U.S. CONSUMER PRODUCT SAFETY COMMISSION
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David H. Baker, LLC
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006

Re: Section 101 Request for Lead Content Exclusion for Pen Point Components

Dear Mr. Baker:

Your submission on February 9, 2009 on behalf of the Writing Instrument Manufacturers Association (WIMA) requesting an exclusion from section 101(a) of the Consumer Product Safety Improvement Act (CPSIA) has been reviewed by the Commission. The Commission has approved the contents of this letter and directed me to send it regardless of the vote on the WIMA exclusion request.

WIMA requests exclusion from the lead limit of the CPSIA for the tip of ballpoint pens and roller ball pens.[1] According to WIMA, brass tips contain 2.5 to 5 percent lead; the more expensive stainless steel or nickel silver tips contain 0.10 to 2 percent lead. WIMA states that retractable and stick ball point pens are about 95 percent of the pens sold for use in schools or by children, and about 85 percent of all pens. WIMA adds that one billion roller ball pens are also affected. WIMA also asserts that there is currently no known substitute for the brass, stainless steel or nickel silver pen point components and it will take at least 2 or more years to develop a substitute if one is available.

WIMA claims that although many ball point pens and roller ball pens are sold primarily for business or office product purposes or for use by older students and adults, there remains a substantial quantity of the products sold to school systems and retailers who market these products to children 12 and younger. WIMA implies that any pen sold to a child could potentially be a children's product, and arguments have been made by others that if a child is not allowed to use a children's pen, the child will simply use an "adult" pen.

[1] The Promotional Products Association International (PPAI) filed comments in support of, and to join the WIMA request.

The Commission has not declared all pens to be "children's products;" to the contrary, in its "FAQs For Section 101: Children's Products Containing Lead; Lead Paint Rule," there is one question asking whether it is "okay" for children to use ball point pens. The Commission's staff response was:

> The lead ban is applicable to children's products containing lead. The term "children's product" means a consumer product designed or intended primarily for children 12 years of age or younger. Accordingly, *to the extent that these pens are general purpose items not being marketed to, or advertised as being intended for use by children 12 years or younger, these pens would not be subject to the lead limits under CPSIA.*

(Emphasis added.) Thus, the Commission staff has already made clear and, by its approval of this letter, the Commission has confirmed that the vast majority of pens and roller ball pens are not primarily intended for children, whether or not they are sold for use in schools. A "general purpose" pen would not need exclusion from the lead limits because such pens are not "children's products."

The designation of most pens as general use items is consistent with past Commission practice. When Congress enacted the Labeling of Hazardous Art Materials Act (LHAMA), 15 U.S.C. § 1277, Congress expressed its desire that art materials should be labeled to warn consumers of potential chronic hazards. The Commission focused its enforcement efforts on items that were traditionally considered art materials, such as paints, inks, solvents, pastes, ceramic glazes, and crayons, but did not enforce against general use products which might incidentally be used to create art, such as pens and pencils (unless specifically used for sketching and drawing). See 60 F.R. 8188 (February 13, 1995). However, as WIMA's petition points out, the enactment of the CPSIA has brought into question whether products such as brass pen point are now subject to additional requirements such as the lead content limits if intended primarily for use by children.

The majority of "novelty pens" are not considered to be primarily intended for children. Even if a pen were colorful, decorated or embellished, such colors, decorations or embellishments, alone, might not result in a "children's product." For example, a simple ball point stick pen with the name of an elementary school embossed on it without any other decorations would appeal to anyone (i.e. students, teachers, parents) connected with the school. Even a pen with a cartoon character may have mass appeal and not be intended primarily for children if its price point and marketing suggest that it is intended for both adults and children. Pens marketed to executives with puzzle features that allow the user to take it apart and reconfigure the design are also likely to appeal to adults and children alike. Pens that are as likely to be used by adults as by children do not fall within the scope of section 101(a) of the CPSIA because the pens are not marketed to, and used primarily by children, and therefore do not require testing and certification for lead content. Moreover, just because an ordinary ball point pen might be marketed once a year as a back to school item does not convert that pen from a general purpose item to a children's product under the CPSIA.

Only those pens that are considered to be "children's products" as defined by the CPSIA are subject to section 101(a) of the CPSIA and exclusion under section 101(b) of the CPSIA. Determining whether a particular pen is a "children's product" may depend on multiple features, but it should be understood that only pens that are "children's products" – rather than all pens – are required by the Commission to be evaluated further to assess whether they contain lead above the

lead content limits. To the extent, however, that WIMA is inquiring about general use pens in the request for exclusion, including those that are sold to school systems and retailers, those pens would not be subject to the lead limits and testing and certification requirements of the CPSIA.

Sincerely,

Cheryl A. Falvey

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