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CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE TECHNOLOGICAL FEASIBILITY OF 100 PPM TOTAL LEAD CONTENT IN CHILDREN'S PRODUCTS

July 20, 2011

The Democratic Majority of this Commission often points to the inflexibility of the CPSIA or the need to protect public health to explain its willingness to burden the economy with unnecessary and wasteful regulation. The Majority's determination that there are no products or product categories for which 100 ppm total lead content is not technologically feasible belies those claims. The Majority ignored the flexibility Congress granted the Commission to avoid imposing a 100 ppm limit, and cannot point to any gain in public health to offset the substantial economic harm its decision will cause.

The Majority argues that Congress "stacked the deck" in a way that made the move to 100 ppm unavoidable. But in fact, Congress did just the opposite. Congress knew how to unequivocally reduce the lead content of children's products, and it did so -- initially to 600 ppm, and then to 300 ppm. In contrast to these automatic reductions, Congress asked that the lead limit be reduced to 100 ppm "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category." CPSIA § 101(a)(2)(C). This directive cannot reasonably be construed to invite the Commission to fail to make that determination through inadequate investigation and analysis. Nor could Congress have intended the Commission to find technological feasibility based merely on the existence of low-lead raw materials – if that is all that was required, Congress could have reached the obvious conclusion itself. Rather, Congress must have intended the Commission to use the flexibility granted to consider the economic feasibility of a 100 ppm standard, and to perform the qualitative and quantitative analysis necessary to meaningfully do so.

If the deck was stacked against a finding that 100 ppm is not technologically feasible for any product or product category, it was because the Commission erroneously chose: to construe "technological feasibility" as mere technological possibility; to equate the commercial availability of raw materials with the commercial availability of children's products; and to ignore the prohibitive economic costs of obtaining low-lead materials, the fact that low-lead materials do not consistently and reliably test to the specified ppm, and the inability of many manufacturers to obtain low-lead materials in the market.

The Commission's first error was to interpret Congress' direction in CPSIA § 101(d)(1) that it consider whether a "product" complying with the 100 ppm limit is available in "the product category" to refer to raw materials, not children's products. Based on this erroneous reading of

the statute, the Commission was able to rely on raw materials tests with no link to any identifiable children's product as its basis for concluding that "most" children's products on the market today already satisfy the 100 ppm standard.

Although the commercial availability of substitute low-lead raw materials appropriate for use in children's products is a consideration in determining the technological feasibility of 100 ppm children's products under CPSIA § 101(d)(2), the fact that it merely exists is simply not enough. A common sense reading of "technological feasibility", as well as judicial constructions of analogous statutes, confirm that Congress intended the Commission to consider not just the physical possibility of manufacturing a product with 100 ppm of lead, but whether it is economically feasible to produce and market the product.

But the analytical approach taken by the Commission completely ignored economic feasibility. As long as "low-lead materials are available, but are available only at higher prices" the Commission assumed technological feasibility, because "there is no economic basis for determining at what point a cost increase would make production not technologically feasible."[1] Even if it were plausible that economists cannot identify in the abstract prohibitively high production costs, this Commission should at least know it when it sees it. And the Commission had before it evidence, explicit in the published Briefing Package, that the costs associated with a 100 ppm lead limit will be substantial and will drive products and businesses from the market.

Even without considering economic feasibility, the Commission's conclusion that low-lead materials are available as substitutes for the materials currently used in children's products is inconsistent with the record. The conclusion is supported only by evidence that some suppliers expressed a willingness to provide some quantity of the materials. There is no evidence that the materials offered reliably contain the low-lead level specified, or that they are accessible to the manufacturers that would be required to use them to meet a 100 ppm standard. To the contrary, evidence obtained by the Commission demonstrated that suppliers were unable to provide materials that consistently met the specified low-lead standard, and that materials specified as low-lead were not accessible to many manufacturers.

The Majority wholly fails to account for the fact that an unavoidable 15% variability in test results at the 100 ppm level causes fully compliant products to fail tests. As a result, a product must have no more than 87 ppm in order to reliably and consistently test at no higher than 100 ppm. And that in turn means that an 87 ppm lead limit must be both technologically possible *and* economically feasible before the 100 ppm limit could be found to be technologically feasible. Neither conclusion is supported by the evidence before the Commission.

The decision on the record before the agency to require all children's products to reduce from 99.97% lead free to 99.99% lead free is also without a compelling policy justification. Only days ago, President Obama reiterated his call for the CPSC and other independent federal agencies to produce a regulatory system that protects "public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation."

[1] Staff Responses to Commissioner Questions, July 8 2011 ("Staff Responses") at 24-25 (Response to Northup Question 15).

Decisions should be made "only after consideration of their costs and benefits (both quantitative and qualitative)." Executive Order 13579 (7/11/11).

With respect to the regulatory decision at issue here, the Commission determined that the contribution of products containing between 100 ppm and 300 ppm lead to the overall lead exposure in children is minimal. In addition, staff has identified significant economic impacts that are likely to result from setting a 100 ppm lead limit, including: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility of products due to the substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard. Yet contrary to the President's directive, the Commission failed to quantify the harm. Indeed, the Commission's Majority opted to ignore the Executive Order because it states only that the agency "should" follow it, and the Commission can therefore not be compelled to do so.

There is no public policy justification for causing substantial economic harm with no offsetting improvement in product safety, and the Majority's vote to do so violates both the spirit and letter of the President's Executive Order.

Legal Framework

Section 101(a) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA") (15 U.S.C. § 1278a(a)), provides that the total lead content limit by weight in any part of a product designed or intended primarily for children 12 years old and younger, is limited to 600 parts per million ("ppm") 180 days after passage of the Act, 300 ppm as of August 14, 2009, and 100 ppm as of August 14, 2011, unless the Commission determines that a limit of 100 ppm "is not technologically feasible for a product or product category." In the latter event, the Commission is required to establish by regulation the lowest amount of lead below 300 ppm that it determines to be technologically feasible to achieve for that product or product category. The Commission may not find that a limit of 100 ppm is not technologically feasible for a product or product category without analyzing the public health protections associated with substantially reducing lead in children's products.

Thus, the CPSIA reflects that unlike with respect to the imposition of the 600 ppm and 300 ppm standards, Congress intended the Commission to exercise discretion before adopting a 100 ppm standard, and to refrain from doing so if it "determines that a limit of 100 parts per million is not technologically feasible for a product or product category." CPSIA § 101(a)(2)(C). Implicit in the imposition of this condition was the requirement that the Commission make a reasonable effort to determine whether a 100 ppm limit is not technologically feasible. Congress would not have required the limit to drop to 100 ppm unless the Commission proved a negative, without also expecting the Commission to endeavor to do so. Otherwise, the Commission could circumvent Congress' intent merely by inaction. As discussed in the balance of my Statement, I believe the Majority's failure to determine that 100 ppm is not technologically feasible is

attributable in part to the Commission's failure to obtain the qualitative and quantitative information necessary to perform a thorough and reasoned analysis of the question.

To guide the exercise of the Commission's discretion, Congress provided in Section 101(d) of the CPSIA (15 U.S.C. § 1278a(d)) that a lead limit shall be deemed technologically feasible with regard to a product or product category if:

(1) a product that complies with the limit is commercially available in the product category;
(2) technology to comply with the limit is commercially available to manufacturers or is otherwise available within the common meaning of the term;
(3) industrial strategies or devices have been developed that are capable or will be capable of achieving such a limit by the effective date of the limit and that companies, acting in good faith, are generally capable of adopting; or
(4) alternative strategies, best practices, or other operational changes would allow the manufacturer to comply with the limit.

Although these requirements are listed in the disjunctive, they are all ways of addressing the same fundamental standard: commercial availability. The first prong addresses whether such products are already offered for sale. The remaining three identify various ways that existing products could be brought into compliance, either through "commercially available" technology, industrial strategies or devices that companies "acting in good faith, are generally capable of adopting", or alternative strategies, best practices, or other operational changes. But all of them require consideration of whether there are commercially reasonable ways for children's products to be manufactured, marketed and sold with 100 ppm of lead.

The Incremental Public Health Protection Achieved By Requiring Children's Products to Reduce from 99.97% Lead Free to 99.99% Lead Free is Minimal

CPSIA § 101(a)(2)(C) provides that the Commission may find that 100 ppm is not technologically feasible for any product or product category only "after analyzing the public health protections associated with substantially reducing lead in children's products." Commission staff undertook this analysis and concluded that "the contribution of products containing between 100 ppm and 300 ppm lead to the overall lead exposure in children is minimal."[2]

Commission staff also addressed claims made by the American Academy of Pediatricians (AAP) that exposure to children's products containing less than 300 ppm of lead is harmful and, in particular, that swallowing objects containing 300 ppm of lead or less measurably reduces a child's IQ. According to Commission staff, these conclusions by AAP were based on an "incorrect characterization of a CPSC staff analysis first released in 2005." In fact, the Commission reached no conclusion concerning whether swallowing an object containing even as much as 600 ppm of lead would cause excess lead exposure, and drew no link between acute

[2] CPSC Response to Commissioner Nord's Questions (Second Set): Technological Feasibility of 100 Parts Per Million Total Lead Content Limit (July 12, 2011), at 2.

exposure to any level of lead and IQ loss. Indeed, "staff does not have data showing that children's products containing up to 300 ppm will result in excess exposures to lead."[3]

As staff explains, studies cited by AAP estimating the health and economic effects of excess lead exposure are "based on populations of children with significant environmental exposure to lead", such as lead-based paint in older housing or products that contained high levels of lead. *Id*. But according to Commission staff, "no information or studies were presented by [AAP] concerning exposure estimates for children who use specific products containing relatively low concentrations of lead (i.e., up to 300 ppm)." *Id.*

The Majority Conflates the Lead Content of An Unidentified Selection of Materials with the Lead Content of "Most" Children's Products in the Market Today, and Ignores Direct Evidence that Many Toys and other Children's Products Currently Exceed 100 ppm of Lead

CPSIA § 101(d)(1) directs the Commission to find 100 ppm to be technologically feasible *with regard to a product or product category* if "a product that complies with the limit is commercially available in the product category." Neither Congress nor the Commission define what "product" or "product category" means in this context, but the purpose and contextual language of the statute clearly indicates that the phrase refers to children's products and children's product categories.

Rather than adopt this common sense and contextually consistent construction, the Commission chose to interpret "product" or "product category" under § 101(d)(1) to refer to the raw materials used in the manufacture of children's products. According to the Staff Briefing Package, "CPSC staff interpreted the commercial availability of products that comply with the lead content limit to mean that a *compliant material* or component is available in the marketplace, as evidenced by its use or purchase by manufacturers, *or a stated willingness or ability of the supplier to make a material* or component *available.*" Briefing Package at 14 (emphasis added). Thus, according to staff and the Majority, as long as a supplier *states a willingness* to sell some low-lead material that could *theoretically* be substituted for the 300 ppm material currently used by every manufacturer of a particular product, then "products" within a "product category" are commercially available at the lower lead limit. In addition to being an unreasonable construction of the terms "product" and "product category" in § 101(d)(1), this approach does not even make sense. As many commenters stated and as detailed below, the fact that a supplier *offers for sale* a specified low-lead material does not mean the material delivered will reliably and consistently test to the specified level. Moreover, even when a reliable low-lead substitute for a material can be obtained, it is a *feasible* alternative only if it can be obtained for a price at which the commercial viability of the particular product can be maintained.

The evidence before the Commission did not support the conclusion that products complying with a 100 ppm limit are commercially available in all product categories. The Commission could reasonably find that a children's product is commercially available at 100 ppm only through lead content data that can be linked to the particular product. But the datasets the staff

[3] Consumer Product Safety Commission Staff Briefing Package: Technological Feasibility of 100 Parts Per Million Total Lead Content Limit (June 22, 2011) ("Briefing Package"), at 38.

relied on to establish the current lead level of children's products "do not offer details about the materials or products tested." Briefing Package at 5; *see also* Staff Responses at 7 (the datasets "did not specifically identify the material or the product"). Moreover, notwithstanding the Briefing Package's characterization of the SGS laboratory data principally relied on by staff as "present[ing] the results of testing of thousands of toy samples", the data was *not* comprised exclusively of tests performed on children's products.[4]

There is therefore no way to know whether the tests are representative of 1% of all children's products or 99% of all children's products. Moreover, the SGS data was obtained from tests conducted at a single lab in Shenzhen, China. *Id.* This suggests the scope of products tested may be quite narrow. At the very least, the Commission could have identified the lab's clientele in order to get a sense for the product categories that may have been tested. That information was not obtained. As staff concedes, the only conclusion the Commission could possibly reach from this data is that *of the products tested* most "that complied with a 300 ppm limit would comply with a 100 ppm limit as well." Briefing Package at 5. But even that very narrow conclusion appears to be an overstatement. Of the metal components and materials that tested positive for lead, 18.18% tested at 100-300 ppm, and only 2.05% tested below 100 ppm. That means that a far greater proportion of those containing some lead would fail a 100 ppm standard than would fail a 300 ppm standard. This suggests that for those metal products for which the removal of lead poses a problem, it is far more difficult to achieve 100 ppm than 300 ppm.

Notwithstanding this data's fundamental limitations, staff, and through their vote, the Majority of Commissioners conclude from it that, "for most products and materials, lead content is already low." Briefing Package at 11. In addition to reaching a conclusion not rationally related to the evidence upon which it is purportedly based, the Majority completely ignored substantial evidence more directly on point indicating that a large number of products currently on the market do *not* comply with a 100 ppm limit. Toys `R Us submitted results from tests of 536 toy components. Of the components tested, 373 had over 100 ppm of lead and 163 had 100 ppm of lead or below. *See* Comment 12. This data, which relates to specifically identified products and demonstrates that many do not currently meet 100 ppm, should have been considered. Similarly, the Majority's decision ignores the conclusion of the Commission's Deputy Director, Office of Compliance and Field Operations, that "some manufacturers of children's products are having difficulty complying with the current limit."[5]

Economic Feasibility Is a Necessary Element of Technological Feasibility.

A common sense reading of "technological feasibility" in CPSIA § 101 required the Commission to consider not just the physical possibility of manufacturing a product with 100 ppm of lead, but whether it is economically feasible to produce and market the product. This is because Congress must be assumed to have known that there are materials, both in nature and fabricated, with a

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[4] *See* UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION PUBLIC HEARING: CHILDREN'S PRODUCTS CONTAINING LEAD, TECHNOLOGICAL FEASIBILITY OF 100 PPM FOR LEAD CONTENT (February 16, 2011), Hearing Transcript at 67 (SGS spokesman Sanjeev Gandhi stated only that "*most* of the products from which this data has been taken . . . are children's products").

[5] The Technological Feasibility of Reducing Lead Content to 100 ppm: Compliance Data (6/29/2011) ("Compliance Data Memo") at 4.

lower lead content than 100 ppm. Congress did not need the CPSC to tell it that any product currently made out of one material could theoretically also be made from a substitute lower lead material, such as wood, natural fibers, virgin steel or virgin plastic. Congress must therefore have meant something more than merely "technological possibility."

Judicial construction of other statutes in which Congress called for a feasibility analysis confirm that Congress intended the common sense requirement that the Commission consider the economic feasibility of products and product categories with 100 ppm of lead. In *Honeywell Int'l v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004), the court explained that "technical feasibility" necessarily incorporates the concept of economic feasibility:

> [E]conomic feasibility is part of technical feasibility. It is often possible to fit a round peg in a square hole if enough money is present to make the round peg fit. In other words, a given change in a manufacturing technique may be "technically feasible" only as compared to some baseline of what it would cost to change the technique.

374 F.3d at 1372.

Similarly, the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 655(b)(5), requirement that OSHA establish worker protection standards "to the extent feasible" is understood to involve consideration of economic as well as technological feasibility. As explained in *AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974):

> [I]t would comport with common usage to say that a standard that is prohibitively expensive is not "feasible" . . . Congress does not appear to have intended to protect employees by putting their employers out of business – either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible. . . . Standards may be economically feasible even though, from the standards of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers. As the effects become more widespread within an industry, the problem of economic feasibility becomes more pressing. For example, if the standard requires changes that only a few leading firms could quickly achieve, delay might be necessary to avoid increasing the concentration of that industry. Similarly, if the competitive structure or posture of the industry would be otherwise adversely affected – perhaps rendered unable to compete with imports or with substitute products – the Secretary could properly consider that factor. These examples are offered not to illustrate concrete instances of economic unfeasibility but rather to suggest the complex elements that may be relevant to such a determination.

499 F.2d at 477-78 (citations omitted). *See also AFL-CIO v. Brennan*, 530 F.2d 109, 123 (3d Cir. 1975) (while Congress contemplated that OSH Act rulemaking could force the closure of

marginal businesses unable to meet standards otherwise universally feasible, it did not permit "the [OSHA] Secretary to disregard the possibility of massive economic dislocation caused by an unreasonable standard. . . . [T]he Secretary may in the weighing process consider the economic consequences of his quasi-legislative standard-setting.").

While "feasibility" may not require a formal cost-benefit analysis to ensure that the costs of a new standard bear a reasonable relation to the benefits the standard would yield, it does require a "responsible prediction of what [the standard] would cost and its impact on production, employment, competition and prices." *Am. Textile Mfrs. Inst. v. Donovan*, 449 U.S. 490, 531 (1981).

The Majority's Decision Ignores Record Evidence Establishing that a 100 ppm Lead Limit is Not Economically Feasible for Some Products.

As discussed above, the commercial availability of substitute materials is not relevant to establishing technological feasibility under CPSIA § 101(d)(1). However, it is arguably relevant to doing so under CPSIA § 101(d)(2), which provides that the 100 ppm limit is deemed technologically feasible with regard to a product or product category if "technology to comply with the limit is commercially available to manufacturers or is otherwise available within the common meaning of the term." But the evidence also does not support a finding that 100 ppm materials are "available" to substitute for materials currently used by manufacturers to meet the 300 ppm limit. This is because there is *no* evidentiary basis for concluding that (1) low-lead materials are available at an economically feasible cost for any product or product category; (2) materials offered for sale reliably contain the low-lead level specified; or (3) low lead materials are accessible to the manufacturers that would be required use them to reduce the lead content of their products.

The Impact of Cost Increases Was Not Adequately Considered

The analytical approach taken by Commission staff and adopted by the Majority as its basis for concluding that there are no products or product categories for which 100 ppm of lead is not technologically feasible was cogently summarized as follows:

> If the low-lead materials are available, but are available only at higher prices, then staff assumes that it is still technologically feasible to produce the low-lead children's products. Staff made this assumption because there is no economic basis for determining at what point a cost increase would make production not technologically feasible.

Staff Responses at 24-25.

This statement does not justify the Commission's failure to address the economic impact of setting a 100 ppm limit for lead. It is inconceivable that the Commission cannot identify *any* point at which the cost of manufacturing a product would exceed the price at which a market could exist to purchase it. If such questions could not be answered, capitalism would not exist. The truth is that such questions are asked and answered every day by every manufacturer.

Even if it were plausible that economists cannot identify in the abstract prohibitively high production costs, this Commission should at least know it when it sees it. And the Commission had before it evidence that the costs associated with a 100 ppm lead limit will be substantial and will drive products and businesses from the market. As reflected in the public record:

- The low-lead substitution materials necessary for products to meet the 100 ppm standard will be available only at higher prices, including "substantially more expensive" virgin steel, and virgin plastic with a price 50% to 100% higher than the recycled plastic currently used. (Briefing Package at 24-25)
- The price of complying materials will be higher also due to "the added constraint in the production process needed to ensure that trace lead amounts are less than 100 ppm" and "from the limited availability and lack of sufficiently developed distribution channels." (Briefing Package at 4)
- Increased testing variability at 100 ppm will cause compliant products to fail tests periodically, with "quite significant" economic implications, including a "costly" amount of testing necessary to ensure compliance, "needless scrapping of failing materials, as well as the potential for increased recalls." (Briefing Package at 29).
- As a result of these factors and others, "the 100 ppm lead content limit will increase the costs of producing children's products, and [ ] in some cases, these cost increases will be significant." (Staff Responses at 21)
- These increased costs may cause firms to "reduce the selection of children's products they manufacture", "exit the children's market", or "go out of business." (Briefing Package at 30)
- "[I]t is possible that a large proportion of firms might exit the market or market segment." (Staff Responses at 22)
- In this regard, 10 out of 40 manufacturers stopped producing youth bicycles after the 300 ppm limit went into effect, and as staff observed, "the 100 ppm lead limit is likely to reduce further the number of manufacturers that will produce these children's models." (Briefing Package at 27)
- Similarly, a number of ATV manufacturers have responded to the lower lead limits by no longer producing ATV's for the youth market. (Briefing Package at 28)
- And as staff observed, "costs will have relatively greater consequences for smaller manufacturers and artisans, who have less bargaining power with component suppliers, fewer technical resources, smaller production runs to spread testing costs over, and smaller product lines." (Briefing Package at 30)
- The resulting price increases to consumers attributable to these higher manufacturing costs "could be significant" and staff expects a "reduction in the production of products for the children's market." (Briefing Package at 29-30)
- Although not addressed by staff, the reduction in competitive manufacturers and products is also likely to contribute to higher prices when a smaller number of players control a greater proportion of the market. *See Hodgson*, 499 F.2d at 478 ("if the standard requires changes that only a few leading firms could quickly achieve, delay might be necessary to avoid increasing the concentration of that industry").
- Finally, the costs associated with the loss of inventory that does not comply with the 100 ppm standard "could be substantial." (Briefing Package at 30)

- In sum, staff concluded that "while producing the more costly products with low-lead materials may be `technologically feasible,' such production may not always be `economically feasible.' That is, a determination of technological feasibility does not necessarily mean that manufacturers will remain in the market." (Staff Responses at 22)

I believe this evidence is alone sufficient to establish that the 100 ppm limit is not technologically feasible. The Majority, on the other hand, objects that there is insufficient quantitative data to convince them that the cost of compliance renders the 100 ppm limit not technologically feasible for any product or product category. But even assuming the Majority's argument has merit, the Commission should not lightly rely on the absence of evidence, given the uncommon approach taken by Congress in CPSIA § 101. As discussed above, Congress charged the CPSC with ensuring that it could not prove a negative before setting a limit of 100 ppm. That imposed on the Commission an obligation to do more than passively await evidence. Once on notice of a substantial issue regarding the economic viability of products and the companies that manufacture them if the standard went to 100 ppm, the Commission had an affirmative duty to gather enough evidence to make an informed decision.

Staff instead concedes that in numerous instances, it identified substantial financial impediments to a 100 ppm standard, and failed to obtain the additional information necessary to quantify the scope of the problem:

- "We did not investigate the price differential between metals with 300 ppm and 100 ppm." (Staff Responses at 11)
- "Our research into the availability of brasses with less than 100 ppm lead did not include price comparisons for the same material with less than 300 ppm lead." (Staff Responses at 13)
- Meeting 100 ppm for plastics may require the use of virgin plastic, virgin plastic costs 50-100% more than recycled plastic, but staff cannot estimate the cost of requiring plastics used in children's products to have no more than 100 ppm of lead (Briefing Package at 24 and Staff Responses at 19)
- The estimate in the Briefing package that 100 ppm brass will cost 10% more than other brass alloys "was meant to serve as an estimate of a minimum cost impact. It is not possible to predict an upper boundary or a range, given available information." (Staff Reponses at 20)
- Notwithstanding the large percentage of toys manufactured in China and staff's recognition that "the price premium for low-lead materials may also vary from the price premium in the U.S. market", "staff did not directly contact any Asian manufacturers who might produce low-lead materials." (Staff Responses at 20)
- Due to "time constraints", staff "did not follow up with" manufactures who reported that complying with a 100 ppm lead standard will involve additional costs "to try to obtain quantitative cost information or to determine specifically how the percentage increases in the costs of particular components might impact the overall cost of manufacturing children's products." (Staff Responses at 21)
- Despite recognizing that "relatively little information was provided on compliance costs for toys and juvenile products," and generally concluding that "the cost increases may be

substantial," staff "did not seek additional information regarding the compliance costs for specific toys and juvenile products." (Staff Responses at 22)

- ("A price premium for aluminum guaranteed to have less than 100 ppm of lead content was not determined." (Staff Responses at 23)

And in the absence of data regarding the price differentials for substitute materials, staff could obviously make no findings concerning the aggregate costs to the economy as a whole. *See* Briefing Package 29 ("On the basis of current information, it is not possible to quantify the aggregate economic impacts of imposing the 100 ppm lead content limit."). Yet the nature of the information necessary to quantify the costs associated with a 100 ppm limit for particular products and in the aggregate is not a mystery. As staff explained:

> A detailed estimate of the aggregate economic impacts of the 100 ppm lead content limit would require, among other things, information on the number of manufacturers of children's products; information on the number and types of children's products they produce (e.g., toys, clothing); an understanding of how the production processes will change for each of these products when the requirement for lead content changes from 300 ppm to 100 ppm; and the amount and costs of the types of low-lead inputs that would need to be substituted into these children's products.

Staff Responses at 1.

I have no doubt as to the accuracy of staff's estimate that obtaining this information would require conducting a broad survey of manufacturers and "would be time consuming and expensive." Staff's Responses at 23. Perhaps that is why Congress gave the Commission three years within which to make its determination. In my view, the one-time cost to the Commission of developing an adequate record and undertaking a thorough analysis would have been justified by the permanent savings to the economy and the individuals who would have retained their businesses and jobs had the Commission ultimately concluded that the costs of compliance made 100 ppm not technologically feasible for even a small fraction of children's products.

> **The Majority Erroneously Equates a "Stated Willingness" to Sell a Substitute Low-Lead Material with the Material's "Commercial Availability."**

Even removing cost from the equation, there remains insufficient evidence to support the Majority's conclusion that low-lead materials are "commercially available" in the marketplace to substitute for currently used materials with over 100 ppm of lead. In order for a substitute low-lead material to be available in any meaningful sense, it must (1) reliably contain the low-lead level specified and (2) be accessible to the manufacturers that would use it to reduce the lead content of their products. The evidence presented by staff and relied upon by the Majority does not support a finding that either is satisfied.

Commission staff made no effort to determine the reliability of representations made by materials suppliers that they had low-lead materials available for sale. For instance, staff did not inquire whether low-lead materials offered by suppliers had been tested by accredited third-party testing laboratories. Staff Responses at 11. Nor did the Commission actually obtain and test

itself any materials represented by suppliers to be at or below 100 ppm of lead. Rather, low-lead materials were deemed "available" if a supplier was willing to quote a price over the phone, or even via the internet on a Chinese website.

In contrast to the Commission, children's products manufacturers have actual experience ordering, receiving, and testing materials specified by suppliers as meeting a 100 ppm lead standard. And they informed the Commission through comments that such materials did not reliably test at or below 100 ppm. *See* Comment 11 (presenting data showing that a statistically significant percentage of materials specified to be below 100 ppm fail the 100 ppm standard); Comment 3 (reporting that notwithstanding material supplier's report showing lead levels far below 100 ppm, the supplier refused to guarantee that all of the material sold would be compliant); Comment 15 (reporting that "low-lead" materials used in manufacturing children's jewelry result in finished products that do not consistently test at or below 100 ppm).

Regardless of whether reliable low-lead substitute materials are to some extent "available" in the marketplace, Commission staff acknowledges repeatedly that it has no evidence upon which to base a finding that the materials can be obtained by the manufacturers that would be required to use them in order to meet a 100 ppm standard. According to staff, "low-lead metal alloys that can replace alloys that would typically contain lead for functional purposes are also available, although access to these materials, especially for smaller businesses, is less certain." Briefing Package at 4. Staff further concluded that "the presence in commerce of low lead metals does not guarantee their continuous availability to manufacturers, particularly small manufacturers." Briefing Package at 6. For plastics, staff obtained no information regarding the amount of recycled plastic currently used in children's products, or the proportion of recycled plastic that is above 100 ppm of lead. Briefing Package at 24. It therefore cannot even estimate the demand for virgin plastic, let alone determine whether there is adequate supply to meet that demand.

While the Briefing Package reflects that access to low lead metal alloys is uncertain for all manufacturers, their availability to small manufacturers is particularly problematic. As staff explains, "larger manufacturers may be able to leverage their buying power and obtain greater access" to low lead metal alloys, and smaller manufacturers may be unable to meet minimum order size requirements that range from a few thousand pounds to many tons. Briefing Package at 18-19. But rather than recognize that complying materials cannot reasonably be considered "commercially available" under these circumstances, staff posits unrealistic scenarios to address the need for "alternative means of acquiring compliant metals." Staff thus suggests that small manufacturers enter into long term contracts or pool their material requirements with other small manufacturers into a single order. Briefing Package at 19. But staff never even "investigate[d] whether metals suppliers would be willing to enter into" such agreements. Staff Responses at 14. Nor was any consideration given to the logistical problems associated with multiple, geographically diverse manufacturers sharing a single order of materials, or a single manufacturer projecting its materials needs far enough into the future to risk committing to a large volume purchase agreement. For some manufacturers, this statement alone must have been a "laugh out loud" moment. Its absurdity is compounded by the fact that small manufacturers do not even fabricate many components, such as plastic tubing or metal wiring. They purchase pre-made components, and the Commission has no evidence to suggest such components are available in low lead specifications, or that it is realistic to believe they ever will be.

This is the real world, not a brain storming experiment. If materials that consistently and reliably test at or below 100 ppm are not available as needed and when needed by children's product manufacturers, they cannot be deemed "available" for purposes of complying with the 100 ppm lead limit.

The Majority's Conclusion That There is No Product or Product Category for Which 100 ppm is Not Technologically Feasible Failed to Account for Testing Variability

The Commission can impose and enforce a 100 ppm lead standard for children's products only if products that meet the standard can reliably and consistently pass lab tests measuring lead content of 100 ppm. Otherwise, *the same products* that pass lead content tests in a third party lab and are certified as compliant can fail subsequent tests conducted by the CPSC and be turned back at the border or destroyed. No rational business owner would be willing to take that chance with the capital investment required to manufacture and export a line of children's products. And Congress could not have intended the CPSC to set a standard that would inject such uncertainty into the children's product market.

But that is precisely the system the Majority's decision creates. There is overwhelming evidence that substantial testing variability exists for both metals and plastics. *See* The Technological Feasibility of Reducing Lead Content to 100 ppm: Compliance Data (6/29/2011) at 4-9 (reporting widely divergent test results for the same samples and subsamples); Briefing Package at 29 ("the reported variations in testing suggest that fully compliant products or components are likely to fail tests periodically, even though they actually comply with the legal limits"). The Commission's technical experts also concluded that there is an irreducible minimum variability in lead content test results of 15%. Staff Responses at 15 (random variability in testing accounts for 10% and interlaboratory error accounts for an additional 5%). As a result, a product must have a lead content of no more than 87 ppm in order to reliably and consistently pass testing to satisfy a 100 ppm limit (87 + (87 X .15) = 100.05). And that in turn means that an 87 ppm lead limit must be both technologically possible *and* economically feasible before the 100 ppm limit could be found to be technologically feasible.

Neither conclusion is supported by the evidence before the Commission. Indeed, the Commission did not even attempt to learn whether there are children's products currently on the market, or potential substitute materials for those currently used in children's products, with 87 ppm or less of lead. *See* Staff Responses, at 16 ("we did not try to ascertain the availability of materials at concentrations below 100 ppm").

Nonetheless, the Commission was well aware that some children's products would be unable to achieve the lower lead level necessary to ensure consistent and reliable passing results at under a 100 ppm standard. As the Briefing Package explains:

> The Testing variability means that ensuring compliance with the 100 ppm limit may require that lead in components or products are, in fact, significantly below the limit. Levels significantly below the limit may not be technologically feasible for some products.

Briefing Package at 29. *See also* Compliance Data Memo at 9 ("ensuring compliance with the 100 ppm limit may require that lead in components or products is sufficiently below the limit to account for expected quality control variability"). These facts are not compatible with the Majority's conclusion that there are no products or product categories for which a 100 ppm lead limit is not technologically feasible.

The Commission's Petition Procedures are Not a Realistic Avenue for Manufacturer's Seeking Relief from the Majority's Decision

During the public vote on the 100 ppm determination, the Majority suggested that its decision was not the final word on the technological feasibility of achieving 100 ppm of lead for all children's products and children's product categories, because manufacturers will always have the option to petition the Commission for an exemption. Even if this were a plausible avenue of relief, it turns Congress' directive on its head. The Commission is obligated *now* to determine if there are any products for which 100 ppm is not technologically feasible. It cannot kick that can down the road by failing to do the hard work necessary, and instead, hoping that manufacturers who are wrongly swept up in the new standard can reach the Commission before going under.

But more importantly, petitioning the Commission is not a realistic means of redress. The Commission has a detailed and complex rule governing the petitioning process. Many entities seeking relief under its requirements fail to satisfy the prerequisites even to have their entreaty docketed as a "petition." Such requests for relief have little chance of success. Those parties with the means and sophistication to engage a lawyer and technical experts may succeed in preparing a petition that overcomes that initial hurdle. But we have been told by parties who have done so that the effort can cost $50,000 or more. A small company facing bankruptcy because it is not technologically feasible for its products to meet the 100 ppm standard is unlikely to be in a position to incur that expense. So the manufacturers for whom the avenue of relief is essential, are the ones least able to invoke it.

In any event, even parties who succeed in getting a petition docketed by the Commission face uncertain prospects at best. Given the Majority's rationale for determining that there is no product or product category for which 100 ppm is not technologically feasible, it is hard to imagine how they would reach a different conclusion for any particular petitioner's product. They have already ruled out considering economic feasibility, and are unmoved by the prospects of business failures and products leaving the market. Proof that a product could have minimal effect on public health would also be irrelevant to the Majority – that fact is already before the Commission and had no impact. The Commission's record addressing petitions for exemptions from the lead standards under CPSIA § 101(b)(1)(A) is also instructive. None have been granted.

Based on these facts, it would be difficult to understand why any manufacturer would waste their limited resources petitioning the agency for an exemption from the 100 ppm standard. While paying lip service to this chimera of relief may help the Majority to sell its irrational decision to an understandably skeptical White House, it surely provides no solace to those businesses who will be brought down by it.

Conclusion

There is a reason President Obama issued an Executive Order in January requiring Executive Agencies to reduce unwarranted regulatory burdens on American businesses, and issued another Executive Order last week imploring independent agencies, including the CPSC, to do the same. The President recognizes that overly burdensome regulations are strangling the economy and hindering the job growth essential to a sustained recovery.

Last week's 100 ppm vote gave this Commission the opportunity to let the President know that it is listening and that it understand and cares. Instead, hiding behind the President's inability to compel us to act and under the guise that Congress made them do it, the Majority once again imposes huge economic costs on American manufacturers with no evidence that there will be any improvement in public health.

The Commission had valid and compelling grounds to find that there are product and product categories for which 100 ppm is not technologically feasible. The Majority's contrary conclusion is based on a misreading of the statute, an implausible application of the evidence, and a willful refusal to require the Commission's staff to gather the evidence relevant to the question before it.

It is also clear that mandating that children's products that are already 99.97% lead free become 99.99% lead free makes no sense as a matter of public policy. The Commission has no data to support a finding that children's products containing up to 300 ppm of lead will result in excess exposure to lead, and concluded that any improvement to public health from moving to a 100 ppm standard would be "minimal." In contrast, Commission staff identified a long list of economic harm, both to individual business and in the aggregate that are likely to flow from the Majority's vote.

The Majority's willingness without justification to take such an economically destructive action in today's precarious times, particularly several days after the President directed the CPSC to avoid such actions, is disheartening.