UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP
ON THE REQUEST FROM LEARNING CURVE BRANDS, INC. FOR EXCLUSION FROM
SECTION 101(b)(1) OF THE CPSIA
November 4, 2009

Today I was in the minority when I voted to accept the petition from Learning Curve Brands, Inc. to allow an exclusion for brass collars on toy cars under the Consumer Product Safety Improvement Act (CPSIA), which contain trace amounts of lead. I believe that a reasonable interpretation of the statute allows for a *de minimis* amount of lead which poses no real harm to children to be excluded from the new lead limits enacted in the CPSIA. This reasonable and common-sense interpretation of the law's exclusions is not only safe for children and legally viable, but is necessary to maintain stability in the marketplace for small businesses and other producers of children's products.

Protecting children from exposure to lead is a serious issue and one that has been addressed by numerous federal agencies such as the CDC, EPA, NIEHS, and NICHD. Lead can be found in the air we breathe, the ground we touch, and the water we drink. It most significantly affects children under the age of five who crawl on their hands and knees and put their hands and other objects in their mouths. Lead in larger concentrations can cause brain damage, behavioral problems, attention span deficit, etc. High levels of lead exposure are most often found in old homes where lead paint is chipping (which often occurs in the most disadvantaged neighborhoods), in soil tainted by leaded gas, or in water from old pipes. According to every agency with responsibility for reducing high lead levels in children, the best ways to reduce lead exposure include cleaning, repairing, washing hands, and testing high-risk children. Not one of these agencies suggests checking current toys (other than chipping paint on older toys) to eliminate *de minimis* sources of lead. In fact, considering that children touch and use many, many items throughout the house, this would be impossible.

While there is no level of lead that has been declared "safe" by any federal agency, many agencies have recognized that a level of lead in a child that has no measurable impact on the health of the child is acceptable. The Centers for Disease Control recognizes a level of 10 micrograms of lead per deciliter of blood as a level of concern with respect to lead poisoning. Some believe, as I do, that this level may need to be lowered. Additionally, the Food and Drug Administration in 2006 recommended a maximum lead level of 0.1 parts per million (ppm) in candy, since it is nearly impossible to rid the environment of all lead. One Commissioner observed that in all probability, the CPSC staff, who are most knowledgeable about lead risk, would allow their children to play with these cars even if a child was at the "tipping level" for lead poisoning.

Unfortunately, the Commission's vote today to deny Learning Curve's petition to allow brass collars on toys finalized interpretations of "any" and "absorption" in exceptions under the CPSIA, in a way that no product will meet this standard. Thus, it is an exception written into the statute that has been rendered useless.

While the CPSIA bans children's products containing lead in excess of certain levels, it also explicitly exempts some materials and products that "will neither—(A) result in the absorption of **any** lead into the human body" nor "(B) have any other adverse impact on public health or safety." Even the most trivial trace of lead detected in a wipe test can theoretically come off on the hand, move from hand to mouth, get ingested, and then get absorbed (albeit at undetectable levels in the blood). The product in question in the petition, brass collars on wheels, contains a lower level of absorbable lead than what the Food and Drug Administration has found to be acceptable in a piece of candy. The brass collars registered above zero on the wipe test (.8 µg or 8/10,000,000 grams). Even though the lead cannot leach out or be extracted by saliva, rubbing away minute amounts of the metal, brass in this case, allows trace amounts of lead to wear off. Thus the exclusion would no longer apply if "any" means zero. In fact, the Commission staff conceded that they are not aware of any materials to which the exclusion based on absorption would apply.

I voted to accept Learning Curve's petition for an exclusion because I disagree with the determination that the law allows for zero flexibility for the definition of "absorption of any lead." For the following reasons, I believe there are numerous ways that the statute allows for a *de minimis* exception to the lead ban:

First, a narrow interpretation of the provision in question, § 101(b)(1)(A), contradicts several accepted canons of statutory construction. The "whole act" canon dictates not just looking to the general words used in a particular clause, but interpreting them in view of the entire statute and its wider purposes. Disregarding this canon provides an interpretation that misses the forest for the trees. Section 101(b)(1) explicitly establishes an exception to the lead ban, so it cannot properly be read *not* to establish one. The scope of the exceptions established elsewhere in § 101(b) provides additional reason to think that the first, most broadly worded exception of the series is more than an empty set. In § 101(b)(2), Congress created an exception for inaccessible component parts, which the Commission has interpreted to cover many products. In § 101(b)(4), Congress created an exception for electronic devices, which the Commission already has interpreted to include many children's products. Read in the context of the whole act, it is hard to believe that § 101(b)(1) was intended as a vanishingly small exception when the other adjoining exceptions are not narrow ones.

The canon against "surplusage" likewise requires that "a statute should be interpreted so as not to render one part inoperative."[1] An agency—no less than a court—must give force to every provision of an enactment. A narrow reading of the word "any" not only renders the absorption exception inoperative, but it also makes other parts of §101(b)(1) pointless. For example, the discussion of "objective, peer-reviewed, scientific evidence," the reference to "reasonably foreseeable use and abuse" and the mention of "other adverse impacts on public

[1] *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); see also *Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n. 14 (1986) (noting that every phrase is presumed to add something to the statutory command).

health" all become irrelevant if the word "any" by itself negates any exceptions. In contrast, an interpretation permitting a *de minimis* exception solves the surplusage problem by giving meaning to § 101(b)(1)(B). In referring to "any **other** adverse impact on public health," § 101(b)(1)(B) implies that the "absorption of any lead" mentioned in § 101(b)(1)(A) must itself be absorption at a level that would cause an adverse impact on public health or safety.

Most noticeably, the Commission's interpretation violates the canon against absurdity in a variety of ways.[2] The CPSC's stark interpretation imposes enormous costs on retailers and manufacturers, who must abandon non-compliant inventory and re-engineer harmless products, with no added benefit to children. It has, for instance, already led many thrift shops and consignment stores to stop selling children's clothes due to the miniscule lead content in zipper stays and buttons. In addition, the Commission's interpretation prohibits the sale of some toy modeling dough products whose lead content is so low that it would be legal to sell it as food. Further, the Commission's rule requires banning the sale of everything from children's bicycles and brass band instruments to junior golf clubs—even though no detectable rise in blood lead levels occurs from children using these products. Finally, consistent application of the rule will require prohibiting libraries from lending children's books published before 1986 (when some ink used still contained lead). These absurd consequences of CPSC's interpretation become all the more ridiculous when considering that children will still face exposure to traces of lead from everyday products like doorknobs, faucet handles, drawer pulls, and even school lockers. When construction of a statute yields such plainly absurd results, the Commission should reconsider the interpretive approach it has taken.

In addition to violating canons of construction, banning even *de minimis* lead absorption levels that do not compromise children's health and safety turns the entire statute on its head—undermining the statute's clear purpose to protect children's health. For instance, where the presence of lead makes the steel frame of a bicycle stronger or makes the steel axle of a toy better able to grip the wheels attached to it (thus minimizing the choking hazard detached small parts would present), the lead increases the overall safety of the product. Worse yet, where refusing an exception will increase unhealthy risks (like using adult products in lieu of children's products), that affirmatively threatens the health and safety of children using these products.

Finally, the Commission's treatment of § 101(b)(1) becomes even harder to defend in light of the exception it has read into § 102(a)(2)'s third-party testing requirements. Section 102(a)(2) states that "before … distributing in commerce *any* children's product that is subject to a children's product safety rule, every manufacturer of such children's product … shall" submit sufficient samples for third-party testing.[3] Admittedly on its own initiative, the Commission has exempted gemstones, pearls, wood, natural fibers, surgical steel, precious metals, and other natural materials from lead testing when used in children's products despite the reference in the law to "any" children's product. Thus, even though § 102 contains no language whatsoever

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[2] See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, ___ (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")(cites omitted); See also *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989) (Kennedy, J., concurring in the judgment)("Where the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not *possibly* have intended,' we need not apply the language in such a fashion."). No legislative history indicates that Congress foresaw such absurd bans when it passed the CPSIA.

[3] § 102(a)(2) (emphasis added).

inviting a list of exceptions, the Commission has exempted from testing "certain products or materials that inherently do not contain lead or contain lead at levels that do not exceed the lead content limits under section 101(a) of the CPSIA."[4] Meanwhile, the Commission has interpreted § 101(b)(1) in this vote so narrowly that it has completely eliminated an exception Congress wrote into the law. By effectively adopting a reasonable *de minimis* standard in the testing context, the Commission has already embraced a definition of "any" that permits *de minimis* exceptions. For purposes of consistency alone and to establish a defensible position for any future litigation, the Commission should extend that same treatment to § 101(b)(1)(A).

Since I believe that the law allows for a common-sense *de minimis* exception to the lead ban, I also believe the Commission has a responsibility to act on this interpretation. As a former Member of Congress, I doubt that Congress would bother to create an exception that could not possibly cover any products. As such, I subsequently offered a motion to stay enforcement and delay the decision, following the failure of the first vote, in order to seek greater clarification from Congress on the definitions of "any" and "absorption" and then to return to the petition at a later time. Unfortunately, this vote failed 2-3, ensuring that the Commission as a whole is not interested to receive additional information from Congress on the issue.

While one company's request for leniency for brass collars, which are used to attach wheels to toy cars, may seem trivial, this decision also sets a precedent for how the Commission will interpret the entirety of the CPSIA. By solidifying the interpretation that "absorption of any lead" means zero lead in a children's product outside the safe harbor, even a *de minimis* amount, the Commission has decided there is no additional flexibility in the law for common-sense applications or reasonableness. Contrary to the intent of Congress and to dozens of letters from Members of Congress to the Commission following passage of the law, today's vote signaled that the Commission will not allow for a flexible and reasonable execution of the CPSIA.

In considering the consequences of today's vote, I am particularly concerned about the effects of this interpretation on small businesses and young families. In meetings with larger American companies, many of whom produce all of their products offshore, the cost and engineering expertise necessary under the CPSIA appears to be staggering. Thus, even these companies have speculated that small businesses will find compliance next to impossible. Often, it is our small businesses that actually hire American workers and produce products here in the United States. Furthermore, the cost of compliance will, of course, be passed on to families with young children and low-income families who face the tightest budget constraints.

As a result of today's decision, unless there is quick action from Congress to amend the CPSIA, the permanent impact of the law on the market will be irreversible. In the end, it is consumers and small businesses here and abroad that will bear the burden of this economic impact. I regret that I was unable to persuade my fellow commissioners of the wisdom of this interpretation. However, I will continue my fight for finding reasonableness and flexibility within this law.

[4] 74 Fed. Reg. 2433 (Jan. 15, 2009).