



**U.S. CONSUMER PRODUCT SAFETY COMMISSION**  
4330 EAST WEST HIGHWAY  
BETHESDA, MARYLAND 20814-4408

Record of Commission Action  
Commissioners Voting by Ballot\*

Commissioners Voting:     Chairman Inez M. Tenenbaum  
                                  Commissioner Thomas H. Moore  
                                  Commissioner Nancy A. Nord

ITEM:

Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety Improvement Act ("CPSIA")  
(Briefing Package dated July 31, 2009, OS no. 3805)

DECISION:

The Commission voted unanimously (3-0) to approve the draft Statement of Policy and the issuance of the draft *Federal Register (FR)* Notice of Availability with changes. The Notice announces the availability of the "Statement of Policy," which establishes the Commission's position with respect to testing products to determine whether they contain phthalates in excess of the statutory limits.

Chairman Tenenbaum and Commissioner Nord issued the attached statements with their votes.

For the Commission:

  
Todd A. Stevenson  
Secretary

\* Ballot vote due August 6, 2009

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM  
ON THE STATEMENT OF POLICY  
REGARDING COMPONENT PART TESTING FOR PHTHALATES

In March of 2009, the Commission issued its testing method for measuring the concentration of phthalates in children's products. The March 2009 testing method called for testing the entire product to determine the phthalate concentration. With input from various stakeholders, the Commission continued to evaluate and contemplate the advantages and disadvantages of this method. In my view, the disadvantages appear to outweigh any advantages of the March 2009 test methodology. I believe the guidance policy and the revised CPSC testing method issued today will better protect children from potential risks associated with phthalate exposure in children's products and will provide clarity for manufacturers required to test these products. We are also inviting comments on this guidance policy, and we will consider those comments prior to proceeding to a notice of proposed rulemaking.

As the staff pointed out in its memorandum, testing the entire product as opposed to the plasticized parts could result in a less stringent and less health-protective regulation. Factoring the nonplasticized parts into the concentration calculation would likely dilute the overall phthalate measurement. For example, a high chair with a teething toy that exceeds the phthalates limit could actually pass the phthalates test when all the other non plasticized parts of the high chair are used in the concentration calculation. Testing plasticized components of the product achieves the legislative intent of the CPSIA.

The guidance set forth today is in the best interest of children and provides a more practical testing alternative for manufacturers. There may be concern among some stakeholders that the guidance issued today does not address inaccessible parts. Unlike the lead provision in the CPSIA, however, the phthalates provision does not contain an exclusion for inaccessible parts. To that end, the Commission welcomes submissions on accessible versus inaccessible component parts, statutory construction, potential migration issues, studies and other information that would be helpful to the Commission in drafting a proposed rule.



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BETHESDA, MD 20814

STATEMENT OF COMMISSIONER NANCY NORD  
ON SECTION 108 OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT  
REGARDING PHTHALATES COMPONENT TESTING  
August 7, 2009

While the general purpose of section 108 of the CPSIA is to ensure that children are not exposed to certain specified phthalates, I have serious reservations about both the process used and the substance of this guidance document in furthering that purpose. Nonetheless, I am voting to put it out for discussion because it is important to receive the benefit of public comment on the issues presented.

With respect to the process, the document before the Commission for consideration is characterized as a guidance stating the Commission's policy with respect to testing plasticized component parts of toys and child care articles. Because of the significance of the guidance, the fact that it represents a significant change in direction from earlier statements of commission staff on the same matter, and because it can be read to impose requirements (and compliance risks) on product manufacturers, it can equate to a substantive rule, not merely a "guidance," in which case it is subject to the notice and comment and other rulemaking requirements of the Administrative Procedure Act.

Limiting the testing requirements to plasticized component parts may be more protective of public health and may also minimize testing burdens. This is also the approach taken by other jurisdictions that have regulated phthalates. However, the language of the statute, as the staff recognized in earlier statements, suggests that the entire product should be tested, resulting in wasteful and expensive testing that actually could dilute the results of the tests and counter the goal of public health. Therefore, the Commission's attempt to reinterpret the statute to limit the testing requirement to plasticized component parts may well be a very good step forward. We need public input to answer this question and to fully understand what other issues are being raised by this guidance.

The staff is now developing an advanced notice of proposed rulemaking dealing with component parts. Presumably, phthalates testing will be discussed in that rule as well. Therefore the public comments we receive here will provide a context for proposals that will be put out in the near future.

One important issue that is not adequately addressed in the guidance is the issue of inaccessible component parts. The lead content provisions of the CPSIA treat the question of inaccessibility. The phthalates provisions of the CPSIA are silent on this subject. Instead, the phthalates provisions (dealing with the interim ban) extend to child care articles and toys that can be placed in a child's mouth. Since, according to the interpretation set out in this guidance, the statute defines "toy" as a "consumer product" and since "consumer product" includes component parts of the product, then it seems to follow that only those component parts of the toy that can be placed in the child's mouth would be subject to the testing requirements. Another issue that needs to be considered is what reliance sellers who have used the earlier test method can place on those tests. This issue becomes more critical given the retroactive impact of the statute. These issues are among many others presented by this less than clear statutory provision.

Today's vote is an effort to provide further interpretation of section 108 of the CPSIA concerning phthalates, specifically guidance concerning plasticized component part testing. While I am voting to advance this statement of policy, I am convinced we do not have adequate answers to such related and important phthalates issues as inaccessibility, retroactivity and reliance on previous agency guidance. I believe it is essential to have additional comment from affected stakeholders about this approach and fully endorse having a 30 day comment period. My fellow Commissioners and I should then craft a solution to effectively implement this provision without unnecessary costs and avoidable confusion.