



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action Commissioners Voting by Ballot*

Commissioners Voting: Acting Chairman Thomas H. Moore
 Commissioner Nancy A. Nord

ITEM:

Request from the Writing Instrument Manufacturers Association ("WIMA") for Exclusion from Lead Limits under Section 101(b)(1) of the Consumer Product Safety Improvements Act ("CPSIA")
(Briefing package dated May 22, 2009, OS No. 5640)

DECISION:

A decision has not been reached on this matter. The Commission voted 1-1 on WIMA's request for an exclusion of ball point pen tips. Acting Chairman Moore voted to deny the request for exclusion. Commissioner Nord voted to grant the request for exclusion, as it applies to children's products. Regarding a stay of enforcement the Commission voted 1-1. Acting Chairman Moore voted that if the vote is to deny WIMA's request for exclusion or the vote results in no action due to a one-one tie, do not direct the staff to draft a stay of enforcement of the section 101(b)(1) lead for ball point pens that are children's products. Commissioner Nord voted that if the vote is to deny WIMA's request for exclusion or the vote results in no action due to a one-one tie, direct the staff to draft a stay of enforcement of the section 101(b)(1) lead for ball point pens that are children's products.

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

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson".

Todd A. Stevenson
Secretary

* Ballot vote due June 2, 2009



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

STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE REQUEST FROM THE WRITING INSTRUMENT MANUFACTURERS
ASSOCIATION (WIMA) FOR EXCLUSION FROM LEAD LIMITS UNDER
SECTION 101(b)(1) OF THE CONSUMER PRODUCT SAFETY
IMPROVEMENT ACT OF 2008
June 5, 2009

On June 3, 2009, the Commission voted to affirm the staff view that the vast majority of ball point pens are not covered by the new lead ban because they are not children's products as that term is defined in the Consumer Product Safety Improvement Act of 2008 (CPSIA). (A letter from the agency's General Counsel to WIMA stating that position will be posted on our web site.) Since those pens are not covered by the ban, they do not need to be granted an exclusion from the ban. Thus only the relatively small number of ball point pens that are designed or intended primarily for children twelve years of age or younger are subject to the lead ban.

The Commission has recognized that the lead provisions of the CPSIA are very tightly crafted. The Congress drew a clear line in terms of the parts per million of lead that it would allow in any part of a children's product and it provided for very few exceptions to that limit. In deciding on requests for exclusion pursuant to section 101(b)(1) of the Act, the Commission has found that not giving manufacturers of certain specific products additional time to bring their products into compliance can create a possible safety hazard that outweighs the safety protections in the Act's lead provisions (such as in the case of youth motorized recreational vehicles). In those cases, it is appropriate for the Commission to exercise its enforcement discretion to decide the competing safety concerns in favor of the consumer and to stay enforcement of the lead provisions while the affected manufacturers change future production to meet the lead limits.

In the case of ball point pens, however, there is no such safety tradeoff. In fact, granting a stay of enforcement would allow the pens that children are most likely to find play value in and, therefore, are most likely to handle as playthings, to be made and marketed during the period of the stay. Without a stay of enforcement children would be using ball point pens intended for the use of the general population which, while they may still have the same amount of lead in them, are more likely to be used simply as writing instruments and not as playthings. In this case, any competing safety considerations are on the side of not granting a stay. Thus I am voting to deny the exclusion request and I am not voting to direct the staff to draft a stay of enforcement.

The writing instrument manufacturers have indicated that they may be able to find a substitute for the lead in ball point pens in a couple of years. I hope they will work toward that goal. Their other alternative is simply not to make or market ball point pens with excess lead that appeal primarily to children. In the meantime, while I do not expect the agency to turn into the "pen police," manufacturers, retailers and distributors should police themselves as we move toward a marketplace where lead in children's products is dramatically reduced.



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STATEMENT OF COMMISSIONER NANCY NORD
ON THE WRITING INSTRUMENT MANUFACTURERS ASSOCIATION'S REQUEST FOR EXCLUSION FROM
THE LEAD CONTENT BAN OF THE CPSIA
June 2, 2009

With respect to the petition from the Writing Instrument Manufacturers Association for an exclusion for pens from the lead content provisions of the CPSIA, I am in strong agreement that the vast majority of pens are not children's products and therefore not subject to the reach of the law. This determination is being communicated in a letter to the petitioners from the agency General Counsel and reflects a longstanding view as expressed in an answer to a question posted on the CPSC web site last fall. While this disposes of most of the products in question, it does leave a small percent of products that may be specifically designed and marketed for children 12 years or younger. For reasons stated below, I am voting to grant the petition for rulemaking to exclude pens that are children's products.

The portion of a child's pen that violates CPSIA Section 101(a) is the tiny brass, stainless steel or nickel tip that holds the roller ball in a ball point pen. Industry has stated that there is no known substitute for the existing tip. Therefore, failure to grant the exclusion (or stay enforcement of the law) would result in ball point pens designed for children's use no longer being available. This result would occur even though agency staff is clear that they do not see a risk of lead poisoning to children from using ball point pens.

Staff has pointed out on many occasions and in a number of ways the lack of flexibility the statute gives the agency to deal with products that may contain lead over the statutory limits but that do not present a real risk to children. While the staff has stated that they are not aware of any product that could meet the definition for an exclusion from Section 101(b) of the CPSIA, it is important that we continue to struggle to give meaning to this provision, on the theory that Congress would not knowingly enact a meaningless provision. If there were any product that would seem to qualify for the exclusion, it is this one.

In the briefing package, staff indicates that the chance of children coming in contact with the tip of the pen through normal use is extremely remote. Staff states that the possible lead exposure would be through ingestion, and not dermal exposure. Staff raises a possibility that a child could come in contact with lead in the pen tip, presumably by writing on his or herself and then licking or sucking on that part of the body or by sucking on the business end of the pen. However, staff also points out that toddlers and small children who generally mouth objects are not given ball point pens to play with. Staff states that children regularly begin using ball point pens around 4th grade.

Following our regulations, the petition presents studies that argue exposure to lead from ball point pen tips is undetectable. The staff does not challenge this conclusion but apparently believes that because contact with the lead-containing tip is "not inconceivable," the statute precludes sale of this product and that it must, therefore, recommend against the exclusion. While I agree that the statute is extraordinarily rigid and I realize the staff is working within that rigid framework, I disagree with their conclusions in this case.

The Commission needs to spend its resources focusing on products that actually harm children, not chasing speculative harms that are not relevant to the real world. Removing perfectly safe products will needlessly limit consumer choice and, more importantly, not advance consumer safety. If Section 101(b) has any meaning at all, then a rulemaking proceeding to consider an exclusion for children's pens should be initiated.