



1700 N. Moore Street, Suite 2250, Arlington, VA 22209  
Phone: 703-841-2300 Fax: 703-841-1184  
Email: [info@retail-leaders.org](mailto:info@retail-leaders.org) [www.retail-leaders.org](http://www.retail-leaders.org)

October 30, 2008

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

Re: Section 101 Lead Restrictions

Dear Secretary:

Please accept the following comments from the Retail Industry Leaders Association (RILA) on behalf of its members in response to the Consumer Product Safety Commission's ("Commission") Request for Comments and Information; Children's products containing lead; lead paint rule Section 101 of the Consumer Product Safety Improvement Act ("CPSIA" or "Act"). To avoid confusion or possible conflicting direction, we urge the Commission to respond to the comments received by revising its existing "Guidance for Lead (Pb) in Consumer Products" found at 16 CFR §1500.230.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

### **Definitions**

Section 101(a) of the Act provides that "any children's product that contains [total lead in excess of 600 ppm in 180 days, 300 ppm in 1 year and 100 ppm in 3 years] shall be treated as a banned hazardous substance..."

Section 235(a)(16) defines the term "children's product" as "a consumer product designed or intended primarily for children 12 years of age or younger." This definition is clearly inclusive of all toys designed or intended primarily for children 12 years of age or younger. Consequently, the 90 ppm limit on total lead in surface coatings of Section 101(f) applies to toys for children 12 years of age or younger. However, ASTM F963, made law by Section 106 of the Act, contains a 90 ppm soluble lead limit for surface coatings on toys for children up to 14 years of age. The inconsistent age limits and lead measurement methodologies of Section 235 of the Act and

ASTM F963 create several questions for our members and their suppliers. First, will “toys” under Sections 101, 106 and 108 of the Act include toys designed or intended primarily for children up to 12 years of age or for children up to 14 years of age? Second, will the ASTM F963 soluble lead limit for surface coatings also apply, or will the Section 101 total lead limit control for all toys?

Fortunately, Congress foresaw and made provisions for the resolution of these inconsistencies. Section 101(c) of the Act provides that “[t]o the extent that any regulation promulgated by the Commission under this section (or any section of the Consumer Product Safety Act or any other Act enforced by the Commission, as such Acts are affected by this section) is inconsistent with the ASTM F963 standard, such promulgated regulation shall supersede the ASTM F963 standard to the extent of the inconsistency.”

Hence, to the extent that the definition of “toy” in ASTM F963 is inconsistent with the definition of “children’s product” under Section 235(a)(16), the definition of “children’s product” under Section 235(a)(16) controls the application of Section 101(f) lead limits. Likewise, to the extent that ASTM F963 establishes a different limit on lead in surface coatings of toys, that limit is superseded by the limits of Section 101 of the Act. In any event, it is impossible to have more than 90 ppm of soluble lead and less than 90 ppm total lead. RILA therefore urges the Commission to clarify that the total lead limit on surface coatings found in Section 101(f) only applies to toys for children 12 years of age and younger, and the ASTM F963 soluble lead limit for surface coatings on toys is superseded by the Section 101 total lead limit for surface coatings on children’s products.

RILA would also like the Commission to clarify whether packaging of children’s products is covered by the lead limits of Section 101. Lead and other heavy metals are already limited under the toxics in packaging laws of 19 states. Those limits (100 ppm aggregate total of lead, cadmium, mercury and hexavalent chromium) are in fact lower than the lead limit of Section 101. Therefore, we urge the Commission to clarify that the lead limits of Section 101 do not apply to the packaging of children’s products.

### **Exemptions**

Section 101(b)(2)(A) clarifies that the lead limits do “not apply to any component part of a children’s product that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product, as determined by the Commission. A component part is not accessible...if such component part 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. Reasonably foreseeable use and abuse shall include to (sic), swallowing, mouthing, breaking, or other children’s activities, and the aging of the product.”

Section 101(b)(1) permits the Commission, by regulation, to “exclude specific product or materials...if the Commission after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither (A) result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing,

mouth, breaking, or other children's activities, and the aging of the product, nor (B) have any other adverse impact on public health or safety."

Finally, section 101(b)(4) provides that "[i]f the Commission determines that it is not technologically feasible for certain electronic devices...to comply with [the lead limits], the Commission, by regulation, (A) shall issue requirements to eliminate or minimize the potential for exposure to and accessibility of lead in such electronic devices...and (B) establish a schedule by which such electronic devices shall be in full compliance with [the lead limit]...unless the Commission determines that full compliance will not be technologically feasible for such devices within a schedule set by the Commission."

Many household products contain varying amounts of metal alloys that are not easily substituted with alternatives. RILA urges the Commission to provide an exemption for the components made of these alloys, while allowing industry the option to petition the Commission at a later date for exclusions for other broad classes of products that contain metal alloys.

Specifically, in an effort to stay ahead of the product safety curve, our members have over the past year applied their own product safety restrictions to children's products. In implementing such restrictions, our member's suppliers have encountered significant difficulty sourcing certain kinds of components to meet the lead limits. Examples include: valve stems of bicycle tire inner tubes made of brass, keys made of brass, ball tips on ballpoint pens, certain parts of musical instruments made of brass, and electrical connectors (headphone/ear bud jacks of brass, antennae, USB connectors, electrical plugs, etc.). Many of these components are made of brass, and sufficient quantities of viable alternatives have been difficult or impossible to source. RILA urges 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.

Similarly, certain materials used to make children's products may contain levels of lead by total weight that exceed permissible levels, but pose little hazard of exposure due to molecular structure or other reasons. Examples of such materials include glass, crystal and rhinestones. Viable alternatives to these materials may not be available for use in certain categories of products, like children's jewelry. As noted above, Congress recognized this scenario in section 101(b)(1) and granted the CPSC the authority to exclude certain materials. RILA urges the Commission to accelerate the rulemaking process specified in section 101(b)(1) to avoid the possibility of eliminating entire categories of products from the marketplace when section 101(a) becomes effective.

### **Enforcement**

Our members are obviously concerned that even when the Commission provides guidance short of rulemaking on any provisions of the Act, that guidance may be ignored by state attorneys general. While state attorneys general provide a critical multiplier of enforcement capability under the Act, inconsistency of enforcement among state attorney generals and the Commission could render the Commission's considered judgment irrelevant. To avoid this calamity, our members urge the Commission to include state attorneys general, where possible, in the process of developing guidance on enforcement of the Act. Furthermore, our members hope that when

the Commission establishes enforcement discretion guidance, that guidance will be widely distributed among state attorneys general. The Commission should consider providing support and even training to state attorneys general as they enforce the Act. Finally, the Commission should make clear its expectation that the district court, in any action by a State Attorney General to enforce the provisions of the Act, will defer to the Commission's determinations about how the Act should be and should not be enforced.

### **Conclusion**

RILA and our members will continue to stay engaged in the Commission's process to provide further guidance on implementation of the CPSIA and will take advantage of the opportunity to offer further constructive comments. On behalf of our members, we thank you for the work that you have undertaken and for the opportunity to offer some insights on how to make implementation of the CPSIA successful. We appreciate this opportunity to comment on the Commission's Request for Comments and Information; Children's products containing lead; lead paint rule Section 101 of the Consumer Product Safety Improvement Act. Should you have any questions about the comments as submitted, please don't hesitate to contact me by phone at (703) 600-2046 or by email at [stephanie.lester@rila.org](mailto:stephanie.lester@rila.org).

Sincerely,

A handwritten signature in black ink that reads "Stephanie Lester". The signature is written in a cursive, flowing style.

Stephanie Lester  
Vice President, International Trade