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Subject: CPSIA - CPSC Commissioners Speak Out

Have you read the statements of Commissioners coming out of the CPSC lately? The statements of Commissioners Nancy Nord and Thomas Moore of the CPSC given after the rejection of the NAM petition for a stay of the new lead standards under the CPSIA (<http://cpsc.gov/library/foia/ballot/ballot09/nam.pdf>), as well as their statements given in support of

the new interim final rule exempting certain items from the lead standards (<http://cpsc.gov/library/foia/ballot/ballot09/101lead.pdf>) are very revealing.

Rejection of the NAM Petition. As my recent letters confirm, the NAM petition decision was a foregone conclusion, as the CPSC is prohibited under Sections 101(b)(1) and 101(e) of the CPSIA from changing the new standards in any way for any product. Thus, the CPSC was legally prohibited from staying the new lead standards and the Commissioners made the legally proper decision to vote down the petition under your CPSIA. Interestingly, as another of my recent letters notes, after Acting Chairman Nord made this very point in writing to Representative Waxman et. al. in her letter of January 30, those House and Senate leaders responded on February 3 by demanding that she resign. Some great open dialogue there!

The NAM petition, it should be noted, focused on the retroactive CPSIA lead standards because the NAM letter preceded the NRDC phthalates case decision last Thursday. Presumably, had NAM known that the phthalates ban would become retroactive instantaneously two business days before its February 10 effective date; their request would have included a stay request on the phthalates ban, too. Alas, we cannot wind back the clock, so the Commissioners did not consider this issue. They would have been legally prohibited from taking any action on the phthalates standard, of course, but the Commissioners would have been free to comment on it. In the below discussion, I believe you can safely read between the lines and infer parallel references to phthalates in the Commissioners discussion of the issues.

The statements of Nord and Moore are quite informative. After reiterating the fact that the Commission is prohibited from staying the lead standard, Ms. Nord notes: "Rather than applying the lead content provision to products manufactured after the effective date, Congress applied it to all products out in the stream of commerce on February 10, sitting in container ships, in warehouses, and on store shelves. CONGRESS HAS NEVER BEFORE ENACTED SUCH A SWEEPING CONSUMER PRODUCT PROVISION IN A RETROACTIVE MANNER AND THE DISRUPTIVE RESULTS OF THIS PROVISION ARE NOW BEING SEEN IN PAINFUL WAYS." [Emphasis added] Of course, Ms. Nord overlooks the Prohibition as a precedent for this dramatic legislative overreaction.

Ms. Nord goes on to note several impacts on trade, including removal of product from store shelves out of fear, disrupted buying by retailers and the prospect of widespread loan defaults. All old news, if you read my emails. Importantly, Ms. Nord states in conclusion: "CONGRESS SPOKE CLEARLY IN SETTING OUT A REGULATORY REGIME THAT APPLIES TO ALL CHILDREN'S PRODUCTS IN COMMERCE REGARDLESS OF EXPOSURE TO ACTUAL RISK. CONGRESS SPOKE CLEARLY ABOUT THE LIMITED NATURE OF THE EXCLUSIONS AND EXEMPTIONS AVAILABLE UNDER THE LAW. CONGRESS SPOKE CLEARLY ABOUT THE LIMITED NATURE OF OUR ENFORCEMENT DISCRETION AFTER FEBRUARY 10. THE AGENCY CANNOT AMEND OR CHANGE THE STATUTE." [Emphasis added] Happy days, indeed.

Commissioner Moore takes a different tack when discussing the NAM petition. After reciting various administrative activities of the Commission relating to lead over the years, he attacks the integrity of the business community: "It would have been hard for a manufacturer of children's products to miss the clear message that they needed to get the lead out of children's products well in advance of final congressional action." It's always helpful to have a "bad guy" to bash. Other than the fact that lead poisoning is virtually unknown in children's products outside of lead-in-paint (illegal for decades) and that the CPSC has always administered safety matters by examining the actual quantifiable risks, Mr. Moore might be right. However, responsible businesspeople concentrate on real consumer risks, and have no reason to concern themselves with the ebb and flow of possible arbitrary movements in the nation's regulatory scheme. Until recently, safety administration in this country was rational – is it really "foreseeable" that the legal standard would detach itself from risk so profoundly? In truth, periodic CPSC administrative

activity over many years in relation to very specific circumstances is hardly a damning fact pattern revealing a dim-witted, oblivious or pernicious business community.

Further rationalizing his condemnation of protests against the CPSIA, Commissioner Moore states his belief that "certain Hill staffers were assured by various segments of the children's product industry, that there would NOT BE A PROBLEM with meeting the 600ppm standard as most already were." [Emphasis added.] What a wonderfully open and accountable process Mr. Moore recites. It's a shame that Commissioner Moore chose not to attach names, dates or written testimony to such hazy assertions. In any event, it's really not the standard itself that is the business community issue, but instead the breadth of the definition of products subject to the standard and the costs associated with PROVING COMPLIANCE with the standard and otherwise complying with the law.

Mr. Moore clarifies that "[t]his does not mean I am not sympathetic to resellers and home crafters who are trying to figure out how to comply." Mr. Moore gives the impression that he believes opposition to this law comes only from marginal groups of unsophisticated people. In fact, the businesses impacted by the CPSIA are big and are small, and span industries like footwear, apparel, publishing, thrift stores, online marketplaces like eBay, toys, housewares, school supplies, furniture, bicycles, office supplies, sports equipment, novelties, incentives - and yes, crafters. Notably, this wide group of businesses certainly understands business law as a general matter. The law speaks for itself, and we have read it.

Interim Final Rule Exempting Certain Electronics Items. In her statement on this decision, Ms. Nord notes that the hurry-up process used to issue the complex policy Congress demanded was driven by the agency's inability to stay the lead standards: "This is not a procedure that I anticipate the agency will use in the future, except under the most demanding circumstances." Could something important have been missed? Apparently Congress only wants true, peer-reviewed science utilized when opponents attack its bill. Interestingly, Ms. Nord also notes that the CPSC no longer controls how safety is policed in the United States because there are now 50 shadow CPSC's to dog the business community: "I also HOPE the state attorneys general will follow our lead and adopt similar enforcement policies." [Emphasis added.] In our business, we say "hope is not a strategy". I take little comfort in Ms. Nord's plea.

Commissioner Moore adopts a more conciliatory posture in his statement, as though we might not have read his other attacks on business: "The Commission will take a measured, reasonable approach to administering the new law. We will be patient with businesses working to come into compliance" I would note that every communication that the CPSC has put out in recent weeks has asserted the importance and inflexibility of the new standards, including the need to self-report for seemingly any known violation. Does this mean that the CPSC won't force recalls for these self-reported violations? That seems contrary to everything I have read from the CPSC and Congress lately. I take cold comfort in Commissioner Moore's soothing words – the CPSC's stated policies are otherwise. He goes on: "We have always focused on protecting the consumer over penalizing the inadvertent missteps of small businesses. I see no reason for that approach to change under the new laws" This might be true (I certainly hope so), except that now the safety rules are absolute and the agency has little discretion left in its administration of these rules, so whether missteps are "inadvertent" won't matter AS A MATTER OF LAW. Furthermore, the range of legal requirements has spiraled out of control, leaving the task of compliance beyond the capability of 99% of all companies (in the real world). There will be plenty of missteps to review and consider.

The concerns of the business community are legitimate and are URGENT. You MUST take action right now to stay this "awful law" (see WSJ Editorial dated February 6 <http://online.wsj.com/article/SB123388626627155299.html>). You have been notified AGAIN AND AGAIN about the many problems created by the carefully crafted language of the CPSIA. The

financial consequences to many businesses will begin to become apparent in just a few short days without your action. Whether you agree or disagree with my position, sufficient doubt has been created to merit “hitting the pause button” allowing for further hearings and open discussion of the impact of this law. The public health “crisis” is imaginary and does not justify the horrifying risks you are taking with the U.S. economy.

Sincerely,

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