

This final rule carries out the 2000 Act by clarifying the definition of "Indian product." It also provides specific examples of items that may be marketed as Indian products and those that may not, thereby informing the public as to when an individual may be subject to civil or criminal penalties for falsely marketing a good as an "Indian product."

Public Participation

Prior to drafting regulations for the 2000 Act, in early January, 2001, the IACB sent out individual letters to the Tribal leaders of all federally recognized Tribes informing them of the 2000 Act and providing them with copies of the legislation. The letters invited the Tribal leaders to designate a member of their staff or Tribal member from their arts and crafts community with whom the IACB could discuss their Tribe's interest in specific language for consideration in the further clarification of "Indian product." This Tribal involvement was intended to ensure that the amended definition properly encompasses Indian art and craft products that should be protected by the 1990 Act.

Following written and telephone communications and subsequent teleconference consultations with designated representatives from a broad range of interested Tribes, the IACB published the proposed rulemaking for the 2000 Act on May 21, 2001. 66 Fed. Reg. 27915-27920. In addition to publication, several thousand copies of the proposed rulemaking were distributed to interested parties, including every federally recognized Tribe, members of the Indian arts and crafts industry, key offices within the Department of Justice, including U.S. Attorneys and the Federal Bureau of Investigation, State Governors, State Attorneys General, and State Arts Councils.

The IACB received 25 public comments on the proposed rulemaking, and each was carefully reviewed, analyzed, and considered. These comments are grouped in the following summary.

Summary and Analysis of Public Comments

A broad range of Tribal, federal, State, and Indian arts and crafts industry comments were received in response to the proposed rulemaking for the 2000 Act. The respondents provided a variety of comments, including concern for the protection of Indian artists and artisans' economic livelihood, suggestions for changes to the proposed product categories, product items, and descriptions, as well as requests to

further clarify that the labor component of the Indian art or craft product must be entirely Indian.

Overall Comments

Definition of "Indian"

One respondent requested that a working definition of "Indian" be developed to assist in the definition of "Indian product," while another respondent questioned whether State-recognized Tribes met the definition of "Indian." One comment proposed that, under the "Background" section's definition of "Indian product," the terms "American Indian or Alaska Native" be substituted for "Indian." Another respondent requested that the definition of Indian be expanded to permit people of Indian descent, yet who are not enrolled in State or federally recognized Tribes, to sell their work as Indian art.

The final rule has not adopted these comments. The term "Indian" and the interrelated term "Indian Tribe" are defined by Congress by statute in the 1990 Act and may not be changed by regulation. As defined by the 1990 Act, however, the terms "Indian" and "Indian Tribe" already include, for purposes of sections 104, 105, and 107 of the 1990 Act, members of State-recognized Tribes and Alaska Natives, as well as members of federally recognized Tribes.

Sections 104 and 105 of the 1990 Act define "Indian" and "Indian Tribe" as follows:

"The term 'Indian' means any individual who is a member of an Indian tribe, or for the purposes of this section is certified as an Indian artisan by an Indian tribe;"

"The term 'Indian tribe' means—

"Any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

"Any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority."

In response to the comment regarding the sale of art by individuals who are not members of federally or State-recognized Tribes, but are of Indian descent, it should be noted that such individuals may market their goods as an Indian, provided they are certified as an "Indian artisan" by an Indian Tribe. Certification is at the option of the Tribe. Certification by a Tribe, under 25

CFR 309.4, requires that the individual be of the Indian lineage of one or more members of that Tribe. As a result, it is not necessary to adopt this comment. Furthermore, neither the 1990 Act nor the 2000 Act prohibit any statements about a person's Indian heritage in the marketing of his or her art or craft work that are truthful and that do not falsely suggest the individual is a member of an Indian Tribe, as defined by the 1990 Act.

Materials Used To Make Indian Arts and Crafts

One respondent expressed concerns regarding the use and representation of stabilized turquoise in Indian jewelry, as well as the need for information regarding the 1990 Act to reach markets and businesses violating the 1990 Act. Issues regarding the use and representation of stabilized turquoise in Indian jewelry are beyond the scope of the 1990 Act, which focuses on Indian labor, not on art and craft base materials. While the IACB welcomes any suggestions to improve its efforts to educate the industry and public about the 1990 Act, as well as any information regarding potential violations of the 1990 Act, these comments have not been adopted in the final rule as they do not address the 2000 Act's statutory mandate to further clarify the definition of "Indian product."

One respondent recommended that the Lanham Act language, 15 U.S.C. 1125(a), which addresses strict liability for misleading words and markings, be adopted to further clarify what kind of conduct the IACB will interpret as "falsely suggests" that products are Indian for purposes of civil action. Another comment requested that the statutory language "In a manner that 'falsely suggests' it is Indian produced," 18 U.S.C. 1159(a), be changed to "In a manner that 'falsely states' it is Indian produced," to narrow the gap in the proof of criminal intent. Another respondent recommended that the term "falsely suggests" be used consistently throughout the regulations, rather than the word "misrepresented" to avoid confusion.

The final rule has not incorporated the first comment recommending adoption of the Lanham Act's strict liability language to clarify conduct that "falsely suggests" an art or craft is an Indian product or the second comment regarding a change in statutory language. Both of these recommendations are beyond the scope of IACB's Congressional mandate under the 2000 Act to promulgate regulations to further clarify the definition of Indian product. However, the third