U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING
July 13, 2011

Chairman Inez M. Tenenbaum convened the July 13, 2011, meeting of the U. S. Consumer Product Safety Commission at 10:00 a.m. in open session. Commissioners Thomas H. Moore, Nancy A. Nord, Robert S. Adler and Anne M. Northup were also in attendance. Chairman Tenenbaum made welcoming remarks and summarized the Commission's activities regarding the matter to be considered.

Technological Feasibility of 100 ppm for Lead Content, Section 101(a) of the Consumer Product Safety Improvement Act ("CPSIA") (Ref: staff briefing packages dated June 22 and 29 and July 8 and 12, 2011.)

Chairman Tenenbaum called for any questions for the staff. Hearing no questions or discussion, Chairman Tenenbaum called for any motions. Commissioner Northup moved that: "The Commission determines based on the evidence presented by staff that it is not technologically feasible for any children's product or children's product category to be reliably and consistently manufactured and tested to 100 ppm of lead. The Commission directs staff to undertake a further analysis to identify any products or product categories that it is technologically feasible to manufacture at less than 300 ppm of lead, and for such product or product category to determine the particular lead concentration between 300 ppm and 100 ppm that is technologically feasible. In performing that analysis, staff should (1) seek the views of those likely to be affected; (2) afford the public a meaningful opportunity to comment, with a comment period of at least 60 days; (3) identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public; (4) perform a quantitative and qualitative evaluation of the costs associated with meeting a standard below 300 ppm; (5) consider the public health protections associated with the reduction of the standard below 300 ppm." Commissioner Nord seconded the motion. After discussion about the matter, Chairman Tenenbaum called for a vote on the motion. The Commission voted 3-2 to not adopt a motion Chairman Tenenbaum and Commissioners Adler and Moore voted to not adopt the motion. Commissioners Nord and Northup voted to adopt the motion.

Chairman Tenenbaum called for any motions. Commissioner Nord moved that: "To the extent that any children's product contains a substantial proportion of recycled metals, plastics, fibers, or other materials, the Commission determines that is it not technologically feasible to manufacture such products in a way that can be reliably and consistently comply with the 100ppm lead standard. The staff is directed to initiate rulemaking to establish an appropriate limit for children's products containing a substantial proportion of recycled materials for Commission consideration on an expedited basis." Commissioner Northup seconded the motion. After a discussion on the issue, Chairman Tenenbaum called for a vote on the motion. Chairman

Tenenbaum and Commissioners Adler and Moore voted to not adopt the motion. Commissioners Nord and Northup voted to adopt the motion.

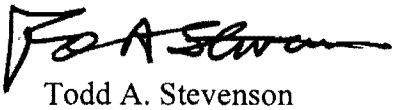
Chairman Tenenbaum called for any motions. Commissioner Nord moved to make an amendment addressing testing variability that reads: "Because of the uncertainty of testing at trace levels and because the staff has concluded that an amendment like this 'would be unlikely to result in any adverse health effects but could provide some relief to manufacturers of children's products,' the Commission directs staff to develop as a public enforcement policy an acceptable confidence interval reflecting testing variability." Commissioner Northup seconded the motion. The Commission discussed the motion. Before the matter came to a vote, Commissioner Adler moved to table the motion by Commission Nord and delay consideration for a week from this meeting. Commissioner Moore seconded the motion. The Commission voted (3-2) to table the motion for future consideration. Chairman Tenenbaum and Commissioners Adler and Moore voted to table the motion. Commissioners Nord and Northup voted not to table the motion.

Chairman Tenenbaum moved that the Commission approve publication of the draft notice in the *Federal Register* ("*FR*") without changes that will announce that children's products must meet the statutory 100 parts per million lead content limit on August 14, 2011, unless otherwise excluded under 16 CFR 1500.87 through 1500.91. Commissioner Adler seconded the motion. Hearing no discussion, Chairman Tenenbaum called the question. The Commission voted (3-2) to approve publication of the draft notice in the *FR*. Chairman Tenenbaum and Commissioners Adler and Moore voted to approve the publication. Commissioners Nord and Northup voted to not approve the publication. Chairman Tenenbaum and Commissioners Adler and Moore made closing statements.

There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 12:05 p.m.

Chairman Tenenbaum and Commissioners Nord, Northup and Adler issued the attached written statements about the matter.

For the Commission:



Todd A. Stevenson
Secretary to the Commission

Attached: Statement of Chairman Tenenbaum
Statement of Commissioner Nord
Statement of Commissioner Northup
Statement of Commissioner Adler

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

JULY 13, 2011

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM REGARDING THE COMMISSION DECISION ON THE TECHNOLOGICAL FEASIBILITY OF REDUCING THE LEAD LIMIT IN TOYS AND OTHER CHILDREN'S PRODUCTS TO .01 PERCENT

The Commission's decision on the statutorily mandated .01 percent (100 parts per million) lead limit was an important step forward in achieving the goal to "get the lead out" of toys and other children's products. Children are particularly vulnerable to the effects of lead, a contaminant and a powerful neurotoxin that accumulates in the body over time. Even exposure to small amounts can lead to irreversible IQ loss and behavioral problems in young children. Despite this widely known fact, in the recent past, the agency found itself conducting recall after recall to try to pull back from the market, and children's toy boxes, products with lead far in excess of allowable limits.

Through Section 101(d) of the Consumer Product Safety Improvement Act (CPSIA), Congress sought to reverse this trend, and called for a reduction of lead levels in toys and other children's products to .01 percent or the lowest levels that technology would allow. The CPSIA was the vehicle through which Congress empowered the CPSC to require manufacturers and retailers of toys and children's products to reduce lead to trace levels in the products they sell. As a result of the Commission's decision, consumers can rest assured that lead should be virtually nonexistent in toys and other children's products.

Icom mend my colleagues, and particularly agency staff, for their outreach to stakeholders and additional research they have conducted for over a year to determine if there are any products or product categories for which it would not be technologically feasible to achieve a .01 percent lead limit.

The Agency's Statutory Mandate

In writing the CPSIA, Congress established a very high threshold in order for the agency to permit products not to comply with the statutory reduction in the lead limit to .01 percent. The statute states that beginning on August 14, 2011, all children's products must comply with the reduced lead limit "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category. The Commission may make such a determination only after notice and a hearing and after analyzing the public health protections associated with substantially reducing lead in children's product."

Rather than leave the definition of "technological feasibility" to the discretion of the Commission, the statute provides an explicit definition, stating that the reduced 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 or 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 practices, best practices, or other operational changes would allow the manufacturer to comply with the limit.

All of these four criteria must be satisfied in order for the Commission to make a finding that it is not technologically feasible for a product or product category to meet the .01 percent lead limit. Our staff worked extensively to solicit input from the regulated community concerning the technological feasibility of compliance with the .01 percent lead limit for children's products and categories of children's products. Based on their analysis of all the information sought out by and submitted to the agency, our professional staff could not recommend that the Commission make a determination that it is not technologically feasible for any children's product or category of children's products to meet the .01 percent lead limit based on the statutory criteria necessary to support such a finding.

Despite our clear and strict statutory instructions on this issue, some of my colleagues have raised a concern that the Commission's actions run contrary to an Executive Order issued by President Barack Obama on July 11, 2011. Their position is not correct. In that Order, the President has asked independent agencies, to the extent permitted by law, to make decisions only after taking into account several considerations, but also to remain true to their statutory mandates. I am confident that the Commission has met and exceeded its mandate under the CPSIA. As such, the decision reached by the Commission today is consistent with the President's Executive Order, because we have followed the law as mandated in the CPSIA, and as clearly intended by its Congressional authors.

The Data before the Commission

During our consideration of this matter, with the exception of bicycles and other youth motorized products,[1] the Commission received very little product specific information. Much of the information provided was broad and lacked sufficient supporting facts to

[1] Bicycles and related products and youth motorized recreational vehicles have a stay of enforcement for lead content in certain parts, including metal components, that is in effect and will not expire until December 31, 2011. See 76 Fed. Reg. 6765. Staff has indicated that they will revisit these products later this year.

enable staff to make a recommendation to the Commission that it was not technologically feasible for any particular children's product or category of children's products to comply with the .01 percent lead limit. In the absence of the submission of this type of information by any interested party, our dedicated team of technical experts at the agency, on their own initiative, sought information on the availability of specific potential sourcing materials that met the .01 percent limit. This research enabled them to look at the question of technological feasibility from another perspective. Further buttressing their analysis concerning the data submitted to the agency, the staff found that potential sourcing materials that met the .01 percent limit are commercially available to manufacturers of children's products.

The Commission has before it an extensive record of testimony and data points that indicate that most of the market already has achieved lead levels in children's products significantly below .01 percent. This information includes data from SGS North America, Inc. that presented their results of testing conducted on thousands of toy samples. The testing data they provided to the Commission showed that between 96 and 99 percent of the products or materials tested complied with the .01 percent limit. In addition, the Hong Kong American Chamber of Commerce indicated that in its more than 13,000 tests of metallic parts used in the toy industry, 99.54 percent of samples contained less than .01 percent lead. Based on this and other information garnered by the Commission, the record does not support a Commission determination that a .01 percent lead limit for a children's product or category of children's products is not technologically feasible.

In addition to the data collected by and submitted to the agency over the previous year, three letters received by agency this week from trade associations were discussed, at length, at our decisional meeting on this issue. These letters asked the Commission to reverse some of the conclusions reached by our professional staff in their briefing package. The staff briefing package made clear that, based upon the information submitted to the Commission thus far, "staff could not recommend that the Commission make a determination that it is not technologically feasible for a product or product category to meet the 100 ppm lead content limit for children's products under section 101(d) of the CPSIA."[2]

These three letters made claims only of a general inability to ensure consistent compliance with the .01 percent limit and, like much of the other information submitted to the agency relating to this issue, fall short of providing the additional data necessary to allow our staff to make a determination of a lack of technological feasibility.

Proposals Unsupported by the Record

Additional concerns have been raised by some of my colleagues, however, much of the relief they sought to address their concerns lacks support in the record, and some of the relief sought extends beyond the requests made by many of the manufacturers themselves.

[2] See http://www.cpsc.gov/library/foia/foia11/brief/100ppmlead.pdf at 4.

Two of my colleagues requested a finding by the Commission that *no single* children's product or category of children's products can meet the .01 percent limit due to reliability and consistency issues. This relief would apply to all children's products and all source materials, including metals, glass, and plastics. Icanno t support this exemption—one that would entirely reject our Congressional mandate—particularly in light of our professional staff's collection of information showing that source materials that meet the .01 percent lead limit are commercially available. Furthermore, in the face of thousands of tests demonstrating 96 to 99 percent compliance rates with the .01 percent lead limit for many of the most common materials used in children's products, I cannot, in good conscience, support a finding that compliance with the reduced lead limit is not technologically feasible for all children's products. Such a finding simply is not supported by the data before the Commission and is, instead, overwhelmingly contradicted by the information at hand.

I also was unable to support an amendment offered that would have the Commission determine that is was not technologically feasible for any children's product that "contains a substantial proportion of recycled materials, plastics, fibers, or other materials" to comply consistently with the .01 percent lead limit. This amendment's stated purpose was to increase recycling and environmental benefits, as well as to take into account the cost benefits to industry from the use of such materials. In my view, this amendment was not defensible due to the staff's findings that materials meeting the .01 percent lead limit are commercially available and that evidence has not been submitted sufficient to make a finding that it is not technologically feasible for a particular product or product category to meet the new lead limits. The statute does not grant the agency the discretion to allow for the use of materials that do not meet the .01 percent lead limits for a product or product category unless all of the statutory criteria are satisfied. Simply stated, unless the statutory criteria are satisfied, the agency lacks the discretion to allow for the use of certain materials based on a preference by manufacturers for their use.

Retroactivity

There is one area, in particular, that I have joined with all of my colleagues at the Commission—requesting the legal authority for the prospective application of the .01 percent lead limit. I have in the past and will continue to urge Congress to allow this provision to apply only to newly manufactured products. I still hope that Congress will act on this concern through narrowly tailored legislation that addresses this issue, without undermining the CPSIA's overall mandate to reduce lead in toys and children's product to trace levels.

Future Technological Feasibility Determinations

Although the Commission already has voted on this issue today, if a manufacturer were to discover that it is not technologically feasible to manufacture a children's product or category of children's products, the agency always will consider a request for a technological feasibility determination through our normal petitioning process. During my

tenure, the Commission has docketed and either has resolved or is considering several petitions requesting action on various issues. The criteria for any petition on the technological feasibility of achieving the .01 percent lead limit are laid out clearly by the statute and further explained in the staff briefing package. The process for writing a petition also is clearly set forth in the agency's regulations. I encourage any business that discovers it manufactures a children's product or category of children's products for which it is not technologically feasible to meet the .01 percent limit to come to us with enough specific data to enable our staff to recommend that the Commission make a finding concerning technological feasibility under section 101(d) of the CPSIA. Our door always will be open to considering future requests. As always, for small businesses that may require additional guidance, our small business ombudsman stands ready to work to work with you on any of your concerns. I realize that this process has presented a challenge for manufacturers, and I commend those in industry who have worked so diligently to bring the lead levels in their products below .01 percent.

Moving Forward

I would like parents, grandparents and caregivers to know that the product safety net in our nation continues to grow stronger. As a result of the Commission's decision, consumers can rest assured that lead should be virtually nonexistent in toys and other children's products. Indeed, with this lower limit in place, along with the other protective provisions of the CPSIA, parents can have confidence that we should not have a repeat of the leaded toy scares of years past.

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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE OF TECHNOLOGICAL FEASIBILITY OF MOVING FROM 300 PPM TO 100 PPM OF TOTAL LEAD CONTENT

July 13, 2011

This holiday season, parents will do as they always do, brave the traffic and the parking and the crowded stores trying to find that one perfect gift that will light up their children's eyes. And when they do, they will find fewer choices and higher prices on the shelves, thanks to the Consumer Product Safety Commission (CPSC). It didn't have to be that way.

In 2008, Congress passed the Consumer Product Safety Improvement Act (CPSIA). The Act dictated that, as of August 14, 2009, no manufacturer and no retailer could make or sell a children's product with more than 300 parts-per-million (300 ppm) of lead. That meant that a product that was 99.96% lead-free, perfectly safe and legal to sell on August 13, had to be destroyed on August 14. The CPSC had no say in that change; it was the law.

The CPSIA also mandated that, on August 14 of this year, the limit would drop to 100ppm (99.99% lead free). That means any product that is more than 0.01% lead will be illegal, and countless numbers of toys retailers are stocking have to come off the shelves.

Congress gave CPSC a job to do. The CPSIA told us to look at actual products and figure out if the 99.99% standard makes sense. If it is not technologically feasible for a product to be made reliably to the extreme new standard regulating miniscule trace amounts, then CPSC has the authority to find a standard that product can meet. Today, we decided we would rather make it tougher and more expensive for kids to have toys at the holidays than actually do the work the law requires us to do.

The majority of the Commission blithely ignored the challenges – some of them perhaps impossible to overcome – that our hasty and under-informed action will present to businesses and consumers. The majority once again ignored staff warnings that some companies will stop offering some safe products and parents will have to pay more for virtually everything they buy for their children, all with no real health benefits.

Today's new surprise is the majority's complete disregard for the significant environmental impacts of this decision. At our meeting, I offered a proposal to create some room in this extraordinarily tight restriction (remember, today's vote makes 99.98% lead-free illegal on August 14, 2011) for products that have a substantial proportion of recycled materials. For good reason, Congress has put a lot of effort into encouraging use of recycled materials. As a result, the environmentally-friendly market is booming, and our homes are greener every day. Today, the majority of the CPSC has seriously undercut much of that progress.

As the majority went through the process they used to reach their conclusion, we heard from companies big and small across the children's market that, even if it is possible to meet the 99.99% standard, it is not possible to do so reliably with recycled materials. There is just too much variability in the quality and composition of those materials. Faced with massive enforcement penalties, the companies cannot afford to risk making a product that is only 99.98% lead-free, so many will have to switch to only new or "virgin" materials. Virgin materials are more expensive and create more environmental costs, but they are far cheaper than running afoul of CPSC dictates.

Recognizing these problems, the Coalition of Northeastern Governors (CONEG), when it created its model legislation for toxins in packaging, created an allowance for recycled materials. Nineteen states have adopted that model legislation, and more are considering it, but the majority of the CPSC considered it for less time than it takes to order a pizza and then decided the untold environmental damage these rules will do isn't important. This disregard for both the environment and Congress' clear policy goals is disturbing.

This is not the first time the majority has disregarded the costs to both businesses and consumers. Businesses told us that they aren't sure they can get the materials to make products to this onerous new standard. They said, if they can even find a way, it is going to be much more expensive, and their products will be less useful and often less durable. They told us the labs they have to use under this law don't even come up with consistent test results. They told us they'll have to stop making some products, products that are safe and legal right now. Some told us they will go out of business entirely, especially small businesses who can't get the materials they need and can't risk CPSC penalties. So, consumers will have fewer and poorer choices from fewer companies and at higher prices, all at a time when the economy is struggling in ways we haven't seen for decades. And, all of this turmoil and pain comes with no demonstrable benefit to children's health.

The majority effectively said: "So what? It's the law." Well, no, to be correct, it didn't have to be that way. Congress gave CPSC the power and the responsibility to make a rational decision, but, because of the majority's scramble to meet a deadline that's been looming for three years, we didn't use that power.

We could have, as the law told us to do, looked at feasibility of the standard for individual products or categories. Instead, the majority looked only at whether the materials themselves were feasible. It didn't matter if a material was useless for an entire range of products; it existed in one place, so it was feasible in every place. This is like the idea of building entire airplanes out of the same material as the "indestructible" black boxes in the cockpits; sure, you can do it, but the plane will never get off the ground. We don't know how many children's products won't get off the ground with this new standard because the majority didn't bother to find out.

We could have looked, as the law told us to do, at whether these materials are really available. The majority decided availability only meant something could be bought anywhere in the world at any price, even if no one could afford it or the end product would be too expensive to sell. *Wired* magazine tells us that jetpacks are now "commercially available," at almost $90,000 each. I don't think this means the skies of Washington will be filled with jetpacking commuters anytime soon, but this is exactly the logic the majority used to impose a one-size-fits-all mandate on an entire industry. The fact that someone is selling a material doesn't mean a small business toy manufacturer can afford to buy it.

Instead of making the real-world decisions the law demands, the majority suggested companies should just petition for an exemption if the standard, as predicted, does not work. Never mind that CPSC's history and its current seemingly stacked deck give them little reason to believe a CPSIA petition will get docketed, let alone succeed. If a company cannot afford to use these materials, how can that company afford the time and legal bills necessary to file a petition? And, in the length of time this process takes, how many will stop making the product or just throw in the towel?

We don't know how massive an environmental impact today's vote will have. We don't know how many products this will take off the shelves. We don't know how much more the products that stay on the shelves will cost. We don't know how many jobs will be lost. We don't know how many companies will be harmed. We don't know if companies can find the materials they need to comply. We don't know if it is even possible for different testers and different labs to get the same numbers. And we don't know – or even have reason to think – that this will make one child safer. But the majority did it anyway, without doing the homework Congress gave us three years to do.

It didn't have to be that way. But now it is. And now, it is not the Grinch but the CPSC who is needlessly taking away kid's toys, children's clothes, and parents' jobs. That's a vote no one should be proud of.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER ANNE M. NORTHUP

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."

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[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.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF COMMISSIONER ROBERT S. ADLER REGARDING THE TECHNOLOGICAL FEASIBILITY OF 100 PARTS PER MILLION LEAD CONTENT LIMIT IN CHILDREN'S PRODUCTS

August 1, 2011

On July 13, 2011, I joined a majority of the Commission in affirming the Commission staff's recommendation to approve publication of the announcement that children's products must meet the Congressionally mandated 100 parts per million (ppm) lead content limit as of August 14, 2011. This was not a vote without controversy and, accordingly, I believe the record needs to be set straight with respect to the vote itself, what it means – and, despite what some have suggested, how much discretion the agency actually had in making its decision.

We cannot, and should not, deny that July 13 was a significant day both for the public health community and for the manufacturing community. I recognize that the 100 ppm statutorily mandated total lead content limit has been extremely contentious since the passage of the CPSIA three years ago. I also recognize the implementation of the limits has triggered a number of complaints and objections from some of my fellow Commissioners and some in the regulated industry.

Yet, the issue before us was actually a simple legal question. The question was: does the Commission have evidence before it to determine it is not technologically feasible for a product or product category to meet the 100 ppm total lead content limit? The answer was overwhelmingly, "no."[1] This was our technical staff's unanimous conclusion,

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[1] As I have repeatedly noted, Congress "stacked the deck" in terms of our ability to make a finding that moving the lead limit to 100 ppm was not "technologically feasible." As defined in section 101(d) of the Consumer Product Safety Improvement Act, the term "technological feasibility" means that the 100 ppm lead content limit must go into effect 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 practices, best practices, or other operational changes would allow the manufacturer to comply with the limit.

which a majority of Commissioners affirmed after more than a year of fact gathering, open meetings, public hearings, and Federal Register notices.

I have made no secret, that as a general proposition, I am not a big fan of retroactivity either in legislation or regulation. And had I been a policy maker at the time the lead section of CPSIA was written, I would have probably advised a slower step down of the lead content limits and a prospective application of them only. So, while I would have preferred the question before us to have been broader and included the question of whether the limit should be applied retroactively,or whether the time frame between lowering the limits should have been extended, Congress settled those issues when they passed the CPSIA and removed that discretion from the agency.[2]

Notwithstanding my reservations,I certainly understand why Congress made the decisions it did. The scientific community has continually said there is no safe level of lead – and says that still today. Lead is a powerful neurotoxin that accumulates over time. Even low levels of lead are widely associated with learning disabilities, decreased growth, hyperactivity, impaired hearing, and brain damage. Congress, the American and worldwide public health communities, and our society in general are undertaking a holistic approach to this dangerous chemical. The goal is to remove lead everywhere and anywhere we can. This means removing lead from our air, from our water, from our food, and,y es, from our children's products. The fact that Congress in 2008 chose to place the removal of lead from children's products at the top of the list was a well-considered policy choice. It is one that I am hopeful will be followed soon by reducing the allowable levels of lead from many other sources that affect our daily lives in this country.

It is also important not to lose in all of the clamor by those with an economic interest in opposing this step down to 100 ppm that there are very few children's products that require lead. For those that claim to need lead, such as bikes and ATVs, we will continue to try and find ways to assist these manufacturers.[3] Yet, Congress said that lead should no longer appear in our children's products – and overwhelmingly the market has responded by making products that meet this new standard.

CPSC staff's recommendation was based on their conclusion that the evidence is not there to determine that it is not technologically feasible for a particular product or product category to meet the 100 ppm total lead content limit. And the evidence in support of this

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In other words, so long as the Commission finds that at least one of the above factors applies with respect to lead in the market, the Commission must allow the limit to drop to 100 ppm. The staff concluded that all 4 of these factors applied in the market.

[2] In January 2010, I joined a unanimous Commission in recommending to Congress that the lead content limits be administered prospectively. See http://www.cpsc.gov/ABOUT/Cpsia/cpsiareport01152010.pdf.

[3] The Commission extended a stay of enforcement pertaining to lead content in Youth Motorized Recreational Vehicles and Bicycles and Related Products until December 31, 2011. See Federal Register Notice at: http://www.cpsc.gov/businfo/frnotices/fr11/stayleadrev.pdf (Feb. 8, 2011).

recommendation was quite strong. According to data submitted by SGS – a large testing and certification company that testified before the Commission – 98.6% of 90,000 samples of children's products had test results of 40 parts per million total lead content or less. The Hong Kong-American Chamber of Commerce indicated that in more than 13,000 tests of metallic parts used in the toy industry, 99.54% of samples had less than 100 ppm of lead. In fact, the Commission's technical staff has said that they have not found a product or product category for which materials that have a lead content lower than 100 ppm are not currently commercially available.[4] The Commission remains open to new data on this topic but all we have received in the last few weeks has been a series of conclusory letters telling us we are reading the law incorrectly and that this move will be a costly one.

To be clear, there is no disagreement that this move from 300 ppm to 100 ppm will cost some companies money. This is an unfortunate byproduct of most safety laws and rules – they have real costs to real businesses and real people. That said, I believe that we take every step we can as a regulatory body to minimize those impacts. But, one should also remember in the almost three years since the passage of CPSIA, many companies have already incurred substantial costs in destroying large amounts of inventory and altering their production processes to meet the new restrictions. To reverse the retroactive application of the 600 ppm and 300 ppm lead content limits as some of my colleagues attempted to by amendment, would penalize those who have conscientiously moved to comply with the law and perhaps put them at a competitive disadvantage. In short, for the companies that worked hard to be in compliance by August 14, 2011, not moving to 100 ppm as scheduled would be the equivalent of moving the goal posts in the last two minutes of the game.

Finally, I think it is important to remind manufacturers of children's products that if they find it is not technologically feasible for their children's products to meet the 100 ppm total lead content limit they may always request relief from the Commission. The statute clearly lays out the four factors the Commission will use to evaluate such a request,[5] and I have no doubt that both our technical staff and the Commissioners will seriously consider the merits of any information presented to them. In fact, I strongly disagree with some of my colleagues that a request for relief would not be considered expeditiously and with an open mind. CPSC's professional staff has always treated

[4] My dissenting colleagues seem to assume that almost any increased cost to manufacturers renders a product or product category not "commercially available" under CPSIA. And notwithstanding one of my colleague's amusing insistence that our definition of this term would result in a finding that jetpacks costing $90,000 are commercially available, our definition was simply the common sense approach that if one could obtain a product in the market at a reasonable price – even if more expensive – the product was commercially available. Further, the facts demonstrate that children's products that meet the 100 ppm lead content level are already on the market, so discussions of using "jet plane" materials in toy planes, or the cost of jetpacks, are great talking points but bear little relation to the reality of our decision.

[5] See note 1, supra and accompanying text.

requests for relief fully and conscientiously. Any assertion to the contrary is not grounded in any objective fact or data.

What I see when I look at the large amount of data before me is that most industries have made great strides in getting the lead out of our children's products. They should be commended for their good work. Come August 14th American parents, grandparents, and caregivers can be assured that children's products sold in the United States must meet one of the most stringent lead content limits in the world.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

SUPPLEMENTAL STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE OF TECHNOLOGICAL FEASIBILITY OF MOVING FROM 300 PPM TO 100 PPM OF TOTAL LEAD CONTENT

August 3, 2011

Nearly three weeks after three members of the Consumer Product Safety Commission (CPSC) decided to impose a hyper-restrictive lead limit on children's products without any demonstrable safety benefit, one of those three, Commissioner Adler, has issued a statement that attempts to rebut my own. He omitted my name, referring to me only as one of "[his] dissenting colleagues. No matter that he did all this in a footnote.

In his footnote, my colleague misrepresents – or perhaps misunderstands – two of my arguments against the majority's under-informed decision. First, he takes issue with my observation that personal jetpacks are now commercially available. Second, he paraphrases half of the analogy I used to illustrate the fallacy of the majority's definition of technological feasibility. Commissioner Adler's straw men do not help the public understand CPSC's reality.

First, as the Commissioner should be aware, I was not the first within the agency to use the jetpack reference and it aptly demonstrates that the majority has defined commercial availability poorly. Under the Consumer Product Safety Improvement Act (CPSIA), if lead-limit compliant material is not commercially available, we have authority to give manufacturers relief from the limit. The majority defined any material for sale anywhere at any price as commercially available. Interestingly, Commissioner Adler's statement contains the phrase "reasonable price," but that phrase never escaped his lips before we cast our votes. I do not know if he forgot it or if he is retreating from his earlier position, but it is immaterial at this point. The majority declared everything commercially available to everyone and for every purpose.

I, however, do not believe commercial availability, as the CPSIA uses that term, has a limitless meaning, and the jetpack reference illustrated the absurdity of that definition. Simply stated, if a material will raise the cost of a product above the price consumers will pay, that material is not commercially available for that product.

Though I am not certain he grasped its purpose, I am glad Commissioner Adler found my *reductio ad absurdum* (illustrating an argument's weakness by highlighting its most absurd results) so "amusing." However, I do not find it amusing when an agency uses its authority to hand down dictates that offer nothing but higher prices, fewer consumer choices, lost jobs and failed businesses. I take seriously our charge to protect consumers and our responsibility to do so rationally.

Second, Commissioner Adler dismisses as nothing but a "talking point" my analogy to the construction of airplanes, omitting half of it. The portion he cites is my point that materials that are feasible and

appropriate for real planes are not necessarily feasible and appropriate for toy planes. The materials that keep us safe when we're 30,000 feet above the ground have a host of properties that are not necessary for the toy your child guides through the air, yet, because those materials do exist, the majority could find technological feasibility.

The second half of the analogy referred to one of the common responses when news breaks of a plane crash. As investigators look for and use the on-board recorders (the so-called indestructible black boxes), some wonder why we do not build the entire plane of the same material. The reason is simple: that material is so heavy the plane would never get off the ground. Similarly, there will be products and perhaps entire companies that will never get off the ground because of the weight of our regulations.

Through our definitions of commercial availability and technological feasibility we had the opportunity to provide some reasonable relief. We failed to take that opportunity, choosing instead to issue a blanket rule that had no connection to the realities producers and consumers face. As a result of our heavy-handed approach, our edict will require a burden some companies, particularly small businesses, simply will not be able to carry (again, with no demonstrable health benefit). Commissioner Adler chose to advance his position by condescendingly dismissing my arguments as "amusing" and "talking points" rather than by making a genuine attempt to grapple with the difficulties this action has created.