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Subject: CPSIA - The Misconception of a Marketing Intent-driven Law

The CPSIA presents puzzles for those intent on complying with its terms. I mentioned one perplexing consequence of the CPSIA in my letter entitled "CPSIA Problems Seem Endless" dated January 12, namely that the rules for total lead can apply differently for a manufacturer and its dealer for the VERY SAME PRODUCT. In that letter, I noted that an industrial product would not subject the manufacturer to CPSIA lead standards for good reason, as the product is not intended for children 12 years of age or younger. However, if the manufacturer sells the product to a dealer who puts it in a catalog that he then mails to schools, the dealer becomes subject to the total lead rules. The common understanding of the CPSIA rule defining a Children's Product depends entirely on intent, in other words, what is in your heart and in your business plan when you offer the product for sale. The nature of the product does not govern the application of the new lead standards. In this particularly case, since the manufacturer is objectively free of testing obligations and the dealer is objectively subject to the testing standards, the law creates an immediate conflict in the supply chain. Since it is likely that the dealer sells only a small volume of the distributed product (and therefore cannot afford to test the product profitably) and because the manufacturer will lose very little business by refusing to test the product, this industrial product will be dropped from the school catalog. There is no information here to suggest that the product was not safe by any definition. We'll never know, because no one will test it, and commerce in this item will stop in the school market.

These small stories are meaningful, especially when viewed in the aggregate. These battles in the marketplace are a direct result of the disruptive effect of a poorly designed rule. The definition of Children's Product should be objective, so that all sellers of the same product are subject to the same rule. The principal reason for this change is that an intent-based law creates too much confusion and dislocation. Either a product is for children or it's not, and what you think when you sell it should be irrelevant. If intent is essential to the definition, the result will be a smaller economy or a CPSC that will never cease issuing rulings. The CPSC, by the way, has had objective rules in place for many years governing age grading. Age grading is essentially a tool for deciding if something is a product intended for children. The confusing addition of the overly-broad definition of Children's Product makes the rule on age grading harder to comprehend, and will create lasting confusion among companies attempting to sort out how to comply with law.

I do not think this is good public policy and will reverberate in our economy for some time to come. One common misconception is the debate about the CPSIA is that the current furor relates simply to February 10, the notorious "National Bankruptcy Day". Actually, I think that's just the beginning of the misery. While the frictional transition issues brought upon us by the September 12 legal opinion of the CSPC General Counsel will eventually pass, the costs from testing will soon begin to mount. After that, the monumental, suffocating and expensive chore of

lot markings will kick in to do their economic damage, too. These elements of the CPSIA will cause many small decisions to be made. This letter sets out one of the change mechanism. Imagine decisions of this nature, times a million or ten, and then you may begin to see the true negative impact of the new law.

I need to note that this law is supposed to be about SAFETY. The above discussion notably has nothing to do with safety. Why? Because the misery caused by the CPSIA has never had anything to do with safety. No one can rationally argue that the enormous spectrum of affected products and industries have a long record of personal injuries caused by lead. There is simply so much data available. It is therefore no great leap to grasp the enormity of the economic calamity – we are going to severely distort our economic decisions because of legally-mandated waste of precious capital and suffer major losses all in the name of safety, although no one can link these activities with any actual safety risk. Theoretical safety risks are not worth the destruction of countless markets.

I call on Congress to take immediate steps to substantially revise the CPSIA to protect markets while providing reasonable assurance of safety for children.

Sincerely,

Richard Woldenberg
Chairman
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