



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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CHAIRMAN INEZ M. TENENBAUM

JULY 13, 2011

**STATEMENT OF CHAIRMAN INEZ M. TENENBAUM
REGARDING THE COMMISSION DECISION ON THE
TECHNOLOGICAL FEASIBILITY OF REDUCING THE LEAD
LIMIT IN TOYS AND OTHER CHILDREN'S PRODUCTS TO .01 PERCENT**

The Commission's decision on the statutorily mandated .01 percent (100 parts per million) lead limit was an important step forward in achieving the goal to "get the lead out" of toys and other children's products. Children are particularly vulnerable to the effects of lead, a contaminant and a powerful neurotoxin that accumulates in the body over time. Even exposure to small amounts can lead to irreversible IQ loss and behavioral problems in young children. Despite this widely known fact, in the recent past, the agency found itself conducting recall after recall to try to pull back from the market, and children's toy boxes, products with lead far in excess of allowable limits.

Through Section 101(d) of the Consumer Product Safety Improvement Act (CPSIA), Congress sought to reverse this trend, and called for a reduction of lead levels in toys and other children's products to .01 percent or the lowest levels that technology would allow. The CPSIA was the vehicle through which Congress empowered the CPSC to require manufacturers and retailers of toys and children's products to reduce lead to trace levels in the products they sell. As a result of the Commission's decision, consumers can rest assured that lead should be virtually nonexistent in toys and other children's products.

I commend my colleagues, and particularly agency staff, for their outreach to stakeholders and additional research they have conducted for over a year to determine if there are any products or product categories for which it would not be technologically feasible to achieve a .01 percent lead limit.

The Agency's Statutory Mandate

In writing the CPSIA, Congress established a very high threshold in order for the agency to permit products not to comply with the statutory reduction in the lead limit to .01 percent. The statute states that beginning on August 14, 2011, all children's products must comply with the reduced lead limit "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category. The Commission may make such a determination only after notice and a hearing and after analyzing the public health protections associated with substantially reducing lead in children's product." Rather than

leave the definition of “technological feasibility” to the discretion of the Commission, the statute provides an explicit definition, stating that the reduced lead limit *shall* be deemed technologically feasible with regard to a product or product category 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 or 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.

If *any* one of the four criteria is satisfied, the Commission cannot make a finding that it is not technologically feasible for a product or product category to meet the .01 percent lead limit. Our staff worked extensively to solicit input from the regulated community concerning the technological feasibility of compliance with the .01 percent lead limit for children’s products and categories of children’s products. Based on their analysis of all the information sought out by and submitted to the agency, our professional staff could not recommend that the Commission make a determination that it is not technologically feasible for any children’s product or category of children’s products to meet the .01 percent lead limit based on the statutory criteria necessary to support such a finding.

Despite our clear and strict statutory instructions on this issue, some of my colleagues have raised a concern that the Commission’s actions run contrary to an Executive Order issued by President Barack Obama on July 11, 2011. Their position is not correct. In that Order, the President has asked independent agencies, to the extent permitted by law, to make decisions only after taking into account several considerations, but also to remain true to their statutory mandates. I am confident that the Commission has met and exceeded its mandate under the CPSIA. As such, the decision reached by the Commission today is consistent with the President’s Executive Order, because we have followed the law as mandated in the CPSIA, and as clearly intended by its Congressional authors.

The Data before the Commission

During our consideration of this matter, with the exception of bicycles and other youth motorized products,¹ the Commission received very little product specific information. Much of the information provided was broad and lacked sufficient supporting facts to enable staff to make a recommendation to the Commission that it was not technologically feasible for any particular children’s product or category of children’s products to comply with the .01 percent lead limit. In the absence of the submission of this type of information by any interested party,

¹ Bicycles and related products and youth motorized recreational vehicles have a stay of enforcement for lead content in certain parts, including metal components, that is in effect and will not expire until December 31, 2011. See 76 Fed. Reg. 6765. Staff has indicated that they will revisit these products later this year.

our dedicated team of technical experts at the agency, on their own initiative, sought information on the availability of specific potential sourcing materials that met the .01 percent limit. This research enabled them to look at the question of technological feasibility from another perspective. Further buttressing their analysis concerning the data submitted to the agency, the staff found that potential sourcing materials that met the .01 percent limit are commercially available to manufacturers of children's products.

The Commission has before it an extensive record of testimony and data points that indicate that most of the market already has achieved lead levels in children's products significantly below .01 percent. This information includes data from SGS North America, Inc. that presented their results of testing conducted on thousands of toy samples. The testing data they provided to the Commission showed that between 96 and 99 percent of the products or materials tested complied with the .01 percent limit. In addition, the Hong Kong American Chamber of Commerce indicated that in its more than 13,000 tests of metallic parts used in the toy industry, 99.54 percent of samples contained less than .01 percent lead. Based on this and other information garnered by the Commission, the record does not support a Commission determination that a .01 percent lead limit for a children's product or category of children's products is not technologically feasible.

In addition to the data collected by and submitted to the agency over the previous year, three letters received by agency this week from trade associations were discussed, at length, at our decisional meeting on this issue. These letters asked the Commission to reverse some of the conclusions reached by our professional staff in their briefing package. The staff briefing package made clear that, based upon the information submitted to the Commission thus far, "staff could not recommended that the Commission make a determination that it is not technologically feasible for a product or product category to meet the 100 ppm lead content limit for children's products under section 101(d) of the CPSIA."²

These three letters made claims only of a general inability to ensure consistent compliance with the .01 percent limit and, like much of the other information submitted to the agency relating to this issue, fall short of providing the additional data necessary to allow our staff to make a determination of a lack of technological feasibility.

Proposals Unsupported by the Record

Additional concerns have been raised by some of my colleagues, however, much of the relief they sought to address their concerns lacks support in the record, and some of the relief sought extends beyond the requests made by many of the manufacturers themselves. Two of my colleagues requested a finding by the Commission that *no single* children's product or category of children's products can meet the .01 percent limit due to reliability and consistency issues. This relief would apply to all children's products and all source materials, including metals, glass, and plastics. I cannot support this exemption—one that would entirely reject our Congressional mandate—particularly in light of our professional staff's collection of

² See <http://www.cpsc.gov/library/foia/foia11/brief/100ppmlead.pdf> at 4.

information showing that source materials that meet the .01 percent lead limit are commercially available. Furthermore, in the face of thousands of tests demonstrating 96 to 99 percent compliance rates with the .01 percent lead limit for many of the most common materials used in children's products, I cannot, in good conscience, support a finding that compliance with the reduced lead limit is not technologically feasible for all children's products. Such a finding simply is not supported by the data before the Commission and is, instead, overwhelmingly contradicted by the information at hand.

I also was unable to support an amendment offered that would have the Commission determine that it was not technologically feasible for any children's product that "contains a substantial proportion of recycled materials, plastics, fibers, or other materials" to comply consistently with the .01 percent lead limit. This amendment's stated purpose was to increase recycling and environmental benefits, as well as to take into account the cost benefits to industry from the use of such materials. In my view, this amendment was not defensible due to the staff's findings that materials meeting the .01 percent lead limit are commercially available and that evidence has not been submitted sufficient to make a finding that it is not technologically feasible for a particular product or product category to meet the new lead limits. The statute does not grant the agency the discretion to allow for the use of materials that do not meet the .01 percent lead limits for a product or product category unless all of the statutory criteria are satisfied. Simply stated, unless the statutory criteria are satisfied, the agency lacks the discretion to allow for the use of certain materials based on a preference by manufacturers for their use.

Retroactivity

There is one area, in particular, that I have joined with all of my colleagues at the Commission—requesting the legal authority for the prospective application of the .01 percent lead limit. I have in the past and will continue to urge Congress to allow this provision to apply only to newly manufactured products. I still hope that Congress will act on this concern through narrowly tailored legislation that addresses this issue, without undermining the CPSIA's overall mandate to reduce lead in toys and children's product to trace levels.

Future Technological Feasibility Determinations

Although the Commission already has voted on this issue today, if a manufacturer were to discover that it is not technologically feasible to manufacture a children's product or category of children's products, the agency always will consider a request for a technological feasibility determination through our normal petitioning process. During my tenure, the Commission has docketed and either has resolved or is considering several petitions requesting action on various issues. The criteria for any petition on the technological feasibility of achieving the .01 percent lead limit are laid out clearly by the statute and further explained in the staff briefing package. The process for writing a petition also is clearly set forth in the agency's regulations. I encourage any business that discovers it manufactures a children's product or category of children's products for which it is not technologically feasible to meet the .01 percent limit to come to us with enough specific data to enable our staff to recommend that the Commission make a finding concerning technological feasibility under section 101(d) of the CPSIA. Our

door always will be open to considering future requests. As always, for small businesses that may require additional guidance, our small business ombudsman stands ready to work to work with you on any of your concerns. I realize that this process has presented a challenge for manufacturers, and I commend those in industry who have worked so diligently to bring the lead levels in their products below .01 percent.

Moving Forward

I would like parents, grandparents and caregivers to know that the product safety net in our nation continues to grow stronger. As a result of the Commission's decision, consumers can rest assured that lead should be virtually nonexistent in toys and other children's products. Indeed, with this lower limit in place, along with the other protective provisions of the CPSIA, parents can have confidence that we should not have a repeat of the leaded toy scares of years past.