U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD
ON SECTION 108 OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT
REGARDING PHTHALATES COMPONENT TESTING
August 7, 2009

While the general purpose of section 108 of the CPSIA is to ensure that children are not exposed to certain specified phthalates, I have serious reservations about both the process used and the substance of this guidance document in furthering that purpose. Nonetheless, I am voting to put it out for discussion because it is important to receive the benefit of public comment on the issues presented.

With respect the process, the document before the Commission for consideration is characterized as a guidance stating the Commission's policy with respect to testing plasticized component parts of toys and child care articles. Because of the significance of the guidance, the fact that it represents a significant change in direction from earlier statements of commission staff on the same matter, and because it can be read to impose requirements (and compliance risks) on product manufacturers, it can equate to a substantive rule, not merely a "guidance," in which case it is subject to the notice and comment and other rulemaking requirements of the Administrative Procedure Act.

Limiting the testing requirements to plasticized component parts may be more protective of public health and may also minimize testing burdens. This is also the approach taken by other jurisdictions that have regulated phthalates However, the language of the statute, as the staff recognized in earlier statements, suggests that the entire product should be tested, resulting in wasteful and expensive testing that actually could dilute the results of the tests and counter the goal of public health. Therefore, the Commission's attempt to reinterpret the statute to limit the testing requirement to plasticized component parts may well be a very good step forward. We need public input to answer this question and to fully understand what other issues are being raised by this guidance.

The staff is now developing an advanced notice of proposed rulemaking dealing with component parts. Presumably, phthalates testing will be discussed in that rule as well. Therefore the public comments we receive here will provide a context for proposals that will be put out in the near future.

One important issue that is not adequately addressed in the guidance is the issue of inaccessible component parts. The lead content provisions of the CPSIA treat the question of inaccessibility. The phthalates provisions of the CPSIA are silent on this subject. Instead, the phthalates provisions (dealing with the interim ban) extend to child care articles and toys that can be placed in a child's mouth. Since, according to the interpretation set out in this guidance, the statute defines "toy" as a "consumer product" and since "consumer product" includes component parts of the product, then it seems to follow that only those component parts of the toy that can be placed in the child's mouth would be subject to the testing requirements. Another issue that needs to be considered is what reliance sellers who have used the earlier test method can place on those tests. This issue becomes more critical given the retroactive impact of the statute. These issues are among many others presented by this less than clear statutory provision.

Today's vote is an effort to provide further interpretation of section 108 of the CPSIA concerning phthalates, specifically guidance concerning plasticized component part testing. While I am voting to advance this statement of policy, I am convinced we do not have adequate answers to such related and important phthalates issues as inaccessibility, retroactivity and reliance on previous agency guidance. I believe it is essential to have additional comment from affected stakeholders about this approach and fully endorse having a 30 day comment period. My fellow Commissioners and I should then craft a solution to effectively implement this provision without unnecessary costs and avoidable confusion.