

NAM CPSC COALITION



January 28, 2009

VIA ELECTRONIC MAIL

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East-West Highway, Room 502
Bethesda, MD 20814-4408

Re: Request for Emergency Stay of Effective Date (CPSIA §101(a)(2))

Dear Mr. Stevenson:

On behalf of the Consumer Product Safety Commission Coalition of the National Association of Manufacturers (NAM CPSC Coalition), and the undersigned parties to this letter (hereinafter referred to collectively as “the Requesters”), we respectfully request the Commission to issue an immediately effective emergency rule staying the effective date of limits on lead content in accessible parts and components in children’s products established under Section 101(a)(2) of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”) (Pub. L. 110-314). The length of the requested stay is 185 days, or until 90 days after final comprehensive rules and interpretative regulations implementing Section 101 are issued, if later. We do not think that when it adopted the deadlines in the CPSIA Congress realized or intended to effectuate a massive economic dislocation at a time when so many businesses are teetering on the edge of financial ruin and we are suffering the largest job losses in decades.

The current effective date of February 10, 2009 for the new lead content requirements is less than two weeks away. The law requires manufacturers and importers of children’s products to issue certificates that newly manufactured or imported products comply with the lead content requirements. In addition, under an opinion issued by the CPSC General Counsel, previously manufactured products in existing inventory which do not comply with the lead content limit for accessible parts may no longer be distributed or sold.

It has become clear that compliance with these new lead content requirements will be a practical impossibility for thousands of manufacturers, distributors, retailers, and resellers on February 10, 2009. While the Commission has issued several notices of proposed rulemaking regarding the interpretation of which parts and components are considered to be accessible and thus subject to

the lead content limits, proposing exclusions for a limited number of materials, and proposing procedures and criteria for making additional exclusion determinations, the comment period on these proposed regulations will extend beyond February 10, 2009. These rulemakings clearly cannot be completed until well after the current effective date. Moreover, realistically it will be many months before the Commission is likely to act on petitions for permanent exclusions. In practice, many types of materials or products that will not expose children to harmful amounts of lead and are thus perfectly safe, based on reasonably foreseeable use and abuse conditions, will as a result be banned due to the inability to process petitions for permanent exclusions before February 10, 2009. We are aware that some industry sectors are preparing petitions for temporary exclusions and we urge you to grant these petitions before February 10, 2009. Experience under appropriate temporary exclusions can provide additional, useful information for the Commission when it begins to review petitions for permanent exclusions after that process is finally established.

In addition, the Commission has yet to even propose specific designated test procedures for lead content for any materials other than metal in children's jewelry and lead in paint, or to clarify the critically important role of component testing within a regime of third party testing of children's products by accredited laboratories. Manufacturers and retailers of thousands of children's products containing parts made of various types of plastic, rubber, wood, composites, paper, fabric and other materials have no designated test method under which to determine the accessibility or lead content, if any, of these products or components thereof. In addition the definitions of component parts subject to regulation have yet to be finally determined.

Given the impossibility for many manufacturers and retailers to determine with any degree of confidence that all accessible parts and components of a particular children's product do not contain lead above 600 ppm, the clear prospect is for massive disruption in the consumer product distribution and retail system beginning on February 10, 2009. Large amounts of safe product inventory whose compliance with the lead content requirements cannot be confirmed will be pulled from retail inventory or withheld from distribution. In many cases retailers are requiring the manufacturer to take the product back and offer credit for the unsold goods. Aside from the immediate financial hardship of handling product returns – which may amount to hundreds of thousands of dollars in particular cases – once inventories are unsalable, lines of credit to retailers or manufacturers secured by financial institutions may be rescinded, leading to the potential for widespread bankruptcies.

The chaotic application of yet-to-be established legal requirements to current inventories at retail potentially threatens to render obsolete billions of dollars of legally produced products already introduced into interstate commerce. In addition, the threatened wholesale destruction on February 11, 2009 of inventory which cannot be verified as complying with newly established requirements could inflict additional damage to the U.S. economy and threatens the ability of small American manufacturers and retailers to remain in business. The environmental impact of widespread destruction of unverifiable merchandise should also be considered. Further, companies have reported that the testing for CPSIA lead levels is different from the testing required by the Environmental Protection Agency (EPA). Thus, in addition to destroying

merchandise that may in fact be CPSIA compliant but is unverifiable, companies are also incurring costs to determine how to properly destroy that merchandise.

Considering the breadth of potentially affected types of children's products - shoes, apparel, bedding, jewelry and accessories, books, educational materials, electronics, luggage, toys, housewares, sports equipment, bicycles, recreational vehicles and home furnishings - clearly developed final regulations are first necessary to enable compliance determinations and effective enforcement. Otherwise tens of thousands of businesses and hundreds of thousands of employees could be adversely impacted. This position is consistent with recent correspondence from Members of Congress to the CPSC indicating that they did not intend such consequences from a chaotic implementation of the CPSIA. This developing situation in which products which may ultimately be determined to be in full compliance with the lead content requirements are nonetheless pulled from shelves and in some instances even destroyed in the middle of the worst economic environment for businesses and consumers in decades clearly does not serve consumer safety, the welfare of the public at large, or market stability.

Under Section 3 of the CPSIA, the Commission has authority to "issue regulations, as necessary, to implement this Act and the amendments made by this Act." The Commission should exercise its authority to grant the requested delay. Under the doctrine enunciated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984), a regulatory agency is permitted to adopt a reasonable interpretation of a statute that Congress entrusts that agency to administer. In choosing among reasonable interpretations, an agency may consider their policy implications. *Chevron*, 467 U.S. at 843. Here, substantial policy implications point in favor of staying the effective date of Section 101(a)(2) until the final substantive rules and interpretative regulations can be established and regulated entities can, as a practical matter, determine whether particular new and existing products are in compliance with the lead content requirements.

As we noted, Section 3 of the CPSIA reaffirms that "[t]he Commission may issue regulations, as necessary, to implement this Act and the amendments made by this Act." Moreover, the CPSIA adds, in Section 101, that a product containing more lead than the new limits "shall be treated as a banned hazardous substance under the Federal Hazardous Substances Act," § 101(a)(1), and that a ban or rule pursuant to Section 101(a) "shall be considered a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the Federal Hazardous Substances Act," § 101(g). The Federal Hazardous Substances Act, in turn, requires the Commission in classifying an article or substance as a banned hazardous substance to craft a regulation that "imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the regulation is being promulgated." 15 U.S.C. § 1262(i)(2). Congress also left it to the CPSC to develop, as part of the overall regulatory scheme, regulations reasonably defining the scope of products and components subject to the regulation itself; the exclusions to be afforded, as mandated by Congress, to inaccessible components, excluded material and electronic components (CPSIA Section 101(b)); and the applicable test methodology to be employed. None of these requirements have yet been finalized for lead "content."

The Administrative Procedure Act, 5 U.S.C. §553(b), authorizes the Commission to exclude rules from otherwise applicable notice and comment procedures where the agency for good

cause finds such procedures are impractical or contrary to the public interest. Although well intentioned, piecemeal interpretative rulemakings that have a substantive impact on the marketplace require adherence to such due process procedures¹. Given the short time until the February 10, 2009, effective date and the absence of comprehensive final regulatory guidance on compliance, however, notice and comment procedures in this particular case are both impractical and contrary to the public interest and the Commission should issue an immediate final rule extending the deadline.

The Requesters fully support government efforts under the CPSIA to safeguard consumers and reduce their exposure to lead or other materials that could affect their health and safety based on sound scientific principles. However, retaining the current February 10, 2009 effective date for the lead content limit in accessible components will create massive marketplace confusion and business disruption without any commensurate benefit to consumer safety.

The business community appreciates the enormous effort the Commission staff has made since last August to complete the many rulemakings and other tasks that Congress required under the CPSIA. However, you and we are faced with an impossible situation. Time is needed for the Commission to complete the many rulemakings necessary to provide clarity on the Act's requirements. Requesters hereby respectfully request that the Commission, on an emergency basis, use the discretion afforded it to issue an immediately effective rule delaying for 185 days, or until 90 days after final comprehensive rules and interpretative regulations implementing Section 101 are issued, if later, the effective date of lead content limits for accessible parts and components in children's products.

Respectfully submitted,

American Apparel & Footwear Association (AAFA)
American Fiber Manufacturers Association
American Home Furnishings Alliance
American Specialty Toy Retailing Association
Amusement & Music Operators Association
Association for Safe Glass and Ceramicware
Association of American Publishers
Association of Home Appliance Manufacturers
Bicycle Product Suppliers Association
Book Manufacturing Institute, Inc.
California Fashion Association
California Retailers Association
Coalition for Safe and Affordable Childrenswear, Inc.
Coalition for Safe and Responsible ATV Use
Consumer Electronics Association (CEA)
Consumer Electronics Retailers Coalition (CERC)
Craft Yarn Council of America (CYCA)
Fashion Incubator Association

¹ Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission, 875 F2d 205 (4th Cir. 1989); National Knitwear Manufacturers Assn v. Consumer Product Safety Commission, 666F2d81 (4th Cir. 1981)

Fashion Jewelry Trade Association
Footwear Distributors and Retailers of America
Georgia Retail Association
Gift and Home Trade Association
Greeting Card Association
Handmade Toy Alliance
Illinois Retail Merchants Association
INDA, Association of the Nonwoven Fabrics Industry
Information Technology Industry Council (ITI)
International Association for the Leisure & Entertainment Industry (IALEI)
International Association of Amusement Parks & Attractions
International Sleep Products Association
IPC – Association Connecting Electronics Industries
Louisiana Retailers Association
Maine Merchants Association
Minnesota Retailers Association
Missouri Retailers Association
Motorcycle Industry Council
National Association of Manufacturers
National Bulk Vendors Association
National Council of Textile Organizations (NCTO)
National Retail Federation
National Textile Association
New Jersey Retail Merchants Association
Ohio Council of Retail Merchants
Outdoor Industry Association
Pennsylvania Retailers' Association
Printing Industries of America
Promotional Products Association International
Real Diaper Industry Association
Retail Association of Nevada
Retail Industry Leaders Association
Retail Merchants of Hawaii
Retailers Association of Massachusetts
Retail Merchants Association of New Hampshire
Secondary Materials and Recycled Textiles (SMART)
Specialty Graphic Imaging Association
Specialty Vehicle Institute of America
Sporting Goods Manufacturers Association
The Hosiery Association
The International Snowmobile Manufacturers Association
The Juvenile Products Manufacturers Association (JPMA)
The National Cotton Council
Toy Industry Association
Travel Goods Association (TGA)
United States Association of Importers of Textiles and Apparel
U.S. Chamber of Commerce
Virginia Retail Merchants Association
Washington Retail Association