



January 11, 2010

Honorable Chairman Inez Tenenbaum  
Consumer Product Safety Commission  
4330 East-West Highway  
Bethesda, MD 20814

**Subject: Report to Congress on Amendments to the CPSIA**

Dear Chairman Tenenbaum:

I write to you on behalf of the approximately 1,500 businesses that are members of the National School Supply and Equipment Association (NSSEA). NSSEA members sell educational supplies, equipment and instructional materials to schools, parents, and teachers. Our manufacturing members range from businesses as small as one person and many are relatively small businesses that do not sell a large volume of products. Some of our member's products are highly specialized and serve niche markets such as differently-abled children. Many of these products are manufactured in low volumes. Other products have unique educational purposes and are used in schools in a supervised setting. Because so many of our members are relatively small firms, manufacturing or selling low volume and sometimes specialty products, compliance with the Consumer Product Safety Improvement Act of 2008 (CPSIA) is proportionally much more burdensome for our members.

We understand that the Consumer Product Safety Commission (CPSC) is planning to provide Congress with recommendations for fixing problems created by the CPSIA. Since you have decided not to discuss these changes in a public meeting, we are not aware of what you are considering. Nevertheless, we believe it might be helpful to provide you with some of our suggestions and the rationale for the changes. In sum, our focus is on maintaining a high level of safety for children but giving the agency more discretion to deal with problems based on the level of hazard that actually exists. We also believe the agency needs more discretion to take into account the unique problems of small businesses or firms selling small volumes of products as other agencies frequently do.

*Lead Content Limit:*

To many people's surprise—apparently including many members of Congress—the lead content limit affects many products for which there is no history of problems including books, pens, recreation vehicles, bicycles, and many other products that are intended for older children and seem to present virtually no risk to children. CPSC has attempted to address some of these unintended consequences of the current version of the CPSIA either by exercising enforcement discretion through public pronouncement, or through quiet non-enforcement. These actions were necessary to keep useful, non-hazardous products in use and to conserve agency resources to address significant risks of injury. However, as some of you have pointed out, stays of enforcement are not a long-term solution to these issues.

We suggest that you ask Congress to amend the “exclusion” provision of section 101(b)(1)(A) of the CPSIA which currently does not allow anything to be excluded. We think the reference to absorption of “any lead” should be changed to read “result in the absorption of sufficient lead into the human body to elevate blood lead levels more than one microgram per deciliter, taking into account normal and reasonably foreseeable use and

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abuse. . .” This number is far short of the accepted “action levels” and provides a significant margin of safety to prevent adverse health effects. At the same time, it provides a definable benchmark the CPSC can use in future actions. We hasten to add that this is not the only solution to the exclusion problem. We would support any provision that allows the CPSC discretion to exclude products that do not present a real health risk to children. We note that both behavioral factors (age of child user, how the product is handled, the likelihood of interaction with the lead component, and the nature of that interaction) as well as the amount of lead that is biologically available can and should be considered in determining whether to exclude products from the lead ban.

We also believe that Congress should add a section we might call a “Technological feasibility and Practicability Exception.” We suggest something along the following lines:

If the Commission determines that it is not technologically feasible or practicable to meet the lead content requirement, the Commission may grant exemptions for classes of products or individual products that do not meet the requirement of section 101(a) regarding total lead content. In considering practicability, the CPSC shall consider the function of the lead containing component, the availability of alternative materials, the cost of alternative materials, the potential risks posed by alternative materials, the potential risks posed by elimination of the lead from the product, and the level of health risk to children likely to use the product.

We also believe that an exclusion of the lead ban should be added for ordinary books, posters, and similar printed materials manufactured prior to the effective date of the lead ban. Books are of tremendous value to children both as educational and recreational resources and are important to their development. There is no evidence that books or similar printed matter have ever caused a lead poisoning, and based on the available data, this appears highly unlikely. In addition, the costs to schools, municipalities, libraries, and others of identifying and replacing such books would be extremely high and there is no reason to impose such costs given the lack of identifiable risk.

Given the special nature of educational products used in schools, these products are typically used with close adult supervision. The likelihood that children will be sucking or chewing on educational products is very low. In addition, as children age to school age, that kind of mouthing behavior is greatly reduced. However, the current requirement arguably bans—or requires expensive compliance measures that amount to a de facto ban—for things like lead weights, rock and mineral collections, chemicals, and other products that have tremendous educational value. The statute should recognize the special value of educational products used in schools as well as the reduced risk because of the age of the students and the supervised nature of the product handling and use. Another possible approach is to reduce the age of a “children’s product” from 12 to an age more likely to be at risk, or to give the agency the discretion to make such judgments.

We also recommend amending the law to make it clear that the lead ban was prospective in nature: that products that complied with the law before the ban went into effect February 10, 2009 may be sold unless they contained sufficient lead to be considered “banned hazardous substances” under the Federal Hazardous Substances Act. This provision will alleviate the burden on thrift shops, schools, libraries, and resellers who may have some untested inventory and cannot afford to test that inventory or to destroy what are likely perfectly safe products.

#### *Third Party Testing and Certification:*

We understand the events that led to the third party testing requirements for children’s products and the certification provisions. However, it should now be apparent that not all manufacturers and importers of children’s products are multi-national, billion dollar corporations manufacturing millions of products. Those firms enjoy an economy of scale and can spread the costs of testing among enough products to render those costs insignificant. That is not true for much of the manufacturing and importing community including many of our members. While we applaud the efforts the CPSC has made to find solutions for small businesses including the recent guidance on component testing for lead content and lead paint, we believe the CPSC could do more if given more discretion by Congress. The alternative is the elimination of many valuable educational toys and products, some manufactured in low volume for niche markets (such as the deaf, blind, or otherwise differently-abled children) and typically not supplied by the huge multi-national toy manufacturers.

To give the Commission more discretion, we recommend section 102 be amended to add a provision saying something like the following: “The Commission shall have the authority to exempt small businesses or to provide lesser requirements for small businesses or for businesses manufacturing small numbers of products, handcrafted products, or niche products. In considering such exemptions, CPSC shall consider the impact of testing and certification requirements on the cost of the products, the ability of the small business to compete in the marketplace against larger firms, the usefulness of the products affected, and the likelihood of elimination of useful products from the marketplace due to costs of testing and certification, and the risks of injury associated with a reduced testing scheme.” A similar provision should apply to the general conformity assessment provision and to any recordkeeping provisions that relate to either testing requirement.

#### *Tracking Labels:*

The tracking label requirement imposes huge administrative costs on firms that may exceed the actual costs of labeling. We recommend a provision similar to the one for testing above that gives the CPSC discretion to modify the content of tracking labels for categories of products that present no demonstrable risk and to allow small business or firms manufacturing or importing small volumes of products to provide less detailed labels.

#### *Durable Infant or Toddler Products:*

Amend Section 104 to allow CPSC more time leeway to select standards and more reasonable time frames for implementation. The CPSC does not appear to have the resources to address all these products on the ambitious timeframe established by Congress in the CPSIA.

#### *Adoption of Voluntary Standards:*

The ASTM F963 standard is still not widely known or understood—including by the CPSC staff. In addition, the nature of the standard is obscure since many of the relevant provisions are not in the Code of Federal Regulations. Some of the provisions of ASTM F963 are merely summations of existing CPSC mandatory bans. In addition, some of the provisions do not necessarily relate to a significant hazard, and many of the provisions are methodologies for testing cribbed from the CPSC’s FHSA guidance documents and are not truly “bans.” Although the CPSC seems to have refrained from any significant enforcement, much confusion exists about these provisions both on the part of businesses and testing labs. Congress should amend section 106 of the CPSIA to give CPSC authority to select portions of the ASTM F963 standard that should be mandatory based on the significance of the risk posed by products that do not meet the requirements. These provisions should become mandatory only after CPSC publishes those requirements as rules in the CFR and provides testing procedures and accreditation provisions. This would allow CPSC to avoid confusion by filtering out test procedures and provisions that overlap with CPSC or other agency requirements. Further, it would lead to better knowledge and understanding of the provisions and a higher rate of compliance and safety would result.

#### *Phthalates:*

Perhaps more than any other provision in this law, this provision vastly exceeds in scope and costs imposed on the marketplace any known risk of injury. Particularly given the testing costs, this requirement imposes huge compliance costs on industry, CPSC, and consumers for very little, if any, gain in risk prevention. Even many of those who supported the existing phthalate provision concede that the risk from phthalates relates to younger children or fetuses whose development might be affected by ingestion. As you know, CPSC studies found that there was not sufficient mouthing of most toys to cause a risk to such children. However, if there were a risk it would be among children who are more likely to mouth products. Ironically, section 108 applies to items that are intended to facilitate sleep or are used in feeding, sucking, or teething *for children 3 and under*. However, the phthalate requirement applies to *toys* intended for children *12 and under*. CPSC should ask the Congress to limit application of the phthalate requirement to toys intended for children 3 and under (if it wishes to be extra conservative from a risk point of view, 5) based on the low likelihood of children over these ages to mouth toys. Further, Congress should limit the provision for *all* phthalates to “accessible components that would fit a child’s mouth” as defined in section 108(e)(1)(B). There is no rational reason for a phthalate provision that applies to

non-mouthable products. There is no evidence that hand to mouth transfer of phthalates from plastic presents a realistic risk. Further, the failure to take accessibility into account for phthalates but to allow an exception for inaccessible lead makes absolutely no sense.

Finally, CPSC should ask Congress to provide CPSC with the authority to consider input from the CHAP and to determine based on that input and other evidence of risk whether to continue in effect the de facto ban of phthalates that CPSC determines do not present a sufficient health risk. In addition to being allowed to consider risks, CPSC should also be allowed to consider the potential risk of replacement materials that will be used in lieu of phthalates. It would be tragic if a relatively well understood and studied material is replaced by materials that turn out to present far greater risks to the public and CPSC should have some ability to prevent such an unforeseen consequence of this provision.

As with lead, this requirement should be treated as prospective only. Given the extraordinarily low likelihood of risk associated with pre-February 10, 2009 toys, it is foolish to apply this provision retroactively with all the burdens that places on resellers, thrift shops, and others.

*Conclusion:*

While there are many other provisions of the CPSIA that are problematic for our members, we have tried to focus our recommendations on changes that most rational people would agree do not increase risk but allow CPSC to manage its resources effectively, and decrease unnecessary compliance burdens. We appreciate that the CPSC has done many things to address our concerns but wish to remove some of the strictures that have bound CPSC and limited its ability to regulate rationally. We trust that you want to be an effective regulatory agency and recognize that the law needs to be changed to allow you to do your job properly and to reduce unnecessary burdens on the marketplace and consumers. We hope that you will have the political courage to ask Congress to make the necessary changes.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Holt". The signature is fluid and cursive, with the first name "Tim" and last name "Holt" clearly distinguishable.

Tim Holt  
President/CEO