



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD
ON THE COMMISSION REPORT TO CONGRESS PURSUANT TO
THE STATEMENT OF MANAGERS ACCOMPANYING P.L. 111-117
January 15, 2010

My fellow Commissioners and I, together with the agency's staff experts, have been working diligently to respond to the request of Congress for recommendations on how to change the CPSIA. Our bipartisan approach has produced a report that is a good step in the right direction. While the report identifies several recommendations with which all the CPSC Commissioners agree, it stops short of addressing all the issues that need to be considered before the CPSIA can truly become the constructive force for consumer protection envisioned by the Congress when it passed the legislation. The law contains a number of useful new tools, many of which were requested by the agency, to better position the CPSC to act more quickly and effectively to protect consumers. However, there are aspects of the law that limit the flexibility of the agency to act appropriately and, as a result, we have seen unfortunate, unintended consequences flowing from the law's implementation. I have been requesting for some time that the Congress address these problems and I appreciate the opportunity to contribute to that process. The recommendations in the report represent a good start, but the conversation about how to fix the problems with the CPSIA needs to go further. I have listed below some of the critical changes that need to be made to the law.

1. Lead Exclusions and the Process for Granting Exclusions

There is absolutely no disagreement over the need to limit children's exposure to lead. However, the language of the CPSIA is drafted so tightly that the exclusions process in the law, which Congress intended for the agency to use, is not workable. The law limits the agency's ability to focus on products that present actual injury or harm to children. The CPSC scientific staff has told us that they are not aware of any product that could meet the exceptions requirements of the law and hence have had to recommend denial of each of the petitions for exclusions that have been considered. This is in spite of the fact that staff has told us with each petition for exclusion that the products in question do not present a risk of harmful exposure to lead.

Over the past 18 months, staff has taken thousands of hours away from dealing with ongoing, significant safety concerns to consider issues such as the following:

- Determining whether to exempt ball point pens, which have a tiny brass tip that holds the ball. That brass tip contains lead over the statutory limit. After much deliberation, the Commission decided that a pen that is used by both adults and children is not a children's product and is not subject to the law but if that same pen is decorated with brightly colored cartoon characters it may fall within the reach of the law and if so, could not be sold.
- Determining that it is illegal to sell children's products containing crystals or rhinestones which, by necessity, contain more than the statutory amount of lead and for which there is no suitable substitute. This is true even though the lead in rhinestones and crystals does not easily leach out and even though a child could be exposed to more lead from products that meet the statutory requirements than from

exposure to rhinestones and crystals.

- Determining how to allow for the continuing sale of children's bicycles even though some parts contain lead, e.g. the Schrader valve used to put air in the tire. Many bicycles are made with recycled metal that also may contain lead at levels that are unpredictable and not easily controllable but which may exceed the statutory limits. In this case, a stay of enforcement was the only way to avoid an unacceptable regulatory result – banning children's bicycles – flowing from applying the statute to this product.
- Determining that a brass collar and other brass components of die-cast toys are prohibited even though staff reported there is no real risk of harmful lead exposure. The implications of this decision for other products containing brass, not only those in the home, but also in our schools – such as desk hinges, locker handles and coat hooks – are significant and far-reaching.

The agency needs flexibility to deal with products that contain lead over the statutory limits but which do not present a risk to children. The Congress specifically asked the agency to look at risk and exposure in crafting a solution to this problem. To solve the problems we have had in applying the exclusions language of the current statute, Congress needs to give the agency the flexibility to look at whether there is a real risk of lead exposure based on the child's interaction with the product and the extent to which that interaction results in a measurable increase in the child's blood lead levels, rather than the absolute language that is now in the statute. This would address the conferees direction to look at risk and exposure and the many concerns expressed by individual members of Congress, including primary sponsors of the law, who have indicated that they thought the statute contained this flexibility. As we do this analysis, it is important to look at how other jurisdictions and agencies address lead exposure so that we consider consistent requirements where appropriate.

In addition, additional thought should be given to the scope of the law. There are certain products – most toys and children's metal jewelry, for example – that warrant aggressive regulation with respect to lead. There may be others – books, educational products, sporting equipment and apparel, for example – where there is less concern. Congress should either write the law specifically to spell out what they want included and excluded, or they should give the agency sufficient flexibility to regulate appropriately. This could be done either by product category or by age. With respect to age, the agency has extensive experience in dealing with the ways that children of different ages interact with consumer products. The CPSIA does not allow flexibility for the agency to utilize this expertise. It treats all children – infants to pre-teens – the same, and, as a result, our regulatory decisions cannot be tailored to meet the requirements of the age of the child and thereby apply the most effective solution for the greatest risk and exposure. Lowering the age requirements of the statute and making clear the agency's ability to regulate upward as safety circumstances warrant, would go a long way to solving many of the problems in the law and keeping the agency's resources focused on providing real protection for consumers.

2. Testing and Certification/Small Manufacturer and Crafter Concerns

The agency and the Congress have heard from many small manufacturers and crafters that are being severely and adversely impacted by the CPSIA. Indeed, a website has been established that tracks the demise of businesses attributed to the law. The testing and certification requirements are at the heart of the complaints being made by small manufacturers and crafters. The agency has worked hard, within the confines of the statute, to deal with the issues small manufacturers and crafters are facing as they struggle to meet CPSIA's requirements, but our options are limited. Our report points to the guidance booklets we have published, the component testing enforcement guidance and possible regulatory relief in the so-called '15-month rule' dealing with frequency of ongoing testing. It is not clear that the problems small manufacturers and crafters are having now can be adequately addressed with more education, a policy on components that is still unimplemented and unproven, and by the promise of future regulatory action, months from now, that treats only part of the problem.

While independent third party testing is the most robust way to provide assurance of compliance, it is also the

most costly and least efficient. The requirement that all children's products be third party tested has raised the cost and added to the complexity for many small producers of children's products. The application of this requirement to handcrafted products made by individual artisans has raised serious concerns about their continued viability. While we hope that our component testing enforcement policy will address some of this concern, we have been told that this is not a panacea and more must be done. In addition, small producers face higher testing costs, are receiving conflicting information from testing labs about what must be tested, and are facing barriers from retailers who are requiring redundant testing or additional testing to be done by laboratories they specify, often at prohibitive cost.

Given all this, Congress should consider whether child safety can be served by other testing alternatives that will assure adequate compliance testing without the cost and complexity of third party testing. Specifically, the agency should have the ability to establish, by rule, alternative testing requirements for certification under section 102 of the CPSIA for manufacturers based on small volume or other appropriate criteria, as long as the requirements provide for a reasonable testing program and such other provisions as the Commission deems necessary to provide reasonable assurance of compliance with underlying consumer product safety rules.

3. Retroactivity

The report's recommendation that retroactivity not apply when the lead provisions of the statute transition from 300 ppm to 100 ppm is the minimum that must be done to address the significant losses that businesses have incurred because of the retroactive nature of the statute. The problems with retroactivity have been exacerbated by retailers who have required the lower limits ahead of their implementation dates in the statute, stranding safe inventory that cannot be sold. Although it is unfortunate that a recommendation could not have been made and acted upon a year ago to forestall the economic losses that have already been suffered, it is imperative that it be implemented as soon as possible.

We are seeing the same phenomenon occur with respect to phthalates, where the testing process to determine the presence of phthalates is much more difficult than is that for lead. The CPSIA permanently banned three types of phthalates and banned, on an interim basis, three other types until more health data could be assembled and analyzed. A Chronic Hazard Advisory Panel is being convened according to the timetable set out in the CPSIA, to look at the health effects of the various phthalates banned on an interim basis by the statute. The Commission is trying to define the universe of products to which the phthalate ban is applicable, is still working on a test method to determine the presence of phthalates in those products, and has not yet approved a laboratory accreditation process. Unlike lead, there is no screening test to more easily determine the presence of phthalates. It is unreasonable to require that retailers and resellers either face potential liability or go back through their inventory to try to determine the presence of phthalates when we do not even have a test method in place, putting aside questions of testing practicality and affordability. Congress should consider clarifying that this provision will not apply in a retroactive manner. At the very least, retroactivity should apply only to the three permanently banned phthalates.

Finally, the recommendation with respect to retroactivity does not go far enough since it does not treat sales by charities, consignment shops and other resellers. For example, we have been told that many of the charities are not selling children's apparel because of the potential liability imposed by this law. Obviously, it is crazy for people not to be able to buy their children winter coats or boots at a Goodwill store or at a yard sale. Yet that is where the CPSIA leads us and I doubt Congress really intended this result. The agency has an excellent working relationship with charities such as Goodwill and the Salvation Army, and our regulation of these groups should focus on stopping the sale of recalled products. Congress should act to assure that the products parents need to buy are available in the resale market.

Conclusion

This statement is not intended to be a comprehensive description of all the implementation issues we have seen with respect to the CPSIA. I have focused for the past 18 months on the major challenges we have faced in implementing this law. As Congress reflects on the implementation issues presented by the CPSIA, there are a number of other things – both technical and substantive – that should be considered, including coordination with the state attorneys general in enforcing the law and issues related to improving the agency’s database.

Please be confident that the Commission shares the commitment of the Congress to assure American families that products on store shelves do not present an unreasonable risk of injury. These recommendations are given in the spirit of finding a path forward that, while minimizing unnecessary regulation, assures parents that the products they buy are as safe as possible for their families.