U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Acting Chairman Nancy Nord
Commissioner Thomas H. Moore

ITEM:

Request for Emergency Stay of Enforcement of Tracking Label Requirement in Section 103 of the Consumer Product Safety Improvement Act ("CPSIA")
(Briefing package dated May 4, 2009, OS No. 4565)

DECISION:

A decision on this matter has not been reached. Acting Chairman Nord voted to grant the request for a stay of enforcement of section 103 of the CPSIA and direct the staff to draft a statement implementing the decision. Commissioner Moore voted to deny the request for a stay of enforcement of section 103 of the CPSIA.

Acting Chairman Nord and Commissioner Moore submitted the attached statements with their votes.

For the Commission:

Todd A. Stevenson
Secretary

Ballot vote due May 13, 2009

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF ACTING CHAIRMAN NANCY NORD
ON THE STAY OF ENFORCEMENT ON TRACKING LABELS REQUEST FROM THE NATIONAL ASSOCIATION OF MANUFACTURERS
May 13, 2009

One of the most important responsibilities and authorities of the CPSC is the ability to recall products found to be harmful to consumers. The effectiveness of these recalls is dependent on a number of factors such as information dissemination to the public and consumer awareness and willingness to respond. Equally important are the agency's efforts preceding public notification that involve identification of harmful products and intricate negotiations with product manufacturers or retailers. Tracking labels on consumer products, if properly executed, could facilitate agency efforts. This simple-sounding solution, however, belies the difficulty in requiring tracking labels "to the extent practicable," as defined in the law.

It is not clear that the application of the tracking label provisions across the board to all companies will improve recall effectiveness to such an extent as to justify the potential significant disruption and adverse impact on manufacturers, especially smaller companies. Because of this problem, I am voting today to grant the stay of enforcement requested in the petition from the NAM and other associations representing consumer product manufacturers.

The tracking label requirements of the Act have the potential to be especially burdensome given the long lead times many companies need to implement such requirements. Unfortunately, the law does not give us appropriate lead time nor does it give us flexibility to impose the requirements by product class and prioritize in an order based on importance. For example, with more regulatory flexibility, I would argue that we first turn our attention to high value products with long useful lives and a history of recall issues. Applying lessons learned, we could then determine how the tracking label requirement should be applied to additional products.

In January when we developed priorities for the second 6 month CPSIA implementation period, the staff was directed to develop tracking label guidance for Commission consideration by June. Given the complexity of the subject, this is an aggressive time table for completion of this work. The staff has been working diligently to accomplish the task on schedule. A request for information was put out earlier this spring. Over 130 comments were received and are now being analyzed. Because of the global implications of the issue, other countries were contacted about their plans for similar labels. The agency held a public forum yesterday to gain additional information. Throughout this process a number of things have become clear, including:

- there is a great deal of confusion over the meaning of the statutory provisions;
- there seems to be consensus that "one size does not fit all" with respect to tracking labels and that companies need to be able to develop labels that work for their individual products and situations, yet meet the needs of the agency to increase recall effectiveness;
- lead time is critical so that companies can absorb our guidance and make adjustments as appropriate; and
- a period of time is needed to educate those impacted about the new requirements.

The staff is working hard to complete a proposed tracking label guidance document for Commission consideration that will address the issues that have been raised and that will assure companies that they should reasonably exercise the judgment anticipated by the loose language of the statute. We also recognize that the initial guidance we give will not be the final word on this subject and that future iterations will be needed. Given all this, in my view it is unreasonable for enforcement of the tracking label provision to begin in August, 2009, and that a one year delay would *result in* more efficient implementation of the Act.

UNITED STATES
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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE REQUEST FOR EMERGENCY STAY OF ENFORCEMENT OF THE TRACKING LABEL REQUIREMENT UNDER SECTION 103 OF THE CPSIA

May 13, 2009

The section of the Consumer Product Safety Improvement Act of 2008 (CPSIA) that requires manufacturers of children's products to place tracking information on their products becomes effective on August 14, 2009, with no requirement for any action by the Commission. Unlike other provisions of the CPSIA, section 103 does not require the Commission to adopt regulations as an aid to compliance. It is a relatively brief section, but it does, like so many provisions of our laws, require manufacturers to exercise sound judgment in meeting its requirements.

The statute states the information that is to be on the product but it does not require it to be in any specific location or to be any particular size or format. The lack of detailed requirements may have been an acknowledgement that a one-size fits all approach may not be possible given the broad range of products covered by this provision, although there are certainly potential benefits of eventually moving to a standardized tracking system.

In developing their tracking marks manufacturers should consider the purposes behind the section. Among other purposes, the tracking information is to help the Commission and manufacturer distinguish with great specificity the products that are subject to a recall from those that are not and to help the consumer do the same by being able to look at our recall notices and match the tracking information in them to what is on their product. Some manufacturers already have tracking labels that would meet the CPSIA requirements or that are readily adaptable to it. As long as the tracking information required by the law is ascertainable from that tracking information, there is no need for the Commission to dictate a particular format. I do hope the Commission, after a review of all of the numerous comments that it has received on this issue, will issue some guidance to help small businesses such as the small home-based crafter, for example, devise simple ways to meet this requirement.

The Congress expected, and I also anticipate, that this provision will evolve over time as we learn more about the practices of various manufacturers and review the decisions they are making in complying with the statutory requirements. The Commission will facilitate a reasonable roll-out of this provision. The Commission does not contemplate mandating specific sizes or type fonts or a standard label that would be uniform for all of the products that fall under

this section in the near future and it may never be something the Commission feels is necessary. However, if we *were* to issue a regulation in this area in the future, it would have prospective application and would give manufacturers adequate time to adopt the requirements. For now, the "guesses" that the emergency request indicates manufacturers are making are not going to be "wrong" as long as they have the information required by the statute and do not take a cavalier approach to the "to the extent practicable" language in the statute. If we find manufacturers who have diligently tried to comply with the statute, but miss the mark on devising a complying tracking label, we will work with them (and learn from them) to make their marks comply with the law. This will be a learning process for all of us and not an excuse to punish an unwitting mistake.

I appreciate that manufacturers want complete certainty as to what they can or cannot do under this section, but I cannot vote to grant the request for a stay of enforcement of the entire section. While the Commission has stayed enforcement of a few sections of the CPSIA for certain products, it has not granted a blanket stay of enforcement from a provision for *every* affected product, which is what this request seeks. Granting such a request would amount to a postponement of a statutory effective date and that is something the Commission does not have the authority to do.