



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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Report to Congress Pursuant to the Statement of
Managers Accompanying P.L. 111-117

January 15, 2010

I. Summary of Enforcement Activity and Issues Relating to Section 101 Lead Content and Lead Paint Limits

Section 101 of the Consumer Product Safety Improvement Act (CPSIA) established numerical limits for lead content of children’s products. The initial limit, which took effect on February 10, 2009, was 600 parts per million (ppm) for any accessible part. This limit was reduced to 300 ppm effective August 14, 2009.

The CPSIA also established a stricter limit for lead in paint and similar surface coatings. The pre-CPSIA limit, originally set by the Commission in 1978, was 600 ppm. CPSIA reduced the limit to 90 ppm, effective August 14, 2009. This limit applies not only to paint sold to consumers as such, but also to paint on toys and other articles intended for children and to certain household furniture items.

You have directed us “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.” This section of the report discusses the enforcement efforts by the CPSC’s Office of Compliance, which is responsible for enforcing the lead content and lead paint limits. In some cases, a single product may violate both paint and content limits. In the following discussion, however, each type of violation is considered separately.

A. *Lead Content*

In Fiscal Year 2009, the Office of Compliance identified 338 violations relating to lead content limits of the CPSIA. Most of these violations were based on the 600 ppm limit in effect between February 10, 2009 and August 14, 2009. A few were based on the 300 ppm limit that took effect just six weeks before the end of the fiscal year or were based on the pre-existing Federal Hazardous Substances Act (FHSA).

Most of the lead content violations were identified by screening of children’s products at the ports using x-ray fluorescence (XRF) technology. In these cases, the violative products were seized and never entered into the U.S. marketplace. Some of the violations were reported to the staff under section 15(b) of the Consumer Product Safety Act, as revised by CPSIA. 15 U.S.C. § 2064(b). Some also were identified as a result of market surveillance (generally at U.S. retail locations). A few violations were brought to the staff’s attention by third parties, including state or local officials. In addition to the violative products seized and destroyed at port during FY 2009, CPSC staff also sought and obtained voluntary recalls in six lead-content cases, primarily involving children’s jewelry.

As the Committee stated in its request for this report, over the last year, the Commission and staff have confronted a number of enforcement issues involving section 101 lead content limits. These can be broken down into three distinct categories: (1) the

scope of the products covered and requests for exclusion; (2) the retroactive application of the law to products already in distribution for the use and enjoyment of children; and (3) the cost of testing and certifying products for lead content. Each of these issues is discussed separately below.

1. Implementation Issues Relating to the Scope of Section 101(a) and Permissible Exemptions

The lead limits under section 101 apply to all “children’s products,” which is defined by CPSIA to include any consumer product designed or intended primarily for children age 12 years of age or younger. A variety of children’s products can contain lead over the 300 ppm limit. Vinyl can contain lead in excess of the limit. For example, the vinyl seats of some youth-sized ATVs were found by staff to violate the new lead content limits. Many metals can also contain lead in amounts that exceed the 300 ppm limit, for example, the metal frames of bicycles and ATVs can violate the lead limits depending on the lead content of the steel used in fabricating those parts. Screws and hinges on children’s products and even the metal stay used to clamp the end of a zipper on a children’s garment can contain lead in excess of the limit. Zipper pulls on children’s items ranging from children’s clothing to a children’s golf bag can contain lead in excess of the CPSIA lead content limits because they are made of metal, vinyl or plastic. Most brass contains lead, and a variety of parts of children’s products use brass, ranging from the brass tip of a ball point pen to the brass hinges on furniture made for a child’s room to the trumpet the child plays in the school band. Finally, as our stakeholders came to terms with the new lead content limits, a number of other products were discovered that could potentially exceed the lead limits, including the “pearlized” buttons that are on many items of children’s clothing. In sum, the law served to illuminate the lead content of certain materials and components used in children’s products, and, given the breadth of the definition of children’s products, there were numerous products that were technically noncompliant.

The Commission took a variety of approaches to try to deal with the scope of the problem. First, it looked at the definition of children’s products to determine whether relief could be found for some manufacturers, if appropriate, by finding that their products were not intended or designed *primarily* for children twelve and younger. This approach is best illustrated by the Commission’s approach to the lead in excess of the limit found in the brass tip of ball point pens. The Commission approved an opinion indicating that ball point pens were general use items not intended exclusively for children unless something about the pen made it uniquely appealing to children twelve and under, in which case the law would apply. Second, the Commission utilized the exclusions permitted under section 101(b) of the CPSIA to provide exemptions from the lead limits for products where the component containing lead was inaccessible and for electronics devices that utilized materials for conductivity, such as aluminum, that contain lead. The Commission has also announced determinations with regard to a wide variety of materials whose lead content is inherently below applicable lead limits. When a children’s product contains such materials, those parts do not need to be tested to show compliance with lead limits.

Some products still presented issues because they were clearly intended primarily for children and did not fit into the exemptions for electronics devices or products where the lead containing part was inaccessible. The CPSIA provides one additional possible exclusion by authorizing the Commission, by regulation, to exclude a specific product or material from the lead content limits if it determines, after notice and a hearing, that lead in such product or material “will not 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.” A number of entities applied for exemptions under this provision, but no exemption has been granted by the Commission to date because in each instance the manufacturer admitted that an amount of lead was present in the product that could be handled by the child, however infrequently, leading to hand to mouth ingestion of lead. Thus, the Commission could not find that the product would “not result in the absorption of any lead into the human body.”¹ Among the types of products refused exemptions are (1) youth all-terrain vehicles (ATVs) and other youth motorized recreational vehicles; (2) children’s bicycles; (3) lead crystals or rhinestones used on children’s apparel or jewelry; and (4) brass materials used in toys.

Even though it denied all of these exemption requests, in two cases the Commission granted a temporary stay of enforcement for the same class of products. Specifically, the Commission has stayed enforcement of lead content limits for (1) certain metal components of youth ATVs and other motorized recreational vehicles; and (2) certain metal components of youth bicycles and related products such as trailers. In each of those cases, the Commission found that the safety of children using these products could be compromised by strict enforcement of the lead limits. The Commission wanted to ensure that youth-sized ATVs remained available to children given the mortal danger presented when children 12 and under use adult-sized ATVs. Likewise, the Commission concluded that the structural integrity of bicycles could require the use of metals containing lead and the stay provided the bicycle manufacturers with time to find substitute materials that could be used without compromising consumer safety.²

¹ Some Members of Congress, including members of the Conference Committee on CPSIA, have expressed the view that the Commission’s interpretation of the any absorption exclusion provision is more inflexible than Congress intended. They have indicated that the intent of Congress in stating that an exclusion was only permissible when it would “not result in the absorption of any lead into the human body” was to ensure that children could not ingest lead in an amount that would lead to “a meaningful increase in blood lead levels.” Neither the staff, nor four of the five Commissioners have accepted this broader interpretation of the language.

² The staff has denied requests to interpret those stays of enforcement as applicable to non-metal components of youth ATVs, and to tricycles, scooters and wagons. The stays do not cover these cases and no manufacturer of those products has asked the Commission for relief from the lead limits.

2. Implementation Issues Relating to the Retroactive Application of the Lead Limits

The CPSIA makes it unlawful to sell products that exceed the lead content limits after the effective date regardless of when the products were manufactured. Thus, with certain exceptions, children's products having lead content above 600 ppm could no longer be sold or distributed after February 10, 2009, even if they were manufactured before the effective date of CPSIA. Similarly, children's products having lead content above 300 ppm became illegal to sell or distribute after August 14, 2009.

This provision created substantial problems for manufacturers and retailers with large inventories of children's products and similar problems will occur in the future whenever the lead limits are lowered. CPSIA requires at least one future reduction of the lead content limit, from 300 ppm to 100 ppm in August 2011, unless the Commission determines that the lower limit is not technologically feasible, in which case the Commission must establish a new limit at the lowest feasible level.

For second-hand stores and other resellers of products, the problems of retroactivity are ongoing. Items such as youth ATVs, bicycles, musical instruments, toys and apparel all have strong resale potential at thrift stores and other resellers.

Used books have emerged as a particular problem due to the retroactive nature of the law. While most modern publishers can comply with the law with regard to the books they are printing today, the Commission has tested older books and found books printed in the 1970s and earlier that exceed the lead limits. The retroactive applicability of the lead limits creates problems for libraries and used book stores because some older books were printed with inks containing lead in excess of the new lead content limits.

To help thrift stores and other resellers understand their obligations under the law, CPSC issued a comprehensive guidance document and conducted workshops to educate resellers on the requirements of the law and help them to identify the products that are likely to present a problem. Our efforts have been directed toward working with the resellers to educate them on the scope of the law and its purpose and not to sanction. Education and enforcement discretion have been the primary means the agency has used to deal with this section 101(a) issue. The Commission's stay of enforcement on youth ATVs and bicycles expressly applies to resellers and the second-hand market for these items. Likewise, the Commission has announced an enforcement policy relating to older books. In February 2009, it announced that it would not seek penalties for sale or distribution of children's books printed after 1985 unless the seller or distributor had actual knowledge that the book's lead content exceeded 600 ppm.

3. Implementation Issues Relating to Testing and Certification Costs

Many firms have complained about the costs of third-party testing to demonstrate compliance with section 101 lead limits. The Commission has taken steps to reduce unnecessary testing and certification costs without undercutting the safety benefits of

third-party testing. First, it has announced determinations with regard to a wide variety of materials whose lead content is inherently below applicable lead limits. When a children's product contains such materials, those parts do not need to be tested to show compliance with lead limits.³ Second, the Commission has adopted an interim enforcement policy that allows manufacturers to certify compliance with lead content and lead paint limits based on testing of individual components. This step has the potential to lower testing costs substantially, though it introduces some risk that post-testing contamination or inappropriate substitutions may go undetected. Third, the Commission has stayed enforcement of the requirement to certify compliance of all children's products with section 101 lead limits until February 10, 2011.

B. *Lead Paint*

During FY 2009, the staff identified 117 violations of the lead-in-paint limits. Most of these violations were based on the pre-CPSIA (600 ppm) limit, which was in effect until just six weeks before the end of the fiscal year.

The vast majority of these violations were found by CPSC staff screening children's products at the ports using XRF technology. These products were successfully prevented from entering U.S. commerce. A few violations were reported to the Commission under section 15(b).

Where a violation of the lead-in-paint limits is identified after a product has already reached consumers, the staff generally pursues a recall. In FY 2009, staff sought and obtained voluntary recalls for lead-in-paint violations in 25 cases. (This does not count recalls announced in FY 2009 that resulted from samples collected in FY 2008.)

In the few months since the new lead paint limits took effect, the Commission has not seen the same implementation and enforcement issues with regard to lowering the lead paint limits as it has seen with the lead content limits reductions. However, the CPSC staff does anticipate that retroactivity issues are applicable in both instances.

C. *FY 2010*

At the end of FY 2009, the staff developed an Import Examination database, which allows the staff to identify shipments examined whether or not a sample was collected. This database provides a better accounting of time and effort spent on import surveillance and also provides a better insight into the overall rate of compliance with the lead limits. In the first quarter of FY 2010, CPSC staff screened 912 products for compliance with lead content and/or lead-in-paint limits, and collected 83 samples for further evaluation. Of the samples for which laboratory testing is already complete, 70 have been found violative.

³ For example, the Commission made a determination that ordinary books using the standard CMYK printing process do not violate lead limits and need not be tested or certified as complying with section 101 lead limits because the paper and ink used to make them do not exceed the lead limits.

The upcoming challenge for the agency in FY 2010 and 2011 will be the determination of when and whether it is technologically feasible for the lead content in a particular product to be lowered to 100 ppm. The lead content in all children's products must be lowered to 100 ppm unless a petitioner requests relief. The CPSC staff anticipates numerous requests and difficulties in handling those petitions by the deadline in August 2011. While some of the Commissioners have expressed their reluctance at resorting to stays of enforcement, stays may be needed to handle the transition from 300 ppm to 100 ppm in an orderly manner.

II. Recommendations for Improvement to the Statute

The following suggestions represent the unanimous and bipartisan opinion of the Consumer Product Safety Commission in response to Congress' direction to recommend improvements to the CPSIA. As always, the Commission's first priority is the health and safety of consumers. Accordingly, the following consensus recommendations are intended to maintain the safety and welfare of consumers while minimizing administrative burdens on the agency, or significant market disruptions, caused by the implementation of specific provisions of the CPSIA. Although individual Commissioners may have differing ideas on the exact avenues to achieve the suggested improvements listed below, the Commission is united in its belief that these recommendations would be useful to facilitate a more orderly implementation of the statute and enhance Commission enforcement efforts. In addition to these consensus items, individual Commissioners may have further recommendations designed to improve implementation of the Act.

Section 101(b) Exclusions

The Conferees stated that they believed 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. They mentioned parts of youth motorized off-road vehicles and bicycles, sporting equipment and ordinary books. As the Conferees have urged, the CPSC will continue to consider exemptions under 101(b), however, the Commission believes section 101(b)(1) does not give the agency the flexibility to address the items mentioned above, except in the manner in which it has already addressed youth motorized vehicles and bicycles, which is through enforcement discretion. The Commission believes it could more effectively fulfill its mandate under section 101(a) if it were allowed greater flexibility in granting exclusions from the section 101(a) lead limits. In addition to promulgating final rules on the exemptions for lead in electronic devices and inaccessibility, the Commission has taken a variety of approaches within its authority to try to reduce any unduly burdensome impact of section 101(a) on the regulated market generally and where Congress may not have intended to include certain products within the scope of the lead content limits. Although the Commission has not reached a consensus on a specific approach to improving section 101(b), the Commission is unanimous in its opinion that it needs additional flexibility within this section to grant exclusions from the lead content limits in order to address certain products, including those singled out by the Conferees.

Exclusion for Certain Printed Materials

In the statement of managers attached to the FY 2010 omnibus bill, the Conferees noted their belief that the CPSIA may not have been intended to subject ordinary children's books to the section 101(a) lead content limits. Through our continued implementation efforts, the Commission has worked within its authority to provide a measure of relief for ordinary children's books. The issue continues to present a significant enforcement issue for the Commission, however, as the staff has found that

some older children's books (pre-1985) contain highly illustrated pages with lead content above the strict lead ban. These books were not covered by the Commission determination that newer ordinary children's books were not subject to the ban. In order to address this issue, Congress may, with some limitations, choose to consider granting an exclusion for ordinary children's books and other children's paper-based printed materials.

Retroactive Application of the 100 ppm Lead Content Limits

Based on the agency's experience implementing the lead content limits retroactively, market disruption may occur if the 100 ppm lead content limits are applied retroactively. The shift to 100 ppm is particularly challenging compared to the previous shift in allowable lead content due to the requirement for the Commission to determine whether such a limit is technologically feasible. Because they do not make the products they are selling, resellers in particular have found it difficult to deal with reducing lead limits. Resellers have no easy way to determine the material composition of products and, while they have no obligation to test, they still are required to be in compliance with the law. Also, manufacturers or industries with petitions pending before the Commission for technological feasibility determinations will face uncertainty as to whether they should continue to manufacture products prior to a decision by the Commission on their petition. In addition, the new tracking-label requirements that mandate the date of manufacture to be on the product will help to ensure that products manufactured after the 100 ppm deadline goes into effect are compliant with the 100 ppm limit. Accordingly, the Commission believes that a prospective application of the 100 ppm lead limits would be helpful for our continued implementation of the law.

Small Manufacturers' and Crafters' Concerns

The Conferees stated they were aware of concerns among small manufacturers and crafters regarding the third-party testing requirements under section 102 of the CPSIA and urged the Commission to consider those concerns when issuing rules and guidance on third-party testing. The Commission has been mindful of the small business and crafter community in its implementation of the Act and will continue to exercise the discretion granted under section 102 to address these concerns accordingly. For example, the Commission has issued guidance directly targeted to smaller and home-based businesses to help them to understand and to comply with the law's new (and existing) requirements, as well as issued an enforcement policy on testing of lead content and lead paint which allows a great deal of flexibility in both testing of component parts and composite testing of materials. During the development of the mandatory rule on testing and certification, the Commission will be seeking ways to relieve unnecessary testing and certification burdens on business, especially smaller and home-based businesses, without compromising the law's protections for children. The Commission will be looking at volume of production, channels of distribution as well as any similar distinctions other federal agencies have made with respect to smaller businesses, as possible ways to structure the testing and certification requirements. The Commission remains committed

to working with Congress to explore other ways to address the concerns of low volume manufacturers.

Links to statements by individual commissioners on this report are below:

[Chairman Inez Tenenbaum](#)
[Commissioner Anne Northup](#)

[Commissioner Nancy Nord](#)
[Commissioner Robert Adler](#)