



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814**

CHAIRMAN INEZ M. TENENBAUM

**STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE PETITION
OF JOSEPH ERTL, INC. FOR AN EXEMPTION FROM THE LEAD CONTENT LIMITS
FOR CERTAIN COMPONENTS OF ITS RIDE-ON PEDAL TRACTORS**

April 27, 2012

I join my colleagues in applauding the Commission's unanimous vote to grant the petition of Joseph Ertl, Inc. for an exception from the lead content limit of 100 parts per million (ppm) for certain aluminum alloy components of its die-cast, ride-on pedal tractors. This outcome is not only a demonstration of my commitment to common sense application of the lead content limits when necessary, but also a vindication of the "functional purpose" exception itself.

Background of the Functional Purpose Exception

On September 10, 2009, just two short months after becoming Chairman, I testified at my first U.S. House of Representatives Committee on Energy and Commerce oversight hearing and was asked whether the U.S. Consumer Product Safety Commission (CPSC) needed additional flexibility with the lead content limits established by the Consumer Product Safety Improvement Act of 2008 (CPSIA). This line of questioning stemmed from the fact that the CPSIA, as originally enacted, contained only two exemptions from the lead content limits that provided relief for certain components of children's products. Those two provisions established exclusions for certain electronic devices and inaccessible component parts of children's products. A third exemption in the law, commonly referred to as the "any lead" exclusion, proved too inflexible to provide relief, resulting in some legitimate concerns about the lack of a meaningful exemption provision in the law for components of products that did not fit within the first two exemptions.

The "Any Lead" Exemption

In order to grant an exclusion using the "any lead" exemption, the Commission was required by statute to determine, by regulation, that the lead in the product would "neither result in the absorption of any lead into the human body . . . nor have any other adverse impact on public health or safety." Starting in 2008, before my tenure as Chairman even started, the Commission denied each petition seeking an exemption under the "any lead" exclusion because, in each petition submitted, the manufacturer admitted that a small amount of lead was present in the product that could be handled by the child and result in the hand to mouth ingestion of minuscule amounts of lead in a child's body. In considering these petitions, the Commission correctly interpreted the plain words "any lead" to mean just what the statute said—*any lead*—which resulted in the denial of those petitions.

Some critics contended that the Commission's interpretation of the "any lead" exclusion was more inflexible than Congress intended, and the language could have been interpreted to grant exclusions where children could not ingest the lead in an amount that would lead to "a meaningful increase in blood lead levels." However, neither the CPSC staff, nor four of the five Commissioners serving during the time when these petitions were considered, accepted this broader interpretation of the plain statutory language.

The Renewal of Functional Purpose

Following the September 2009 CPSC oversight hearing, I received a written question from then Subcommittee on Commerce, Trade, and Consumer Protection Ranking Member George Radanovich, who asked me about my support for potential statutory exclusions for certain products from the lead content limits. In response to this question, I convened a meeting with CPSC's toxic metals experts in which we discussed the concept of a functional purpose exception to the lead content limits. CPSC staff was already very familiar with this type of condition for an exemption because the Commission had already adopted a similar requirement as a part of its interpretive rule on exclusions from the lead limits for certain electronic devices. Under this rule, exemptions for certain electronic devices are allowed only where "*the use of lead is necessary for the proper electronic functioning of the component part* and it is not technologically feasible for the component part to meet the lead content limits."¹

Additionally, the agency had long recognized the functional purpose provision of the Federal Hazardous Substances Act (FHSA), which gave the Commission the ability to exempt "articles, such as chemical sets, which by reason of their functional purpose require the inclusion of the hazardous substance involved" from consideration as a banned hazardous substance.² Although this functional purpose provision of the FHSA was superseded by the requirements of Section 101 of the CPSIA as it relates to lead content in children's products, the new functional purpose provision in PL 112-28 restores the same basic principle it embodied.

After exploring the concept of this exception within the agency and growing comfortable with it personally, I sent Mr. Radanovich a response to his question on October 16, 2009, that outlined a functional purpose exception.³ In the twenty-two months that followed, I continually advocated for a functional purpose exception to the lead content limits.

The Functional Purpose Exception: The Right Approach

During Congressional consideration of various options to add some additional flexibility to the Section 101 lead limits, the functional purpose concept was subject to a number of exaggerated criticisms by those who sought much larger exceptions or wholesale repeal of the landmark

¹ 16 CFR §1500.88(c)

² 15 U.S.C. § 1261 (q)(1)(B)(i)

³ In response to then Ranking Member Radanovich's question, I stated: "[I]t would be helpful to have a narrow exception to the overall Section 101 lead prohibition in cases where a component with lead is required for a functional purpose, contact with the lead is infrequent, and the elimination of such component part is impracticable or impossible based on available scientific and technical information."

Section 101 lead limits. My support of the requirement for a petitioner to meet the basic functional purpose criteria to obtain an exception to the lead content limits has remained consistent and is based on the fact that lead is a powerful neurotoxin and virtually all experts have concluded that there is “no known safe level of lead.”⁴ In the end, I was gratified that Congress almost unanimously supported this approach as the only health-protective, workable option.

The Commission’s unanimous vote on the Ertl Petition shows that the functional purpose exception was the appropriate legislative solution. The decision also puts to rest the major criticisms of the functional purpose exception, including claims that:

- The exception will only apply to a “null” set of products.

While this vote does not guarantee how the Commission will handle future petitions from manufacturers of different products, I believe it is particularly noteworthy that the very first petitioner was able to successfully obtain an exception for their products. Using a totality of factors approach that took into account each of the considerations surrounding the statutory criteria, staff was able to analyze this petition carefully and come to a recommendation that the Commission grant the exception.

- Exceptions granted under this type of provision cannot be extended to a product class and every individual company within a product category will have to individually petition the agency to receive relief.

For this petition, staff was able to survey the relatively small market for ride-on toys and therefore confidently recommend that an extension of the same exceptions granted to the petitioner was suitable for the entire class of these particular products. The Commission accepted staff’s recommendation, meaning no other companies manufacturing these types of ride-on toys must seek the same exception.

- The functional purpose exemption will only benefit very large businesses with the resources needed to incur the expenses associated with consulting the legal and scientific experts required to put together a petition.

This petitioner was financially constrained but able to submit a substantive petition, albeit missing a few data points, and receive an exception under the functional purpose provision.⁵ While I share Commissioner Adler’s concern for the somewhat incomplete nature of the petition and his appreciation of the extra steps that staff undertook to handle those missing data points, I note that this is the first petition we have received. It is my hope that any future petitions will contain the data needed for staff to more easily make a recommendation to the Commission.

⁴ <http://www.cpsc.gov/pr/tenenbaum01152010.pdf> at 3; Commissioner Adler has also provided some background on this point in his statement on this vote (<http://www.cpsc.gov/pr/adler04252012.pdf> at 1, 2).

⁵ <http://www.cpsc.gov/pr/adler04252012.pdf> at 4, 5.

- The provision requiring petitioners to show the need for an exception on a component basis is unworkable.

The petitioner was able to specifically identify and tailor the request to only those components for which an exception was needed. I was especially comforted by the fact that the petitioner tailored this request in the same manner that Congress wrote the statutory provision allowing for a 300ppm lead content limit for just those components of bicycles that could not meet the 100ppm limit.

- Companies would flood the agency with requests for functional purpose exceptions, thereby diverting valuable agency resources away from more pressing safety issues.

Unsurprisingly, the agency has received only one functional purpose petition in the seven months since the functional purpose exception became law, and our staff was able to consider it with an immaterial impact on agency resources. The existence of only one functional purpose petition and lack of any petitions concerning the technological feasibility of the 100ppm lead content limit further evidences that the Commission made the right decision regarding the technological feasibility of the 100ppm lead content limit.

- The Commission's ability to, after granting an exception, require an alternative lead content limit higher than the 100ppm limit would reduce the appeal to manufacturers of submitting a petition seeking an exception.

Not only was this petitioner undeterred from submitting a petition to the agency, the petitioner did not even seek a complete exemption from the lead content limits. Instead, the petitioner only sought an increase in the permissible lead content limits up to 300ppm and submitted extensive test results showing it could meet the 300ppm limit for its products. This petitioner has set an excellent precedent that I strongly encourage and will expect any future petitioners to follow.

- The likelihood of a petitioner successfully obtaining a functional purpose exception is low given the membership of the Commission.

I am pleased that the Commission unanimously granted this petition, and I look forward to working with my fellow Commissioners on any future petitions.

Moving Forward

I would like to echo the sentiment of my colleagues cheering the unanimity of this decision and express my shared desire to work together on any future petitions. I also want to thank our professional staff for their excellent work dating back to the first consideration of a functional purpose exception all the way forward to the approval of CPSC's first functional purpose petition over two years later. Working together, we as an agency can utilize this new tool to provide common sense relief from the lead content limits where it is warranted.