

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.

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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