

Consumer Electronics Retailers Coalition



October 31, 2008

Todd A. Stevenson
Secretary
Consumer Product Safety Commission
4330 East-West Highway
Room 502
Bethesda, Maryland 20814

RE: Section 101 – Comments and Information: Children’s Products Containing Lead;
Lead Paint Rule.

Dear Mr. Stevenson:

Please accept the following comments from the Consumer Electronics Retailers Coalition (CERC) in response to the Commission’s Request for Comments and Information: Children’s Products Containing Lead; Lead Paint Rule.

By way of background, the Consumer Electronics Retailers Coalition (CERC) is a public policy issue organization consisting of the major specialty retailers of consumer electronics products and retail associations. CERC members include Amazon.com, Best Buy, Circuit City, K-Mart, RadioShack, Sears, Target, Wal-Mart, and the leading retail industry trade associations – NRF, NARDA, and RILA.

Section 101 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) establishes a set of standards for children’s products containing lead. The CPSIA reduces the allowed amount of lead (in parts per million) in children’s products over the course of the three years after the CPSIA’s enactment. CERC supports the general goal of reducing the risk posed to children who use these products. However, further clarification is necessary, particularly with regard to the extent to which a product is a children’s product, the exceptions for inaccessible component parts and certain electronic devices established at Section 101(b). Because the first lowered lead limit goes into effect only 180 days after the enactment of the CPSIA, it is important that CPSC issues regulations providing guidance regarding these exceptions as soon as possible.

I.General Review of the Exceptions

The CPSC's Request for Comments focuses on two separate exceptions to the general lead ban in Section 101(b). The first, Section 101(b)(2), exempts inaccessible component parts from the lead limits. The second, Section 101(b)(4), exempts electronic devices when the Commission has determined that it would be technologically infeasible to bring these devices into compliance.

A natural reading of Sections 101(b)(2) and 101(b)(4) indicates that a product or some of its component parts would have two distinct ways in which to be exempt from the lead limits. First, a component part with lead is exempt from the product's lead limit if that part is inaccessible to a child through normal and reasonably foreseeable use and abuse of said product. A product will still be subject to the lead limits of the Act.

If a product is noncompliant even with the exclusion of certain inaccessible parts, the product may still be exempt under the second exception if it meets the following criteria: 1) it is an electronic device; 2) the Commission has determined that it is not currently technologically feasible for it to comply; 3) it complies with Commission-issued requirements to eliminate or minimize the potential for lead exposure and accessibility; and 4) the Commission establishes a schedule by which the device shall be in full compliance with the lead limits, if full compliance is at all technologically feasible. This exception, which is triggered by technological infeasibility, focuses on adapting the product so that it can come as close to compliance as is feasible. The long-term goal of the exception is to lower the lead level, if possible, until the product is compliant. In the meantime, however, it authorizes the CPSC to require changes to the product that will minimize lead exposure, such as adding child-resistant covering or casings. In setting appropriate technically feasible limits, CERC notes the importance of recognizing that lead is a naturally occurring element and that the CPSC's reviews of technical feasibility ought, as the CPSIA suggests in Section 101(b)(5), to focus on the best available scientific information.

Below, CERC responds to specific questions from CPSC regarding the accessibility and electronics devices exceptions, and highlights the importance of CPSC providing more clarity on various terms used in the CPSIA. CERC requests that CPSC define these terms, and identify examples of items that will qualify for exemption.

II.Exception for Inaccessible Component Parts

The CPSIA exempts parts that are inaccessible to a child through normal and reasonable use and abuse of the product, as determined by the Commission. This provision is very relevant to the types of consumer electronics products CERC's members sell. The CPSC asks for comments on whether any children's products currently on the

market contain component parts with lead that are inaccessible and for comments on what makes a part inaccessible.¹

The statute indicates that a component part is not accessible if it is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product, including swallowing, mouthing, breaking, or other children's activities and the aging of the product. CERC seeks further clarification of the term "normal and reasonable use and abuse." Because the lead ban targets products made for children from birth until the age of twelve, CERC believes that in its determination, CPSC should recognize that "normal and reasonable foreseeable use and abuse" of a product may vary depending on the age gradation of the product. As to the issue of physical exposure, it is CERC's position that a component part is inaccessible if active disassembly would be required to expose it.

Although lead is a fairly common component in electronic devices, most of the lead contained in these types of products is inaccessible. Many component parts that contain lead are rendered inaccessible by a cover or enclosure. Typical examples include components on a circuit board. Lead solder, one of the main components on a circuit board, is used to secure components to printed circuit boards and/or to solder wires to other components and connectors. Because of the product's outer casing, in most cases, significant effort (i.e. removal of screws, sonic welds, or glue) is required to access these components). CERC would therefore argue that the lead present in a circuit board is exempted from lead limits of the product because it is inaccessible. CERC believes that the exclusion of lead in contact in battery compartments would also be considered inaccessible under this analysis if the compartments are enclosed with screw covers or other technique which makes the contacts difficult to access.

There also may be cases where lead is in a product component such as a glass or crystal element which poses either no risk where contact can transfer lead to skin or mouth or where the component by its very nature does not leach lead. These types of product components should also be determined to be "inaccessible" and exempt.

Once the Commission defines "inaccessibility," it should clarify what type of test will be sufficient for determining whether a part qualifies as such. Currently, manufacturers use a "finger probe" test developed by ASTM to determine whether a child's fingers, when inserted into openings in a product, would come in contact with a part. This test, ASTM F963 can be used to determine whether a part is accessible or not.

III.Exception for Electronic Devices

¹ CERC notes that many of the consumer electronics products sold by CERC members would not be subject to the CPSIA because they do not meet the definition of children's product. See further discussion in Section III below.

CERC seeks a definition of what an “electronic device” is under CPSIA. On its face, the term “electronic devices” seems to encompass much more than the children’s products the CPSIA seeks to regulate. In fact, many electronic products are never marketed toward, or intended for use by, children. It is important that CPSC clarify that such products are not subject to the CPSIA. A current CPSC regulation draws the distinction between “adult” electronics and “children’s” electronics, defining an “electrically operated toy or other electrically operated article intended for use by children” as:

any toy, game, or other article designed, labeled, advertised, or otherwise intended for use by children which is intended to be powered by electrical current from nominal 120 volt (110-125 v.) branch circuits. . . . This definition does not include components which are powered by circuits of 30 volts r.m.s. (42.4 volts peak) or less, articles designed primarily for use by adults which may be used incidentally by children, or video games.

16 CFR §1505.1. It is CERC’s position that the same definition should be used to define the scope of products that might be eligible for the consumer electronics exceptions under the CPSIA.

The Commission requested the “identification of any component part of any children’s product that currently contains lead in any concentration.” CERC is concerned that, to the extent that any such list of parts or products is created, CPSC may inadvertently send a signal that it is pre-judging products’ compliance. Therefore, CERC recommends that the CPSC focus on the types of metal that contain lead in any concentration and the general categories of children’s electronics products in which they may be included as component parts.

Alloys are the primary example of accessible component parts containing lead. Various alloys use lead to achieve certain properties necessary to form or make the part, including steel, aluminum, and copper-based alloys are used in numerous children products. Examples of such products include: battery contacts; audio and video connectors; battery chargers; and AC adapters. Brass alloy which is particularly malleable, can be cast and machined and is a commonly used metal. It can be molded into usable products more accurately and at a faster rate, making it particularly useful in small metal parts, and in antenna parts for electronic devices ranging from radios to remote-controlled cars. For the reasons stated below, we believe that component parts of this nature would be exempt from meeting the CPSIA lead standard because it would not be technologically feasible for them to do so.

A. Technological Feasibility

Because the exception for electronic devices focuses on “technological feasibility,” the way in which the Commission construes that term is crucial. The CPSIA defines a limit to be deemed “technologically feasible” with regard to a product or product category if:

(1) a product that complies with the limit is commercially available in the product category;

(2) technology to comply with the limit is commercially available to manufacturers or is otherwise available within the common meaning of the term;

(3) industrial strategies or devices have been developed that are capable or will be capable of achieving such a limit by the effective date of the limit and that companies, acting in good faith, are generally capable of adopting; or

(4) alternative practices, best practices, or other operational changes would allow the manufacturer to comply with the limit.

Consumer Product Safety Improvement Act of 2008, Section 101(d).

It is imperative that CPSC consider the importance of Congress’ use of the term “commercial availability.” Given the first two prongs of the “technological feasibility” test, it is clear that Congress intended to inject some cost-benefit analysis into the CPSIA. The statute does not ban products based on the mere existence of technology that would make compliance possible. Rather, it focuses on the commercial availability of compliant products and technology that would allow for compliance. This indicates that, while the Commission should certainly be concerned with whether compliance is technically possible, it must also consider the realities of cost prohibitions and marketability.²

CERC, of course, recognizes that the use of lead in electronic devices has been regulated for some time, both by individual states, and by other countries in which products are marketed. For instance, the European Union limits the use of lead in electronic equipment to 1000 ppm. Recognizing that the 1000 ppm limit was impossible to meet in every product, the EU has allowed 22 applications above its lead standard. Within these exceptions, the EU recognizes the utility of lead alloys, even as an external component in products, by creating an exception for “lead as an alloying element in steel

² Because Congress intended to focus on the commercial availability of compliant products and compliance technology, the use of the phrase “available practices, best practices, or other operation changes” must be construed narrowly. To construe those terms broadly, as requiring compliance any time it is possible regardless of cost or marketability, would render the first three prongs of the test nonsensical. Instead, it is CERC’s belief that the fourth prong is intended to correct the problem of residual lead on manufacturing equipment.

containing up to 0.35% lead by weight [3,500 PPM], aluminum containing up to 0.4% lead by weight [4,000 PPM] and as a copper alloy containing up to 4% lead by weight [40,000 PPM].”³

After the expenditure of much effort and money, a majority of electronics that are sold in the global market are attempting compliance with RoHS standards, which now serve as the worldwide benchmark. However, there are some markets where even those standards are not met because of the cost impact to meet RoHS. Items produced around the world are made to comply with these standards, and therefore products with lower standards and the technology to create such lower standards are both commercially unavailable. To comply with standards lower than those set out in RoHS would raise the cost of producing children’s electronics in a significant manner and may alter the ability of manufacturers to produce certain children’s electronics even though these products pose no meaningful risk to children..

At a minimum, the CPSC should provide immediately temporarily exempt electronics products according to RoHS. Without this retailers will be forced to pull products from shelves even though the risk factors remain low and can't at this time be minimized.

B. Ability to eventually meet CPSIA Limits

CERC recommends that CPSC study the EU standard as a guide to the technological feasibility of eliminating lead from electronic devices. Without the exception in the RoHS, compliance with that regulation would be impossible; especially considering the short timeframe adopted in 180 days. CERC agrees with ITI/CEA/IPC’s position that it is not technologically feasible at this time to achieve lead levels under 1000 ppm in all parts of children’s electronic devices within the timeline set forth in the CPSIA. In addition, the CPSC needs to consider the exemptions adopted in the RoHS requirements. CERC’s members recommend that the CPSC establish a working group which would analyze the ability to achieve lower lead limits over time.

Conclusion:

CERC strongly believes in protecting the safety of our customers and children. CERC appreciates the opportunity to respond to the CPSC’s Request for Comments on the Exceptions provided for inaccessible component parts and certain electronic devices. CERC looks forward to its continued work with the CPSC as it implements these provisions.

³ EU Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2008, Annex.

Respectfully,

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