UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP
ON THE PROPOSED INTERPRETIVE RULE DEFINING "CHILDREN'S PRODUCT"

March 31, 2010

Today's proposed rule on the definition of "children's product" contains a number of provisions meant to ensure the most accurate interpretation of that term. I endorse this proposal and hope that commenters consider all attributes of this rule so that the Commission may know if this interpretation clarifies whether their products are "children's products" and thus, will be subject to all of the new obligations set forth in the Consumer Product Safety Improvement Act (CPSIA). The new age requirements of the CPSIA bring the Commission into less familiar territory, as the Commission has not previously had to develop the expertise surrounding what line exists between products intended for the 9-12 age group vs. the teenage years. It is crucial that the agency receive feedback on this proposed rule, particularly from manufacturers whose products occupy the "grey area" between the pre-teen and teenage groups, or who produce items intended for both children and adults.

The risks

The Commission continues to be charged with protecting the public from unreasonable risks of injury or death. Lead poisoning is a serious issue and one that, thankfully, we know considerably more about today than we did thirty years ago. According to the Centers for Disease Control (CDC), children age five and under are by far the most at-risk for elevated blood lead levels, the main sources of which are lead paint in old homes and lead in dust caused by exhaust fumes from leaded gasoline.[1] Additionally, the Commission has recalled some swallowable items for high lead content, including certain children's jewelry, which young children may be prone to ingest. Regardless of the CPSIA's new age and lead content requirements, the Commission has had in the past, and continues to have, the authority to regulate products at any time, should they pose a risk.

Once children move past age five, they do not generally mouth products, crawl on the floor, and put their hands in their mouths as they do as toddlers and babies, and the risk of lead ingestion drops considerably. In fact, current CDC statistics show that it is extremely rare for a child over five years old to have a dangerous blood lead level. Despite this fact, the CPSIA encompasses millions of everyday products for children up to age 12 where the lead can be absorbed only in infinitesimal amounts and which have never been considered hazardous. For example, sports equipment, most toys, bicycles, and jackets with zippers and buttons have not been found to pose any risk in regards to lead content.

[1] Centers for Disease Control and Prevention, Lead Prevention Tips: http://www.cdc.gov/nceh/lead/tips.htm

The economic consequences

The stakes are particularly high in fleshing out this interpretive rule, considering the costs companies must incur if their products fall under the requirements of the new law. Companies whose products meet the new definition of "children's product" will have to: 1) reengineer non-compliant products to meet the law's lead content requirements, moving to essentially lead-free parts (a maximum of 100ppm lead) by next August; 2) pay to have the product or its components tested in a third-party lab; 3) pay to certify to the lead content requirements; 4) third-party test and certify after any material change to a product; 5) pay to have the product retested periodically; 6) put tracking labels on each product, including any periodic change in cohort information, and; 7) face, potentially, the highest penalties in the Commission's history for violating any of these rules. What's more, products subject to these requirements (*e.g*. a child's school desk, lunchbox, zippers, or buttons) may violate the law's arbitrary lead *content* limits, even though they would not pose a lead risk to children. In other words, a child's normal interaction with these products still would never cause any measurable increase in the child's blood lead level.

The consequences of including such arbitrarily broad categories of products within the CPSIA have been enormous, both for manufacturers and for the Commission. Hundreds of small and large businesses have contacted the Commission or Congress to request relief from the law's overreach. Businesses have cut jobs, reduced product lines, raised the prices of their products, closed their doors, or left the children's market completely due to the tremendous costs.

The strain on the agency due to the scope of the law is also significant. The Commission remains by and large a safety agency, but the CPSIA effectively removes any calculation of risk with regards to regulating lead and phthalates while also adding enormous regulatory requirements and enforcement authority. As a result, the Commission must spend hours of manpower and other resources implementing dozens of new regulations and interpretive guidance where before the CPSIA, risk would never have dictated that we regulate at all. The Commission's resources today are focused on dissecting an overly burdensome, non-risk based statute, instead of responding to true threats.

For all of these reasons, Congress asked the Commission in December for a report on how to fix the unintended consequences of the law. Now that Members of Congress have the Commission's report and accompanying statements, it will be up to Congress to decide what changes to the law may be made. In the meantime, the Commission's role should be to use whatever discretion it has to interpret the law in the clearest, most flexible manner for manufacturers and consumers. I believe we have made a good start in doing so with this interpretive rule today, which is why I am pleased to lend my support.

The meaning of "primarily"

Fortunately, Congress included the word "primarily" in the definition of "children's product," giving the Commission latitude to focus the scope of products covered *downward* toward the younger ages rather than around, or even upwards of, age 12. If a product is "primarily" designed or intended for children age 12 and under, it is conversely not primarily intended for the population as a whole, for the older youth population, or for adults. In other words, a product that is

used throughout a person's lifetime or that is just as appealing or useful for children ages 13-15 as it is for ages 10-12, should not fall into the new CPSIA definition of "children's product." Within both the preamble and the interpretive rule, we attempt to provide useful examples of products that have an ongoing interest for older populations, including certain recreational equipment, plain rugs, traditional board games, and regulation-sized sporting goods.

By the same token, if a product is *initially* marketed to, or *initially* intended for, children in the 10-12 age range, for example, but still used throughout the individual's lifetime (or at least, primarily *after* the age of 12), I also believe such products should not fall under the definition of "children's product." There is a fine distinction between the concepts of "initially marketed to or intended for" children but used throughout the older ages and the concept mentioned previously of "ongoing" use or appeal, but it could make a difference for some products. There may be consumer products we have not thought of (and about which manufacturers are uncertain) that are actually marketed to a younger age-range but not "primarily intended for" age 12 and under. I would encourage feedback around all of these concepts.

While the Commission has used the term "intended for children" in past rulemakings, the CPSIA marks the first time the agency has been given the word "primarily" as part of a clause "primarily intended for" children of a certain age group. In the context of the historical mission of the Commission to assess risk, this new qualifier is significant. In the past, under risk-based regulations, the Commission might have determined an age grade with a cautiously broader scope simply because that particular regulation was meant to address a true risk. For example, if a product appeals to a two-year-old and includes small parts, the Commission could certainly decide to ban that product due to the risk of a choking hazard[2] –regardless of whether that product would hold ongoing appeal for toddlers above age two. However, under the CPSIA, for products not "*primarily* intended for" the 12 and under age group, even if there is *equal* use of the product by teens and by the 9-12 age group, such products will not fall under the "children's product" definition. Of course, as mentioned previously, the Commission always retains the authority to pursue a product at any time should a genuine risk emerge.

Conclusion

In this interpretive rule defining "children's product" under the CPSIA, the Commission should clarify the term's meaning as precisely as possible in order to give manufacturers maximum ability to determine in advance if their products fall under the purview of the statute. Manufacturers (as well as the Commission) need certainty in order to know where to direct precious compliance (and enforcement) resources. This interpretation is especially important given the more challenging line that must be drawn between the pre-teen and teenage age groups and the severe consequences a company faces should it misinterpret where its product falls. While I believe today's interpretive rule is a good start in providing necessary clarification, I hope companies will provide further suggestions on ways to sharpen or improve this definition for the final rule.

[2] Under the Commission's small parts regulation, toys or other articles intended for use by children under age 3 that present a choking hazard due to small parts are considered banned hazardous substances. 16 CFR Ch. II. §1501