



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**STATEMENT OF COMMISSIONER ROBERT S. ADLER
REGARDING THE TECHNOLOGICAL FEASIBILITY OF 100 PARTS
PER MILLION LEAD CONTENT LIMIT IN CHILDREN'S PRODUCTS**

August 1, 2011

On July 13, 2011, I joined a majority of the Commission in affirming the Commission staff's recommendation to approve publication of the announcement that children's products must meet the Congressionally mandated 100 parts per million (ppm) lead content limit as of August 14, 2011. This was not a vote without controversy and, accordingly, I believe the record needs to be set straight with respect to the vote itself, what it means – and, despite what some have suggested, how much discretion the agency actually had in making its decision.

We cannot, and should not, deny that July 13 was a significant day both for the public health community and for the manufacturing community. I recognize that the 100 ppm statutorily mandated total lead content limit has been extremely contentious since the passage of the CPSIA three years ago. I also recognize the implementation of the limits has triggered a number of complaints and objections from some of my fellow Commissioners and some in the regulated industry.

Yet, the issue before us was actually a simple legal question. The question was: does the Commission have evidence before it to determine it is not technologically feasible for a product or product category to meet the 100 ppm total lead content limit? The answer was overwhelmingly, "no."¹ This was our technical staff's unanimous conclusion,

¹ As I have repeatedly noted, Congress "stacked the deck" in terms of our ability to make a finding that moving the lead limit to 100 ppm was not "technologically feasible." As defined in section 101(d) of the Consumer Product Safety Improvement Act, the term "technological feasibility" means that the 100 ppm lead content limit must go into effect 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.

which a majority of Commissioners affirmed after more than a year of fact gathering, open meetings, public hearings, and Federal Register notices.

I have made no secret, that as a general proposition, I am not a big fan of retroactivity either in legislation or regulation. And had I been a policy maker at the time the lead section of CPSIA was written, I would have probably advised a slower step down of the lead content limits and a prospective application of them only. So, while I would have preferred the question before us to have been broader and included the question of whether the limit should be applied retroactively, or whether the time frame between lowering the limits should have been extended, Congress settled those issues when they passed the CPSIA and removed that discretion from the agency.²

Notwithstanding my reservations, I certainly understand why Congress made the decisions it did. The scientific community has continually said there is no safe level of lead – and says that still today. Lead is a powerful neurotoxin that accumulates over time. Even low levels of lead are widely associated with learning disabilities, decreased growth, hyperactivity, impaired hearing, and brain damage. Congress, the American and worldwide public health communities, and our society in general are undertaking a holistic approach to this dangerous chemical. The goal is to remove lead everywhere and anywhere we can. This means removing lead from our air, from our water, from our food, and, yes, from our children’s products. The fact that Congress in 2008 chose to place the removal of lead from children’s products at the top of the list was a well-considered policy choice. It is one that I am hopeful will be followed soon by reducing the allowable levels of lead from many other sources that affect our daily lives in this country.

It is also important not to lose in all of the clamor by those with an economic interest in opposing this step down to 100 ppm that there are very few children’s products that require lead. For those that claim to need lead, such as bikes and ATVs, we will continue to try and find ways to assist these manufacturers.³ Yet, Congress said that lead should no longer appear in our children’s products – and overwhelmingly the market has responded by making products that meet this new standard.

CPSC staff’s recommendation was based on their conclusion that the evidence is not there to determine that it is not technologically feasible for a particular product or product category to meet the 100 ppm total lead content limit. And the evidence in support of this

In other words, so long as the Commission finds that at least one of the above factors applies with respect to lead in the market, the Commission must allow the limit to drop to 100 ppm. The staff concluded that all 4 of these factors applied in the market.

² In January 2010, I joined a unanimous Commission in recommending to Congress that the lead content limits be administered prospectively. See <http://www.cpsc.gov/ABOUT/Cpsia/cpsiareport01152010.pdf>.

³ The Commission extended a stay of enforcement pertaining to lead content in Youth Motorized Recreational Vehicles and Bicycles and Related Products until December 31, 2011. See Federal Register Notice at: <http://www.cpsc.gov/businfo/frnotices/fr11/stayleadrev.pdf> (Feb. 8, 2011).

recommendation was quite strong. According to data submitted by SGS – a large testing and certification company that testified before the Commission – 98.6% of 90,000 samples of children’s products had test results of 40 parts per million total lead content or less. The Hong Kong-American Chamber of Commerce indicated that in more than 13,000 tests of metallic parts used in the toy industry, 99.54% of samples had less than 100 ppm of lead. In fact, the Commission’s technical staff has said that they have not found a product or product category for which materials that have a lead content lower than 100 ppm are not currently commercially available.⁴ The Commission remains open to new data on this topic but all we have received in the last few weeks has been a series of conclusory letters telling us we are reading the law incorrectly and that this move will be a costly one.

To be clear, there is no disagreement that this move from 300 ppm to 100 ppm will cost some companies money. This is an unfortunate byproduct of most safety laws and rules – they have real costs to real businesses and real people. That said, I believe that we take every step we can as a regulatory body to minimize those impacts. But, one should also remember in the almost three years since the passage of CPSIA, many companies have already incurred substantial costs in destroying large amounts of inventory and altering their production processes to meet the new restrictions. To reverse the retroactive application of the 600 ppm and 300 ppm lead content limits as some of my colleagues attempted to by amendment, would penalize those who have conscientiously moved to comply with the law and perhaps put them at a competitive disadvantage. In short, for the companies that worked hard to be in compliance by August 14, 2011, not moving to 100 ppm as scheduled would be the equivalent of moving the goal posts in the last two minutes of the game.

Finally, I think it is important to remind manufacturers of children’s products that if they find it is not technologically feasible for their children’s products to meet the 100 ppm total lead content limit they may always request relief from the Commission. The statute clearly lays out the four factors the Commission will use to evaluate such a request,⁵ and I have no doubt that both our technical staff and the Commissioners will seriously consider the merits of any information presented to them. In fact, I strongly disagree with some of my colleagues that a request for relief would not be considered expeditiously and with an open mind. CPSC’s professional staff has always treated

⁴ My dissenting colleagues seem to assume that almost any increased cost to manufacturers renders a product or product category not “commercially available” under CPSIA. And notwithstanding one of my colleague’s amusing insistence that our definition of this term would result in a finding that jetpacks costing \$90,000 are commercially available, our definition was simply the common sense approach that if one could obtain a product in the market at a reasonable price – even if more expensive – the product was commercially available. Further, the facts demonstrate that children’s products that meet the 100 ppm lead content level are already on the market, so discussions of using “jet plane” materials in toy planes, or the cost of jetpacks, are great talking points but bear little relation to the reality of our decision.

⁵ See note 1, *supra* and accompanying text.

requests for relief fully and conscientiously. Any assertion to the contrary is not grounded in any objective fact or data.

What I see when I look at the large amount of data before me is that most industries have made great strides in getting the lead out of our children's products. They should be commended for their good work. Come August 14th American parents, grandparents, and caregivers can be assured that children's products sold in the United States must meet one of the most stringent lead content limits in the world.