



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE REVISION OF TERMS
OF THE STAY OF ENFORCEMENT OF CERTAIN TESTING AND CERTIFICATION REQUIREMENTS
OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008**

December 17, 2009

Justice Louis Brandeis, after whom the law school in my hometown of Louisville, Kentucky is named, wrote: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." That sentiment perfectly describes the problem with the Consumer Product Safety Improvement Act of 2008. The Congress which passed the CPSIA meant well, but it lacked understanding of the dire consequences that enactment of this law would entail. And while the danger to liberty lurking in this law remained hidden from all but a few at the time of its enactment, it is now readily apparent to all. Much work remains to be done by this Commission and the Congress to prevent the insidious encroachment of regulations that would impose enormous costs for negligible improvements in children's product safety. However, today's vote is the first step in the right direction, and I am pleased to support it.

At yesterday's public meeting of the Commission, I proposed to carve out the decision on lifting the stay on lead content. I did this because I wanted to vote with the other Commissioners after working for many weeks to reach consensus with them on all but one of the issues regarding lifting the stay on testing and certification, and I appreciate their courtesy in agreeing to my request. I also hoped to be able to take advantage of the extra day to persuade my fellow Commissioners to join me in voting to postpone lifting the stay on lead content until six months after publication of the so-called 15-month rule. I was particularly encouraged by Chairman Tenenbaum's statement at the meeting that she would never lift the stay until the 15-month rule has been completed. Of course lifting the stay too soon after publication of the rule would still come as cold comfort to businesses that would lack time to prepare for its implementation.

Chairman Tenenbaum then proposed an alternative fixed date for lifting the stay of February 10, 2011. Although I would prefer to tie the lifting of the stay on testing and certification for lead content explicitly to some defined period of time after completion of the 15-month rule, I am willing in the spirit of compromise to accept the Chairman's proposal for three reasons: 1) I believe the 15-month rule can be completed in time to give the regulated community something close to six months to prepare for it; 2) The new deadline responds to Congress' recent overture seeking the Commission's advice on amending the law by giving the legislature one more year to revisit and fix it; and 3) Practically speaking, a February 2011 deadline is far preferable to the alternative August 2010 deadline that would have prevailed absent this agreement.

Before discussing these reasons, I want to emphasize that no children will be harmed by extending the stay for lead content. As was the case when the stay was implemented, it only applies to testing and certification. All products must already abide by the statutory lead limit of 300 ppm. Large retailers are

already requiring their merchandise to be tested at retailers' labs. In some cases, because different retailers require suppliers to use different test labs, the CPSC's required test would be the third, fourth, or fifth nearly identical test on the same product. It makes no sense for the agency to tout—as it has many times in recent weeks—that consumers are safer than ever before, and then rush testing and certification requirements for which there is no pressing need. In contrast, the costs of lifting the stay this February (or even in August) would be quite high. Unless altered, the requirement to test and certify compliance to the lead limit may shutter many small businesses permanently and not improve safety. The difference between the non-existent harm done by keeping the stay in place and significant harm done by lifting the stay for lead content argues strongly against lifting the stay until February 2011. Furthermore, it is worth reinforcing once again that we are not necessarily talking about products that pose a risk to children. A “non-compliant” product in the case of lead content could mean a product that poses no safety hazard for a child but that has lead in the substrate (*e.g.*, bicycles, brass musical instruments, the brass axle collar of a toy car, the imprinted ink on a children's t-shirt, the zipper on a child's pair of jeans). Even though the lead is not bio-available, the product would still be in violation of the CPSIA.

The Importance of Waiting for the 15-Month Rule

Numerous products never before regulated by any government agency including the CPSC fall within the ambit of the CPSIA, particularly its lead and phthalate restrictions. Hence—unlike what is usually the case when we issue new regulations—many of the individuals and businesses affected by the CPSIA are not accustomed to adapting their internal processes quickly to comply with new rules. This group includes both low-volume producers as well as industries like book publishing that have generally been exempt from consumer product regulations. For this reason, it makes sense for the Commission to be especially sensitive to the impact the timing of its regulations will have.

Even for larger companies used to dealing with consumer product regulations, lifting the stay on testing before the 15-month rule has been in place for an adequate time period would force them to change their compliance management processes twice in quick succession and thereby incur additional retraining expenses. Internal briefings have informed me that the 15-month rule will be complicated and more difficult with which to comply than the current reasonable testing program standard. For this reason, the 15-month rule could very well make the testing processes adopted at many companies before the 15-month rule obsolete. It would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing to publish the 15-month rule and then lift the stay shortly thereafter (let alone lift the stay and then later impose the 15-month rule). We should not callously disregard the unnecessary disruptions caused by the order in which we issue our rules. Rather than dismiss these genuine concerns, we should keep the stay in place until well after the 15-month rule goes into effect.

Indeed, part of the justification given when the original one-year stay was put into place last February was that the 15-month rule would come out in the interim. This order of proceeding is no less significant now than it was then. In fact the argument is even stronger today than it was then, because the agency's previous action has created the expectation within the regulated community that issuance of the 15-month rule would precede the lifting of the stay. Today's vote should mean that the rule will have been issued well before the time the stay lifts. Nor is it just the 15-month rule that would be out of sequence. The Commission also has not defined more precisely what counts as a children's product, and it should do that before the stay lifts. If Congress adopts other statutory fixes in the interim, then the agency may need to define other terms before a stay could lift as well.

As part of the 15-month rule process, we will have the opportunity to consider whether any rules or enforcement priorities can differ according to the size or volume of business. The agency has considered—and thus far rejected—options for lifting the stay at a later stage for small businesses, microbusinesses, or low-volume businesses, but I would like the opportunity to consider whether we can define “low-volume business” in the enforcement context. I am also fleshing out a proposal under which certain rules would apply only once a product enters certain channels of distribution. Today’s vote allows time to fully consider and construct such an alternative scheme rather than force premature adoption of a one-size-fits-all plan without apparent regard for the harsh—indeed fatal—consequences for many small businesses.

Responding to Congress’ Overture

In meetings with Senators in conjunction with my confirmation process, every Senator with whom I met—Republican and Democrat alike—let me know they would expect that as a Commissioner I would tell them whenever I came across something in the law that needed to be amended or improved or that just was not workable. Some Members said they thought or hoped the Consumer Product Safety Improvement Act contained sufficient flexibility so that it could be implemented in a reasonable way. But if not, they requested that I go to them with any problems that needed to be fixed. Since the CPSIA passed, the CPSC has received dozens of letters from Members of Congress on both sides of the aisle requesting that the law be implemented in as flexible a manner as possible. Some of these letters were quite hostile in expressing the view that the Commission has failed to use the flexibility contained in the law.

So, in November, I argued for a legally viable interpretation of the law under the Commission’s current statutory authority. Because the brass lead petition would set a precedent for how the Commission would deal with an entire class of exemptions, I fought for a *de minimis* interpretation of the word ‘any’ that would have allowed for consideration of the level of absorbability of lead. This interpretation would have given meaning to an exemption contained in the statute, and it would have allowed the Commission to concentrate resources on regulating products with true safety risks. Despite my best efforts, I lost the battle to meet Congress’ request to take a flexible and reasonable approach to the CPSIA.

At that time, the Chairman also ruled my motion out of order to have the Commission jointly send a letter to Congress asking it to at least clarify the law and reaffirm that Congress intended not to have any allowance for *de minimis* (or not bio-available) lead content—or to seek any sort of reasonable allowance for products that pose no real harm to children. The Democrat Commissioners subsequently made clear they did not want to inform Congress on the issues dividing the Commission nor openly seek changes to the law nor even seek input from the Office of Management and Budget. They refused to sign a letter to Congress later that same month seeking guidance on the *de minimis* issue.

Although the Commission refused to reach out to Congress, Congress has now reached out to the Commission. The Congress has expressly asked (yet again) in writing through report language in the FY 2010 Financial Services Appropriations bill that the Commission report to Congress in short order:

The conferees ... are aware of concerns surrounding implementation of certain aspects of the law. The conferees believe there may be parts of some products subject to the strict lead ban under section 101(a) of the CPSIA that likely were not intended to be included. ... The conferees urge the CPSC to continue

considering exemptions under section 101(b) of the CPSIA for parts of products that, based on the CPSC's determination, present no real risk of lead exposure to children. The conferees are also aware of concerns among small manufacturers and crafters regarding the third-party testing requirements under section 102 of the CPSIA and urge the CPSC to consider those when issuing rules and guidance on third-party testing. . . . The CPSC is directed to assess enforcement efforts of section 101(a), including difficulties encountered, as well as recommendations for improvement to the statute, and to report to the House and Senate Appropriations Committees, as well as the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee, *no later than January 15, 2010*. (emphasis added)

Given that Congress has requested feedback from the Commission in the very near future regarding recommendations to change the law, it would be tone deaf at best to pre-empt consideration of possible statutory changes by establishing an August 10, 2010 date for lifting the stay for lead content. A number of possible modifications to the law could provide relief to domestic small businesses that make safe products but would not be able to afford to comply with CPSIA's testing and certification requirements. Lifting the stay for lead content without providing adequate time for exploration of potential legislative improvements or clarifications in this area would make no sense. We would be prematurely putting more small companies out of business while there's still a glimmer of hope to address the law's unintended consequences.

In justification of the stay issued February 10, 2009, the CPSC noted that it had received "innumerable inquiries seeking relief from the expense of testing children's products that either may not contain lead or may be subject to exemptions that the commission may announce in the near future as a result of ongoing rulemakings[.]" One of those rulemakings involved procedures for seeking exclusions from otherwise applicable limits on lead content of children's products. However, since implementing those procedures, the Commission has rejected every single petition seeking exclusion. If it made sense to implement the original stay in part because such a rule offered the hope that some products would thereby be spared the cost of complying with the lead limits, it makes even more sense to keep the stay in place while Congress actively considers amendments to the statute that would succeed where the petitions have failed. Jumping the gun by imposing an August deadline before submitting our proposed amendments to the Hill would show little regard for Congress' intent to revisit the topic. It would also send a message to the regulatory community that the Commission does not plan to seriously entertain Congress' request. Intentionally or not, it would convey the sense that the Commission will run interference on any effort to make the statute more reasonable, more risk-based, and more consistent with advancing safety.

Although today's vote delays for one more year the full impact that will be felt from this law, it still lights the fuse on implementation of a testing and certification regime that promises virtually no increase in consumer safety while imposing massive costs. My hope and expectation is that today's vote signals a genuine openness on the part of those Commissioners in the majority to proposing a wide-ranging set of CPSIA amendments to Congress when we submit our report next month. If instead the Commission majority intends to ignore the unintended consequences of the CPSIA, despite the letters and calls we have received from Congress and despite the informative feedback from all the businesses that travelled to DC to discuss the law's requirements at our two-day workshop last week, then today's vote will not have amounted to much.

Furthermore, if that happens, then this Commission will rightfully bring down on its head a flood of criticism. Up until now the Commission has been engaged in a classic standoff with Congress. The legislature has pointed a finger at the agency for interpreting its statute inflexibly, and the agency has in turn pointed a finger at the Congress for writing an inflexible statute. But now that Congress has asked for fixes, the onus is on us to argue successfully for amendments that will make the CPSIA more workable. Should we fail to do that, it would turn the high costs and low benefits obtained by this statute into the fault of the majority of this Commission—not Congress any longer.

Waiting for the Definition of a Children's Product

In addition to waiting for the 15-month rule, the Commission should not lift the stay when it has not yet identified a consistent, non-arbitrary way to exclude children's products from the testing and certification requirement for lead content, because doing so will invite successful lawsuits against this agency based on a claim of arbitrary and capricious exemption decisions. To date, the agency has offered a raft of potentially conflicting rationales for excluding specific products. It has, for instance, made determinations that some materials inherently do not contain lead, even though they may sometimes contain lead. The agency has also decided that swimming pool slides (a product used primarily by children) are not a children's product because the regulations governing them requires them to be built to withstand the weight of an adult. At the same time the agency has leaned heavily on the word 'primarily' in the definition of a children's product as something primarily intended for a child to say that ball point pens are not a children's product. These decisions are not necessarily wrong, but they need to be reconciled in a defensible way.

Similarly, some Commissioners argue that brass musical instruments are not subject to the lead limits in the CPSIA (despite last month's decision on brass lead), because such instruments are not primarily used by children. Even putting to one side the fact that some music stores and other businesses sell or rent primarily or exclusively to children (and would thus come under the Act), this does not pass the laugh test. Under this logic, the agency would permit selling a brass instrument to a child to handle for hours on end each week, and yet forbid selling a toy car with brass axle collars that the child would rarely if ever touch when playing with the toy. Of course there's nothing wrong with children touching brass instruments every day, because lead in brass is not bio-available and does not get ingested even by a child that puts his/her mouth on the instrument. But there's nothing wrong with playing with a toy car with brass parts for the exact same reason. These subjective enforcement decisions have nothing to do with risk analysis and everything to do with avoiding having the statute fall on high-profile items like band instruments. But where the agency does not act based on safety considerations, but rather makes arbitrary exclusions based on the political or public relations consequences, it invites litigation from industry. By waiting to lift the stay until agency staff has more completely defined what counts as a children's product, this concern can be resolved.
