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Sent: Wed 2/4/2009 5:50 PM

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Subject: CPSIA - The Blame Game

In the attached letter dated February 3, 2009, Representatives Waxman and Rush and Senators Rockefeller and Pryor call on President Obama to seek the replacement of Commissioner Nancy Nord as Acting Chairman of the CPSC. The argument presented in the February 3 Letter is that under the current administration of the agency, the CPSC has failed to give guidance, correct "misinformation" and otherwise smoothly implement the CPSIA. The authors of the letter place

the blame squarely on the Acting Chairman, noting “[the agency’s] new authority and powers to better execute its mission” under the CPSIA. Unfortunately, the February 3 Letter misconstrues the law itself and the powers granted to the CPSC. The fault for the stalemate on implementation of the CPSIA lies with the law itself.

The urgent need for better “guidance” is a recurrent theme in discussions of the role of the CPSC under the CPSIA. Various parties and consumer groups contend that the CPSC has the “discretion” to act to relieve the “confusion” and “misunderstandings” under the CPSIA and that with their “guidance”, the issues relating to the lead limits could be resolved. The failure to issue that guidance in a form and at a speed suited to the CPSIA effectiveness dates has been deemed administrative “dysfunction”. Is this true?

Section 101(a)(2) “Total Lead” Limits are Very Clear. Under Section 101(a)(2) of the CPSIA, new lead limits were established, notably 600 parts per million “total lead content by weight for any part of the [children’s] product” effective as of February 10, 2009. The General Counsel of the CPSC issued an opinion letter on September 12, 2008 stating that these standards apply to all products in commerce on and after the effective date (including existing inventory and resale merchandise). Considerable criticism has been lavished on this new standard for its sweeping application to a wide range of products known to be safe. Much of the problem derives from the definition of “children’s product” (15 USC 2052(a)(16)) which now extends to all products “designed or intended primarily for children 12 years of age or younger”, even though children over six years of age are generally recognized as not being at risk from lead poisoning. The standard thus becomes a litmus test divorced from conceptions of risk.

The CPSIA Provides Limited Exceptions to the “Total Lead” Standards. The CPSIA provides that the Commission may by rule grant exceptions to the “total lead” limits, but carefully limits the ability of the CPSC to take such action. Outrage over toy recalls in 2007 led to a noose-like definition of what the CPSC could and could not do to ease the application of the Section 101(a) lead limits. By essentially blaming the CPSC for the 2007 recalls in its design of the CPSIA, Congress left the agency with few options but to follow the new lead limits strictly – regardless of the messy details.

The following text defines the discretion allowed to the CPSC under Section 101(b)(1) of the CPSIA in very narrow and specific terms:

“(1) CERTAIN PRODUCTS OR MATERIALS. – The Commission may, by regulation, exclude a specific product or material from the prohibition in subsection (a) if the Commission, after notice and a hearing, determines on the basis of the best available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither –

- (A) result in the absorption of any lead into the human body, taking into account normal and reasonable foreseeable use and abuse of such product by a child . . . nor
- (B) have any other adverse impact on public health or safety.”

Notably, the CPSIA goes on to state in Section 101(e):

“(e) PENDING RULEMAKING PROCEEDINGS TO HAVE NO EFFECT. -- The pendency of a rulemaking proceeding to consider –

- (1) A delay in the effective date of a limit or an alternate limit under this section related to technological feasibility,
- (2) An exception for certain products or materials or inaccessibility guidance under subsection (b) of this section, or

- (3) Any other request for modification of or exemption from any regulation, rule, standard, or ban under this Act or any other Act enforced by the Commission,

shall not delay the effect of any provision or limit under this section nor shall it stay general enforcement of the requirements of this section.”

Thus, the CPSC must take the following steps to grant ANY relief from the new “total lead” standards:

- a. Issue regulations to exclude specific products or materials.
- b. Must hold public hearings before issuing those exclusionary regulations. [The CPSC currently takes the position that solicitation of public comments satisfies this requirement.]
- c. Must base ANY exemptions on the (i) best available, (ii) objective, (iii) peer-reviewed, AND (iv) scientific evidence that lead in such product will not result in the absorption of ANY lead into the human body, or have ANY other adverse impact on public health or safety.

These high standards and demanding requirements make it exceptionally difficult for the CPSC to grant quick or meaningful relief from intentionally over-broad hazard definitions. Because of the limited discretion granted the Commission under the new law, relatively few children’s products will ultimately be exempted, while many others will continue to be impacted even though an objective review would show that they present no quantifiable risk of injury. Notably, there is nothing in Section 101(e) that permits the agency to exempt thrift stores for “good faith” compliance. There is likewise no “good faith” exemption for our company either. The standards are ABSOLUTE and are UNRELATED TO RISK OF INJURY.

In addition, the CPSC’s arduous task of creating these regulations, regardless of how long it takes or how necessary (or obvious) the regulations are, will NOT delay the impact or implementation of the Section 101(a) limits. Thus, there may be extended periods of time, like now, when bad law prevails despite everyone’s desire to fix it. This is apparently by design.

So What Does This Mean? The law, plainly and unambiguously, does not allow the CPSC to override the new “total lead” standards. The CPSC has no discretion to consider risk in granting exemptions. With the bar for exemptions raised so high, the CPSC cannot give any guidance other than that companies must meet the standards for any product within the definition of a “children’s product”. Blaming Chairman Nord or the agency for following the law itself is not fair and is not right. It is highly likely that the problems facing the agency under Nord will also dog the agency under the next Chairman. The problem is with the law itself.

The language of the CPSIA was drafted specifically to prevent the CPSC from doing its job. The law creates a bright line standard for “total lead” which the CPSC is basically prohibited from adjusting. The “prohibition” imposed on the CPSC is essentially administrative in nature, preventing a speedy or unfettered reconsideration or modification of the standards. In its new law, Congress made clear that it was not open to feedback from the agency on what the standards should be and left no room for regulators overrule the CPSIA by administrative action.

To criticize the CPSC for their “slow progress” is cynical and misleading. Let’s not beat around the bush – there was no intention to allow the CPSC to do its work as a safety administrator under the CPSIA and to make the kind of decisions that Congress created it to make. To contend today that the CPSC should be doing or even could be doing this work more efficiently, is to distract the public from closely examining a defective and poorly-conceived law. The CPSIA doesn’t work – and blaming the CPSC or Chairman Nord for the mess won’t absolve Congress of its responsibility for the damage the CPSIA is wreaking.

Final Thoughts. There are many aspects of the February 3 Letter that I disagree with but I want to close with a simple message: We are not confused about this law or its implications. Those who oppose this dangerous and misguided law understand it all too well. The CPSIA impairs our ability to make or sell safe products that our customers, our valued consumers, depend upon. If we don't stick up for our right to make these safe and responsible items, our customers, our employees and associates and our country will SUFFER. There is nothing wrong with more effective safety legislation in principle. The CPSIA is not the right approach. It doesn't work and can't be made to work.

Let's stop arguing and fix this law. Congress, the CPSC and the business community can unite to make children safer. Now is the time to act.

Sincerely,

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Chairman

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