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September 11, 2017

VIA ON-LINE ELECTRONIC SUBMISSION

Donald S. Clark, Esq.
Office of the Secretary
Federal Trade Commission
Constitution Center
400 Seventh Street, S.W.
Room 5610
Washington, D.C. 20024

**Re: Proposed Consent Agreement and Request for Public Comments –
In the Matter of Benjamin Moore & Co., Inc., File No. 1623079
In the Matter of Imperial Paints, LLC, File No. 1623080
In the Matter of ICP Construction Inc., File No. 1623081
In the Matter of YOLO Colorhouse, LLC, File No. 1623082**

Dear Secretary Clark:

Pursuant to Section 2.34 of the Federal Trade Commission Rules of Practice, the Sherwin-Williams Company (“Sherwin-Williams”) hereby submits the following comment in relation to the above-referenced proposed consent agreements (hereinafter referred to as the “proposed orders”). Sherwin-Williams appreciates the Commission’s efforts to provide guidance on claims concerning volatile organic compounds (“VOCs”), which raise complex issues for advertisers. Sherwin-Williams agrees with the aim of ensuring that “No VOC” paints should not emit VOCs or other substances at levels that may cause harm during and after application. However, for the reasons detailed below, Sherwin-Williams objects to certain provisions of the proposed orders as creating standards that are either confusing, inaccurate, inconsistent with the most rigorous practices in the industry, or impossible to implement. For these reasons, Sherwin-Williams requests that the proposed orders be modified accordingly.

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(1) *The Definition of “Emission” is Overly Broad and Inaccurate*

The proposed order¹ defines “emission” as “any compound that is emitted *or produced* during application, curing, or exposure of a covered product.” *See* Definitions ¶¶C (emphasis added). Including reference to “produced” compounds in the definition of “emission” is inaccurate and distorts the meaning of the defined term in a manner that renders it contrary to industry practice and common usage. “Emission” is ordinarily defined as “an act or instance of emitting”; “something that is emitted”; or a “discharge” or “emanation.”² That is, “emission” is related to what may be released from a product, and not the content of the product.

A compound that may be produced during application, curing, or exposure of the product is not necessarily an emission. While many VOCs are assumed to be emitted from paint products over time, what matters is whether a compound that is present in paint, whether as part of the original formula or produced during or subsequent to use, may be released into the air and cause harm to humans through inhalation exposure. Compounds that are not emitted or released into the air from the product should not be of concern when assessing the validity of a “No VOC” claim.

As a result, including “produced” compounds within the definition of “emission” expands the scope of the order beyond what is relevant to VOC claims and creates confusion. In addition, this aspect of the definition has no reasonable relation to the allegations in the proposed complaints. Accordingly, the “or produced” language is extraneous and should be deleted.

(2) *Section I.B.: Including the Term “Produce” is Redundant and Confusing*

As with the definition of “emission,” it is confusing to include the term “produce” in the provision of Section I related to “Prohibited Misleading and Unsubstantiated Representations Regarding Emission and VOC Level of Covered Product.” As the title of this section makes clear, the purpose of the consent order is to ensure that no harmful levels of VOCs or other compounds are emitted from paint products for which “No VOC” claims are made. Section I.B., however, states that “[t]he covered product does not emit *or produce* more than a trace level of emission.” (emphasis added). It is also unclear why the word “produce” is included in this provision, as it either renders the sentence redundant (“... not emit or produce ... emission”), or unnecessarily expands the scope of the proposed order beyond addressing VOCs or other substances that may be discharged or released into the air from the product.

Accordingly, the phrase “or produce” should be deleted from Section I.B.

¹ The citations in this comment refer to provisions in the proposed Imperial Paints consent decree, although they are common to all of the proposed orders.

² Dictionary.com, LLC, <http://www.Dictionary.com> (“Emission” definitions 1 and 2) (last visited Sept. 11, 2017).

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(3) *The Definition of “Trace” Level of Emission is Confusing and Not Consistent with Industry Practice*

The proposed order includes three prongs for the definition of “trace level of emission.” First, a VOC must not be “intentionally added.” Second, emissions must “not cause material harm” to human health or the environment. Third, emissions must “not result in more than harmless concentrations of any compound higher than would be found under *normal conditions in the typical residential home without interior architectural coating.*” See Definitions ¶F(3) (emphasis supplied). Sherwin-Williams questions the viability of, and legal basis for, the italicized phrase, and believes it is impossible to implement in a non-arbitrary way.

For example, how are companies (or the FTC) to determine the concentration of potentially emitted compounds in the “typical residential home,” which can contain an endless variety of potential sources of VOCs or other compounds? The U.S. Environmental Protection Agency (“EPA”) has found that “VOCs are emitted by a wide array of products numbering in the thousands” and reports that “[s]tudies have found that levels of several organics average 2 to 5 times higher indoors than outdoors. During and for several hours immediately after certain activities, such as paint stripping, levels may be 1,000 times background outdoor levels.”³ EPA identifies some of the potential sources of VOCs as follows⁴:

Household products, including:

- paints, paint strippers and other solvents
- wood preservatives
- aerosol sprays
- cleansers and disinfectants
- moth repellents and air fresheners
- stored fuels and automotive products
- hobby supplies
- dry-cleaned clothing
- pesticide

Other products, including:

- building materials and furnishings
- office equipment such as copiers and printers, correction fluids and carbonless copy paper

³ Environmental Protection Agency, “Volatile Organic Compounds’ Impact on Indoor Air Quality”, available at www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality (last visited Sept. 11, 2017).

⁴ Cigarette smoking and vehicle-related emissions are also sources of VOCs in the home.

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- graphics and craft materials including glues and adhesives, permanent markers and photographic solutions.

In the same report, EPA explains further:

Organic chemicals are widely used as ingredients in household products. Paints, varnishes; and wax all contain organic solvents, as do many cleaning, disinfecting, cosmetic, degreasing and hobby products. Fuels are made up of organic chemicals. All of these products can release organic compounds while you are using them, and, to some degree, when they are stored.

EPA's Office of Research and Development's "Total Exposure Assessment Methodology (TEAM) Study" (Volumes I through IV, completed in 1985) found levels of about a dozen common organic pollutants to be 2 to 5 times higher inside homes than outside, regardless of whether the homes were located in rural or highly industrial areas. TEAM studies indicated that while people are using products containing organic chemicals, they can expose themselves and others to very high pollutant levels, and elevated concentrations can persist in the air long after the activity is completed.

Given the diversity of VOC emission sources - and wide range of VOC concentrations - that may be found in the "typical home," a standard based on "normal conditions in the typical residential home without interior architectural coating" does not provide a meaningful basis of comparison for determining whether emissions from paint are more than "trace levels."

In contrast, the March 2013 Sherwin-Williams order uses a comparison with background levels in ambient air:

7. "Trace" level of VOCs shall mean: . . . C. The presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.⁵

The background ambient air approach was proposed by FTC Staff during consent negotiations in reliance on recognized and readily available information from federal and/or state agency resources.⁶ The Staff concluded that a total VOC concentration of 200 µg/m³ or less reflect background levels that have no perceived adverse health or environmental consequences, and that paints contributing less than this level to a dwelling's indoor ambient air contain only trace amounts of VOCs as defined in the 2013 consent order.

⁵ Agreement Containing Consent Order, *In the Matter of The Sherwin-Williams Co.*, File No. 112 3198 (Definitions ¶7) (March 12, 2013).

⁶ Molhave, L. (Dec.1991), Volatile Organic Compounds, Indoor Air Quality and Health, *Indoor Air*, Vol. 1, Issue 4, p 357-376.

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In addition, referencing outdoor ambient air concentrations as a means of determining the trace levels of VOCs is reinforced by the EPA's finding that typical VOC levels are 2-5 times higher indoors than outdoors.⁷ As a result, relying on outdoor ambient air concentrations to determine the "trace" level of VOCs is a more objective approach than relying on indoor air levels influenced by a wide variety of site-specific factors, and should be preserved in the current orders.

(4) The Proposed Order Creates a Standard with which Compliance is Currently Impossible

The proposed order requires that to justify a "Zero VOC claim" a company must have competent and reliable scientific evidence that **at all times, during and after application**, emissions from the paint product are zero or no more than trace levels. *See* Section I. At present, however, there is no competent and reliable testing method to measure emissions during the first several hours after application.

To our knowledge, there is currently no verified testing protocol available from industry or federal or state regulatory agencies that provide for accurate emission reporting within the first several hours after paint application.⁸ Accordingly, by specifying that competent and reliable evidence (*i.e.*, emissions data) must be available "at all times," the order creates a standard with which compliance is currently impossible.

As an alternative, Sherwin-Williams recommends a proposed method to substantiate unqualified "No VOC" claims consistent with (1) the need to consider emissions that could pose material, acute harm to human health or the environment immediately after application⁹; and (2) the concept that content analysis, or modeling based on the content of the paint, may provide an appropriate proxy for emissions testing and a level of comfort that harmful emissions are not released at significant levels during this time period.

The proposed approach has three prongs for substantiating "No VOC claims," including:

- (1) Content Review: No intentional addition of VOCs;

⁷ *See* Environmental Protection Agency, "Volatile Organic Compounds' Impact on Indoor Air Quality".

⁸ Two examples of possible alternative test protocols – the continuous emissions method described in a study for the American Coating Association ("ACA") Study, conducted by the University of Texas-Austin, and EPA's Wall Paint Exposure Methodology ("WPEM") – have not been shown to be reliable test methods or reflective of typical consumer use patterns.

⁹ *See, e.g.*, Underwriters Laboratory LLC ("UL"), "Standard Method for Measuring and Evaluating Chemical Emissions from Building Materials, Finishes and Furnishings Using Dynamic Environmental Chambers." The method follows the guidance of ASTM Standards D5116 and D6670, EPA, the California Department of Public Health Services Standard Practice for Specification Section 01350, and the ISO 16000 environmental testing series.

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- (2) Competent and reliable emissions testing in accordance with industry standard practice¹⁰; and
- (3) Safety Data Sheet (“SDS”) verification.

SDS provides complete toxicological information on the potential hazards of the paint, as well as the individual component substances of potential toxicological concern. It is required to identify all substances present in the paint that may cause adverse effects to human health and the environment, as well as to provide detailed summaries of the available toxicity information for all health endpoints, including acute and inhalation toxicity, carcinogenicity and reproductive toxicity.

Every paint product is required to have an SDS. U.S. Occupational Safety and Health Administration (“OSHA”) guidance¹¹ explains how to develop SDS for communication of hazards based on the principles established in the Globally Harmonized System for Hazard Communication (“GHS”). The guidance makes clear that the development of SDS involves consideration of all relevant toxicological data on the substances that comprise mixtures (such as paint products), as well as all possible harms that may arise from reasonably anticipated uses of the product. As a result, paint product SDS will identify any possible hazards from exposure to emissions at any time during the painting process and are therefore a reliable proxy for identifying potentially harmful emissions in the absence of a scientifically reliable method for continuous testing.¹² Using SDS to verify the absence of potential material harm to users of “No VOC” paint products would occur in conjunction with the other two existing “prongs” noted above (content review and emissions testing). The proposed approach provides assurance that there are unlikely to be emissions before the testing window that present material risks of harm to human health or the environment. Accordingly, the proposed three-prong approach would provide adequate assurance that the paints meet consumer expectations for “No VOC” claims.

¹⁰ For the reference to Sampling Schedule at 6 hours see Sec 3.10.11.1 on Page 29.

http://greenguard.org/Libraries/GG_Documents/33486D20.sflb.ashx.

¹¹ OSHA, “Hazard Communication: Hazard Classification Guidance for Manufacturers, Importers, and Employers” (2016), available at www.osha.gov/Publications/OSHA3844.pdf (“OSHA Guidance”) (last visited Sept. 11, 2017).

¹² OSHA guidance also makes clear that hazards presented by ingredients at concentrations below the traditional (1%/0.1%) cut-off values for evaluation must be identified on the SDS:

If the chemical manufacturer, importer or other hazard classifier has information that the hazard of an ingredient will be evident (*i.e.*, it presents a health risk) below the specified cut-off value/concentration limit, the mixture containing that ingredient must be classified accordingly.

OSHA Guidance at 24-25.

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Sherwin-Williams looks forward to discussing these issues further with the Staff and Commissioners at their earliest convenience.

Respectfully submitted,

KELLEY DRYE & WARREN LLP


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