U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD
ON THE FINAL INTERPRETIVE RULE ON THE INTERPRETATION
OF A CHILDREN'S PRODUCT
September 29, 2010

The children's product rule is an interpretive rule and as such it is to provide guidance to the manufacturing community and the public about how the agency staff will apply the statute in assessing whether a product is a "children's product" as that term is used in the CPSIA. In my view, this final rule lacks useful guidance for the staff and even less clarity for the regulated community. Therefore I cannot support it.

We decided to issue this optional rule because we wanted to be helpful and provide clarity, not because we are required to do so by the CPSIA. Unfortunately, the rule is neither helpful nor clear.

Agreed Upon Improvements

The rule before us is different from the version that was proposed this past spring and also quite different from that which came up from staff at the end of August after public comments were analyzed. We have worked very hard to try to improve what was before us and we were able to accomplish the following improvements, among others:

- Product Misuse: The earlier versions of the rule stated that manufacturers would somehow have to divine how a product would be not only used, but also misused, as it attempted to determine whether the product was intended primarily for use by children. The concept of "misuse" has been removed. Such a concept may have a place in analyzing hazards but has no place in defining children's products.
- Childish Decorations: The rule makes clear in several places that embellishment of a product with childish themes, such as cartoons, is not enough, standing alone, to support a children's product determination.
- Art Materials: The rule clarifies the intersection between the Labeling of Hazardous Art Materials Act (LHAMA) and the CPSIA. Art materials do not need third party testing (beyond testing of children's art materials imposed by CPSIA) or certification to show compliance with the provisions of LHAMA. We hope that this clarification will address the reports of duplicative testing that we have received.
- School Marketing Programs: We have tried to make clear that marketing general use products, such as office supplies or scientific and musical instruments, to schools will not turn those products into children's products.

These improvements came after weeks of time-consuming discussion and heated debate among the commissioners and their staffs. What started out as an exercise to be helpful devolved into a regulatory quagmire. Although it is improved, I cannot support this final rule because it does not provide the clarity that business needs. It is another lost opportunity to provide a common sense approach to implementing the CPSIA.

Problems Remaining

I do not believe that the rule has given proper weight to the manufacturer's intent in the analysis of whether a product is designed or intended primarily for children. I believe that the correct reading of the definition of children's product in Section 3 of the CPSA is that a product is not a children's product unless the manufacturer designs and intends for such a result. The four factors listed set out the considerations the manufacturer should use in forming and communicating that intent and the agency should apply in determining whether that intent is reasonable. Instead the four factors have taken on a life of their own independent of any consideration of how they inform the question of manufacturer's intent.

This is a critical consideration since the statute is premised on manufacturers determining at the design and manufacturing stage whether the products they are making and selling are children's product. The manufacturer must determine up front whether a tracking label will be needed and whether third party testing will need to be done. The rule gives little comfort that those decisions will not be second-guessed downstream and at a point where penalty liability can be imposed (for labeling and testing violations) even though there is no indication that the product was unsafe. I believe that this result distorts the meaning of the statute in a way that is unreasonable, unfair and, most of all, not driven by safety considerations.

Safety is not advanced by the rule adopted today. We need to be spending our resources addressing products that can harm consumers especially children, not constructing a 'truth or consequences' guessing game for product sellers where the consequences of a wrong guess are pretty severe.

During our discussions about this rule, over and over again, five commissioners, steeped in the details of the statute and knowledgeable about the operations of the agency, could not reach agreement on whether or not particular products were children's products. Instead, over and over again, the rule merely states that the Commission will apply the four factors, rather than saying how the factors will be applied in particular situations. Given that reasonable people have differences of opinion on what is a children's product, how is a manufacturer to have any confidence that a decision made in good faith at the beginning of the manufacturing process will not be overturned down the road by the supposedly crystal clear 20/20 hindsight of the agency.

What we are left with is a rule that leads to nonsensical results. A small lamp decorated with a teddy bear in a child's room may or may not be a children's product – hard to know from the rule – and therefore subject to testing for lead but a brass lamp used in that same room is deemed an adult product and not required to be tested for lead even though we all know that lead is present in brass above the limits in the statute. The fact that neither pose a health risk is of no importance to us and irrelevant to our analysis. As another example of a nonsensical result, apparently a "Dora the Explorer" DVD must be tested for lead but an "Animal Planet" DVD presumably does not. Since electronic media is widely available in libraries, they may have a challenge dealing with this result. It would have been helpful if we had applied some common sense to these issues but that was not to be.

Finally, the rule goes into effect immediately. This means that those products out there which arguably may have morphed into children's products because of this rule must have tracking labels, must have a certification based on third party testing for any product safety rules for which we have now accredited labs and must prepare to meet the lead standards when the stay of enforcement is lifted. Given that the requirements in the rule have changed since it was proposed, this may impose new obligations on some who relied on the direction we gave in the NPR issued last spring. It is unfortunate that more lead time

could not have been provided. But lack of lead time is only one of the shortcomings of this rule. It does not accomplish its objective of giving clarity and should not have been adopted.