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November 14, 2008

Mr. Michael A. Brown
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3201 New Mexico Avenue, N.W. Suite 242
Washington, D.C. 20016

Dear Mr. Brown:

I have received your request for reconsideration of the advisory opinion on whether the limits in Consumer Product Safety Improvement Act (the "Act") on the amount of lead permissible in children's products apply to unsold inventory when those limits take effect in February of 2009. The Commission is aware of the potentially significant economic impact that the new Act could have on any remaining inventory next February. However, Congress stated that children's products that did not meet the new lead limits would be treated as "a banned hazardous substance" under the Federal Hazardous Substances Act as of February 10, 2009, and made it unlawful "to sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States" any banned hazardous substance. The language Congress wrote does not permit me the flexibility to take into consideration the policy issues that have been raised by you and your client as to the potential consequences of requiring products to meet the new stricter lead limits by that date. For the reasons provided in the September 12, 2008 advisory opinion, which will not be readdressed here, your request for reconsideration is denied.[1] If you believe that your client will be unable to bring its products into compliance with the statutory requirements, I suggest that you consider petitioning the Commission for relief.

Sincerely,

/s/

Cheryl A. Falvey

[1] Advisory opinions represent the legal opinions of the General Counsel and may be changed or superseded by the Commission.

B & G
BROWN & GIDDING, P.C.

November 4, 2008

Cheryl A. Falvey, Esquire
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U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Request for Reconsideration of the Office of the General Counsel's Advisory Opinion on Retroactive Application to Inventory of Total Lead Limits Specified in the Consumer Product Safety Improvement Act of 2008

Dear Cheryl:

It was a pleasure talking with you at the BNA conference on the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). As you know, Brown & Gidding represents a number of clients who manufacture and/or import children's products and thus will be subject, as of February 2009, to the new total lead limits set forth in Section 101(a) of the CPSIA. On their behalf, we respectfully request reconsideration of the advisory opinion issued by the Office of the General Counsel, captioned "Retroactive Application of the CPSIA to Inventory," dated September 12, 2008 ("the OGC Lead Inventory Opinion"). That opinion concluded that the CPSIA's new total lead limits should retroactively apply to product inventory as of February 2009.

We applaud and recognize the Commission staff's hard work and earnest efforts to seek and offer guidance on the many new obligations the CPSIA creates. The task is a daunting one, not only because of the CPSIA's myriad of new obligations and demanding timelines, but also, in large part, because the legislation that Congress ultimately passed -- a measure born of competing agendas and committee staff compromises driven by the pressure to produce a final bill before the imminent August recess of the lawmakers involved - is hardly a model of legislative clarity. We have now had a chance to digest the new legislation more fully and to appreciate more fully the practical and legal ramifications of the new legislative provisions, not the least of which are those relating to total lead. As detailed below, applying the new total lead limits to

product inventory as of February 2009 will have seismic practical, logistical, economic and legal consequences for affected businesses. Moreover, when one considers the relevant CPSIA provisions, and the conflicting inferences that can be drawn from them, we believe that the law does not provide the kind of unambiguous expression of Congressional intent to apply the new total lead limits retroactively needed to overcome the strong presumption *against* such retroactive application of the law. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

For the reasons discussed below, we believe that the OGC opinion that the new CPSIA lead limits apply to inventory as of February 2009 runs afoul of Landgraf, as the application of such limits will "have a retroactive effect, *i.e.*, . . . it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already concluded" (emphasis added). 511 U.S. at 280. When this retroactive effect is coupled with the CPSIA's ambiguous language on the retroactivity issue, we believe that the better reading of the law does not permit construing the CPSIA as having retroactive application to the lead limits. Instead, in our view, the law supports prospective application of the lead limits.

I. Retroactive Application of the CPSIA's Total Lead Limits to Product Inventory Will Impose New Obligations and Liabilities for Commercial Conduct Already Completed

It is now approximately seven weeks since the issuance of the OGC Lead Inventory Opinion. As we now know from direct experience in counseling many different clients, applying the statute retroactively will have severe practical, economic, logistical and economic consequences. At the outset, the Commission's opinion affects all products primarily intended for use by children under twelve years of age -- literally hundreds of millions or more units in inventory and billions of dollars in value. According to the opinion, as of February 10, 2009, such products in inventory that contain lead in excess 600 ppm will be contraband. Although, as a practical matter, the great majority of these products may meet this limit, virtually none of this inventory has been tested for the presence of elemental lead in excess of 600 ppm because no federal obligation or requirement to do so previously existed. Hence, no record exists to determine which items comply and which are contraband.

Moreover, as the Commission staff recognizes, one cannot simply look at a product to determine whether it contains lead or, if it does contain lead, the level of lead involved. Instead, determining the total level of lead in the components of a product (or determining the absence of lead) requires expert

testing -- an expensive and time consuming process. [1] Given the vast inventory throughout the U.S. economy affected by the retroactive application of the law, the costs and logistics of testing will be staggering,[2] even if such testing could be performed as a practical matter within the next 100 days. Given these real practical limitations, manufacturers, distributors and retailers will have to make a choice in February 2009 if retroactive application of total lead rules prevails: sell inventory at risk of violating the Federal Hazardous Substances Act (FHSA) or abandon their existing inventory at enormous, possibly fatal expense.

Various Brown and Gidding clients have offered their own estimates of the economic and practical costs if the new total lead limits apply retroactively to inventory. One large retailer, who has thousands of stores, estimates that the value of the affected inventory could be as high as $500,000,000. Another client estimates that it might have inventory at risk in excess of its financial capital, potentially causing a default under its loan agreements or rendering its operations unfinanceable. The impact of applying the lead requirements retroactively will present these and other clients with the Draconian options of incurring huge expenses for what appears to be little gain in public safety or risking the imposition of fines and penalties.

Branding previously legal items as contraband and saddling consumer product businesses with these new and expensive tasks unquestionably violates "elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf. 511 U.S. at 265. Businesses with existing inventory affected by the ban that goes into effect on February 10, 2009 *legally* purchased goods *legally* manufactured under a set of legal norms that *did not include* any requirements for total lead levels. As such, they should not have to endure the adverse consequences that a retroactive interpretation of the lead requirements engenders, absent clear evidence that Congress intended to do so.

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1 This comment does not begin to address the issue of whether there is sufficient qualified capacity in testing laboratories to perform such tests nor does it address the practical issues of and limitations on in-house testing.

2 Many distributors/manufacturers and retailers maintain inventories containing more than 25,000 different products. Even the logistics of sampling every item in inventory and transporting the samples to testing laboratories would crush most operating companies, particularly in a short period of time during the Christmas season. Complicating matters, testing one item out of several in inventory in, for example, a distribution business may still not provide the necessary assurance that all similar items comply since the various items may be from different lots received at different times.

If Congress had intended the far-reaching consequences that result from retroactive application of the lead limits, one would expect to see in the legislation itself, or in the CPSIA's legislative history, some evidence that Congress specifically considered and deemed necessary the economic burden that might result from retroactive application of the new lead limits or considered the threat to public health from lead in product inventories to be so severe that retroactive application of the lead limits was necessary. The CPSIA itself contains no express unambiguous Congressional statement concerning retroactivity, nor does the legislative history contain any indication that Congress intended the lead limits to apply retroactively, as Landgraf requires.[3] 511 U.S. at 272-73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits").

The little additional legislative commentary that exists on the lead provisions supports a conclusion that Congress intended those provisions to be prospective. The OGC Lead Inventory Opinion cites the following remarks of Senator Hutchinson: the new legislation established "the most comprehensive lead safety standards that we have seen to date for toys and the paint manufacturers use on toys" through "standards [that] are implemented responsibly to give manufacturers time to adapt, without compromising safety." *OGC Lead Inventory Opinion at 4.* Applying the lead standards retroactively so that products already legally produced arbitrarily become illegal as of February 10, 2009 hardly comports with this stated intent. To the contrary, if the Congressional intent was to allow time for manufacturers to adapt to the new rules, it follows that existing inventory should not be subject to an outright ban.

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[3] To the extent that the legislative history addresses retroactivity at all, it supports prospective application of the new lead limits, as the language used is *forward looking.* In discussing Section 101 in general, as far as determining what lead level is technologically feasible, it states:

> "The Conference Report ultimately requires that the Commission lower the permissible lead level in children's products to the lowest amount that is technologically feasible. This section provides a definition of technologically feasible, and includes a provision that identifying alternative practices, best practices, or other operational changes that would allow a manufacturer to comply with the lead limit. The intent of this alternative and best practices provision is *to require manufacturers to use better methods of producing a product that can be achieved without the need for major technological advances, such as taking steps to better clean equipment or the factory, or to make changes in operation, maintenance, or other practices that can reduce or eliminate lead in the product* (emphasis added)." H.R. Conf. Rep. No. 110-787, p. 66, 110th Congress, 2nd Sess. (2008).

While the legislative history provides no specific support for a retroactive interpretation of the new lead limits, we nonetheless recognize that reviewing the plain language of the CPSIA should be the first step in determining whether the lead requirements apply retroactively. As the next sections of this letter show, however, the CPSIA's language, when taken in conjunction with that of the Federal Hazardous Substances Act, provides little guidance on that topic.

II. Considered as a Whole, the CPSIA Does Not Support the Conclusion that the New Total Lead Limits Should be Applied Retroactively to Inventory

The CPSIA -- Much of the OGC opinion discusses the requirements of the Federal Hazardous Substances Act as they relate to the retroactive application of the new lead requirements. However, to the extent that the CPSIA itself contains provisions relevant to the issue of whether the new lead limits should apply retroactively, the legislation at best is ambiguous in providing an answer. As the OGC Lead Inventory Opinion correctly notes, in general, one can assume that Congress acted deliberately and intentionally in fashioning the CPSIA. Yet the provisions of the CPSIA itself cut both ways on the issue of the retroactive application of the total lead limits. In our judgment, such conflicting evidence by its nature cannot be sufficient to overcome the strong presumption *against* retroactivity of new requirements, especially when the new requirements will have the far-reaching and severe economic consequences outlined in the first part of this letter. Stated another way, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouse holes." Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

In partial support of retroactive application of the lead limits, the *OGC Lead Inventory Opinion at 2*, cites to the fact that Section 102(a)(3)(A) of the CPSIA expressly provides for the prospective application of third-party certification requirements to children's products manufactured after the various effective dates for certifying such products. Thus, according to the opinion, Congress clearly knew how to make something prospective in its application if it so desired, but did not do so with respect to lead. However, taken literally, this interpretation would also require all such products in inventory as of November 12, 2008, that are subject to existing Commission standards, to be self-certified because Section 102(a)(1) of the Act does not contain an express reference to certifying those products based on their manufacturing date. Yet the

Commission staff has, of course, taken the position that self-certification only applies to products manufactured after November 12.

On the other hand, the *OGC Lead Opinion at 3 and n.4* also notes that some of the new CPSIA standards on cribs expressly apply retroactively. Based on this, one can argue that Congress clearly knew how to make something retroactive in its application as well and would have done so if it wanted the lead requirements to be retroactive. It did not, of course, do so, thus supporting the proposition that the requirements apply prospectively. In our judgment, these contradictory signs within the CPSIA itself point to the same conclusion: CPSC should not interpret the law as imposing the new lead limits retroactively in the face of Congressional silence, as such silence cannot always be construed as purposeful. Instead, silence may simply be the result of the failure to consider an issue, compromise, or an agreement to disagree. Indeed, the case that the OGC Lead Inventory Opinion cites for the presumption against retroactivity -- Landgraf – stands for this proposition as well. 511 U.S. at 261-262.

In addition, a basic rule of statutory construction is that enacted legislation should be construed "so as to avoid rendering superfluous" any specific provisions or language contained in that legislation. *See e.g.*, Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991). Yet the "plain language" reading of the new lead limits in the OGC Lead Inventory Opinion will engender exactly such a result for much of CPSIA § 101(a)(2). The obvious intent of CPSIA §§ 101(a)(2)(B) and (C), relating to progressively lowering the permissible level of lead in children's products, is to phase in increasingly stringent total lead limits on a rolling basis -- six months, one year, and three years after enactment of the CPSIA. However, the OGC Lead Inventory Opinion takes the position that the same plain language reading of the 600 ppm lead limit that makes that limit apply retroactively to inventory as of February 10, 2009 also makes the 300 ppm limit applicable to inventories of children's products as of August 14, 2009, and the 100 ppm lead limit, "if it is deemed technologically feasible," applicable to such inventory as of August 14, 2011. *OGC Lead Inventory Opinion at 4 and n.5.*

The retroactive application of the progressively more stringent lead limits to inventory means, for example, that a manufacturer who produces or a retailer who stocks products that meet the new 600 ppm lead limit after February 12, 2009, will have to destroy or take back any items that exceed 300 ppm lead six months later -- or risk the imposition of legal sanctions and penalties. In practical terms, then this reading makes the 100 ppm lead limit applicable now, since, if only to protect themselves, manufacturers and retailers will require

products to meet the 100 ppm immediately.[4] In sum, interpreting the lead limits as being retroactive produces an illogical result that makes the phased-in scheme that Congress specifically enacted essentially obsolete. One would expect that, if Congress intended such an anomalous effect, it would have expressly indicated so in the legislation or at least explained in the legislation or legislative history how it expected firms to meet their obligations under the phased-in approach. It did not do so, supporting the conclusion that Section 101 of the CPSIA should apply prospectively.

The same analysis applies to the phased-in limit of 90 ppm on lead in paint, which the OGC Lead Inventory Opinion also posits is retroactive. The original 600 ppm lead standard was prospective when it was enacted in the late 1970s, and Congress has specifically required in the CPSIA that children's products manufactured after November 12, 2008 be certified as meeting that standard. Interpreting the law retroactively, however, essentially means that the certifications will be worthless nine months after they are required unless the products certified as meeting the 600 ppm standard also meet the 90 ppm standard. Nothing in the law suggests that Congress intended this result.[5]

The Federal Hazardous Substances Act - The OGC Lead Inventory Opinion on retroactivity relies heavily on the decision of Congress to designate the total lead and lead-in-paint limits as regulations issued under Section 2(q) of the FHSA.[6] In that vein, the OGC Lead Inventory Opinion cites the failure of the FHSA to include an express provision that makes such rules prospective in application as one of the factors supporting a retroactive interpretation.

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[4] To do otherwise would be to keep the violative inventory sword indefinitely suspended over the entity's head.

[5] The provisions of Section 108 of the CPSIA relating to the ban on phthalates create a similar, but even more perplexing issue of interpretation. On the one hand, they prohibit offering for sale banned phthalates after February 10, 2009. On the other, the provisions are expressly characterized in the law as consumer product safety standards which, by the terms of section 9(g)(2) of the CPSA, can only apply to products manufactured after that date. Given this contradiction, Landgraf would appear to require that the phthalate requirements be prospective.

[6] CPSIA § 101(a) reads: "...any children's product . . . that contains more than the limit established by paragraph (2) *shall be treated as a banned hazardous substance under the Federal Hazardous Substances Act* (15 U.S.C. 1261et seq.) (emphasis added). CPSIA § 101(g) states "Any ban imposed by subsection (a) . . . shall be considered a regulation of the Commission promulgated under or *for the enforcement of section 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)* (emphasis added).

As a general principle of statutory construction, however, in a Congressional enactment that contains both specific and general language relevant to the same subject matter, the specific parts of the legislation control over the general [parts]. *See, e.g.* Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957). While the OGC Lead Inventory Opinion at p. 1 correctly identifies the FHSA as the statute under which the lead limits were promulgated as Section 2(q) rules, it does not address the provisions of the FHSA under which Section 2(q) bans are enforced. Instead, it skips to the general language of the Consumer Product Safety Act's (CPSA) Section 19 "prohibited acts" section[7] which also provides for the enforcement of such bans as partial evidence of Congress' alleged intent to apply the new lead limits retroactively.

Rather than looking to Section 19 of the CPSA in isolation, the OGC Lead Inventory Opinion should have first examined the FHSA's "prohibited acts" section, as it is the relevant enforcement mechanism for the specific statute Congress identified. Under FHSA Sections 4(a) and (c), 15 U.S.C. §§ 1263(a), (c), the following relevant acts and the causing thereof are prohibited:

> (a) The introduction or delivery for introduction into interstate commerce of any . . . banned hazardous substance.
>
> . . .
>
> (c) The receipt in interstate commerce of any . . . banned hazardous substance and the delivery or proffered delivery thereof for pay or otherwise."

Taking section 4(c) first, under the new law, any entity that receives a children's product with lead in excess of 600 ppm in interstate commerce before February 10, 2009 has received a legal product. Even though, on or after February 10, that product may be technically defined as a banned hazardous substance, offering the product for sale does not violate section 4(c) of the FHSA because the product must be contraband at the time of receipt in interstate commerce for any subsequent sale or offer for sale to be a prohibited act. In addition, the downstream entity holding the now violative product for sale did not violate section 4(a) of the FHSA because it was not the entity that "introduced [the now violative product] into interstate commerce." With respect to section 4(a), a plausible argument also exists that, if the product was initially

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[7] Section 19 is basically a general catch-all provision that covers all other rules and standards issued pursuant to the statutes the Commission administers.

introduced into commerce before February 10, 2009, section 4(a) has not been violated even though the product continues to move towards the ultimate seller.[8]

The OGC Lead Inventory Opinion does not address the statutory enforcement scheme under the FHSA that expressly applies to the requirements for children's products containing lead by virtue of their status as section 2(q) rules. Yet, since the products are specifically regulated under the FHSA, consideration of the provisions of the enforcement scheme of the FHSA is elementary to deciding if Congress intended to apply the lead limits retroactively, with potential civil and criminal sanctions attaching to further distribution of previously legal products. As the review above shows, those provisions do not support an interpretation of retroactively. Moreover, should one argue that amending section 19 of the CPSA to make it a prohibited act to sell a banned hazardous substance overrides the existing enforcement provisions of the FHSA, that argument would essentially "read into" the CPSIA an implied repeal of FHSA Sections 4(a) and (c), as they apply to the legal possession and further distribution of inventory that fails to meet the new total lead limits. As the Supreme Court has said, a strong presumption exists against interpreting a new statute in such a way that it changes or repeals an existing statute, absent clear Congressional language to that effect. *See, e.g.,* Astoria Federal Savings, 501 U.S. at 109. Yet this contradictory result is precisely what relying on the section 19 prohibited acts section of the CPSA in analyzing retroactivity would accomplish.

The apparent conflict between the prohibited act sections of the FHSA and CPSA, in our opinion, raises a substantial question as to whether Congress has spoken unambiguously that the new lead requirements are retroactive. Because of that conflict, we believe that the lead provisions of the CPSIA must apply prospectively.

Practice under the FHSA - With respect to the FHSA, in part the argument for retroactivity in the OGC Lead Inventory Opinion rests on the distinction that Section 9(g) of the CPSA contains a specific requirement that CPSA standards must be prospective and the FHSA does not contain such a

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[8] A harder question relates to whether products that have been manufactured before February 10, 2009, but have not yet been distributed are subject to the total lead limits. If, however, the Commission agrees that the lead requirements do not retroactively apply to products that have already been introduced into interstate commerce, applying them to products that have been manufactured before February 10 but not yet shipped would appear to be an arbitrary distinction with little basis in the law.

specific provision. The procedural requirements of the FHSA and Commission practice do not support this distinction. The procedures for rulemaking under Section 2(q)(1)(A) of the FHSA require that the Commission follow the procedures of 5 U.S.C. § 553.[9] Because of the delayed effective date provisions of Section 553, the agency has, to our recollection, always or almost always interpreted it as applying prospectively for rules issued under that section. Indeed, 5 U.S.C. § 551(4) defines a rule as "an agency statement of general or particular applicability and future effect (emphasis added)." In addition, until the passage of the CPSIA, both Sections 2(q)(1)(A) and (B) of the FHSA referenced the procedures of Section 701(e) of the Food, Drug, and Cosmetic Act for rulemaking. While the Commission has issued few rules under those procedures, it historically applied those rules prospectively.[10]

As further support for the argument that FHSA bans should be prospective, Section 15 of the FHSA gives the Commission the authority to seek the recall of a banned hazardous substance regardless of whether or not the product was banned at the time of sale. This grant of authority provides an implicit, if not explicit, Congressional recognition that bans under the FHSA are generally to be prospective

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[9] The CPSIA is unclear as to whether Congress intended to make the ban on excessive lead in children's product a rule under Section 2(q)(1)(A) or Section 2(q)(1)(B) of the FHSA.

[10] The OGC opinion letter cites the bans on lead wick candles and dive sticks as supporting the proposition that the Commission has sometimes applied the banning provisions of the FHSA to apply to inventory and other times has not. The record, however, shows that retroactive application is a rarity. While the preambles of the lead wick candle and dive sticks rules discuss inventory, the implementing provisions of those regulations make it clear that they applied the banning provisions prospectively.

> Dive sticks: "This rule will become effective 30 days from publication . . . and will apply to dive sticks entering the chain of distribution on or after that date" (emphasis added) 45 Fed. Reg. 13650.
>
> Metal wick candles: "The rule provides an effective date of 180 days after publication. The time before that date may be used to deplete stocks . . . subject to the ban. The ban then applies to any metal candle wick containing more that .06 percent lead, and any candle with such a wick, that is manufactured or imported on or after that date" (emphasis added). 68 Fed. Reg. 19147.

In addition to the revocation of the exemption from the ban on lawn darts that Congress mandated, we have found only one additional ban that technically applied to inventory -- the ban on infant cushions. That ban, however, which was effective immediately upon publication, specifically noted that the effective date was appropriate because all 12 known manufacturers had already withdrawn their cushions from the chain of distribution. In other words, no inventory was affected and, as the notice indicated, the Commission was promulgating the rule to assure that such products did not reappear in the market in the absence of a ban.

in application, with Section 15 providing the vehicle to address products distributed prior to the effective date of the ban.

This is not to say that the agency is absolutely prohibited from acting retroactively under the FHSA in appropriate instances. According to the Guide to Federal Agency Rulemaking, 2nd Ed., issued by the Administrative Conference of the United States in 1991, such instances include those where retroactive application would not be "manifestly unjust" or where a balance of factors would favor it. The factors to be balanced include whether the rule is an abrupt departure from prior practice, the extent of reliance on a former rule (or, in the case of lead, the absence of a rule), the degree and burden that retroactivity would impose, and the statutory interest in applying the new rule despite the reliance of affected parties on the old rule. Since the CPSIA declares that the new lead requirements are FHSA section 2(q) rules, it would appear that this type of analysis would be appropriate in evaluating whether they should apply retroactively. Without belaboring the point, in the absence of the citation in the legislation to any hard data that show that products in the stream of commerce present such a risk that they should be banned, the adverse burden and impact, as well as the dramatic change in the status quo that retroactive application would present, appear to dictate against an interpretation that the new lead limits should have such application.

In short, given the provisions of the FHSA itself and history of the agency's interpretation and application of the relevant provisions of that Act, the failure of the FHSA itself to include a specific provision for prospective application for FHSA bans is not, in our view, particularly relevant to or determinative of the issue of retroactive application of the new lead limits. The same is true for that portion of the analysis in the opinion based on the section 19 prohibited acts section of the CPSA. The requirement for clear Congressional guidance is even more pronounced since virtually none of the products in inventory that are affected by the OGC Lead Inventory Opinion were required to be or have ever been tested for quantitative lead.

III. Conclusion.

We do not agree that Congress has spoken in a sufficiently unambiguous manner to meet the standards for retroactive application outlined in key cases on this issue. From what we understand, and from what is evident from the sometimes jumbled text of the CPSIA itself, this legislation was the child of legislative compromise, hammered out under the pressures of competing interest groups and compressed timelines. To construe some of the CPSIA's most

ambitious provisions – the new total lead limits – in such a way that *legal* products *already manufactured and in the stream of commerce* become *illegal* as of a certain date imposes huge after-the-fact sanctions for past transactions undertaken in good faith -- with little or no legislatively articulated or factual rationale supporting that result. The unfairness of such a result is one reason why, as the OGC Lead Inventory Opinion correctly notes, almost all CPSC rulemaking is prospective in nature. We do believe that it would effectuate the overall purposes of the CPSIA and the CPSA in general to follow the path that the Commission has taken for virtually all standards and bans under the acts it administers by interpreting the law to apply the CPSIA's new total lead limits only to products manufactured after February 10, 2009.

We thank you for your time in considering these comments. Please let us here at Brown & Gidding know if we can be of further assistance.

Sincerely,

Michael A. Brown

cc: Office of the Secretary