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Subject: RE: CPSIA - Don't Believe the Consumer Groups' Snow Job!

On January 30, several consumer advocate groups supporting the CPSIA issued a press release (“January 30 PR”) to “set the record straight” (see <http://www.citizen.org/pressroom/release.cfm?ID=2812>). In this letter, the authors make many assertions in their arguments in favor of the bill and against the “misleading statements” appearing in “the media, on blogs and on other Web sites”.

Frankly, it has proven challenging to oppose the CPSIA in part because the law is known to be supported by the various consumer groups issuing the January 30 PR. Who would oppose such meritorious organizations? Every American has benefited in one way or another from the work of these groups over the years. Is it possible that their letter is misleading itself, a last ditch effort to support their law in the midst of sagging support? Let’s examine the facts:

January 30 PR Includes Misleading Statistics. The January 30 PR states: “In 2007, there were 473 recalls of children’s products, including millions of toys that contained dangerous levels of lead paint and other toxins. In 2008, consumers fared even worse with 563 recalls, including nearly 8 million toys.” Is this true? I have summarized the [posted recalls from the CPSC website on the attached spreadsheet](#). I encourage you to open each of its seven pages and check my work (the citations are there). This is what the CPSC says happened:

2007: 212 Recalls, 47,626,080 units of which 10,291,440 were due to lead-in-paint

2008: 178 Recalls, 18,256,110 units of which 3,971,264 were due to lead-in-paint

2009: 19 recalls (through Jan. 30), 2,375,100 units of which 23,950 were due to lead-in-paint

Of the 125 recalls due to lead-in-paint since January 1, 2007, 36 were for less than 5,000 units and like many (if not the vast majority), were very likely disclosed voluntarily by the companies themselves. Contrary to the assertions of the authors of the January 30 PR, the trend in recalls is SHARPLY DOWNWARD.

The misleading statistics used in the January 30 PR include crib and bassinet recalls, hoodie recalls, flammable clothing recalls, magnet recalls, and so on. This careless misuse of statistics has the effect of whipping up fear among legislators and the public. Fear is displaced, leading to support for a safety bill that will horribly miss its target. Notably, as I have been saying in my correspondence with you for three months, the vast majority of lead infractions are from LEAD-IN-PAINT AND JEWELRY. The consumer

groups don't mention this, but only ONE lead recall (10,000 pieces) in this period was due to substrate. [The circumstances are not clear.] EVERY OTHER LEAD RECALL RELATED TO L-I-P OR JEWELRY. Notably, none of the L-I-P recalls involved a reported injury. Consider the expense imposed on industry with that statistic in mind.

I suggest one can tentatively conclude the following:

- a. The laws preceding the CPSIA were sufficient to control L-I-P and lead in jewelry, as shown by the statistics for recalls in this period. Obviously, the CPSC was hard at work recalling those items without the benefit of the CPSIA. There is nothing in these statistics or other information publicly available to suggest that any lead human health issue exists that the CPSC is not empowered to address using the pre-CPSIA law.
- b. It is not reasonable to assert that lead in other forms is dangerous without data. In this very active two-year period, apparently ZERO reports of injury from lead in substrates were reported. [There were no reports of injury from L-I-P either.] As noted again and again in my letters, the prohibition against "total lead" will not change "safety" but will impoverish the companies attempting to serve the children's product markets.
- c. The current enforcement environment, plus all the negative publicity from recalls, is having the desired effect on recalls. Recalls declined in all columns from 2007 to 2008, and continues to decline in 2009. Please note that there have been successively fewer recalls, fewer units recalled, and fewer repeat offenders. At the pace of 2009 recalls for January, L-I-P recalls are on track for a meager 300,000 units this year, down from 10 million two years ago. All without the benefit of the draconian CPSIA penalties and prohibitions.

The January 30 PR letters goes on to state: "These recalls prove that the law's implementation cannot come too soon." It is not possible to make this statement after examination of the data on the CPSC website. Did the authors bother to check their facts?

The January 30 PR Misstates that Exemptions Material-by-Material is Workable.

To rationalize the design of the CPSIA, the January 30 PR asserts that the CPSC has the ability to exempt materials provided that "there is no risk of harm to the public health". Interestingly, the House and Senate leadership behind this bill has a different notion (in their letter dated January 16, Reps. Waxman and Rush and Senators Rockefeller and Pryor state that exemptions are allowed for "certain materials – those that inherently do not contain lead or contain lead at levels that do not or would not exceed the law's limits", see <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/nord%20more%202009%201%2016.pdf>). Even if the CPSC could make the judgment under the law as the consumer advocates suggest, the resulting system would be so mind bogglingly complex and incomprehensible that it would be defeated in practice within weeks. Most products have many components by the definition contemplated by the CPSIA. With exceptions for certain materials, a typical testing package will be a fat packet represented to be a complete set of tests on only those component materials still

subject to testing – it will be impossible to reconcile the reports to the original item. And this is going to IMPROVE safety in the United States by making testing transparent?

It is not possible to create a workable system out of a hodgepodge of testable and exempt materials in a world of real products. Only a non-businessman could come up with a system like this and think it would work.

The January 30 PR Misleads on Testing. The authors of the January 30 PR state that “testing costs have been exaggerated”. Not unlike their assertions on recall statistics, they do not supply invoices or quotes to show affected American businesses how to solve their testing dilemma. I have submitted actual quotes to you previously (see my letters of November 26 and December 12 at http://www.learningresources.com/text/pdf/no_more_telescopes.pdf). If testing is so cheap, why don’t these consumer groups reveal their excellent sources?

The January 30 PR also misleads in stating that under the CPSIA, “big corporations can’t skimp on safety by manufacturing toys in countries with lower safety standards, such as China.” This is highly misleading for more than one reason. First, U.S. corporations are responsible to obey the laws of the United States when they sell products here. Whether they manufacture here or on the Moon, they are still subject to this country’s laws. Blaming China is rather convenient, but the legally responsible parties are still the importers. U.S. importers have always had an obligation to control their supply chains, so China’s willingness or unwillingness to comply with U.S. laws is moot – we need to patrol our own products. Second, as the above statistics demonstrate, U.S. corporations were never able to skimp on safety, not if they had any concern over breaching our laws. It goes without saying that skimping on safety is not a good way to build a business with consumers, either. The January 30 PR relies on convenient conclusions to make its arguments.

The January 30 PR Misleads on Resale Stores (or Just Doesn’t Get It). In reassuring the resale stores are fine, just fine, under the CPSIA, the authors of the January 30 PR state: “the responsibility and expense of certifying the safety of a product belongs to a manufacturer.” Actually, I believe the law states quite clearly that “no person” may “sell, offer for sale . . . distribute in commerce . . . any consumer product” which violates the new CPSIA standards (15 USC §2068(a)(1)). So while resale stores don’t have to test, they still can’t violate the standards. And how, exactly, is a store supposed to pull that one off? Should anyone be troubled by the “knowingly” standard under 15 USC §2069(d) which makes it impossible to play “don’t ask, don’t tell” without exposing your business to high penalties and potentially exposing yourself to jail time? The authors of the January 30 PR provide a laundry list of items that it thinks stores should particularly watch out for. That’s very helpful; can we use their letter as our defense?

The January 30 PR Blames the CPSC for the Failings of Its Law. The authors of the January 30 PR continue their public bashing of the CPSC, fixating blame on the agency for failing in their impossible task: “We called on the agency several weeks ago to urge them to offer more guidance.” They cite “numerous other problems with the agency’s

implementation of the law”. Nowhere do the authors address the fact that the law as explained by the above January 16 letter leaves it NO AUTHORITY to make the changes necessary to fix this law. It is not fixable, and as such, the agency cannot work magic.

There is Something I Agree with in the January 30 PR. The authors state: “The continued circulation of misinformation about the new law helps no one.” ‘Nuf said.

Sincerely,

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