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INDEPENDENT

January 13, 2005

The Honorable Hal Stratton
Chairman
Consumer Product Safety Commission
East-West Towers
4330 East-West Highway
Bethesda, MD 20814

Dear Mr. Chairman:

From September 2003 through July 2004, the Consumer Product Safety Commission (CPSC) oversaw three recalls of nearly 150 million pieces of toy jewelry because of toxic levels of lead. Last month, and again this week, there have been more recalls involving an additional 162,000 pieces of lead-containing children's jewelry.

Yet despite these actions, children continue to be exposed to products with dangerous lead levels. A recent study has found that 60% of more than 400 pieces of costume jewelry purchased at major department stores contain dangerous amounts of lead. I am writing to urge CPSC to solve the underlying problems that have led to the repeated marketing of these dangerous items.

These problems start with a basic disagreement between CPSC and manufacturers of children's products over which laboratory tests for lead should be conducted. CPSC recommends a series of tests to measure the accessibility of lead in a given product. The industry standard, however, is to test only the product's surface coating. Companies using this method can fail to detect major risks to children.

It is unacceptable that this situation has not been corrected. While four companies have agreed temporarily not to use lead in toy jewelry, CPSC has not sought to include its recommended tests in federal regulations or industry standards applicable to a wide range of children's products. Nor has the agency worked to ensure that laboratories can be accredited in performing these tests correctly. These steps should be taken immediately.

More broadly, CPSC should address the question of why lead is permitted in toy jewelry and other children's products at all. To protect children, CPSC should ultimately ban the use of this toxic metal altogether.

Background

Acute lead toxicity can cause seizures, coma, and even death.[1] Chronic lead toxicity is associated with attention problems, learning disabilities, mental retardation, and antisocial and delinquent behaviors.[2] Even very low dose exposures have been linked to intellectual impairment.[3] Because of these risks, Congress and CPSC have long sought to protect children from lead exposure.

Two statutes govern the lead content of toys. Regulations implemented under the Consumer Product Safety Act ban paint containing greater than 0.06% lead.[4] The Federal Hazardous Substance Act bans toys or articles that expose children to "hazardous substances" through routine handling or reasonably foreseeable use, including ingestion.[5]

The responsibility for complying with these laws rests with manufacturers, which often hire private laboratories to conduct premarket testing. To help manufacturers and private laboratories implement the statutory standard for lead, CPSC in 1998 provided guidance on the importance of assessing the following factors:

> the total amount of lead contained in a product, the bioavailability of the lead, the accessibility of the lead to children, the age and foreseeable behavior of the children exposed to the product, the foreseeable duration of the exposure, and the marketing, patterns of use, and life cycle of the product.[6]

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[1] *Behrman: Nelson Textbook of Pediatrics*, 17th ed., 2358–2360 (2004).

[2] *See, e.g.,* D. Bellinger et al., *Attentional Correlates of Dentin and Bone Lead Levels in Adolescents*, Archives of Environmental Health, 98–105 (Mar.–Apr. 1994); H. Needleman et al., *Deficits in Psychologic and Classroom Performance of Children with Elevated Dentine Lead Levels*, New England Journal of Medicine, 689–695 (Mar. 29, 1979); H. Needleman et al., *Bone Lead levels and Delinquent Behavior*, Journal of the American Medical Association, 363–9 (Feb. 7, 1996).

[3] R. Canfield et al., *Intellectual Impairment in Children with Blood Lead Concentrations below 10 Micrograms per Deciliter*, New England Journal of Medicine, 1517–26 (Apr. 17, 2003).

[4] 16 CFR 1303.

[5] 15 USC § 1261-1278.

[6] 63 Fed. Reg. 70629 (Dec. 22, 1998).

CPSC Lead Testing

For at least seven years, CPSC has used four specific tests to assess the hazards of lead in children's products. These tests are:

- **Total Lead Content**. This screening test is performed in order to determine whether the product contains enough lead to warrant further testing. The object is dissolved in nitric acid and then lead content is measured according to general procedures for lead content published by the Association of Official Analytical Chemists.[7]

- **Acid Test**. This test estimates the lead exposure of children who swallow the product. The object is exposed to weak hydrochloric acid (to simulate the environment of the stomach) in three separate baths over one, two, and then three hours. Total lead content of all three solutions is then measured.[8]

- **Wipe Test**. This test estimates the lead exposure of children who touch the product and then place their hands in their mouth. The object is wiped ten times with three surface sampling towels. Each towel is digested in nitric acid. Samples are then analyzed, and a total lead content is determined from the sum of all samples.[9]

- **Saline Test.** This analysis estimates the lead exposure of children who suck or "mouth" the product. The object is bathed in warm saline solution for a total of six hours over a series of one-, two-, and three-hour baths. Total lead content is determined from the solution.[10]

These four tests, which were most recently detailed in a July 2004 letter to the toy jewelry industry, are appropriate for a wide range of toys that are used by young children.[11]

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[7]Consumer Product Safety Commission, *CPSC Staff Report on Lead and Cadmium in Children's Polyvinyl Chloride (PVC) Products* (Nov. 21, 1997).

[8]Consumer Product Safety Commission, *Brief Description of the CPSC Staff Hazard Assessment Procedure for Lead in Crayons* (May 17, 1994) (online at http://www.cpsc.gov/BUSINFO/crayonslead.html); Consumer Product Safety Commission, *CPSC Staff Report on Lead and Cadmium in Children's Polyvinyl Chloride (PVC) Products*, Appendix (Nov. 21, 1997).

[9]Consumer Product Safety Commission, *CPSC Staff Report on Lead and Cadmium in Children's Polyvinyl Chloride (PVC) Products*, Appendix (Nov. 21, 1997).

[10]*Id.*

[11]Alan H. Schoem, Director, Office of Compliance, Consumer Product Safety Commission, *RE: Children's Toy Jewelry Containing Lead* (July 1, 2004).

However, because they are not set out in statute or regulation, there is no legal requirement that manufacturers conduct these tests on any toys prior to marketing.

Industry Lead Testing

In the absence of a legal requirement to follow CPSC's lead testing standards, toy manufacturers can decide for themselves how to assess the safety of their toys. Companies that test to industry standards, however, do not perform the four CPSC tests.

Testing standards for the toy industry are published by the American Society of Testing and Materials (ASTM). The ASTM standards include only a single test for lead. Specifically, section 8 of the *Standard Consumer Safety Specification for Toy Safety* recommends bathing a scraping of the outer surface of the toy in a weak hydrochloric acid solution and assessing the lead content of the solution.[12] The ASTM standards do not recommend the "wipe" or "saline" tests to ensure that children are protected from lead to which they may be exposed through mouthing or touching toys.

Five recent recalls of millions of pieces of toy jewelry sold widely in vending machines raise serious questions about the adequacy of this voluntary industry testing.

The first recall occurred in September 2003 and involved 1.4 million toy necklaces distributed by L.M. Becker & Company, Incorporated, of Kimberly, Wisconsin.[13] The necklaces came to CPSC's attention after a child swallowed a pendant and subsequently developed extremely high blood lead levels. This pendant did not appear to have any outer coating.

The second recall, in March 2004, involved one million toy rings manufactured by Brand Imports, LLC, of Scottsdale, Arizona.[14] The rings contained lead and were covered in lead paint.[15]

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[12]Because the ASTM standard is based on a scraping of the outer surface of the toy, and not the entire toy, it can underestimate the danger of ingestion. American Society of Testing and Materials, *Standard Consumer Safety Specification for Toy Safety* (2003).

[13]Consumer Product Safety Commission, *CPSC, L.M. Becker & Co. Announce Recall of Toy Necklaces* (Sept. 10, 2003) (online at http://www.cpsc.gov/cpscpub/prerel/prhtml03/03178.html).

[14]Consumer Product Safety Commission, *CPSC, Brand Imports, LLC Announce Recall of Children's Rings* (Mar. 2, 2004) (online at http://www.cpsc.gov/cpscpub/prerel/prhtml04/04090.html).

[15]E-mail from Consumer Product Safety Commission to minority staff of Government Reform Committee (Sept. 22, 2004).

The third recall, in July 2004, affected an additional 147 million pieces of jewelry, made by L.M. Becker & Company, Brand Imports, A & A Global Industries, Incorporated, and Cardinal Distributing Company.[16] Some of these pieces had a non-lead-containing metal plating that did not prevent exposure to underlying lead when mouthed, touched, or ingested.

The fourth and fifth recalls occurred even more recently. Last month, CPSC announced a recall of 155,000 pieces of metallic necklaces featuring frogs, dolphins, and a "sunshine smiley face" because of dangerous levels of lead.[17] Just this week, CPSC announced a recall of 7,100 pieces of lead-containing metal costume jewelry that "have heart, oval, and rectangular shaped charms." These products were sold at Bloomingdale's, Kohl's, and other major department stores.[18]

These recalls reveal serious deficiencies in the current industry testing for lead. According to industry representatives, the manufacturers of most of toy jewelry involved in the recalls did conduct pre-market testing according to the ASTM standard.[19] If true, this means that it is not the failure to test, but rather the presence of lead and inadequacies in the testing protocol that are exposing children to dangerous levels of lead.

According to Carole Pilch, a lawyer for several of the companies that distributed the recalled toy jewelry, the products involved in the March and July recalls were tested to ASTM standards by leading toy laboratories, including, for at least two of the companies, Bureau Veritas.[20] Bureau Veritas would not comment upon whether it was involved in these cases, citing confidentiality concerns. Lisa Bate, the company's vice president for toy and juvenile products, did state, however, that laboratories like Bureau Veritas will conduct the tests asked for by their clients, which may not include all tests used by CPSC. She also stated that because the

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[16]Consumer Product Safety Commission, *CPSC Announces Recall of Metal Toy Jewelry Sold in Vending Machines* (July 8, 2004) (online at http://www.cpsc.gov/cpscpub/prerel/prhtml104/04174.html).

[17]Consumer Product Safety Commission, *CPSC, Raymond Geddes Co. Announce Recall of Children's Necklaces* (Dec. 17, 2004) (online at http://www.cpsc.gov/cpscpub/prerel/prhtml05/05072.html).

[18]Consumer Product Safety Commission, *CPSC, Riviera Trading Inc. Announce Recall of Children's Costume Bracelets* (Jan. 11, 2005) (online at http://www.cpsc.gov/cpscpub/prerel/prhtml05/05082.html).

[19]National Bulk Vendors Association, *Press Release: Toy Recall Response* (July 7, 2004) (online at http://www.nbva.org/issues/response.pdf).

[20]E-mail from Carole Pilch to minority staff of the Government Reform Committee (Dec. 17, 2004).

laboratory only tests a small fraction of the toys sold, the testing cannot assure the safety of every toy.[21]

It is not known at this point whether the manufacturers in the fourth and fifth recalls conducted the ASTM testing. But even if they had, this testing would have been unlikely to reveal the lead hazard. In both of the recent recalls, the lead hazard appears to have been present in the metal base of the product, not the surface coating. As a result, these recalls appear to be additional symptoms of the same underlying problem: For those children's products on the market that do contain lead, premarket safety testing according to industry standards (which is limited to the outer surface coating) is likely to be inadequate.

Despite the problems demonstrated by the recalls, many industry representatives continue to resist removing lead from their products or testing their products according to the CSPC-recommended tests. Four major distributors of toy jewelry sold in vending machines have agreed in writing not to use any lead until further guidance is produced by the CPSC.[22] However, other important sectors of the industry have not taken this step.

According to the National Bulk Vendors Association, which represents other toy jewelry companies besides those involved in the recall, there is no Association policy barring the use of lead or requiring the use of all CPSC-recommended lead tests.[23]

The National Juvenile Products Association represents companies that manufacture children's products such as utensils for babies. This association also does not bar the use of lead or require the use of all CPSC-recommended lead tests prior to marketing. Companies can have their products certified by the National Juvenile Products Association by meeting the ASTM standard.[24]

The Toy Industry Association represents major toy manufacturers. According to the Association's senior vice president Gary S. Klein, companies in the Association pledged in 1998

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[21]Telephone call with Lisa Bate, Bureau Veritas, and minority staff of the Government Reform Committee (Dec. 8, 2004).

[22]Letter from A&A Global Industries, Inc., Cardinal Distributing Co., Inc., L.M. Becker & Co., Inc. and Brand Imports, LLC, to U.S. Consumer Product Safety Commission (June 28, 2004).

[23]Telephone call with National Bulk Vendors Association and minority staff, Government Reform Committee (Jan. 4, 2005).

[24]Telephone call with Juvenile Products Manufacturers Association and minority staff, Government Reform Committee (Jan. 3, 2005).

"to eliminate lead from products altogether."[25] Mr. Klein also stated that as far as he knows, no companies in the Association intentionally use lead in their toys.[26] Nonetheless, the Toy Industry Association has raised questions about CPSC's lead testing procedures.[27] In a bulletin to its members, the Association challenged the legal standing of the recommendations, stating that "test procedures for children's products are being employed without proper notice and review, as required by law."[28] The Association warned that a "legal challenge to the validity of the unpublished and uncodified tests could result in their being stricken by the Courts."[29]

Problems also confront responsible companies that want to use the CPSC standards. Even if a company wants to perform the appropriate testing recommended by the CPSC, it may encounter difficulty finding a laboratory that can conduct these tests accurately. Testing laboratories are accredited by the American Association for Laboratory Accreditation. The accreditation process requires on-site inspections, including demonstrations of laboratory technique. Each lab receives accreditation for specific modules of testing, such as standards for crib rails, playpens, and bath seats.[30] For lead toxicity, the Association accredits labs that can test to the ASTM standards. There is no accreditation module for the four CPSC-recommended tests for lead hazards.[31] As a result, there is no external oversight of laboratory quality to be sure these tests are conducted correctly.

An Ongoing Threat to Children

The current system is not working to protect children from lead hazards. We need a system that protects children from being exposed to lead in the first place, not one that relies on

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[25]E-mail from Gary S. Klein, senior vice president of the Toy Industries Association, to minority staff, Government Reform Committee (Jan. 6, 2005).

[26]Telephone call with Gary S. Klein, senior vice president of the Toy Industries Association, and minority staff, Government Reform Committee (Jan. 6, 2005).

[27]Toy Industry Association, *Uncodified Testing for Lead in Children's Products* (Aug. 18, 1004).

[28]*Id.*

[29]*Id.*

[30]Telephone call with Darren Valentine, Communications Manager, American Association for Laboratory Accreditation, and minority staff, Government Reform Committee (Dec. 10, 2004).

[31]*Id.*

after-the-fact recalls. By their nature, recalls occur after children are already exposed. Also, they can be difficult to enforce.[32]

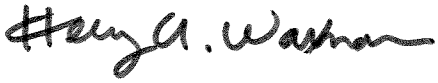
Recent evidence indicates that there continues to be significant risk to children from lead in consumer products. Researchers at the University of North Carolina-Asheville recently tested bracelets, pins, earrings, toe rings, and other costume jewelry from major department stores in California and the South. They found that over 60% of 400 items tested contained dangerous levels of lead.[33]

The ultimate answer to this threat is to ban lead in children's products. I urge you in the strongest possible terms to take this step as soon as possible. If CPSC cannot take this step on its own, I ask that you recommend legislation to Congress.

In the interim, CPSC should immediately strengthen its testing requirements. Despite repeated recalls of children's products with toxic levels of lead, CPSC has failed to take basic steps to ensure that its recommended tests are conducted appropriately. The agency has not sought to include its tests either in federal regulations or in the next revision to the ASTM testing standards.[34] CPSC has also not asked the American Association for Laboratory Accreditation to develop a testing module around its recommended tests.[35] These steps should be taken without delay.

I would be pleased to work with you in this effort. Please reply to this letter by January 27, 2005.

Sincerely,



Henry A. Waxman
Ranking Minority Member

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[32]According to a recent news report, many lead-containing pieces of toy jewelry are still sold in vending machines. *Lead Toys Continue to Be Sold*, CBS Evening News (Dec. 16, 2004) (online at http://election.cbsnews.com/stories/2004/12/16/eveningnews/main661577.shtml).

[33]*Significant Amount of Costume and Children's Jewelry Contains Dangerous Levels of Lead*, All Things Considered, National Public Radio (Dec. 16, 2004).

[34]Telephone briefings from Consumer Product Safety Commission staff to minority staff, Government Reform Committee (Dec. 16–17, 2004)

[35]Telephone call with Darren Valentine, *supra* note 30.