

From: Rick Woldenberg

Sent: Sat 1/17/2009 10:43 AM

To: 'Christian.Fjeld@mail.house.gov'; 'robin.appleberry@mail.house.gov';
andrew_grobmyer@pryor.senate.gov; james_reid@rockefeller.senate.gov

Cc: 'brian.mccullough@mail.house.gov'; 'shannon.weinberg@mail.house.gov';
'william.carty@mail.house.gov'; 'mjpg@brown-gidding.com'; Etienne Veber;
'challengeandfun@gmail.com'; 'kathleen@fashion-incubator.com'; 'Stephen Lamar
(slamar@apparelandfootwear.org)'; 'Nancy Nord (nnord@cpsc.gov)'; 'Joe Martyak
(jmartyak@cpsc.gov)'; 'Mary Toro (MToro@cpsc.gov)'; 'tmoore@cpsc.gov'; 'Patrick Magnuson
(patrick.magnuson@mail.house.gov)'; 'Carter Keithley (ckeithley@toy-tia.org)'; 'Rick Locker
(fblocker@LockerLaw.com)'; 'Desmond, Edward'; 'David Callet (calletd@gtlaw.com)';
'ravitz.georgia@arentfox.com'; 'Pamela Gilbert (pamelag@cuneolaw.com)'; 'Robert Adler'; 'Dan
Marshall (dan@peapods.com)'; 'erik.lieberman@mail.house.gov'; 'cfalvey@cpsc.gov'; Judy Bailey
(judith.bailey@mail.house.gov); adele@narts.org; kmchugh@astratoy.org;
richard.goldberg@mail.house.gov; matthew.abbott@mail.house.gov;
'Brian_hendricks@hutchison.senate.gov'; 'david@commerce.senate.gov';
'Cathy.hurwit@mail.house.gov'; pweller@cpsc.gov; mgougisha@cpsc.gov;
bridget_petruczok@boxer.senate.gov; michael_daum@cantwell.senate.gov;
bill_ghent@carper.senate.gov; hap_rigby@demint.senate.gov;
frannie_wellings@dorgan.senate.gov; david_quinalty@ensign.senate.gov;
james_chang@inouye.senate.gov; jonathan_becker@klobuchar.senate.gov;
michelle_schwartz@lautenberg.senate.gov; lee_dunn@mccain.senate.gov;
sonya_wendell@mccaskill.senate.gov; matthew_hussey@snowe.senate.gov;
brendan_plack@thune.senate.gov; hugh_carroll@wicker.senate.gov;
elissa.levin@mail.house.gov; christopher.schepis@mail.house.gov;
theresa.lavery@mail.house.gov; greg.louer@mail.house.gov; brian.diffell@mail.house.gov;
amy.ingham@mail.house.gov; laura.vaught@mail.house.gov; matt.johnson@mail.house.gov;
saul.hernandez@mail.house.gov; aaron.shapiro@mail.house.gov; rick.axthelm@mail.house.gov;
steve.plevniak@mail.house.gov; scott.cleveland@mail.house.gov;
jonathan.smith@mail.house.gov; pat.cavanagh@mail.house.gov; rachel.wood@mail.house.gov;
michael.gaffin@mail.house.gov; angela.manso@mail.house.gov;
dana.lichtenberg@mail.house.gov; derrick.ramos@mail.house.gov;
elizabeth.stack@mail.house.gov; lori.pepper@mail.house.gov; josh.connolly@mail.house.gov;
david.bahar@mail.house.gov; mark.bayer@mail.house.gov; Neeta.Bidwai@mail.house.gov;
kyle.victor@mail.house.gov; chris.debosier@mail.house.gov; morgan.jones@mail.house.gov;
matthew.dockham@mail.house.gov; tuley.wright@mail.house.gov; cade.king@mail.house.gov;
betsy.christian@mail.house.gov; chris.herndon@mail.house.gov; Mike.Ward@mail.house.gov;
laura.abshire@mail.house.gov; randi.meyers@mail.house.gov; Greta.Hanson@mail.house.gov;
liz.muro@mail.house.gov; jamie.euken@mail.house.gov; jon.oehmen@mail.house.gov;
brad.schweer@mail.house.gov; dana.grayson@mail.house.gov;
michael.beckerman@mail.house.gov; valerie.henry@mail.house.gov;
Becky.Claster@mail.house.gov; tiffany.guarascio@mail.house.gov; jeff.mortier@mail.house.gov;
Christopher_day@billnelson.senate.gov; john_phillips@kerry.senate.gov; Kerrie Campbell
(kcampbell@manatt.com)

Subject: CPSIA - The Lessons of Nero

I am writing in response to the letter dated January 16 to Commissioners Nord and Moore of the CPSC signed by Reps. Henry Waxman and Bobby Rush and Senators Rockefeller and Pryor (January 16 Letter).

See <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/nord%20moore%202009%201%2016.pdf>. In this letter, Congressional leaders urge the CPSC to clarify "confusion and misinformation" under the CPSIA in a "clear and understandable manner" and specifically, to address the application of the new law to certain books and clothing items, resellers like thrift and consignment stores and component testing and to provide guidance to

small businesses. Notably, the letter counsels that "greater communication and expedited action by the Commission will improve compliance with the law and lead to more effective and efficient achievement of the law's goals." I respectfully disagree. In large part, I believe this letter mischaracterizes the nature of the problem with the CPSIA by implying that with a few regulatory tweaks and a little more guidance, everything will be "fine". This is patently untrue and misleading in itself. Furthermore, with economic conditions as they are today (see http://video.forbes.com/fvn/business/er_retailers011409 - 200,000 stores are expected to close in 2009), the negative economic implications of this law have the potential to be catastrophic without an IMMEDIATE serious reconsideration of legislative approach. See also http://www.forbes.com/opinions/2009/01/16/cpsia-safety-toys-oped-cx_wo_0116olson.html and http://www.forbes.com/entrepreneurs/2009/01/15/toys-lead-retail-ent-law-cx_rb_0115bovarnickssafetylaw.html?partner=relatedstoriesbox. By attempting to prop up a poorly-conceived law, I believe that Congress is fiddling while Rome burns. This did not work out well for Rome or Nero, and will not work out well for the United States in this case.

Fixing the Law Exception-by-Exception Will Not Succeed. I am confounded by the notion that by drafting a list of exceptions, the CPSC will address the fundamental compliance issues under the CPSIA. As the January 16 Letter notes, the only permitted exceptions are those items which "do not contain lead or contain lead at levels that do not or would not exceed the law's limits" - in other words, the only exception criteria under this law is lead levels, NOT risk. This rule is the source of much of the problem, as it sweeps into the law many items and item categories that are well-known to be safe. No amount of rule-making will reconstruct an economy based on selling safe products that happen to have lead as a trace element. The diversity of products, markets and channels in our economy will defy every attempt to build a workable law that makes everything illegal without regard to risk except as defined. The absurdity of this effort is illustrated by the January 16 letter itself in which Congressional leaders request special rules for children's apparel consisting "entirely of dyed or undyed fabric", in other words hats, socks and underwear. Perhaps the requested rule will be known as the Hats, Socks and Underwear Exception. Frankly, this does not solve the problem for those of us living in cold Chicago. Likewise, the January 16 Letter's request to create exceptions for books is limited to "ordinary" books made entirely of paper - staples, glue, thread, laminates and other components of books (not apparently well-known to Congress) will make most books ineligible in this non-risk-based exception. However, all books comprised of loose sheets of paper should fall comfortably within the recommended exception. I am sure libraries will appreciate this helpful loophole.

A safety law that is divorced from risk assessment cannot be fixed by exceptions. Congress needs to recognize this serious flaw in the CPSIA and take immediate action to fix it.

The Proposed Actions in the January 16 Letter Will Increase Complexity. The CPSIA is already one of the most complex pieces of legislation in American history. For companies like ours which are committed to complying with law, the CPSIA presents a unique business challenge to conquer. Now Congress is suggesting that the CPSC add to the confusion by making the law even more complex with a series of detailed exceptions for various industries, channels of trade, products, features, and other unspecified circumstances. In other words, if American businesses didn't understand how the law worked before, the solution is to make it more complicated. This concept is embedded in the CPSIA, which instructs the CPSC to carve out limited exceptions for products which could not possibly violate the new standards. The legislative construct is entirely wrongheaded, as the approach to safety should be risk-based and further, is incredibly divorced from reality. For instance, the January 16 Letter does not request that resellers of used merchandise be relieved of any responsibility under the law, just that they be coached better. I suggest that Congress write a book called "How to Run A Thrift Store under the CPSIA." Perhaps then, and only then, will we understand the procedures such stores must undertake to ensure compliance when selling old merchandise.

Complexity itself is the enemy of compliance with law. Even a simple rule like the lead-in-paint ban has proven surprisingly resistant to universal compliance despite the fact that there is no economic incentive to use leaded paint in children's products. [Notably, as violations of the laws prohibiting murder illustrate, compliance problems are not unusual in American jurisprudence and are certainly not restricted to children's products companies.] Under this new legislative regime, the blazingly complex CPSIA and its attendant CPSC exceptions, rules and regulations, FAQs, opinions, interpretations, private letter advice and so on will make compliance with law a false promise to the American people, and at the same act as a high-octane stimulus package for the legal industry. Even if more \$600-per-hour lawyers is a good thing for our economy, I rather doubt this will be a workable solution for any American business, including the largest, wealthiest and most sophisticated companies. For perspective, I suggest you contact the legal department of your nearest thrift store for their opinion.

The Approaching February 10 Deadline is Incredibly Unrealistic. The January 16 letter posits a fantastic resolution to the CPSIA problem, namely that the CPSC should just issue a lot of rules and regulations in the next few days to resolve the painful concerns expressed by constituents of late. Even if this were possible, the idea that it would resolve the issue is, frankly, delusional. The United States has literally hundreds of thousands of businesses affected by the CPSIA. They tend to vary in size and sophistication and many depend on a small, low-cost labor force. Despite the outpouring of concern over this law, Congress has heard from only a miniscule percentage of the affected businesses - many of the silent companies are very likely oblivious to the law and its implications. Is the concept here that when the CPSC issues a stack of rules a few days ahead of the deadline, every affected business will instantly and perfectly absorb the news, properly interpret the regulations and their application to its economic activity, rejigger processes, repair damaged relations in its supply chain overnight, and so on? I think the timeline of public reaction to the CPSIA since the law was written and signed into law informs us that this is a wholly unrealistic scenario. A series of rulings by the CPSC in the next few days will not do much to stop the economic carnage. About the only remedy that the CPSC can implement before February 10 to stop this train wreck is a broad STAY OF ENFORCEMENT. The solution of a stay ("hitting the pause button") would offer the advantage of both bringing overnight relief to the affected industries, and provide time for an open public debate over how to fix this law, whether by amendment, further regulation or some combination thereof. A stay for one year (or more) would also have the advantage of unifying the lead standards with more time to plan and sell-off inventory, thus eliminating the problem of retroactive application of the law against product with total lead levels between 300 ppm and 600 ppm which will be legal for only six months (February 10 - August 9).

Congress Seems to Want to Do the CPSC's Job. The CPSIA establishes new standards for safety in children's products in a number of now well-known ways. Prior to the CPSIA, it was the responsibility of the CPSC to make a risk-based determination for safety hazards. The January 16 letter continues the new tradition of Congress in supplanting the CPSC as the arbiter of safety risks. I do not understand what qualifies Congress to make the judgment, first that books are illegal until proven legal, and then that some kinds of books are in fact okay. Did Congress hold hearings or does it have some other way to make this assessment of risk? I believe that Congress should not be in the same business as the CPSC, and by micro-managing the activities of the Commission, it has meaningfully contributed to creating the morass that it complains about today. The CPSC is qualified to manage the process of assessing safety risk and writing sensible rules for the administration of those risks. If Congress persists in looking over the shoulder of the CPSC and critiquing its judgments down to the level of buttons, snaps and other "metal, plastic or painted components", it should not express dismay over the slow, tedious and tentative process that results. Congress is teaching the CPSC that the determination of risk is a Congressional Subcommittee responsibility now.

And What about State Attorney Generals? I want to point out that in a post-CPSIA world, having empowered the State AGs to meddle in and enforce federal safety laws; companies like ours are

now faced with 51 CPSC's (plus Congressional Subcommittees). Is this someone's idea of a more efficient way to run an economy? Has Congress thought about the practical effect of this change in our Federal system, or the risk that it imposes on businesses? The exponential expansion in regulatory bodies under the CPSIA increases the complexity of compliance to mind-boggling levels that outstrip literally everyone's ability to process - American businesses are in effect forced to ignore State laws because they can't manage compliance with them as a practical matter - and introduces significant externalities (uncontrolled risks) that cannot be managed in any way. State AGs do not answer to the CPSC and are now empowered by the CPSIA to take matters into their hands if, in their judgment, the CPSC is not enforcing the law. Great. See, e.g., http://www.azag.gov/press_releases/dec/2008/Mattel%20CJ.pdf. In Eighth Grade, I learned about the Federal system and thought this was how the Founding Fathers intended to organize our economy for maximum efficiency and equitable treatment under the law. I believe the CPSIA has rendered my Eighth Grade civics education obsolete. We are nevertheless hopeful that Congress will act before the CPSIA makes our company obsolete, too.

While I appreciate the hard work and good intentions behind the CPSIA and its passage last summer, the time has come to stop defending a defective bill and its defective process and acknowledge the reality of the law's weaknesses. I am personally convinced that there is more than one way to legislate improved safety in children's products, and that the CPSIA can be safely amended without ripping the fabric of our society. A revised bill can be built to strike the problematic overly-broad provisions that contribute nothing to the safety of children's products, and replace them with a simple, sensible, risk-based approach that will provide reasonable assurance of the safety and appropriateness of children's products in our economy.

We are facing a historic economic crisis in our country. It is time for non-partisan leadership to bring our country out of this terrible situation. The CPSIA is part of the problem and needs to be fixed. I urge Congress to face this reality, stop blaming the CPSC for a doomed attempt to make a defective law workable and get to work on amending the CPSIA for the good of our country.

Sincerely,

Richard Woldenberg
Chairman
Learning Resources, Inc.
rwoldenberg@learningresources.com