

(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 than 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 elements³ minus all intangible assets other than mortgage servicing rights and purchased credit card relationships⁴ 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. * * *

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.

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 assets. 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

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 highlighters 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]

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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**.

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).