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

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
Commissioner Thomas H. Moore
Commissioner Nancy A. Nord

ITEM:

Statement of Policy Concerning Tracking Label Requirement in Section 103(a) of the CPSIA
(Briefing Package dated July 14, 2009, OS no. 5426)

DECISION:

The Commission voted unanimously (3-0) to approve the draft Statement of Policy as drafted providing guidance to the public about the tracking label requirement in section 103(a) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

Chairman Tenenbaum, Commissioner Moore and Commissioner Nord issued the attached statements with their votes.

The Commission also posted answers to Frequently Asked Questions (FAQs) on the matter.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due July 20, 2009

UNITED STATES
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CHAIRMAN INEZ M. TENENBAUM

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE STATEMENT OF POLICY CONCERNING SECTION 103(a) OF THE CPSIA

Section 103(a) of the CPSIA requires manufacturers to place permanent, distinguishing marks on children's products and their packaging to the extent practicable. Importantly, and as this guidance indicates, the tracking labels provision applies only to products manufactured on or after August 14, 2009. The primary purpose of the distinguishing marks is to aid in the quick and effective facilitation of recalls involving children's products. I believe that the guidance unanimously approved by the Commission today will help to achieve the goals of improved recall effectiveness and better protection of consumers while also providing industry with assurance that the Commission does not intend to penalize manufacturers for inadvertent violations of the statute when they have made a good faith effort in attempting to comply with the tracking label requirements.

Although there are a number of issues surrounding the tracking labels requirement, I will address three of the principal concerns regarding this statute. First, many manufacturers have expressed concern that "one size does not fit all" with respect to tracking labels. In the guidance issued today the Commission acknowledges this concern and has agreed that Section 103(a) does not require a uniform "one size fits all" labeling system. Rather, the only "uniform" requirement is that the tracking information required by statute be ascertainable from the distinguishing marks made on the children's product and its packaging. How an individual manufacturer chooses to achieve this end is left to the reasonable judgment of each individual manufacturer, unless and until such time the Commission decides it necessary to implement more detailed and uniform regulations.

Second, small volume manufacturers and crafters have expressed concern that they cannot feasibly comply with the statute because their production patterns do not lend themselves to lot, batch, and run labeling systems. To this end, the Commission agrees that small volume manufacturers or crafters need not create a labeling system incorporating the use of lot, batch, or run numbers so long as such manufacturers can keep adequate records of the components used in their products. The goal of the labeling statute is to enable manufacturers and consumers alike to ascertain pertinent information about a children's product in the event of a recall, not to implement a rigid and uniform labeling standard that applies to both small and large manufacturers in the same way. In developing and implementing a tracking label system, small volume manufacturers and crafters should also consider the business and recordkeeping practices of their peers.

Third, many manufacturers have expressed concern over the lead time it will take to implement the new tracking label requirements due to confusion over the statutory provisions and the lack of clear guidance from the Commission. The Commission is aware of this concern and the guidance approved by the Commission today is intended to help clear up any confusion over the statutory requirements. While this guidance is incapable of answering every product specific question, I believe that the guidance provides sufficient general direction for all manufacturers to comply. To the extent that more detailed direction is necessary, the Commission may work directly with firms, issue additional guidance, or initiate rulemaking if such future measures are deemed necessary by the staff or the Commission. The Commission also understands that manufacturing changes cannot occur overnight, and some manufacturers may require some additional lead time to take the necessary measures to meet the statutory requirements. I believe the Commission and staff will measure the good faith efforts of a manufacturer, considering steps taken both before and after the issuance of this guidance to comply, in evaluating a firm's compliance with section 103(a).

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STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE STATEMENT OF POLICY CONCERNING THE "TRACKING LABEL" REQUIREMENT IN SECTION 103(a) OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

July 20, 2009

The tracking label provision in the Consumer Product Safety Improvement Act (CPSIA), as well as a related provision in the prohibited acts section, sprang from the legislative proposals I sent to Congress in July 2007. In my proposal I said:

> "Identifying the exact product to be recalled can also be a problem. Manufacturers are not required, in most cases, to put date codes or other distinguishing marks on their products every time they change them. Thus they often cannot tell the Commission at what point in a product's production it presented a risk, and at what point the problem was fixed (particularly if they fixed the problem before the Commission became aware of it). Because old product can stay on store shelves for quite a while and be intermingled with newer versions of the same product, this presents problems for retailers and the Commission staff in identifying which products in stores are subject to the recall. I believe the law should put the burden squarely on the manufacturer/importer/distributor to make sure the products are marked (production date codes, for example) so that problem products can be readily distinguished by everyone (including the consumer who has the product in his home). If Commission staff is unable to clearly distinguish between products that should be covered by a recall and those that should not, then that should result in the recall of <u>all</u> similar products made by that manufacturer. The Commission should not have to guess (or test) every possible permutation of a particular product to determine if it has been remedied (although we certainly should test the alleged 'fix' to make sure that the hazard has indeed been eliminated). A company that misrepresents the scope of the products affected by a recall should be subject to a penalty. In fact, a company that knowingly misrepresents any material fact in a recall investigation that delays or otherwise hinders the agency's ability to promptly initiate an effective recall should be subject to penalties by the Commission."

My proposal assumed that the manufacturer was identifiable. Congress took my proposal a step further by making sure that the manufacturer or private labeler of the product could be identified as well as the location of where the product was made. The Act's provision also requires not just marking the product, but marking the product's packaging as well, realizing that retailers need an easy way to identify products whose markings may be covered by their packaging.

I believe section 103(a) as written by Congress has an additional purpose beyond the recall setting. When problems begin to surface publicly about products made in a particular part of the world, whether there has been a recall of any of the products or not, many consumers will want to know where those products are being made so they can exercise caution in their purchasing decisions. We certainly see this in the food industry and we saw it with toys during the period when many toys were being recalled due to excessive lead in paint. Consumers were not simply avoiding the products recalled or the products made by a company who had a recalled product, they were avoiding any toys made in that particular part of the world. There can be regional variations within a country as to manufacturing processes, which is why I think the statutory provision does not simply require the name of the country where the product was manufactured, but requires "the location ... of production of the product." The Commission has interpreted this to mean not only the country but also the city and the state or other administrative unit in which the city is located. The city of production may be a piece of information many manufacturers do not already mark on their products. The Commission recognizes that it may take some time for manufacturers to add this information and will not penalize companies as they work to bring their products and packaging into compliance as long as they are making good faith efforts to comply in a reasonable fashion with the provision.

As the Commission's guidance indicates, many manufacturers already comply with most, if not all of the requirements in section 103(a). A number of commenters took the section title too literally and assumed that the word "label" meant that the distinguishing marks all had to be in one spot on the product and on the packaging. The Commission does not read the provision that narrowly. In an ideal world, such a requirement would be helpful in locating the information, but in the practical world of children's product manufacturing, where the size of manufacturers and the types of products and the styles of packaging available is all so varied, uniform compliance with such a provision would be extremely difficult. It could also, as some commenters pointed out, require a substantial reworking of their products and packaging. The Commission's interpretive guidance is meant to minimize disruption of manufacturing practices while still holding manufacturers responsible for a good faith compliance with the law. We recognize it may take time for smaller manufacturers to figure out how best to comply with marking requirements and the recordkeeping that will be the underpinning for making the information required by the marks "ascertainable." The Commission will shortly be posting answers to additional Frequently Asked Questions (FAQs) about the marking required by this section. The Commission will continue to update the FAQs and use other means to make the latest information available to manufacturers about the application of this section of the CPSIA.

A related provision is section 19(a)(13) of the CPSA (as amended by the CPSIA). It is now unlawful for any person to misrepresent the scope of consumer products subject to a recall. This is not intended to snare the innocent manufacturer who misjudges the extent to which a product hazard applies to his product line and corrects that misjudgment as soon as it is discovered. However, manufacturers who knowingly seek to obscure how much of their products should be subject to a recall would be subject to a penalty. Similarly those who fail to keep the information required by the tracking label provision and then seek to limit the scope of a recall of their product without reference to good production data will not find a very sympathetic ear at the Commission. The Commission also understands that a number of manufacturers have already taken steps to be in compliance with the marking provision as they

understand it. They are to be commended for their diligence and will not be penalized for having guessed wrong as to how the Commission would ultimately interpret the section.

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NANCY A. NORD
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STATEMENT OF COMMISSIONER NANCY NORD ON TRACKING LABELS GUIDANCE

July 20, 2009

Today the Commission is issuing guidance on the tracking label requirement in Section 103(a) of the Consumer Product Safety Improvements Act ("CPSIA"). The policy statement tries to address issues and concerns raised during the extensive public comment process we conducted over the past seven months to educate ourselves about the impact of this requirement on product sellers and how it will actually work to improve quality assurance and, by extension, recall effectiveness.

It is important to note that the guidance issued today probably will not be the last word on this important issue. We realize that all the issues presented by Section 103(a) cannot be addressed by this document. Recognizing the concern that this provision has caused, I emphasize that the agency initially will be looking for "good faith" compliance in the context of a recall. As companies gain experience in implementing this provision, we encourage them to bring to our attention any need for additional guidance to make this provision work better to achieve its objective.

Unfortunately, the CPSIA does not give the agency the flexibility to phase in the requirements, for example, by first addressing high value products with long useful lives and a history of recall issues. Applying lessons learned, we ideally could then have tailored the requirement to additional products. I discussed these concerns in my statement of May 13, 2009. We have tried to minimize the burdens imposed on all childrens' product manufacturers through this policy statement while we stay focused on how to improve recall effectiveness.