

NAM CPSC Coalition



December 18, 2008

Via Overnight Delivery

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

Re: Petition for Rulemaking under CPSIA Section 101

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 Petitioners), we respectfully urge the Consumer Product Safety Commission (CPSC or the Commission) to issue a comprehensive direct final rule on the requirements under § 101(b) of the Consumer Product Safety Improvement Act (CPSIA), including rules governing test methods, exemptions, and warning statements.¹ Action by the Commission is urgently needed in light of the upcoming February 10, 2009 deadline for new lead limits in substrates. Issuance of a final rule is particularly critical since the statute's deadlines do not mesh with other deadlines and requirements. In other words, the CPSIA specifies that a pending rulemaking will not delay implementation of the effective dates for such limits, but does not adequately provide for an orderly implementation of a comprehensive rule that clarifies lead test methods, acceptability of component testing, or standards to be applied for determining reasonable exclusions for inaccessible parts, accessible materials that do not present a health hazard, and electronic products and components.

The CPSIA was drafted with the intention of enhancing children's product safety. Many industries supported imposition of new requirements and expected they would be implemented in an orderly, comprehensive manner. In connection with the imposition of new lead content requirements it is necessary for the CPSC to define the scope of products subject to regulation,

¹ Pub. L. No. 110-314, 122 Stat. 3,016 (August 14, 2008).

what constitutes accessible component parts, how component testing can be relied upon, and which materials and components, including electrical components, should be excluded. In addition, US manufacturers need to be able to rely upon supplier certifications for component materials. Clearly developed regulations that address all of these issues before the February 10, 2009 deadline are necessary to enable effective compliance and enforcement. Without a well defined regulatory regime predicated on sound test standards and science-based exclusions that protect children, the threat to small business and their employees is significant. Congress did not reasonably intend such consequences from a chaotic implementation of the CPSIA.

Consequently, we request that the Commission issue a direct final rule with an immediate effective date so that the Commission and industry can focus attention on those products and materials that pose the greatest potential risk.² The Commission should simultaneously issue a Notice of Proposed Rulemaking (NPRM) to gather additional information in an orderly fashion and a direct final rule on the scope of preemption.

Executive Summary

Petitioners fully support all government efforts to safeguard consumers and reduce their exposure to lead or other materials that could affect their health and safety based on sound scientific principles. Our intent in submitting this petition is to work with the Commission to advance our shared goals of product safety and smart, effective regulation.

The CPSIA sets forth standards and timetables to reduce lead in paint and in substrate materials. As the Commission is well aware, there are less than 60 days for manufacturers to meet the first phase of the lead substrate limits prescribed under CPSIA § 101(a): 600 ppm effective February 10, 2009.³ Further complicating compliance efforts, the lead limits are intertwined with other obligations set forth in the CPSIA which themselves have not been fully defined. For example, the CPSIA imposes many obligations, including new requirements to

² 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.” While §101(b)(1) includes a reference to a notice and hearing, Section 3 of the CPSIA, coupled with Section 553(b) of the Administrative Procedure Act (APA), 5 U.S.C. 553, excludes rules from the otherwise applicable notice and comment requirements of the APA when the agency for good cause finds that notice and comment are impracticable or contrary to the public interest. We believe that notice and comment in this situation are indeed impracticable and contrary to the public interest and ask the Commission to act on this Petition now in light of the short time frame in which broad bans go into effect.

³ Many retailers are issuing instructions to their manufacturers and suppliers requiring them to comply with the lead substrate (and other) requirements weeks and months ahead of the statutory deadlines. This further reduces the time available before the new limits effectively apply to their products, making an early promulgation by the Commission that particularly urgent.

issue certificates of conformity and certifications representing third party testing of children's products, under § 102 of the CPSIA.⁴ The CPSC staff has issued accreditation standards for testing of lead in paint, and just released a proposed test method for testing metal, including children's metal jewelry. However, standards for lead substrate testing of other materials or products will not be issued until late next year. The absence of guidance on testing methodologies for all products, scope of testing (including component and quality control testing) and exclusions now create real confusion and hardships to industry, particularly since the CPSC General Counsel has advised that the lead limits are retroactive, affecting all products on store shelves on February 10.

The CPSIA imposes a limit on lead in substrates of "any part" of a children's product, defined as a consumer product designed or intended primarily for children 12 and under. This means that unless otherwise exempted, the manufacturer of a children's cotton sweatshirt with a painted zipper, a drawstring, an appliqué and the mandatory care label would have to test the following components: the sweatshirt material (*i.e.*, the fabric and sewing thread), the zipper, the paint on the zipper, the drawstring, any appliqué on the sweatshirt, the plastic tip on the drawstring and the care label. A manufacturer of shoes would have to test the following components, if accessible: the soles, uppers, metal shanks or heels, grommets around shoelaces, and the laces and tips. A manufacturer of a child's upholstered chair might have to test the finish, the wood, plastic and/or metal substrate, the stuffing, innersprings, bolts and rivets, fabric and other components for lead. A manufacturer of a child's computer or educational aid would have to test the glass screen, screws or fasteners, the plastic housing, the circuitry, wiring, solder and other components, and the electrical cord and plug. A manufacturer of a silver-plated piggy bank would have to test the underlying metal and sterling silver plating material. A publisher of books, magazines, newspapers or other paper-based printed materials for children, such as flash cards, posters, bookmarks, worksheets, or menus, would have to test such components as the paper, cardboard, bindings, glues, laminates and inks, notwithstanding the specific exclusion for such printing under 16 CFR 1303, *et. seq.*

It is readily apparent from these examples that a great many of these materials, components or products are not likely to pose a risk of lead exposure in reasonably foreseeable use and abuse situations. If the CPSC does not act promptly to exclude materials and products that do not pose a genuine risk, hundreds of thousands of materials and products may be banned or will have to be tested for lead unnecessarily and at great expense, despite the fact that no laboratories are duly accredited to do lead substrate testing and no comprehensive screening methods have yet been approved by the CPSC staff for such testing. In addition, there are currently an inadequate number of accredited test laboratories to perform the testing under existing regulations and standards already being required.

The CPSC Health Science Division has already developed an extensive body of risk assessment data upon which to base exclusions from lead testing and from the lead standards

⁴ 73 Fed. Reg. 68328 (November 18, 2008).

now, and has the capacity to develop additional criteria as needed.⁵ Just as the CPSC staff has indicated that there is no need to test for lead paint when none is used on a children's products, and no need to test certain materials for flammability when they are known to meet the test criteria, the CPSC staff needs to provide direction on which materials do not need to be tested as part of a finished product. Therefore, it is critically important for the Commission to act now to exclude materials and products that do not pose a risk of lead exposure to children in accordance with the various mechanisms for exception provided in the statute. This will avoid unnecessary and costly testing that will deprive consumers of safe products without a health-based rationale, or impose extraordinary testing costs, at a fragile economic time.

The CPSIA established various procedures under which the Commission may recognize exceptions to the lead limits. In acting to recognize health and risk-based exceptions, we also ask the Commission to address the scope of testing, including, specifically, acceptability of component and raw material testing, so that proper testing can be done without unnecessary duplication or cost.

In addition, Congress explicitly established that the limits outlined in Section 101 preempted state law, with a narrow exception for state warning requirements in force prior to August, 2003. In issuing a final, comprehensive rule on lead, the Commission must also address the fact that non-identical state standards, including warning obligations, violate the Congressional scheme of federal preemption. We ask the Commission to exercise its authority as provided under §§ 3 and 101 of the CPSIA and the APA (5 U.S.C. 553) and grant this Petition by issuing an interim final rule and NPRM to provide guidance to the business community and testing laboratories on testing and exemptions, and a direct final rule on the scope of the lead requirements relative to state law.

I. Impact of Failure to Grant This Petition

Members of the NAM CPSC Coalition support the goals and objectives of the CPSIA. We believe that in establishing a framework of standards to reduce lead, Congress also recognized an important role for risk and exposure assessments in identifying exclusions from those limits. Section 101(b) authorizes the Commission to grant exemptions to the lead limits under several circumstances, and § 3 gives the Commission authority to issue regulations, as necessary, to implement this Act and the amendments made by this Act.

One major problem with the impending deadline to meet the lead limit is that the limit comes into force before the CPSC is expected to issue guidance on test methods for accredited laboratories to conduct lead tests or rule on exceptions. For example, new lead substrate limits take effect on February 10, yet the Act did not specify a deadline for the Commission to issue standards for accredited laboratories to conduct lead substrate tests except as to metal children's

⁵ See 16 C.F.R. §1500.230.

jewelry.⁶ While the Commission has advised that it plans to issue metal jewelry test standards soon, to go into effect next spring, for the vast array of substrate materials subject to lead testing, the Commission will not have defined an appropriate test method until well into 2009. The requirements for certificates of conformity, and ultimately for third-party testing of children's products, pose an additional challenge to affected manufacturers: laboratory capacity to test for lead content in the hundreds of thousands of different children's products that might be subject to lead limits is already strained. The problem is exacerbated further by the absence of clear guidance on circumstances in which composite and upstream input component testing is acceptable. Such guidelines need to be firmly established as part of a rule. The use of verified third party accredited testing (for which there is limited capacity given the extraordinarily broad range of products and materials subject to regulation) could require indiscriminate lead testing that takes an undue amount of scarce laboratory time, space and resources.

For example, a garment manufacturer may use fabrics like cotton and cotton thread with no or very low total lead to make thousands of SKUs of children's t-shirts. Absent an exemption, the garment producer may have to test each different SKU for lead – testing the identical material thousands of times. Or, a garment maker might purchase 100,000 zippers and use the zippers in a variety of children's apparel, perhaps involving 10,000 SKUs. Common sense tells us that it must be acceptable for garment manufacturer to rely upon the zipper manufacturer to certify compliance on all of its zippers, rather than to needlessly require the zipper and each other of the multiple components used in various garments to be tested 10,000 times because it is used in 10,000 different garments. Absent clear guidance to the contrary the statutory language could be interpreted to mandate 10,000 different tests. These are the types of practical problems that manufacturers, importers and retailers face and that have enormous cost implications at a time when we are faced with the deepest economic recession in decades. Testing costs, in turn, will be passed on to consumers.

Some companies report that lead testing costs have increased to an average range of \$300 – \$1,000 per product, depending on the number of components involved. Lead testing costs may run considerably higher for very complex items with many different colors and materials. Testing costs as a proportion of production costs are higher for smaller lots of products, so affect small and medium-sized businesses to an even greater degree. The result of a failure to grant relief will not just be the disappearance of some SKUs or product lines, but potentially the disappearance of entire companies whose products will be banned or who simply cannot support unnecessary test costs. Excluding from the requirements of §101 materials or components that are known to meet the lead standards or which do not pose a risk is crucial to maintaining safety, maximizing consumer choice and preserving the economic viability of American businesses.

As is apparent from these examples, the cumulative burden of testing for lead in each component is significant. Lead testing on common products which contain multiple components made of multiple different types of materials often reaches thousands of dollars and more.

⁶ The Commission proposed test methods for lead in metal, including children's jewelry, on December 4. See <http://www.cpsc.gov/ABOUT/Cpsia/CPSC-CH-E1001-08.pdf>.

Limiting the number of lead tests that must be conducted by excluding materials, components and products that do not pose a risk will avoid costly and unnecessary testing, and offers environmental benefits as well. Laboratory test methods for measuring total lead typically involve use of a strong acid, like hydrochloric acid or nitric acid, that dissolves most metals and other materials and, consequently, allow for the identification of lead present in the substance. While individual tests generally use small amounts of acid, given the thousands and thousands of products, materials and components that potentially must be tested unless excluded as part of the broader regulatory scheme of regulation, the cumulative total acid involved to test “any part” of a children’s product will be significant, adding to environmental waste disposal burdens. Overall health, safety and environmental protection objectives will not be advanced by unnecessarily testing for lead and creating additional hazardous wastes.

Adoption of common-sense, risk, health and safety-based exemptions, consistent with the Commission’s statutory authority, will protect the public while minimizing unnecessary economic impacts on business that lack any added safety benefit to consumers.

II. Exclusions Pursuant to § 101(b)(1)

The Commission has authority to exclude specific products or materials if it determines that lead in such product or material will neither result in the absorption of any lead into the body, taking into account normal and reasonably foreseeable use and abuse, nor have any other adverse impact on public health or safety.⁷ The CPSIA establishes limits on total lead that phase down over time, looking at total lead content as a benchmark. Congress nevertheless understood that children could be exposed to some lead through reasonably foreseeable handling, use and abuse, such as swallowing or mouthing, even where products meet the lowest limits established in the Act (90 ppm lead in paint and 100 ppm lead in substrate). Consequently, the intent of § 101(b)(1) is to offer a means for the Commission to grant health- and risk-based exceptions for products or materials whose use or misuse by children will not result in the likelihood that lead would be absorbed or that the child would face other health or safety risks. Congress did not and could not have meant that to satisfy the criteria the materials have zero lead or zero accessible lead under hypothetical test conditions since it concluded that it could not and should not seek to mandate zero total lead in paint or substrate materials. Rather, the grant of exceptions under §101(b)(1) and the Commission’s general authority under § 3 requires an evaluation of overall available scientific evidence about actual use and abuse scenarios to assess the risk of lead exposure by children, and overall health and safety considerations related to specific applications of lead-containing materials.

As discussed below, two categories of products or materials meet the criteria for exemption under the provisions of § 101(b)(1). One category includes materials that have no inherent or only trace amounts of accessible lead. A non-exhaustive list of such materials include fabrics, threads, wood, paper, printing inks, laminates, adhesives and binding materials

⁷ CPSIA § 101(b)(1).

used in books and other paper-based printed products, surgical steel, most gemstones and precious metals, among others. The second category includes materials where lead is not likely to be absorbed into the body based on reasonable and foreseeable use and abuse scenarios. This might include materials that require lead to impart strength or performance (like recycled steel or other metals), including where such product or material relates to a safety-critical aspect of the end product. Structural steel metals may be required for safety purposes, such as on bicycle tire rims and spokes. In addition corrosion resistant brass metal may be used on swing sets, in buckles, tire valves and latches to impart strength and a safety benefit under high stress use such as on strollers, high chairs, restraint seats, bicycle rims and valve stems. Similarly, materials subject to toxicological review (such as arts and crafts materials), where heavy metal content is already subject to restriction and review under existing laws and regulations should be granted safe harbor status for compliance purposes. This was already recognized by Congress when it excluded LHAMA compliant products from testing and certification requirements under the Act. (See Section 102). It would also include materials, like crystal, rhinestones, or glass beads used in apparel, accessories and jewelry, or glass or crystal used in electronics applications, where lead is physically bound such that it is not accessible under reasonably foreseeable use and abuse scenarios.

Test data and data on physical and chemistry properties of various materials can be useful in identifying materials that do not contain lead, which contain lead at very low levels, or which contain lead in a manner that is not accessible. In addition, tests have been developed to determine the amount of lead that can be extracted or migrate from various consumer products under various scenarios that mimic human contact and behaviors such as mouthing, sucking, ingestion, or hand to mouth contact. Human factors and behavioral considerations will help identify potential exposure routes during reasonably foreseeable use or abuse; when those are identified, appropriate test methods can be selected to assess the likelihood of exposure to lead in amounts that may create a health risk.

A. Best Available Scientific Evidence Supports Excluding Certain Products or Materials That Have No or Restricted Lead

Petitioners ask the Commission to determine that certain products or materials that have no lead or low lead will not result in lead absorption into the body or otherwise have any adverse impact on public health or safety within the meaning of § 101 (b)(1).

For the textiles, apparel and footwear sectors, fabrics, thread and other materials should be excluded because they are known to contain no or very low amounts of lead. Paper, printing inks, laminates, adhesives, bindings and cardboard used in books and other paper-based printed materials should also be excluded.⁸ In the jewelry sector, through a consensus process that

⁸ Materials used in packaging, such as paper, plastic resins or other materials, that meet Toxics in Packaging Clearinghouse (TCPH) limits on total heavy metals (lead, cadmium, mercury and hexavalent chromium) in packaging should also be excluded as combined heavy metal content is limited to 100 ppm.

included scientists, toxicologists, scientists and others, the state of California agreed to exclude from regulation under The Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as Proposition 65) materials that have no or trace amounts of lead, like gems, precious metals, stainless steel, natural and cultured pearls, elastic and fabrics, and natural materials like amber, fur, feathers, etc. were exempt from lead limits based on scientific and other evidence that these materials did not contain lead or contained low levels of lead.² These common sense and technically-based exclusions should be adopted by the CPSC.

Products or materials known to have no or only very low levels of total lead should not have to be tested to demonstrate compliance with the lead limits in apparel, footwear, toys, publishing, jewelry or other children's products. Tests for total lead are destructive tests, requiring that the test material be dissolved in acid in order to conduct the test. The enormous expense involved in unnecessary testing, plus the associated cost of unnecessarily destroying some inherently valuable items like gemstones, precious metals, pearls and the like, are clearly not warranted because the materials do not pose a health risk to children.

B. Best Available Evidence Demonstrates that Leaded Materials Should be Exempt Where Lead Will Not Be Absorbed or Pose a Health Risk

Petitioners also believe that materials that contain lead may be exempted in specific applications where foreseeable use and abuse scenarios indicate that lead is not likely to be absorbed or public health and safety adversely affected by granting an exemption. This includes applications of metal alloys that contain lead in circumstances where incidental contact under reasonably foreseeable use and abuse scenarios will not result in the likely absorption of lead or any type of public health risk. In some of these applications lead is added intentionally and imparts strength or performance benefits that enhance safety in the end-use application. An example is the European Union's decision under Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS Directive) to exempt lead as an alloying element in steel containing up to 0.35% lead by weight.

Another category of products are made of metal alloys, such as brass, for which sufficient quantities of viable alternatives have been difficult or impossible to source. Petitioners urge the Commission to broadly interpret the meaning of "technologically feasible," taking into account that completely eliminating lead from such component parts would prevent a large swath of products from coming to market. Examples of such products include: ball tips on ballpoint

² See *People v. Burlington Coat Factory Warehouse Corporation, et al*, Case No. RG 04-162075 (Alameda Superior Court June 15, 2006). This agreement was subsequently enacted as legislation in California. See Cal. Health & Safety Code §§ 25214.1-.4. Given the deference that Congress accorded to the Proposition 65 scheme under Section 231 of the CPSIA, the Commission must adopt the exemptions recognized pursuant to Proposition 65 cases such as *Burlington*.

pens, certain parts of musical instruments made of brass, and electrical connectors (headphone/ear bud jacks of brass, antennae, USB connectors, electrical plugs, etc.).¹⁰

A third category of materials ripe for exclusion because lead is not in accessible, ingestible form includes glass and crystal (including rhinestones or cubic zirconium made of glass or crystal). Lead crystal, by definition, may include 24 – 35% lead, but lead is physically bound in the matrix of the crystal, and thus is not accessible to children in a manner that results in a health risk. Glass has the same properties. The chemistry and physical properties of lead crystal glass are well understood.¹¹ Like all glass products, lead crystal is composed primarily of silicon dioxide containing additives for various purposes. Silicon dioxide serves as the primary structural component of glass of all types; it forms an extensive and difficult to disrupt molecular network. Additives, such as lead or colorants, added to glass to create specific properties or effects are known as network modifiers. They are incorporated into, but do not disrupt the network of silicon dioxide. Removing any component of a glass product by extraction (leaching) or any other means is very difficult and does not occur to a significant degree under normal or even abnormal circumstances.¹² “Lead bound in crystal glass” is also exempt from the Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the RoHS Directive pursuant to Commission decision 2006/690/EC. Optical and other glass applications are similarly exempt pursuant to the RoHS Directive. These decisions recognize that the vastly different physical properties of glass and crystal as compared to other lead-containing materials make the lead inaccessible, and crystal, glass, rhinestones and cubic zirconium should be excluded in all children’s products, including jewelry, apparel and electronics applications.

III. Exclusions for Inaccessible Components

The CPSIA also provides that inaccessible component parts are exempt from the lead limits. Congress provided the Commission the authority to adopt a rule within one year addressing inaccessible component parts under § 101(b)(2)(B); in the interim, the determination of inaccessibility is to be made by individual companies pursuant to § 101(b)(2)(A) by assessing whether the product or part is accessible to a child through normal and reasonably foreseeable use and abuse. The CPSIA establishes one clear example of an inaccessible component part: a part which is not physically exposed by reason of a sealed covering or casing that can withstand appropriate use and abuse testing. Under section 101(b)(2), the lead limits prescribed under paragraph (a) of the section do not apply “to any component part of a children’s product that is

¹⁰ These are examples of products that would often not be considered children’s products as defined in the CPSIA because they are marketed for general use, and are not designed or intended primarily for children 12 and under. Nevertheless, depending on how a specific product may be sized, marketed or sold, that specific product may be considered a children’s product.

¹¹ *Glass and Science Technology* (1990). R. Uhlmann and N.J. Kriedl, Editors. Academic Press, New York.

¹² Ahmed, A.A., and Youssof, I.M. (1997). Interaction between lead crystal glass (24% PbO) and acetic acid. *Glass Sci. Technol.*, Vol. 70(6), pages 173-185.

not accessible to a child through normal and reasonably foreseeable use and abuse of such product, as determined by the Commission.” The Commission is required no later than August 14, 2009, to promulgate a rule providing guidance on what product components or classes of components would meet this criterion. We believe there is sufficient evidence for the Commission to immediately conclude that certain components of children’s products do not present hazards based on their inaccessibility to children when contained in the product, and thus, request that the Commission issue an interim final rule excluding them from the requirements under § 101(a). We respectfully ask for the following exclusions:

- Any lead-containing material (including, but not limited to, circuit boards, solder, wiring, batteries and other components) contained behind a sealed covering or casing (paint, surface coatings and electroplating do not qualify);
- Materials such as innersprings, padding and similar materials used in items like mattresses and upholstered furniture;
- Any lead-containing products or materials (like rivets, bolts, fasteners, lid supports, and other items) that meet the CPSC’s use and abuse tests contained in Part 1500 or other appropriate standards to assure the integrity of the item under reasonably foreseeable use and abuse conditions.
- Materials such as mid soles, box toe stiffeners, shanks, interlinings, and fillers that comprise internal components for footwear.

The Commission should also provide exclusions where in reasonably foreseeable use and abuse scenarios a product or component is simply too large to be ingested, mouthing and hand-to-mouth contact does not pose a risk, certain components (like innersprings and cushioning in mattresses or upholstered furniture) are not likely to be exposed, or aging of products or components does not result in dust or debris that might expose a child to lead in harmful amounts. We encourage the Commission to consider real-life scenarios and to exclude from application of the requirements components that are inaccessible in reasonably foreseeable use and abuse situations based on human factors and behavioral analysis of real life scenarios.

IV. Electronics

Section 101(b)(4) authorizes the Commission to establish, by regulation, requirements to eliminate or minimize the potential for exposure to and accessibility of lead in electronic devices. As indicated in the discussions at the Commission’s November 6, 2008 meeting on lead, the issue of lead in electronics has been closely studied in the EU and it has been determined that lead cannot be feasibly eliminated from numerous items used in electronics products. Specifically, Paragraph 2 of European Decision 2005/747/EC found that:

*Certain materials and components containing lead and cadmium should be exempt (or continue to be exempt) from the prohibition, since the use of these hazardous substances in those specific materials and components is still **unavoidable** [emphasis added].*

The need for lead in electronics products continues to be reaffirmed. It is worth noting, for example, that the European Union provides several exemptions for the use of lead solder. The European Commission Decision 2005/747/EC, of 21 October 2005, exempts from the RoHS Directive “[l]ead in solders consisting of more than two elements for the connection between the pins and the package of microprocessors with a lead content of more than 80 % and less than 85 % by weight.” As the RoHS Directive and its international analogues increasingly become the *de facto* global standards for reducing lead and other chemicals in electronic products and components, based on an assessment of the technical feasibility of eliminating or reducing lead in electronic products and components, we urge the Commission to rely at least initially on all of the RoHS determinations about exemptions or exclusions in adopting a final rule that excludes electronics products from the lead limits as part of this final rule to avoid confusion.

V. Testing

As noted above, industry is grappling with technical and practical questions about how and what to test for lead. In addition to granting exceptions, as outlined above, which are entirely consistent with public health objectives and the statutory framework, Petitioners urge the Commission to recognize reasonable component or raw material testing as the basis for certifications required under the CPSIA. Similarly, although the CPSC may limit itself to certain testing methodologies for regulatory enforcement purposes, it should expressly recognize alternate screening methodologies which are readily available and can be relied upon as the basis for screening goods or component parts thereof for the purposes of testing and certification. This concept was recognized and embraced by Congress when it adopted ASTM F-963, which incorporates soluble lead testing protocols for other heavy metals in paint or similar surface coatings on toys (*see* CPSIA Section 106) and directed the CPSC to review the feasibility of using X-Ray Fluorescence (XRF) technology or other alternate methods for measuring lead in paint and other surface coatings (*see* CPSIA Section 101 (f)(3)). In addition many accredited laboratories use alternate test methods such as EPA 3050 and 3051 for lead testing¹³ and for screening.

Industry understands the need for robust quality control to assure that components or raw materials meet required specifications and Petitioners have implemented quality control procedures to assure that they do. However, laboratory capacity is already strained. The supply chain must rely upon a basket of acceptable alternate test methods, and reasonable raw material and component manufacturer testing, as part of a comprehensive lead compliance verification process. Failing to address these issues will create enormous practical difficulties and financial burdens with no commensurate public safety benefit.

¹³ Versions of these EPA methods are required under some state laws for testing of jewelry components, and the Commission has recognized alternatives in the metal children’s product test guidance.

VI. Preemption

In enacting the CPSIA, Congress recognized that the proliferation of non-identical standards on lead would harm interstate commerce, and included a strong preemption clause in Section 101. Section 101(g) specifies that the lead standards are treated as a regulation under the Federal Hazardous Substances Act (FHSA), stating:

Any ban imposed by subsection (a) or rule promulgated under subsection (a) or (b) of this section, and section 1303.1 of title 16, Code of Federal Regulations (as modified pursuant to subsection (f)(1) or (2)), or any successor regulation, shall be considered a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)).

In turn, Section 18(a)(1)(B) of the FHSA provides, in pertinent part:

...if, under regulations of the Commission promulgated under or for the enforcement of section 2(q) a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

Congress understood that the proliferation of non-identical standards on lead in consumer products was creating massive uncertainties that impeded interstate commerce and were not outweighed by public safety benefits in adopting this express preemption provision. It was keenly aware that the uniform federal scheme of regulation would be undermined by inconsistent standards and timeframes to reduce lead, changes in the scope of covered products by definitional changes, or a patchwork of state warning laws that effectively changed the substantive standard by imposing a warning obligation on products that meet federal safety standards.

Congress identified the hazardous substance to be regulated, namely, lead, in consumer products. It did so by addressing lead in two types of consumer products: lead in paint and painted products, and lead in substrate of children's products. As to the lead paint standard, HR 4040 modifies existing regulations which apply to the following consumer products: painted toys and children's products, painted furniture, and paint (sold as paint). For the lead substrate limits, Congress defined the types of consumer products covered, namely, products designed or intended *primarily* for children 12 and under, rejecting legislative proposals to apply these limits to any product in the home which might be foreseeably used by children. Congress defined the age of children for purposes of defining the category of consumer products covered by the lead substrate limits (consumer products designed or intended primarily for children 12 and younger), substantive standards and timelines, and exemption processes. It is equally clear that legislation purporting to impose warning labels on products that may contain lead at levels that are safe under the CPSIA or are otherwise exempt is preempted.

As a result of the enactment of HR 4040, no state or political subdivision of a state may establish or continue in effect a requirement applicable to such substance, namely, lead in a consumer product, and designed to protect against the same risk of illness or injury, namely, lead poisoning, unless such requirement is *identical* to the requirement established by the CPSC.

Several states have now withdrawn or are in the process of withdrawing their non-identical standards in the wake of adoption of the CPSIA. Other states, however, have not. Allowing states to impose non-identical standards, including requirements for lead warnings on products which meet the lead limits of the CPSIA, will frustrate the scheme of uniform, national standards set forth in the CPSIA. Petitioners ask the Commission to specify in a direct final rule that no consumer product may be subject to a limit on lead in paint or substrate materials unless the state petitions the Commission for recognition of a non-identical standard in accordance with the FHSA.

The only exception to the express preemption provisions set forth by Congress related to the lead limits is the proviso at Section 231(b) that the preemption provisions of the CPSIA do not apply to requirements established under legislation in force prior to August 31, 2003. This is an explicit reference to California's Proposition 65. This provision states:

Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.

Consumer products that must include a Proposition 65 warning statement due to lead content are thus not explicitly preempted by virtue of this section. However, reading Section 101 in conjunction with Section 231, products or materials that are not subject to a Proposition 65 lead warning obligation, or which meet lead limits established by Proposition 65 agreements (or legislation embodying such agreements) arguably cannot be required to include warning statements pursuant to other state laws. An example is jewelry. A Proposition 65 lawsuit was settled with adoption of material-specific limits on lead in jewelry for children 6 and under and jewelry for all other consumers, with exemptions for certain materials. The lead limits and exemptions under the settlement agreement were subsequently enacted into California law. Jewelry and jewelry components which meet these limits or exemptions are not subject to a Proposition 65 warning statement related to the presence of lead. Consequently, no state can impose a warning requirement on jewelry that meets the Proposition 65 limits based on a common-sense reading of Section 101 and Section 231. To effectuate the intent of Congress, consumer products that meet lead limits pursuant to Proposition 65 settlement agreements must be deemed safe nationally and may not be the subject to any state warning requirement as to lead content.

VII. Conclusion

Granting this Petition is in the public interest. As we have demonstrated, the exemptions proposed here are fully consistent with the requirements of the CPSIA and the Commission's authority. Clarity on testing obligations is required as well. Finally, the Commission must provide guidance on the scope of preemption as businesses may face non-identical schemes that will frustrate the goal of national uniformity and create confusion to consumers about safe products.

Best available scientific evidence demonstrates that lead only poses a health hazard to consumers when it is in an accessible, ingestible form. Best available scientific evidence establishes that many materials contain no lead or trace amounts of lead at levels well below the lowest thresholds established in the CPSIA and thus do not pose a risk and should be excluded from the lead limits. Best available scientific evidence establishes that lead in certain materials like glass and crystal (including rhinestones and CZ) is physically bound and thus not accessible under foreseeable use and abuse conditions and should be excluded from the lead limits in all applications. Best available scientific evidence also tells us that certain materials, components or products that contain lead in excess of the CPSIA limits do not pose a risk of absorption under realistic use and abuse scenarios, and often the lead-containing material provides safety and other benefits in the particular application.

Further, Congress recognized that inaccessible component parts do not pose a risk to children of exposure to accessible, ingestible lead and should be excluded. It also recognized that lead serves an important technical function in electronics products. Many components of electronics products would certainly qualify as inaccessible component parts. To the extent electronics components are not "inaccessible" as defined by the Commission, they should nevertheless be excluded from application of the lead restrictions because the lead in such products is unlikely to pose a risk of lead exposure and lead is needed to provide technical functionality in electronics products and components.

The timelines for the Commission to act on testing and exceptions are not synchronized with the February 10, 2009 deadline for lead. Action is urgently needed on a comprehensive rule on all aspects of the lead limits to provide clarity and minimize disruption to markets in a fashion that fully meets our shared product safety objectives. Many industries and organizations have and will continue to submit additional technical data and information that supports specific exclusions based on the principles outlined in this petition.

Petitioners respectfully request that the Commission grant their petition.

Respectfully submitted,

American Apparel & Footwear Association
Association of American Publishers
Book Manufacturers Institute, Inc.

December 18, 2008

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Fashion Jewelry Trade Association
Juvenile Product Manufacturers Association
National Association of Manufacturers
National Association of Printing Ink Manufacturers
National Bulk Vendors Association
National Retail Federation
Retail Industry Leaders Association
Printing Industries of America
Specialty Graphic Imaging Association
Toy Industry Association