UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE FINAL RULE ON PROCEDURES AND REQUIREMENTS FOR A COMMISSION DETERMINATION OR EXCLUSION WITH REGARD TO CHILDREN'S PRODUCTS CONTAINING LEAD

March 3, 2009

The 110th Congress demonstrated its justified concerns about the possible exposure of children to toxic lead in children's products by writing a structured and very strict lead ban into the Consumer Product Safety Improvement Act of 2008. They are to be applauded for that. It took courage and leadership to withstand the forces that argued for higher lead limits or for special treatment for their products.

Lead is a known neurotoxin that can accumulate in the human body over time and can have serious effects on a child's mental and emotional development. Additionally, acute lead poisoning can cause death. Studies have linked this nation's success, over the years, in removing lead from such products as gasoline and paint to higher student test scores and reduced crime rates among juveniles. Despite these efforts there continues to be lead in children's products and continue to be parents who, after ruling out the most likely sources of lead in their homes, are uncertain why their children have elevated blood lead levels. Acknowledging that there is no evidence of an absolute safe level of lead exposure for children, but also recognizing that an absolute ban on lead in all children's products could be difficult to achieve, the Congress laid out a scheme that set decreasing lead limits with certain limited exceptions to meeting those limits.

The initial lead limit, which went into effect on February 10th of this year, is 600 parts per million (ppm) total lead content, by weight, for any part of the product.[1] The Act adopted 600 ppm as the first phase limit for children's products, above which a product would be banned, except in certain carefully delineated circumstances.

One circumstance the Congress took into account was a children's product where the parts containing lead in excess of the allowable limit were not physically accessible to the child. Commission staff recommended the use of the same probes that manufacturers presently use to determine if a child can touch a sharp point on a product with either their fingers or their tongue to determine inaccessibility. The Commission voted to put this proposal out for public comment.

[1] The lead limit is scheduled to drop to 300 ppm in August of this year and then to 100 ppm in August 2011.

Congress also recognized that certain electronic devices might contain parts with prohibited amounts of lead that could not be made physically inaccessible and for which it was not as yet technologically feasible for the part to be made within the acceptable lead limits and still serve its intended function. The Commission adopted an interim final rule describing certain components in electronic devices that it deemed met the requirements of this provision. This interim rule has been issued for public comment.

Finally, because Congress could not envision every circumstance involving every component of a children's product that might contain lead, it also considered the possibility that a material other than those used in electronic devices existed that had accessible lead in excess of the lead limits, but which neither resulted in any absorption of the lead into a child's body nor had any other adverse impact on public health or safety. The final rule that I am voting on today sets out the procedures and requirements that requestors must meet to obtain an exclusion under this section of the Act.

The structure as laid out by Congress is as follows:

- Children's products containing no lead or that have lead content below the applicable lead limit—not covered by the ban;
- Children's products with lead in excess of the lead limit but where the lead is not accessible by a child's fingers or tongue—not covered by the ban;
- Children's products that are considered electronic devices that have accessible lead-containing components which because of their function or nature can neither be made inaccessible nor be made to comply with the lead limit—not covered by the ban; and
- Children's products with accessible lead in excess of the lead limit but which a child's contact with the lead results in neither any absorption of the lead into the child's body nor has any other adverse impact on public health or safety—not covered by the ban.

In addition, the Act excludes paint, coatings or electroplating as acceptable barriers to make the lead content inaccessible or prevent the absorption of any lead into the human body.

The lead provisions are based on the premise that the higher the lead content of a product, the higher amount of lead a child may absorb. So far the Commission has combined a child protective approach with flexible enforcement policies in applying the new lead content limits.

Some commenters have argued that the Commission's recognition of the high barrier presented by the last exception described above rendered the provision meaningless and that there must be some de minimis amount of lead over and above the lead limit set by the Congress that is allowable even if it is accessible by a child. I think it is more likely that there was a material (or materials) that the Congress had in mind that they thought could meet the stringent exception. The bill that passed the Senate in March of 2008 (one of the precursors of the CPSIA) contained an express exemption for lead crystal. It stated that the Commission could by rule decide that the lead limit did not apply to the lead content in lead crystal if it could determine that such content will "neither (A) result in the absorption of lead into the human body, nor (B) have an adverse impact on public health and safety." This is very similar to the language that survived in the final statute, but without reference to a specific material and with

the modifier “any” added before the word ‘lead.’ Recognizing that a provision allowing any children’s product to have excessive and accessible lead had to be narrowly construed if it was not tied to a specific material, or that would open up the law to numerous exemption requests that could make the central provisions of the lead ban meaningless, the Congress also required that anyone seeking exemption under this provision had to make their case of not any absorption through the best available, objective, peer-reviewed, scientific evidence, and not base it on mere speculation or a “common sense” analysis.

It probably came as a shock to some people just how many children’s products contained lead in excess of the limits. Either the manufacturers knew, but had no reason to deal with the issue until the deadline approached for the ban, or they did not know because they had never before been required to test their children’s products for lead. Either way, the law has brought out into the open a variety of children’s products that contain lead in excess of 600 ppm.

Some want the Commission to interpret section 101(b)(1) to say that if a product does contain accessible lead in excess of the limit (regardless of how much above the limit it might be) that there will not be any absorption of lead into any child’s body if it is unlikely that many children will come into contact with that part. Such an interpretation would do violence to the careful scheme set out in the statute with regard to lead limits and inaccessibility. As I read the language of the Act, we would have to be able to say that **no** child would come into contact with the accessible part before we could come to a conclusion that the material will not result in the absorption of any lead into the human body on that basis. We know that some children do handle the valve stems of their bikes; they certainly do have their hands on the handle bar grips and break levers of youth model ATVs. It is also foreseeable that any child will handle any accessible part of these products and then put their hands to their mouths. The law does not say that we should only consider foreseeable *mouthing* of the parts with lead. It contemplates all the ways in which a child might ingest lead, and hand to mouth contact is a very common mode of lead ingestion in children. The Commission has always used the foreseeable use and abuse language as being protective of the product user, not the product manufacturer.

In addition the statute uses “neither/nor” for the two clauses of (A) and (B) in section 101(b) and added the word “other” in clause (B) before ‘adverse impact,’ the latter change implying an impact different from that caused by lead absorption. Had the language used been “either/or” and the word “other” been left out of clause (B) (that is, if it had read that the product or material must “**either** not result in the absorption of any lead **or** not have any adverse impact on public health), then the Commission would have had the ability to assess whether the absorption of some lead above the lead content limit would have any adverse impact on public health. The changes to this section that now appear in the CPSIA, simultaneously sought to broaden the scope of the materials covered by the original lead crystal exemption and narrowed the acceptable impact on the human body. As presently written, I find it impossible not to conclude that Congress intended this to be a very narrowly construed exception that does not allow for any absorption of lead into a child’s body.