



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
Commissioner Thomas H. Moore
Commissioner Nancy A. Nord

ITEM:

Request from the Fashion Jewelry Trade Association ("FJTA"), et al. for Exclusion from Lead Content Limits under Section 101(b)(1) of the Consumer Product Safety Improvement Act ("CPSIA")
(Briefing package dated July 9, 2009, OS No. 4725)

DECISION:

The Commission voted (2-1) to accept the staff's initial recommendation and deny the FJTA's request for exclusion. Chairman Tenenbaum and Commissioner Moore voted to deny the request for exclusion and also directed the staff to take other action, specifically, in addition to denying FJTA's request for exclusion, the Commission directs the staff to focus its enforcement actions in this area on crystal and glass bead products designed and intended primarily for children six years of age and younger. Commissioner Nord voted to take other specific actions.

Chairman Tenenbaum, Commissioner Moore and Commissioner Nord issued the attached statements with their votes.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due July 16, 2009 (Received July 17, 2009)



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM
ON THE REQUEST TO EXCLUDE
CRYSTAL AND GLASS BEADS IN CHILDREN'S PRODUCTS
FROM THE CPSIA LEAD LIMITS

July 17, 2009

Today I voted to deny the Fashion Jewelry Trade Association's ("FJTA") request to exclude crystal and glass beads contained in children's jewelry and other products from the lead content limits set by Congress. When Congress enacted the CPSIA, it included a provision which permits the Commission by regulation to exclude a specific product or material from the lead content limits established for children's products under section 101(a) of the Act. A specific product may be excluded from section 101(a) if the Commission determines, based on scientific evidence, that the lead in the product or material will 1) neither 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, mouthing, breaking, or other children's activities, and the aging of the product; nor 2) have any other adverse impact on public health or safety.

The amount of lead contained in the crystal beads that were tested ranged from 900 ppm to 23,000 ppm—well in excess of the statutory limit set by section 101(a) of the CPSIA. In requesting an exclusion for crystal and glass beads from the CPSIA lead limits (currently 600 ppm, decreasing to 300 ppm on August 14, 2009), the FJTA presented test data and analysis to show that ingestion and mouthing of leaded crystal beads would result in very low lead exposure to children such that the lead absorption may not even be detectable in a child's bloodstream. FJTA also argues that in spite of the high lead content of the beads, the potential lead exposure from the beads is less than the possible exposure from metal jewelry that is in compliance with the CPSIA lead limits.

In considering whether the exclusion should be granted under the section 101(b), I considered whether children mouthing and swallowing crystal and glass beads constitutes normal and reasonably foreseeable use and abuse of this type of product. The staff's analysis showed that mouthing and swallowing of small objects is part of the normal behavior of infants and young children. Moreover, emergency room data collected through NEISS shows that jewelry is one of the top five items ingested by children.

Because mouthing and swallowing of crystal and glass beads constitutes normal and reasonably foreseeable behavior and is not merely a conceivable use or misuse of this type of product, the question turns to whether the ingestion or mouthing of these beads would result in the absorption of any lead by a child. In making a determination, I was mindful that the statute does not use the term "harmful" amount or another term which would allow staff to utilize a risk based approach. The staff's memorandum noted that if ingestion of lead leached from the beads occurs, some portion of the lead will be absorbed into the child's body. Furthermore, the staff found that the amount of leachable lead in crystal beads is variable, and it is not necessarily true the lead exposure from crystal beads would always be lower than exposure from metal jewelry containing less than 300 ppm lead. Thus, while Commission staff recognized that most crystal and glass beads do not appear to pose a serious health risk to children, because ingested crystal beads that leach lead will result in some lead absorption, the request for an exclusion must be denied.

Further, a decision to grant the exclusion by using compliant metal jewelry as the baseline for assessing the acceptable level of exposure will reintroduce risk analysis back into consideration, including such factors as bioavailability of the lead, accessibility of the lead to children, foreseeable use and abuse, foreseeable duration of exposure, marketing, and life cycle of the product. Such an interpretation of the exclusion section of the CPSIA appears to be in direct conflict with the statutory language, which does not allow for the consideration of risk.

Finally, while the FJTA did not provide much information about the specific products mentioned in their request, nor include data or analysis about children's possible interactions with these various products, the agency will take a common sense approach to enforcement. There is a wide range of children's products that contain crystal and glass beads that are subject to the 101(a) lead limits and, as the Commission staff recognized, many of these products do not present an immediate danger of harmful lead exposure to children. Consequently, we will focus our enforcement activities on crystal and glass bead products designed and intended primarily for children six years of age and younger, the population most at risk of mouthing and swallowing small objects. While this approach does not provide the exact relief that the FJTA seeks through this request, I urge manufacturers and retailers of crystal and glass beads to remember that, especially during the implementation period of the CPSIA, the agency's primary enforcement focus will remain on noncomplying lead products that present serious health risks to children.



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STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE REQUEST FROM THE FASHION JEWELRY TRADE ASSOCIATION, ET AL
FOR EXCLUSION FROM LEAD CONTENT LIMITS UNDER SECTION 101(b)(1) OF THE
CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

July 17, 2009

During the consideration of the lead ban in both the House and Senate versions of what later became the Consumer Product Safety Improvement Act of 2008 (CPSIA), the issue of whether lead crystal should be excluded from the lead ban was discussed. The House Report from the Committee on Energy and Commerce accompanying H.R. 4040 stated the following: "Paragraph (4) authorizes the CPSC, in very narrow circumstances, to exclude, by rule, certain materials and products from the total lead weight limits. The lead content in these materials must be in a form that will not result in absorption of any lead whatsoever into the human body or have any adverse effect on public health or safety. The Committee understands that one such material may be lead crystal because of its molecular structure, but the CPSC must make that determination by rule. The CPSC would also have to determine if other materials meet this strict standard, including for example, certain gemstones."

The Senate accepted an amendment to its bill during floor debate that would have given the Commission the ability to specifically exempt lead crystal from the lead ban provided the Commission could determine that the lead content in the lead crystal would neither result in the absorption of lead into the human body nor have an adverse impact on public health and safety.

The provision ultimately adopted by the Conference Committee makes no mention of lead crystal but did incorporate the concept from the House Committee report that not "any" absorption of lead would be tolerated. As I indicated in my statement accompanying my vote on March 3, 2009, on the Final Rule on Procedures and Requirements for a Commission Determination or Exclusion with Regard to Children's Products Containing Lead, I must conclude that Congress intended section 101(b)(1) to be a very narrowly construed exception that does not allow for any absorption of lead into a child's body. The House Report language leaves open the possibility that after scientific investigation, the Commission might conclude that there would be no material or product, not even lead crystal, which would meet the exclusion criteria. Our scientists have concluded that while the absorption into a child's body of the lead in lead crystal is likely to be very small, there will still be some absorption and, thus, I cannot vote to exclude lead crystal from the lead ban pursuant to section 101(b)(1).

I am, however, cognizant of the need for the Commission to prioritize the use of its limited compliance resources, particularly in light of the many new mandates and prohibitions in the CPSIA. One factor the Commission has always used to direct its enforcement activities is

the relative severity of the hazards that the agency must address. In the context of the hazard presented by lead in lead crystals, it makes sense to me to focus our enforcement actions on products *designed or intended primarily* for the age group that is most likely to ingest or mouth lead crystal objects. Based on our staff's analysis, that would be children six years of age and younger. This would focus agency resources on the children who are most physiologically vulnerable to exposure from lead and on the children most likely to mouth and ingest lead crystals. The petitioners also identified mouthing and ingestion as the worst case scenarios. Manufacturers, importers, distributors, retailers and resellers should direct their attention to children's jewelry, children's clothing and other items containing lead crystal designed or intended primarily for children six years of age and younger and make sure these products are not available for purchase by consumers. I am voting today to direct our enforcement staff to focus their activities on these products.

A few states, such as California, allow lead crystals in children's jewelry for this age group, provided the weight of the crystals does not exceed one gram. The California policy is based on a court settlement. While such a result is appropriate in the context in which it was agreed to, it is difficult to find a basis to allow similar enforcement discretion under federal law. The one gram limit was predicated on a type of risk analysis that the CPSIA has deemed to not be protective enough of the nation's children. To allow this exception to our enforcement activities is simply not supportable under the strict standards of the CPSIA.



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STATEMENT OF COMMISSIONER NANCY NORD
ON THE REQUEST FROM THE FASHION JEWELRY TRADE ASSOCIATION FOR EXCLUSION FROM
SECTION 101(b)(1) OF THE CPSIA
July 17, 2009

The Commission is considering a petition by the Fashion Jewelry Trade Association and others for an exclusion from the lead provisions of the Consumer Product Safety Improvements Act ("CPSIA") for crystal and glass beads in children's jewelry, apparel, accessories, and other products that may be used by children. For the reasons stated below, I believe that, in this case, the Commission should issue a stay of enforcement until Congress can address this situation.

This case presents in dramatic terms the unintended consequences of the CPSIA. While it is tempting to argue that the statute should allow for a *de minimus* amount of lead when there is no real risk of harmful exposure – i.e., determined by a measurable increase in blood lead levels – both the staff and the Commission have on several occasions in the past made clear that is not what we understand the statute to mean. At the time of its drafting, CPSC staff pointed out that lack of a *de minimus* standard could lead to arbitrary results but committee staff informed them that this flexibility was not intended. (I recognize that one of the primary sponsors of the legislation recently wrote us arguing that we can "grant exclusions for... materials that can be shown to pose no measurable increase in a child's blood lead level...". As much as I agree that this would be a more sensible policy result, the statute does not seem to allow for this flexibility.)

The result of not granting an exclusion is to remove from consumers' hands products that do not present a real risk, that consumers want to buy and that are being produced by companies, many of them small businesses, who will now be forced to incur substantial losses. This result imposes burdens on both consumers and businesses without any net increase in consumer safety.

In this case, certain things are clear:

- Our staff report indicates that there is no real risk of harmful lead exposure associated with crystals and glass beads.
- By definition, lead crystal exceeds the statutory limit, compliance is impossible and there currently is not an acceptable substitute.
- In most cases, a child who swallows a crystal bead would be exposed to lead at a level lower than if that child swallowed a similar weight of metal jewelry that complies with the statute.
- If we adopt the staff recommendation, there will be significant and severe economic injury to those who make and sell these products. Although the total impact has not been computed, we have been given enough anecdotal evidence to know that the economic loss will be severe. Here is a sample of what we have heard:
 - A major retail chain attributed a \$6.5 million loss in the first quarter to the lack of an exclusion for crystals;
 - \$200,000 of jewelry that complies with Proposition 65 in California nevertheless was pulled by another manufacturer;
 - About 2 million jewelry pieces from a different manufacturer are being returned, the loss estimated to reach millions of dollars;
 - A retailer reported \$700,000 in testing costs for crystals;
 - Substantial drop in sales reported by companies who have substituted plastic for crystal products, and
 - Examples of job losses: a small children's jewelry manufacturer with 50 employees anticipates closing down because of this law; several companies are preparing to reduce their workforce by 1/3 because of the CPSIA.

These losses are exacerbated by the retroactive effect of the law which extends the ban to inventory, including items sold in thrift stores.

Other jurisdictions in the U.S. have considered the health effects of leaded crystal and reached different results than those required by the CPSIA. In 2008, California enacted a statute which codified a consent decree among the state, consumer advocates and jewelry manufacturers that allows for the sale of jewelry with crystals less than one gram by weight for children six years or under. For children above six years of age, there is no restriction. Minnesota and several other jurisdictions have similar statutes.

The approach taken by California, which is precautionary with respect to young children but recognizes both the lack of risk and the consumer demand for these products among older children, is an approach which we do not have the flexibility under the CPSIA to adopt. The CPSIA does not recognize that risks impact children of different ages in different ways and instead takes a "one size fits all" approach. This is unfortunate, yet this is the reality. Instead of being able to craft something that works for both consumers and product sellers, we are being forced into a position that does not advance consumer safety and restricts consumer choice. In addition, we preempt several state laws that were crafted to address the concerns of all the stakeholders.

Because the statute does not give us the ability to be flexible, I cannot vote to grant an exclusion in this case. However, not granting an exclusion will result in the removal of safe products from the marketplace, causing significant economic injury. Therefore I believe there is only one equitable solution available to us and that is to grant a stay of enforcement for a limited time while Congress considers the unintended consequences of the CPSIA, e.g. products banned that have no real safety issues; economic hardship that is unnecessary to achieve consumer safety; and in this case, 10-year old girls being told by the Federal Government that they cannot have rhinestones on their jeans.

Congressional leaders have stated that they will consider "tweaks" to the CPSIA. It is time for Congress to address the serious issues created by this law in order to make it truly work for the consumer. The lead exclusion process would be one place to start.