UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

BALLOT VOTE SHEET

DATE: FEB 5 2009

TO: The Commission
Todd A. Stevenson, Secretary

THROUGH: Patricia Semple, Executive Director PS
Cheryl A. Falvey, General Counsel CAF

FROM: Lowell F. Martin, Attorney M

SUBJECT: Draft Statement of Commission Enforcement Policy on Section 101 Lead Limits

Ballot Vote Due: FEB 6, 2009

The Director of the Office of Compliance and Field Operations has prepared for Commission consideration the attached draft *Statement of Commission Enforcement Policy on Section 101 Lead Limits* in view of the fact that the first requirement on the total lead content of children's products -- 600 parts per million -- mandated by paragraph 101(a)(2) of the Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314, 122 Stat. 3016, becomes effective on February 10, 2009.

Please indicate your vote on the following options.

I. Adopt the enforcement policy as drafted.

(Signature) (Date)

II. Adopt the draft enforcement policy with changes. (Please specify.)

(Signature) (Date)

CPSA 6(b)(1) CLEARED for PUBLIC
NO MFRS/PRVTLBLRS OR PRODUCTS IDENTIFIED 7/8/09

__EXCEPTED BY: PETITION RULEMAKING ADMIN. PRCDG

__WITH PORTIONS REMOVED: _____

Note: This document has not been reviewed or accepted by the Commission.
Initials rl Date 2/5/09

III. Do not adopt the draft enforcement policy.

_____ _____

(Signature) (Date)

Attachment: Draft *Statement of Commission Enforcement Policy on Section 101 Lead Limits*

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Memorandum

Date: February 5, 2009

TO : The Commission
Todd Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel CAF
Patricia M. Semple, Executive Director PS

FROM : J. Gibson Mullan, Assistant Executive Director JGM
Office of Compliance and Field Operations

Mary F. Toro, Director, Regulatory Enforcement MFT

SUBJECT : Enforcement Policy

Transmitted herewith for Commission approval is a proposed "Statement of Commission Enforcement Policy on Section 101 Lead Limits."

Note: This document has not been reviewed or accepted by the Commission.
Initials rl Date 2-5-09

CPSA 6(b)(1) CLEARED for PUBLIC
2/5/09
NO MFRS/PRVTLBLRS OR PRODUCTS IDENTIFIED

EXCEPTED BY: PETITION RULEMAKING ADMIN. PRCDG

WITH PORTIONS REMOVED: _____

STATEMENT OF COMMISSION ENFORCEMENT POLICY ON SECTION 101 LEAD LIMITS

Effective on February 10, 2009, section 101 of the Consumer Product Safety Improvement Act sets new limits on lead content in any children's product as defined in the Act. Generally, beginning on February 10, 2009, any children's product that contains more than 600 parts per million (ppm) of lead in any part that is accessible will be treated as a banned hazardous substance.

The term "children's product" is defined by the Act to mean any consumer product that is designed or intended primarily for children 12 years of age or younger. Congress set out four factors that must be considered in determining whether a consumer product is primarily intended for children 12 and under. A statement of the manufacturer's intent concerning the appropriate age for users of the product is one factor to be considered if the statement is reasonable.

In section 101, Congress made clear that the lead limits apply not only to products manufactured after the effective date, but also to products manufactured earlier. In August, these limits will drop to 300 ppm and will be reduced again in 2011 to the lowest level that is technologically feasible.

Congress gave the Commission only limited authority to grant relief from the new lead limits. The Commission has taken steps to exercise that authority through rulemaking, but that process cannot be completed before February 10, 2009 in most cases. The purpose of this statement, therefore, is to set forth the enforcement policy of the Commission that will prevail on February 10, 2009.

1. Accessibility

Under section 101(b)(2), the new lead limits do not apply to component parts that are not accessible to a child through normal and reasonably foreseeable use and abuse of a children's product. A component part is deemed not accessible if it is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product; however, paint and other similar coatings or electroplating may not be considered to be a barrier that makes underlying components inaccessible.

Congress directed the Commission to promulgate a rule providing guidance on inaccessibility by August 14, 2009. The Commission issued a proposed inaccessibility rule for comment on January 6, 2009. 74 Fed. Reg. 2439 (Jan. 15, 2009).

Until the inaccessibility guidance is finalized, the Commission staff will accept a manufacturer's determination that a part is inaccessible if it is based on a reasonable interpretation of section 101(b)(2). Otherwise, the Commission staff will make its own determination of inaccessibility, following the approach outlined in the proposed rule.

2. Electronics

Under section 101(b)(4) of the Act, Congress authorized the Commission to promulgate rules establishing alternative lead limits for certain electronic devices. The Commission issued a proposed rule addressing electronics on January 6, 2009. 74 Fed. Reg. 2435 (Jan. 15, 2009). To date, the Commission has received no comments from the public in opposition to the approach proposed there. The Commission therefore intends to issue an interim final rule in this proceeding on or before February 10, 2009. The limits established in the interim rule will apply unless and until they are revised by the Commission after consideration of all public comments on the proposal. It is the Commission's intent that the interim final rule be effective February 10, 2009 so as to prevent unnecessary removal from inventory of children's products due to electronic components exceeding 600 ppm but not exceeding the alternative limits proposed by the Commission.

3. Exclusions

Congress authorized the Commission to grant exclusions by regulation to materials or products containing more than 600 ppm of lead, but only if it determines, after notice and a hearing, and based on the best-available, peer-reviewed, scientific evidence that lead in such product or material will neither result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, nor have any other adverse impact on public health or safety.

Congress obviously established a very demanding standard for such exclusions. Indeed, the Commission staff is not yet aware of any substance as to which the required showing can be made. Nevertheless, the Commission has issued a proposed rule setting forth an application process for these exclusions. 74 Fed. Reg. 2433 (Jan. 15, 2009). While the Commission may refine the proposed process based on comments received, the process described in the notice of proposed rulemaking will be used unless and until it is amended by final rule.

4. Materials Whose Lead Content Is Consistently Below Prescribed Limits

The Commission staff has begun to identify materials whose lead content is consistently below the limit of 300 ppm (the limit that becomes applicable in August 2009). These include certain natural materials, such as wood, cotton, and wool, as well as certain metals and alloys. The Commission has issued a notice making preliminary determinations as to these and other materials for public comment. 74 Fed. Reg. 2433 (Jan. 15, 2009).

Until the Commission promulgates a final rule announcing its determinations on these materials, the Commission's Office of Compliance shall not prosecute any person for manufacturing, importing, distributing, selling or offering for sale a children's product on the basis that it contains more than 600 ppm lead in any material as to which the Commission has made a preliminary determination in the January 15, 2009 proposed rule unless the Director of Compliance finds that (1) such person had actual knowledge that the product contained more than 600 ppm lead in such materials; or (2) continued to manufacture, import, distribute or sell such children's product after being put on notice of its lead content by the Commission staff. The Compliance staff will seek corrective action to protect consumers where appropriate. If the Office of Compliance learns of any instance in which reliable test data shows that any of the materials described in the Commission's proposed rule contains more than 300 ppm lead, it will promptly communicate that information to the Office of Hazard Identification and Reduction, which will take that information into account in developing final determinations with respect to such materials.

5. Product Classes Whose Lead Content Is Consistently Below Lead Limits

The Commission staff has begun to identify classes of children's products whose lead content appears to fall consistently below the prescribed limits. The staff is not aware of a single documented case in which a product falling within one of the following classes contained total lead above 300 ppm:

- Ordinary children's books[1] printed after 1985
- Dyed or undyed textiles (not including leather, vinyl or PVC) and non-metallic thread and trim used in children's apparel and other children's fabric products such as baby blankets. This class does not include such products if: (1) they have undergone further treatment that may impart lead (2) they are ornamented with metal, rhinestones or other objects; or (3) they have plastic or metal fasteners with possible lead content (such as snaps, grommets, zippers, or buttons)

Upon completion of the staff's investigation of these product classes, the Commission intends to issue guidance addressing them in greater detail. In the meantime, the Commission's Office of Compliance shall not prosecute any person for manufacturing, importing, distributing, selling or offering for sale a children's product (or part thereof) that falls within the two classes described above on the basis that it contains more than 600 ppm lead unless the Director of Compliance finds that (1) such person had actual knowledge that the product contained more than 600 ppm lead; or (2) continued to manufacture, import, distribute or sell such product after being put on notice by the Commission staff. The Compliance staff will seek corrective action to protect consumers where appropriate. If the Office of Compliance learns of any instance in which reliable test data shows that a product belonging to either of these two classes contains more than 300 ppm lead, it will promptly communicate that information to the Office of Hazard Identification and Reduction, which will take that information into account in developing final guidance on the product class.

[1] The term "ordinary book" in this context means one that is published on cardboard or paper printed by conventional methods and intended to be read. It excludes children's books that have plastic, metal or electronic parts.

6. Reporting Excess Lead Content in Children's Products

Section 214 of the Consumer Product Safety Improvement Act amended section 15(b) of the Consumer Product Safety Act to expand the types of violations that must be reported to the Commission. Under section 15(b) as amended, any manufacturer (including an importer), distributor or retailer must report to the Commission immediately if it obtains information that reasonably supports the conclusion that a product fails to comply with a standard or ban under any Act enforced by the Commission. Accordingly, manufacturers, distributors and retailers must report to the Commission if they become aware of a children's product that exceeds the applicable lead limits in any accessible part (including the higher limits for certain electronic components and devices) and that is being manufactured for sale in the United States, imported for sale, distributed, held for distribution or sale, offered for sale, or sold after February 10, 2009.

7. Exports of Children's Products Containing Excessive Lead

Section 216 of the Consumer Product Safety Improvement Act amended section 19 of the Consumer Product Safety Act to make it unlawful to export for sale any banned hazardous substance (except for certain products that are manufactured for export and for products stopped at the ports and allowed to be re-exported by the Secretary of the Treasury). This provision generally precludes the export for sale of children's products exceeding the applicable lead limits after February 10, 2009. The Commission must be notified more than thirty days in advance of exports for other reasons (such as exports for destruction) so that it can notify other governments of the matter.

8. Testing and Certification

Section 102 of the Consumer Product Safety Improvement Act expanded the applicability of section 14 of the Consumer Product Safety Act to require certifications of compliance with most CPSC standards and bans. In the case of children's products, Congress established a schedule under which all required certifications will eventually have to be based on testing by an accredited laboratory.

On January 30, 2009, the Commission voted to stay enforcement of most of these broader testing and certification requirements for a limited period. This stay makes it unnecessary for any regulated party to test or certify

compliance with the lead limits of section 101 provisions before February 10, 2010 with two exceptions. First, children's products that are manufactured after December 21, 2008 and bear paint or a similar surface coating must certify, based on testing by an accredited laboratory, that the paint or surface coating does not contain more than 600 ppm lead. This limit on lead in paint will drop to 90 ppm for products manufactured after August 14, 2009, and such products will need to be certified accordingly. Second, for children's metal jewelry manufactured after March 23, 2009, the domestic manufacturer or importer will have to certify, based on testing by an accredited laboratory, that no metal part contains more than 600 ppm lead. This limit will drop to 300 ppm for children's jewelry manufactured after August 14, 2009 and will require certification to that level.

9. Effectiveness

This Statement of Commission Policy will apply according to its terms, from the date issued by the Commission until revoked, modified or superseded by Commission vote.