



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

VOTE SHEET

DATE: DEC 15 2009

TO: The Commission
 Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel *CAF*
 Maruta Budetti, Executive Director *myb*

FROM: Philip L. Chao, Assistant General Counsel *[Signature]*

SUBJECT: *Federal Register* Notice: "Interim Enforcement Policy on Component Testing and Certifications of Children's Products and Other Consumer Products to the August 14, 2009 Lead Limits"

The Office of the General Counsel is providing a draft *Federal Register* notice that would announce the Commission's interim enforcement policy with regard to the testing and certification of consumer products to the lead paint and lead content limits that took effect on August 14, 2009. This supersedes the package provided to you on November 3, 2009.

Please indicate your vote on the following options.

I. Issue the *Federal Register* notice as drafted.

 (Signature)

 (Date)

II. Do not issue the *Federal Register* notice.

 (Signature)

 (Date)

~~FSA 6(b)(1) CLEARED for PUBLIC~~

~~NO MFERS PRVT LBLRS OR PRODUCTS IDENTIFIED~~

~~EXCEPTED BY: PETITION RULEMAKING ADMIN. PRCDG~~

~~WITH PORTIONS REMOVED~~

CPSC Hotline: 1-800-638-CPSC(2772) H CPSC's Web Site: <http://www.cpsc.gov>

Note: This document has not been reviewed or accepted by the Commission.
 Initials RA Date 12/15/09

III. Issue the *Federal Register* notice with changes. (Please specify.)

(Signature)

(Date)

IV. Take other action. (Please specify.)

(Signature)

(Date)

Attachment: Draft *Federal Register* notice titled, “Interim Enforcement Policy on Component Testing and Certifications of Children’s Products and Other Consumer Products to the August 14, 2009 Lead Limits”

CONSUMER PRODUCT SAFETY COMMISSION

Interim Enforcement Policy on Component Testing and Certification of Children's Products and Other Consumer Products to the August 14, 2009 Lead Limits

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission ("CPSC," "Commission," or "we") is announcing an interim enforcement policy regarding component testing and certification of children's products and other consumer products to the 90 parts per million (ppm) lead in paint limit and to the 300 ppm lead limit for children's products established in section 101 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

DATES: The interim enforcement policy is effective on [insert date of approval by the Commission].

FOR FURTHER INFORMATION CONTACT: John "Gib" Mullan, Assistant Executive Director for Compliance and Field Operations, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail jmullan@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

This statement sets forth the Commission's interim enforcement policy with regard to testing and certification of consumer products to the lead paint and lead content limits that took effect on August 14, 2009. It states the circumstances under which

domestic manufacturers or importers may certify children's products as in compliance with lead limits based on testing, at different times, of components or paints used on those products. As explained more fully below in part V of this document, a domestic manufacturer or importer may certify compliance with lead limits if, for each accessible component and each type of paint used on a product, it either obtains passing test results from a recognized third-party test laboratory or holds a certificate from another person based on passing test results from a recognized third-party test laboratory.

To make it easier for interested parties to understand the interim enforcement policy's provisions and how certain provisions interact with others, we have numbered each paragraph in the interim enforcement policy.

II. Lower Limits for Lead in Paint and in Children's Products

1. On August 14, 2009, the limit for lead in paint and similar surface coatings was reduced from 600 parts per million (ppm) to 90 ppm. Section 101(f)(1) of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law No. 110-314 (Aug. 14, 2008) required the Commission to modify its pre-existing regulation banning lead in paint by decreasing the applicable limit to 90 ppm (see 73 FR 77492 (Dec. 19, 2008)). To simplify discussion, we use the term "paint" broadly herein to include any type of surface coating that is subject to 16 C.F.R. part 1303. The new lower limit applies not only to paint sold to consumers as such (for example, a gallon of paint sold at a hardware store), but also to any paint on toys or other articles for children and to any paint on certain household furniture items (not limited to children's furniture). See 16 C.F.R. part 1303.

2. Also on August 14, 2009, the general limit for lead in any accessible part of a children's product was reduced from 600 ppm to 300 ppm (see section 101(a)(2)(B) of the CPSIA). In this context, the term "children's product" means any consumer product that is designed or intended primarily for children 12 years of age or younger (see 15 U.S.C. § 2052(a)(2)). 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 not determinative, but must be considered as one factor if it is reasonable. The Commission has promulgated a final rule for determining when parts of a children's product may be deemed inaccessible (see 74 FR 39535 (August 7, 2009)).

3. The Commission has established higher lead content limits for certain electronics components of children's products and has exempted certain other electronics components, such as cathode ray tubes, altogether (see 74 FR 6990 (February 12, 2009)). The Commission has denied exemptions in all other cases that have come before it to date, but it has temporarily stayed enforcement of the applicable lead content limits for certain metal components of youth motorized vehicles and youth bicycles (see 74 FR 22154 (May 12, 2009) (stay of enforcement pertaining to youth motorized recreational vehicles)); 74 FR 31254 (June 30, 2009) (stay of enforcement pertaining to youth bicycles and related products)).

4. Beginning on August 14, 2009, it became unlawful to sell, offer for sale, manufacture for sale, distribute in commerce or import into the United States any product that is subject to the new lead limits, but fails to comply, regardless of when the product was

made. Under section 101(a)(1) of CPSIA, any children's product containing lead above the limit is to be treated as a banned hazardous substance under the Federal Hazardous Substances Act. It is unlawful for any person to sell, offer for sale, import or distribute a banned hazardous substance (see 15 U.S.C. § 2068(a)(2)(D); see also 15 U.S.C. § 1263(a)). Products that do not comply with the applicable lead limits are classified as banned hazardous substances and thus are also subject to export restrictions (see 15 U.S.C. § 2068(a)(15)(A)).

III. Certification Requirements and Effective Dates

5. Any children's product that bears paint and is manufactured after August 14, 2009 must be certified as in compliance with the 90 ppm lead limit (see 15 U.S.C. § 2063(a)(2) and (a)(3)(B)(i)). The certification must be based on testing by a third-party conformity assessment body listed on CPSC's website as qualified to test for lead in paint (see <http://www.cpsc.gov/cgi-bin/labapplist.aspx> and use the "Narrow the Laboratory List" function to identify conformity assessment bodies that are accredited to a specific scope). For convenience, we use the term "third-party test lab" as shorthand for "third-party conformity assessment body." In addition, we refer to a third-party test lab as "recognized" when it has been listed on CPSC's website as qualified to test products for compliance with a particular standard, ban or regulation.

6. The testing and certification requirements for paint sold as such and for consumer products that are subject to the lead paint limits but are not intended primarily for children age 12 and younger (such as certain household furniture items) were stayed by vote of the Commission on January 30, 2009 (see 74 FR 6396 (February 9, 2009)). With

respect to these products, the stay of enforcement relating to the lead in paint limit will be lifted as of February 10, 2010. Accordingly, such products, if manufactured after that date, will have to be certified to the 90 ppm limit based on a test of each product or a reasonable testing program (see 15 U.S.C. § 2063(a)(1)(A)).

7. Children's metal jewelry that is manufactured after August 14, 2009 must be certified as in compliance with the 300 ppm limit on lead in any accessible metal part. (The stay of enforcement discussed in paragraph 6 does not apply to the certification of metal components of children's metal jewelry.) The Commission has promulgated guidance for determining when a part is inaccessible (see 74 FR 39535). Neither paint nor electroplating may be considered as making underlying materials inaccessible (see section 101(b)(3) of the CPSIA). The certification must be based on testing by a third-party test lab listed on CPSC's website as qualified to test for lead in children's metal jewelry (see <http://www.cpsc.gov/cgi-bin/labapplist.aspx> and use the "Narrow the Laboratory List" function to identify conformity assessment bodies that are accredited to a specific scope). If the children's metal jewelry bears paint, it must also be certified as in compliance with the 90 ppm limit, as discussed in paragraph 5.

8. The Commission has determined that some materials, by their nature, will never exceed the lead content limits. These include many natural materials such as gemstones, wood, cotton and wool, as well as certain refined metals and alloys. For a more complete list of such materials, see 74 FR 43031 (August 26, 2009). If all accessible parts of a children's product consist of such materials, then that product need not be tested or certified as in compliance with the lead content limits. The Commission recently issued a

“Statement of Policy on Testing and Certification of Lead Content in Children’s Products” (see 74 FR 55820 (Oct. 29, 2009)).

9. Children’s products other than those described in paragraphs 7 or 8 must be certified as in compliance with the 300 ppm lead content limit only if they are manufactured after August 10, 2010 and only as to accessible parts that are not subject to the Commission determination described in paragraph 8 above. Pursuant to section 14(a)(2) of the Consumer Product Safety Act (CPSA), the certification must be based on testing by a third-party test lab listed on CPSC’s website as qualified to test for lead in children’s products. The Commission has issued a notice of requirements for recognizing laboratories as qualified to test for lead content in children’s products (see 74 FR 55820 (October 29, 2009)).

10. By rule, the Commission has specified that products made within the United States must be certified by the domestic manufacturer; products made outside the United States must be certified by the importer (see 16 C.F.R. § 1110.7). Neither a foreign manufacturer nor a private labeler is currently required to certify compliance, but either may do so voluntarily.

IV. Certification to Lead Paint Limits Based on Testing of Paint Samples Not Obtained from the Final Product

11. In general, certification of children’s products must be based on testing of samples of the final product, in the same condition as it would be in when sold to a consumer, or samples that are “identical in all material respects” (see 15 U.S.C. § 2063(a)(2)(A) (manufacturer must provide a test lab with “sufficient samples of the children’s product

or samples that are identical in all material respects to the product”)). In the case of lead paint limits, the manufacturer of a children’s product can send samples of the final product to a test laboratory so that each type of paint may be scraped off and tested individually. Where small amounts of a particular paint are used, however, a large number of samples of the children’s product may be needed to obtain enough of that paint to test.

12. The Commission intends to issue rules addressing when certification may be based on testing of paints before they are applied to a product rather than based on testing of paints after they have been applied to such a product and then scraped off the product. Until issuance of such rules, and subject to paragraph 24, the Commission will permit certification of a children’s product as being in compliance with the 90 ppm lead paint limit if, for each paint used on the product, the domestic manufacturer or importer who certifies the product either has obtained a test report as described in paragraph 13 or holds a paint certificate as described paragraph 14. The certificate accompanying the children’s product should list each paint used, by color, location or other means, and for each paint, should identify the corresponding test report or paint certificate on which the product certification is based.

13. As part of its basis for certification of a children’s product to the 90 ppm lead in paint limit, a domestic manufacturer or importer may rely on a test report showing passing test results for one or more paints used on the product, based on testing either of them has commissioned from a recognized third-party test lab. The manufacturer of the children’s product should ensure that each paint sample sent to a third-party test lab is representative of that used on the final product. Test reports should identify each paint tested by color,

specification number or other characteristic, as well as the manufacturer of the paint and the supplier of the paint (if different).

14. As part of its basis for certification of a children's product to the 90 ppm lead in paint limit, a domestic manufacturer or importer may rely on a certificate from another person certifying that paint complies with the 90 ppm lead limit. The paint certificate must be based on testing of a representative sample of one or more paints conducted by a recognized third-party test lab. The paint certificate should identify all test reports underlying the certification, consistent with section 14 of the CPSA, 15 U.S.C. § 2063.

15. Any person who certifies a children's product as complying with the 90 ppm lead paint limit should be able to trace each batch of paint that is used on the product to the paint manufacturer. The product manufacturer should ensure that paints meeting the lead limits when tested and certified are not later contaminated with lead from other sources before or during application to the product.

16. To be "representative" for purposes of paragraphs 13 and 14, a paint sample need not be of the same quantity as is applied to the children's product nor must it be painted on the same substrate material; rather, it may consist of any quantity of paint that is sufficient for testing purposes, either in liquid form or in the form of dried film of the paint on any substrate. In all other respects, the sample should have the same composition as the paint used on the final product. For example, if the manufacturer of a children's product uses a drying agent that mixes with the paint, then the test sample should reflect that mixture.

17. For consumer products that are not children's products but are subject to lead paint limits (such as certain furniture items), a domestic manufacturer or importer may base its

certification to the 90 ppm lead paint limit (when required as explained in paragraph 6 above) on its own testing of each paint used on the product, on testing by any third-party test lab, on paint certification(s) from any person or on a combination of these methods.

V. Certification to Lead Content Limits for Children’s Metal Jewelry and Other Children’s Products Based on Component Testing

18. The Commission intends to issue rules addressing when children’s products may be certified to lead content limits based on testing of components separately from the final product. (The Commission staff has previously stated that it would accept certification of a children’s product to lead content limits based on testing of individual components in the case of products, such as building sets, which consist of an “assortment” of individual pieces. In such cases, the certificate should identify the test information for each piece.) Until such rulemaking is completed, subject to paragraph 24, the Commission will permit certification of a children’s product as being in compliance with the 300 ppm lead content limit (when required as discussed in paragraphs 7 and 9 above) if, for each accessible component of the product, the domestic manufacturer or importer who certifies the product either has obtained a test report as described in paragraph 19 or holds a component certificate as described in paragraph 20. The certificate accompanying the children’s product should list each component required to be tested by part number or other specification and for each such part, should identify the corresponding test report or component certificate on which product certification is based. The determination of which, if any, parts are inaccessible must be based on an evaluation of the final product, not of individual components.

19. As part of its basis for certification of a children's product to the 300 ppm lead content limit, a domestic manufacturer or importer may rely on a test report showing passing test results for one or more components used on the product, based on testing either of them has commissioned from a recognized third-party test lab. For each type of component to be tested, the manufacturer of the children's product should draw a random sample from the batch or lot of such components to be used in making the final product. Test reports should identify each component tested, by part number or other specification, as well as the manufacturer of the component and the supplier (if different).

20. As part of its basis for certification of a children's product to the 300 ppm lead content limit, a domestic manufacturer or importer may rely on a certificate from another person certifying that a component complies with the 300 ppm lead limit. The component certificate must be based on testing of a representative sample of the component(s) by a recognized third-party test lab. The component certificate should identify all test reports underlying the certification consistent with section 14 of the CPSA, 15 U.S.C. § 2063.

21. Any person who certifies a children's product as complying with the lead content limits should be able to trace each component of the product to the component's manufacturer.

22. To be "representative" of a component for purposes of paragraph 20, a sample need not be of the same size, shape or finish condition as the component of the final product; rather, it may consist of any quantity that is sufficient for testing purposes and in any form that has the same content as the component of the final product. For example, if a manufacturer receives plastic resins or compounds from a supplier in a raw state, such as

pellets, that are later molded into a component or a finished children's product in the manufacturing process, the manufacturer may send the third-party test lab samples of the plastic either in the form received or in their finished state. The manufacturer must take care, however, that the manufacturing process does not add lead from an untested source, such as the material hopper, regrind equipment, or other equipment used in the assembly of the finished product.

VI. Composite Testing

23. In testing paints for compliance with lead limits, third-party test labs may test a combination of different paint samples so long as they follow procedures ensuring that no failure to comply with the lead limits will go undetected. For an example of an acceptable methodology, see Test Method: CPSC-CH-E1003-09, Standard Operating Procedure for Determining Lead (Pb) in Paint and Other Similar Surface Coatings (April 26, 2009) (available on the Internet at <http://www.cpsc.gov/about/cpsia/CPSC-CH-E1003-09.pdf>). Similarly, third-party test labs may test a combination of plastic components or a combination of metal components so long as they follow procedures ensuring that no failure to comply with the lead limits will go undetected.

VII. Requirement that Reliance Be Reasonable

24. No person may rely on a test report, a paint certificate or a component certificate, nor certify a product based on such a test report or certificate, if such person knows, or in the exercise of due care has reason to know, that the test report or certificate is false or misleading in any material respect.

VIII. Enforcement Policy

25. A domestic manufacturer or importer who certifies a children's product as in compliance with lead limits based on component testing in accordance with this policy statement shall not be subject to civil or criminal penalties for failure to certify or for false certification on the grounds of having certified to such limits without submitting samples of the final children's product (i.e., the product in its entirety) for testing. A retailer or other seller of a product who holds a certificate based on component testing in accordance with this policy statement may rely upon it to the same extent as if it had been based on testing of the final product. Any person who issues a false or misleading certificate for any paint or component is subject to penalties.

IX. Disclaimer

26. Certification of a product in accordance with all conditions of this policy statement does not exempt any manufacturer (including an importer) from the duty to ensure that each product unit manufactured or imported complies with all applicable lead limits, nor from the duty to report to the Commission immediately should it obtain information which reasonably supports the conclusion that such product fails to comply with applicable lead limits.

X. Delegation

27. The Commission hereby delegates to the Assistant Executive Director, Office of Compliance and Field Operations, authority to implement this policy and to depart from

the policy in individual cases if warranted by unusual circumstances. The Assistant Executive Director shall notify the Commission promptly where he deems it advisable to depart from the policy in individual cases.

XI. Effective Dates

28. This interim statement of policy will take effect immediately upon approval by the Commission. It supersedes: (1) the “Statement of Commission Enforcement Policy on Section 101 Lead Limits” announced on February 6, 2009 (available on the Internet at <http://www.cpsc.gov/about/cpsia/101lead.pdf>); and (2) the “Interim Enforcement Policy for Children’s Metal Jewelry Containing Lead” issued February 3, 2005 (available on the Internet at <http://www.cpsc.gov/BUSINFO/pbjewelgd.pdf>). This interim policy shall remain in effect until it is revoked, modified or superseded by Commission vote.

Dated: _____

Todd A. Stevenson, Secretary

Consumer Product Safety Commission