UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE INTERIM ENFORCEMENT POLICY ON COMPONENT TESTING AND CERTIFICATION

December 16, 2009

I voted to approve the Interim Enforcement Policy on Component Testing and Certification for lead content in order to provide guidance and more options to businesses who must comply with the law's testing and certification requirements for lead, in the interim, before the Commission has completed a number of necessary rulemakings to implement the Consumer Product Safety Improvement Act (CPSIA).

While I support the issuance of this interim policy, which is necessary to provide some flexibility to the marketplace, I am hopeful that the Commission also votes to accept my amendment to the "Commission Action on the Stay" to extend the stay for lead content until six months after such time as we have finalized the 15-month rule on compliance and testing frequency as well as the rule defining a children's product. In fact, this interim policy is only necessary because the Commission is still working on these two, crucial rulemakings. These two rules will provide fundamental information that businesses will need in order to make basic investment decisions on how they will come into compliance with the testing and certification requirements in the CPSIA. Without all of this information, and by lifting the stay prematurely, we would add to the confusion for companies trying to become CPSIA-compliant by creating one set of requirements shortly before we provide the marketplace with final, binding regulations which will be substantively different.

We also cannot ignore the fact that Congress has asked the Commission for recommendations on amendments and clarifications to the law in order to find ways to halt the unintended consequences of the CPSIA plaguing small businesses—especially as it applies to materials that in no way affect a child's health. It is possible that Congress will reinsert "risk" into the statute to allow the Commission to account for whether a product or material could pose any real risk to children when issuing regulations on new testing and certification requirements. If they do, this will provide the Commission and the business community much more flexibility in approaching these new requirements.

Up until now the Commission has been engaged in a classic standoff with Congress. The legislature has pointed a finger at the agency for interpreting its statute inflexibly, and the agency has in turn pointed a finger at the Congress for writing an inflexible statute. For that reason, the Commission should take every opportunity to insert flexibility into these regulations and should be responsive to Congress's most recent request to recommend clarifications to the law.

In that vein, I have listed below opportunities that were lost to improve this interim policy through increased flexibility, especially given that the Commission just held a two-day workshop on component testing where businesses presented a number of challenges that the Commission has not yet had time to address. In the following ways I believe the enforcement policy could have been strengthened:

With respect to risk:

- It is important to keep in perspective as we move forward with this policy that we are not always talking about products that pose a risk to children. A "non-compliant" product in the case of lead content would not necessarily mean a product that could pose a safety hazard for a child, but these could be products that contain lead substrate (*e.g.*, bicycles, brass musical instruments, the brass axle collar of a toy car, the imprinted ink on a children's t-shirt, the zipper on a child's pair of jeans) where the lead is not bio-available, but yet the product would still be in violation of the CPSIA. It would represent a poor allocation of limited enforcement resources to penalize "non-complaint" products rather than truly unsafe ones.

- The policy fails to use the maximum flexibility granted the agency in the area of enforcement to provide a distinction between what it means to enforce the lead limits for products that present a real risk of harm to a child (*e.g.*, lead paint) vs. enforcing the law for products that present no real harm to children, such as products that contain lead substrate but for which there is no bio-available lead. My staff and I presented this proposal during internal discussions with agency staff and other Commissioners' offices. This is an important distinction, both for the agency's workload and mission and for the marketplace struggling to comply with the new testing requirements. Separating these enforcement policies would allow the Commission to prioritize safety (which is its core mission) while also providing maximum flexibility to businesses struggling to comply with the law's requirements. This enforcement distinction would also minimize the unintended consequences of the CPSIA.

- Along the same lines of separating enforcement policies based on risk, I would have preferred that the Commission pursue a more stringent policy toward enforcement of the lead paint ban. While I support the policy that retailers, distributors, importers, or manufacturers may certify to the lead content standard at any point in the distribution process, I believe lead paint (which, after all, is where the greatest risk lies) should be held to a stricter standard. I would limit the ability to certify compliant paint to the original paint manufacturer and the final product manufacturer using Type I component testing only. Therefore, if a product were found to have leaded paint, such as the products that were recalled during the height of the lead-in-toys controversy in 2007, the liability would be clearer and more easily traced.

With respect to small businesses:

- The policy does not include any allowance for relief on testing costs for small businesses, beyond component testing. It is important to keep in mind that the reason that Congress

wrote and passed the CPSIA in the first place was due to the high-profile recalls of several toys made with lead paint by large-scale toy manufacturers who produce products in China. Unfortunately, this enforcement policy does not provide any distinction between what is required for a large company that may produce millions of toys in foreign manufacturing facilities (and that can also have their products tested in their own firewalled labs) vs. what is required for small domestic manufacturers of children's products that now have to pay to have their products tested in third-party accredited labs. Additionally, testing a product in a lab in a country such as China is likely to be cheaper than the cost of sending that same product to a third-party lab in the United States. While this enforcement policy is well-intentioned, by failing to make any distinction between large and small businesses (and, incidentally, foreign and domestic manufacturing) it also serves to solidify the competitive advantage that large manufacturers will have over small manufacturers due to the inability of small companies to afford to meet the new testing and certification requirements. For this reason, large toy manufacturers have turned a corner to become supportive of the new, onerous regulations and clearly see the competitive advantage that the law gives them over smaller companies.

- There is also no distinction in this enforcement policy for low-volume manufacturers, which may include either a small or large company. Companies that produce only five or ten of a product to sell to a small retailer or to a crafts fair cannot spread the testing costs for their product across economies of scale like a high-volume manufacturer. However, a company that produces 10,000 identical dolls per year would have a competitive advantage in spreading the testing costs for a doll across 10,000 units. The low-volume manufacturer will be severely disadvantaged until possibly such time as the Commission completes the official rulemaking for testing frequency (dubbed the "15-month rule")—a date that has yet to be determined.

- Additionally, I have concerns that the issuing of this interim policy coupled with the August 2010 date for lifting the stay will not provide relief for businesses that already are dealing with more stringent requirements from large retailers. There is no reason to believe that if retailers are placing more onerous requirements for testing on businesses than are required under the law now that anything short of an official rulemaking from the Commission or a change to the statute would prevent this. After all, no matter what testing and certification is done prior to the product being sold to the consumer, anyone who has certified to the lead limits, or has relied on the certification of someone else in the distribution chain, including retailers on up to the to the manufacturer level, could be liable for a non-compliant product.

  If the Commission were to have focused on inserting risk into this enforcement policy, we could have, for example, <u>reduced</u> the liability for retailers to ensure that they do not force suppliers and manufacturers to jump through more hurdles than are necessary for products that are inherently safe. This could be accomplished by: 1) absolving retailers of any penalties associated with non-compliant products, unless the product poses a real risk to a child (*e.g.*, lead paint); 2) allowing for only a stop-sale of a product, instead of a recall, for products found to be non-compliant but that pose no real risk; and/or 3)

providing that retailers are only liable for the need to possess a certificate of compliance with the lead limits, but are not liable for the lead content of the product itself.

Other concerns:

- I also object to the policy that companies be expected to practice "random sampling" to obtain a testing sample due to the one-size-fits-all nature of this policy and the additional burden this will place on domestic companies. We can solve the problem of "golden sampling"—a practice prevalent in China where a business purposefully avoids compliance by testing a sample that is "better" than the batch—without also burdening domestic manufacturers with micro-managed sampling requirements. Instead of expecting only a "random sample," the manufacturer should be able to pursue a wide variety of avenues in determining how to minimize compliance failures. For example, I believe that final product testing could be permitted without truly random samples, since regardless of the method of sampling the manufacturer is still on the hook for any and all compliance failures.

- Finally, the concern was raised during the two-day workshop on component testing that the needs of testing labs could end up being prioritized over businesses and consumers as these policies and rulemakings unfold. The Commission has not discussed a way to address this issue. At the workshop, the Commission heard from the interests of laboratories, who would prefer that the Commission go so far as to endorse or allow random sampling along each production line, or random sampling where the lab would choose the sample—which is clearly in the financial interest of testing labs who would be able to charge for each visit or sample. This would be a clear burden on small and large businesses and entirely unnecessary to improve safety.