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
Commissioner Anne M. Northup
Commissioner Robert S. Adler

ITEM:

Federal Register Notice: "Consumer Product Safety Act: Notice of Commission Action on the Stay of Enforcement of Certain testing and Certification Requirements Pertaining to Lead Content"
(Briefing Package dated December 16, 2009)

DECISION:

The Commission voted (4-1) to direct the staff to take other actions than the options presented by staff regarding the *Federal Register* Notice: "Consumer Product Safety Act: Notice of Commission Action on the Stay of Enforcement of Certain Testing and Certification Requirements Pertaining to Lead Content." Chairman Tenenbaum and Commissioners Moore, Nord and Northup voted to direct staff to revise the *Federal Register* notice with regard to lead content testing and certification, to strike the date of August 10, 2010, where it appears, and inserting in lieu thereof, the date of February 10, 2011. Commissioner Adler voted to direct the staff to prepare a *Federal Register* notice with regard to lead content testing and certification, with an indication that the stay will be lifted on August 10, 2010.

Chairman Tenenbaum and Commissioners Moore, Northup, Adler and Northup submitted the attached comments with their votes.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due December 17, 2009

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE STAY OF ENFORCEMENT OF TESTING AND CERTIFICATION REQUIREMENTS

December 17, 2009

As Chairman I believe that the Commission should act to prevent confusion within the regulated community and give consumers confidence in the safety of the products they purchase, especially those intended for children. To fulfill this goal, the Commission came together to announce what actions we intended to take with regard to the stay of enforcement, in advance of the original February 10, 2010 deadline. The Commission voted this week to extend the stay of enforcement of testing and certification requirements for many regulated children's products, including those subject to the lead content limits. I would like to sincerely thank the staff of the agency and the Commissioners' staffs who worked tirelessly over the past month to provide a timely decision for our stakeholders. Through the hard work of our staff, the Commission was able to reach a full consensus on most of the issues related to the stay of enforcement on testing and certification requirements.

The extension of the stay was needed in order to give the agency more time to promulgate rules important to the continued implementation of the CPSIA and for the agency to educate our stakeholders on the requirements of those new rules. The agency is actively seeking input from our regulated community, and we will continue to do so as we implement the CPSIA. The attendance of over 250 people at our recent testing workshop was highly encouraging, and it is my hope that our stakeholders will continue to be active partners in our implementation of the CPSIA.

The Commission also voted unanimously to approve an interim enforcement policy that allows component testing as a basis to demonstrate compliance with the new lead paint and lead content limits. It is hoped that component testing will prove to be a successful solution for certification to the new lead limits, especially for smaller businesses. To this end, I voted to extend the stay on lead content testing and certification until February 10, 2011, in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements. Although the stay on testing and certification requirements has been extended for many regulated children's products and component testing is now permissible, it is important to remember that all products have always and must continue to comply with all applicable standards and bans.

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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE FEDERAL REGISTER NOTICE OF COMMISSION ACTION ON THE STAY OF ENFORCEMENT OF TESTING AND CERTIFICATION REQUIREMENTS

December 17, 2009

I voted to extend the stay on testing and certification for a number of consumer products and to lift the stay on many others. Our staff has done yeoman's work in going through all of our many regulations, standards and bans to determine how the testing and certification requirements will affect the numerous products regulated by our agency. While I would have preferred a shorter extension of the stay on lead content, we cannot be certain how long it will take for a secondary market in lead-compliant components to develop and I do want to give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead-compliant materials. A one year extension, which is what many small businesses have requested, will provide them with that time.

I am not concerned about there being no final testing and certification rule (the so-called "15 month rule") in place prior to the lifting of the stay. A guidance document reflecting Commission thinking on testing and certification requirements was made public nearly two months ago. A revised version of that document, which will take into account the actions the Commission has just taken on component part testing for lead paint and lead content, and the revised stay of enforcement, will be released shortly. I would be surprised if the final rule on testing and certification differed dramatically from what the public has already seen. Most large and medium-sized manufacturers already have testing protocols in place that will meet many, if not all, aspects of the rule the Commission will ultimately issue, because both must be based on sound and safe business practices. For smaller manufacturers, the enforcement policy on component testing will relieve them of much of the testing burden once the stay is lifted in February of 2011. I believe the actions the Commission has taken reflect the common sense approach that the Congress has been urging us to apply to the statute as we attempt to balance our mission of protecting consumers with the need to allow industry time to adjust to the new, safer marketplace that Congress has mandated.

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STATEMENT OF COMMISSIONER NANCY NORD ON LIFTING THE STAY OF ENFORCEMENT ON TESTING AND CERTIFICATION MANDATED IN THE CPSIA

December 17, 2009

Today the Commission is taking very significant action to further implement those provisions of the CPSIA dealing with testing and certification. In the agreed-to Federal Register Notice (see CPSC website), we are setting out a schedule for lifting the stay of enforcement we adopted in February, 2009. This action impacts a number of different products in a number of different ways. However, the action that will be of most interest across industry lines is **our decision to extend for one additional year, until February 10, 2011, the stay on testing and certification to the lead content standards.**

The stay was needed because the deadlines set out in the CPSIA were wildly unrealistic and their enforcement would have resulted in even more chaos in the marketplace than we have already seen over the past year without increasing safety. Since the stay of enforcement did not negate the need to comply with the underlying requirements of the law, it provided relief to regulated industry without impacting consumer safety.

The stay was adopted so that the Agency would have the time to issue guidance and rules addressing what products must be tested, when testing is required and how it is to be conducted. Even thought agency staff has been working diligently, the issues presented are extraordinarily complex since the statute basically requires a reordering of the manufacturing processes for a vast number of industries. As a result, and in spite of our best efforts, many of those foundational rules are still under development. They must be finalized and given a chance to be absorbed by impacted industries before we lift the stay with respect to lead content testing.

Over the next year we must define what is a children's product since that will determine what products are subject to independent third party testing. Component testing offers the potential for reducing the cost and burden of the third party testing requirements while still addressing our concerns for safety. Therefore we must put those rules in place and assess whether component testing actually works to relieve the significant cost burdens the law places on small manufacturers and crafters. Finally, as Chairman Tenenbaum recognized at our meeting yesterday, we must adopt the "15 month" testing rule and allow adequate time for industry to implement it and that this action is a prerequisite for lifting the stay on lead content. I agree with the bipartisan majority on this.

The agency will need to work aggressively to complete this regulatory schedule within the next year. I stand ready to assist as our staff of seasoned (but severely overworked) professionals steps up to this challenge. I call on industry and other impacted stakeholders to help us accomplish this task and actively participate in the comment process.

Last but not least, it is important to note that our action extending the stay for lead content comports to the Congressional direction recently given us to minimize the burdens imposed on small businesses especially with respect to the enforcement of the lead provisions of the CPSIA. The entire commission is directed to come forward with suggested changes to make the CPSIA work better. Keeping the stay in place is in keeping with Congressional direction, and is keeping further unnecessary chaos from implementation of the CPSIA.

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COMMISSIONER ROBERT S. ADLER

December 17, 2009

STATEMENT OF COMMISSIONER ROBERT ADLER REGARDING THE STAY OF ENFORCEMENT OF CERTAIN TESTING AND CERTIFICATION REQUIREMENTS

On December 16, 2009, the Commission, by unanimous vote, agreed to modify the stay of enforcement on certain testing and certification requirements mandated by the Consumer Product Safety Improvement Act (CPSIA). I was delighted to see that, as a result of much hard work and careful deliberation, by the CPSC staff and the Commissioners' staff, such broad agreement was reached. As a result of this unanimous vote, a number of products will have the stay extended. A number of products manufactured after February 10, 2010, however, will be required to have certification based on independent third-party testing at CPSC-recognized laboratories. These include bike helmets, dive sticks, bunk beds, and rattles.

One issue is not so easily resolved. That pertains to the requirement in section 101(a) of the CPSIA that any "children's product" that contains more than 300 parts per million total lead content be treated as a banned hazardous substance. In order to demonstrate that any children's product meets the lead limits in section 101(a), firms must undertake third party testing by CPSC-recognized laboratories and must then issue a certificate indicating that the product meets the requirements of section 101(a).

On February 9, 2009, the Commission issued a stay of enforcement of the testing and certification requirements of section 102 of the CPSIA. (This section, among other things, requires third-party testing by CPSC-recognized laboratories of children's products.) The stated reason was the need to avoid chaos in the marketplace because the Commission had not had time to provide guidance to the business community regarding a number of issues, including whether testing to demonstrate compliance had to be conducted on the final product or whether suppliers could test and certify components used in children's products. With its December 16 vote, I believe the Commission has addressed this point and most of the other factors used to justify the stay.

Today I voted to direct the CPSC staff to prepare a *Federal Register* notice with regard to lead content testing and certification indicating that the stay will be lifted on August 10,

2010. While I had originally hoped the Commission and the marketplace would both be prepared for the lifting of this stay of enforcement, after thorough consultation with CPSC staff and stakeholders in both industry and the public health community, I believe an extension of another six months is necessary to permit market adjustments, especially with respect to the testing and certification by the suppliers of components.

I respectfully disagree, however, with my colleagues who have chosen to extend the stay beyond August 10, 2010. While there will be some disruption in the marketplace no matter which date is chosen, no hard evidence has been brought to my attention that would require an even longer extension of this stay than two years from the passage of this landmark legislation. I recognize that others feel differently.

One of the primary rationales advanced for extending the stay is to await the effective date of the so-called 15-month rule. (This is the rule with respect to continuing testing under section 14(d)(2) of the Consumer Product Safety Act.) At the Commission meeting yesterday, I opined that it would be helpful for the expiration of the stay to be linked to the 15-month rule. Upon further consultation with CPSC staff and a full consideration of the matter, I no longer believe that these two should be linked.

To await the effective date of the 15-month rule before lifting the stay risks the stay being repeatedly and endlessly extended because of unforeseen delays in drafting the 15-month rule. This is problematic for a number of reasons, including an ongoing lack of confirmation that products are in compliance with section 101(a). Congress added testing and certification requirements for a reason, and the sooner they are in place, the sooner the public will have confirmation of the safety of the products they buy.

Moreover, the 15-month rule and the lifting of the stay have less in common than may appear upon first impression. I believe this for a number of reasons:

- Congress never linked the 15-month rule to when the lead limits in the CPSIA were to become effective. In fact, Congress mandated that lead limits be lowered beginning 180 days after enactment of the CPSIA, well before the 15-month rule was likely to become effective. The only linkage that Congress imposed in the CPSIA was with respect to the accreditation of third party laboratories. This has been done. As of today, there are a number of fully-accredited laboratories capable of testing children's products for lead content and there are likely to be more as of August 10, 2010.

- When the Commission issued the stay on February 9, 2009, it refused to extend the stay to lead in paint, full-size and non-full size cribs, small parts, metal components of children's metal jewelry (which expressly included limits on lead), certifications expressly required by CPSC regulations, certifications of compliance required for ATV's in section 42(a)(2) of the CPSA (added by CPSIA) and flammable fabrics voluntary guarantees. Needless to say, the 15-month rule was not in effect at that time nor did the Commission indicate that the stay should be extended to these products because of the 15-month rule.

- One of the items approved unanimously by the Commission on December 16, 2009, was to lift the stay with respect to bike helmets, dive sticks, bunk beds, and rattles. If finalizing the 15-month rule were critical to extending the stay for lead content in children's products, one would think that it would be equally important for lifting the stay for these products. Yet, there were no objections to lifting the stay because of the absence of the 15-month rule.

- Most manufacturers already test and certify their products for quality assurance reasons and would do so irrespective of the requirements of the 15-month rule. In fact, most large retailers have required their suppliers to test and certify to the lead content requirements for many months irrespective of the Commission's stay. This rule will provide some guidance for companies, but will likely not require major modification of the programs they already have in place to assure compliance with the CPSC. Moreover, extending the stay based on the 15-month rule could be seen as creating a competitive disadvantage for firms that test and certify before the Commission has directed them to do so (perhaps based, in part, on those firms' anticipation that the stay would be lifted in February 2010), and a disincentive for other firms to test and certify before being directed to do so.

- Section 14(d) of the CPSA, which is the heart of the 15-month rule, pertains to *continuing* testing rather than *initial* testing for certification purposes. The two types of testing are only marginally related and need not be linked. The stay relates only to the initial testing required under the CPSIA.

- Developing and implementing the 15-month rule will require extensive time, resources and analysis. Although it is possible that the rule will become effective before the stay expires, it is equally likely that the 15-month rule may still be under consideration upon the expiration of the stay. There is no need to have one be the trigger for the other. I know of no company that has indicated that it will withhold production until the 15-month rule becomes effective.

- The Interim Enforcement Policy on Component Testing and Certification (of Lead and Content) that we issued yesterday will address the largest set of concerns raised by the manufacturing community regarding testing and certification. Now that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner.

Commissioner Robert S. Adler	December 17, 2009 Date

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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE REVISION OF TERMS OF THE STAY OF ENFORCEMENT OF CERTAIN TESTING AND CERTIFICATION REQUIREMENTS OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

December 17, 2009

Justice Louis Brandeis, after whom the law school in my hometown of Louisville, Kentucky is named, wrote: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." That sentiment perfectly describes the problem with the Consumer Product Safety Improvement Act of 2008. The Congress which passed the CPSIA meant well, but it lacked understanding of the dire consequences that enactment of this law would entail. And while the danger to liberty lurking in this law remained hidden from all but a few at the time of its enactment, it is now readily apparent to all. Much work remains to be done by this Commission and the Congress to prevent the insidious encroachment of regulations that would impose enormous costs for negligible improvements in children's product safety. However, today's vote is the first step in the right direction, and I am pleased to support it.

At yesterday's public meeting of the Commission, I proposed to carve out the decision on lifting the stay on lead content. I did this because I wanted to vote with the other Commissioners after working for many weeks to reach consensus with them on all but one of the issues regarding lifting the stay on testing and certification, and I appreciate their courtesy in agreeing to my request. I also hoped to be able to take advantage of the extra day to persuade my fellow Commissioners to join me in voting to postpone lifting the stay on lead content until six months after publication of the so-called 15-month rule. I was particularly encouraged by Chairman Tenenbaum's statement at the meeting that she would never lift the stay until the 15-month rule has been completed. Of course lifting the stay too soon after publication of the rule would still come as cold comfort to businesses that would lack time to prepare for its implementation.

Chairman Tenenbaum then proposed an alternative fixed date for lifting the stay of February 10, 2011. Although I would prefer to tie the lifting of the stay on testing and certification for lead content explicitly to some defined period of time after completion of the 15-month rule, I am willing in the spirit of compromise to accept the Chairman's proposal for three reasons: 1) I believe the 15-month rule can be completed in time to give the regulated community something close to six months to prepare for it; 2) The new deadline responds to Congress' recent overture seeking the Commission's advice on amending the law by giving the legislature one more year to revisit and fix it; and 3) Practically speaking, a February 2011 deadline is far preferable to the alternative August 2010 deadline that would have prevailed absent this agreement.

Before discussing these reasons, I want to emphasize that no children will be harmed by extending the stay for lead content. As was the case when the stay was implemented, it only applies to testing and certification. All products must already abide by the statutory lead limit of 300 ppm. Large retailers are

already requiring their merchandise to be tested at retailers' labs. In some cases, because different retailers require suppliers to use different test labs, the CPSC's required test would be the third, fourth, or fifth nearly identical test on the same product. It makes no sense for the agency to tout—as it has many times in recent weeks—that consumers are safer than ever before, and then rush testing and certification requirements for which there is no pressing need. In contrast, the costs of lifting the stay this February (or even in August) would be quite high. Unless altered, the requirement to test and certify compliance to the lead limit may shutter many small businesses permanently and not improve safety. The difference between the non-existent harm done by keeping the stay in place and significant harm done by lifting the stay for lead content argues strongly against lifting the stay until February 2011. Furthermore, it is worth reinforcing once again that we are not necessarily talking about products that pose a risk to children. A "non-compliant" product in the case of lead content could mean a product that poses no safety hazard for a child but that has lead in the substrate (*e.g.*, bicycles, brass musical instruments, the brass axle collar of a toy car, the imprinted ink on a children's t-shirt, the zipper on a child's pair of jeans). Even though the lead is not bio-available, the product would still be in violation of the CPSIA.

The Importance of Waiting for the 15-Month Rule

Numerous products never before regulated by any government agency including the CPSC fall within the ambit of the CPSIA, particularly its lead and phthalate restrictions. Hence—unlike what is usually the case when we issue new regulations—many of the individuals and businesses affected by the CPSIA are not accustomed to adapting their internal processes quickly to comply with new rules. This group includes both low-volume producers as well as industries like book publishing that have generally been exempt from consumer product regulations. For this reason, it makes sense for the Commission to be especially sensitive to the impact the timing of its regulations will have.

Even for larger companies used to dealing with consumer product regulations, lifting the stay on testing before the 15-month rule has been in place for an adequate time period would force them to change their compliance management processes twice in quick succession and thereby incur additional retraining expenses. Internal briefings have informed me that the 15-month rule will be complicated and more difficult with which to comply than the current reasonable testing program standard. For this reason, the 15-month rule could very well make the testing processes adopted at many companies before the 15-month rule obsolete. It would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing to publish the 15-month rule and then lift the stay shortly thereafter (let alone lift the stay and then later impose the 15-month rule). We should not callously disregard the unnecessary disruptions caused by the order in which we issue our rules. Rather than dismiss these genuine concerns, we should keep the stay in place until well after the 15-month rule goes into effect.

Indeed, part of the justification given when the original one-year stay was put into place last February was that the 15-month rule would come out in the interim. This order of proceeding is no less significant now than it was then. In fact the argument is even stronger today than it was then, because the agency's previous action has created the expectation within the regulated community that issuance of the 15-month rule would precede the lifting of the stay. Today's vote should mean that the rule will have been issued well before the time the stay lifts. Nor is it just the 15-month rule that would be out of sequence. The Commission also has not defined more precisely what counts as a children's product, and it should do that before the stay lifts. If Congress adopts other statutory fixes in the interim, then the agency may need to define other terms before a stay could lift as well.

As part of the 15-month rule process, we will have the opportunity to consider whether any rules or enforcement priorities can differ according to the size or volume of business. The agency has considered—and thus far rejected—options for lifting the stay at a later stage for small businesses, microbusinesses, or low-volume businesses, but I would like the opportunity to consider whether we can define "low-volume business" in the enforcement context. I am also fleshing out a proposal under which certain rules would apply only once a product enters certain channels of distribution. Today's vote allows time to fully consider and construct such an alternative scheme rather than force premature adoption of a one-size-fits-all plan without apparent regard for the harsh—indeed fatal—consequences for many small businesses.

Responding to Congress' Overture

In meetings with Senators in conjunction with my confirmation process, every Senator with whom I met—Republican and Democrat alike—let me know they would expect that as a Commissioner I would tell them whenever I came across something in the law that needed to be amended or improved or that just was not workable. Some Members said they thought or hoped the Consumer Product Safety Improvement Act contained sufficient flexibility so that it could be implemented in a reasonable way. But if not, they requested that I go to them with any problems that needed to be fixed. Since the CPSIA passed, the CPSC has received dozens of letters from Members of Congress on both sides of the aisle requesting that the law be implemented in as flexible a manner as possible. Some of these letters were quite hostile in expressing the view that the Commission has failed to use the flexibility contained in the law.

So, in November, I argued for a legally viable interpretation of the law under the Commission's current statutory authority. Because the brass lead petition would set a precedent for how the Commission would deal with an entire class of exemptions, I fought for a *de minimis* interpretation of the word 'any' that would have allowed for consideration of the level of absorbability of lead. This interpretation would have given meaning to an exemption contained in the statute, and it would have allowed the Commission to concentrate resources on regulating products with true safety risks. Despite my best efforts, I lost the battle to meet Congress' request to take a flexible and reasonable approach to the CPSIA.

At that time, the Chairman also ruled my motion out of order to have the Commission jointly send a letter to Congress asking it to at least clarify the law and reaffirm that Congress intended not to have any allowance for *de minimis* (or not bio-available) lead content—or to seek any sort of reasonable allowance for products that pose no real harm to children. The Democrat Commissioners subsequently made clear they did not want to inform Congress on the issues dividing the Commission nor openly seek changes to the law nor even seek input from the Office of Management and Budget. They refused to sign a letter to Congress later that same month seeking guidance on the *de minimis* issue.

Although the Commission refused to reach out to Congress, Congress has now reached out to the Commission. The Congress has expressly asked (yet again) in writing through report language in the FY 2010 Financial Services Appropriations bill that the Commission report to Congress in short order:

> The conferees ... are aware of concerns surrounding implementation of certain aspects of the law. The conferees believe there may be parts of some products subject to the strict lead ban under section 101(a) of the CPSIA that likely were not intended to be included. ... The conferees urge the CPSC to continue

> considering exemptions under section 101(b) of the CPSIA for parts of products that, based on the CPSC's determination, present no real risk of lead exposure to children. The conferees are also aware of concerns among small manufacturers and crafters regarding the third-party testing requirements under section 102 of the CPSIA and urge the CPSC to consider those when issuing rules and guidance on third-party testing. . . . . The CPSC is directed to assess enforcement efforts of section 101(a), including difficulties encountered, as well as recommendations for improvement to the statute, and to report to the House and Senate Appropriations Committees, as well as the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee, *no later than January 15, 2010.* (emphasis added)

Given that Congress has requested feedback from the Commission in the very near future regarding recommendations to change the law, it would be tone deaf at best to pre-empt consideration of possible statutory changes by establishing an August 10, 2010 date for lifting the stay for lead content. A number of possible modifications to the law could provide relief to domestic small businesses that make safe products but would not be able to afford to comply with CPSIA's testing and certification requirements. Lifting the stay for lead content without providing adequate time for exploration of potential legislative improvements or clarifications in this area would make no sense. We would be prematurely putting more small companies out of business while there's still a glimmer of hope to address the law's unintended consequences.

In justification of the stay issued February 10, 2009, the CPSC noted that it had received "innumerable inquiries seeking relief from the expense of testing children's products that either may not contain lead or may be subject to exemptions that the commission may announce in the near future as a result of ongoing rulemakings[.]" One of those rulemakings involved procedures for seeking exclusions from otherwise applicable limits on lead content of children's products. However, since implementing those procedures, the Commission has rejected every single petition seeking exclusion. If it made sense to implement the original stay in part because such a rule offered the hope that some products would thereby be spared the cost of complying with the lead limits, it makes even more sense to keep the stay in place while Congress actively considers amendments to the statute that would succeed where the petitions have failed. Jumping the gun by imposing an August deadline before submitting our proposed amendments to the Hill would show little regard for Congress' intent to revisit the topic. It would also send a message to the regulatory community that the Commission does not plan to seriously entertain Congress' request. Intentionally or not, it would convey the sense that the Commission will run interference on any effort to make the statute more reasonable, more risk-based, and more consistent with advancing safety.

Although today's vote delays for one more year the full impact that will be felt from this law, it still lights the fuse on implementation of a testing and certification regime that promises virtually no increase in consumer safety while imposing massive costs. My hope and expectation is that today's vote signals a genuine openness on the part of those Commissioners in the majority to proposing a wide-ranging set of CPSIA amendments to Congress when we submit our report next month. If instead the Commission majority intends to ignore the unintended consequences of the CPSIA, despite the letters and calls we have received from Congress and despite the informative feedback from all the businesses that travelled to DC to discuss the law's requirements at our two-day workshop last week, then today's vote will not have amounted to much.

Furthermore, if that happens, then this Commission will rightfully bring down on its head a flood of criticism. Up until now the Commission has been engaged in a classic standoff with Congress. The legislature has pointed a finger at the agency for interpreting its statute inflexibly, and the agency has in turn pointed a finger at the Congress for writing an inflexible statute. But now that Congress has asked for fixes, the onus is on us to argue successfully for amendments that will make the CPSIA more workable. Should we fail to do that, it would turn the high costs and low benefits obtained by this statute into the fault of the majority of this Commission—not Congress any longer.

Waiting for the Definition of a Children's Product

In addition to waiting for the 15-month rule, the Commission should not lift the stay when it has not yet identified a consistent, non-arbitrary way to exclude children's products from the testing and certification requirement for lead content, because doing so will invite successful lawsuits against this agency based on a claim of arbitrary and capricious exemption decisions. To date, the agency has offered a raft of potentially conflicting rationales for excluding specific products. It has, for instance, made determinations that some materials inherently do not contain lead, even though they may sometimes contain lead. The agency has also decided that swimming pool slides (a product used primarily by children) are not a children's product because the regulations governing them requires them to be built to withstand the weight of an adult. At the same time the agency has leaned heavily on the word 'primarily' in the definition of a children's product as something primarily intended for a child to say that ball point pens are not a children's product. These decisions are not necessarily wrong, but they need to be reconciled in a defensible way.

Similarly, some Commissioners argue that brass musical instruments are not subject to the lead limits in the CPSIA (despite last month's decision on brass lead), because such instruments are not primarily used by children. Even putting to one side the fact that some music stores and other businesses sell or rent primarily or exclusively to children (and would thus come under the Act), this does not pass the laugh test. Under this logic, the agency would permit selling a brass instrument to a child to handle for hours on end each week, and yet forbid selling a toy car with brass axle collars that the child would rarely if ever touch when playing with the toy. Of course there's nothing wrong with children touching brass instruments every day, because lead in brass is not bio-available and does not get ingested even by a child that puts his/her mouth on the instrument. But there's nothing wrong with playing with a toy car with brass parts for the exact same reason. These subjective enforcement decisions have nothing to do with risk analysis and everything to do with avoiding having the statute fall on high-profile items like band instruments. But where the agency does not act based on safety considerations, but rather makes arbitrary exclusions based on the political or public relations consequences, it invites litigation from industry. By waiting to lift the stay until agency staff has more completely defined what counts as a children's product, this concern can be resolved.

UNITED STATES
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COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP
ON THE INTERIM ENFORCEMENT POLICY ON COMPONENT TESTING AND CERTIFICATION

December 16, 2009

I voted to approve the Interim Enforcement Policy on Component Testing and Certification for lead content in order to provide guidance and more options to businesses who must comply with the law's testing and certification requirements for lead, in the interim, before the Commission has completed a number of necessary rulemakings to implement the Consumer Product Safety Improvement Act (CPSIA).

While I support the issuance of this interim policy, which is necessary to provide some flexibility to the marketplace, I am hopeful that the Commission also votes to accept my amendment to the "Commission Action on the Stay" to extend the stay for lead content until six months after such time as we have finalized the 15-month rule on compliance and testing frequency as well as the rule defining a children's product. In fact, this interim policy is only necessary because the Commission is still working on these two, crucial rulemakings. These two rules will provide fundamental information that businesses will need in order to make basic investment decisions on how they will come into compliance with the testing and certification requirements in the CPSIA. Without all of this information, and by lifting the stay prematurely, we would add to the confusion for companies trying to become CPSIA-compliant by creating one set of requirements shortly before we provide the marketplace with final, binding regulations which will be substantively different.

We also cannot ignore the fact that Congress has asked the Commission for recommendations on amendments and clarifications to the law in order to find ways to halt the unintended consequences of the CPSIA plaguing small businesses—especially as it applies to materials that in no way affect a child's health. It is possible that Congress will reinsert "risk" into the statute to allow the Commission to account for whether a product or material could pose any real risk to children when issuing regulations on new testing and certification requirements. If they do, this will provide the Commission and the business community much more flexibility in approaching these new requirements.

Up until now the Commission has been engaged in a classic standoff with Congress. The legislature has pointed a finger at the agency for interpreting its statute inflexibly, and the agency has in turn pointed a finger at the Congress for writing an inflexible statute. For that reason, the Commission should take every opportunity to insert flexibility into these regulations and should be responsive to Congress's most recent request to recommend clarifications to the law.

In that vein, I have listed below opportunities that were lost to improve this interim policy through increased flexibility, especially given that the Commission just held a two-day workshop on component testing where businesses presented a number of challenges that the Commission has not yet had time to address. In the following ways I believe the enforcement policy could have been strengthened:

With respect to risk:

- It is important to keep in perspective as we move forward with this policy that we are not always talking about products that pose a risk to children. A "non-compliant" product in the case of lead content would not necessarily mean a product that could pose a safety hazard for a child, but these could be products that contain lead substrate (*e.g.*, bicycles, brass musical instruments, the brass axle collar of a toy car, the imprinted ink on a children's t-shirt, the zipper on a child's pair of jeans) where the lead is not bio-available, but yet the product would still be in violation of the CPSIA. It would represent a poor allocation of limited enforcement resources to penalize "non-complaint" products rather than truly unsafe ones.

- The policy fails to use the maximum flexibility granted the agency in the area of enforcement to provide a distinction between what it means to enforce the lead limits for products that present a real risk of harm to a child (*e.g.*, lead paint) vs. enforcing the law for products that present no real harm to children, such as products that contain lead substrate but for which there is no bio-available lead. My staff and I presented this proposal during internal discussions with agency staff and other Commissioners' offices. This is an important distinction, both for the agency's workload and mission and for the marketplace struggling to comply with the new testing requirements. Separating these enforcement policies would allow the Commission to prioritize safety (which is its core mission) while also providing maximum flexibility to businesses struggling to comply with the law's requirements. This enforcement distinction would also minimize the unintended consequences of the CPSIA.

- Along the same lines of separating enforcement policies based on risk, I would have preferred that the Commission pursue a more stringent policy toward enforcement of the lead paint ban. While I support the policy that retailers, distributors, importers, or manufacturers may certify to the lead content standard at any point in the distribution process, I believe lead paint (which, after all, is where the greatest risk lies) should be held to a stricter standard. I would limit the ability to certify compliant paint to the original paint manufacturer and the final product manufacturer using Type I component testing only. Therefore, if a product were found to have leaded paint, such as the products that were recalled during the height of the lead-in-toys controversy in 2007, the liability would be clearer and more easily traced.

With respect to small businesses:

- The policy does not include any allowance for relief on testing costs for small businesses, beyond component testing. It is important to keep in mind that the reason that Congress

wrote and passed the CPSIA in the first place was due to the high-profile recalls of several toys made with lead paint by large-scale toy manufacturers who produce products in China. Unfortunately, this enforcement policy does not provide any distinction between what is required for a large company that may produce millions of toys in foreign manufacturing facilities (and that can also have their products tested in their own firewalled labs) vs. what is required for small domestic manufacturers of children's products that now have to pay to have their products tested in third-party accredited labs. Additionally, testing a product in a lab in a country such as China is likely to be cheaper than the cost of sending that same product to a third-party lab in the United States. While this enforcement policy is well-intentioned, by failing to make any distinction between large and small businesses (and, incidentally, foreign and domestic manufacturing) it also serves to solidify the competitive advantage that large manufacturers will have over small manufacturers due to the inability of small companies to afford to meet the new testing and certification requirements. For this reason, large toy manufacturers have turned a corner to become supportive of the new, onerous regulations and clearly see the competitive advantage that the law gives them over smaller companies.

- There is also no distinction in this enforcement policy for low-volume manufacturers, which may include either a small or large company. Companies that produce only five or ten of a product to sell to a small retailer or to a crafts fair cannot spread the testing costs for their product across economies of scale like a high-volume manufacturer. However, a company that produces 10,000 identical dolls per year would have a competitive advantage in spreading the testing costs for a doll across 10,000 units. The low-volume manufacturer will be severely disadvantaged until possibly such time as the Commission completes the official rulemaking for testing frequency (dubbed the "15-month rule")—a date that has yet to be determined.

- Additionally, I have concerns that the issuing of this interim policy coupled with the August 2010 date for lifting the stay will not provide relief for businesses that already are dealing with more stringent requirements from large retailers. There is no reason to believe that if retailers are placing more onerous requirements for testing on businesses than are required under the law now that anything short of an official rulemaking from the Commission or a change to the statute would prevent this. After all, no matter what testing and certification is done prior to the product being sold to the consumer, anyone who has certified to the lead limits, or has relied on the certification of someone else in the distribution chain, including retailers on up to the to the manufacturer level, could be liable for a non-compliant product.

  If the Commission were to have focused on inserting risk into this enforcement policy, we could have, for example, <u>reduced</u> the liability for retailers to ensure that they do not force suppliers and manufacturers to jump through more hurdles than are necessary for products that are inherently safe. This could be accomplished by: 1) absolving retailers of any penalties associated with non-compliant products, unless the product poses a real risk to a child (*e.g.*, lead paint); 2) allowing for only a stop-sale of a product, instead of a recall, for products found to be non-compliant but that pose no real risk; and/or 3)

providing that retailers are only liable for the need to possess a certificate of compliance with the lead limits, but are not liable for the lead content of the product itself.

Other concerns:

- I also object to the policy that companies be expected to practice "random sampling" to obtain a testing sample due to the one-size-fits-all nature of this policy and the additional burden this will place on domestic companies. We can solve the problem of "golden sampling"—a practice prevalent in China where a business purposefully avoids compliance by testing a sample that is "better" than the batch—without also burdening domestic manufacturers with micro-managed sampling requirements. Instead of expecting only a "random sample," the manufacturer should be able to pursue a wide variety of avenues in determining how to minimize compliance failures. For example, I believe that final product testing could be permitted without truly random samples, since regardless of the method of sampling the manufacturer is still on the hook for any and all compliance failures.

- Finally, the concern was raised during the two-day workshop on component testing that the needs of testing labs could end up being prioritized over businesses and consumers as these policies and rulemakings unfold. The Commission has not discussed a way to address this issue. At the workshop, the Commission heard from the interests of laboratories, who would prefer that the Commission go so far as to endorse or allow random sampling along each production line, or random sampling where the lab would choose the sample—which is clearly in the financial interest of testing labs who would be able to charge for each visit or sample. This would be a clear burden on small and large businesses and entirely unnecessary to improve safety.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE FINAL RULE REQUIRING MANUFACTURERS OF INFANT OR TODDLER PRODUCTS TO ESTABLISH AND MAINTAIN A REGISTRATION CARD PROGRAM

December 16, 2009

I am voting today to approve a Final Rule on registration cards for durable infant or toddler products. I think the staff has done a fine job of balancing the very specific statutory requirements in the Consumer Product Safety Improvement Act with the needs of the affected industries. The changes made to the card in the Final Rule from the requirements that were in the Notice of Proposed Rulemaking give more flexibility in the card's design. The melding of the Act's section 103 and section 104 product marking requirements are very sensible. I also agree that the best course in defining the scope of this rule is to list the products that the Commission has now determined are subject to the rule and to make any future additions to the list through notice and comment rulemaking.

I believe having product registration cards attached to these products will be a big step forward in increasing the response we get from the owners of recalled durable infant or toddler products. Too many of these products are ones that children have died in. But it is especially troubling when a child dies in a product that our agency has recalled because the owner of the product was unaware of the recall. I think we must do everything in our power to encourage the public to use these safety alert/recall cards and I hope the product manufacturers will strongly promote the use of these cards to their customers.