



**THE ART & CREATIVE
MATERIALS INSTITUTE, INC.**

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Federal Trade Commission
Office of the Secretary
Room H – 135 (Annex J)
600 Pennsylvania Ave. NW
Washington DC 20580

Re: Revised Green Guides – Proposed Revisions, 75 FR 63552

Dear Sir:

These comments are submitted in connection with the Federal Trade Commission (FTC) “Request for Comment” on proposed revisions to the FTC Green Guides by the Art & Creative Materials Institute, Inc. (ACMI). ACMI is an association of some 235 active member manufacturers, 148 licensees and 14 associate members. The membership is drawn from the United States, Canada, Europe, Asia, Central and South America and Australia.

ACMI sponsors a certification program for art materials ranging from children’s art materials to professional art materials. The program has two certification marks, the AP Seal (Exh. A), used on children’s and adult art materials that are non-toxic or which do not require any health hazard labeling under acute and chronic health regulations of the Consumer Product Safety Commission (CPSC). The second certification mark is the CL Seal (Exh. B) and is used on art materials that bear hazard warnings, which by federal and state law may not be sold to children.

ACMI offers these comments relating to the FTC proposal regarding the claim “non-toxic” (at page 63580) and the new proposed Section 260.9 Example 3 (at page 63604):

“A marketer advertises a lawn care product as ‘essentially non-toxic’ and ‘practically non-toxic’. The advertisement likely conveys that the product does not pose any risk to humans or the environment. If the pesticide poses no risk to humans but is toxic to the environment, the claims would be deceptive.”

LOOK FOR THESE SEALS.....



Background

The ACMI certification program was started in 1940 for children's art materials to assure consumers and art educators that products in the program were suitable for children and were non-toxic. This program preceded any federal or state laws governing product health hazard labeling. The program has evolved over the years and is recognized as one of the best private voluntary certification programs in the United States. Comments were submitted by ACMI in 1995 on the "Green Guides" and our counsel, Martin J. Neville, appeared at the hearing held on the subject. Enclosed is a copy of the comments submitted by ACMI in 1995 (Exh. C).

These comments are submitted in support of ACMI's use of the term "non-toxic" and to provide a current explanation of its certification program. The non-toxic term is the only claim made by ACMI in the context of claims covered by the FTC Green Guides.

Legislative and Regulatory Standards of the ACMI Program

The Federal Hazardous Substances Labeling Act (FHSLA) was enacted in the 1960's to deal with acute and other product hazards. The Federal Poison Prevention Packaging Act was also enacted in the 1960's. The FHSLA was originally enforced by the FTC but, when the Consumer Product Safety Commission (CPSC) was established, enforcement was transferred to it. The FHSLA was renamed the Federal Hazardous Substances Act (FHSA) and CPSC enforcement powers were strengthened in subsequent amendments. There was some doubt even within CPSC as to whether FHSA authority extended to chronic health hazards, although there were examples of CPSC acting to require what was regarded as chronic health labeling for some chemicals, such as methylene chloride.

When adult art materials came under criticism for lack of chronic health labeling, ACMI expanded its program and was active in the drafting of ASTM D 4236, the standard for chronic health labeling in the 1980's. Ultimately ACMI worked with a coalition of artists and consumer advocates to support the enactment of the Labeling of Hazardous Art Materials Act (LHAMA) in 1988, which codified as a federal regulation ASTM D 4236. In the 1992 CPSC publication of the regulations (57FR 4626 et seq.), CPSC for the first time defined the term 'chronic toxicity' under the FHSA as applied to all consumer products. (Exh. D, LHAMA)

ACMI's toxicologists had considered chronic health hazards along with acute health hazards long before the law was enacted. The toxicologists are based at Duke University Medical Center. An advisory board of toxicologists has been in existence for many years and includes a toxicologist from the federal Environmental Protection Administration and other well-recognized and well-credentialed toxicologists.

The "chronic toxicity" definition of CPSC, 16 CFR Section 1500.3(c)(2)(ii), covers carcinogens, neurotoxins and reproductive toxins. This was a direct result of ACMI's progressive actions in the legislative arena, no minor matter for a small industry program. Also see CPSC's Chronic Hazard Guidelines, which accompanied the regulatory definition of chronic toxicity.

Since 1995, ACMI has made improvements to its program. Evaluation of direct contact packaging is now part of the ACMI certification program. Direct contact packaging is defined as packaging that remains with the product during use, for example the paper wrapper on a crayon or a marker barrel. Other improvements have also been made.

The Consumer Product Safety Improvement Act of 2008

In what may have been the most significant legislative enactment to counter the well-known problems of lead in imported toys and other consumer products, Congress passed and the President signed the Consumer Product Safety Improvement Act of 2008, HR 4040, which requires compliance with lead and phthalate limits for children's products, tracking labels, product certification certificates by manufacturers and other measures. Congress recognized the ACMI certification program, providing in Section 102 of the Act the following:

“Testing and Certification of Art Materials and Products: ‘A certifying organization (as defined in Appendix A to section 1500.14(b)(8) of title 16, Code of Federal Regulations....meets the requirements of subparagraph (A) with respect to the certification of art materials and art products required under this section or by regulations prescribed under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.)”

In addition, Health Canada has accepted the ACMI AP Seal for non-toxic art materials. See letter from Health Canada to ACMI, dated February 20, 2007 (Exh. E). Since Canadian laws and regulations for hazard labeled products differ from CPSC regulations, we did not expect complete congruence for CL labeled products.

The ACMI Non-Toxic Claim

ACMI and its members believe that the AP Seal, accompanied by the term “Non-Toxic,” and by the legally required statement “conforms to ASTM D4236,” meets and exceeds the FTC's proposed requirement in Section 260.9 of the Green Guides. With a program almost 71 years old and without a single recall of any product certified since 1988 when LHAMA was enacted, we believe the term “Non-Toxic” is non-deceptive and generally understood by consumers not to refer to environmental hazards in the context of the ACMI program.

Industry Usage of the Term “Non-Toxic”

With a 70+ year history of the use of the term non-toxic in the art materials industry, particularly in relation to children's art materials, and the long-time promotion of the term by ACMI, there is substantial recognition by consumers that the term relates to human health effects, not to environmental effects. Thus, when member companies may use the term non-toxic, consumers generally understand the term in this industry means that a product is not harmful if ingested or in relation to skin contact. We doubt that any other industry in the United States has a record of consumer protection equivalent to this industry's record of some seventy years and literally billions of products sold and used by children and adults without harm every year. Consumers demand and governmental purchasers demand non-toxic children's art materials for use in the home and schools. Thus, the use of the term is necessary to fulfill the expectations of all

customers and users. It is not deceptive in any way, provided the product is one of ACMI's member companies and the products have been certified in ACMI's demanding program.

ACMI, in its 1995 submission, urged the FTC to adopt the standard contained in the FTC Consent Decree. In the Matter of Orkin Exterminating Company, Docket No. C-3495:

“...[I]t 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 so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.”

The FTC adopted this exact standard in the Green Guides, although it is not known if the adoption was based upon ACMI's recommendation alone.

Conclusion

ACMI requests the FTC to add the following phrase to Section 260.9, Example 3:

“A marketer advertises a lawn care product as ‘essentially non-toxic’ and ‘practically non-toxic’. The advertisement likely conveys that the product does not pose any risk to humans or the environment. If the pesticide poses no risk to humans but is toxic to the environment, the claims would be deceptive. **If the term ‘non-toxic’ is appropriately qualified, the claim is not deceptive.**”

In the event that FTC believes that the term “Non-Toxic” as applied in the ACMI program necessarily requires additional qualification, we request that we be so advised. ACMI believes that consumers understand the term to refer to human health effects, not human and environmental effects, based upon its use in the program for 70+ years.

Sincerely,

Deborah M. Fanning
Executive Vice President

Of Counsel: Martin J. Neville

Attachments: Exhibit A – ACMI's AP Seal
Exhibit B – ACMI's CL Seal
Exhibit C – ACMI's 1995 Comments to the FTC
Exhibit D – Federal Law LHAMA
Exhibit E – Letter from Health Canada