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

MINUTES OF COMMISSION MEETING
November 4, 2009

Chairman Inez M. Tenenbaum convened the November 4, 2009, 9:00 a.m., meeting of the U. S. Consumer Product Safety Commission in open session. Commissioners Nancy A. Nord, Robert S. Adler and Anne M. Northup were present. Commissioner Thomas H. Moore was not present. Chairman Tenenbaum made welcoming remarks and opened for discussion the decisional matter involving the petition seeking the exclusion of brass and mechanical components in replica and toy die-cast items.

Learning Curve Brands Inc., request for exclusion of brass and mechanical components in replica and toy die-cast items under section 101(b)(1) of the Consumer Product Safety Improvement Act ("CPSIA")

Commissioner Northup made a motion seconded by Commissioner Nord to accept or grant Learning Curve's request for exclusion. The Commissioners discussed issues involved with the request and the interpretations of terms in the CPSIA. After the discussion the Commission voted (3-1) to not to accept the Learning Curve Brands Inc., request for exclusion. Chairman Tenenbaum and Commissioners Nord and Adler voted to not accept the petition. Commissioner Northup voted to accept the request for exclusion.

Commissioner Northup made a motion seconded by Commissioner Nord to delay the decision to allow Learning Curve Inc., to file for an exemption under other provisions of the CPSIA and to proactively seek from Congress further guidance and clarify the issues about implementation of the exclusion from lead limits and other parts of the CPSIA. After discussion, the Commission voted to a tie (2-2), therefore the motion failed to carry. Commissioners Northup and Nord voted to delay the decision. Chairman Tenenbaum and Commissioner Adler voted not to delay the decision.

Commissioner Adler made a motion seconded by Chairman Tenenbaum to accept the staff recommendation and deny the Learning Curve Brands Inc.'s petition and request for exclusion. Commissioner Nord made a motion and Commissioner Northup seconded to amend the motion to deny the petition and to grant a stay of enforcement until the end of the current Congressional session. The Commission voted (3-2), therefore the amended motion did not carry. Chairman Tenenbaum and Commissioner Adler voted not to accept the amended motion. Commissioners Northup and Nord voted to accept the motion. (In a written ballot vote, Commission Moore voted to deny the request for exclusion and to deny any stay of enforcement.)

Chairman Tenenbaum called for a vote on the original motion made by Commissioner Adler to accept the staff recommendation and deny the Learning Curve Brands Inc., petition and request for exclusion. The Commission voted (3-2) to accept the staff recommendation and deny the Learning Curve Brands Inc.'s request for exclusion. Chairman Tenenbaum and Commissioner Adler voted to accept the motion and deny the request for exclusion and deny any stay of enforcement. (Commissioner Moore voted by written ballot.) Commissioners Nord and Northup voted against the motion. Commissioners Nord and Northup submitted the attached statements.

Commissioner Northup requested the Commission to consider communicating with Congress to seek clarification and definitions for the exclusion to lead content and which products to which the law applies. Chairman ruled the motion as out of order, because the matter before the Commission was the consideration of this specific petition, this was not part of the petition and the request is vague in nature. Commissioner Nord proposed that this subject be put on the Commission agenda to be considered in a future open meeting. The Chairman suggested that the any communications with Congress be put in writing for the Commission formal review and the matter be presented in agenda planning.

Chairman Tenenbaum adjourned this part of the meeting.

Public Hearing on Virginia Graeme Baker Pool and Spa Safety Act ("VGBPSA"): Technical Guidance on Unblockable Drains

Gib Mullan, Assistant Executive Director for Compliance and Field Operations, gave an overview of the hearing. Barbara Little, General Attorney with the Office of General Counsel, explained the requirements of the VGBPSA. Chairman Tenenbaum welcomed the presenters and invited their presentations. The presenters of the program were: Carvin DiGiovanni, Association of Pool & Spa Professionals; Robert Rung, Hayward Pool Products; Myles McMorrow, Poolcenter.com Inc.; David Stingl, Stingl Products; Paul Pennington, Pool Safety Council; Chip Whalen, Intex Recreation Corporation; Ron Schroader, New Water Solutions; Leif Zars, ASME/ANSI; and Bonnie Snow, BeeSafe Systems. After their presentations, the presenters responded to questions from the Commission and the staff. No decisions were made during this part of the meeting.

There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 11:55 a.m.

For the Commission:

Todd A. Stevenson
Secretary to the Commission

Attachments:
Statement of Commissioner Nancy A. Nord
Statement of Commissioner Ann M. Northup
Statement of Retraction of Commissioner Robert S. Adler

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STATEMENT OF COMMISSIONER NANCY NORD ON THE REQUEST FROM LEARNING CURVE BRANDS INC. FOR EXCLUSION FROM SECTION 101(b)(1) OF THE CPSIA

November 4, 2009

The Commission has denied, by a 3 to 2 vote, a petition by Learning Curve Brands for an exclusion from the lead provisions of the Consumer Product Safety Improvements Act ("CPSIA") for brass and other mechanical components of replica and toy die-cast items. The agency also voted down a motion I offered to grant a stay of enforcement so that Congress might reconsider the reach of Section 101, the lead provisions of the CPSIA.

This case presents yet another example of the unintended consequences of the CPSIA. No one believes that this product presents a risk of lead poisoning to children. The result of not granting an exclusion is to remove from consumers' hands products that, in their current state, do not present a real risk. A substitute collar for the axle, for example made of plastic, could prove a greater safety concern if it could more easily break, posing a choking hazard for small children. This result imposes burdens on both consumers and businesses without any net increase in consumer safety, and indeed a potential decrease in consumer safety.

In this case, certain things are clear:

- Our staff report indicates that there is no real risk of harmful lead exposure associated with the brass collar components of die-cast toys.
- If brass is prohibited in children's products under the CPSIA, the impact could be far reaching throughout our economy. The implications of this decision for other children's products, not only those in the home, but also in our schools – such as desk hinges, locker handles, and coat hooks – are significant and should be considered by Congress.
- There will be significant economic injury not only to Learning Curve Brands, but also to other companies making children's products with brass in them.
- These losses are exacerbated by the retroactive effect of the law which extends the ban to inventory, including items sold in thrift stores.

Instead of being able to craft something that works for both consumers and product sellers, the Commission's decision does not advance consumer safety and restricts consumer choice. As exclusion requests continue, the ability for the Commission to grant exclusions remains slim, because of the inflexible nature of the law. I urge Congress to give us the clear ability to address these issues based on our scientific expertise.

UNITED STATES
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COMMISSIONER ANNE M. NORTHUP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3] § 102(a)(2) (emphasis added).

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

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

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

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

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

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

Statement of Commissioner Robert Adler: Retraction

At the Commission meeting on Wednesday, November 4, 2009, I criticized Learning Curve Brands, Inc. for what I believed to be its marketing of a toy tractor that violated the lead limits under the recently enacted Consumer Product Safety Improvement Act (CPSIA), while simultaneously seeking an exclusion from the law for certain brass parts that contained lead. I based my criticism on a report to me from someone who had purchased the toy tractor through the internet several days before the vote.

Subsequent to the vote, Learning Curve told me that, in fact, the company had stopped distributing the tractors with the lead-based brass parts in February 2008 in anticipation of the new lead requirements in the CPSIA. **In other words, based on the information I received from Learning Curve, the company has done everything that the law required and is not noncompliant as I alleged**.

I deeply regret my misstatement. I have called and spoken to Gary Jones, the quality assurance director of Learning Curve, to apologize for my mistake. Based on my conversation, I found him to be a person of great integrity. I have told him that I will do my best to correct the error in every way possible. Again, I regret the error.