



AmericanCoatings
ASSOCIATIONSM

September 11, 2017

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

Re: *In the Matter of Benjamin Moore & Co., Inc., File No. 1623079*
 In the Matter of ICP Construction Inc., File No. 1623081
 In the Matter of Imperial Paints, LLC, File No. 1623080
 In the Matter of YOLO Colorhouse, LLC, File No. 1623082

Dear Mr. Clark:

On July 18, 2017, the FTC published notice of four consent agreements in response to complaints of unsubstantiated health and environmental claims resulting in an alleged violation of Section 5 of the Federal Trade Commission Act for unfair or deceptive acts or practices in or affecting commerce. The American Coatings Association (ACA) appreciates the opportunity to comment on all four of these orders and raise serious concerns regarding the likely unintended consequences of FTC actions in this area.

ACA is a voluntary, nonprofit trade association working to advance the needs of the paint, coatings and adhesives/sealants industry and the professionals who work in it. ACA represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA's membership produces some 95% of the total dollar volume of architectural paints and industrial coatings in the United States.

I. Issues related to substantiation broadly affect the industry and should be addressed in a transparent process with industry at large, rather than individual companies, to ensure clarity and broad application.

The paint and coatings industry spends over \$15 million¹ annually on research and development largely focused on new products and unique applications, such as SMART² and multifunctional coatings that provide enhanced functionality and utility in coatings products. Accordingly, how these enhanced performance characteristics and other product attributes are communicated to consumers is extremely important and broadly impacts consumers as well as the coatings industry.

Currently, the “regulatory landscape” for such communications consists of the Green Guides, two 2013 consent orders with The Sherwin-Williams Company and PPG Architectural Finishes, Inc. (2013 orders), as well as a simultaneously issued FTC Enforcement Policy Statement, and the above referenced orders against four additional coatings companies. These materials, when read together, create confusion and uncertainty for paint industry members seeking to comply with FTC guidance and precedent. At best, only those companies which participated in the negotiation of the applicable consent agreements fully understand the nuances of their application and requirements for compliance, and therefore other companies may not have sufficient information to apply a consent agreement’s principles to their own labeling and advertising. With the announcement of the most recent consent agreements at issue, which represent a departure from the 2013 orders, this problem is even more evident with respect to health and environmental benefit claims and the substantiation that is required to make such claims.

¹ Derived from Rothwell and Kulkarni, *Data and Methods Appendix for America’s Advanced Industries: What They Are, Where They Are, Why They Matter*, Jan. 2015, Brookings Institute, available online at: <https://www.brookings.edu/wp-content/uploads/2015/02/Advanced-Industries-Data-and-Methods-Appendix.pdf>; and from U.S. Census Bureau, *2014 US Census Data for Industry Employment* (NAICS Industrial Classification 3255), available online at: <https://www.census.gov/data/tables/2014/econ/susb/2014-susb-annual.html>.

² SMART coatings are a type of multi-functional coating that include self-healing, self-cleaning, self-stratifying/assembling and similar types of coating technologies. For more information see, *Smart Coatings: Reaching the Big Time with Many More Opportunities*, Coatings Tech (July 2017), Vol. 14 No. 7, available online at: <http://www.paint.org/article/smart-coatings-reaching-big-time-many-opportunities/>.

ACA recognizes that the consent agreement process as outlined in the Federal Register notice is authorized by FTC's rules of practice and accepts that consent agreements can be an appropriate means for the FTC to adjust the behavior of specific companies. See 16 CFR §§2.31-2.34. However, ACA believes that by engaging the industry more broadly, the FTC will more likely have the impact it desires – a broad adoption of consistent standards that provide certainty to industry members and meet consumers' needs in the manner the FTC believes is most appropriate. Failure to engage in a transparent process which includes the meaningful participation of the entire industry, other experts and stakeholders results in an uneven competitive playing field where companies in the industry understand FTC enforcement positions differently.

a. An Uneven Playing Field

Negotiating a consent agreement typically involves many communications between FTC and the parties to the agreements which are not part of the public record. These communications may serve to clarify the intent and the application of the agreement's requirements and most often are based upon confidential business information and non-public FTC communications that cannot be disclosed in the consent agreement documents. Consequently, while the parties to the current agreements may have a good understanding of the requirements for substantiation of health and environmental claims developed during the negotiation process in the context of many communications, the rest of the industry does not have the benefit of these clarifying discussions. Yet, the rest of the industry is at risk of an enforcement action if those requirements for compliance are not fulfilled. Consequently, use of the consent agreement process to address industry-wide issues may create an uneven competitive playing field when it comes to compliance issues. Without full information, even the most well-intentioned company may misconstrue the enforcement 'policy' interpretation and its actions in the marketplace and may therefore be different from those of the company subject to the consent order.

b. A "Moving" Target

In this instance, the myriad differences between the 2013 orders and the orders at issue, has resulted in a "moving" regulatory target that poses a serious challenge for paint companies, owing in large part to the agency's explanation of consumer perceptions and uncertain substantiation requirements. FTC's apparent re-direction on the issue of the type of substantiation that is required for making zero VOC claims is significant. For example, the inclusion of a definition of "emission," when considered in the context of calculating a "trace" level of emission, is unduly broad. The definition's reference to "any" compound that is "emitted or produced during application, curing or exposure" suggests that any chemical, whether a VOC or not, must be accounted for if it is either emitted or produced. The reference to chemicals that are "produced" broadens the impact of the order to include chemicals present in the paint, regardless of whether they are released into the air or cause inhalation exposure. This expansion is without explanation and appears unwarranted.

In addition to including a definition of emissions, the current orders depart from the 2013 orders by changing the standard for measuring “trace” emissions. In particular, the third prong of the trace analysis states that 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.*” The italicized phrase above is confusing and not amenable to any practical implementation or understanding, as it is not clear how companies are to measure the concentration of potentially emitted compounds in the “typical residential home,” which can contain many potential sources of VOCs (*e.g.*, carpeting, natural wood, or drywall) or other compounds unrelated to VOCs (*e.g.*, cleaning products containing ammonia or bleach).

The proposed orders also deviate from the 2013 orders by requiring companies to possess 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, before making a zero VOC claim. ACA questions whether there is a reliable way to measure emissions throughout all stages of application, curing, or exposure, and believes that input on this point from all industry members would prove valuable to the FTC Staff and to the companies seeking to comply with such a requirement.

These issues are likely to confuse and confound companies seeking to rely on the consent agreements’ language, or attempting to anticipate issues when developing new and advanced innovative technologies. The fact that this substantial, seemingly industry-wide requirement is promulgated by virtue of individual consent agreements makes compliance even more difficult, given that the process did not include any industry-wide input.

ACA believes that it is necessary for FTC to engage in a transparent regulatory process to address issues that are industry-wide in order to have clear and certain substantiation requirements that apply to all.

II. Uncertain regulatory environment is a deterrent to innovation and continuing the trend of improvements to product safety

It is a very real concern that FTC will similarly modify substantiation or other requirements in the future, with no participation from industry, leading to continued regulatory uncertainty. The potential confusion is compounded by regulatory overlap regarding the VOC content labeling of architectural coatings. For example, FTC's proposal regarding "zero VOC" could conflict with EPA's air quality regulations.³ The risk for confusion is exacerbated in the proposed order because the term "VOC" is effectively equated with harmful "emission" through the FTC's substantiation requirements.⁴

Rather than attempting to navigate through confusing requirements for a marketing strategy for environmentally beneficial products, companies may choose simply to abandon those product lines and the continued research and development towards safer and more "environmentally friendly" paints. ACA believes that the better approach would be for the FTC to abandon the current case-by-case process, and to engage the paint and coatings industry and other collectively in developing environmental labeling requirements, which would promote continuation of trends in the industry to reduce the use of potentially toxic chemicals, lower air emissions, and promote product and environmental stewardship.

For years, the industry has been voluntarily taking significant steps to maximize environmental improvements for its products. As ACA has reported, "Volatile organic compound (VOC) emissions from architectural coatings have drastically decreased over the last few decades, even while the use of architectural coatings has increased over the same time period nationwide. California's South Coast Air Quality Management District estimates that VOCs from architectural coatings in the Los Angeles area — the air basin with the most severe air quality issues in the country — decreased by over 50% between 2008 and 2014. More than 90% of architectural coatings sales in the United States are now for environmentally preferable water-based paint."⁵

³ See 40 C.F.R. Part 59 Subpart D ("National Volatile Organic Compound Emission Standards for Architectural Coatings"). The EPA rule requires manufacturers to label coating containers with either the VOC content of the coating or the VOC content limit for the product that is required by the rule and with which the product complies. An EPA-compliant disclosure could violate the proposed orders.

⁴ The Commission strives to avoid regulatory action that conflicts with rules promulgated by other federal agencies. In the Statement of Basis and Purpose published with the revision to the Green Guides in 2012, the Commission revised the Green Guides explicitly to avoid creating "confusing and potentially contradictory" guidance due to the EPA's rules in this area. See Green Guides Statement of Basis and Purpose, at 18 n. 67, 110 (2012).

⁵ For more information, See *Environmental Footprint*, American Coatings Association, available online at: <http://www.paint.org/about-our-industry/environmental-footprint/>

ACA has also noted that, “The U.S. Environmental Protection Agency’s (EPA) Toxic Release Inventory (TRI) indicates releases by the paint and coatings sector decreased by 81% between 1990 and 2014. Toxicity-weighted results for air releases present an even more significant decline, decreasing 94% from 1990. Air toxics — also known as HAPs — decreased by 82% between 1990 and 2014, and toxicity-weighted air toxics releases declined by 94%.”⁶

ACA strongly urges FTC to work with the paint and coatings industry to promote the continuation of these trends, as the industry continues to evolve marketing practices that reflect strides made in developing safer and better products. We believe that the most effective way for the FTC to achieve its stated goals is to engage the entire industry in this process. This will ensure that all coatings product companies have clear direction as to what the FTC expects from the industry, and that the Green Guides and consent orders reflect those expectations in a consistent and unambiguous manner. ACA would be happy to meet with FTC staff to achieve these goals.

ACA appreciates the opportunity to submit this comment letter. If you have any questions at all and wish to discuss further, please do not hesitate to contact us directly.

Best regards,

/s/

Riaz Zaman
Counsel, Government Affairs

/s/

Heidi K. McAuliffe
Vice President, Government Affairs

*** Submitted via ftcpublic.commentworks.com ***

⁶ *Id.*