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**VIA ELECTRONIC SUBMISSION**

Federal Trade Commission  
Office of the Secretary  
Suite CC-5610 (Annex D)  
600 Pennsylvania Avenue NW  
Washington, DC 20580

Re: Comments of ICP Construction Inc. on the New Industry-Wide Substantiation Standard for Paint Claims, as Announced in the FTC's Proposed Consent Agreements with ICP Construction Inc. (File No. 162-3081)  
Benjamin Moore & Co., Inc. (File No. 162-3079)  
Imperial Paints, LLC (File No. 162-3080 )  
YOLO Colorhouse, LLC (File No. 163-3082)

On behalf of ICP Construction Inc. (ICP), we respectfully submit this comment in response to the Federal Trade Commission ("FTC") request for comments on the proposed consent agreements with ICP and with the three other companies identified above (Proposed Consents) regarding claims relating to Volatile Organic Compounds (VOCs) in paint.

The Proposed Consents would, among other things, replace the FTC's 2013 content-focused substantiation standard for claims that architectural coatings (paint) contain "zero VOCs," "0 VOCs," or "No VOCs" (Zero VOC Claims) with a significantly more stringent emissions-based standard that would consider not only VOCs but also "any compound that is emitted or produced during application, curing, or exposure" of paint.

ICP finds itself in the unusual and uncomfortable position of having to comment publicly on its own and the other proposed consent agreements. ICP is committed to complying with FTC requirements and with the terms of its Proposed Consent. ICP also agrees that a single, industry-wide FTC standard for substantiating Zero VOC claims and related emissions claims would benefit both consumers and competition. Nevertheless, ICP questions whether an industry-wide substantiation standard can be effectively promulgated through the Proposed Consents, particularly given the existence of prior, still-valid FTC orders that impose a different, less-stringent, content-based substantiation standard. Notwithstanding the representations of FTC staff during the consent negotiation process about a single, new, industry-wide substantiation standard for Zero VOC Claims and related emissions claims, it is not clear how the Proposed

Consents will protect consumers and create a level playing field for businesses when the purported industry-wide standard was developed without meaningful and interactive input from consumers, industry, and experts and cannot be reconciled with the substantiation standard in two earlier FTC orders.

If the Proposed Consents with their new emissions-based substantiation standard become final, the likely result will be both consumer confusion and a distortion of competition, without any accompanying supporting evidence that the existing content-based standard is inadequate; that the new emissions-based standard will significantly improve consumer health and promote improved consumer decision-making capabilities in the marketplace; or that the new standard will improve marketplace compliance.

#### *The FTC's Earlier "Zero VOC" Orders*

Until the Proposed Consents become final, the only specific FTC standard for substantiating Zero VOC claims is the one announced in the FTC's still-valid March 6, 2013 VOC orders with PPG Architectural Finishes Inc. and The Sherwin-Williams Company (PPG/Sherwin-Williams Orders).<sup>1</sup> Those Orders focused on VOC content and on the impact of adding tint to base paint because, as stated in the FTC's press release, "while [a claim of zero VOC content] may be true for uncolored 'base' paints, it is not true for tinted paint, which typically has much higher levels of the compounds, and which consumers usually buy."

Under the terms of those Orders, PPG and Sherwin-Williams (and, presumably, industry members that look to those Orders for guidance about how the FTC interprets Zero VOC Claims) may make FTC-compliant Zero VOC claims under any of the following three circumstances:

- "After tinting, the VOC level is zero grams per liter ("g/L"), or respondent possesses and relies upon competent and reliable scientific evidence that the paint **contains** no more than a trace level of VOCs" (emphasis added); or
- "After tinting, the VOC level is less than 50 g/L, and respondent clearly and prominently discloses, either within or in close proximity to the representation, that the representation applies only to the base paint and that the VOC level may increase, depending on the color choice;" or
- "Respondent clearly and prominently discloses, either within or in close proximity to the representation, that the representation applies only to the base paint and that the

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<sup>1</sup> See March 6, 2013 press release and linked materials at [www.ftc.gov/news-events/press-releases/2013/03/ftc-approves-final-orders-settling-charges-against-sherwin](http://www.ftc.gov/news-events/press-releases/2013/03/ftc-approves-final-orders-settling-charges-against-sherwin).

VOC level may increase ‘significantly’ or ‘up to [insert: the highest possible VOC level after tinting],’ depending on the color choice.”<sup>2</sup>

As the FTC’s accompanying *Enforcement Policy Statement Regarding VOC-Free Claims for Architectural Coatings* (March 6, 2013)<sup>3</sup> makes clear, the content-based standard used in the PPG/Sherwin-Williams Orders for determining “trace level of VOCs” is a tailored, paint-specific application of the “trace content test” for “free of” claims from the FTC’s “Green Guides” (*Guides for the Use of Environmental Marketing Claims*; 16 C.F.R. Part 260).<sup>4</sup>

### *The Proposed Consents*

The Proposed Consents mandate a completely different, emissions-based standard for substantiating Zero VOC claims and related emissions claims. In contrast to the standard set forth in the PPG/Sherwin-Williams Orders, the Proposed Consents contain no reference to added tints or to VOC content, generally or by specific amount, but instead identify only two circumstances in which compliant Zero VOC Claims can be made. The first is an “absolute zero” standard, which ICP believes to be currently (and likely permanently) unattainable: “the covered product’s emission is zero micrograms per meter cubed and the covered product’s VOC content is zero grams per liter.”<sup>5</sup> Proposed Consent at I.A. The second standard is a trace amount standard that, unlike the corresponding Part I in the PPG/Sherwin-Williams Orders, focuses on all possible paint emissions rather than solely on “VOC content”: “The covered product does not emit or produce more than a trace level of emission.” Proposed Consent at I.B.

The Proposed Consents also emphasize the more-stringent, emissions-based focus of the FTC’s new substantiation standard with more detailed “fencing-in” relief in Part II of the Proposed

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<sup>2</sup> See PPG Order and Sherwin-Williams Order at I.A-C, available at [www.ftc.gov/sites/default/files/documents/cases/2013/03/130306ppgdo.pdf](http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130306ppgdo.pdf) and [www.ftc.gov/sites/default/files/documents/cases/2013/03/130306sherwinwilliamsdo.pdf](http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130306sherwinwilliamsdo.pdf).

<sup>3</sup> Available at [www.ftc.gov/sites/default/files/documents/public\\_statements/voc-free-claims-architectural-coatings/130306ppgpolicystatement.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/voc-free-claims-architectural-coatings/130306ppgpolicystatement.pdf).

<sup>4</sup> See Enforcement Policy Statement at 2 (“[T]he Commission finds it in the public interest to apply the tailored definition of “trace level of VOCs” to all VOC-free claims for architectural coatings. “If a marketer makes a VOC-free claim about an architectural coating that **contains** more than a “trace level of VOCs,” as defined by the Sherwin-Williams and PPG orders and discussed above, or lacks substantiation for such claim, the Commission may take action under Section 5 of the FTC Act.” (emphasis added)).

<sup>5</sup> As the FTC makes clear in its July 11, 2017 press release, zero emissions is, at best, a hypothetical concept: “All paints emit chemicals during the painting process and while drying.” See also July 11, 2017 FTC Consumer Blog entry (similar).

Consents than in Part II of the PPG/Sherwin-Williams Orders, including requirements to substantiate claims regarding

- “The emission of the covered product”
- “The odor of the covered product”
- “Any other health benefit or attribute of, or risk associated with exposure to, the covered product, including those related to VOC, emission, or chemical composition” and
- “Any other environmental benefit or attribute of the covered product, including those related to VOC, emission, or chemical composition.”

Thus, paint manufacturers who must, or want to, comply with the new industry-wide substantiation standard set forth in Parts I and II of the Proposed Consents must use different, non-standardized tests for emissions; substantiate additional specified claims; and use different labeling and marketing claims for their paint lines. Their competitors are free to comply with the earlier substantiation standard articulated in Parts I and II of the PPG/Sherwin Williams Order. The cost and conduct discrepancy exists even though both the earlier Orders and the Proposed Consents purport to identify an industry-wide substantiation standard and even though both standards arose as relief from an FTC enforcement action relating to substantiation of Zero VOC and related paint claims.

ICP does not question the FTC’s authority to change the substantiation standard for Zero VOC Claims and related emissions claims, as ICP’s acceptance of the Proposed Consent implicitly acknowledges. However, the manner in which the FTC has chosen to do so will unnecessarily and adversely impact both consumers and businesses. The new, more-stringent substantiation standard for Zero VOC and related claims, as announced for the first time in the Proposed Consents,

- was not developed through a public, transparent, industry-wide process that addressed the impact not only on consumers but also on business, while also considering the broader policy issues implicated by the proposed change;
- was not developed with input from the paint industry or its two major trade initiatives, ACA (American Coatings Association) and CRGI (Coatings Research Group, Inc.), both of which play a significant role in developing and promoting industry-wide compliance initiatives, testing standards, and recommended best practices;
- was not developed in consultation with ICP or, to the best of ICP’s knowledge, with any of the other proposed settling defendants, but instead was unilaterally created by the FTC and presented as a non-negotiable settlement term;
- cannot be reconciled with the FTC’s earlier, more-lenient, substantiation standard in the PPG/Sherwin-Williams Orders; and
- does not include an evidence-based FTC analysis demonstrating that the industry-wide standard in the PPG/Sherwin-Williams Orders failed to protect consumer health and consumer decision-making in the marketplace and provide a level playing field

for competitors; or that the new industry-wide standard announced in the Proposed Consents will do so.

### *Discussion*

As the FTC is well aware, and as expressed in the Green Guides, environmental claims, including those for “green” paints, are powerful marketing tools. Based on ICP’s experience, consumers generally prefer – and pay a premium for – paints marketed with “Zero VOC” claims rather than paints making “Low VOC” claims or making no claims regarding VOC, not only for residential use, but also for commercial use, including for LEED Certified buildings (sometimes called “green buildings”).

Because of the Proposed Consents and FTC staff’s accompanying representations, only ICP and the three other proposed settling defendants, acting in good faith, will have abandoned the FTC’s still-valid and more-lenient 2013 content-based VOC substantiation standard. Only ICP and the three other proposed settling defendants will have had to choose between incurring the additional compliance costs associated with the FTC’s new emissions-based substantiation standard or forgoing Zero VOC Claims and related emissions claims. Only ICP and the three other proposed settling defendants will have had to grapple with the resulting loss of sales that choosing either option entails, whether because higher compliance-related substantiation costs make Zero VOC paint that complies with the new standard more expensive and thus less desirable than Zero VOC paint that complies (or not) with the earlier substantiation standard or because the marketplace prefers to purchase even non-compliant Zero VOC paint rather than compliant Low VOC paint. Meanwhile, PPG and Sherwin-Williams, larger competitors who have significantly more impact on both consumers and competition within the paint industry than the four proposed settling defendants combined, as well as other paint companies who watch the behavior of the industry leaders, will continue to market paints using Zero VOC Claims that comply with the earlier content-based substantiation standard that the FTC announced in the PPG/Sherwin-Williams Orders.<sup>6</sup>

As a result, if the current Proposed Consents become final, the FTC’s new substantiation standard for Zero VOC Claims and related emissions claims will not be an industry-wide standard, will not provide a level playing field for all competitors in the architectural coatings

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<sup>6</sup> The FTC acknowledges its creation of two equally valid and irreconcilable VOC substantiation standards by noting that it “plans to propose harmonizing changes to [the PPG/Sherwin-Williams Orders].” See July 11, 2017 press release and accompanying Analys[e]s of Proposed Consent Order to Aid Public Comment (available at <https://www.ftc.gov/news-events/press-releases/2017/07/paint-companies-settle-ftc-charges-they-misled-consumers-claimed>). As discussed below, the FTC’s “plans” will not necessarily resolve the competing substantiation standards.

industry, and will not protect consumers by providing a single, clear, enforceable standard. Consumers will be confused by the impact of the two alternative standards and the inability to make a meaningful, apples-to-apples comparison among Zero VOC Claims and related emissions claims made by different paint manufacturers. Indeed, consumers researching and shopping for Zero VOC paints at any retailer or online will have no way of knowing that there are two different, valid, substantiation standards for making compliant Zero VOC claims that depend not upon the claim being made but upon which company is making the claim. Similarly, consumers will not know that some, but not all, manufacturers are required to substantiate specific emissions-based claims.

ICP and the other proposed settling defendants will face a significant competitive disadvantage in the marketplace, based on the higher compliance costs associated with the new, more stringent substantiation standard, including costs of new or additional emissions testing, relabeling their paint lines, redeveloping and reissuing marketing materials, and educating their distributors, wholesalers, and retailers. While costs often result from resolving an FTC consumer protection action by agreeing to comply with additional substantiation requirements, these compliance costs are unusual because of the existence of another, currently equally valid, less-stringent FTC substantiation standard, and the absence of any showing that the new standard is any more protective of consumers and competition than the earlier still-valid standard.

ICP's entry into the Proposed Consent was based on the FTC's representation that the newer, more stringent standard would be the FTC's new, industry-wide standard and would be imposed on all members of industry. As long as another equally valid substantiation standard, in the form of the PPG/Sherwin-Williams Orders, remains in effect, and as long as industry and companies not already under order believe either that they can choose which standard they prefer or that both standards apply only to those companies that were the focus of an FTC enforcement action, there will be no benefit to consumers in the form of increased clarity and protection against unsubstantiated or improperly substantiated Zero VOC Claims in the marketplace, and no benefit to industry in the form of developing consensus around a single standard and recommended best practices going forward.

If the FTC's premise for abandoning the standard set forth in the PPG/Sherwin-Williams Orders in favor of that set forth in the Proposed Consents is correct, consumers who unknowingly purchase Zero VOC paints with claims based on the earlier content-based substantiation standard (or no standard at all) will face significantly more exposure to potentially harmful emissions than will consumers who purchase Zero VOC paints based on the new emissions-based substantiation standard. However, consumers will not know about, much less be able to detect the difference in, substantiation standards or emissions levels, and thus will not realize the purported benefits of the new standard relative to the old standard. Consumers may even be deceived into making a purchasing decision without knowing about the potentially adverse impact on their health. ICP and others who comply with the new substantiation standard will thus be marketing what the FTC now considers to be Zero VOC paint with a higher compliance cost; they may also market

“low VOC” paint that meets the same content-based criteria as Zero VOC paints marketed under the PPG/Sherwin-Williams Order’s content-based substantiation standard, with no meaningful way for consumers to know that the old “high VOC” paints and the new “low VOC” paints are functionally the same for VOC and emissions purposes.

*FTC’s Intent to Harmonize the PPG/Sherwin-Williams Orders with the Proposed Consents*

The FTC’s current intent to “harmonize” the existing content-based substantiation standard in Parts I and II of the PPG/Sherwin-Williams Orders with the new emissions-based substantiation standard in Parts I and II of the Proposed Consents will not necessarily result in timely – or any – resolution of the consumer protection and competition problems created by two alternative substantiation standards existing simultaneously. The FTC cannot unilaterally change the terms of the existing Orders to conform to a later-developed industry-wide substantiation standard for Zero VOC Claims and related emissions claims. Instead, it must identify a lawful basis for changing the PPG/Sherwin Williams Orders and provide PPG and Sherwin-Williams with legal rights, including briefing, hearing, and appeal, should one or both decide that they are (understandably) reluctant to voluntarily accept a change to an existing order that increases their compliance burden and costs in the absence of any evidence that the old standard was inadequate or that the new standard would improve consumer protection and competition. *See* 16 C.F.R. § 3.72(b).

Even if the FTC were to prevail, whether quickly with voluntary cooperation from PPG and Sherwin-Williams or slowly after prevailing in a legal proceeding, the FTC would need to provide the settling defendants with sufficient time to adapt their compliance program to the new substantiation standard, including time to determine and implement appropriate new testing standards, to relabel product lines, to replace existing shelf and retail stock, and to develop interim and new marketing materials. Furthermore, if ACA and CRGI were to get involved in the FTC’s efforts to develop and implement an industry-wide emissions-based substantiation program and related certification, industry would likely want to take the time necessary to do a thorough analysis of existing tests and standards and identify appropriate additional tests and standards, in consultation with affected companies, experts, and the FTC.

Finally, there is no guarantee that a future Commission will agree with this Commission about the wisdom of revisiting the PPG/Sherwin-Williams Orders or using limited FTC resources to either or both litigate revisions to the PPG/Sherwin Williams Orders and enforce a new industry-wide substantiation standard for Zero VOC Claims. As a result, and notwithstanding the initial burst of activity reflected by the Proposed Consents, the FTC’s intent regarding the new substantiation standard neither binds the FTC nor guarantees that the new emissions-based standard will supersede the current content-based standard in the PPG/Sherwin-Williams Orders. As a result, the FTC has no basis to determine that the adverse impact on consumers and competition from the two valid substantiation standards that will result from its approval of the Proposed Consents will be short-lived rather than permanent.

*Conclusion*

For all of these reasons, ICP respectfully urges the Commission to reconsider its use of the Proposed Consents to establish a new, industry-wide emissions-based substantiation standard for Zero VOC claims that departs from the standards in the PPG/Sherwin Williams Orders. ICP also respectfully urges the FTC to address the range of adverse consumer protection and competition issues that will result from finalizing the Proposed Consents without simultaneously resolving the inconsistent earlier substantiation standard that the FTC created in its PPG/Sherwin-Williams Orders.

If the Commission proceeds to finalize the Proposed Consents, ICP respectfully requests that the Commission formally determine and publicly state that i) the substantiation requirements in Parts I and II of the Consents are the FTC's new, industry wide-standard for substantiating Zero VOC Claims and related emissions claims; ii) the FTC intends to harmonize Parts I and II of the earlier PPG/Sherwin Williams Orders with Parts I and II of the Proposed Consents; iii) the substantiation requirements articulated in Parts I and II of the PPG/Sherwin Williams Order are fact-specific and thus limited to PPG and Sherwin-Williams unless and until harmonized with the Consents and thus should not be relied upon by third parties; and iv) the FTC will begin enforcing the new substantiation standard reflected in the Consents throughout the paint industry (e.g., by issuing warning letters). Otherwise, the primary effect of finalizing the Proposed Consents will be widespread consumer confusion and a consequent unfair, disproportionate impact on ICP and the other proposed settling defendants, to the benefit of paint companies that continue to use the old, content-based substantiation standard – or no standard at all – and to the detriment of consumers who will be unable to understand and resolve the issues created by the two substantiation standards.

Sincerely,

  
  
Peter B. Miller  
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