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Sent: Friday, March 13, 2009 4:45 PM

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Subject: Letter to Chairman Dingell re CPSIA

March 13, 2009

The Hon. John D. Dingell, Chairman Emeritus
House Committee on Energy and Commerce
Washington, D.C. 20515

Re: Your Letter of March 4, 2009 regarding the CPSIA

Dear Chairman Dingell,

I am writing in response to your letter of March 4 to Acting Chairman Nancy Nord and Commissioner Thomas Moore of the Consumer Product Safety Commission (CPSC) regarding the Consumer Product Safety Improvement Act (CPSIA). I want to thank you for raising the serious issues about unrealistic deadlines and timelines for implementation of this legislation, not to mention the troubling removal of regulatory discretion from the CPSC. These serious problems, and other related issues, make the CPSIA an existential threat to our businesses, our markets and to other important elements of our national economy. The CPSIA needs urgent attention before it causes irreversible harm to our economy and the market for children's products. Your leadership in fostering this change can make a tremendous difference.

I have taken the liberty of answering the questions you posed to the Commissioners in the March 4 letter. The CPSIA is a very serious matter for our businesses and for our country. In this letter, I will answer your ten questions one-by-one, and will also provide additional information that I think is relevant to any reconsideration of this law. Before addressing your questions, however, I would like to address a few preliminary points:

Safety is NOT the Big Issue in the CPSIA Debate. It is no secret that I find the CPSIA to be deficient in many ways. This is not reflective of a disregard or disrespect for safety or the interests of the schools, parents or children that use children's products. Far from it, we are safety hawks at our companies and have the safety track record to back it up. **It is my strong belief that the assertion that our nation faces a public health emergency in children's products is a BIG LIE.** Even taking into account the large number of recalls in 2007/8 (many of which were hyper-technical in nature and resulted from CPSC enforcement policy changes in response to public and Congressional pressure), the actual data demonstrates that few injuries actually resulted from these notorious incidents. See <http://learningresourcesinc.blogspot.com/2009/02/cpsia-dont-believe-consumer-groups-snow.html> for my analysis of the CPSC's recall data. The CPSC recall data demonstrates clearly and unambiguously that the 2007/8 recalls were entirely concentrated in two areas – lead-in-paint and lead jewelry. There is no demonstration in the data that there has ever been a history of injury from "total lead" in children's products. The recall data does not support the contention that there are hidden dangers from lead lurking in children's products.

Recent studies show that lead blood levels have dropped precipitously in the last 20 years. See <http://www.cdc.gov/nceh/lead/surv/stats.htm>, http://www.cdc.gov/nceh/lead/surv/database/State_Confirmed_byYear_1997_to_2006.xls and http://news.yahoo.com/s/ap/20090302/ap_on_he_me/med_children_lead. The news coverage of falling lead blood levels correctly notes that these successes relate to lead house paint and lead gasoline bans and better air and soil management. The main culprits even today remain house paint, lead in water (from old lead plumbing pipes) and soil. Children's products have not been proven as a material source of lead poisoning in large population studies. Safety is not the real issue in this law.

Precautionary Laws Are Unaffordable and Dangerous. The idea that the public needs to be protected from something vague lurking in consumer products is a big part of the underlying problem in the CPSIA. By accepting that we must take strict precautions against unspecified dangers, the law goes far off course where unintended consequences wreak havoc. The cost to prove safety prior to sale makes many, if not most, specialty market items uneconomic to produce. It also makes the hurdle rate to get into business or to develop new products

proportionately higher, thus trimming innovation and economic growth significantly. If we must be subject to precautionary laws to produce and sell children's products, the market for our items will shift irreversibly toward the mass market where unit volumes can absorb the wasteful costs, resulting in widespread job losses, sharply reduced product diversity and under-served niche markets like education or special needs. I presented a detailed argument against revision of the Toxic Substances Control Act as a precautionary-style law based on my experience with the CPSIA. See <http://learningresourcesinc.blogspot.com/2009/02/cpsia-my-22409-testimonyletter-on-tsca.html>. My TSCA letter on the consequences of the ill-conceived precautionary approach of the CPSIA is incorporated here by reference.

Please Do Not Fall Victim to the Misinformation Blame Game. I have written extensively about accusations of misinformation made repeatedly by consumer groups and members of Congress. I do not know who they refer to so obliquely but I have my own ideas. Notably, some of the most ardent purveyors of misinformation accusations have themselves crossed the line in the past. See <http://learningresourcesinc.blogspot.com/2009/01/view-from-us-pirg-get-ready-to-feel.html>, <http://learningresourcesinc.blogspot.com/2009/02/cpsia-dont-believe-consumer-groups-snow.html> and <http://learningresourcesinc.blogspot.com/2009/02/cpsia-significant-of-recent.html>. I urge you to evaluate all testimony provided to you with an open mind. The people who spread distracting accusations of misinformation intend to discredit the messenger – rather than address inconvenient or unwanted messages. As I have said in numerous writings – if I am wrong, please tell me so I can address the problem. Otherwise, all I ask is that our arguments be considered rationally in the spirit in which they have been offered.

My Reply to Your Ten Questions:

1. ***“To what extent has robust implementation of the Act been hampered by CPSC’s lack of resources? What levels of funding and staffing does CPSC believe necessary for proper implementation of the Act?”***

A: Robust implementation of the CPSIA has clearly hobbled the CPSC. Acting Chairman Nord rightly pointed out in her keynote speech at the ICPHSO conference on February 26 that the regular work of the agency continued during implementation of the CPSIA, as well as implementation of at least two other major pieces of new safety legislation. She cites an overnight doubling of workload straining the agency's ability to function, a sentiment echoed by Bob Adler in a separate address at ICPHSO. The inability of the CPSC to promptly answer the 14,000+ inquiries it received only exacerbated the problems of the children's products industry. [Please note that the law is drafted in such a way to invite more questions than the previous law. For one thing, the law is based in INTENT. In other words, what is and is not a “children's product” depends on the intent of the marketer (see 15 U.S.C. §2052(a)(2)). Thus, many decisions about the applicability of the law require findings of fact. Since the law adds serious risk of civil and criminal liability (not to mention risk of asset forfeiture), these questions need definitive answers which are often not available.] Increased funding of the agency should help relieve some of this backlog and also allow for the creation of deeper resources for building a better relationship with industry.

2. ***“Given the paramount importance of ensuring children’s safety and the overall mission of CPSC, to what extent are the deadlines in the Act practicable for CPSC and industry to meet acting with all deliberate speed? If these deadlines are not practicable, what revisions to them does CPSC suggest?”***

A. The deadlines in the CPSIA are unrealistic for several reasons. First, they are rigid and do not allow adequate time for consultation with industry or for thorough deliberation about the consequences and appropriateness of the proposed rules. Speed in this case promotes chaos and economic pain while delivering very questionable compensating safety benefits. The scale of the required rulemakings under the CPSIA in its first 18 months is nearly equal to the

rulemakings at the CPSC in the prior 30 years. While the focus in the media is on the capability of the CPSC to manage this process, please note that the pace of releases from the CPSC exceeds virtually all companies' ability to process or respond to such critical information. Speaking strictly for myself, I am unable to keep up with the flow of paper from the CPSC on this critical law, and I happen to be rather motivated to be part of the deliberative process. Remember, there are 400 people in the CPSC, and I am but one person – the flow is just too much, too fast, for all market participants.

Second, the deadlines are unrealistic because of insensitivity to the marketplace realities. The CPSC cites a need to ask for comments and to learn about market issues from industry. They do not claim to be experts in our businesses. There is a related factor that has been largely ignored, namely the “messiness” of a real world market. There is no one source of information or one business model that predicts the impact of new rules on the marketplace. Many of the deadlines, especially for dealing with inventory, will affect MANY companies adversely. The fact that some businesses might be indifferent to the changes does not mean all businesses or even most businesses will feel the same way. The law does not affect EVERYONE the same way. Therefore, deadlines need to be spread out over a more reasonable period to smooth out the varying impact on different companies.

Third, the impact of some deadlines has been GREATLY underestimated. Consider, for instance, the loathed lot traceability provisions of the CPSIA. For large, mass market companies that produce in large runs, this provision may not be a big issue. [We are not in this category, so I am not an expert on the impact on large businesses.] However, for niche players like us, or for small businesses operating in short production runs in general, the impact of lot markings may lead to a total reorganization of manufacturing processes. We have six months to get this done. Please note that detailed recordkeeping at the component level will be necessary to properly trace lots to their sources. This has widespread implications for how we manufacture (among other things). Although we are experienced at manufacturing, we do not know how we will manage this new kind of complexity – it will require that we reorganize how we make our products. [Ed. Note: And none of our products will be safer as a result.] A short and inflexible deadline like August 14, 2009 to get this in place is contemptibly unrealistic.

A final word on deadlines is that they are inherently artificial and possibly divorced from actual need. We need to restore concepts of management of risk of injury to our safety laws and move away from micro-managing a process that has been capably administered by the agency. The message that Congress sought to deliver to the CPSC and to industry was well-received in 2008 – now it's time to restore a manageable system of safety administration less dependent on Congressional deadlines.

3. ***“Does CPSC have quantitative data concerning any negative impact of the Act (i.e., the lead and phthalate limits and testing requirements) on small manufacturers of children’s products, and if so, would CPSC please provide them? What information does CPSC have on any such negative impact of a more anecdotal nature?”***

A. In an article entitled “Makers Are Pushing Back on Toxic-Toy Law” (Wall Street Journal, March 5, 2009 <http://online.wsj.com/article/SB123621357629835121.html>), Joe Periera reported the following loss statistics:

- Goodwill Industries to destroy \$170 million in merchandise.
- Salvation Army expects to lose \$100 million in sales and disposal costs.
- The Toy Industry Association estimates inventory losses at \$600 million.
- Members of the Coalition for Safe and Affordable Childrenswear lost \$500 million.
- The California Fashion Association estimates troubled inventory at \$200 million.
- The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least \$125 million.

On March 11, Playthings Magazine reported updated data from the TIA (see <http://www.playthings.com/article/CA6643505.html>), including

- From a pool of nearly 400 manufacturers and 220 retailers, the TIA estimates losses of \$2 billion in retail value.
- More than \$1 billion in already shipped merchandise has been returned or is being withheld for return.
- More than \$800 million in compliant merchandise is at risk of return.
- 40% of all respondents plan to eliminate jobs to pay for the CPSIA, with more than 1200 jobs reported to be in jeopardy.

Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members' businesses could total \$1 billion. See <http://www.1st5ive.com/harley-davidson/motorcycles/2009/02/2452/new-lead-rule-could-cost-motorcycle-industry-1-billion-annually> [Please watch some of the videos attached to this article. There are several videos – click on the back button to find more.]

The cautionary tale of Gymboree (800+ children's clothing store chain) is also noteworthy. See <http://learningresourcesinc.blogspot.com/2009/03/cpsia-body-count-rises.html>. Gymboree lost 40% of its market value overnight after releasing financial results that blamed declines and losses specifically on the CPSIA.

The American Apparel and Footwear Association just distributed an economic survey and will be gathering data through the end of March.

There is no accurate tabulation of business closures to date. A number of small or micro-businesses have announced their closure or substantial change in business models. Some of these announcements have been provided to your office in response to your March 4 letter.

The total market impact of the CPSIA is very difficult to estimate, particularly at this point. First of all, the impact of the CPSIA is only being partially felt at this time. The immediate business impact relates to (large) gratuitous losses caused by the retroactive ban on lead and phthalates. Retroactivity is causing massive dislocations throughout the market, as mass market retailers initiate widespread returns of merchandise produced and sold in compliance with law. See the Joe Pereira/WSJ article referenced above. The other source of immediate losses comes from disruptions in buying patterns from fear promoted by the new law. Uncertainty in a marketplace is no stimulus package – and revenue losses are significant among all children's products companies.

Second, the cost and consequence of the CPSIA rises over time and thus, the true impact won't be felt for some time. Implementation of another new level of lead-in-paint and "total lead" standard in August 2009 (also retroactive, of course, so the pain, gratuitous losses and uncertainty of the February "hot potato" wars will likely be repeated across the economy), lot marking requirements of August 2009, increased penalties, resumption of testing requirements after the testing stay is lifted in February 2010, will all raise costs and losses from this bill. The cost today is light compared to the ultimate burden.

It is also worth noting that these rising costs act as economic incentives. If businesses behave as "profit maximizers" (as theory predicts they will), anticipated rising costs will influence business/operational decisions. Massive restructuring of children's product businesses can be confidently predicted if CPSIA rules don't change soon. The increased costs of operating a children's product business under the new law will lead to massive culling of available products. Businesses won't be able to afford to sell or develop low volume items, and will seek more high volume customers as the only possible profit source. Low volume customers will be neglected or abandoned in response to these new legal incentives. Thus, the industry will gravitate toward consolidation and will favor low product diversity selling through limited, mass market distribution.

“Mom and Pop” stores across America will lose out because they won’t be able to generate sufficient revenue potential to interest manufacturers. In addition, as manufacturers reorient their businesses around mass market outlets, they will have to shed overhead (this means jobs, lots of them). All of these changes are inevitable as businesses attempt to survive the risk and costs imposed by this law (the economic incentives). Legislators in Congress need to consider whether this disruption will pay off for American society in light of the limited and hypothetical potential safety gains. Remember, in 2007/8, there was ONE death due to one swallowed bangle off one bracelet, and ONE claim of lead poisoning from lead-in-paint reported by the CPSC in its recall data. Should we structure the entire economy and shed many thousands of jobs in tribute to these two incidents?

The losses and related costs under the CPSIA also work like an across-the-board governmental tariff. The U.S. economic history of high tariffs is notorious. See <http://learningresourcesinc.blogspot.com/2009/01/cpsia-smoot-hawley-redux.html>. There is a good argument that the CPSIA is our market’s Smoot-Hawley Act for the 21st Century. Congress cannot stand idly by and allow such massive self-inflicted injury to go on for even one more day.

4. ***“Does CPSC have any suggestion for how to mitigate any such economic impact of the Act on small manufacturers of children’s products (e.g., component testing for lead and phthalate content) that, in accordance with the intent of the Act and the CPSC’s mission, will not compromise the health and safety of children using them?”***

A. There are two answers to this question. The first answer is a “green field” answer – return the administration of safety to the discretion of the CPSC based on quantifiable risk assessment. This change (along with appropriate changes in penalty and penalty-related provisions, plus a general effort to simplify the new law) would fix the problems for the business community by and large (small businesses particularly). It can be anticipated that a risk assessment model will eliminate many unnecessary tests and other economic burdens which make commerce so difficult under the CPSIA. It is also worth noting that businesses should not be allowed to engage in “dangerous behavior” just because of their size or because they are unsophisticated. Any suggestion that it would be “okay” to allow certain businesses to be subject to lesser safety standards because of their size tacitly acknowledges that consumer protection isn’t dependent on the standards. Why? Because whether higher or lower standards are imposed, apparently the acceptable safety “outcome” will be the same for consumers. Instead, we should impose the same rational and fair rules on everyone, and create a level playing field for both consumers and large AND small businesses.

Second, if Congress is unwilling to abandon its inflexible standards, then some form of relief on testing is definitely required to prop up small businesses. This will not be feasible, however. All roads lead to Rome - any “workable” testing system around a misconceived legal structure will have the appearance of a Rube Goldberg Machine. Let me explain:

i. Component testing will provide financial relief but will make certificates infinitely more difficult to interpret. Arguably, this defeats their purpose. It is unrealistic to think that any consumer or retailer could take a heap of component tests and create an intelligible certificate for an entire product. This would be just a meaningless and bureaucratic “trust me” system of certification. If we render our testing system unintelligible, we will waste the VAST infrastructure and expense created for its implementation and use. The information value will be squandered as well.

ii. Confusion at the port will hobble Customs. This is a SERIOUS issue. By changing the CPSIA to allow component-level testing, Congress will need our border patrols to become experts at the nuances of the entire U.S. supply chain for each product in the economy. This is unrealistic, to say the least. How is Customs supposed to interpret the pile of documents provided by importers using component tests? If they must actually review them for validity, the import process will quickly grind to a halt. If they have to consult with experts at the CPSC, the

import process will simply stop. If they are just “checking the box”, the purported value of Customs involvement in the process is rendered moot. Please note that importers bear high daily fees for delays in processing Customs paperwork. If Customs simply throws up its hands, what has been achieved? Just a hobbled economy.

iii. The form of imported products often changes in our economy. Many businesses are in the business of kitting or otherwise transforming items in their supply chain. It can be anticipated that test reports for items to be used as components might be rejected by either Customs or other parties in the chain of commerce if they do not understand how the item will be used as a component. This level of inquiry is pure waste – **a drag on our economy that is shocking, frankly**. Consider the sprawling bureaucracy that will be spawned by this bill – the “speed” and “efficiency” of Communist governments will become objects of envy in the U.S. business community. Is that what we want to become in an increasingly global marketplace?

iv. Regulation of the frequency of testing is another term that will need to be specified and can be expected to have a terrible impact on small business. Please consider that if an item is safe, no amount of testing or retesting will make it any safer. Testing it once a year or once a decade will not change its safety nature. At some point, manufacturers must take some responsibility for the output of their supply chain – piles of passing test reports will not substitute for individual responsibility. If lead-in-paint is the principal safety concern in children’s products, as I think it is, then high testing frequency for “total lead” and phthalates will simply add unnecessary expense and further distort the decisions of small businesses to participate in children’s markets.

As an illustration of what component testing might look like, please consider what we might submit for component tests on our LER 2629 Calculator Cash Register.

<http://www.learningresources.com/product/pretend+-amp-+play--174-+calculator+cash+register.do?search=basic&keyword=2629&sortby=best&asc=true&page=1>.

The following test reports could be submitted:

- Polypropylene raw stock (pellets)
- PVC sheet (clear)
- PVC sheet (white)
- Red plastic pigment
- Blue plastic pigment
- White plastic pigment
- Yellow plastic pigment
- Black plastic pigment
- Silver plastic pigment
- Brown plastic pigment
- Plastic additives and solvents
- White paint
- Blue paint
- Black ink
- Blue ink
- Bills (paper)
- Bills (ink)
- Label stock
- Labels ink
- Pad of paper
- Guide (paper stock)
- Guide (inks)
- Guide (laminates and solvents)
- Rubber
- Black rubber pigment
- Adhesives (several)

- Screws
- F963-08 compliance on entire unit
- Small parts test on entire unit
- Phthalates test on entire unit
- Other???

The Department of Homeland Security, the Customs border patrol, will need to interpret this massive heap of documents for compliance with the CPSA, FHSA, CPSIA, F963-08 and so on. It would be unintelligible to me, and I know this product intimately. Customs will be unable to process such paperwork, and without it, there would be no relief from the ridiculous testing requirements of the CPSIA... Fundamentally, these problems flow NOT from a public health crisis (lack of safety) – the issues flow directly from a wrongheaded law that mistakenly assumes that only with such paperwork can anyone feel confident in safety. The structure of the law is defective, and thus all proposed solutions are equally awkward and unworkable.

5. ***“What information has CPSC received about the impact of the Act on the availability of second-hand products for children, especially clothing? It is my understanding that many second-hand stores now refuse to sell children’s products. Does CPSC have any suggestions for how to mitigate any negative effects of the Act on second-hand stores for children’s products, especially in light of the recent economic downturn and the consequent increased need for low-cost sources of children’s clothing?”***

A. I wrote about this topic in my blog on more than one occasion, most recently at <http://learningresourcesinc.blogspot.com/2009/03/cpsia-you-have-wrecked-thrift-industry.html> in which I discuss an article in the February 27th issue of the Boston Globe. There are many other articles that confirm the referenced Boston Globe article.

Fundamentally, the problem caused by the CPSIA for thrift stores derives from the fact that the law attempts to fix an imaginary problem. Data does not bear out that thrift stores were doing much of anything wrong. Under the CPSIA, however, everything that the thrift industry does is now subject to scrutiny. This is part of the bubble wrap culture, precautionary approach implicit in the new law. It is far too costly to take this approach – as the facts bear out, commerce will simply STOP which creates a much more menacing problem for our society. As a practical matter, thrift stores do not have the means to check all of their merchandise against recalls over the past umpteen years. It is unrealistic to think so, and to build a law around that fantasy only invites economic disaster for the stores and for their customers. It is possible that better control over the resale of recalled items might be achieved if the CPSC committed more of their annual budget to outreach to industry (in this case, resale stores). Some form of electronic notice to these stores might help, too.

The specter of civil and criminal penalties under the CPSIA is affecting thrift store behavior. The Boston Globe article confirms that thrift stores are organizing their affairs to avoid any risk of liability from selling the non-compliant items. In other words, they are curtailing much of their commerce in children’s products. To get thrift stores to comply with the rule to not sell recalled items, Congress should eliminate criminal penalties (and asset forfeiture) and sharply limit civil liability to egregious conduct ONLY. This may get the thrift economy moving again for children’s products.

6. ***“Does CPSC believe that the age limit contained in the Act’s definition of “children’s products” (i.e., 12 years and under) is appropriate? If not, what should the age limit be? Further, should CPSC have the discretion to lower the age limit for certain groups of children’s products for which the risk of harm from lead or phthalate exposure is remote to non-existent (e.g., snaps or zippers on children’s clothing)?”***

A. In my opinion, many problems in the CPSIA flow out of overly-broad definitions of “children’s products” subject to the lead standards, and of “toys” subject to the phthalate ban.

The overly-broad definition of these terms sweeps many items into the realm of this law that have never presented any known quantifiable risk of injury. The unnecessarily large age range in these definitions comes at a HUGE cost. For example, the recent TIA economic survey data indicates that the industry is expecting to lose 10% of the retail value of toy sales over restrictions under the CPSIA. Yet there were no deaths and only ONE reported injury from lead-in-paint or lead-in-substrate in toys since January 1, 2007. Is this expense worthwhile? Is this the best policy for a healthy economy AND a healthy populace? I think not. However, there is no solution to this dilemma if Congress sticks stubbornly to the precautionary construct of the law and leaves the wide age ranges in place. We cannot afford a legal approach in which all risks, big or little, are weighted equally. It is well-accepted that children stop mouthing toys and other objects at age three. A much narrower age range that conforms to this long-accepted data will go a long way to fixing the definitions of Children's Products and Toys under the CPSIA.

There are severe logical problems in the concept that Congress solved ANY safety problem by broadly defining Children's Products or Toys in this law. For one thing, it seems to me implicit that these broad definitions are intended to encompass all relevant controllable risks. Of course, this idea is absurd on its face. As many commentaries have pointed out, there are equal or greater risks just outside the definition of these terms. For instance,

- Adult products or products of general use present similar risks. Ballpoint pens, for instance, are okay under the law if they are for "general use". If they are "general use" pens, we are permitted to freely sell them to kids and it's equally okay for kids to use them. If, however, the very same pen has Elmo stenciled on it, it is illegal. Perhaps the Elmo stencil makes the pen dangerous? Somebody needs to explain this to me.
- Unregulated products like dog toys and other consumer products are everywhere in a child's life. If Children's Products or Toys present such a risk to children that we must turn the economy upside down, how was Congress able to determine that these other items present no detectible risk of injury to children? Is that belief backed up with DATA? Perhaps Congress felt that children would be prone to suck on their 12-year-old brother's shoes, but not on a dog toy or a ceramic plate. This makes no sense – and therefore the entire notion of a broad definition of Children's Product or Toys falls apart.
- Products of equal or greater "danger" are in use throughout society. Notably, an incomprehensibly large volume of products with the characteristics that would be illegal under the CPSIA are present in the home, at school and around town. From shopping carts to furniture to old books, the world is awash, absolutely soaked, in these products, far in excess of the mass of children's products being sold annually. If the dangers of children's products are SO great that we must turn our economy upside down, how on Earth can Congress permit these other products to be in daily use throughout our society? Isn't that dodging a serious responsibility – or is it a tacit acknowledgement that the risks in the newly regulated products are simply not as great as advertised?

I have previously written about the dangers of an "intent"-based definition of Children's Products. See <http://learningresourcesinc.blogspot.com/2009/01/cpsia-misconception-of-marketing-intent.html>. Since the definition of Children's Product depends on what is your head and your heart when you sell the product, the application of the safety standards to the product can literally change on a daily basis in your business. Consider an office supply store that sells ballpoint pens, a clear example of a "general use" item outside this law. If they dare hang a banner over the pen section in their store stating "Back to School Special on Pens", the pens will suddenly become a Children's Product. When they later take down the banner, the pens again become a "general use" item. Absurd? Yes. Does the law really work that way? You betcha. This kind of law is impossible to administer and impossible to live with.

I strongly support giving the CPSC the authority to set appropriate age limits for both the phthalate ban and the lead standards based on quantifiable risk assessment. . I believe the CPSC can restore rationality to safety rules if given the authority to devise rules around material risk of injury.

7. ***“Although some youth all-terrain vehicles (ATVs) and youth motorcycles are intended for use by children under 12 years of age, does CPSC believe it is necessary that these products be tested for lead and phthalate content? Similarly, does CPSC believe that these products present a risk to children for the absorption of phthalates or lead?”***

A. I happen to agree with the sentiments of Mike Swigart as quoted in the February 18 edition of the Arkansas Democrat Gazette (<http://www.nwanews.com/adg/National/252680/>): “As for lead poisoning [by an ATV or dirt bike]? ‘That’s the craziest thing I’ve ever heard in my life,’ Swigart laughed. ‘If we’re riding in the snow, that’s about the only way we’re going to get sick.’” There has been massive coverage in the press of the issues relating to ATVs and related products (see, e.g., <http://www.myvalleynews.com/story/35906/>). Notably, the issues relating to ATVs are simply illustrative of the dangerous application of the CPSIA to children’s products without a risk assessment approach to safety management. If risk is no longer considered in the calculus of American safety law, then it can be safely predicted that embarrassing and ridiculous dislocations will happen regularly in our economy as regulators attempt to enforce silly rules on innocuous products, companies or markets.

8. ***“In light of recent court decisions that the lead and phthalate content restrictions are retroactively applicable, does CPSC have concerns about the effect on the environment of the disposal of inventories of non-compliant children’s products?”***

A. The most serious environmental issue posed by this law is the senseless disposal of billions of dollars of perfectly safe and appropriate merchandise in landfills across the country and overseas. It is worth noting that the standards for lead-in-substrate are NOT a soluble lead standard. Thus, items violating the CPSIA standards may not necessarily leach lead in any quantity into ground water. The media and consumer group mania over lead-in-any-form creates the impression that all lead manifestations are equally dangerous, which is **PATENTLY UNTRUE**. No group has demonstrated with any data that disposal of merchandise violating the standards will pollute the ground or ground water. In addition, phthalates are used only in soft plastics (and in trace amounts), which comprises only a very small percentage of the total mass of children’s products disposed of annually. Consumer groups have not demonstrated that there is any health risk associated with disposing of merchandise with phthalate concentrations above the CPSIA ban standards. Even the health risk of phthalates remains controversial.

9. ***“I understand that, since early December 2008, CPSC has had access to a large number of lead content test results for finished “ordinary books” (i.e., books published in cardboard or paper by conventional methods and intended to be read by or to children age 12 or under) and their component materials (i.e., paper, paperboard, ink, adhesives, laminates, and bindings). Have CPSC staff reviewed those test results? What do those test results indicate about such ordinary books and component materials in connection with the statutory lead limits prescribed in Section 101(a) of the Act? Does CPSC have any recommendations regarding how to mitigate the burdens that the testing and certification requirements of the Act, and especially the retroactive applicability of those requirements to inventory, could otherwise impose on publishers, printers, and retail sellers of such ordinary books, as well as on libraries, schools, charities and other second-hand distributors of such ordinary books, including those published before 1985?”***

A. The fundamental issue with books is whether there is ANY reason to believe that books are harmful. This controversial idea sprung out of the ridiculously wide definition of

Children's Products, NOT because of safety data or recalls of books. **I believe the staunch defense of this application of the law by consumer groups has more to do with their fear of losing this law than their interest in protecting the public from any danger in our libraries.** As a matter of fact, books are well-known to be safe, even books with ornaments. Common sense and everyday experience dictates that books are safe and appropriate. Books are simply an innocent victim of an overly-broad law which uses the bogeyman of lead to create widespread fear of the unknown.

10. ***"In general, does CPSC believe that the Act was written with too little implementation discretion for the Commission? If this is the case, for which issues (e.g., third party testing requirements) does CPSC require more discretion?"***

A. Congress should not do the CPSC's job in setting safety standards and rules. That's why the agency was created and what it should be allowed to do. If the CPSIA was borne out of anger and frustration, with the passage of time, cooler heads should prevail and a reasonable reliance on the CPSC to regulate markets can be restored. As noted above, the fundamental flaw of the CPSIA is that it is not based on assessment of quantifiable risk of injury, but instead on the administration of MANY arbitrary standards and rules that are often remote from risk of injury. There is no getting around this flaw, and until it is excised from the law, there will no peace among manufacturers and retailers still attempting to trade in this marketplace.

It is far too easy to take comfort in the arbitrary standards for "total lead" and think that the problem of lead poisoning has been "solved". Notwithstanding the familiar (and persuasive) argument that the presence of lead in trace amounts in substrates is NOT the proximate cause (or even a significant proximate cause) of childhood lead poisoning, the standards and the way they are administered (according to the terms of the law) are plainly irrational, again because of faulty legislative design. The "total lead" standards today are at 600 ppm, dropping to 300 ppm in August. This standard is based on mass and not based on the ability of the body to access the lead. Based on my May 16, 2008 conversation with Cindy Pellegrini of the American Academy of Pediatricians (the apparent author of the Dana Best testimony given before the Rush Subcommittee), it appears that the consumer groups (at least the AAP) could not agree on how to conduct a leach test (like the EU's EN-71 Part III), and consequently, they recommended a total mass test for U.S. law. Their inability to agree on a standard consistent with Europe's test means that below 600 ppm lead-in-substrate, there is no limitation to soluble lead (it can range from zero ppm to 600 ppm). Interestingly, if the standards are ever exceeded by a material or product (think ballpoint pens or ATV spare parts), the exclusion requirements state that the material may not be excluded if ANY lead can leach into the human body. Yes, that's right – below 600 ppm there no limit on soluble lead, but above 600 ppm lead-in-substrate, the limit on soluble lead is ZERO. And one wonders why this law is so unworkable.

Other Important Points:

11. Penalties. I have been told by Christian Fjeld of Bobby Rush's office TWICE that penalties under the law are only applicable if violations are done "knowingly". The word used to explain this "loophole" in those conversations was the legal term scienter. Acting Chairman Nord alluded to a similar interaction with an unidentified Capitol Hill staffer in her keynote speech to the ICPHSO conference on February 26. This assertion of a scienter loophole is absolutely INCORRECT. See my letter of January 12 (<http://learningresourcesinc.blogspot.com/2009/01/cpsia-confusion-and-chaos.html>). The law makes the standard for penalties that of a reasonable man exercising due care (15 U.S.C. §2069(d)). In other words, translated into English, actual knowledge is not required. We are all at risk of high penalties.

The high potential, almost unlimited civil penalties are a tremendous threat to honest business people. We face virtually no other uncontrollable liability like these penalties. In addition, a "knowing" violation of the CPSA and other similar laws can trigger CRIMINAL

LIABILITY. It is unthinkable that we would conduct our business in a way that could expose our managers or employees to criminal liability. We are NOT criminals but the threat of criminal sanctions seems uncontrollable now. Notably, the CPSC is also empowered to conduct asset forfeitures under the CPSIA (15 U.S.C. §2070(c)(1)). In addition, whistleblower provisions provide further coercion on business people, creating a truly noxious legal environment.

How might such a legal problem arise? Under Section 15 of the CPSA (15 U.S.C. §2064), we are responsible to self-report (within 24 hours) the failure to comply with “an applicable consumer product safety rule . . . voluntary consumer product safety standards . . . or any other rule, regulation, standard or ban under the [CPSA] or any other Act enforced by the Commission.” The failure to self-report under this rule or even the act of self-reporting late can trigger BOTH civil and criminal penalties. Please think about how that must feel to us. Start with a basic question – what laws are we supposed to monitor to make sure we are never in a self-reporting situation? How would we know? I am an experienced lawyer, and I have no good answer to those questions. Thus, I consider it highly likely that we, and everyone else, will be in perpetual violation of this liability-creating provision. What might that mean, as a practical matter? A couple things come to mind: first, we will stay out of harm’s way only by prosecutorial discretion. That is a very uncomfortable position to be in, to say the least. It is also quite coercive and unfair. This ongoing dynamic is unique in my experience as a businessman and as a lawyer. Second, we would be a sitting duck for plaintiff attorneys. Do you expect us to stay in this market with that kind of cleaver hanging over our heads?

The dark cloud of potential liability has already had a chilling effect on the marketplace. This is apparent from virtually every CPSIA article or economic anecdote you might come across these days. War has broken out between retailers and manufacturers over returned merchandise. Thrift stores are pulling children’s products all over the country. Libraries have begun to isolate books printed before 1985. Many small businesses have either closed or are changing their business models radically to avoid liability. Retailers have reverted to super-conservative pre-conditions for trade, tacitly slamming the door in the face of small businesses who cannot afford their “zero tolerance” business approach. [See, e.g., the approach of Toys R Us to planning around avoiding the possibility of liability. See <http://learningresourcesinc.blogspot.com/2009/03/cpsia-my-first-response-to-rep-dingell.html>.] These terrible economic incentives (penalty provisions) must be sharply curtailed before the children’s market empties of all specialty, small and medium-sized businesses. These provisions are a clear cancer within this law.

12. Complexity. I have written about the complexity problem under the CPSIA previously. See <http://learningresourcesinc.blogspot.com/2009/02/cpsia-information-overload.html>. While the subject of complexity gets little media attention, I believe it is one of the most critical factors for legislators to investigate and reconsider. Fundamentally, the problem is that the law is both exceedingly difficult to understand, and exceedingly difficult to teach. If we cannot easily teach the law to our associates, we cannot adequately administer the law. The gap between common sense and real world experience on one hand, and the standards in the law on the other hand, make it hard to identify safety threats that deserve attention. Remember, businesses need to efficiently sort the massive data they receive every day – if businesses cannot find an easy mechanism to identify “problems”, then they will start making big mistakes. The CPSIA renders most children’s product businesses senseless in this way. The law needs to be stripped down to what actually matters, and most of the rules should be discarded or made voluntary standards (such as restoration of F963 to a voluntary standard), solely in an effort to make the law simpler and easier to teach. If the law draws too many lines in the sand, then Congress should expect to see disrespect for the law develop over time. And if manufacturers or retailers are punished severely for that disrespect (as can be anticipated), there will be a mass exodus from the children’s market. Just wait for the first company executive to be charged with a crime under this law

13. State Attorney General Enforcement. There used to be a Federal system of laws in this country. The United States is not a confederation of some sort, but this law seems to be confused on this point. By giving the State Attorneys General (SAGs) the virtually unfettered right to enforce the CPSA and related legislation independent of the CPSC, the CPSIA effectively creates 50 new CPSCs run by ambitious elected officials catering to local audiences. To companies operating nationally in the children's product space, this is a horrifying development. The notion that this term protects the public is a fallacy. What it does is introduce an uncontrollable externality to the operation of children's products businesses that only the largest of the large companies can possibly endure. Please consider the \$12 million settlement of a lawsuit between Mattel and 39 SAGs over toy recalls (see http://www.azag.gov/press_releases/dec/2008/Mattel%20CJ.pdf). This type of litigation is unthinkable and would be a death sentence to all but a tiny handful of companies in this market. What protection do businesses have against abuse of this term? How are we supposed to manage relationships with 50 SAGs? As a practical matter, it is simply impossible. The provision giving SAGs the right or power to enforce these laws should be reversed explicitly.

14. Explicit Pre-emption. The failure of Congress to deal with the tsunami of State legislation on children's products has created a maze of local regulations and rules that no small or medium-sized company can possibly comprehend or manage. The scale of this legal deluge is like a ticking time bomb for the industry. Because of the multiplicity of the changes in State law on product safety, 99% of companies in this space must simply "take their chances" and hope that compliance with Federal rules will protect them. That is probably naïve. The uncontrolled trend in State legislation is going to make Americans envious of the patchwork quilt of laws that Europeans had to endure prior to the creation of the European Union. This degradation of our legal system, Congress' failure to use the Commerce Clause to create the uniform regulation to encourage inter-state commerce, will deepen the already horrific recession we face today. The burden of 51 competing legislative schemes will kill commerce. It's time for Congress to face the music and truly pre-empt State legislation on children's product safety on a comprehensive basis.

15. Lot Markings. The origin of this terrible provision in the law grew out of the desire to improve recall efficiency. I am all in favor of recall efficiency but not if it means that we will have to drop hundreds of products or waste scarce financial resources on useless recordkeeping and bureaucratic administration. This provision converts the focus of our company from innovation to paper-pushing, all without a demonstrable contribution to improved product safety. In our case, we estimate we have sold perhaps as many as one billion units of various items in the last 25 years, and recalled a total of 130 pieces. More than 100% of those recalled units were identified and retrieved, and we were able to contact each buyer of the defective products by phone. EVERY DOLLAR we would spend on tracking labels under the CPSIA will be wasted because we have no reasonable expectation of future recalls. How we design contingency plans for recalls should be left up to us – if the cost of lot markings makes no economic sense to us, we should not be required to do it. This provision is one of the worst and most damaging in the entire law and must be excised urgently – before the August 2009 implementation deadlines makes it a fait accompli.

16. A Pause. There are clearly many complex issues in this law. The hearings that led to this legislation were not really an open dialogue with industry, at least not at all levels. The outpouring of opposition to the law makes it clear that some important voices were simply not heard. It is essential that this groundbreaking law be done RIGHT. Also clear is that damage is mounting by the day. For our company, the worst is yet to come, as the lot markings, testing requirements, administrative overhead and liability management hold the prospect of being a "near death" experience for us. I recommend that the entire law be stayed to allow the dust to settle, and to allow for a true Congress-CPSC-industry partnership to be forged. This will take some time, but the investment of time and energy will be worthwhile if we can create a good law that protects children from real risks, deploys governmental resources appropriately based on risk of injury, and which facilitates healthy trading among competitive and innovative companies occupying world leadership positions.

Your request for further information on the CPSIA is a great start to an important process. Congress should promptly hold open hearings with a bias to receive testimony from a broad array of interested parties, and then attend to the serious business of urgently amending this law. A fair and reasonable set of rules can be designed to appropriately protect both the interests of consumers and the interests of the business community. Frankly, the business community serving children's markets is quite devoted to kids, so rules that enhance safety at an appropriate cost will be welcomed. A non-partisan approach to safety will serve everyone's interest.

Thank you for considering my views on this important topic. Please do not hesitate to contact me if I can be helpful in any way.

Sincerely,

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