicability to art and craft materials. (ACMI Manual and Safe Use publications submitted with comments.)

The ACMI mark is, by federal and state law, always accompanied by the phrase, "Conforms to ASTM D4236", which gives context and "qualification" to the nontoxic designation. That conformance phrase has no meaning apart from its applicability to art and craft materials and health labeling. (Exhibit.)

This is not to say that ACMI would not adopt a better, more generally definable term, if one were available that conveyed the same sense to consumers and also to public purchasers. It is a complex message to be conveyed. No manufacturer can reproduce on a product label what the program definition represents in its entirety. There was some scientific impetus given to the concept of rating products on a toxicity scale of 1-10, with 1 representing the least "toxic" or "nontoxic" products, and 10 representing the most toxic. This has never been widely adopted and consumers are not likely to understand the concept. It would be meaningless if evaluations were not consistent, or based on consistent toxicology.

In discussions with FTC staff in connection with this request for comment, ACMI was requested to address several specific related issues as to whether:

1. The ACMI nontoxic claim is "substantiated"

Upon the basis of review by the toxicological staff at Duke University, ACMI believes the claim is fully supported in connection with ACMI's program usage of the term. ACMI offers to make its toxicologists available to discuss the issue at the FTC workshop.

This is a health-related claim, one obviously of greater safety significance than a product performance claim to the effect that company X's crayon product is washable, etc. Under FTC precedent, a health-related claim is one that should (and does) require more critical substantiation than many other product claims, perhaps even general "environmental claims", although in current context they are the claims of the moment.

The ACMI nontoxic claim, along with other health-related product claims or warnings, rests with the toxicologists on staff at the Duke University Medical Center, subject to oversight by the ACMI Toxicological Advisory Board, and also to existing CPSC required labeling law and regulations. The program does not exist in isolation. The basic toxicological protocols, which serve as the risk estimate parameters are on file with CPSC as confidential documents.

There is frequent communication, both formal and informal, between ACMI's and CPSC's toxicologists, and between ACMI and CPSC staff. One of the benefits of the program, both to our industry and to CPSC, is the ability to produce data relating to all products in the program in a relatively short period of time for a variety of inquiries. The toxicological "database" is also evolving and growing.

ACMI's certification which is initially formula-evaluation dependent is backed up by both (1) affidavits from members and (2) random and other tests conducted as required by the toxicologist and sometimes in response to governmental inquiry. But even at the initial formula evaluation stage, the toxicologists have broad discretion to require such data or tests as in their professional judgment are necessary at anytime. And they frequently do.

This is not to say that the program is cast in concrete. It continues to be "upgraded" and improvements are added as time passes and the number of formulations evaluated brings into the program new ingredients from all over the world. As new scientific, medical, or toxicological information becomes available, it is integrated into the program.

It is, and remains, an evolving program, attempting to be "user friendly" to its members, to consumers and to regulators,

both in the United States and even at times in Canada and elsewhere. It is one of the most demanding programs sponsored by an association in the United States. It is complex in its many facets and we believe, a shining beacon in the voluntary sector that is and has been characterized by other outside experts as one of the best association certification programs in continuous existence for more than fifty years.

2. Does ACMI understand whether the term "nontoxic" implies an "environmental" benefit?

Certifying a product to be "nontoxic" to humans and specifically to children, certainly explicitly and, by implication, states a claim that a product will not "chemically" injure a child. This is certainly a kind of environmental "benefit", but not the kind of environmental benefit normally understood by use of the term in the environmental context. Unfortunately there are products on the market that are labeled "nontoxic" but which may harm children or adults (and there is evidence some will), or are not labeled as is required by CPSC (other federal) or state regulations. We believe that the term should be defined along the lines of the FTC standard expressed in the Orkin Consent Decree and jointly adopted by both FTC and CPSC.

To ACMI's knowledge, there has never been any known confusion on the part of consumers or public authority purchasers as to the nontoxic mark as implying an environmental benefit, other than the product's nontoxicity to humans. For example, no one has ever inquired of ACMI if the mark also applies to packages.

Most of the consumer inquiries received by ACMI are for free publications or product information, which ACMI makes available. The materials are intended to explain what the mark means, since it serves as a kind of "shorthand" product description or attribute, somewhat similar to the "UL" mark on electrical products. The UL symbol has probably been promoted for a longer period of time with greater promotional resources by Underwriters Laboratory. The appearance of the mark on a product serves as a reference to the source for further information, the same kind of reference as the ACMI mark serves. Additionally, the program definition is promoted by ACMI from time to time in press releases, magazine articles, and by members in their product literature.

3. Qualification of the ACMI Mark:

For the most part, the ACMI Nontoxic mark appears on relatively small consumer packages, e.g. boxes of crayons, chalk, pastels, markers, a plastic watercolor set, a plastic glue container, etc. (and in some cases, even on the product, e.g. a marker "barrel").

If it were recommended that the mark be qualified, it probably could be further qualified but would also need shorthand qualifiers, with details of the qualifications appearing in related publications of ACMI or its members or both, parallel to current procedures. In fact, the ACMI Nontoxic mark is always accompanied by the phrase, "Conforms to ASTM D4236" on product labels or packages, even now for context and "qualification." In effect, the ACMI mark in context is already qualified by federal law relating specifically to art and craft materials and health labeling (Exhibit).

Conclusion:

ACMI appreciates the opportunity to present its views in this proceeding. With an objective of always striving to improve its program, ACMI has always considered recommendations made by the public and private sector and has acted upon many. The industry is one of the few that in essence "regulated" itself, in cooperation with consumer groups, to enact the 1988 Labeling of Hazardous Art Materials Act, which immeasurably enhances CPSC's oversight of this industry as to both members of ACMI and nonmember manufacturers.

CPSC recognizes the value of "good" certification programs as noted in Chairman Ann Brown's recent speech (Exhibit). ACMI believes its program is one that serves the industry, artists, children and government. Its growth from a small number of members in the 1940's to its current representation of almost all domestic producers and many foreign producers is to a degree evidence of its program success. The relative absence of recalls of art materials of its members relative to other children's products, also serves as evidence of the program success. And finally, the fact that CPSC records, over the years, reflects a very low incidence of any injuries associated with or attributable to art materials is additional evidence of the program success. When all is said and done, ACMI believes that its program use of the term "nontoxic" is fully substantiated, not "deceptive" in any way, is already "qualified" pursuant to federal statute, conveys necessary and accurate information, and is integral to its program.

ACMI will appreciate the opportunity to appear at the Commission workshop as to this specific issue. The ACMI program preceded the enactment of the Federal Hazardous Substances Labeling Act, now the Federal Hazardous Substances Act. The program preceded the establishment of the Consumer Product Safety Commission. The program preceded the environmental claims issue. The program is driven by the current need to produce new and improved creative products that can be used "safely" by children and adults, subject to uniform, across the board toxicological criteria -- that subjects competitive products to an even-handed analysis -- to assure consumers, competitors and regulators that

ACMI certified products are appropriately labeled. This is no small undertaking in today's marketplace in the United States by any voluntary association of manufacturers. ACMI has always responded to the challenges of the times and imposes high standards upon itself and its members to the ultimate benefit of the public good.

Respectfully submitted,

Martin J. Neville

MJN:cmg
enc.

cc: By telefax -
Mr. Kevin Bank, FTC

THE ART AND CREATIVE MATERIALS, INC.
EXHIBITS RELATING TO COMMENTS ON FTC EMG

INDEX TO EXHIBITS

Public Law 100-695
100th Congress

An Act

Nov. 18, 1988
[H.R. 4847]

To amend the Federal Hazardous Substances Act to require the labeling of chronically hazardous art materials, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Hazardous Substances Act is amended by adding at the end the following:

Public health and safety.
15 USC 1277.

"LABELING OF ART MATERIALS

"SEC. 23. (a) On and after the last day of the 2-year period beginning on the date of the enactment of this section, the requirements for the labeling of art materials set forth in the version of the standard of the American Society for Testing and Materials designated D-4236 that is in effect on the date of the enactment of this section and as modified by subsection (b) shall be deemed to be a regulation issued by the Commission under section 3(b).

Business and industry.

"(b) The following shall apply with respect to the standard of the American Society for Testing and Materials referred to in subsection (a):

"(1) The term 'art material or art material product' shall mean any substance marketed or represented by the producer or repackager as suitable for use in any phase of the creation of any work of visual or graphic art of any medium. The term does not include economic poisons subject to the Federal Insecticide, Fungicide, and Rodenticide Act or drugs, devices, or cosmetics subject to the Federal Food, Drug, and Cosmetics Act.

"(2) The standard referred to in subsection (a) as modified by this subsection applies to art materials intended for users of any age.

"(3) Each producer or repackager of art materials shall describe in writing the criteria used to determine whether an art material has the potential for producing chronic adverse health effects. Each producer or repackager shall be responsible for submitting to the Commission these criteria and a list of art materials that require hazard warning labels under this section.

"(4) Upon the request of the Commission, a producer or repackager of art materials shall submit to the Commission product formulations and the criteria used to determine whether the art material or its ingredients have the potential for producing chronic adverse health effects.

Children and youth.

"(5) All art materials that require chronic hazard labeling pursuant to this section must include on the label the name and address of the producer or repackager of the art materials and an appropriate telephone number and a statement signifying that such art materials are inappropriate for use by children.

"(6) If an art material producer or repackager becomes newly aware of any significant information regarding the hazards of an art material or ways to protect against the hazard, this new

information must be incorporated into the labels of such art materials that are manufactured after 12 months from the date of discovery. If a producer or repackager reformulates an art material, the new formulation must be evaluated and labeled in accordance with the standard referred to in subsection (a) as modified by this subsection.

"(7) If the Commission determines that an art material in a container equal to or smaller than one fluid ounce (30 ml) (if the product is sold by volume) or one ounce net weight (28 g) (if the product is sold by weight) has the potential for producing chronic adverse health effects with customary or reasonably foreseeable use despite its small size, the Commission may require the art material to carry a label which conveys all the information required under the standard referred to in subsection (a) as modified by this subsection for art materials in a container greater than one fluid ounce or one ounce net weight. If the information cannot fit on the package label, the Commission shall require the art material to have a package insert which conveys all this information. If the art material has a package insert, the label on the product shall include a signal word in conformance with paragraph 5 of the standard referred to in subsection (a), a list of potentially harmful or sensitizing components, and the statement 'see package insert before use'. For purposes of this subsection, the term 'package insert' means a display of written, printed, or graphic matter upon a leaflet or suitable material accompanying the art material. This requirement is in addition to, and is not meant to supersede, the requirement of paragraph 5.8 of the standard designated D-4236.

"(8) In determining whether an art material has the potential for producing chronic adverse health effects, including carcinogenicity and potential carcinogenicity, a toxicologist shall take into account opinions of various regulatory agencies and scientific bodies.

"(c) If the Commission determines that a revision proposed by the American Society for Testing and Materials is in the public interest, it shall incorporate the revision into the standard referred to in subsection (a) as modified by subsection (b) after providing notice and an opportunity for comment. If at any time the Commission finds that the standard referred to in subsection (a) as modified by subsection (b) is inadequate for the protection of the public interest, it shall promulgate an amendment to the standard which will adequately protect the public interest. Such final standard shall be promulgated pursuant to section 553 of title 5, United States Code, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation. Records.

"(d)(1) Within 1 year of the date of the enactment of this section, the Commission shall issue guidelines which specify criteria for determining when any customary or reasonably foreseeable use of an art material can result in a chronic hazard. In developing such guidelines the Commission shall conduct a public hearing and provide reasonable opportunity for the submission of comments.

"(2) The guidelines established under paragraph (1) shall include— Children and youth.

"(A) criteria for determining when art materials may produce chronic adverse health effects in children and criteria for determining when art materials may produce such health effects in adults,

"(B) criteria for determining which substances contained in art materials have the potential for producing chronic adverse health effects and what those effects are,

"(C) criteria for determining the bioavailability of chronically hazardous substances contained in art materials when the products are used in a customary or reasonably foreseeable manner, and

"(D) criteria for determining acceptable daily intake levels for chronically hazardous substances contained in art materials.

Where appropriate, criteria used for assessing risks to children may be the same as those used for adults.

"(3) The Commission shall periodically review the guidelines established under paragraph (1) to determine whether the guidelines reflect relevant changes in scientific knowledge and in the formulations of art materials, and shall amend the guidelines to reflect such changes.

"(e) The Commission shall develop informational and educational materials about art materials and shall distribute the informational and educational materials to interested persons.

Children and youth.

"(f) The Commission may bring an action under section 8 to enjoin the purchase of any art material required to be labeled under this Act which is for use by children in pre-kindergarten, kindergarten, or grades 1 through 6.".

Approved November 18, 1988.

LEGISLATIVE HISTORY—H.R. 4847:

CONGRESSIONAL RECORD, Vol. 134 (1988):
Oct. 12, considered and passed House.
Oct. 19, considered and passed Senate.

29-139 O - 88 (605)

(2) *Tier 1 capital limitations.* (i) The maximum allowable amount of deferred tax assets that are dependent upon future taxable income, net of any valuation allowance for deferred tax assets, will be limited to the lesser of:

(A) The amount of deferred tax assets that are dependent upon future taxable income that is expected to be realized within one year of the calendar quarter-end date, based on projected future taxable income for that year; or

(B) Ten percent of the amount of Tier 1 capital that exists before the deduction of any disallowed purchased mortgage servicing rights, any disallowed purchased credit card relationships, and any disallowed deferred tax assets.

(ii) For purposes of this limitation, all existing temporary differences should be assumed to fully reverse at the calendar quarter-end date. The recorded amount of deferred tax assets that are dependent upon future taxable income, net of any valuation allowance for deferred tax assets, in excess of this limitation will be deducted from assets and from equity capital for purposes of determining Tier 1 capital under this part. The amount of deferred tax assets that can be realized from taxes paid in prior carryback years and from the reversal of existing taxable temporary differences generally would not be deducted from assets and from equity capital. However, notwithstanding the above, the amount of carryback potential that may be considered in calculating the amount of deferred tax assets that a member of a consolidated group (for tax purposes) may include in Tier 1 capital may not exceed the amount which the member could reasonably expect to have refunded by its parent.

(3) *Projected future taxable income.* Projected future taxable income should not include net operating loss carryforwards to be used within one year of the most recent calendar quarter-end date or the amount of existing temporary differences expected to reverse within that year. Projected future taxable income should include the estimated effect of tax planning strategies that are expected to be implemented to realize tax carryforwards that will otherwise expire during that year. Future taxable income projections for the current fiscal year (adjusted for any significant changes that have occurred or are expected to occur) may be used when applying the capital limit at an interim calendar quarter-end date rather then preparing a new projection each quarter.

(4) *Unrealized holding gains and losses on available-for-sale debt securities.* The deferred tax effects of any unrealized holding gains and losses on available-for-sale debt securities may be excluded from the determination of the amount of deferred tax assets that are dependent upon future taxable income and the calculation of the maximum allowable amount of such assets. If these deferred tax effects are excluded, this treatment must be followed consistently over time.

(5) *Intangible assets acquired in nontaxable purchase business combinations.* A deferred tax liability that is specifically related to an intangible asset (other than purchased mortgage servicing rights and purchased credit card relationships) acquired in a nontaxable purchase business combination may be netted against this intangible asset. Only the net amount of the intangible asset must be deducted from Tier 1 capital. When a deferred tax liability is netted in this manner, the taxable temporary difference that gives rise to this deferred tax liability must be excluded from existing taxable temporary differences when determining the amount of deferred tax assets that are dependent upon future taxable income and calculating the maximum allowable amount of such assets.

4. Section I.A.1. of appendix A to part 325 is amended by revising the first paragraph following the definitions of Core capital elements to read as follows:

Appendix A to Part 325—Statement of Policy on Risk-Based Capital

* * * * *

I. * * *

A. * * *

1. * * *

At least 50 percent of the qualifying total capital base should consist of Tier 1 capital. *Core (Tier 1) capital* is defined as the sum of core capital elements [3] minus all intangible assets other than mortgage servicing rights and purchased credit card relationships [4] and minus any disallowed deferred tax assets.

* * * * *

5. Section I.B. of Appendix A to part 325 is amended by adding a new paragraph (5) immediately after paragraph (4) and preceding the final undesignated paragraph of Section I.B. to read as follows:

* * * * *

I. * * *

B. * * *

(5) *Deferred tax assets* in excess of the limit set forth in § 325.5(g). These disallowed deferred tax assets are deducted from the core capital (Tier 1) elements.

* * * * *

Appendix A to Part 325 [Amended]

6. Table I in Appendix A to part 325 is amended by redesignating footnote 3 as footnote 4, by adding a new entry at the end under ''Core Capital (Tier 1)'' and by adding a new footnote 3 to read as follows:

TABLE I.—DEFINITION OF QUALIFYING CAPITAL

[Note: See footnotes at end of table]

Components	Minimum requirements and limitations after transition period
Core Capital (Tier 1) * * *	
* * * * *	
Less: Certain deferred tax assers.[3]	
* * * * *	

[3] Deferred tax assets are subject to the capital limitations set forth in § 325.5(g).

* * * * *

By order of the Board of Directors.

Dated at Washington, D.C., this 31st day of January 1995.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 95–3179 Filed 2–10–95; 8:45 am]

BILLING CODE 6714–01–P

[3] In addition to the core capital elements, Tier 1 may also include certain supplementary capital elements during the transition period subject to certain limitations set forth in section III of this statement of policy.

[4] An exception is allowed for intangible assets that are explicitly approved by the FDIC as part of the bank's regulatory capital on a specific case basis. These intangibles will be included in capital for risk-based capital purposes under the terms and conditions that are specifically approved by the FDIC.

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Statement of Policy or Interpretation; Enforcement Policy for Art Materials

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule; statement of enforcement policy.

SUMMARY: In 1988, Congress enacted the Labeling of Hazardous Art Materials Act which mandated a labeling standard and certain other requirements for art materials. Based on its experience enforcing these requirements, the Commission is issuing a statement of enforcement policy to more clearly apprise the public of its intended enforcement focus.

DATES: Effective Date; February 13, 1995.

Applicability Dates: For items for which this policy relieves a restriction, this policy is applicable for products introduced into interstate commerce on or after February 13, 1995. For items against which the Commission previously stated it would not enforce under LHAMA, the policy becomes applicable for products introduced into interstate commerce on or after August 14, 1995.

FOR FURTHER INFORMATION CONTACT: Mary Toro, Division of Regulatory Management, Office of Compliance and Enforcement, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–0400.

SUPPLEMENTARY INFORMATION:

A. Background

In 1988, Congress enacted the Labeling of Hazardous Art Materials Act (''LHAMA''), 15 U.S.C. 1277. Through LHAMA, Congress expressed its desire that art materials should be labeled to warn consumers of potential chronic hazards. LHAMA mandated a voluntary standard, ASTM D 4236, with certain modifications, as a mandatory Commission rule under section 3(b) of the Federal Hazardous Substances Act (''FHSA'').

On October 9, 1992, the Commission issued a notice in the **Federal Register** that codified the standard as mandated by Congress. 57 FR 46626. (At that time, the Commission also issued guidelines for determining when a product presents a chronic hazard, and a supplemental regulatory definition of the term ''toxic'' that explicitly includes chronic toxicity.) The standard is codified at 16 CFR 1500.14(b)(8).

LHAMA and the standard it mandated provide certain requirements for art materials. Under these requirements, the producer or repackager of an art material must submit the product's formulation to a toxicologist to determine whether the art material has potential to produce chronic adverse health effects through customary or reasonably foreseeable use. If the toxicologist determines that the art material has this potential, the producer or repackager must use suitable labeling on the product. The producer or manufacturer of the art material must submit to the Commission (1) the criteria the toxicologist uses to determine whether the producer/repackager's product presents a chronic hazard and (2) a list of art materials that require chronic hazard labeling. The standard also requires that the product bear or be displayed with a conformance statement indicating that it has been reviewed in accordance with the standard. The standard, which is set forth at 16 CFR 1500.14(b)(8), and section 2(p) of the FHSA, 15 U.S.C. 1261(p), provide additional information on the required content of labels and the conformance statement.

B. The Scope of ''Art Materials''

1. The Statute and Previous Commission Interpretation

The requirements described above apply to ''art materials'' as broadly defined in LHAMA. The term art material is defined in the statute as ''any substance marketed or represented by the producer or repackager as suitable for use in any phase of the creation of any work of visual or graphic art of any medium.'' 15 U.S.C. 1277(b)(1). The definition applies to art materials intended for users of any age, but excludes pesticides, drugs, devices, and cosmetics subject to other federal statutes, *Id.* 1277(b) (1) and (2).

When the Commission issued the final rule implementing the LHAMA provisions on October 9, 1992, it recognized that the statutory definition of art material could be interpreted to reach far beyond the common perception of the meaning of that term. Accordingly, the Commission identified three categories of products that it would not enforce the LHAMA requirements against, although they arguably fall within the statutory definition of art materials. Specifically, the Commission stated that it would not enforce the LHAMA requirements against tools, implements, and furniture that were used in the process of creating a work of art but do not become part of the work of art (called ''category 3 products'' in the October 9, 1992 notice). Examples provided of items that might fall into this category were drafting tables and chairs, easels, picture frames, canvas stretchers, potter's wheels, hammers, chisels, and air pumps for air brushes.

The Commission also delineated two general categories of products which could fall within the statutory definition and against which the Commission would enforce the LHAMA requirements. The October 9, 1992 notice identified these items as products which actually become a component of the work of art (e.g., paint, canvas, inks) (previously ''category 1 products'') and products closely and intimately associated with the creation of an art work (e.g., brush cleaners, solvents, photo developing chemicals) (previously ''category 2 products'').

2. The Statement of Enforcement Policy

The distinctions made in the October 9, 1992 notice have proved unsatisfactory in the practical enforcement of the LHAMA requirements. The staff has found that these categories, and enforcement policies based on the categories, may lead to inconsistent determinations. Thus, the Commission began to reconsider its enforcement of the LHAMA requirements against certain products. On March 8, 1994, the Commission published a proposed Enforcement Policy for Art Materials. 59 FR 10761. Today, the Commission is finalizing its enforcement policy essentially as it was proposed. This notice restates the enforcement policy, clarifies several issues, and responds to public comments received on the proposal. This interpretation will supersede the enforcement policy stated in the October 9, 1992 notice and other related interpretations.

The Commission will focus its enforcement efforts on items that have traditionally been considered art materials, such as paints, inks, solvents, pastes, ceramic glazes, and crayons, and on other items that may present a risk of chronic injury. This enforcement policy will not compromise public safety because there is virtually no risk of chronic health effects with the types of products and materials—such as paper or hard plastic—that the Commission will not enforce against. Also, even if such products presented such a risk, the Federal Hazardous Substances Act, 15 U.S.C. 1261(p), requires cautionary labeling for any article intended or packaged for household use if it contains a hazardous substance. This includes, but is not limited to, art materials that, under reasonably foreseeable conditions of purchase, storage, or use, may be used in or around the household. Unless expressly exempted, children's articles are banned under the FHSA if they are or contain a hazardous substance. The Commission believes that the public interest will be better served by this exercise of enforcement discretion because the staff can use its limited resources more efficiently to pursue enforcement actions against those art materials that present the greatest risk of chronic health effects.

The Commission will not enforce against the following types of products under LHAMA.

(1) General use products. The Commission will not take enforcement action under LHAMA against general use products which might incidentally be used to create art, unless a particular

product is specifically packaged, promoted, or marketed in a manner that would lead a reasonable person to conclude that it is intended for use as an art material. Examples of such general use products are common wood pencils, pens, markers, and chalk. For enforcement purposes, the Commission presumes that these types of items are not art materials. The presumption can be overcome, however, by evidence that such an item is intended for specific use in creating art. Factors the Commission will consider to determine the status of such items include how the items are packaged (e.g., packages of multiple colored pencils, chalks, or markers unless promoted for non-art material uses are likely to be art materials), how they are marketed and promoted (e.g., pencils and pens intended specifically for sketching and drawing are likely to be art materials), and where they are sold (e.g., products sold in an art supply store are likely to be art materials).

(2) Tools, implements, and furniture. The Commission will not take enforcement action under LHAMA against tools, implements, and furniture used in the creation of a work of art, such as brushes, chisels, easels, picture frames, drafting tables and chairs, canvas stretchers, potter's wheels, hammers, and air pumps for air brushes. In this policy statement the Commission expands the scope of what were referred to as ''category 3'' art materials in the October 9, 1992 notice. Based on the Commission's enforcement experience, the Commission will consider some items that it previously categorized as closely and intimately associated with creation of a work of art (previously ''category 2'' products) to be tools, implements and furniture. The Commission believes that these items (brushes, kilns, and molds) are better characterized as tools and implements against which the Commission will not enforce the LHAMA requirements. The Commission believes this revised interpretation is more consistent with the purposes of LHAMA. They are not like the more traditional art materials mentioned in LHAMA floor debates, and they are unlikely to pose a chronic hazard to the user.

(3) Surface materials. The Commission will not take enforcement action under LHAMA against the surface materials to which an art material is applied. Examples are coloring books and canvas. In many instances, an art material is applied to a surface such as paper, plastic, wood, or cloth. These surfaces continue to be components of the work of art and thus art materials, but are now characterized as products against which the Commission will not enforce the LHAMA requirements.

(4) Specific Materials. The Commission will also not take enforcement action under LHAMA against the following specifically enumerated materials: paper, cloth, plastic, film, yarn, threads, rubber, sand, wood, stone, tile, masonry, and metal. Several of these materials are often used as a surface for art work while others are used to create the work of art itself. Regardless of whether such items are used as a surface or not, the Commission will not enforce the LHAMA requirements against them.

The guidance given in (3) and (4) above does not apply if the processing or handling of a material exposes users to chemicals in or on the material in a manner which makes those chemicals susceptible to being ingested, absorbed through the skin, or inhaled. The Commission believes that in most cases, the surfaces and specific materials listed do not present a chronic risk. These types of materials are unlikely to allow exposure. However, if it is likely that reasonably foreseeable handling or use of the material would expose the consumer to chemicals, the Commission will enforce all LHAMA requirements with respect to that product. This is a question of potential exposure, not the manufacturer's assessment of hazard. Thus, even if the chemical to which the consumer might be exposed is potentially non-hazardous, the Commission would enforce the LHAMA requirements, including review by a toxicologist. This is consistent with Congress's intention that a toxicologist, not the manufacturer, should assess the potential chronic hazard.

For example, paper stickers marketed or promoted as art materials often have an adhesive backing that users lick. The act of licking the backing can result in the ingestion of chemicals, and the LHAMA requirements will therefore be enforced. For self-adhesive stickers, on the other hand, which present little risk of exposure, the staff will generally refrain from enforcement unless there is reason to believe that the nature of a particular sticker and its intended use presents a genuine risk of exposure to a potential chemical hazard either by ingestion or absorption.

Another example involves plastic. If the artistic use for which the plastic is intended requires heating or melting it in a manner that results in the emission of chemical vapors, the LHAMA requirements will be enforced.

C. Craft and Hobby Kits and Supplies

1. Kits

a. Previous Interpretation

In enforcing LHAMA, the Commission has encountered the question of the applicability of LHAMA requirements to certain craft or hobby kits. The basic issue centers on the meaning of the term ''work of art.'' In previous letters to industry, the staff has advised that the determination depends on whether the end product produced from the kit would be primarily functional or aesthetic. If the former were true, the staff has said that the end product would not be a work of art and none of the components would be art materials. If the latter were true, the end product would be a work of art and all of the components of the kit would be art materials. This distinction proved difficult for practical enforcement, and has raised the possibility of inconsistent enforcement results. For example, if the same paints that were included in a kit to make a working model airplane were also included in a paint-by-number set, under the staff's previous interpretation, the Commission would enforce the LHAMA requirements against the paints in the second kit, but not in the first.

b. Statement of Enforcement Policy

After considering the above, as well as the purpose of LHAMA to alert consumers to the potential dangers associated with products used in the creation of art, the Commission published its proposed policy to clarify its enforcement of LHAMA concerning craft and hobby kits. The Commission is finalizing that aspect of the policy as proposed. As explained below, the Commission believes that its LHAMA enforcement should include both (1) kits to make items for display and (2) kits which involve decorating an item, regardless of the end use of the item created. Models and similar kits to make hobby or art/craft items can have dual purposes, both functional and for display. In addition, when a consumer creatively decorates a functional object, it arguably becomes a work of art just as decorated canvas or paper would. Therefore, the Commission believes that materials for decorating and assembling models and art/craft items come within the reach of LHAMA. The Commission believes that the following interpretation is more workable than the previous one and is consistent with the intent of Congress.

For kits that include materials to decorate products whether the products are functional, for display, or both, the Commission will enforce the LHAMA

requirements against materials in the kit that are intended to decorate or assemble an item in the kit—i.e., traditional art materials, such as, paints, crayons, colored pencils, adhesives, and putties—even if the finished product is a toy or other item whose primary use may be functional. Thus, for a kit that contains a plastic toy or a paint-by number board, along with paints or adhesives to decorate or assemble the item, the Commission will expect the paints and adhesives in each case to meet all the LHAMA requirements. However, as explained in section B.2.(3) & (4) above pertaining to surfaces and specific materials, the Commission would not enforce the requirements against the plastic toy or the board.

For kits that package an item that would be subject to enforcement under this policy together with an item that would not, any necessary chronic hazard statements or labeling, including any required conformance statement, must appear on the outer container or wrapping of the kit, or must be visible through it, and must specify the item to which the statement or labeling refers. Any conformance statement must be visible at the point of sale. In addition to being visible at the point of sale, any required chronic hazard warning label must be on the immediate package of the item that is subject to LHAMA as well as on accompanying literature where there are instructions for use. See 16 CFR 1500.125.

2. Enforcement Policy for Separate Supplies

As stated in the March 8, 1994 proposal, the Commission will enforce LHAMA requirements against materials intended to decorate art and craft, model and hobby items, such as paints, even if they are sold separately and not part of a kit. Similarly, paints or markers intended for decorating clothes will be considered art materials for enforcement purposes since they are intended for decorating clothing, even though the resulting item, the garment, has a functional purpose. Note that as explained in section B above, the Commission would not enforce the requirements against the surface upon which the art material is applied, regardless of the primary use of the finished product.

The status of glues, adhesives, and putties will depend on their intended use. Some illustrative examples follow. Glues which are marketed for general repair use only would not be art materials, and the Commission will not enforce the LHAMA requirements against them. Glue sticks for glue guns which are for art or craft use would be considered art materials. Spray adhesives and rubber cements will normally be considered art materials unless they are marketed for some specialty non-art use. School pastes and glues will also be considered art materials.

D. Conformance Statement

Section 1500.14(b)(8)(i)(C)(7) of the LHAMA rule requires that a conformance statement appear with an art material. In the preamble to the original LHAMA rule, the Commission stated that every art material must display either a conformance statement or a hazard warning, but not both. *See* 57 FR 46629, October 9, 1992.

The Commission has reviewed this matter in light of one comment it received opposing the Commission's policy on this issue and its experience enforcing the LHAMA requirements. The Commission agrees with the commenter and is now modifying its policy concerning the conformance statement.

The language of the standard that was mandated by LHAMA is not entirely clear on this question. 16 CFR 1500.14(b)(8)(i)(C). However, based on its experience enforcing LHAMA, the Commission agrees with the commenter that there is the potential for confusion if some products that have been reviewed according to the standard display a conformance statement but others do not. Thus, the Commission's policy is that a conformance statement must appear with all toxicologist-reviewed art materials subject to LHAMA regardless of whether they also have a hazard warning statement. A subsection has been added to the enforcement policy, § 1500.14(b)(8)(iv)(C), stating this policy. Since the conformance statement constitutes ''other cautionary labeling'' as defined in 16 CFR 1500.121(a)(2)(viii), it must comply with the conspicuousness requirements of 16 CFR 1500.121 (c) and (d), including the type-size requirement laid out in Table 1 of 1500.121(c)(2).

E. Response to Comments

1. General

The Commission heard from six commenters on its proposed enforcement policy. For the most part, commenters supported the Commission's effort to clarify its enforcement intentions in this area. For example, one commenter stated that the proposed enforcement policy alleviates practical problems, follows common sense, is consistent with Congressional intent, and appropriately focuses on intended use. However, commenters did raise several specific criticisms of certain aspects of the proposed policy. These comments and the Commission's responses are discussed below.

2. Scope of ''Art Materials''

One commenter suggested changing 16 CFR 1500.14(b)(8)(iv)(A)(1) to state that markers sold in art supply stores *are* art materials, rather than *likely* to be art materials.

The Commission declines to make this change. For general use products, the Commission will look at a variety of factors, including packaging, marketing, and where the item is sold. Often a single factor will not be determinative. For example, along with other markers, an art supply store might sell high-lighters which are clearly promoted for use by students in marking textbooks. These are probably general use products, and the enforcement policy should be flexible enough to allow this determination.

The Writing Instrument Manufacturer's Association (''WIMA''), a trade association for the writing instrument industry, commented that it generally supported the proposed enforcement policy but suggested that cased pencils (referred to as common wood pencils in the proposed policy) should generally be considered art materials. WIMA asserted that these pencils are generally considered in the industry to be art materials and are used for drawing and sketching. Another commenter argued that if the enforcement policy considers these general use pencils not to be art materials, products from China and other countries without consumer protection laws will flood the market.

The Commission declines to make this change in the enforcement policy. The Commission believes that common pencils, much like pens or markers, are generally used as writing materials. Under the policy, specific pencils that are intended primarily for drawing or sketching (such as colored pencils) will be considered art materials for enforcement purposes. Of course, pencil makers who wish to submit their formulations to a toxicologist for evaluation and label them accordingly may do so. However, the Commission will not enforce the LHAMA requirements against common pencils unless they are specifically intended or marketed as art materials. Whether products are produced domestically or imported, they are all subject to the consumer protection laws and regulations of this country if they are sold here. With respect to the comment concerning imports from countries

without consumer protection laws, CPSC reminds the commenter that imports are subject to the same requirements as products made in this country.

One commenter stated support for the proposed enforcement policy's treatment of brushes, kilns, and molds, finding it to be consistent with other CPSC policy interpretations. CPSC agrees.

3. Actual Toxicity Hazards

One commenter argued that the proposed enforcement policy would allow products which present chronic toxicity hazards to consumers to evade the review required by LHAMA. The commenter stated that items ''such as pencils, paper, fabric, paint brushes, and sand have all been found to present chronic toxicity hazards in the past * * *.''

The Commission's scientific staff examined this comment, and does not agree. Neither the Commission nor the staff have concluded that any of the listed items typically present chronic toxicity hazards. The staff has in the past examined some uses of some of these materials outside of the context of art materials. For example, children's playsand was evaluated to see if the sand posed a hazard through tremolite asbestos or non-asbestos tremolite. No such hazard was established. Paper has been found to contain extremely small amounts of dioxin, but the amount is so small that the risk is negligible. Through its enforcement policy, the Commission is attempting to focus enforcement efforts on items that may actually harm consumers. The Commission believes this policy furthers that goal. It is worth noting that in the unlikely event that any of these items were found to be dangerous, the labeling and banning provisions of the Federal Hazardous Substances Act (15 U.S.C. 1261 (f), (p), and (q)(1), and 15 U.S.C. 1263) still apply.

Another commenter agreed with the Commission's focus on potential for genuine risk of exposure but suggested that the language of the proposed policy be changed in 16 CFR 1500.14(b)(8)(iv)(A) (3) and (4) to state that the user's exposure must be to a *hazardous* chemical before the Commission will enforce LHAMA against the materials listed in those subsections. In the sections referred to, the enforcement policy provides that the Commission will not enforce the LHAMA requirements against surface materials and certain specifically enumerated materials unless it is likely that handling or processing the material may expose the user to chemicals in or on the material.

The Commission declines to make the commenter's suggested change. As explained in section B.2 above, although the Commission believes that generally there will not be a chronic hazard with use of these materials, the Commission is concerned that a situation could arise in which a unique manner of handling or using these materials could pose a risk of exposure. An example is paper stickers with adhesive that is licked. The commenter's suggestion would put the manufacturer in the position of deciding whether a particular chemical is hazardous. However, Congress intended that this determination be made by the toxicologist reviewing a product's formulation. The enforcement policy concerns the initial question of whether exposure is likely, not whether a chemical is hazardous. Thus, under the Commission's enforcement policy, if there is the potential for exposure to a chemical from a surface or specifically enumerated material, the LHAMA requirements will be enforced.

4. Enforcing LHAMA Against Non-Hazardous Products

Comments suggested that all art materials should have to comply with LHAMA regardless of actual risk, and that the items listed in the proposed enforcement policy should not be excluded from enforcement efforts. They noted that the conformance statement on a non-hazardous product tells the consumer that the product has been cleared by a toxicologist. An unlabeled product, on the other hand, could either have been evaluated as non-toxic, or not evaluated at all. Thus the commenters argue that the Commission should enforce against all art materials, whether hazardous or not.

In response, the Commission notes that focusing its enforcement efforts is important to ensure that the enforcement program is as effective as possible through the effective use of the Commission's limited resources. The Commission believes that the categories of products against which it will no longer enforce present virtually no risk of exposing consumers to chronic toxicity hazards. No evidence of consumer confusion was presented with the comments, and we think any such confusion should be minimal.

5. Conformance Statement and Warnings

As explained above, one commenter argued that the conformance statement should accompany all art materials, including those that also require a hazard warning. The preamble to the original LHAMA rule stated that every art material must display either a conformance statement or a hazard warning, but not both. *See* 57 FR 46629, October 9, 1992.

The Commission has reviewed this issue in light of this comment and its experience. For reasons explained in greater detail above, the Commission agrees with the commenter and has added a subsection to the enforcement policy making this change.

6. Other Labeling Issues

One commenter noted that some labels bear adequate safe handling instructions, but do not list the chronic hazards that necessitate these precautions. LHAMA and the ASTM standard clearly require that both the chronic hazard and the safety instructions be on the label.

Another commenter noted that facially adequate labels should be examined for accuracy. The Commission considers this a very important issue. If labels are inaccurate, the labels and the standard itself become meaningless to the consumer. It is clearly unacceptable for labels to indicate that they have been reviewed by a toxicologist (by display of the conformance statement) if they in fact have not.

7. Kits and Supplies

One commenter stated specific support for the proposed enforcement policy concerning kits and separate supplies.

8. Status of Enforcement Policy

One commenter argued that the Commission is actually exempting certain products from the FHSA, and it is therefore improper to issue an enforcement policy rather than a regulation under section 3(c) of the FHSA (15 U.S.C. 1262(c)). The commenter argued that the enforcement policy would create confusion.

The Commission disagrees with this comment. This policy does not exempt any items from the FHSA. First, the policy does not grant exemptions from the LHAMA provisions, but rather clarifies the Commission's interpretation of the statutory term ''art material'' and informs the public that the Commission's enforcement efforts under LHAMA will be directed against those products that present the greatest risk. Through this policy, the Commission is explaining what that means in practice. The policy explains how the Commission will interpret the statutory definition of ''art material'' for purposes of enforcement and that it does not intend to enforce LHAMA

requirements against certain items or materials which are unlikely to present a chronic hazard. The Commission believes that the policy, with its general guidance and specific examples, will help to clarify existing confusion. The enforcement policy will be published in the CFR with the LHAMA regulations so that all will be aware of Commission policy. In addition, the policy has no impact on the enforcement of other provisions of the FHSA, such as recall or notice actions under section 15 of the FHSA, as to art materials.

Focusing enforcement efforts to make them maximally effective is an appropriate use of an enforcement policy. The commenter stated that enforcement policies should clarify where an agency will take action, rather than where it will not. No authority was cited for this proposition, and the Commission is not aware of any such authority.

However, the Commission is modifying the language of section 1500.14(b)(8)(iv)(A)(1) slightly to clarify its interpretation with respect to that one category of products. The Commission does not consider the products described in that subsection (products intended for general use) to be art materials under the statutory definition. This is now stated explicitly in that subsection.

9. Effective Date

One commenter requested that manufacturers have one year to comply with this enforcement policy, rather than six months. No data were submitted as to why compliance in six months would be unduly burdensome. The Commission believes that six months is adequate time to submit formulae to toxicologists and comply with relevant labeling requirements. The Commission will, however, apply the policy to those products initially introduced into interstate commerce after six months, rather than those manufactured or imported after that date.

10. Prohibition of Lead in Children's Products

One commenter suggested that the Commission should prohibit the use of lead in products intended or marketed for the use of children. This comment is beyond the scope of this enforcement policy. However, we remind the commenter that the hazard of lead in consumer products intended for children is dealt with by regulations under the CPSA, 16 CFR 1303.4, and provisions of the FHSA, 15 U.S.C. 1261 (f)(1)(A) & (q)(1)(A).

F. Environmental Considerations

The Commission has considered whether issuance of this enforcement statement will produce any environmental effects and has determined that it will not. The Commission's regulations at 16 CFR 1021.5(c)(1) state that rules and safety standards ordinarily have little or no potential to affect the human environment, and therefore, do not require an environmental impact statement or environmental assessment. The Commission believes that, as with such standards, this enforcement policy would have no adverse impact on the environment.

G. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act generally requires agencies to prepare proposed and final regulatory analyses describing the impact of a rule on small businesses and other small entities. Section 605 of the Act provides that an agency is not required to prepare a regulatory flexibility analysis if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Commission believes that this enforcement statement will have little effect on businesses in general or on small businesses in particular. Accordingly, the Commission concludes that its enforcement statement concerning the labeling of hazardous art materials would not have any significant economic effect on a substantial number of small entities.

H. Authority

Section 10 of the FHSA gives the Commission authority to issue regulations for the efficient enforcement of the FHSA. 15 U.S.C. 1269(a). This provision authorizes the Commission to issue statements of enforcement policy in which the Commission explains how it intends to enforce a Commission requirement.

I. Applicability Date

Since this notice issues an interpretative rule/statement of policy, no particular applicability date is required by the Administrative Procedure Act. 5 U.S.C. 553(d)(2). The Commission recognizes, however, that as to items against which the Commission previously stated that it would not enforce LHAMA, manufacturers will need time to bring their products into compliance. Thus, this policy regarding such items applies to products introduced into interstate commerce on or after 6 months from the date this policy is published in the **Federal Register**. The Commission believes that this is adequate time to submit formulae to toxicologists and comply with relevant labeling requirements. As to those items where this policy relieves a restriction, the policy becomes applicable for such products introduced into interstate commerce on or after the date of publication of this notice.

List of Subjects in 16 CFR Part 1500

Arts and crafts, Consumer protection, Hazardous materials, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, Toys.

For the reasons given above, the Commission amends 16 CFR 1500.14 as follows:

PART 1500—[AMENDED]

1. The authority citation for part 1500 continues to read as follows:

Authority: 15 U.S.C. 1261–1277.

2. Section 1500.14 is amended by adding a new paragraph (b)(8)(iv) to read as follows:

§ 1500.14 Products requiring special labeling under section 3(b) of the Act.

* * * * *

(b) * * *

(8) * * *

(iv) *Policies and interpretations.*

(A) For purposes of enforcement policy, the Commission will not consider as sufficient grounds for bringing an enforcement action under the Labeling of Hazardous Art Materials Act (''LHAMA'') the failure of the following types of products to meet the requirements of § 1500.14(b)(8) (i) through (iii).

(*1*) Products whose intended general use is not to create art (e.g., common wood pencils, and single colored pens, markers, and chalk), unless the particular product is specifically packaged, promoted, or marketed in a manner that would lead a reasonable person to conclude that it is intended for use as an art material. Factors the Commission would consider in making this determination are how an item is packaged (e.g., packages of multiple colored pencils, chalks, or markers unless promoted for non-art materials uses are likely to be art materials), how it is marketed and promoted (e.g., pencils and pens intended specifically for sketching and drawing are likely to be art materials), and where it is sold (e.g., products sold in an art supply store are likely to be art materials). The products described in this paragraph do not meet the statutory definition of ''art material.''

(2) Tools, implements, and furniture used in the creation of a work of art such as brushes, chisels, easels, picture frames, drafting tables and chairs, canvas stretchers, potter's wheels, hammers, air pumps for air brushes, kilns, and molds.

(3) Surface materials upon which an art material is applied, such as coloring books and canvas, unless, as a result of processing or handling, the consumer is likely to be exposed to a chemical in or on the surface material in a manner which makes that chemical susceptible to being ingested, absorbed, or inhaled.

(4) The following materials whether used as a surface or applied to one, unless, as a result of processing or handling, the consumer is likely to be exposed to a chemical in or on the surface material in a manner which makes that chemical susceptible to being ingested, absorbed, or inhaled: paper, cloth, plastics, films, yarn, threads, rubber, sand, wood, stone, tile, masonry, and metal.

(B) For purposes of LHAMA enforcement policy, the Commission will enforce against materials including, but not limited to, paints, crayons, colored pencils, glues, adhesives, and putties, if such materials are sold as part of an art, craft, model, or hobby kit. The Commission will enforce the LHAMA requirements against paints or other materials sold separately which are intended to decorate art, craft, model, and hobby items. Adhesives, glues, and putties intended for general repair or construction uses are not subject to LHAMA. However, the Commission will enforce the LHAMA requirements against adhesives, glues, and putties sold separately (not part of a kit) if they are intended for art and craft and model construction uses. This paragraph (b)(8)(iv)(B) applies to products introduced into interstate commerce on or after August 14, 1995.

(C) Commission regulations at § 1500.14(b)(8)(i)(C)(7) require that a statement of conformance appear with art materials that have been reviewed in accordance with the Commission standard. The Commission interprets this provision to require a conformance statement regardless of the presence of any chronic hazard warnings.

(D) Nothing in this enforcement statement should be deemed to alter any of the requirements of the Federal Hazardous Substances Act (''FHSA''), such as, but not limited to, the requirement that any hazardous substance intended or packaged in a form suitable for household use must be labeled in accordance with section 2(p) of the FHSA.

Dated: February 6, 1995.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 95–3450 Filed 2–10–95; 8:45 am]

BILLING CODE 6355–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 140

Delegation of Authority to the Director of the Division of Trading and Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is delegating to the Director of the Division of Trading and Markets, and to such members of the Commission staff acting under the Director's direction as the Director may designate from time to time, the authority to perform all functions reserved to the Commission under the recently adopted risk assessment requirements for holding company systems in §§ 1.14 and 1.15 of the Commission's regulations. The delegation should result in more expeditious treatment of exemption requests, which will benefit futures commission merchants (''FCMs'') and the Commission.

EFFECTIVE DATE: February 13, 1995.

FOR FURTHER INFORMATION CONTACT: Lawrence T. Eckert, Attorney Adviser, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street N.W., Washington D.C. 20581. Telephone (202) 254–8955.

SUPPLEMENTARY INFORMATION:

I. Delegation

On December 21, 1994, the Commission adopted Rules 1.14 and 1.15 to implement the risk assessment authority set forth in Section 4f(c) of the Commodity Exchange Act.[1] These rules generally require FCMs that are subject to the rules to maintain and file with the Commission certain information concerning their financial activities and the activities of their material affiliates.

In promulgating the risk assessment rules, and at the suggestion of commenters on the proposed rules, the Commission reserved, in Rules 1.14(d)(3) and 1.15(c)(3), the authority to exempt any FCM from any of the provisions of either Rule 1.14 or Rule 1.15 if the Commission finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought. Additionally, the rules permit the Commission to exempt an FCM affiliated with a ''Reporting Futures Commission Merchant'' from the recordkeeping and reporting requirements of the rules, and permit the Commission to request information to supplement an FCM's filings with the Commission if the Commission determines that additional information is necessary for a complete understanding of a particular affiliate's financial impact on the FCM's organizational structure.[2]

The Commission has determined to codify in Part 140 the delegation of its authority under the risk assessment rules to the Director of the Division of Trading and Markets.[3] Accordingly, the Commission is hereby amending its delegation of authority to the Director of the Division of Trading and Markets set forth in Rule 140.91, which currently governs authority to perform functions on behalf of the Commission with respect to the minimum financial and related reporting requirements for FCMs and introducing brokers under Rules 1.10, 1.12, 1.16 and 1.17, by adding to it the authority to act on behalf of the Commission with respect to all functions reserved to the Commission under Rules 1.14 and 1.15. The Commission further notes that paragraph (b) of Rule 140.91 will continue to provide that the Director may submit any matter delegated under the rule to the Commission for its consideration.

II. Related Matters

A. Administrative Procedure Act

The Commission has determined that this delegation of authority relates solely to agency organization, procedure and practice. Therefore, the provisions of the Administrative Procedure Act, 5 U.S.C. 553, which generally require notice of proposed rule making and which provide other opportunities for public participation, are not applicable. The Commission further finds that, because the rule has no adverse effect upon a member of the public, there is good cause to make it effective immediately upon publication in the **Federal Register**.

[1] 59 FR 66674 (December 28, 1994).

[2] Rules 1.14(d)(2), 1.15(c)(2) and 1.15(a)(2)(iii). For a complete discussion of the recently adopted risk assessment rules, see 59 FR 66674.

[3] See 59 FR 66674, at 66682, n.35 (Director of Division of Trading and Markets is generally delegated the authority to act on behalf of the Commission with respect to the risk assessment rules).

Health Canada
Santé Canada

Healthy Environments and Consumer Safety Branch
Direction générale, Santé environnementale et sécurité des consommateurs

Your file Votre référence

Our file Notre référence

07-104525-309

Consumer Product Safety
123 Slater Street, 4th Floor
Address Locator: 3504D
Ottawa, Ontario
K1A 0K9

2007-02-20

Deborah Fanning
Art & Creative Materials Institute
P.O Box 479
1280 Main Street, 2nd Floor
Hanson, MA 02341

Dear Ms. Fanning:

The U.S. Consumer Product Safety Commission and Health Canada have reviewed the documents sent by the Art and Creative Materials Institute (ACMI) in order to determine if the Memorandum of Understanding could be used as a mechanism to help resolve the differences in the requirements for art and craft materials in the two jurisdictions. This letter represents Health Canada's response to your request. You should also be receiving a separate response from the U.S. Consumer Product Safety Commission.

From the point of view of Health Canada, it would appear that almost all art and craft materials for children certified by ACMI for the U.S. market would also be acceptable in Canada with respect to toxicity, subject to some of the points of clarification provided for in the attachment.

For art and craft materials intended for adults, we find that there are too many fundamental differences between the U.S. and Canadian requirements to attempt resolution through any bilateral discussion. There is currently an international effort toward harmonization of both classification and labelling: the Globally Harmonized System of Classification and Labelling of Chemicals (GHS). Therefore, any further discussion should be delayed until the final decision to adopt the GHS has been made in both the U.S. and Canada and both countries have begun the rule-making/regulatory process to do so.

..../2

Health Canada would like to thank ACMI for the suggestion of a cooperative effort between ourselves and the U.S. Consumer Product Safety Commission that would benefit both industry and consumers in our two jurisdictions.

Please contact me if you would like to meet to discuss this matter further.

Sincerely,

Sandra Wright
Manager, National Coordination Division
Tel: (613) 954-3889
Email: sandra_wright@hc-sc.gc.ca

Encl.

Points of clarification with respect to toys:

Art and craft materials, if intended for children under the age of 14 years, would be subject to the prohibitions and restrictions for "toys, equipment and other products for use by a child in learning or play" (toys, for short) under the *Hazardous Products Act*. Documents submitted by ACMI analysing the differences in our requirements appear to make reference to the provisions for toys as only applying to products intended for children aged 3 years or less.

The *Hazardous Products Act* prohibits certain ingredients in toys. For example, the Act prohibits toys that contain any amount of accessible boric acid or salts of boric acid. However, an interim enforcement policy is in place such that a maximal acceptable concentration of 9.1 mg of boric acid per g of toy material is tolerated. It should be duly noted that Health Canada does not recommend the addition of boric acid or salts of boric acid to children's toys and there are no plans at this time, to change the interim enforcement policy. Cellulose nitrate is also prohibited in any children's toy products other than ping pong balls. This would include cellulose nitrate lacquers. Health Canada does not currently have data to demonstrate that cellulose nitrate lacquers are not a concern in all products from all sources and there is currently no plan to soften this prohibition through enforcement policy, however, Health Canada will look to research this issue further as other priorities allow.

The toxicity assessment of art and craft materials for children that are packaged in bulk would be assessed on a case-by-case basis depending on the circumstances of where they are sold. In the application of Paragraph10(b) of the *Hazardous Products (Toy) Regulations*, special consideration would be given for products that are packaged in bulk, and intended to be prepared and/or proportioned by an adult and given to a child in limited quantities, and not sold for individual consumer use. Under these conditions, the general acute dose such as the one indicated by Dr. Stopford of 50g liquid and 10g solid for application to substances and products sold only to schools and the like is reasonable. The use of these artificial limits in total quantity available would not be acceptable for products intended for use in individual households.

The *Hazardous Products (Toy) Regulations* do not require non-mandatory labelling to be present in both French and English. However, industry is strongly encouraged to have all information on the label in both French and English to ensure that people in Canada have all available information regarding health and safety.

Health Canada has no certification programme for toys. Therefore the application of the mark by the ACMI would simply serve as assurance to the Product Safety inspectors that the products comply with the toxicology requirements of the toy regulations. These products would then be less likely to be targeted in any sampling, testing and compliance survey of art and craft materials intended for children, but Health Canada would always reserve the right to do so. Note that any mark applied by the ACMI should not imply that the product has been approved by Health Canada in any way.