

**SUBCOMMITTEE ON  
INVESTIGATIONS AND OVERSIGHT  
HEARING ON THE CONSUMER PRODUCT SAFETY  
IMPROVEMENT ACT AND SMALL BUSINESS**

---

**HEARING**

BEFORE THE

**COMMITTEE ON SMALL BUSINESS  
UNITED STATES  
HOUSE OF REPRESENTATIVES**

**ONE HUNDRED ELEVENTH CONGRESS**

**FIRST SESSION**

HEARING HELD  
May 14, 2009



Small Business Committee Document Number 111-023  
Available via the GPO Website: <http://www.access.gpo.gov/congress/house>

U.S. GOVERNMENT PRINTING OFFICE

49-618 PDF

WASHINGTON : 2009

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

HOUSE COMMITTEE ON SMALL BUSINESS

NYDIA M. VELÁZQUEZ, New York, *Chairwoman*

DENNIS MOORE, Kansas

HEATH SHULER, North Carolina

KATHY DAHLKEMPER, Pennsylvania

KURT SCHRADER, Oregon

ANN KIRKPATRICK, Arizona

GLENN NYE, Virginia

MICHAEL MICHAUD, Maine

MELISSA BEAN, Illinois

DAN LIPINSKI, Illinois

JASON ALTMIRE, Pennsylvania

YVETTE CLARKE, New York

BRAD ELLSWORTH, Indiana

JOE SESTAK, Pennsylvania

BOBBY BRIGHT, Alabama

PARKER GRIFFITH, Alabama

DEBORAH HALVORSON, Illinois

SAM GRAVES, Missouri, *Ranking Member*

ROSCOE G. BARTLETT, Maryland

W. TODD AKIN, Missouri

STEVE KING, Iowa

LYNN A. WESTMORELAND, Georgia

LOUIE GOHMERT, Texas

MARY FALLIN, Oklahoma

VERN BUCHANAN, Florida

BLAINE LUETKEMEYER, Missouri

AARON SCHOCK, Illinois

GLENN THOMPSON, Pennsylvania

MIKE COFFMAN, Colorado

MICHAEL DAY, *Majority Staff Director*

ADAM MINEHARDT, *Deputy Staff Director*

TIM SLATTERY, *Chief Counsel*

KAREN HAAS, *Minority Staff Director*

STANDING SUBCOMMITTEE

---

Subcommittee on Investigations and Oversight

JASON ALTMIRE, Pennsylvania, *Chairman*

HEATH SHULER, North Carolina  
BRAD ELLSWORTH, Indiana  
PARKER GRIFFITH, Alabama

MARY FALLIN, Oklahoma, *Ranking*  
LOUIE GOHMERT, Texas<sup>Q46</sup>

(III)



# CONTENTS

## OPENING STATEMENTS

	Page
Altmire, Hon. Jason .....	1
Fallin, Hon. Mary .....	2

## WITNESSES

Nord, Hon, Nancy A., Acting Chairman, U.S. Consumer Product Safety Commission .....	3
Schreiber, Ms. Laurel, Lucy's Pocket Allison Park, PA .....	12
Lang, Ms. Suzanne, Starbright Baby, Boalsburg, PA .....	14
Baustian, Ms. Susan, Director, Once Upon a Child Corp., Minneapolis, MN ....	16
Vittone, Mr. Anthony F., Vice President & General Counsel, Swimways Corporation, Virginia Beach, VA .....	18
McCubbin, Mr. David, McCubbin Hosiery, Oklahoma City, OK .....	20

## APPENDIX

Prepared Statements:	
Altmire, Hon. Jason .....	28
Fallin, Hon. Mary .....	30
Nord, Hon, Nancy A., Acting Chairman, U.S. Consumer Product Safety Commission .....	32
Schreiber, Ms. Laurel, Lucy's Pocket Allison Park, PA .....	71
Lang, Ms. Suzanne, Starbright Baby, Boalsburg, PA .....	75
Baustian, Ms. Susan, Director, Once Upon a Child Corp., Minneapolis, MN ....	81
Vittone, Mr. Anthony F., Vice President & General Counsel, Swimways Corporation, Virginia Beach, VA .....	85
McCubbin, Mr. David, McCubbin Hosiery, Oklahoma City, OK .....	96
Statements for the Record:	
Dahlkemper, Hon. Kathy .....	102
Eckerly, Ms. Susan, Senior Vice President of Public Policy, National Federation of Independent Business .....	105
Hilbert, Mr. Sean, Cobra Motorcycle, Manufacturing, Hillsdale, MI .....	107
Consumers Union, Consumer Federation of America and others .....	110
Wion, Ms. Stacey, SpielWerk Toys, Portland, OR .....	112
Handmade Toy Alliance .....	115
Warring, Mr. Michael, American Educational Resources, Fort Collins, CO .....	119
Ballas, Ms. Connie, From My Room, Naperville, IL .....	128
Tommey, Ms. Melanie, MCC Enterprises, Sand Springs, OK .....	129
Peapod Natural Toys and Baby Care, St. Paul, MN .....	132
Printing Industries of America .....	134
Chuckas, Ms. Jill, Crafty Baby, Stamford, CT .....	137
American Apparel & Footware Association .....	138
Newell, Ms. Mary, Terrapin Toys, Eugene, OR .....	142
Burnside, Mr. Steve, DSD KAWasaki, Parkersburg, WV .....	143
Toy Industry Association .....	146
Woldenberg, Mr. Richard M., Learning Resources, Inc., Vernon Hills, IL .....	151



**SUBCOMMITTEE ON  
INVESTIGATIONS AND OVERSIGHT  
HEARING ON THE  
CONSUMER PRODUCT SAFETY  
IMPROVEMENT ACT AND SMALL BUSINESS**

---

**Thursday, May 14, 2009**

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON SMALL BUSINESS,  
*Washington, DC.*

The Committee met, pursuant to call, at 10:00 a.m., in Room 2360 Rayburn House Office Building, Hon. Jason Altmire [chairman of the Subcommittee] presiding.

Present: Representatives Altmire, Ellsworth and Fallin.

Also Present: Representatives Dahlkemper and Thompson.

Chairman ALTMIRE. Thank you all for being here. And as we discussed, there are going to be votes called on the House Floor probably in 20 minutes or a half hour, so we're going to try to get through Ms. Nord's testimony, first, before we have those votes. And I will now call the meeting to order.

This Subcommittee hearing is now called to order. When it comes to protecting our children Americans take every possible precaution. We strap our kids into car seats when we're driving. We insist on training wheels when they're learning to ride a bike. We vaccinate them against chicken pox, polio, and countless other illnesses. In other words, we do everything we can to make sure our children are safe. That's why it's so distressing when threats to their health go undetected, particularly when those threats come from inside our own homes.

In 2007, excessive lead levels were detected in a wide variety of children's toys. Up until that point, those products which ranged from Thomas the Tank Engine toys to Winnie the Pooh playset were assumed to be safe. But when it turned out they were not, the Consumer Product Safety Commission launched a massive recall. All tolled 17 million products were collected and entrepreneurs played a critical role in getting them off the shelves. Needless to say, these small business owners wanted to protect their customers. However, what they didn't want—and what they couldn't afford—were the economic consequences of doing so and in the end they suffered heavy losses and economic consequences they could not afford.

To help ensure this type of massive recall never happens again, President Bush signed the Consumer Product Safety Improvements Act into law in August 2008. While the law was intended to protect

our children, it has done less to accomplish that than to hurt small businesses all across our country. In today's hearing, we are going to examine the impact of that law on entrepreneurs and discuss ways to ease that regulatory burden.

Now recalls are never easy. Small firms already operate on tight profit margins and additional outlays for destroying products and reimbursing retailers can often be devastating. Under the new law, small businesses are required to conduct costly product testing and use pricey new tracking labels. These requirements are well intended and good in concept, but their utility has yet to be seen. And what's more, they are extremely expensive for small businesses to comply with.

Even the Consumer Product Safety Commission has admitted that the cost to small business might be crippling. In fact, the Commission estimates entrepreneurs will end up paying billions of dollars just to comply with the new regulations. For small manufacturers, product testing alone can cost hundreds, if not thousands of dollars, per item. The process of testing the 233 various components in a child's bicycle, one bicycle, might run close to \$14,000 for one.

Manufacturers are not alone in shouldering these costs. Small retailers—from toy stores to clothing shops—have also been affected. They are now saddled with countless items that they can't sell and according to the Toy Industry Association, the new law has led to inventory losses which will reach close to \$600 million.

At a time when with the retail and the manufacturing industries are struggling these outlays might very well be the straw that breaks the camel's back. Obviously, we need to protect our children. We all support that. But we need to do it in a way that makes sense and doesn't cripple our small businesses.

Fortunately, the Consumer Product Safety Commission, we believe, does have the authority to be flexible with these small firms. This is critical, particularly when it comes to product testing. For instance, it allows the rubber for a toy doll to be pretested at the rubber plant rather than the doll factor. This would go a long way. This kind of component analysis could reduce costs without compromising safety.

Protecting our children is all of our top priority. It is extremely important to consumers to have confidence in the products they buy, and the Consumer Product Safety Act was intended to provide that confidence. But rather than streamlining and improving the process, it's added a crippling new level of complexity. As small firms continue to grapple with obstacles like restricted lending and tightening credit, we shouldn't be creating more roadblocks for those same small businesses.

I'd like to thank all of today's witnesses in advance for their testimony and when—unless—Mr. Thompson, do you have an opening statement? I will, without objection, allow Ranking Member Fallin the opportunity to provide her opening statement when she arrives.

So at this point I will turn to the witnesses and our first witness, thank you for being here is the Honorable Nancy A. Nord. She's the Acting Chairwoman of the United States Consumer Product Safety Commission. She was appointed by President Bush for a term that expires in October 2012. Ms. Nord formerly served as General

Counsel of the White House Council on Environmental Quality and is counsel to the House Commerce Committee. Thank you for being here, Ms. Nord, and welcome.

**STATEMENT OF NANCY A. NORD, ACTING CHAIRMAN, U.S.  
CONSUMER PRODUCT SAFETY COMMISSION**

Ms. NORD. Thank you, Mr. Chairman, for calling this important hearing. I'm delighted to be here to talk with you about the efforts that my Agency has made to implement the CPSIA. My written statement provides an overview of the Agency and the details of the Agency's activities in implementing the new statute. So therefore, what I'd like to do with my time that I have with you is to first of all tell you what we did to inform the public about the new law. Second, what we learned along the way. And third, what we see as the issues going forward, especially as they impact small businesses.

First, what we did. I first have to say that the CPSC staff has just been tremendous since the Act was signed into law last August and I can't praise their work highly enough. But they were operating in an extremely difficult environment right from the start. The Act was a very significant rewrite of our statutes and it required that we begin promulgating regulations very quickly. The first rule had to be finally promulgated within 30 days of enactment. So we really had to begin our implementation with absolutely no time to train our employees into the nuances of the new statute.

Even though the Act doubled the workload of the Agency, we began with no additional funds, no new resources for a period lasting over seven months which was the critical first period of implementation of the Act. We also already had a very full safety agenda that had been planned for this coming year. So the new Act's requirements were layered on top of that important safety agenda.

We took very seriously our obligation to educate stakeholders about the requirements of the new law. In the first month alone, we began a series of public meetings first providing an overview of the Act with later ones addressing specific topics that had fast-approaching deadlines, the testing and certification requirements, the phthalates ban, the lead ban, altering vehicles, books, apparel, to give you just some examples.

We developed a special website dedicated to the Act which includes automatic updates to the public. We developed a plain English summary of the law's most relevant provisions and posted that summary on the website. We began what is now a list of over 100 plain English answers to Frequently Asked Questions.

We've also issued guidance documents on numerous topics. Some of those that are particularly targeted to small businesses, resellers, and home crafters. Our small business guide got 365,000 hits on our website the first month that it was put up. Okay, so what have we learned? As we worked to educate both consumers and businesses, it became apparent that many—is this on?

It became apparent that many of those impacted—somebody does not want me to talk. It became very apparent that many small businesses, in particular, were not well aware of the requirements of the law, the implications for the businesses, or the fast-ap-

proaching deadlines. And throughout the fall and the winter, as we heard more and more from small business people and learned about the problems that they were encountering with the law, the staff really did search for ways to provide some relief for them. But we were hamstrung by the law's sweeping reach and the inflexibility of the law.

Just to give you a couple of examples, first of all when the House passed HR 4040 which is your version of the bill, you had a small business exemption in your legislation that allowed us to push back dates. That provision was taken out in the conference. Hence, we lost our ability to be flexible with respect to small business implementation.

Perhaps the most onerous impact on small businesses, resellers, and thrift stores is caused by the lead and phthalates ban being retroactively applied to inventory. What I mean by that is that the law impacts not only products manufactured after the effective date, but it impacts products sold after the effective date. And this retroactive effect makes illegal on February 10 of 2009, inventories sitting in warehouses, products sitting on store shelves, that were perfectly legal when they were made and that nobody has alleged to be unsafe.

The staff tried to address the retroactive effect of the law with respect to phthalates where the law, we thought, gave us a little bit of wiggle room, but we were overturned by the Courts just before the effective date of the law. The law also gives us very little ability to grant exclusions from its provisions, even for products that are scientists do not believe present risks of injury.

Because we don't have the ability under the law to craft common sense solutions to the problems that we are now seeing, the Commission has used stays of enforcement as pressure valves to provide some relief for certain products and for the testing and certification requirements of the law.

But we know that these stays of enforcement are now solutions. Instead, they are time outs for everyone. Businesses, consumers, the CBSC and also for Congress, and these time outs are meant to allow the CBSC and the Congress to address the growing list of unintended consequences that we are seeing coming out of this law. But it is important to remember the stays of enforcement are not solutions, permanent solutions to problems. Even if a provision, if the enforcement is stayed, the underlying liability stays in effect.

Okay, so what do we see going forward? Having met every single deadline that was in the statute over the last, over the first six months of implementation, having advanced over 40 rulemaking activities to date, we do know that much work lies ahead of us. And let me just give you a bit of a flavor of some of the problems that we see on the horizon as they impact small businesses.

The first is August 14th of 2009 when the issue of retroactivity will occur again as even lower limits on lead content go into effect pulling into the law's reach, even more children's products. And this is where you're going to see the impact on books and bicycles. Permanent tracking label requirements also go into effect on August 14th which will have a particularly hard impact on home crafters. Next February, small businesses will be facing testing and certification requirements when the stay of enforcement ends.

What can be done to improve the situation to still protect consumers which is what the law was intended to do and the mission of our Agency, and yet help small business owners survive under the law? Attached to my written statement is a list of legislative recommendations from the CPSC career staff that would go a long way towards helping small business people while maintaining the health and safety standards and enforcement activities that are at the core of our safety mission.

Thank you for holding this hearing today. This is the very first hearing on the Act's implementation and I want to have a dialogue with the Congress so that we can work together to address the law's real-world problems by finding common sense solutions.

Thank you so much.

[The prepared statement of Ms. Nord is included in the appendix.]

Chairman ALTMIRE. Thank you, Chairwoman Nord, and we know that you, like every Member of Congress have been inundated with questions about this and impact statements and we're very happy to have you here to have this discussion.

At this point I would yield to the Ranking Member, Ms. Fallin, from Oklahoma, for her opening statement, following which we'll do the questions.

Ms. FALLIN. Let me just say thank you to our Chairman Altmire for holding this hearing and working with us on the issue that's very important to our small businesses around the United States. And Chairwoman Nord, I appreciate your comments today. I appreciate the awareness that you have of the situation facing so many of our businesses throughout our nation and the challenges that this Congress have given you with the law itself and some of the recommendations that you've made to try to resolve this issue. And hopefully, within this panel and this group and our legislative body, we'll be able to draft some legislation. That's my hope, Mr. Chairman, that we'll be able to address these issues.

We have called this hearing, of course, to examine the Consumer Product Safety Improvement Act on small business and it is a very important issue for all our manufacturers, distributors, and sellers of goods aimed at children under the age of 12. The federal law and regulations adopted last year were meant to ensure that our children were safe from toys that they play with and clothes that they wear, however, there are unintended consequences that this well-meaning legislation that do severely impact many of our small businesses that produce children's products, not only overseas in factories, but also right here in the United States.

I'd like to extend a personal thank you to all of our witnesses that have joined us here today on our Subcommittee and to welcome you and we look forward to hearing all of your testimony and your personal experience with how this all has affected your small business and manufacturing and especially to give a welcome to David McCubbin who is from my home state, my home town, a long-time personal friend of mine and he is the owner and operator of McCubbin Hosiery in Oklahoma City.

In 2007, toy manufacturers had to recall over one million toys that violate the standards concerning lead-based paint. The toys re-

called included well-known children's products associated with things like Thomas the Tank Engine, Barbie Doll, Dora the Explorer, and obviously parents were rightfully outraged about the danger to their children and prompted Congress to pass a Consumer Product Safety Act in 2008. Most of the lead in these cited toys came from overseas toy manufacturers and although the law harshly affects many of the American businesses that also produce toys, the CPSIA prohibits the sale and distribution of a product for children under the age of 12 if it contains more than 600 parts per million, as we've talked about, of lead in February of 2009. And of course, that will drop to 300 parts August 14th. And to ensure this compliance the Act requires the manufacturers to certify their products meet these standards through independent lab testing.

Given the many concerns of small businesses across the country and their ability to meet these strict requirements in a short time frame, the Commission did ease the enforcement of the regulations for one year, but it ended February 10th—it will end February 10, 2010. This stay, as you mentioned, is intended to ease some of the problems facing our small businesses, but it is by no means a cure-all. We do need a resolution to this and though the Consumer Product Safety Commission may not take punitive action against anyone selling the product with more than 600 parts of lead, others may choose to enforce the law, as you also stated. So there's still liability to many of our manufacturers and small businesses. An example of that is that a State Attorney General may take legal action if they find a business has produced, distributed, or sold a product for a child that exceeds the lead limit. So small businesses and owners are thus forced to incur large costs of testing their products or risk punishment in the future if their products do not conform to these standards and that has been exacerbated for small business retailers who, unlike manufacturers, are not yet required to certify lead content of products. So the retailers who do not test for lead are still subject to these restrictions on selling a product containing lead, even though they lack the ability and resources to determine if their products contain it.

So cost of testing is going to be upwards of tens of thousands of dollars for small retailers and just to make sure that only a few of their products don't fall below the minimum requirements. And of course, at a time when our economy is suffering and a recession is here and people watching their bottom line trying to make a profit, keep their employees employed, this is certainly not good news for small businesses. So I think it is very imperative that we look at federal law changes to ensure that we do have a healthy environment for our children and their products and their toys, but also to have a regulatory structure that can co-exist and does not have unduly burdensome regulations upon our small businesses and especially our manufacturers.

So I look forward today to having our witnesses and their testimony and hearing their recommendations, Mr. Chairman, that they have. Thank you so much and once again, I look forward to working with you on legislation and I'll yield back my time.

Chairman ALTMIRE. Thank you, Ms. Fallin. We should be able to get through the four of our questions. We each have five minutes before the vote is called, which is good. I want to note the presence

of Congressman Ellsworth from Indiana and Congressman Thompson from Pennsylvania. I thank each of you for being here as well.

I just first wanted to ask your opinion as someone who is literally at the tip of the sphere on this issue something that we've all heard so much about. And you think about this and work on this every day. Is it your opinion that the impact that this law has had on small businesses, the issue that we're talking about today, is this an unintended consequence of the law that was passed or is this what we were trying to achieve in passing the law?

Ms. NORD. I cannot for a moment believe that Congress intended to make billions of dollars worth of products that were sitting on store shelves, sitting in warehouses, on container ships illegal even though nobody is alleging that they are unsafe.

The biggest problem I think for small retailers and for resellers of products is the retroactive effect of the law that sweeps into its effect, products that were manufactured well before the effective date and were manufactured to meet the laws as they existed at that point.

Chairman ALTMIRE. And we believe that the law specifically gives the Commission the authority to exclude products from the lead limits that clearly do not pose lead ingestion risks. So do you agree with that, and if so, why hasn't the Commission taken specific action to exclude more products?

Ms. NORD. I wish that the law did give us that flexibility. I think that flexibility is needed. Unfortunately, the law was written in a very deliberate way not to give us that flexibility. We brought this to the attention of Committee staff during the conference drafting process and were told very specifically that that flexibility was not intended.

The way the law is written, we do not have the flexibility to exclude many products that our health scientists really feel do not pose a risk of injury, but which may have lead above 300 parts per million content.

Chairman ALTMIRE. The small businesses, as we all know, bear disproportionate share of federal regulatory burdens to begin with, before discussing this law and they don't have the compliance resources of their larger counterparts and I was wanting your opinion, Chairwoman, on this law. Is it placing small businesses at a disadvantage compared to their larger competitors? And if so, is the Commission doing anything to level the playing field, given what you have to work with the letter of the law?

Ms. NORD. I do think that this law is putting small businesses at a disadvantage. I have had informal conversations with many, many companies around the country. I do hear from large businesses, that they are changing their ways to try to accommodate the law. I am hearing from large retailers that they are sending back product early to make sure that everything on store shelves complies with the law. So those bigger companies are working to accommodate themselves to the law, but there are some things in the law that have a particularly adverse impact to small businesses, the retroactivity provision that I just mentioned, the fact that we cannot really do risk assessments and tailor our regulatory approaches to look at real risks. I think that impacts small businesses as well. There are a number of other things that are set out

in my written testimony, but yes, I do think we need to figure out a way to make sure that this law fulfills its objective to help consumers without undue adverse impact on small businesses.

Chairman ALTMIRE. Thank you. I will not turn over to Ms. Fallin.

Ms. FALLIN. I appreciate your comments about the lack of flexibility to exclude products. Does the Commission have the sufficient authority under the law to exempt producers of textiles and textile products from the lead testing requirements in the Act? It's your opinion that you do not?

Ms. NORD. Well, what we have done with respect to a category of products that includes natural textiles like wool and virgin wool and cotton and that kind of thing is we have rather pushed the limits of the law and said we are going to exclude them from the testing requirements. So that's natural fabrics.

We've also included certain kinds of other products that by definition don't and cannot have lead, but that's really as far as we can go.

Ms. FALLIN. Okay, and how does the stay of enforcement on testing and certification requirements help the retail and wholesale industries since they are so liable under this Act, if they do have goods that exceed the lead limits and are subject to the enforcement actions say of Attorney Generals?

Ms. NORD. Well, as I mentioned stays of enforcement are not the optimal way to regulate or to enforce laws, but it was really the only technique that we had available to us. We were hearing from many, many small businesses that they just were not ready to start issuing certifications, especially certifications based on the testing requirement of the law. That is a very stringent requirement. It is going to be very expensive. And it was just very clear that people were not ready to meet the requirements and the time lines in the law. So we did a stay of enforcement, but we made very clear that we don't have the authority to stay the underlying requirement of the law. So they are still liable, potentially, if they sell something that has more than 600 parts per million of lead in it.

Ms. FALLIN. Madam Chairman, according to the authors of the legislation, the authors believe that the Commission has sufficient authority to rectify the concerns of small businesses. What is the legal basis for the Commission to arrive at a different conclusion than this?

Ms. NORD. I've heard that said. What isn't said is any examples of where in the law we have that flexibility. Instead, we can point to many examples where we explicitly don't have the flexibility. And again, as we worked through the drafting process during conference, it was made quite clear that flexibility was not what was being granted to the Commission. I can go through and give you any number of examples of where the Commission's authorities have been cabined so tightly that we really cannot respond to the real world situations that are coming up. And I think that is unfortunate. It is impacting small businesses much more adversely than others and it really doesn't advance product safety.

Ms. FALLIN. Would you please provide the Committee examples in writing where these restrictions keep you from doing that?

Ms. NORD. I would be delighted to do that.

Ms. FALLIN. That would be great for us to have it in this Committee. Thank you.

Thank you, Mr. Chairman.

Chairman ALTMIRE. Mr. Ellsworth.

Mr. ELLSWORTH. Thank you, Mr. Chairman, for holding this extremely important hearing. And I thank Ms. Nord for being with us here today. If my information is correct and we're talking about unintended consequences, if my information is correct, all but one Member of the House of Representatives voted for this legislation, so I would have to assume that minus Dr. Paul, we all didn't have the intended consequence of hamstringing small businesses and large businesses as a matter of fact. I know that it wasn't directly after this vote that I went home and met with folks in my District from shoe distributors that were concerned that children were going to be chewing on their parents' shoes, from a sporting goods company that made foosball tables that the little men on the foosball table were afraid a two-year-old was going to crawl up there and chew on the foosball men, and many other examples of that. That's not the intended consequence of this legislation, like you said. Everyone wants to protect our children, but we have hamstrung many businesses.

One of the things that concerns me, Ms. Nord, is what you said earlier, and it seems to be rampant here is that we implemented this legislation and gave you no time to train and I applaud you for doing the plain English explanation because that's another thing I hear a lot about is that when people deal with the Federal Government, our regulations, it is less than understandable terms, so I appreciate that.

I'd like you, at some point to look at House Bill 1465. We filed that in March and look at that, if you would and see if that answers some of the questions and concerns. We filed that with the help of the NFIB to address some of these concerns and I would encourage the Members of the Committee, if they haven't looked at that already to look at that. It has not received a hearing, but we hope to forward that.

What are some of the things again, in plain English, if I can speak plain English, that you're hearing from small businesses and large businesses, just bullet point the biggest concerns and how we might rectify that. If it's top three, top five, whatever you think you can do.

Ms. NORD. The top thing that we hear is the rather perverse effect of the retroactivity provisions which renders existing inventory illegal. And we are then forcing people to either destroy inventory, test and determine what its contents are, or violate the law. And I think that is just—you shouldn't be putting business people in that position.

Secondly, the law does not really give us the flexibility to respond to real-world situations and real-world problems that we are hearing. Our flexibility was removed. We asked, for example, certification and testing authority, but what we got was something so constricted that we really don't have the ability to move within the provisions of the law to structure something that makes sense for business sellers and small business people in this country.

So more flexibility needs to be given.

I think if you address those two things, as well as several of the other things that are in my written statement, you can have a law that really carries forward the principles that you wanted when you passed the CBSIA and that the Agency wants. Our mission is to protect consumers. That's what we're about, but we don't want to be putting people out of business for selling water wings with excess amounts of lead when we all know that nobody is getting lead poisoning from swimming in a pool with water wings. Or bicycle tire valves that have excess amounts of lead, excess above the law limits, but where nobody is getting lead poisoning by filling their bicycle tires with air. These things are preposterous. The law shouldn't operate in that way. And I think if Congress would give us back the flexibility that was removed from the expert Agency here, we could craft this in a way that makes some sense. I'd like to work with you on your legislation.

Mr. ELLSWORTH. That would be great. And could you touch, briefly, I know they're getting down to that where we can run over there in a few minutes, they might hold it open just a little bit longer than 15 minutes. I've seen that done.

Touch on the secondhand shops, I guess the chain, when we're going to secondhand shops, flea markets, if you could touch on that and the implications there as it goes down the chain what your views are on that?

Ms. NORD. The secondhand shops, charity shops, provide such a value to our society, especially right now. And they have been impacted by this law in a rather unique way and again it's because of the retroactive effect, making it illegal to sell things that don't meet the lead limits as opposed to manufacturing products after the effective date that don't meet the lead limits.

So you've got charities and thrift shops that bring in unique products. They don't have any way of knowing if those products have lead or phthalates. We've given some guidance, but it has to necessarily be general guidance. So they are in the really unfortunate position of either having to decline to sell these things, remove them from inventory and destroy them, or take their chances and possibly break the law. And we're talking about useful products. We're talking about children's clothing.

Nobody has ever brought to my attention a child being poisoned by wearing a pair of kid's dungarees with a metal zipper or wearing a shirt with a pearlized button. These things may have more than 300 parts per million of lead. They don't necessarily pose a risk of injury. And we have put resellers at legal risk because of the retroactive effects of the law. I think that's wrong.

Chairman ALTMIRE. Let me cut it right there, so we can give Mr. Thompson from Pennsylvania the opportunity.

Mr. Thompson.

Mr. THOMPSON. Well, first of all, thanks, Chairman Altmire, Ranking Member Fallin for putting this into the Subcommittee for this very, very important discussion and Chairwoman Nord, we really appreciate your being here, your testifying and frankly, your remarks reflecting on kind of a common sense attitude with this. I find that refreshing for this town.

I do have—you talk within your top five issues that were brought to you and one of those was existing inventory in terms of problems

faced by small businesses. The folks I've been hearing from, however, in fact is that a problem that's being raised by a number of small businesses, in fact, many on the next panel, I believe, that the biggest problem involved the testing of components that have no lead in them, or affixing permanent labels to children's headbands and hosiery.

How would you respond to those businesses, any thoughts on that issue? The inventory, obviously, is significant, but frankly, this is a problem going forward as well.

Ms. NORD. Yes, I think component testing could be a very, very useful tool for us and for small businesses. The problem is that the way the law is written, the testing requirement falls on the producer of the children's product, not on people that make the component parts because buttons, by their nature are not necessarily children's products. When you put them on a child's dress, then they become a child's product. So the person who makes the dress is the person who is under the law required to do the testing. So I think that's one area where we could do some fine tuning of the law to clarify how we're doing to deal with component testing.

The other issue is permanent tracking labels. The law does require that they go on all children's products on August 14th. Now the law was written in a very interesting way because it interjected a bit of ambiguity into it because it says that they need to be put onto to the extent practicable. The Agency had a hearing yesterday. We are in the process of developing guidance. I know it's somewhat late, but we are doing the best we can to get it out, but again, we want to be reasonable here. I want to be focussing with respect to the tracking labels on products that are dangerous; that we've had a history of recalling, like baby cribs. We're frankly not real interested in kids' headbands or stockings, but the law doesn't allow us to make those cuts and that's really what we need.

Mr. THOMPSON. Thanks very much. I yield back the balance of my time, Mr. Chairman. Thank you.

Chairman ALTMIRE. Thank you. I recognize the gentle woman from Pennsylvania, Ms. Dahlkemper.

Ms. DAHLKEMPER. Thank you, Chairman. In the interest of time and the fact that votes are being called I have a statement that I would just ask that there be unanimous consent to place in the record, along with a letter that I have written to Chairman Waxman and the Honorable Joe Barton.

Chairman ALTMIRE. Without objection, thank you.

Thank you, Ms. Nord, for being here.

Ms. NORD. Thank you.

Chairman ALTMIRE. We are going to adjourn for a vote. We have a series of five votes, so we're going to recess the Committee until 11:30 a.m.

Thank you.

[Off the record.]

Chairman ALTMIRE. We will reconvene the hearing. I ask the witnesses for the second panel to come forward. To explain the voting system, you will each have five minutes to give your remarks. As indicated by the lights that are in front of you, when you see the yellow light come on, you will have one minute, so please start to summarize your remarks at that point and the red lights means

you have exceeded your time, please wrap up your thought at that moment and then we will move to questioning after all of you, as a group, have spoken.

So I will introduce the first witness, Ms. Laurel Schreiber, who is my constituent and friend. Ms. Schreiber is owner of Lucy's Pocket in Allison Park, Pennsylvania. Lucy's Pocket sells a variety of children's clothing, as well as embroidered baby items such as bibs and blankets. Ms. Schreiber sells her products both online and in her store. Welcome, Ms. Schreiber. Please turn your microphone on.

#### **STATEMENT OF LAUREL SCHREIBER**

Ms. SCHREIBER. Thank you for the opportunity to speak before you today about the effects of the CPSIA on business. My name is Laurel Schreiber and I have a small home-based business called Lucy's Pocket. I sell monogrammed gifts for children through my website.

As the CPSIA now stands, I as well as thousands of crafters, seamstresses, artists and others who market safe, hand-made items for children under the age of 12 will be put out of business. As small business owners, we are looking to you to make legislative changes that will allow those of us who have been creating safe items to continue doing so.

As it relates to my business, there are two major and substantial problems with the CPSIA as written: the redundant testing requirements and the comprehensive labeling mandates. All of the items I sew onto, or make myself, are made from commercially-available textiles, ribbons, threads, and other materials. They come from wholesale suppliers as well as retail stores. A majority of the items I purchase from wholesale suppliers have General Certificates of Conformity which attest that the items have been tested for lead and/or phthalates and have passed those tests. I also purchase items from large retail stores who are unable to provide GCCs, although they have tested their products prior to placing them on their shelves.

Due to the CPSIA, I will have to test each individual item prior to selling it. And though an enforcement stay for testing has been issued for textiles, there is no guarantee it will not be rescinded at a later date. The enforcement stay does not include items with buttons, snaps, zippers, or other non-textile parts.

In order to have my one-of-a-kind items tested, I will need to create two identical items, the wet method used to test for lead destroys the original. From the testing companies I have contacted, the cost to me is about \$75 per component. A component includes the fabric, and thread and any other material that makes up that product.

I have brought several examples of my work to show you how this expensive redundant testing will put me and those like me completely out of business for good.

One of the most popular items is an appliqued bib and bloomer set. The basic set contains at a minimum 12 components. The components include four threads, two dyed fabrics, a two-part Velcro closure, elastic, poly cotton fabric, 100 percent terry cotton fabric, and 100 percent cotton binding.

To test those 12 components will cost me \$900 to prove that the bib and bloomer set don't contain lead. If I use a plastic-backed bib purchased from a retail store then I will need to add an extra \$375 to prove that it doesn't contain illegal phthalates. So testing for that set will range from \$900 to \$1275. It sells for \$20.

I also create monogrammed hairbows. They consist of a metal clip, two types of thread, and ribbon. I have GCCs on file showing that the importer has tested the clip and it is free from the lead level. It will cost \$300 to test that bow which sells for \$5.

I create monogrammed headbands which we had talked about earlier. The headband is made of plastic so it had to be tested for phthalates as well as the other components for lead. As with my other items, I have GCCs on file from the importer showing the headband does not contain the illegal phthalates. To test the components of the headband, plus the phthalates, will cost \$675. It sells for \$9.

Because each of my items is unique, I'm unable to batch test. Redundant testing is not necessary. The air in my house, the sewing table I work at is not lead infused. It's not lead filled. Items coming out of my home will not be contaminated with lead. I say material coming in will go out as a safe product.

If the redundant testing requirements will put me out of business, the labeling mandates would. As of this August, each and every item going out of my studio must contain a permanent label that contains information like the source, date of manufacture, and batch. For a business that creates one of a kind items and less than 5,000 or so a year, this is an unnecessary hardship. Permanent labels are not technically feasible for many of my items. And procuring permanent labeling supplies is an incredibly expensive proposition.

My business is a way if I were to find out there were problem issue, I could pick up the phone and call my customers.

I and many others like me started creating hand-made items as an antidote to mass-produced, possibly unsafe toys and clothing originating from China. Many of us have young children. We are very aware of the dangers of lead poisoning, but we use safe materials and we create safe products. We're willing to alter our methods to ensure compliance, but with the way the law is written we'll be forced to shut down completely.

We're asking for common sense of the law. We've written letters and faxes, made calls. We're safe. We just want to be legal. But the unintended consequences of the CPSIA are showing that this would be absolutely impossible. I'll have to close my doors and once I close I'll not be supporting my suppliers or other businesses and they may not be affected hugely by my loss, but there are a lot of businesses like me. So once you start multiplying the effects it becomes fairly apparent that CPSIA is going to absolutely kill the hand-made industry and the ramifications are going to be beyond definition.

[The prepared statement of Ms. Schreiber is included in the appendix.]

Chairman ALTMIRE. Perfect timing. Thank you, Ms. Schreiber.

The next witness will be introduced by Representative Thompson.

Mr. THOMPSON. Thank you, Chairman. Actually weeks after I came to Congress I had a meeting in my District Office in Bellefonte, Pennsylvania and the woman that I met with described her entrepreneurial aspirations in really a unique and innovative start-up company she created. And while her company was growing there was an unfortunate setback that had her doubting the future of her business. And it was brought to my attention that the Consumer Product Safety Improvement Act which passed unanimously in the 110th Congress as a result of lead contaminants in children's toys had unintended regulatory consequences that placed undue restraints on everything from product development to expansion.

And my constituent went on to explain that if the materials she used to make her products were not tested by a third-party laboratory, she could be in violation of the law and this testing would have grave financial ramifications on her product line.

This seems to be counter-productive, mainly because her source material was purchased from retail outlets that already certified the goods. My constituent explained as a mother, she wanted our children to be safe and she did everything to ensure that with her business.

I'm certainly confused as to how this law, and in turn, regulation set into place by the Consumer Product Safety Commission could place such a burden and disincentive on a budding entrepreneur and Mr. Chairman, I really appreciate your assistance in having Suzi Lang, owner of Starbright Baby teething giraffes join us today, one of my constituents. Suzi Lang is a former kindergarten through 12th grade art teacher, also trained as a graphic designer, a photographer, and she produces she's stuffed teething and toddler giraffes that are sold online and wholesaled to baby boutiques in both the United States and Canada.

Welcome, Ms. Lang, and we look forward to your testimony.

#### **STATEMENT OF SUZI LANG**

Ms. LANG. Thank you very much for having me here today. As the mother of a 2-year-old, I admire Congress' efforts to draft a law that protects children from excessive amounts of lead in toys. Unfortunately, the law, as it is currently written, will heavily endanger small businesses and entrepreneurs who make and sell items for children in this country. I do not believe the law is fatally flawed, however, I think the injection of some common sense provisions would more effectively ensure safe products for children and prevent irreparable damage to small business.

The reason I am giving my testimony is because that I, along with several business owners, are afraid for what the CPSIA means for our business and the important amount of income it brings into our families. Specifically, my business consists of fabricating and selling these soft little teeth giraffes for babies. I'm not affiliated with any groups. I'm here on behalf of my own business, however, I'm using the resources that I have to advocate for small businesses, many of whom rely on this income to sustain their families.

A few of the major problems that this law presents to my business are unit testing, the tracking and labeling requirement and the fallacy of assuming that everything is toxic until proven safe.

Unit testing is cost prohibitive for many small businesses, including my own. I make very small batches of these giraffes, usually about ten per fabric choice. I also make one-of-a-kind and custom items for my customers, using their own fabric or fabric from my collection. My giraffes would be required by this law, as of February 10, 2010, to be tested for both lead and phthalates. I contacted a research, a lab close to my home in Harrisburg to quote for lead and phthalate testing. For the lead testing I was quote \$50 per component and for each giraffe there are four to five components. Cumulatively the total cost for testing one fabric line of giraffes would be anywhere from \$1800 to \$2200. That's also adding in the \$400 per component for the phthalate testing. My giraffes usually sell for about \$14 to \$18 each, depending on the kind of fabric that I use and the added cost of testing would add another \$180 to \$225 per giraffe. For a one-of-a-kind item, the price would have an additional \$1800 to \$2200 price tag tacked on to a \$14 charge. This is extremely cost prohibitive for my customers.

Considering that the law specifies that if I change any component, it would need to be tested again. I created 36 different patterns of giraffes in 2008. So the total cost of lead and phthalate testing would be \$64,000 to \$81,000. I actually only made \$4500 gross last year. The deficit the testing would create would more than put me out of business. It would bankrupt my family.

Another aspect of the law that affects my business is the tracking and labeling. The law says that it is to be to the extent practicable, but I question how this could be done by any home craft seller or small business. Each lot needs a new tag and it would force me to have to make my own labels because I would never be able to meet the minimum for the label companies that I use to print the labels that I have now. Because my giraffes are only ten or fewer or sometimes only one, it would never be practical.

The most disheartening thing for me as a small business is the assumption that the law is everything bad and dangerous until proven safe. Especially since many of the materials I use are proven to have no phthalates, no lead, fabric is all I'm using, quilt fabric, cotton fabric. Many small businesses do not purchase their fabric wholesale, but instead buy it from local fabric or quilting shops. In this setting I can buy one yard of fabric from my local shop, make my giraffes, have to have them all lead and phthalate tested and my neighbor can go buy the very next yard off the bolt of fabric, make baby bibs, try to sell them, and she would also have to lead and phthalate test the very same fabric from this very same bolt which is not very—pretty much nonsense.

The most problematic thing for me is to have to phthalate test this item since it's a teething item. It's required under the law to be phthalate tested, but it's entirely made out of cotton fabric. When I contacted the lab to get quotes, they asked me how they would have to be able to do this since the CPSIA said to grind the toy to get a sample to test, but there's no grinding on a fabric giraffe. I don't think he would survive.

There are so many unintended consequences of this law that thousands of small businesses and crafters will be put out of business in this already tough economic climate.

Thank you very much.

[The prepared statement of Ms. Lang is included in the appendix.]

Chairman ALTMIRE. Thank you, Ms. Lang.

Ms. Susan Baustian is Director of the franchise Once Upon A Child located in Minneapolis, Minnesota. Once Upon A Child are independently-owned resale businesses that purchase and sell used and new children's clothing and merchandise. Franchised in 1993, these stores have become a rapidly-growing component of the Winmark Corporation family of brands.

Welcome, Ms. Baustian.

#### STATEMENT OF SUSAN BAUSTIAN

Ms. BAUSTIAN. Thank you, Chairman Altmire for having me to testify today.

My name is Susan Baustian and I am the Director of Once Upon A Child Stores for Winmark Corporation. Today I'm speaking on behalf of our hundreds of stores in what we call the industry of gently-used products.

Winmark Corporation owns two franchises that have been in business for over 20 years; Once Upon A Child, a store selling used children's goods and Play It Again Sports, they sell new and used sporting goods, that have been significantly impacted by this bill. Although our company headquarters are based in Minnesota, we have over 520 franchises across the country. What that amounts to is over 500 store owners worrying about whether or not they comply with the law, 5000 employees scrambling to figure out how to comply and over 200 vendors feeling they do not have the resources to test their products to ensure that they comply with these new standards. Last year alone, our two brands serviced over 7 million parents that are now confused as to what is safe or not for their children.

The ill-executed implementation of this legislation has brought fear into the industry, and that fear, especially in economic times like these, can bring a halt to successful and productive businesses. Our franchises have a lot on the line that is driving this fear. Most of them have business loans where their homes are on the line. They have a family in which their business provides for, and they have a strong sense of giving back to the community in that they are being at the forefront of recycling. They buy and sell product that children no longer use or have outgrown. They are fearful that the CPSIA will force them to give up their American dream which is owning their own business.

I think what is really unfortunate about this debate over the CPSIA has led to finger pointing on an issue that we really all agree, that we want to ensure the safety and protection of our children.

Our store owners have dedicated their lives to providing safe, fun, and educational products for children of all ages, and are now

having to rethink how they can continue to offer these products without violating the law.

We want to work with the Consumer Product Safety Commission to comply with this law, but the guidance issued thus far has been difficult to understand for many of our store owners. We do not want to have to shut our doors over legislation that we all agree could help children if implemented in an effective and productive way, but we need the help of the CPSC and Congress to clarify what is required for our store owners.

The CPSC has come out and stated that resellers such as Once Upon A Child and Play It Again Sports, as well as Goodwill, Salvation Army, ARC, Church organizations, garage sellers, consignment stores, anybody that has a small business that does resell items, do not have to test products, but our businesses are still liable if those products with banned substances are sold.

The CPSC recently produced a Handbook for Resale Stores and Product Resellers with the purpose being and I quote, "to help identify the types of products that are affected and to understand how to comply with the law, so you can keep unsafe products out of the hands of consumers." Unlike the information that the CPSC supplies regarding recalls which is a very specific list by brand and model number, the handbook is too general to effectively determine which products are safe to buy and sell.

For example, on page seven of the handbook, it indicates and I quote that "items made of wood (without paint, surface coating or hardware) are OK to sell." It also indicates that and I quote again, "clothes with rhinestones, metal or vinyl/plastic snaps, zippers, grommets, closures or appliques are best for us to test. We can either contact the manufacturer or we should choose to not sell them." Unlike retailers of new products, our franchisees across the country really have no idea how to determine if the painted blocks, toy trucks, dolls, stuffed giraffe, or anything else that they're bringing in and they're buying and reselling contains lead paint or are made up of dangerous lead components or toxic plastics.

It will be a violation of the Act to sell an item that is known to have more than the acceptable limit. This violation can be a fine of \$5000 for each violation, and that fine increases to \$100,000 on August 14. Being that the handbook gives us only guidance on determining which items are safe, the only way to be certain would be to test the product. However, being each piece that is bought and sold is unique, it would be very costly to do that. With a house on the line, a family to care for, and a potential liability to deal with, fear has really taken over for many of our retailers.

Last year alone, Once Upon A Child paid families \$45 million for children's items that we purchased for resale which generated \$120 million in sales for our franchisees. For families, the money that they receive from selling these children's items can be used to supplement the parents' income or maybe used to buy items for their children that they may otherwise can't afford. For business owners, this income helped provide for their family. But now, many business owners and parents are worried they won't know when a snap or zipper contains lead, and like toys, they have no way to test these items.

If there's really one thing that's become clear through this process is that we as an industry need more guidance and we need more time to sift through inventory, understand the new regulations and find cheaper, more efficient ways of testing products. For my industry, it's critical that we are able to understand how we can better sort through the inventory and confidently buy and sell children's items without fear of selling something that is unsafe for a child or facing consequences of violating the Act.

We need to know specifically what items are deemed unsafe for our children. I thank you for calling this hearing today on the impact of this bill.

[The prepared statement of Ms. Baustian is included in the appendix.]

Chairman ALTMIRE. Thank you. Mr. Anthony Vittone is Vice President and General Counsel of Swimways Corporation in Virginia Beach, Virginia. Swimways Corporation manufactures leisure and recreational water products. The Swimways brand has been around for over 35 years and can be found at major retailers and individual pool dealers alike.

Welcome, Mr. Vittone.

#### STATEMENT OF ANTHONY VITTONI

Mr. VITTONI. Mr. Chairman, Ranking Member Fallin, Members of the Committee, thank you for holding this hearing and giving me the opportunity to talk with you about the issues small businesses are facing as a result last year of the passage of the Consumer Product Safety Improvement Act.

My name is Anthony Vittone. And I am the Vice President and General Counsel of Swimways. Swimways is a small, privately-held, family-owned company headquartered in Virginia Beach where we employ about 70 hardworking Americans.

Swimways designs and makes pool toys for the water. We offer 120 different products to customers ranging from nine months through adulthood. The Swimways brand of products is sold in 40,000 storefronts with major retailers and individual pool dealers alike.

For the past 15 years, Swimways has enjoyed an average rate of growth of 15 percent a year until 2008. Unfortunately, we took a step backwards last year and that was directly attributable to two factors, the state of the economy and the passage of the CPSIA.

The CPSIA, together with the economy, created a perfect economic storm for us. Swimways' main issue with the CPSIA involves the phthalate restrictions. While we would agree that there are issues with other provisions in the Act, I plan to focus my testimony today on four issues regarding the CPSIA and the new phthalate restrictions.

The first issue that we have is the timing of the phthalate ban was in our opinion the single biggest disaster in the CPSIA. When the European Union and the State of California passed a similar phthalate ban, they gave manufacturers and retailers 13 months and 15 months, respectively, to move through their inventories. Conversely, the CPSIA, as written, only gave manufacturers and retailers five months.

For any consumer product company this would be wholly inadequate. For a seasonal company, like Swimways, the time frame was essentially nonexistent. I am sure that the Members will understand that there are not a lot of pool toys being sold in the fall and the winter. People buy pool toys when it's hot.

Furthermore, whatever time was granted in the CPSIA was completely wasted by the back and forth interpretation of the Act's retroactivity on existing inventory. The industry relied on the CPSC's General Counsel's opinion that the new regulations would only apply for inventory manufactured after February 10th. When the New York Court in February overruled that interpretation, the retailers went into a complete panic. They had four days to review their inventory to determine which products were compliant with the CPSIA and remove that merchandise from the shelves. As a result of the severely compressed time line, broad-brush reactionary decisions were made and manufacturers like Swimways were expected to absorb the cost.

The same product, if sold by a retailer on February 9, 2009, was perfectly acceptable and safe by Government and industry standards. The next day, that same product became a toxic and dangerous weapon of mass destruction.

Our second issue with the phthalates restrictions is the CPSIA included a specific legislative exemption for embedded lead. However, no such exemption was given for the significantly more benign phthalates. Swimways makes a number of products where there is no ability to access the phthalates unless the customer essentially destroys the product. These products present no risk to the consumer and should be available for sale.

Third, both the CPSIA and the California legislation permit the use of three phthalates DINP, DIDP, and DNOP, depending on the age grade of the product. The California legislation only prohibits these three phthalates for child care articles and toys that are capable of going in the mouth if they are intended for children three and under while the CPSIA forbids them for children up to 12 years.

We manufacture a product called the Rainbow Reef fish. These are battery-powered fish that swim in a swimming pool. We've sold over 7 million units of this product. Prior to 2009 the fins of these fish were made with phthalates. Even those this Rainbow Reef fish is age graded five plus, there are nearly 15,000 units of this product that are now useless and will have to be destroyed. The only reason is because those fins are capable of going into a child's mouth. They're not going to come off, but they're capable of being chewed on.

Adding further confusion to the marketplace is the exemption for sporting goods in the CPSIA. It is not clear what the definition of sporting good is and what the definition of toy is. The CPSIA has offered limited guidance, but more detailed criteria are needed. In our experience retailers are not willing to take a chance of using a broad-brush approach if it's for a kid, it's a toy.

We manufacture another product called the Spring Jam basketball and have sold over 750,000 units of this product since 2005. A large retailer had approximately 10,000 units of this product on their store shelves and they immediately removed them on Feb-

ruary 10th. We reviewed the item with them, argued that it was a sporting good, offered to sort through the inventory because some of the inventory was 2009 inventory and was phthalate-free. They destroyed it all, all 10,000 units, even though less than 15 percent of that inventory of those 10,000 units had phthalates in them. All of them were put into the shredder.

Under the California Act, these goods would have been compliant. If there had been an embedded phthalate exemption, these goods would have been compliant. Had the CPSIA allowed more time to move through existing inventory, this problem would not have occurred. The retailer is now insisting on \$100,000 credit for the destruction of the Spring Jam inventory and other retailers have destroyed other lots of the same.

I'll wrap up. I'm already over, but suffice it to say, Mr. Chairman, Swimways Corporation has incurred about \$1 million in expenses as a result of this legislation. We ask for your help. Thank you.

[The prepared statement of Mr. Vittone is included in the appendix.]

Chairman ALTMIRE. Thank you and for the video record of the proceedings for our colleagues who can't be here, can you hold that basketball up again, just for the camera?

Mr. VITTONI. Sure.

Chairman ALTMIRE. And that's what you were talking about with the 10,000 units?

Mr. VITTONI. Yes, 10,000 units of this.

Chairman ALTMIRE. Thank you. I would yield now to the Ranking Member to introduce our final witness.

Ms. FALLIN. Thank you, Mr. Chairman. It's my pleasure to introduce a gentleman from my home state, David McCubbin, who is the President of McCubbin Hosiery in Oklahoma City. He's been President of that company since 1982, but it is a family-owned business. It's been in business for 57 years, so that's a long time. They design, market, and distribute children's and ladies' hosiery and their products are sold in a number of national and regional retail outlets including Nordstrom's, Dillard's, Stride Rite, K-Mart, Payless Shoe Source and many other small, independent retailers. Mr. McCubbin started emailing me as a fellow parent, both of our children go to school together, and said Mary, you've got to help me on this. This is really hurting my business and I'm scared to death about the laws that have been passed here in Congress. Help us out.

We were able to do something, David. It's fun when you can complain to your Congressman and we can actually have you up here and hear from you and try to resolve the issues. So thank you all for coming and David, we're pleased to have you here.

#### STATEMENT OF DAVID McCUBBIN

Mr. McCUBBIN. I want to thank you for inviting me to address this Committee. The Consumer Product Safety Improvement Act of 2008, well intentioned to enhance the level of safety in the products Americans purchase for our children has had massive consequences. The legislation's broad scope has impacted thousands of

products for which the measured concerns are not material. Your willingness to review the implications for small businesses, in particular, is very much appreciated.

I was specifically asked to comment in regard to the impact of the law on our business today, the implications we anticipate in upcoming year, and recommendations I would have regarding the CPSIA.

Thus far we have been most impacted by the lead content testing requirements. Initially, we were told by industry experts, both in the U.S. and internationally, that there was no reliable lead content test for textiles engineering a scramble to execute any test that would work or be considered reliable. Reputable testing labs throughout the U.S. and Asia differed on their interpretations of what should be tested, consequently we tested all yarns and every sock at considerable expense. A sudden overwhelming demand in the testing labs resulted in delayed shipments, increased transportation costs, and strained relations with customers and suppliers.

The implications for the upcoming years, staying on Section 101 which is the lead content limits, this section classifies children's products containing more than the allowable limit of lead as banned, hazardous substances. This is a worthy and reasonable proposition, however, it has been laid upon the apparel industry in such blanket fashion without regard to any historical evidence or suggested likelihood that harmful amounts of lead are found in the products. In short, we are asked to search at considerable expense for something that does not exist, nor has been alleged to exist. We anticipate this redundant testing will cost in excess of half a million dollars to our company in the first 12 months.

Section 102, General Conformity Certification, also known as GCCs. This section of the law has been interpreted to mandate that every time we make a shipment, each article contained therein must be accompanied by a GCC identifying each rule, ban, standard or regulation applicable to the product and certifying each product complies with our regulations. Ensuring accuracy and availability for the GCC for every incoming order from our factories and matching that information to the GCC for every item on every order shipped to our customers will result in the creation of tens of thousands of certificates annually. This is a daunting prospect for any small business.

Section 103 on tracking labels. The apparent intent of this section provides for the identification of the specific manufacturing facility for every given item, and to maintain transparency through to the end-consumer. While this goal appears innocuous, we believe actually it will be harmful for our business. Most hosiery is exempt from the care labeling rules enforced by the Federal Trade Commission due to utility or appearance be substantially impaired by a permanently attached label.

My recommendations are as follows regarding Section 101 on the lead contents, I believe based on the evidence a move should be made to exclude textile products from lead testing requirements. At the CPSC's public hearing in January credible and overwhelming evidence was presented demonstrating statistically negligible levels of lead existed in textiles.

Our industry has done its due diligence on lead and textiles. The only possible outcome is higher cost to the consumer. We can't make the product any safer.

Section 102 on the GCCs, allowing this document to be prepared on an annual basis for each style in a company's offering would vastly simplify compliance with the law.

Regarding Section 103 on the tracking labels, the CPSC should follow precedence established by the FTC with regard to consumer labeling laws. We move that all hosiery items be excluded from tracking label requirements. Socks are a low-risk item. The country of origin and the company's RN number are already on the packaging of the item. There's no need for any additional information.

Small businesses applaud the efforts of the United States Congress to ensure the safety of all citizens. In this instance of the CPSIA, however, unclear and belated interpretation is causing unintended punitive consequences for our business and thousands like us. Children's products existing in commerce for years should be judged based on the history of the consumer safety. Where there is no history of problems, common sense exclusions from the regulations should apply.

Your willingness to review the implications for small businesses, in particular, is very much appreciated. My comments today are very consistent with the sentiments expressed last week by the distinguished Chairwoman of the House Small Business Committee, the Honorable Representative Nydia Velasquez. All too often, federal agencies overlook the unintended impact that regulations have on small businesses, she said, to create an environment that fosters entrepreneurship, the regulatory system must be responsive to small business needs.

I hope you agree my testimony underscores her message. Thank you.

[The prepared statement of Mr. McCubbin is included in the appendix.]

Chairman ALTMIRE. Thank you. We'll now move to the questioning. Each Member will have five minutes to question the witnesses. I will begin with Ms. Lang. Thank you for being here again.

I know you talked about in your testimony that your business makes very small batches of the particular product line that you sell and with this limited quantity, testing each line is obviously very expensive and if you could rely on tests conducted by your component suppliers, rather than by you, would that provide significant relief and can you give me an example of the cost reduction that you would see?

Ms. LANG. If I could rely on component testing and just getting GCCs from my suppliers, that would significantly reduce the cost of testing for my product. I wouldn't need to send it for the three-party wet lab lead testing and the phthalate testing. I am unsure, however, if since fabric is an item that is not intended always for a teething item, I'm not sure if that would be tested for phthalates, however, since there aren't any in fabric, it's not a plastic, if there could be an exemption for items that aren't plastic, written into the law or exempted by the CPSC would be wonderful.

Chairman ALTMIRE. Thank you. Ms. Schreiber, the product testing requirements of the law are obviously some of the most burdensome for small businesses and the tests can be very expensive. Can you quantify for us how much exactly would it cost you to test your products?

Ms. SCHREIBER. If just this set would cost up to \$1200, with what I make it would be conservatively in the hundreds of thousands of dollars. I mean because I use, everything I use is made once. It's a one-off item. Everything is personalized. So therefore, everything I make would have to be tested. So it would actually boggle the mind how much it would cost to test.

Chairman ALTMIRE. So it's an amount that you couldn't even consider.

Ms. SCHREIBER. I couldn't quantify it. I wouldn't be able to. It would be 75 times the number of threads I have in my house, the number of ribbons I have, the number of products I have, the number of products that make up the products I get from my wholesalers.

Chairman ALTMIRE. Would anybody else on the panel like to comment on that issue? Okay.

Ms. BAUSTIAN, secondhand stores like Once Upon A Child are generally selling items manufactured years earlier, long before the new law was even considered by Congress and I know the Consumer Product Safety Commission guidance has been vague to resellers. Do you feel that there's any economically feasible way for resellers to determine which products could be legally sold, lawfully sold?

Ms. BAUSTIAN. Economically, I believe there is not. For us to test the product, if we so chose that, you can purchase an XRF technology type gun. The cost of that for an individual owner would be around \$20,000. Let alone the labor included to be able to test each of the components of each of the unique items that they are purchasing for resale in their store.

Chairman ALTMIRE. Thank you. For Mr. Vittone and Ms. Schreiber, overly burdensome regulations can place small businesses on an uneven playing field. Small businesses simply don't have the compliance resources that their larger competitors do. So could each of you talk about how this, from a business perspective, these regulations have put you at a competitive disadvantage?

We'll start with Mr. Vittone.

Mr. VITTORE. Sure. Thank you. I would say they do put us at a competitive disadvantage, not just with our other competitors, but also with the retailers that we sell to. We sell to large box retailers and when a large box retailer tells us that they just shredded 10,000 units of our product and wants \$100,000 credit, we don't have much choice but to comply. We have to sell to that retailer next year if we want to stay in business.

So it puts us at a competitive disadvantage not just to them, but those resources take us away from growing our business and hopefully selling more product the next year.

Ms. SCHREIBER. And for me, the competition I have, it would really fall under who is going to try and be legal under the law and who is not. Many of my competitors probably feel the same way that I do, that we are making safe products. We want to be legal.

There's also many people that believe it doesn't apply to them. They're not going to follow the letter of the law. So at that point the competitive difference goes from zero to 60 because I'm done. I'm closing my doors. I'm selling off my sewing machines and they're continuing to make what they already have on the assumption that they're never going to catch me. So I don't know if that clarifies.

Chairman ALTMIRE. It does. Thank you very much.

Ms. Fallin?

Ms. FALLIN. Thank you, Mr. Chairman. I just have a question for any of you to answer and maybe I'll start with Mr. McCubbin. How does the stay of the enforcement and the testing and certification requirements on the retail and wholesale industry, how does that affect you since you still could be liable under the Act by like Attorney Generals. Does the stay really help or are you still worried about the liability under some other area of enforcement?

Mr. MCCUBBIN. Honestly, I'm not that worried because our products are so low risk and there are no lead in our products so I'm not that worried and I'm not testing currently. However, a lot of my—like Towle and Associates, they sell children's clothes. Well, they're still having to test and they are concerned. They've got lead in the zippers and he can change a button, he can have new buttons flown over from Asia and he can change, but the zippers, he's going to have to cut them out and that ruins the product. So our business is okay, until the stay goes away. And then that's when our costs would be just on the lead half a million dollars.

Ms. FALLIN. Okay.

Mr. VITTONI. Speaking on behalf of Swimways, we appreciate Chairman Nord's efforts. She has done as best she can to reduce the effects of this legislation, but the stay really hasn't affected us, frankly. We've gone ahead and moved forward with compliance. We're really more trying to deal with the aftermath of what to do with the products that we have sold to our retailers that are still on their shelves or that is still in our warehouse or in the warehouses of our manufacturers overseas.

Ms. FALLIN. Anybody else want to add anything?

Ms. BAUSTIAN. Certainly from a resell standpoint for us it doesn't really affect us because either way we will have to comply on the sales side that all items are deemed safe. So our owners certainly are very concerned, but have no way to really ensure that they're doing that.

Ms. LANG. The stay has kept me in business. I was going to shut down on February 10th of this year. It kept me in business until February 10th of next year. If it expires, I'm out of business. The thing that concerns me the most is that since it is a one-year stay, I'm not putting the money into my business that I would if I knew that I was going to be able to continue to grow my business. I'm not probably making the efforts that I would as far as on the wholesale side of selling my product and growing my business. But I would if I knew that I was going to be able to keep operating.

Ms. SCHREIBER. And I think I'm in a sort of a similar situation as Mr. McCubbin, because I work mostly in textiles. I've had to discontinue some products because those wholesalers won't provide me with a GCC because it's a bib that doesn't contain lead, so

they're not going to test for it because it doesn't contain lead. So I've dropped them because I want to have prove products. So it's affected me a little bit, but again, if it's not sort of re-upped, I'm done.

Ms. FALLIN. So all of you are saying basically that if nothing changes in the law and the stay and the one-year moratorium runs out, that there's a possibility that you could shut down your business.

Ms. LANG. It's not only a possibility, it's a given.

Ms. FALLIN. You will.

Ms. LANG. I can't afford \$84,000 in testing when I make \$4500 a year.

Ms. FALLIN. And I thought, Mr. Chairman, the other comment that she just made was that she could be investing more money and adding to her product line and creating more opportunities and buying more products, but she's decided to hold back and that's what we see a lot in our economy right now, especially during this recession time. People who have money are scared to invest, and so here we have one more thing that's causing concern for investment.

I have another question for Mr. Vittone.

Mr. VITTONE. Yes.

Ms. FALLIN. You said you took a step back because of this Act. In taking a step back, what did you do?

Mr. VITTONE. What I meant was is that we had a rate of growth about 15 percent a year for the last 10 years and we went backwards last year and our profitability for 2008 was reduced by about 46 percent as a result of all of the inventory and the chargebacks from the retailers. So it was a significant impact last year.

Ms. FALLIN. And you talked about the one company with the hoop that you showed them a minute ago about how they destroyed their products, are they coming back after you to get a credit?

Mr. VITTONE. Yes, \$100,000.

Ms. FALLIN. \$100,000, and so—

Mr. VITTONE. They want credit not only for the price they paid for the inventory, but also for the destruction to it.

Ms. FALLIN. Are you in a legal matter with them on that?

Mr. VITTONE. No, no. Like I mentioned, we're in discussions with them on how to resolve it.

Ms. FALLIN. That's tough.

Mr. VITTONE. Yes.

Ms. FALLIN. Well, thank you all so much for coming today. We sure appreciate you.

Thank you, Mr. Chairman.

Chairman ALTMIRE. Mr. Thompson.

Mr. THOMPSON. Thank you, Chairman. First question I have for Ms. Schreiber, if one of the problems that the CPSIA tried to resolve was lead in toys from overseas manufacturing, does it make sense to you that most of the laboratories that can your testing are overseas?

Ms. SCHREIBER. It doesn't. That's a little ironic, isn't it? And that's where some of the most cost-effective testing goes to. But I have people that order things for a specific occasion and with my time frame to get things done, between family issues and every-

thing else, and then you're tacking on another two weeks to get it shipped to China to have them test it, when maybe the clip originated from China six months ago and I have testing that says it's good, so I'm sending it back and it's sort of an Alice fell down the rabbit hole sort of situation, really.

I won't be sending it to China, but I quite frankly won't be sending it anywhere because I can't afford it.

Mr. THOMPSON. It's unaffordable to do it. Thank you.

Ms. Lang, the Food and Drug Administration has manufacturing guidelines that accepts certain food additives and chemicals to be generally recognized as safe. Would a similar generally recognized as not having any lead content standard be useful to your business in the implementation of the CPSIA?

Ms. LANG. I think it would probably be useful if it were written into the law or if it were—the thing that I'm afraid of is that the 50 State Attorney Generals are each deputized to go after businesses. I sell in every state and so I would hate to not know if I am going—if somebody is going to come after me for my product.

I would need something more cut and dry, I think. I think it would need to be more set in stone than just a wavy guideline.

Mr. THOMPSON. Okay, thank you.

Mr. McCubbin, in your opinion, has the Commission provided sufficient guidance to the industry on how to implement this CPSIA?

Mr. MCCUBBIN. No, it has not. I think that's a lot of the problem is the confusion that all companies have as to what the guidelines are. And our customers, as Ms. Fallin mentioned, you've got Dillard's. You've got Nordstrom. You've got Kohl's. We've got K-Mark. We've got Payless. They all interpret it differently and so as I said, we're going forth with that the stay is good for the socks, but let's just say K-Mart says no, but it's the law and you have to abide by the law, forget the stay. So we'd have to test the products for K-Mart. It's very confusing.

Mr. THOMPSON. Mr. McCubbin, how will your firm ensure the suppliers meet the certification requirements of the Act?

Mr. MCCUBBIN. Is that addressed to me?

Mr. THOMPSON. Yes, please.

Mr. MCCUBBIN. Say that again, please, I'm sorry.

Mr. THOMPSON. How will your firm ensure that its suppliers meet the certification requirements of the Act?

Mr. MCCUBBIN. We actually have the products tested over in Asia. After they're made, they have to be sent off and as I said you might have a children's tight that six different colors in it at \$40 a color, it gets tested for \$240. The whole section of tights for K-Mart, I got 49 now, do a quick math on that, that's very expensive, just for that one run. So they'll tell us that it's passed. They'll send us the certificate and we're trusting it's accurate.

Mr. THOMPSON. Seems like this Act has been a good economic stimulus for China.

Mr. MCCUBBIN. It's been good for the testing labs, I'll say that.

Mr. THOMPSON. Mr. Vittone, do you have an estimate, in terms of numbers, do you have an estimate of the total number of employee hours devoted to the implementation of this, rather than

more productive work associated with growing the Swimways business?

Mr. VITTONI. It would be hard to count them all up, but it's been thousands upon thousands of hours, just spent on complying with this Act. It touches everybody in the company, so everybody has to deal with it from the art department to the product development department to the finance department to sales, everybody has been having to work to comply with this Act and with the tracking labels and that brings in IT and then all of our manufacturers in China. It's hard to put a number on it.

Mr. THOMPSON. It's pretty fair to say though it's had a pretty significant negative impact on productivity?

Mr. VITTONI. Absolutely.

Mr. THOMPSON. And efficiency.

Mr. VITTONI. One of the points of my written testimony is that all of the time that was spent on complying with this could have been spent on us growing our business.

Mr. THOMPSON. Very good. Mr. Chairman, I think I'm out of time.

Chairman ALTMIRE. Thank you. Thanks to everybody. Thank you for the audience for sticking it out through the long vote series.

Before we adjourn, I just want to make a point about what we've done here today. You heard the Chairwoman say that this is the first hearing that's been held on this issue in Congress and this came about because each one of you took the time to contact your representative as thousands like you have done, all 435 of us have heard from small businesses and you're the reason that this happened. You're the reason that we held this hearing. This is just the first step. We're going to adjourn the hearing now, but we're going to continue to work to try to find a solution to this problem, but I just want to thank you for taking the time, making the trip, all the expenses and the time commitment that that entails. You made a big difference with your advocacy, both today and leading up to today. So be proud of what you've done and we're going to try to carry forward and get a solution to this problem.

So with that, I ask unanimous consent that Members will have five days to submit statements and supporting materials to the record. Without objection, so ordered. This hearing is now adjourned.

[Whereupon, at 1:01 p.m., the hearing was concluded.]

JASON ALTMIRE, PENNSYLVANIA  
Chairman

MARY FALLIN, OKLAHOMA  
Ranking Member

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
**Subcommittee on Investigations and Oversight**  
 1501 Rayburn House Office Building  
 Washington, DC 20515-0515

STATEMENT

Of the Honorable Jason Altmire, Chair  
 Subcommittee on Investigations and Oversight  
 United States Representatives, Committee on Small Business  
*"The Consumer Product Safety Improvement Act and Small Business"*  
 Wednesday, July May 14, 2009

When it comes to protecting our children, Americans take every precaution. We strap our kids into car seats when we're driving. We insist on training wheels when they're learning to ride a bike. We vaccinate them against chicken pox, polio and countless other illnesses. In other words, we do everything we can to make sure our children are safe. That's why it's so distressing when threats to their health go undetected. Particularly when those threats come from within our very own homes.

In 2007, excessive lead levels were detected in a wide variety of children's toys. Up until that point, those products--which ranged from toy cars to Winnie the Pooh playsets-- were assumed to be safe. When it turned out they were not, the Consumer Product Safety Commission launched a massive recall. All told, 17 million products were collected, and entrepreneurs played a critical role in getting them off the shelves. Needless to say, these small business owners wanted to protect their customers. However, what they *didn't* want--and what they *couldn't* afford-- were the economic consequences of doing so and in the end they suffered heavy losses that they could ill afford.

To help ensure this type of massive recall never happens again, President Bush signed the Consumer Product Safety Improvements Act, or CPSIA, into law in August, 2008. While that law was intended to protect our children, it has done less to accomplish that than it has to hurt small firms all across the country. In today's hearing, we are going to examine the impact of the CPSIA on entrepreneurs, and discuss ways to ease their regulatory burden.

Recalls are never easy for entrepreneurs. Small firms already operate on tight profit margins, and additional outlays for destroying products or reimbursing retailers can be devastating.

Under the CPSIA, small businesses are required to conduct costly product testing, and use pricey new tracking labels. These requirements are well intended and good in concept, but their actual utility has yet to be seen. What is more, they are extremely expensive for small firms to comply with.

Even the CPSC admits that the cost to small businesses will be crippling. In fact, the commission estimates entrepreneurs will end up paying billions of dollars just to comply with the new regulations. For small manufactures, product testing alone can cost hundreds -- if not thousands of dollars -- per item. The process of testing the 233 various components in a child's bicycle, for example, runs close to \$14,000.

Manufacturers are not alone in shouldering these costs. Small retailers--from toy stores to clothing shops-- have also been affected. They are now saddled with countless items that they can't sell. According to the Toy Industry Association, CPSIA-inventory losses will reach close to \$600 million.

At a time when both the retail and manufacturing industries are struggling, these outlays could be the straw that breaks the camel's back. Obviously, we need to protect our children. But we need to do so in a way that doesn't handicap small businesses.

Fortunately, the CPSC *does* have the authority to be flexible with small firms. This is critical, particularly when it comes to product testing. For instance, allowing the rubber for a toy doll to be pre-tested at the rubber plant--rather than at the doll factory--would go a long way. This kind of component analysis could reduce costs without compromising safety.

Protecting our children is a top priority. It is extremely important for consumers to have confidence in the products they buy, and the CPSIA was intended to provide that confidence. But rather than streamlining and improving the process, it has added a crippling new level of complexity. As small firms continue to grapple with obstacles like restricted lending and tightening credit, we shouldn't be creating more roadblocks for them.



**Opening Statement for Hearing on  
"The Consumer Product Safety Improvement Act and Small Business."**

**Mary Fallin  
Ranking Member  
Subcommittee on Investigations and Oversight  
Committee on Small Business  
United States House of Representatives  
Washington, DC  
March 25, 2009**

Good morning. Thank you, Chairman Altmire for calling this timely hearing to examine the impact of the Consumer Product Safety Improvement Act on small businesses. This is an important issue that affects manufacturers, distributors and sellers of goods aimed at children under the age of 12. Federal law and regulations adopted last year were meant to ensure that our children are safe from the toys they play with and clothes they wear every day. However, the unintended consequences of this well-meaning legislation may severely hurt many of our small businesses, including small businesses that produce children products, not in overseas factories but right here in the United States.

I'd like to extend a special thanks to each of our witnesses who have taken the time to provide this subcommittee with their testimony. Welcome to the Small Business Subcommittee on Investigations and Oversight; I am sure we will find your expertise on small business and manufacturing extremely helpful. I would especially like to welcome David McCubbin, the owner and operator of McCubbin Hosiery from Oklahoma City.

In 2007, toy manufacturers had to recall over a million toys that violated standards concerning lead-based paint. The toys recalled included well-known children's products associated with Thomas the Tank Engine, Barbie Doll, and Dora the Explorer. Obviously, parents were rightfully outraged about the danger to their children, prompting Congress to pass the Consumer Product Safety Improvement Act or CPSIA, in 2008.

Most of the lead in these cited toys came from overseas toy manufacturers, though the law harshly affects many American businesses. The CPSIA prohibits the sale or distribution of a product for children under the age of 12 if it contains more than 600 parts per million of lead after February

10, 2009 and that will drop to 300 parts per million on August 14 of this year. To ensure this compliance, the Act requires manufacturers certify their products meet those standards through independent lab testing.

Given the many concerns of small business across the country and their ability to meet these strict requirements in such a short time frame, the Commission eased enforcement of the regulations for one year, ending February 10, 2010. Though this stay was intended to resolve the CPSIA problems facing small businesses, it is by no means a cure-all. Though the CPSC may not take punitive action against anyone selling a product with more than 600 ppm of lead, others may choose to enforce the law. For example, a state attorney general may be able to take legal action if they find a business has produced, distributed, or sold a product for a child that exceeds the set lead limit.

Small business owners are thus forced to incur the large cost of testing their products or risk punishment in the future if their products do not conform to CPSC standards. The problem is exacerbated for small retailers, who, unlike manufacturers, are not yet required to certify lead content of products. The retailers who do not test for lead are still subject to these restrictions on selling a product containing lead, even though they lack the ability and resources to determine if their products may even contain lead. The cost of testing may be upwards of tens of thousands of dollars for small retailers, just to make sure only a few of their products fall below the maximum requirements. In a time where our economy is going through enough turbulence, this added stress and cost on small businesses may put many more small retailers and manufacturers out of business forever.

With the passage of the CPSIA last year, we in Congress created unforeseen consequences that could significantly harm the backbone of our economy, small business. It is imperative we look to changes in federal law to ensure a healthy environment for our children can coexist with a regulatory structure that does not unduly burden our American small businesses.

Without permanent changes to the CPSIA, small businesses will remain encumbered with objectives that they may not be able to meet. I look forward to hearing first hand from our witnesses about the state of this law, and to listen to any recommendations you may have. Mr. Chairman, I look forward to working with you on this important issue. Again, I thank each of you for being here today and I yield back the balance of my time.



## U.S. Consumer Product Safety Commission



### TESTIMONY OF THE HONORABLE NANCY A. NORD ACTING CHAIRMAN OF THE U.S. CONSUMER PRODUCT SAFETY COMMISSION

SUBMITTED TO  
COMMITTEE ON SMALL BUSINESS  
U.S. HOUSE OF REPRESENTATIVES

May 14, 2009

*Saving Lives and Keeping Families Safe*

[www.cpsc.gov](http://www.cpsc.gov)  
1-800-638-CPSC



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

NANCY A. NORD  
ACTING CHAIRMAN

TEL: (301) 504-7901  
FAX: (301) 504-0057

Testimony of the Honorable Nancy A. Nord  
Acting Chairman, U.S. Consumer Product Safety Commission

Hearing on  
"The Consumer Product Safety Improvement Act and Small Business"

Committee on Small Business  
U.S. House of Representatives  
May 14, 2009

Good morning, Mr. Chairman, and thank you for this opportunity today to report to the committee on the progress of the U.S. Consumer Product Safety Commission (CPSC) in implementing the Consumer Product Safety Improvement Act (CPSIA) and to discuss the significant impact of this new law on the nation's small businesses.

The Mission of the CPSC

By way of introduction, the CPSC is a small, independent and bipartisan federal commission charged with protecting the public from unreasonable risks of injury and death associated with thousands of consumer products. With a national workforce of approximately 450 individuals, the CPSC is tasked by its governing statutes with three main missions:

1. To identify existing and emerging product hazards that create an unreasonable risk of injury or death and to address those hazards by developing mandatory safety standards when consensus standards fail to do so;
2. To investigate and respond to product-related incidents and conduct recalls of defective and unsafe products; and
3. To alert and educate consumers about product-related safety issues.

Page 2

Since its establishment in 1973, CPSC's work has contributed substantially to the decline in the rates of death and injury related to the use of consumer products. These reductions include:

- An 84 percent reduction in crib-related deaths;
- An 83 percent reduction in poisoning deaths of children from drugs and household chemicals;
- A 74 percent reduction in product-related electrocutions;
- A 43 percent reduction in consumer-related residential fire deaths; and
- A 41 percent reduction in consumer-related carbon monoxide deaths.

While we are proud of these and the agency's many other achievements over the years, consumer product safety is never a completed task but always an ongoing process of research, standards development, enforcement and public education. Ever more technologically complex products, expanding retail sales over the Internet, and the increasing significance of imported products are examples of the many dynamics that continuously challenge the agency.

#### The Consumer Product Safety Improvement Act

In response to the dramatic changes in the marketplace since the CPSC was last reauthorized in 1991, Congress enacted the Consumer Product Safety Improvement Act ("CPSIA") in August of 2008 to modernize and strengthen the agency's authorities. The CPSIA is the most far-reaching and comprehensive overhaul of the agency's statutes since its establishment in 1973, and implementing the new law over these past nine months has been a tremendous challenge to the staff as we redirected our available resources to meet the aggressive and ambitious timetable that Congress mandated.

This challenge was exacerbated by a serious lack of funding to implement the CPSIA along with new Congressional directives on nanotechnology and CPSC staffing in China, as well as two other recently enacted laws, the Children's Gasoline Burn Prevention Act and the Virginia Graeme Baker Pool and Spa Safety Act. This last act sets Congressionally-mandated safety standards for swimming pools and brings the approximately 300,000 public swimming pools under the jurisdiction of the CPSC.

Because a reasonable implementation program for these new laws and directives could not be absorbed within CPSC's original fiscal year 2009 budget request without serious disruption

Page 3

of mission critical activities, my colleague Commissioner Thomas Moore and I submitted an emergency budget request to Congress immediately following passage of the CPSIA. That request was in the amount of \$29,048,000.

While Congress subsequently approved \$25,404,000 for the agency, regretfully that approval occurred in March of 2009 after the first seven critical months of CPSIA implementation had passed. During that critical period much of CPSC's on-going safety work was adversely impacted as the agency had to delay or defer projects in other important product safety areas, such as rulemaking activities on portable generators and standards work on electrical, fire, mechanical and chemical hazards.

Since the time that the CPSIA was first being considered in Congress in 2007, I have fully supported the goal of modernizing the agency and, in fact, originally suggested a number of improvements that found their way into the final legislation. These improvements include enhanced tools for enforcement and greater ability to deal with imported products.

While I appreciate these new tools, there were certain provisions of the legislation that have proved to be especially problematic to implement, both for the agency and for the regulated community. Of special concern are those provisions regarding retroactivity and the ability of the Commission to make decisions about the safety of products based on scientific risk assessments.

#### CPSIA Implementation

This is the CPSC's first Congressional hearing since passage of the CPSIA, and I am pleased to have this opportunity today to discuss the consequences of these provisions with the committee. They have had a particularly severe impact on many of the nation's small businesses.

In implementing the CPSIA over these past nine months, the agency has been truly prolific in its output. The Commission has initiated and advanced over 40 rulemaking activities required by the Act and published enforcement guidelines and policies to enhance compliance with the new law.

We are especially committed to educating both consumers and businesses as to the requirements of the new law and therefore have developed a special website dedicated to the CPSIA, issued various guidances, and responded to questions from the public numbering in the thousands. The staff has held public meetings to elicit comments and respond to

Page 4

questions about how the new law impacts or regulates all-terrain vehicles, books, apparel, bicycles, phthalates, lead, X-ray fluorescence technology, testing and certification, and tracking labels.

Because it is important that our overseas trading partners also understand the new law, I have taken CPSC technical experts to both China and Vietnam to hold training sessions and to discuss implementation of both existing agreements and the new requirements of the CPSIA. We have worked closely with foreign government officials and product manufacturers to help them understand their requirements under the Act.

While the CPSIA mandated a number of ambitious deadlines, during the first six months of implementation the agency met each mandated deadline. For example, the Commission, within 30 days of enactment, approved final requirements for accreditation of third-party conformity assessment bodies and began rolling out testing requirements for various children's products, including full-size and non-full-size cribs, pacifiers, small parts, lead paint and lead in children's metal jewelry; on a schedule as set out in the law. In addition we have issued Final Rules on:

- labeling requirements for toy and game advertisements;
- all-terrain vehicle mandatory safety standards;
- certification and electronic certificates; and
- procedures and requirements for manufacturers seeking an exclusion from the law's lead mandate.

Furthermore, since enactment of the CPSIA, the Commission has issued:

- an advance notice of proposed rulemaking on crib durability;
- a notice of proposed rulemaking for mandatory recall notices;
- guidance regarding which children's products are subject to the ban on phthalates;
- a request for comments and information on tracking labels for children's products;
- a proposed interpretative rule providing guidance on inaccessibility for lead in children's products;
- a notice of proposed rulemaking and an interim final rule on exemptions for certain electronic devices containing lead;
- a notice of proposed rulemaking on proposed determinations regarding lead content limits on certain materials or products;
- instructions on general certification of conformity; and

Page 5

- data collection procedures to establish the mandated Chronic Hazard Advisory Panel that will study the effect's on children's health of certain phthalates as used in children's toys and child care articles.

As we have worked through this process, we have encountered a number of problems where the law does not give us the flexibility to respond to unanticipated but real world problems that have been presented. In these instances we have had to resort to issuing stays of enforcement in order to avoid disruptions of the market that would be counter to the purposes of the new law. Among others, we have issued:

- a stay of enforcement of certain testing and certification requirements;
- a stay of enforcement of lead content limits for certain youth motorized recreational vehicles, and
- a stay of enforcement of lead content limits for children's bicycles.

We anticipate issuing additional stays of enforcement as specific problems present themselves even though we recognize that this is not the optimal way to address these problems. Nevertheless, it is the only means we have to avoid the damaging consequences that would result from application of the law as written.

#### Impact of the Law on Small Businesses

I know that the Committee members have heard from their constituents who have been negatively impacted by various provisions of the CPSIA, and I can assure you that the Commission has heard from them as well. Small business men and women, charity volunteers, arts and crafts people who work at home, thrift and consignment shop owners and customers, ATV sellers and enthusiasts, and many other individuals have been in contact with us regarding the often unexpected consequences of the new law. Many of their problems have resulted from the retroactivity of the lead provisions in the law and the lack of flexibility provided to the Commission to regulate based on thoughtful risk assessments. The problems that have been reported to us have been further exacerbated by the nation's economic downturn. While the agency does not have the capability to compute the economic toll that the new law has taken, we are aware of estimates that place the cost of compliance in the billions of dollars.

The Commission has attempted to ease the burden on these individuals by developing common sense enforcement policies (including stays of enforcement) to the extent that the law allows, issuing comprehensive guidance, identifying certain materials that do not need to

be tested, finalizing exemptions for electronics and inaccessible parts, and putting in place a formal process for exclusions. While the Commission has placed a high priority on processing exclusion requests as quickly as possible, the new law is very restrictive on this point. We have not yet been able to identify any products that would meet the law's requirements for exclusions, and the Commission lacks the authority to change the essential requirements of the underlying statute. Only Congress can do that.

To assist small businesses, in January the CPSC issued a guide to the new law aimed specifically at small businesses. Recently, we published an updated guide for resellers of children's products, including thrift and consignment stores. Both guides are designed to help small businesses, including sellers of used products, in identifying products that may violate the new law or are otherwise unsafe and try to dispel confusion regarding the requirements of the CPSIA.

New Lead Requirements: The CPSC has a long history regulating lead starting with a ban issued on lead-based paint in 1977 under the Consumer Product Safety Act. In more recent years, the CPSC has identified and taken action on a range of different products that presented a potential lead health risk from sources other than paint. Those products have included imported vinyl mini-blinds, crayons and chalk, figurines used as game pieces, toys and children's metal jewelry.

New limits for lead content in children's products and the amount of lead in paint used on those products are set out in Section 101 of the CPSIA. The Act reduces the current lead in paint limit from 600 ppm to 90 ppm for products sold or otherwise distributed in commerce after August 14, 2009.

With regard to lead content, the limits are phased in over the course of three years. As of February 10, 2009, products designed or intended primarily for children 12 years of age and younger may not be sold or otherwise distributed in commerce if they contain more than 600 ppm of lead. As of August 14, 2009, this limit is reduced to 300 ppm of lead, and the limit goes down further to 100 ppm as of August 10, 2011, unless the Commission determines that that limit is not technologically feasible.

New Phthalates Requirements: Turning to phthalates, the CPSC has traditionally had regulatory authority over phthalates under the Federal Hazardous Substances Act (FHSA), and since the early 1980's, the CPSC has researched, and monitored phthalates used in children's products under the agency's jurisdiction. The agency conducted comprehensive behavioral observations and laboratory analysis on phthalates in toys and other products that small children could be expected to mouth in 2000 and 2001.

The CPSIA has permanently prohibited three phthalates, DEHP, DBP and BBP, in concentrations of more than 0.1 percent in children's toys or child care articles. However, since these three phthalates are generally not used in toys or child care articles, the impact of this permanent ban is negligible. Three additional phthalates, DINP, DIDP and DnOP, have been prohibited pending further study and review by a Chronic Hazards Advisory Panel of outside experts convened by the Commission. These interim prohibitions, which took effect on February 10, 2009, apply to any child care article or toy that can be placed in a child's mouth or brought to the mouth and kept in the mouth so that it can be sucked or chewed and that contains a concentration of more than 0.1 percent of these particular phthalates.

Section 108 of the CPSIA applies the prohibition on phthalates to all parts of a children's toy or child care article, not just the plastic parts likely to contain phthalates, and the law does not provide for an exception or exemption for inaccessibility for phthalates as is the case for lead in children's products under Section 101. In addition, because there is no screening test for phthalates (like there is for lead) and because the test requires destruction of the product sample, the test is expensive, especially for a small business or a crafter.

Impact of Requirements: The CPSIA's bans on lead and phthalates are retroactive, rendering illegal inventory on store shelves and in warehouses that was perfectly legal and considered safe when manufactured. This sweeping retroactive application of the lead and phthalates provisions has caused most of the problems that you are hearing from your small businesses, since these businesses may very well have violative product but have no way to make that determination without incurring significant testing costs. The CPSC has never in its history been presented with such a broad based principle of retroactivity. In the 35 year history of the agency, it has been well understood that regulations apply on a prospective basis. The economic damage being done to many small businesses testifies to the wisdom of applying requirements prospectively.

Additionally, CPSIA's lead and phthalates provisions have effectively eliminated the concepts of risk and exposure which had been at the core of U.S. safety laws. For lead and phthalates, the new law revokes the Commission's historic ability to make decisions based on risk and exposure and very tightly restricts the Commission's ability to grant exclusions, even in those situations where the CPSC's health scientists do not believe that there is a safety problem.

Off-road ATVs and motorized bikes designed for children 12 years of age and younger are examples of this new policy. These are products that contain lead above the prescribed limits of the law, although no one has ever seriously suggested that their normal use would expose

Page 8

children to danger of lead poisoning. In addition, lead is needed to maintain the structural integrity of the metal used in the product. We are seeing the same issue with respect to children's bicycles.

The law as written virtually denies the Commission the ability to grant an exclusion for these products so we are now having to resort to the device of enforcement stays to address the inflexibility of the law. I would strongly urge the Congress to revisit the language for exclusions and retroactivity and return to the agency its discretionary authority to make risk-based assessments on a prospective basis.

I would also like to call your attention to Section 218 of the CPSIA that gives state attorneys general the authority to enforce certain federal product safety laws, including those regarding the limits on lead and phthalates. This state authority to enforce CPSC's statutes compromises the ability of our agency's Office of Compliance to engage in reasonable enforcement discretion. For example, the CPSC is powerless to require state attorneys general to join in the agency's stay of enforcement of certain testing and certification requirements. That is regrettable because, as discussed above, enforcement discretion is an important tool that is needed to reach thoughtful and effective outcomes that enhance consumer safety. While we are reaching out to state attorneys general to educate them about our enforcement policies and try to engage them as our partners in safety, the law does limit our ability to exercise enforcement discretion.

#### Recommendations for Improvements

On March 4, 2009, Congressman John D. Dingell, chairman emeritus of the House Committee on Energy and Commerce, wrote to the Commission and posed ten questions having to do with CPSIA implementation. Congressman Dingell, one of the authors of the original Consumer Product Safety Act, expressed his concern that the CPSIA "includes unrealistic deadlines for rulemakings and compliance, as well as too little implementation discretion for the CPSC, both of which are exacerbated by the CPSC's lack of adequate resources, both in terms of funding and staff." I would like to submit for the record Congressman Dingell's letter and the responses of career agency staff to his questions, which are attached to this statement.

In those responses, staff noted that the deadlines in the CPSIA have proven to be impracticable to meet and are presenting significant problems for the agency to solve. Staff requests that the CPSC be allowed to use risk assessment methodology to establish priorities for common sense exemptions and be given the discretion to move CPSIA effective dates.

Page 9

With regard to small business relief, I endorse the staff recommendation that the agency be allowed to develop a robust component certification program so that companies would not need to test a product if the components of that product had already been tested and shown to be compliant. Additionally, Congress could choose to apply the new lead and phthalate limits prospectively to ease the impact on inventory existing prior to the effective dates. If the Congress chose to apply the law prospectively, the Commission still retains the ability to removed unsafe products from the store shelves so consumer safety would not be impacted.

The staff response further states that “the CPSIA forsakes the core strengths of the CPSC’s original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks, and the actual consequences of the hazard.”

CPSC staff concluded with three recommendations:

1. “Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children;
2. Lower the age limit used in the definition of children’s products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household; and
3. Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities, and a phase-in schedule.”

I concur with these recommendations. They would go a long way toward helping the agency help your small business constituents and do so without reducing the health and safety standards and enforcement activities that are the core of CPSC’s safety mission.

Mr. Chairman, I want to thank you again for holding this important hearing today. The U.S. Consumer Product Safety Commission is a small agency, even with our new funding, and we have a large and important mission to accomplish on behalf of the American public. I am committed to that mission and to efficiently, effectively and aggressively implementing the nation’s laws that are designed to provide for the health and safety of consumers. We appreciate your support for CPSC’s mission of protecting our nation’s families, and particularly our nation’s children. I look forward to answering your questions.



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

NANCY A. NORD  
ACTING CHAIRMAN

TEL: (301) 504-7901  
FAX: (301) 504-0057

March 20, 2009

The Honorable John D. Dingell  
U.S. House of Representatives  
2328 Rayburn House Office Building  
Washington, DC 20515

Dear Representative Dingell:

Thank you for your letter of March 4, 2009, regarding the U.S. Consumer Product Safety Commission's (CPSC) implementation of the Consumer Product Safety Improvement Act of 2008. Recognizing and respecting the knowledge that the CPSC career staff has acquired in implementing this new law, I asked them to prepare answers to the important questions that you asked in your letter. Their responses are enclosed.

Since its passage last August, the CPSC staff has been working tirelessly to implement this comprehensive legislation in the most efficient and effective manner possible given the limits of our resources and the time constraints mandated in the law. As you will note in their responses, they have identified some proposed refinements to the law based on their front-line experience with it.

We share your commitment to better protection of our nation's consumers, and we very much appreciate your long-standing advocacy and support of the CPSC. After reviewing the staff's responses, please let me know if you have additional questions or comments.

Sincerely,

A handwritten signature in cursive script that reads "Nancy Nord".

Nancy A. Nord  
Acting Chairman

Enclosure

cc: Commissioner Thomas Moore

Page 2  
Representative Dingell

Representative Nancy Pelosi, Speaker of the House of Representatives  
Representative Steny Hoyer, Majority Leader  
Representative Henry A. Waxman  
Representative Rick Boucher  
Representative Frank Pallone, Jr.  
Representative Bart Gordon  
Representative Bobby L. Rush  
Representative Anna G. Eshoo  
Representative Bart Stupak  
Representative Eliot L. Engel  
Representative Gene Green  
Representative Diana DeGette  
Representative Lois Capps  
Representative Mike Doyle  
Representative Jane Harman  
Representative Jan Schakowsky  
Representative Charles A. Gonzalez  
Representative Jay Inslee  
Representative Tammy Baldwin  
Representative Mike Ross  
Representative Anthony D. Weiner  
Representative Jim Matheson  
Representative G. K. Butterfield  
Representative Charlie Melancon  
Representative John Barrow  
Representative Baron P. Hill  
Representative Doris O. Matsui  
Representative Donna Christensen  
Representative Kathy Castor  
Representative John Sarbanes  
Representative Christopher Murphy  
Representative Zachary T. Space  
Representative Jerry McNerney  
Representative Betty Sutton  
Representative Bruce Braley  
Representative Peter Welch  
Representative Joe Barton  
Representative Ralph M. Hall  
Representative Fred Upton  
Representative Cliff Stearns  
Representative Nathan Deal  
Representative Ed Whitfield  
Representative John Shimkus  
Representative John B. Shadegg

Page 3  
Representative Dingell

Representative Roy Blunt  
Representative Steve Buyer  
Representative George Radanovich  
Representative Joseph R. Pitts  
Representative Mary Bono Mack  
Representative Greg Walden  
Representative Lee Terry  
Representative Mike Rogers (MI)  
Representative Sue Wilkins Myrick  
Representative John Sullivan  
Representative Tim Murphy  
Representative Michael C. Burgess  
Representative Marsha Blackburn  
Representative Phil Gingrey  
Representative Steve Scalise  
Senator Harry Reid, Majority Leader  
Senator John D. Rockefeller, IV  
Senator Daniel K. Inouye  
Senator John F. Kerry  
Senator Byron L. Dorgan  
Senator Barbara Boxer  
Senator Bill Nelson  
Senator Maria Cantwell  
Senator Frank R. Lautenberg  
Senator Mark Pryor  
Senator Claire McCaskill  
Senator Amy Klobuchar  
Senator Tom Udall  
Senator Mark Warner  
Senator Mark Begich  
Senator Kay Bailey Hutchison  
Senator Olympia J. Snowe  
Senator John Ensign  
Senator Jim DeMint  
Senator John Thune  
Senator Roger Wicker  
Senator Johnny Isakson  
Senator David Vitter  
Senator Sam Brownback  
Senator Mel Martinez  
Senator Mike Johanns



UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

Date: March 20, 2009

TO : Acting Chairman Nancy Nord  
Commissioner Thomas Moore

FROM : General Counsel *CAF*  
Assistant Executive Director for Compliance *JEM*  
Assistant Executive Director for Hazard Identification and Reduction *rik*  
Assistant Executive Director for Financial Management, Planning and  
Evaluation *CEQ*

SUBJECT : Responses to Letter from the Honorable John D. Dingell

Chairman Nord has asked us to respond to the questions recently received from Representative Dingell. The following responses have been prepared by career staff at the U.S. Consumer Product Safety Commission (CPSC).

---

***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?***

The CPSC has made implementation of the Consumer Product Safety Improvement Act (CPSIA) our highest priority. Since August 2008, the agency has initiated and advanced over 20 rulemaking activities required by the CPSIA which is an unprecedented number for this agency or any other of this size, published enforcement guidance and policies to enhance compliance with the new law, conducted numerous meetings with stakeholders, developed a special website dedicated to the CPSIA, responded to questions from the public numbering in the thousands, and generally focused the agency's limited scientific, legal, technical, educational, training and administrative resources on CPSIA implementation requirements.

Because requested funding for implementation of the new law was not forthcoming during the critical first six months when many of the CPSIA requirements needed to be initiated or completed, implementation of the CPSIA has impacted our ongoing safety mission by delaying and deferring work in many other areas. While work has been deferred or delayed on these activities -- such as rulemaking activities on portable generators and voluntary standards work on electrical, fire, mechanical, chemical and children's hazards -- some of CPSC's ongoing safety work such as hazardous product investigations and recalls could not be deferred. This has limited our ability to advise you on how to fully reallocate existing staff resources to implementation of the CPSIA.

Moreover, issues related to the accreditations of laboratories and the increasing number of requests for exclusions from the Act's provisions have caused unanticipated additional demands on staff resources, at the same time that the staff has been implementing the Virginia Graeme

---

*The statements in this letter do not necessarily reflect the views of the Commission or any individual Commissioner*

Baker Pool and Spa Safety Act (which became effective in December 2008), and the Children's Gasoline Burn Prevention Act (which became effective in January 2009). This has severely overstretched the agency staff and has begun resulting in delays in implementation that will continue until we are able to fully hire and otherwise maximize the resources that have just been provided to the agency for the second half of fiscal year 2009.

Three examples of the burden and complexity presented by the work on these issues are: (1) the continuing need to process and review applications for laboratory accreditation, including applications from government and proprietary firewalled laboratories, a process initiated by the CPSIA and one that the agency is handling for the first time in its history; (2) the need for further refinement of guidance on the scope of the phthalates ban and, in particular, defining a testing method and dealing with compliance questions regarding the chemistry and carbon chain branching that determines whether a product contains a banned phthalate; and (3) the engineering issues raised by the Pool and Spa Safety Act and the need to reconcile state regulations on health and safety issues such as water quality with the need to replace drain covers as required by that Act. The Commission staff cannot address these and similar matters all at once, yet delay has serious economic impacts on the affected parties which no one anticipated would happen at the same time as the current economic downturn.

As we implement each new requirement, we are seeing unanticipated issues arise, and we are learning more of the far-reaching effects of the CPSIA and there will undoubtedly be more to learn. In August 2008 following passage of the Act, staff estimated that it would require a full annual increase of \$21.1 million and 59 FTEs to begin implementing the new legislation in Fiscal Year 2009. That same month, the Commission submitted an amendment in this amount to the then-pending President's Budget Request through the Office of Management and Budget, as well as directly to Congress. In November 2008 a revised amendment was provided to Congress to reflect CPSC's requirements for only the second half of the fiscal year. Through the first six months of implementing the CPSIA, none of this additional funding was received by the Commission.

The funding amount in the Commission's revised amendment has just been approved by Congress. While we will use these funds to immediately and aggressively hire and train new staff, the six-month delay in funding will cause continued deferrals until such time that the agency fully absorbs the new appropriation. For Fiscal Year 2010 the Commission has requested additional funding to continue implementation of the CPSIA.

***2. Given the paramount importance of ensuring children's safety and the overall mission of the 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 revision does CPSC suggest?***

Mandated Deadlines: Effect on Safety Priorities and Staff Workloads

In the CPSIA, Congress set an aggressive regulatory agenda for the CPSC over the course of the first two to three years after enactment. The work required by the CPSIA is in addition to the

Commission's ongoing regulatory activity in a variety of areas, including upholstered furniture, portable generators and other important standards development activities, as well as our ongoing compliance work in evaluating and recalling products that present hazards to consumers. As with any regulatory agency, CPSC's safety work must be prioritized to deal with the most significant risks; however, the deadlines mandated in the CPSIA have jeopardized our ability to meet Commission priorities and proven to be too much for a relatively small agency to handle all at once. Timely implementation is important, but the flexibility to prioritize our work to deal with the most serious risks is equally important to maximize effectiveness and do the greatest good with the resources that we have been given.

While the CPSIA mandates more than 40 separate action items for the Commission to undertake, that number understates the agency workload that results from each of those mandates. For example, there is no requirement to adopt an interpretative rule defining "child care article" and "toy" under section 108. Yet the Commission has been inundated with thousands of product specific inquiries about what types of products fall within those definitions, from shoes to sporting goods to electronic games. An interpretive rule is our recommended way to address this issue and adds to our rulemaking burden.

The action item count also does not include acting on requests for exemptions from the lead limits provision, nor does the list contemplate making "determinations" on classes of materials or products not covered by the ban on lead in children's products. Because the statute did not permit the agency to exempt products from the scope of the definition of children's product, the staff has been engaged in a process of narrowing the scope of materials likely to include lead in order to provide relief to small businesses and home crafters faced with crippling costs of testing and certification requirements. Many of those businesses are now asking the Commission to begin the same process of exemption of materials with regard to phthalates. As another example, consideration of component testing is not a part of the list of rulemaking activities in the CPSIA, yet it is a challenging issue to consider in implementing its requirements.

There are other activities required of the Commission in the CPSIA that require resources and time that are not evident in the list of required rulemakings. The resource needs have been enormous, ranging from projects so basic as educating headquarters and compliance field staff on the scope of the new regulatory requirements of the Act to the more complex work of updating the Commission's regulations to permit the use of its new authorities with regard to refusing admission of imports. Updating our regulations and coordinating with Customs and Border Protection to allow for a process for a hearing upon refusal of admission requires significant agency resources, as does developing a process for bonding shipments to cover the cost of destruction and related import activities.

Suffice it to say that each of the various initiatives in the Act -- whether it be the lead and phthalates limits, the testing and certification regime, the import provisions, or the new database and information technology upgrades -- will require significantly more time to implement than anyone originally anticipated. Having all of that done simultaneously would have taxed the agency even if we had been given additional funding from the start. Moreover, the agency has significant ongoing work that remains, as well as two other new statutes that it must implement

this year, the Virginia Graeme Baker Pool and Spa Safety Act and the Children's Gasoline Burn Prevention Act.

The deadlines have proven to be impracticable for our staff to meet and are presenting significant problems for the agency to solve. The Commission staff must have some relief from the deadlines imposed.

Practical Solutions: Prioritizing Workload Based on Risk or Extending Deadlines

The following suggestions, ideally in combination, would help ameliorate the issues discussed above.

o Use of Risk Assessment to Establish Priorities

Use of risk assessment methodology would allow the Commission to establish priorities, provide for common sense exemptions, and set CPSIA implementation deadlines. Congress took this approach, to some degree, when setting the initial testing and certification deadlines. Using recall frequency and, to a lesser degree, the severity of possible injuries, Congress determined that cribs, pacifiers, small parts, lead in paint, and lead in children's metal jewelry would lead the children's product testing and certification effort.

However, by this June the Commission must accredit laboratories for third-party testing to all other children's product safety rules, which includes any new or previously existing rule applicable to a product intended for children 12 years of age or younger. The agency will be pushed to meet that deadline as the staff will need to issue accreditation procedures, and all related testing procedures, for the many rules applicable to children's products at that time, including the enormously complex requirements of the ASTM F963-07 Toy Safety Standard. All of this will take place simultaneously with work we are doing to open CPSC's new laboratory facilities.

Examples of Inefficiencies: Furthermore, inefficiencies have been created given the tight timeframes of the Act. For example, under section 102 of the CPSIA, the Commission is required to publish accreditation procedures for laboratories testing baby walkers, bouncers and jumpers by March 12, 2009. However, the existing regulations for baby walkers and bouncers are outdated. The Commission through its enforcement actions has been requiring compliance to the voluntary standard rather than the outdated regulations, and for the most part industry is complying with the voluntary standard. It is inefficient for the staff to accredit laboratories to test to outdated regulations.

The baby walker standard will be one of the first two rules the Commission handles under the series of new consumer product standards required for durable infant products under CPSIA section 104, and therefore, the most efficient (and common sense) resource allocation would be to accredit laboratories for testing when we announce the new baby walker standard in February 2010. Because the statute was written without such flexibility, we must develop an approach to deal with the outdated baby bouncer, walker, and jumper standard, which may include withdrawing the outdated standard to avoid accrediting laboratories to standards no one follows

and to clarify that there is no need for industry to take a step backwards to test to standards that will be updated in a matter of months.

From our standpoint, an ideal solution to these challenges faced by our staff would be for Congress to let the Commission decide what level of testing is required for which products, allowing the Commission to prioritize based on risk and tackle any problems that need to be addressed in the most efficient manner. Alternatively, Congress could continue to require certification and third-party testing for all children's products but allow the Commission to prioritize as to when the testing to each children's product safety rule will begin, so that it can roll those out on a timetable that is based on its discretion and expertise. To do this right, we need to:

- provide our stakeholders with a list of all standards that are applicable to a children's product;
- identify which children's products need to comply with which standards;
- define the test methods for each standard and whether they make sense for all of the different products covered;
- accredit the laboratories for testing to each standard; and
- develop a process for inspecting certificates.

All of that takes time and the ten months the CPSIA gave us to accomplish this task has not proven to be workable.

The wholesale release of "all other" children's product standards in June 2009 may further stress manufacturers, importers, and retailers while providing marginal improvement in children's safety for many of the products. A methodical, pragmatic approach to the release, based on priorities determined by CPSC staff, would facilitate a smoother rollout while addressing first the products presenting the greater risk to children. This allows CPSC staff the flexibility to prioritize tasks, manage our workload, and assure greater safety without an unnecessarily burdensome impact on product sellers.

o Extend Deadlines

Another alternative is to move certain of the dates for implementation in the CPSIA to allow the Commission the time to provide additional implementation guidance. The most challenging deadlines for compliance were those that went into effect on February 10, 2009, requiring retroactive compliance to the new lead and phthalate content limits. The breadth of products covered by the definition of children's products covered by the lead limit, i.e., any product designed or intended primarily for a child 12 years of age or younger, implicated numerous industries that had not understood that their products would be subject to the new lead provisions.

The question asks us to comment on the impact of the deadlines on industry. Whether it be makers of books, bikes, or baseball bats, every industry needed more time to determine which, if any, of its products were covered under the definition of children's product, test those products for compliance, and develop new methods of manufacture to eliminate the lead if it was present

in the product. The scope of products covered by the new regulation and the amount of inventory implicated went well beyond what many may have contemplated. Our information is incomplete but we are told that millions of products wait in storage warehouses for return and destruction. Retailers have indicated that most of these products do not contain accessible lead, and a real question exists in our staff's mind as to whether they contain accessible lead in a sufficient amount to be anything other than a *de minimis* risk but simply were unable to meet the standards that took effect in February. It will be even more difficult for these products to meet the stricter standards to come. These challenges faced by industry have a direct impact on CPSC staff resources and our ability to meet deadlines given the need to respond to their inquiries.

Another approach to the deadlines is to allow the Commission more discretion to move an effective date for a given product or class of products in certain circumstances. The CPSIA does not permit the Commission to delay the effective date of any of the new standards to deal with a problem such as the lead in bike tire valves where the risk to a child is exceedingly small but still measurable, and the economic impact is substantial. In cases such as these, some reasonable amount of time should be allowed to reengineer the product to develop an alternative that can meet the new lead limits.

***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?***

CPSC staff does not have data on the total value of impacted inventories, lost sales, disposal costs, and other costs likely to be incurred by small manufacturers because of the CPSIA; however, information of an anecdotal nature, that has not been verified by CPSC staff, puts the impact in the billions of dollars range.

Industry Estimates

For example, the Motorcycle Industry Council reported in a February 26, 2009, press release that the new lead rules would result in an annual impact of \$1 billion on their industry. In a request for a moratorium on the retroactive application of the lead ban, the American Chamber of Commerce in Hong Kong estimated that the impact on their members producing children's wearing apparel would run in excess of \$300 million. In a letter to the CPSC, counsel to a major mass retailer stated that a client estimated their cost to test inventory at \$1.4 million and projected inventory losses of \$30 million. Another client estimated the value of their unsalable inventory at \$7 million. It was also reported in a March 5, 2009, article in the Wall Street Journal, that the Toy Industry Association estimated inventory losses valued in the range of \$600 million.

CPSC Testing Estimates

CPSC staff has estimated that the cost for third-party testing of product for lead and phthalates would range from several hundred dollars to several thousand dollars per product tested,

depending on the number of product components requiring testing. Based on information obtained from testing laboratory price lists and quotes, the cost to test for the lead content of a substrate appears to range between about \$50 and \$100 per tested component. In a recent public meeting, industry representatives stated that testing of the 233 various components of a bicycle, valued at \$50, cost one of their members approximately \$14,000. Less information is available about the cost of testing products for phthalates, but the limited information obtained from price quotes and laboratory presentations to CPSC staff suggests the best estimate for the cost of phthalate testing at this time ranges from \$300 to \$500 per tested component. The cost to test for phthalates appears to vary widely from market to market. In a recent CPSC public meeting on phthalates, one participant told of receiving quotes for the testing of a product ranging from \$7,000 in Asia to \$22,000 in the United States. Because these tests tend to be destructive, manufacturers also bear the expense of lost material, labor, and overhead associated with production of the products tested.

Economies of scale provide an advantage to larger volume manufacturers, relative to their smaller volume counterparts, as they can absorb these testing costs over a larger production volume. Spread over this larger volume, the incremental increase to the cost of each product is much smaller for the large manufacturer versus the much smaller manufacturer. In short, the heavier burden falls to the smaller volume business. When the Commission establishes random sampling requirements (as part of the required rulemaking on periodic testing in Section 102(b)), testing costs will increase over current levels for manufacturers of all sizes.

The exclusion of most fabric from the third-party testing requirements will provide only limited relief for apparel manufacturers, including small manufacturers. In a public meeting with CPSC staff, several apparel retailers reported finding virtually no lead in fabric, but they did find lead in about 2% of the tests on hard items, such as buttons, zippers, snaps, and fasteners. Since most apparel items have some non-fabric items, there will still be testing requirements for most apparel items. Moreover, under the new restrictions the presence of lead in fasteners used on clothing has had a negative impact on the second-hand market for children's clothing in the United States.

Although testing children's products, as applicable, for lead and phthalates has received the most attention, many products will be subject to additional third-party testing requirements. For example, cribs must be tested for compliance to the crib safety standards at 16 CFR part 1508. Toys are also subject to testing for compliance to applicable provisions of the Toy Safety Standard, including testing for additional heavy metals, such as arsenic, cadmium and chromium. We have no quotes for these tests; however, it is probable that the major factor in the cost of the tests will be the labor time required to conduct the tests. Once again, given the destructive nature of the testing, the manufacturer will also bear the expense of lost material, labor, and overhead.

It is important to keep in mind the wide expanse of goods falling under the definition of "children's products" and subject therefore to third-party testing requirements. Beyond toys and durable infant and toddler products, items such as books, bicycles, clothing, youth-sized motorized off-road vehicles, school supplies, and Scout equipment and accessories are subject to lead and/or phthalates testing. Likewise, all products for children 12 years of age or younger that are made by crafts people, stay-at-home moms or dads, charitable church groups and the like,

must meet the new limits and be tested for compliance or their products are banned. This has completely upset the business model for many of those small businesses and charitable organizations. Because of the retroactive nature of the regulations, many retailers began turning back product with more than 600 ppm well in advance of February 10, 2009, in order to ensure their shelves were free of non-compliant product. As a result, many small manufacturers, who failed to recognize the true scope of the law or were unprepared for the retailers' reaction to the CPSIA, now find they have inventory they cannot sell.

#### Retailers Accelerating Deadlines

Retailers continue to move well ahead of the deadlines established in the CPSIA. For example, it is staff's understanding that Wal-Mart stopped receiving product with more than 300 ppm lead in January 2009. These actions have stranded inventory that may be compliant today but will be banned in August as the lead limit drops to 300 ppm. In addition to the risk that these products may become obsolete and will need to be reworked or destroyed, manufacturers of all sizes are incurring expenses to hold this inventory while they decide how to move their product. The cost to carry this inventory varies by business, but typically runs about 25% of the on-hand inventory value.

As retailers pull product from their shelves, many consumers have also been negatively impacted. For example, CPSC staff have received numerous emails from consumers stating they could no longer purchase parts for their child's youth model motorcycle because of retailer concerns over the lead content of the parts. More than one consumer has noted the possibility of consumers' purchasing vehicles sized for older children or adults if they could no longer service their current motorcycle or ATV. This reaction potentially places these children in a situation of increased risk of injury or death.

#### Solution: Risk-based Assessments That Consider Age and Exposure

It may be too late to mitigate the significant economic impact of the February 10, 2009, ban on children's products containing more than 600 ppm total lead content, by weight, for any part of the product. However, some relief could be provided to deal with the impact on thrift shops and second-hand sales, and Congress still has time to act to prevent the even greater impact that will occur when the lead limit drops to 300 ppm in August 2009. For example, toxic substances limits are better regulated based on the possibility of exposure in relation to age. Foreseeable use data, combined with mouthing and ingestion data at various ages, would define the group at risk for any given product.

This approach would exclude items such as bikes and ballpoint pens from the discussion and we could focus on items like metal jewelry and other objects likely to be mouthed or ingested. By granting the CPSC the flexibility to determine the relevant hazards, flexibility in determining exemptions based on assessment of risks, and the discretion to adjust the age limit for certain groups of products where the exposure is low, resources can be properly focused on areas of greater risk, yielding maximum reductions in consumer risk of death and injury.

***4. Does the CPSC have any suggestions 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?***

In light of the concerns expressed by small business owners and employees, CPSC staff has been considering what relief might be provided for them without compromising safety. The first challenge was to define what is meant by "small business" in the context of the manufacture of children's products.

For example, with regard to children's apparel, there are not good statistics differentiating those firms that make all apparel versus those firms that make apparel intended only for children 12 years of age or younger. With regard to toys, the analysis of those businesses that are focused on the manufacturing of products solely for children is more reliable. Bureau of the Census (2006) data shows that there are 776 firms that manufacture dolls, toys, and games (NAICS 33993); 403 of those firms (51.9%) have fewer than 5 employees, 632 (81.4%) have fewer than 20 employees, and 963 (98.3%) have fewer than 500 employees which is the standard definition of a small business. Only 13 of the firms (1.7%) that produce toys would not be considered small businesses by the Small Business Administration. All (or almost all) of these firms are likely to produce children's products and all are affected by the current economic downturn.

Another group significantly impacted by the CPSIA is small crafters of products for children, many of whom work out of their homes. Based on a 2000 survey conducted by the Craft Organization Directors Association, there were an estimated 106,000 to 126,000 craftspeople in the United States. Additionally:

- The average gross sales revenue was \$76,000 per craftsperson.
- The median household income of craftspeople was \$50,000 per year, with about half coming from craft activities.
- 64% of craftspeople worked alone, 18% work with a partner or family member, and only 16% had paid employees.

Component Certification

The cost of testing and certification is a huge burden on these small businesses and a robust component certification program would be extremely helpful. However, any component testing rule would have to apply across the board to all businesses, small and large, and to our global trading partners in compliance with international trade laws. Furthermore, we have to design a program we are confident will avoid the switch of components during manufacture which is the very problem that Congress was intending to fix by requiring testing of children's products in the CPSIA. Component testing presents real challenges since many of the components used in children's products are not children's products on their own and do not require third party testing. Snaps could be used on a hand knitted sweater that were not produced primarily for use in children's products, and we cannot be sure given the expense of testing, that a market will develop for certified compliant materials for use by crafters.

### Potential Solutions

Recognizing that the Commission always has the ability to take action to address unsafe products in the marketplace, Congress could take many different approaches to mitigate the effects on small businesses. Congress could apply the new lead and phthalates limits prospectively to mitigate the impact on inventory existing prior to enactment. It could allow for a more flexible exception process based on balancing of risks against the burdens of the costs of testing and certification but that could overburden staff. Another option would be to allow the Commission the flexibility to decide what children's products require testing and certification.

***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 economic downturn and the consequent increased need for low-cost sources of children's clothing?***

CPSC staff has only limited, anecdotal information concerning the impacts of the Act on second-hand stores. Major resellers such as Goodwill Industries and the Salvation Army have estimated impacts, including both lost sales and disposal costs, totaling hundreds of millions of dollars. Many smaller resellers have indicated that under present circumstances, they cannot afford to continue selling children's toys or apparel, which account for much of their revenues. Even church bazaars and neighborhood yard sales are adversely affected.

The major problem for second-hand stores and other resellers is that the CPSIA prohibits the sale, distribution or export after February 10, 2009, of any children's products exceeding the applicable lead or phthalate limits regardless of when they were made. Second-hand stores are typically selling items that were manufactured years earlier. Thus, a large percentage of a reseller's current inventory of children's products may have been manufactured long before the stringent new limits took effect, and it may now be impossible to dispose of such items lawfully except by destruction (which itself may be costly, particularly for non-profit organizations). To make matters more difficult, there is often no cost-effective way to determine which products can lawfully be sold and which cannot.

Unlike other retailers, resellers generally have little or no control over the compliance of the goods that they obtain. Most are donated. Even where they have regular donors, resellers cannot practically establish specifications for children's products as major retailers can for their regular suppliers. Testing everything they receive is not a practical solution either. Like small, home-based manufacturers, resellers cannot spread testing costs across many units of the same type; at any given time, they would usually have on hand no more than a few items of the same type. The standard tests for lead and phthalate content are destructive, so if one tests a single item to determine whether it can be sold, one no longer can sell that item.

Screening devices, such as x-ray fluorescence (XRF) machines, can help in weeding out children's products that have excess lead, without destroying products that comply, but the new technology is still expensive. No such screening device yet exists for identifying phthalates. Even if such technology can be developed quickly, it remains a disproportionate burden to test every unique item in inventory. Some internet resellers and auctioneers do not even have access to the products that are offered for sale by third parties on their website and so could not feasibly test them by any method.

The second-hand store problem will get worse for several years before it may ultimately get better. The lead content limits will drop to 300 parts per million in August 2009 and to 100 ppm in August 2011 (unless the Commission determines that such limit is not technologically feasible for a class of products). Products manufactured after these dates will be in use for some years before they are donated to second-hand stores. So, it will probably take many years before children's products that comply with these stringent limits make up a sizable majority of the products for sale at second-hand stores.

#### Potential Solutions

Under the circumstances, merely postponing the effective date of the lead or phthalate limits for everyone, while this would help alleviate some problems we are seeing, would not be very helpful to resellers because it would allow products with excess lead and phthalates to continue being made, and thus add to the number of noncompliant products that may eventually find their way to resellers and so postpone the day of reckoning.

The most effective way to help resellers is to address the issue of retroactivity, requiring that manufacturers meet the statutory limits for products manufactured after the effective date but that retailers and resellers be allowed to continue sale. If this suggestion were adopted, it would be important to note that resellers could not sell recalled products and that the Commission retains its authority to stop sale of any product if it finds an exposure that presents an unreasonable health and safety risk to children.

A law like the CPSIA that outlaws sales of previously lawful products will, by its nature, hurt retailers more than manufacturers and hurt resellers even more than other retailers (given the fact that products are typically in consumers' hands for several years at least before they reach second-hand stores). While dealing with retroactivity across the board would be the most effective way to deal with the inequities presented by the current law, other suggestions include such things as establishing a separate rule for resellers. For example, the ban on selling children's products with excess lead or phthalate content could take effect at a later date for second-hand sellers than for retailers generally. Or, resellers (or some subset of them, such as individual consumers or non-profit resellers) could even be exempted entirely from the provision that makes it a prohibited act to sell products containing more than trace amounts of lead or phthalates. Children's products that would have been banned under prior law should not be exempted in any case, and there may be categories of products, for example, children's metal jewelry, that should be handled more strictly. While consumers are accustomed to the notion that used goods are sold "as is," it might be appropriate to require a label or other type of

warning at the point of sale if resellers are allowed to continue to sell older children's products that do not comply with the new limits.

Lest there be any question, CPSC staff does not favor exempting second-hand sellers from the prohibition against selling recalled products (including children's products that are recalled for excess lead paint, or excess lead or phthalate content). The staff believes that resellers can reasonably be expected to keep abreast of CPSC recalls by signing up to receive CPSC's recall press releases and to remove any recalled products from their shelves. Similarly, where Congress has unambiguously directed application of new regulatory requirements to a discrete class of used children's products, such as cribs, CPSC staff believes that resellers no less than others must take steps to comply, even if that means deciding not to sell the products in question.

The Commission has adopted an enforcement policy on lead limits and has issued other guidance to second-hand stores to address many of the recurring issues. In the staff's view, however, the core problem is caused by the retroactive nature of the law and is beyond the agency's authority to solve.

***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 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 (e.g., snaps or zippers on children's clothing)?***

The term "children's product" has significance for several different provisions of the CPSIA. It specifies which products are subject to the lead content limits. Indirectly, it plays a role in defining which products are subject to the phthalate limits. It governs the scope of products that require certification based on third-party testing and those that will require tracking labels "to the extent practicable."

CPSC staff believes that for purposes of defining which products are subject to lead limits, the boundary age could reasonably be lower than 12, at least in most cases. The Senate bill (S. 2045) deemed age 7 a satisfactory upper limit. CPSC staff understands that the conferees ended up agreeing to age 12 primarily because of the so-called "common toy box problem" – i.e., the concern that a product intended primarily for older children might nonetheless be available to younger ones in the same home. This choice had the effect, however, of applying the lead limits to a much larger population of products, including many that are not toys and even including outdoor products such as dirt bikes or ATVs that would rarely be accessible to younger children under any circumstances.

#### CPSC's Regulations Established Age Limits by Product Class

CPSC's own regulations have used a variety of different ages to define what group of children's products will be subject to a standard or ban, and these precedents may be useful to consider. For example, the small parts ban applies to products that are intended for children under 3. Toys that are intended for ages 3 through 5 are allowed to have small parts, provided that they have

cautionary labels to warn that they are not suitable for youngsters under 3. In general, toys that are intended for children 6 and older do not require cautionary labeling except in a few specific cases such as balloons and small balls. The lead paint ban (16 CFR part 1303) applies to children's products without a specific age definition. Despite this broad applicability, the scope of the lead paint ban has rarely if ever, generated controversy. This is probably so because it is limited to children's products that have paint or similar surface coatings, and such products are much fewer in number and more easily identified than children's products generally.

Both the likelihood of exposure and the route of exposure are factors to consider in deciding what products should be subject to lead limits. Lead presents an acute hazard when direct ingestion is possible. For this reason, CPSC staff has long treated children's metal jewelry as warranting special concern. In other applications, brass and many other metals often have some lead content, particularly to improve workability, corrosion resistance and other properties. Where such objects can be mouthed but not swallowed, they generally pose a lesser risk, and objects that can be licked but not mouthed pose still less risk. There are some products where mouthing or licking is unlikely but where some lead exposure may result from touching and inadvertent transfer of lead from hand to mouth. A child's exposure to lead from zippers and snaps will depend on the type of garment and the child's age, among many other factors.

Practical Solution: Commission Discretion

One way to address these issues would be to give the Commission more discretion to grant exclusions from the lead or phthalate limits. Under the law as currently written, a material having more than 600 parts per million lead cannot be excluded unless touching the product will not result in the absorption of *any* lead. Taken as a whole, the language of section 101 appears to rule out treating even very low levels of absorbable lead as negligible. Congress could modify this exclusion criterion to allow *de minimis* levels of absorption or to change the focus to preventing any significant increase in blood-lead levels of a child, particularly for children who are of the age of the intended user.

Giving the CPSC discretion to lower the age limit for certain classes of products might be more efficient than dealing with many requests for exclusion, which is a resource-intensive process. Another resource conserving approach would be for Congress to lower the age limit across the board and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

***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?***

CPSC staff is aware that many different parts of youth ATVs and youth motorcycles have lead content, some of which may exceed the 600 or 300 ppm level. Some of these parts are inaccessible, and some parts may qualify for the higher limits applicable to certain electronic components. Other parts, however, appear to be accessible and may not qualify for any

exclusion under section 101 of the CPSIA. These youth vehicles may also have some phthalate content, but they do not appear to be covered by the section 108 bans, which are limited to certain toys and child care articles.

The possibility that children will suffer significant lead exposures from these classes of vehicles appears to be remote at best. First, the vehicles are generally stored outside the home, where younger children would rarely be allowed unsupervised access. The vehicles are generally designed for children of at least 6 years of age and older. These children are far less likely to ingest or mouth components of a motorized vehicle – even those that are physically exposed – than something that fits readily in the mouth, such as a jewelry chain or charm. Children may still be exposed to some lead as a result of touching seats, handle bar grips or other places and then inadvertently transferring some of the lead to their mouths from their hands, either directly or indirectly, as for example while eating. For most children, however, this type of exposure is not likely to result in significant absorption of lead. This is particularly true where children are wearing appropriate protective riding gear, such as gloves and helmets.

#### Broadening the Exemptions for Metals

In section 101(b)(4), Congress recognized that it might not be technologically feasible for certain electronic devices to meet the lead limits applicable to children's products generally and gave the CPSC authority to adopt other requirements for such devices. The Commission has exercised this authority on an interim basis and established higher limits for certain electronic components where it concluded that such parts cannot be made inaccessible and it is not technologically feasible to substitute other materials at this time. These include metals such as steel, aluminum and copper alloys as used in electronic devices. In adopting these alternative limits, the Commission made reference to exemptions recognized elsewhere, such as the European Union directive 2002/95/EC known as RoHS. It is worth noting that in Europe, the RoHS exemptions are equally applicable to non-electronic uses of these metals, but the staff believes that section 101 gives us no flexibility to apply the same exemptions outside the realm of electronics. This means that children's products containing these metals and metal alloys manufactured for the U.S. market cannot employ recycled metal to the same extent as they can in Europe; rather, the manufacturers for the U.S. market must obtain supplies of primary metal, forcing vastly higher energy consumption and higher costs, or they must quickly switch to substitutes whose properties are poorly understood and may even pose more significant safety risks to children.

Under the current law, CPSC staff believes that an exclusion for youth ATVs would be very difficult to justify. Some have argued that if youth-sized ATVs cannot be sold for an extended period of time, owing to lead limits, then more children may end up riding adult-sized ATVs. A child using an adult ATV as a substitute would face a far graver and more immediate risk than that of the possible lead exposure from the youth ATVs.

#### Potential Solutions

The ATV situation is illustrative of a number of product classes that may not qualify for an exclusion. Congress could moderate this situation in several different ways. These include one or more of the following (not in priority order): (1) postponing the deadline for sales (not

manufacture) of children's products containing lead above the new limits; (2) lowering the age limit for children's products (as discussed in the response to question 6); (3) exempting some or all children's products that are usually not kept in the house, such as bicycles and ATVs; (4) giving the CPSC greater discretion to exclude from compliance with the lead limits any materials or products that pose a negligible risk to children (as discussed in the response to question 6); or (5) allowing materials that are eligible for special treatment when used in electronic devices to receive similar treatment in other children's products when the justification is equally compelling.

**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?**

This issue lies within the authority and expertise of the Environmental Protection Agency (EPA).

**9. I understand that, since early December 2008, CPSC has had access to a large number of lead content 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 and under) and their component materials (i.e., paper, paperboard, ink, adhesives, laminates, and bindings). Has 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 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 secondhand distributors of such ordinary books, including those published before 1985?**

Lead Testing and Printing Ink: The Publishing Industry's Challenge

Given the breadth of the definition of children's product in the CPSIA, the Commission received thousands of questions over the past six months regarding the scope of applicability of the retroactive lead limits and the required third-party testing of such products. At the same time, retailers began demanding certificates of compliance for products likely to be on their store shelves on February 10, 2009. The publishing industry claimed to have been unaware that the definition of children's product would encompass books until retailers started asking for certificates of compliance and we posted a response to one of the frequently asked questions regarding the application of the CPSIA to books intended or designed primarily for children. Because of the variety of colors of inks used in making children's books printed on paper and cardboard, the requirement of testing for compliance to the new lead limits proved costly and onerous. Some retailers were demanding separate certificates of compliance for each book title.

The issue of lead in printing ink and other products used to make a book is not new. Indeed, in 2007 the publishing industry issued a statement on lead in books to respond to any concerns

raised about books related to that year's toy recalls for excessive lead in paint. (See American Booksellers Association statement of November 29, 2007, *Bookselling this Week: Getting the Lead Out: Consumers Question Books Made in China*, found on March 15, 2009 at <http://news.bookweb.org/news/5695.html>.) The Commission has occasionally recalled such products for excess lead; for example, a recall was conducted in February 2008 for excess lead in paint on the colored spiral metal bindings of several sketchbooks. In July of 2004, the Commission issued a warning regarding the hazards of lead in candy wrappers that contain lead or bearing lead-containing ink.

#### The "Ordinary Book" Exemption

The Commission staff wanted to provide some relief to the book publishing industry given the extraordinary impact of third-party testing for lead and because the publishing industry maintained that the Commission had never considered ordinary children's books to be a health hazard. However, given the requirements of the CPSIA, the staff felt that they needed some representative data upon which to base a decision to exempt children's books from the requirements. The number of requests for relief from the retroactive effect of the CPSIA was so high that the staff felt that in fairness, any determination that the law did not apply to a material or class of products should be based on science and supported by test results.

It is not the case (noted in your question) that the Commission staff has had access to a "large number of tests on finished 'ordinary books'," but rather we have had access to a very limited data set on which the publishers have based their request for an industry-wide exemption from testing to the new lead content limits. The publishing industry association provided the staff with 152 separate entries representing testing done on approximately 157 books conducted anywhere from 2004 to 2009. The books tested range from the ordinary books to books with handles, stickers, kits or other accessories. The staff reviewed those test results, and initially concluded that many of the tests were done for European standards and/or did not test for total lead content as required by Section 101 of the CPSIA. The staff of the CPSC asked the industry to provide more data for total lead content and demonstrate that the data submitted was representative of all of the millions of ordinary books sold to children 12 years of age or younger.

The additional data submitted suggests that modern book publishing using offset lithography does not result in books with lead levels in excess of the 300 ppm limit that goes into effect in August of 2009. However, the Commission staff has not had the time or resources to look at the issue completely or comprehensively and has been hopeful that more data would be submitted by industry particularly with respect to books published in the 1960s and 70s. The Commission staff has been assured that the publishers now all use inks that result in children's books that fall below the statutory limits for lead. While the staff does not have a statistically valid basis for a wholesale exclusion of children's books at this time, its determination to exclude them from testing and certification does not mean that any children's book can exceed the lead limit. All children's books must meet the lead limit.

Making a determination that ordinary books cannot and will not exceed the lead limits appeared to be the only means of providing immediate relief. Such an exemption from testing also should

provide relief from the retroactive application of the standard to all books in schools and libraries that are provided to children for their use. In the meantime, the publishing industry was given a conditional enforcement waiver on the testing and certification requirements for lead, pending staff's review of the data and any additional data that may be submitted. That exemption was limited to books manufactured after 1985 because the publishing industry has not provided any test data on books published in the 60s and 70s. Instead, the industry has pointed to the fact that lead was removed from printing operations in this country due to federal statutory restrictions on worker exposure to lead in printing operations which went into effect in the late 70s. The very limited testing the Commission staff has done indicates that the lead content of these older books can occasionally exceed the 300 ppm limit that goes into effect in August 2009 but that data may not be representative. At this time the Commission staff has not had the time or resources to prove that books made more than twenty years ago do not exceed the lead limits as staff has needed to focus its resources on its investigations of deaths and injuries to children and other emerging risks and health hazards.

#### Library Books and Used Book Resellers

The retroactivity of the lead provision is particularly problematic in the area of books and other printed materials. We have done very limited testing of books from the 60s and 70s. It suggests that the lead content hovers around the 300 ppm mark. Anecdotal evidence received by the agency suggests that on occasion books from this earlier period may contain lead in excess of the lead limits in their binding materials. The only way to determine the total lead content in these books is to test them.

Under the CPSIA, however, sellers of used children's books, including used book stores and thrift shops, are not required to test or certify that children's books meet the new lead or phthalates limits. The CPSIA does not require resellers to test children's products in inventory for compliance with the lead limit before they are sold. However, resellers cannot sell children's books intended primarily for use by children that exceed the lead limit.

The Commission had hoped that an exemption for "ordinary books" plus its announced enforcement policy for lead would alleviate this situation. Based on information received from the trade associations with information regarding books in libraries and schools, the Commission staff understands that most textbooks in schools are less than ten years old. Likewise, the information received suggests that most library books lent to children are recycled approximately every 18 lending cycles or three years. Thus, it appears that few of the books being provided to children in their schools and from libraries would be more than 20 years old.

#### Potential Solutions

Staff has considered children's behaviors with books and concluded that after about 19 months of age, children may occasionally put part of a book in their mouths, but they typically are taught to care for their books so that they can continue to be used for reading and learning. This information suggests that any exposure to lead from contact with books diminishes as children age. We believe an exemption is the only way to provide relief under the CPSIA. Congress could limit the testing of books to only those picture books provided to children much younger

than 12 since this is the population of children that would be most likely to interact with their books in a way that could expose them to inks with higher lead content. Lowering the age limit would be extremely helpful to staff in dealing with books and many other products by narrowing the scope of products covered. Lowering the age limit would also provide relief to schools who face retroactive application of the lead provisions not just with regard to books but also the wide variety of other educational materials they provide to school-aged children.

The CPSIA establishes that any children's product no matter when it was made is a banned hazardous product if it exceeds the lead limits and the law does not have an exemption procedure other than one based on scientific proof that there will not be absorption of any lead. One solution would be for Congress to create a waiver process allowing the Commission to "grandfather" in products made prior to the date of enactment if the Commission concludes those products present only a *de minimis* exposure level and, therefore, a negligible risk. This could be used to solve the problem of used books as well as other products commonly sold second-hand such as used clothing or youth bicycles. It creates an administrative burden that the Commission may not be able to handle without some delay, but it would provide relief without having to undo the retroactive effect of the law altogether.

***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?***

The CPSIA provides too little implementation discretion for the agency. One of the major problems with implementation has been the statute's reach across a variety of industry sectors quickly and simultaneously by virtue of its broad definition of "children's product." The lead limits reach literally every product intended or designed for a child 12 or younger. The breadth of the statute's reach has made it difficult for the Commission to address industry specific concerns in the few areas where the agency has discretion. The Commission needs room to address toy industry concerns separately from those of the apparel industry, from those of the publishing industry, and separately again from those of industries that make outdoor products for children such as motorized recreational products, playground equipment and bikes.

The lead limits and testing and certification provisions could be implemented much more smoothly if the Commission had the discretion to roll out those requirements on a product class basis. The same will soon be true for tracking labels where each industry has specific concerns about how additional labeling requirements will work given existing and multiple other labeling requirements. Congress can direct the agency as to how to determine priorities and work to a specific schedule as evidenced by section 104 which gave some flexibility to the Commission in pursuing the congressional mandates for new durable infant product standards. A similar approach to implementing all of the Act's new rules and requirements would ease the implementation burden. Indeed, the stay of enforcement of certification and testing was the agency's only means to get the breathing room it needed to deal with the various unanticipated issues that arose given the breadth of the industries affected.

Some have argued that the Commission should have a more relaxed approach to exclusions from the lead limits. However, the lead provision of the CPSIA restricts the agency's discretion at a variety of points in the statute. It allows for exemptions in three limited circumstances described in section 101(b). That section allows exclusions for inaccessible component parts of children's products and also allows the Commission to exempt electronic devices where lead is necessary for their functionality and cannot be made inaccessible. Beyond those exclusions, however, the statute leaves very little flexibility. Section 101(b)(1) of the CPSIA provides that the Commission may, by regulation, exclude a specific product or material that exceeds the lead limits established for children's products under § 101(a) of the CPSIA if the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will "neither result in the absorption of any lead into the human body," given reasonably foreseeable use and abuse of such product, including swallowing, mouthing, breaking or other children's activities or the aging of the product, "nor have any other adverse impact on public health or safety." (Emphasis added.)

The clear language of the statute is rigid; an assessment of whether there is absorption of "any lead" cannot be based on a risk based assessment because that language does not appear to allow any amount of lead, no matter how insignificant, to be absorbed in the human body. While the courts have occasionally upheld agencies applying a *de minimis* standard and exempting trivial risks from regulation, that has been permitted only when Congress has not unambiguously denied agencies that authority.<sup>1</sup> Here the act specifically limits the exclusion to an application supported by peer reviewed science supporting a demonstration that there cannot be absorption of *any* lead. Moreover, section 101(e) appears to restrict the agency's ability to use enforcement discretion while exclusion requests are pending, by stating that a pendency of a rulemaking to consider a request for exclusion "shall not delay the effect of any provision or limit . . . nor shall it stay general enforcement" of the lead limits.

Those who argue that common sense exclusions are permitted by the CPSIA would have to ignore sections 101(b)(1) and 101(e). Yet as the unanticipated consequences of the retroactive effect of the law have demonstrated, some ability to provide for *de minimis* exclusions would be helpful in implementing of the Act. The effort to deal with the *de minimis* risks given the speculative yet conceivable routes of exposure presented by certain products such as bike tire valve stems distracts attention from more serious health and safety problems that the agency must address. Recently proposed legislation banning BPA recognizes the need for such flexibility to provide relief when a manufacturer cannot comply because it is not technologically feasible to do so in the timeframes permitted. Yet such a waiver or exemption process could prove to be too resource intensive and divert agency resources to handling thousands of exemption requests when staff should instead be dealing with other risks that deserve attention such as identifying emerging hazards.

<sup>1</sup> Compare *Les v. Reilly*, 968 F. 2d 985 (9<sup>th</sup> Cir.1992) and *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) with *Ohio v. EPA*, 992 F.2d 1520, 1534-35 (D.C. Cir. 1993). See also Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, U Chicago Law & Economics, Olin Working Paper No. 150. This paper can be downloaded without charge at: <http://www.law.chicago.edu/lawecon/index.html>.

The CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks and the actual consequences of the hazard. Congress should permit the agency to exempt certain products from the limits established by the CPSIA, to ease the burdens of testing and certification on products unlikely to present more than a negligible health risk, and to regulate on a timetable influenced by the seriousness of the actual risks not artificial deadlines. A more flexible exception process would avoid regulation of *de minimis* problems both prospectively and retroactively.

Moreover, this would allow the CPSC to consider the impacts of the regulatory requirements of the CPSIA, like the balance between the adverse effects on second-hand sales of children's clothing or bicycles and the potential risks from exposure in such products, which is especially important during the current economic crisis. It should also allow the Commission to balance risks such as balancing the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV. Given that exceptions would be made on a notice and comment basis, the underlying analysis and support for any exceptions will be public allowing for transparency and accountability. Finally, relaxing certain deadlines in the Act will allow for better priority setting which will allow Commission resources to be put towards the most serious health risks first.

\* \* \*

#### CONCLUSION

The staff has set forth in its answers to specific questions above numerous approaches to dealing with the issues raised. In our view, we have been confronted with three major issues in implementing the CPSIA: (1) the retroactive application of requirements to inventory; (2) the broad reach of the legislative mandates given that "children's product" is defined as a product for children 12 years of age or younger; and (3) the impact of the new testing and certification requirements for all consumer products and the third-party testing requirements for children's products. You have asked us to consider possible solutions to the problems raised in the letter, and make our best recommendation as to productive solutions recognizing that these are ultimately policy decisions for others to make. We concluded that the following three changes would resolve many of the major difficulties identified above:

- Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children.
- Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

- Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities and a phase-in schedule.

As discussed above, there are many ways to address the challenges of implementation and meet the important goals of the statute. Regardless of the path chosen, some legislative changes would be helpful to allow the agency to set risk-based priorities given the finite resources available to the Commission.

JOHN D. DINGELL  
15TH DISTRICT, MICHIGAN  
CHAIRMAN  
COMMITTEE ON  
ENERGY AND COMMERCE  
CO-CHAIR  
HOUSE GREAT LAKES  
TASK FORCE  
MEMBER  
MIGRATORY BIRD  
CONSERVATION COMMISSION

Congress of the United States  
House of Representatives  
Washington, DC 20515-2215

March 4, 2009

WASHINGTON OFFICE:  
ROOM 2328  
RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-2216  
(202) 225-4071

DISTRICT OFFICES:  
19855 WEST OUTER DRIVE  
SUITE 103-E  
DEARBORN, MI 48124  
(313) 278-2938  
23 EAST FRONT STREET  
SUITE 103  
MONROE, MI 48161  
(734) 243-1849  
301 WEST MICHIGAN AVENUE  
SUITE 305  
YPSILANTI, MI 48197  
(734) 481-1100

The Honorable Nancy A. Nord  
Acting Chairman  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

The Honorable Thomas Hill Moore  
Commissioner  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Dear Acting Chairman Nord and Commissioner Moore:

As an author of the original Consumer Product Safety Act in 1972 and a long-standing advocate for better protections for our Nation's consumers, I wholeheartedly support a stronger regulatory framework to ensure the safety of children's products. Nevertheless, I share the reasoned concerns of my colleagues, House Committee on Energy and Commerce Chairman Waxman, Subcommittee on Commerce, Trade, and Consumer Protection Chairman Rush, Senate Committee on Commerce, Science, and Transportation Chairman Rockefeller, and Subcommittee on Consumer Protection, Insurance, and Automotive Safety Chairman Pryor, about the implementation of the Consumer Product Safety Improvement Act (PL 110-314, "the Act"). In particular, I am troubled that the Act includes unrealistic deadlines for rulemakings and compliance, as well as too little implementation discretion for the Consumer Product Safety Commission (CPSC), both of which are exacerbated by CPSC's lack of adequate resources, both in terms of funding and staff.

In describing the implementation of the Act, Acting Chairman Nord's January 30, 2009, letter to the Congress maintains, "the timelines in the law are proving to be unrealistic, and [CPSC] will not be able to continue at this pace without a real risk of promulgating regulations that have not been thoroughly considered." Moreover, the letter states, "Although [CPSC] staff has been directed to move as quickly as possible to complete its work, short-circuiting the rulemaking process gives short shrift to the analytical discipline contemplated by the statute." In light of these statements, I would appreciate your candid responses to the following questions, which will assist me and my colleagues in our consideration of common-sense and workable solutions to some of the more pressing problems that have arisen during the Act's implementation:



The Honorable Nancy A. Nord  
The Honorable Thomas Hill Moore  
Page 2

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?
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?
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?
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?
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?
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)?
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?
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?

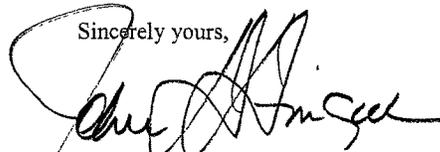
The Honorable Nancy A. Nord  
The Honorable Thomas Hill Moore  
Page 3

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?
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?

Please provide your responses to my office by **no later than the close of business on Friday, March 13, 2009**. I intend to work with my colleagues in the House and Senate to resolve these issues, as well as call on Chairman Waxman and Chairman Rush to hold hearings on problems arising from Act's implementation. Your responses to these questions will be invaluable in preparing Members of Congress for a frank discussion about several of the Act's apparent shortcomings. Should you have any questions, please feel free to contact me or Andrew Woelfling on my staff at 202-225-4071.

With every good wish,

Sincerely yours,



John D. Dingell  
Chairman Emeritus  
Committee on Energy and Commerce

cc: Representative Nancy Pelosi, Speaker of the House of Representatives  
Representative Steny Hoyer, Majority Leader  
Representative Henry A. Waxman  
Representative Rick Boucher  
Representative Frank Pallone, Jr.  
Representative Bart Gordon

The Honorable Nancy A. Nord  
The Honorable Thomas Hill Moore  
Page 4

Representative Bobby L. Rush  
Representative Anna G. Eshoo  
Representative Bart Stupak  
Representative Eliot L. Engel  
Representative Gene Green  
Representative Diana DeGette  
Representative Lois Capps  
Representative Mike Doyle  
Representative Jane Harman  
Representative Jan Schakowsky  
Representative Charles A. Gonzalez  
Representative Jay Inslee  
Representative Tammy Baldwin  
Representative Mike Ross  
Representative Anthony D. Weiner  
Representative Jim Matheson  
Representative G.K. Butterfield  
Representative Charlie Melancon  
Representative John Barrow  
Representative Baron P. Hill  
Representative Doris O. Matsui  
Representative Donna Christensen  
Representative Kathy Castor  
Representative John Sarbanes  
Representative Christopher Murphy  
Representative Zachary T. Space  
Representative Jerry McNerney  
Representative Betty Sutton  
Representative Bruce Braley  
Representative Peter Welch  
Representative Joe Barton  
Representative Ralph M. Hall  
Representative Fred Upton  
Representative Cliff Stearns  
Representative Nathan Deal  
Representative Ed Whitfield  
Representative John Shimkus  
Representative John B. Shadegg  
Representative Roy Blunt  
Representative Steve Buyer  
Representative George Radanovich  
Representative Joseph R. Pitts  
Representative Mary Bono Mack  
Representative Gregg Walden  
Representative Lee Terry

The Honorable Nancy A. Nord  
The Honorable Thomas Hill Moore  
Page 5

Representative Mike Rogers (MI)  
Representative Sue Wilkins Myrick  
Representative John Sullivan  
Representative Tim Murphy  
Representative Michael C. Burgess  
Representative Marsha Blackburn  
Representative Phil Gingrey  
Representative Steve Scalise  
Senator Harry Reid, Majority Leader  
Senator John D. Rockefeller, IV  
Senator Daniel K. Inouye  
Senator John F. Kerry  
Senator Byron L. Dorgan  
Senator Barbara Boxer  
Senator Bill Nelson  
Senator Maria Cantwell  
Senator Frank R. Lautenberg  
Senator Mark Pryor  
Senator Claire McCaskill  
Senator Amy Klobuchar  
Senator Tom Udall  
Senator Mark Warner  
Senator Mark Begich  
Senator Kay Bailey Hutchison  
Senator Olympia J. Snowe  
Senator John Ensign  
Senator Jim DeMint  
Senator John Thune  
Senator Roger Wicker  
Senator Johnny Isakson  
Senator David Vitter  
Senator Sam Brownback  
Senator Mel Martinez  
Senator Mike Johanns

**TESTIMONY**

**Laurel Schreiber, Lucy's Pocket**

**House Small Business Committee; Subcommittee on Investigations and Oversight**

**May 14, 2009**

**Unintended Consequences of the CPSIA as it Relates to Small Business.**

Mr. Chairman and members of the Committee, thank you for the opportunity to speak to you today about the effects of the CPSIA on small businesses. My name is Laurel Schreiber and have a small home-based business called Lucy's Pocket. I sell monogrammed gifts for children through my web site, on eBay, and at etsy.com

As the CPSIA now stands I - as well as thousands of crafters, seamstresses, artists and others that market safe, handmade items to children under the age of 12 - will be put out of business. It is only through congressional intervention that we will be able to continue building our businesses. As a small business owner I am looking to you to take the lead and re-establish legislation that will allow those of us that have been creating safe items to continue creating them.

As it relates to my business, there are two major and substantial problems with the CPSIA as written:

- **redundant testing requirements**
- **comprehensive labeling requirements**

All of the items I sew onto - or make myself - are made from commercially available textiles, ribbons, threads and other materials. They come from wholesale suppliers as well as retail

stores. A majority of the items I purchase from wholesale suppliers have **General Certificates of Conformity (GCC)** which attest that the items have been tested for lead and/ or phthalates and have passed those tests. I also purchase items from large retail stores that have also tested the products but are unable to provide GCCs.

As the CPSIA now stands, I will have to test each individual item prior to selling it. And though an enforcement stay has been issued for textiles, there is no guarantee it will not be rescinded at some later date. The enforcement stay does not include items with buttons, snaps, zippers or other non-textile parts.

Because I sell one of a kind items, I will need to create two identical items—the wet method used to test for lead destroys the original item. From the testing companies I have contacted - many of whom are located overseas - the cost to me is about \$75 per component. (A component includes fabric and thread and any other material that makes up the product.)

I have brought four samples of my work to illustrate the ramifications and the unintended consequences that the law will have on my business.

One of my most popular items is an appliqued bib and bloomer set. The set contains (at a minimum) 12 components

- four threads
- two dyed fabrics
- a two part Velcro closure on the bib
- elastic
- 100% poly cotton fabric
- 100% terry fabric
- 100% cotton binding

To test those 12 components it will cost me \$900 to prove that the bib and bloomer set does not contain lead. If I use a plastic-backed bib purchased from a retail store then I will need to add an extra \$375 for phthalate testing. Testing costs for a two piece set will range from \$900 to \$1275. It sells for \$20.

I also create monogrammed hairbows - they consist of a metal clip, two types of thread, and ribbon. I have GCCs on file from the importer showing that the clip meets the lead guidelines. Because it contains metal, it does not qualify for the enforcement stay. It will cost at least \$300 to test each bow. It sells for \$5

My third example is a monogrammed bow holder. It consists of one metal ring, 3 types of grosgrain ribbons, thread, and hot glue. It hangs on a wall in a child's room. It is not a toy. Because there is a metal ring it will not currently qualify for the enforcement stay. It will cost \$450 to test. It sells for \$12.

Finally, I create monogrammed headbands. The headband is made of plastic so it must also be tested for phthalates. As with my other items, I have GCCs on file from the importer showing that the headband does not contain the illegal phthalates. To test the four components of the headband (ribbon, 2 types of thread, headband) plus phthalates will cost \$675. It sells for \$9.

**Redundant testing is unnecessary.** The air in my house, the sewing table I work at is not lead infused nor lead filled. Items coming out of my home will not be contaminated with lead.

Sadly, if the redundant testing requirements do not put me out of business—then the **comprehensive labeling mandates** certainly will.

As of this August each and every item going out of my workroom must contain a permanent label that contains information such as the source of the product, the date of manufacture and batch or run number. For a business that creates one of a kind items—and less than 5000 or so a year --

this is an unnecessary hardship. Permanent labels are not technically feasible for many of my items and procuring permanent labeling supplies is an expensive proposition -- and one without a value add to my customers and which does nothing to increase the safety of the product.

I, and many others like me, started creating handmade items as an antidote to mass produced, possibly unsafe toys and clothing originating from China. Many of us have young children - we are very aware of safety concerns relating to lead. But, we use safe products and we create safe items. We are willing to change the methods we use to insure compliance but with the way the law is written we are simply unable to continue building our businesses.

I am asking for consideration. I have written letters, sent faxes, made calls. I want to be safe. I want to be legal. But the unintended consequences of the CPSIA are showing that this will be impossible. I will have to close my doors. And, once I close I will not be supporting my suppliers or other local businesses—all of which qualify as **small businesses**. And they may not be affected hugely by me - but there are a lot of businesses like me out there. So once you start multiplying the effects it becomes overwhelming and will ultimately affect tens of thousands of small businesses across the country.

It saddens me, terrifies me, and disheartens me that my ability to build a business creating safe items for children can be taken away by the **unintended effects of the CPSIA**.

I thank the committee for listening to how the CPSIA affects me—and others like me. I'm happy to answer your questions.

CPSIA and my Small Business

Suzanne Lang

Starbright Baby Teething Giraffes

[www.starbrightbabyonline.com](http://www.starbrightbabyonline.com)

As a mother of a 2-year-old, I admire Congress' efforts to draft a law that protects children from excessive amounts of lead in toys. Unfortunately the law, as it currently is written, will heavily damage the small Businesses and entrepreneurs who make and sell items for children in this country. I do not believe the law is fatally flawed; however, I think the injection of some common sense provisions would more effectively ensure safe products for children and prevent irreparable damage to small businesses.

The reason that I am giving my testimony is because I, along with several other small business owners, am afraid for what the current draft of the CPSIA means for my business and the important amount of income it brings to our family. Specifically, my business consists of fabricating and selling soft stuffed teething giraffes. My husband is a Ph.D. student, and after being laid off this spring, my primary focus is caring for my child as well as working on growing my business. Furthermore, I do not have a large amount of money and I am not affiliated with any lobbying groups. However, I am using the resources that I can to advocate for small businesses, many of whom rely on this income to sustain their families.

A few of the major problems that this law presents to my business are 1) unit testing, 2) the tracking and labeling requirement, and 3) the fallacy of assuming everything is toxic until proven safe.

Unit testing is cost prohibitive for many small businesses, including my own. I make very small batches of usually 10 or fewer giraffes per fabric choice. I also make one of a kind items and custom items using my customer's own fabric, or fabric taken from my collection. My giraffes would be required by this law as of February 10<sup>th</sup>, 2010 to be tested for both lead and phthalates. I contacted Elemental Research, LLC (4601

Devonshire Rd, Harrisburg, PA, 17109; Phone 717-540-0212;  
[www.ElementalResearchLab.com](http://www.ElementalResearchLab.com)) to quote lead and phthalate testing for my business. For lead testing, I was quoted \$50 per component. There are 4-5 components per giraffe. For phthalate testing, I was quoted \$400 per component. Cumulatively, the total cost for testing one fabric line of giraffes would be anywhere from \$1,800 to \$2,250. The giraffes sell for \$14-\$18 each depending on the fabric. The added cost of testing would add an additional \$180-\$225 per giraffe (based on 10 giraffes per fabric line) For a custom one of a kind item, the price would have an additional \$1,800-\$2,250 tacked onto the \$14 I charge for customs. Obviously, this is extremely cost prohibitive for the customer.

Considering that the law specifies that if I change any component, the unit would need to be tested again. I created 36 different fabric patterns of giraffes in 2008 (not counting custom giraffes). The total cost of lead and phthalate testing my items would have been \$64,800-\$81,000. I made \$4,500 gross last year. The deficit the testing creates would more than put me out of business, it would bankrupt my family.

Another aspect of the law that directly affects my business is the tracking and labeling requirement. According to the CPSC website FAQ (<http://www.cpsc.gov/about/cpsia/faq/103faq.html>), "Section 103 of the CPSIA provides that the tracking label must contain information that will enable the manufacturer to ascertain the location and date of production of the product and cohort information (including the batch, run number, or other identifying characteristic) and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks."

Even though the law says "to the extent practicable," I question how this could be accomplished by a home craft seller or small business such as mine. Keeping in mind that each lot requires new testing, then each lot requires a different label. That would mean that for each giraffe fabric style that I create, including custom work, would require a different label to attach. Consequently, that would force me to start making my own labels because it would be cost prohibitive for me to meet the quantity minimums of a

label printer when my lots are 10 or fewer giraffes. My labels would need to say something to the effect of: "Made by Starbright Baby at Boalsburg, PA July 4, 2009 Batch 15 Run 1, Teething Giraffe Pattern Toy 1." Thus, I would have to change the date, the batch, the run and the name of the toy on each lot I made. It is possible to buy printer-friendly fabric labels; however, after a few washes the ink is gone or faded making it difficult to ascertain what the label originally said. Another way to make the labels would be with a permanent fabric pen and fabric. However, manually creating each label would likely take longer than fabricating the giraffe itself. This labeling standard will be crippling for small business in added cost and time.

The most disheartening thing for me as a small business owner is the assumption of the law that everything is bad and dangerous until proven safe especially since fabric and many natural materials (now exempt but set to expire on Feb 10, 2010) are lead free or have infinitesimally small lead levels; well within the acceptable range. The fabric exemption should be made permanent. Many small businesses do not purchase their fabric wholesale but instead buy from local fabric or quilting shops. In this setting, I can buy one yard of fabric off the bolt to make giraffes that I have to lead and phthalate test. My neighbor could then buy the very next yard on the bolt to make bibs for her small business and she too would have submit for lead and phthalate testing. The upshot is that provides work for a few laboratories but at the expense of many more small business owners.

Another aspect of the testing that is problematic is the broad definition of what needs to be tested for phthalates. According to the CPSC guide for Small Businesses, all "Child Care Articles" need to be tested for phthalates. "A 'child care article' is a product that a child 3 years of age or younger would use for sleeping, feeding, sucking or teething. Bibs, child placemats, child utensils, feeding bottles, cribs, booster seats, pacifiers and teethers are child care articles that are covered by the law and might contain phthalates." (<http://www.cpsc.gov/ABOUT/Cpsia/smbus/cpsiasbguide.pdf>) As it is written, the law would currently require me to test my teething giraffes for phthalates. The problem is that my teethers are made from cotton fabric, cotton thread, stuffed with PLA fiber made from corn, and a cotton label. According to Test Method: CPSC-CH-C1001-09.1

(<http://www.cpsc.gov/about/cpsia/phthalatesop.pdf>) the lab is to “grind” the toy to get a sample to test. Being that the giraffes are cotton fabric, it will prove to be difficult to “grind” off anything. When I spoke to Elemental Research Lab about phthalate testing on my item, they were unsure if they could effectively test my giraffes. Interestingly phthalates are found only in plastic. So requiring testing on cloth items, even if they are intended to go in the mouth of a child under 3, does not make sense.

There are many unintended consequences of this law. If it is kept as-written, thousands of small businesses and crafters will be put out of business in this already tough economic climate. The only products consumers will have to choose from are mass produced items from huge corporations; many from the same companies that imported the lead tainted toys that prompted Congress to take action on this issue. In effect, the companies that irresponsibly imported tainted toys will be rewarded with a larger market share.

The unintended consequences of this law are not just for small businesses. Although these consequences do not directly affect my business, they affect me as a parent and are concerning.

**Books:** No child has ever proven harmed by a book yet countless books will go into trash/landfills for no reason. Pre-1985 books are not old enough to be vintage or collectible, but so many not reprinted, virtually destroying history and culture.

**Libraries:** If this law holds, children under 12 will not be able to use libraries. Libraries will have to test books or remove them from the shelves.

**Schools and Homeschoolers:** Almost everything in a building housing the under 12 crowd will need to be tested or thrown out. Imagine the needless expense for school systems already strapped for resources to teach our children.

**Low Income Families:** (like mine) in these hard economic times who depend on resale shops and garage sales to provide for their families.

**Charities:** Project Linus and other hospital charities plus shelters that accept donations will have a difficult time keeping up their good works.

**Resale Shops:** like Goodwill etc. are all devastatingly affected. Many resellers are pulling children's items from their shelves.

Although recent rules released by the CPSC state that charities and resale shops are exempt from testing, they are still liable if anything is sold that is above the lead and phthalate levels. Many will chose to not carry the items rather than take the risk of running afoul of the law.

There are some very simple ways that this law can be amended to be more practical for all businesses involved in making items for children under 12. (Handmade Toy Alliance <http://sites.google.com/site/handmadetoyalliance/Home/our-proposal-to-modify-the-cpsia>).

- Component-based testing so that suppliers of our raw materials could provide the children's product manufacturer with certification of compliance within the law, which would eliminate the need for redundant and costly unit-based testing. Safety would be improved by driving compliance upstream in the supply chain, catching non-compliant materials prior to distribution, practically eliminating the chance that any given finished unit would be non-compliant.
- Exemptions from testing for materials known by science not to pose a lead or phthalate contamination hazard such as fabrics, certified organic materials, and many natural materials such as wood, paper and bamboo. Manufacturers would be spared the costs of testing these materials and testing labs and the CPSC could better focus their efforts on high-risk materials such as metals and paints.
- Harmonization with European Standards. Accepting the stringent EU standards in the United States as sufficient for the requirements of CPSIA would save countless US businesses that import from or export to the EU from the costs of performing multiple tests. US and EU regulators would be able to work together to oversee the global marketplace.

- Exempt permanent batch labeling of products for hand crafted and micro businesses that have small batch runs. While permanent labeling may be efficient with large runs of plastic products, it would be extremely difficult and cost prohibitive for small batches made from wood or fabric.. The US Small Business Administration Office of Advocacy has backed the Handmade Toy Aalliance position on tracking labels, citing the Regulatory Flexibility Act, a federal law designed to protect small businesses.
- Revisit the retroactivity of the CPSIA based on a risk-based approach.

I applaud Congress for trying to pass legislation that will keep our children safe from dangerous toys. I want safe toys in the hands of my little boy just as much as any parent would. I don't think that the CPSIA as-written will help make that happen. The suggested changes mentioned in this document along with the problems highlighted for small businesses, I hope that Congress, the Small Business Committee, and the Subcommittee on Investigations and Oversight can amend the CPSIA in order to keep our children safe and keep our small businesses in business and strong.

**U.S. House of Representatives Committee on Small Business  
Testimony before Subcommittee on Oversight and Investigation**

**Susan Baustian, Winmark Corporation  
Thursday, May 14, 2009**

Thank you, Congressman Altmier, for inviting me to testify today, and to all the Committee members for taking the time to talk about this very important—and very timely—issue. I thank my fellow panelists for their thoughts and comments on the impact of the Consumer Product Safety Improvement Act on small businesses across the country, and thank acting Chairwoman Nord for her willingness to answer today’s critical questions.

My name is Susan Baustian, and I am the Director of Once Upon A Child stores for Winmark Corporation. Today, I am speaking on behalf of our hundreds of stores in, as we call it, the industry of “gently used” products.

My company, Winmark Corporation, owns two franchises that have been in business for over 20 years, Once Upon A Child (a store selling used children’s goods) and Play it Again Sports (selling new and used sporting goods), and have been significantly impacted by this bill. Although our company headquarters is in Minnesota, we have over 520 franchises across the country. What that amounts to are 500 store owners worrying about whether or not they comply with the law, 5000 employees scrambling to figure out how to comply, and 200 vendors feeling they do not have the resources it takes to test their products to ensure that they comply with these new standards. Last year alone, our two brands serviced over 7 million parents that are now confused as to what is safe or not for their children.

The ill-executed implementation of this legislation has brought fear into the industry, and that fear—especially in economic times like these—can bring a halt to successful and productive businesses. Our franchisees have a lot on the line that is driving this fear. Most of them have business loans where their homes have been used as collateral. They have a family in which their business provides for, and they all have a strong sense of giving back to the community by being at the forefront of recycling – they buy & re-sell product that children no longer use or have outgrown. They are fearful that the CPSIA will force them to give up their American dream – owning their own business.

I think what is really unfortunate is that this debate over the CPSIA has led to finger pointing on an issue on which we all agree: ensuring the safety and protection of children.

Our store owners have dedicated their lives to providing safe, fun, and educational products for children of all ages, and now are having to rethink how they can continue to offer these products without violating this law.

We want to work *with* the Consumer Product Safety Commission to comply with this law, but the guidance issued thus far has been difficult to understand for many of our store owners. We do not want to have to shut our doors over legislation that we all agree *could* help children if implemented in an effective and productive way, but we need the help of the CPSC and Congress to clarify what is required of our store owners.

The Consumer Product Safety Commission has come out and stated that resellers such as Once Upon A Child and Play It Again Sports—as well as Goodwill, the Salvation Army, ARC, Church organizations, Garage sellers, consignment stores, sellers on ebay and any other small business reseller—do not have to test products, but our businesses are still liable if those products with banned substances are sold.

The CPSC recently produced a Handbook for Resale Stores and Product Resellers with the purpose being, “to help identify the types of products that are affected and to understand how to comply with the law, so you can keep unsafe products out of the hands of consumers.” Unlike the information that the CPSC supplies regarding recalls—a very specific list by brand & model number—the handbook is too general to effectively determine which products are safe to buy & sell.

For example, Page 7 of the handbook indicates that “items made of wood (without paint, surface coating or hardware) are OK to sell.” It also indicates that “Clothes with rhinestones, metal or vinyl/plastic snaps, zippers, grommets, closures or appliqués are best to test, contact the manufacturer or not sell.” Unlike retailers of new products, our franchisees across the country have no idea how to determine if the painted blocks, toy trucks, dolls or even clothing they are buying and reselling contain lead paint or are made up of dangerous lead components or toxic plastics.

It will be a violation of the Act to sell an item that is known to have more than the acceptable limit. This violation can be a fine of \$5000 for each violation, which increases to \$100,000 on August 14, 2009. Being that the handbook gives us only guidance on determining which items are safe, the only way to be certain would be to test the product. However, each piece that is bought & sold is unique, and it would be too costly to test each item. With a house on the line, a family to care for, and a potential liability to deal with, fear has taken hold for many of these resellers.

Last year, Once Upon A Child paid families \$45 million for children's items that we purchased for re-sale, generating \$120 million in sales for our franchisees. Of that, \$23 million worth of clothing items were purchased, generating \$68 million in sales for our franchisees. For families, the money they receive from selling children's items can be used to supplement a parent's income, or may be used to buy items for their children—that they otherwise couldn't afford. For business owners, this income helped proved for their family. But now, many business owners and parents are worried they won't know when a snap or zipper contains lead, and like toys, they have no way to test these items.

The guidance issued on the sale of books has been equally frustrating. Last year, our stores paid families \$500,000 for books that we purchased for re-sale. This generated \$1.5 million in sales for our franchisees. I understand that there are certain bathtub books that may contain excessive amounts of phthalates [THAL-ates] and I would hope our industry will move away from selling these products, but most books—even if they contain trace levels of lead—are innocuous and should not be banned under this legislation. The American Library Association has done a tremendous job sorting through fact and fiction on the production of books in this country, and I commend their efforts to publicize what the industry has done since the 1970s to stop using metal-based paint in their books. But their work was not enough to get books excluded from the Act, and now we are all faced with how to sort through the books on our shelves. The clarification that books printed after 1985 will be considered "safe" was helpful, but it was not enough to ease the fear and frustration with the law.

It is because of the obstacles our business owners and families face that we need the Consumer Product Safety Commission to clarify the law so that parents aren't afraid to sell their children's items, or buy used clothing for fear that it might be banned by this legislation.

If there is one thing that has become clear through this process it is that we, as an industry, need more guidance and need more time to sift through our inventory, understand the new regulations, and find cheaper, more efficient ways of testing products. For my industry, it is critical that we are able to understand how we can better sort through our inventory and confidently buy & sell children's items without fear of selling something that is unsafe for a child, or facing consequences for violating the Act.

Changes like this do not happen overnight, and we need the help of the Consumer Product Safety Commission, as well as members of Congress, to ensure that we can continue to provide families with a resource to provide products at a value by being at the forefront of recycling. We need to know specifically what items are deemed unsafe for our children.

I thank you for calling this hearing on the impact of this law on small businesses, and particularly the thrift industry, and look forward to answering any questions you may have.

GP 2573639 v1



**Hearing Before the**

**House Small Business Committee,  
Subcommittee on Investigations and Oversight**

**Entitled**

***"The Consumer Product Safety Improvement Act  
and Small Business"***

**Written Testimony of:**

**Anthony F. Vittone, Esq.  
Vice President & General Counsel  
Swimways Corp.**

**May 14, 2009**

Mr. Chairman, Ranking Member Fallin and Members of the Committee: Thank you for holding this hearing and giving me the opportunity to talk with you about the issues small businesses have faced and continue to face as a result of the passage last year of the Consumer Product Safety Improvement Act of 2008.

**Swimways Overview**

My name is Anthony Vittone, and I am the Vice President & General Counsel of Swimways Corp. Swimways is a small, privately held, family owned company. We are headquartered in Virginia Beach, Virginia where we employ approximately 70 hardworking Americans. In addition, we provide seasonal and temporary employment to an additional 25 employees throughout the year. Our offices consist of manufacturing facilities for our rotational molding equipment, inventory space and office space.

Even if you do not know Swimways by name, I suspect you know our products. In the water products category, Swimways offers 120 different products to customers ranging from 9 months through adulthood. Swimways' brands include many products that consumers ask for by name, including Spring Float<sup>®</sup>, Toypedo<sup>®</sup>, Subskate<sup>™</sup>, Rainbow Reef<sup>®</sup>, Swim Sweaters<sup>™</sup>, and the Safe-T-Seal<sup>™</sup> swim teaching system just to name a few. The Swimways brand of products has been around for over 40 years and is sold in 40,000 storefronts with major retailers and individual pool dealers alike.

Swimways prides itself on continuing to bring innovation and design to the marketplace. Constant market research and product development allows us to provide the features that have made us a leader in the industry. Our goal is to continue to

provide customers with the most entertaining and fun products, featuring only the very best value, quality, style and innovation.

For the past 15 years Swimways has enjoyed an average rate of growth of 15% a year – until 2008 when we took a step backwards. Unfortunately, this step backwards is directly attributable to two factors: (1) The state of the economy; and (2) the passage of the CPSIA.

#### **CPSIA Introduction**

The CPSIA, together with the economy, has essentially created a 'perfect economic storm'. Like most consumer product companies, Swimways is already experiencing a reduction in sales as a result of the state of the national economy. Individual consumers are buying less; therefore, the retailers we sell to are buying less. At the end of 2008 and beginning of 2009, orders from major retailers for the 2009 summer season were being cancelled or reduced. As a result of the CPSIA, inventory had to be scrapped and orders cancelled.

Swimways' main issue with the CPSIA involves the phthalate provisions. I understand that other toy companies and consumer product companies may have problems with the other provisions, such as the new requirements on lead or tracking labels. While we do not believe those provisions were very well thought through, the primary impact on Swimways involves the new restrictions on the use of phthalates.

I will not revisit in detail the need for these phthalate provisions since Congress has decided that some legislation was needed. However, it is worth pointing out that up until the passage of this Act, the Consumer Product Safety Commission has

consistently opined that oral exposure to DINP phthalates is not likely to present a health hazard to children. In light of the CPSC's conclusions, we would submit that some reasonable accommodations to the businesses that make these products would not be disastrous to Congressional intent.

#### **Phthalate Timing**

The timing of the phthalate ban was, in our opinion, the single biggest disaster in the CPSIA.

The European Union began the phthalate craze by passing European Directive 2005/84/EC. The EU passed this law in December 2005 and gave manufacturers and retailers until January 2007 to move through their inventory (i.e., 13 months).

The State of California kicked off the phthalate issue in the United States by passing the so called "California Toxic Toys bill". This bill was signed by the Governor of California in October 2007 and gave manufacturers and retailers until January 1, 2009 (i.e., 15 months) to clear through their inventories.

Conversely, the CPSIA was signed into law in August 2008, but as written it only gave manufacturers and retailers 5 months to clear through their inventory. For any consumer product company, this would be wholly inadequate. For a seasonal company like Swimways, this timeframe was essentially non-existent. I am sure the Members will understand – there are not a lot of pool toys being sold in the United States in the fall and winter. People only buy pool toys when it is warm enough to go to the swimming pool or a natural body of water; that occurs in the summer long after the time period for the CPSIA had long since run out.

Furthermore, whatever time was granted in the CPSIA was completely wasted by the back and forth interpretation of the Act's retroactivity on existing inventory. In November, the General Counsel of the CPSC in a well meaning opinion threw a life-line to the industry by indicating that the phthalate restrictions would only apply prospectively. Ms. Falvey's rationale was reasonable and supported under the law. Manufacturers and retailers breathed a collective sigh of relief and relied on this position. However, the U.S. District Court for the Southern District of New York's reversal of that decision, just 4 days before the enactment was to take place, created a firestorm of irrational behavior in the toy industry. Manufacturers struggled with what to do with their inventories and existing orders for their goods. Retailers scrambled to pull merchandise off their shelves calling Swimways for guidance, chargebacks, destruction orders, re-shipping mandates, etc.

The same product if sold on February 9, 2009 was perfectly acceptable and deemed safe by government and industry standards. The next day that same product became a toxic and dangerous 'weapon of mass destruction.' I would ask Congress to consider this simple question: If the use of phthalates is such a hazard to American children, why has Congress not ordered the CPSC to do an industry-wide recall of all products that contain phthalates, regardless of when they were sold from the beginning of time?

Congress wants children's consumer products to be made without phthalates. That is an understandable objective, but that guideline could have been adopted without further burdening an industry already struggling with the retraction of the American

economy. Swimways urges Congress to amend the CPSIA to make the phthalate restrictions prospective and apply to goods manufactured after February 10, 2009.

**Imbedded Phthalates**

The CPSIA includes a specific legislative exemption for imbedded lead. However, no such exemption was given for the significantly more benign phthalates. As the Members know, under standard statutory construction, the courts will interpret the CPSIA to mean that Congress intended no imbedded phthalate exemption to exist.

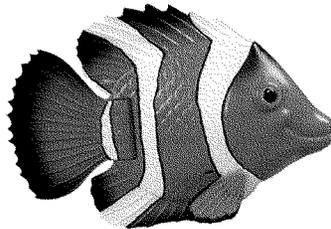
Swimways manufactures products which only contain phthalates on the plastic that surrounds the wires in the battery compartment for the product. The only way to access the phthalates is to take the product completely apart. We offer inflatable products which contains phthalates in the PVC, but the PVC is completely covered with fabric. Again, there is no ability to access the phthalates unless the customer essentially destroys the product. These products present no risk to the consumer and should be available for sale. We request that an imbedded phthalate exception be added to the CPSIA.

**Age Requirement for P6 v P3 Compliance**

Both the CPSIA and the California legislation prohibit 3 phthalates (DEHP, DBP and BBP) from being used in the manufacturing process of all toys and childcare articles. However, the two legislations differ on their treatment of the other 3 phthalates (DINP, DIDP, DnOP) with significant consequences.

The California legislation only prohibits the second 3 phthalates for childcare articles and toys intended for children 3 and under. The federal legislation forbids them for children up to age 12 and under if they are able to be put in the mouth. I am sure the Members would agree that a 10 year old child has long since passed the period when they are putting things in their mouth out of curiosity and sucking on them to relieve teething or coax themselves to sleep. Yet, this small and presumably inadvertent change in the law has made it unlawful for Swimways to sell a large quantity of goods that should be available for sale.

Swimways manufactures a product called the Rainbow Reef fish, which are battery powered to swim like a fish in a swimming pool.



We have sold over 7,000,000 units of this product. Prior to 2009, the fins of these swimming fish were made with phthalates. Even though Rainbow Reef fish are age graded for children 5+, there are nearly 15,000 units of this product that are now useless because the fins 'can be placed in the child's mouth.'

That is not the intent of the product and I will go out on a limb to say that that is not what happens with the product. We have no reports of children sucking on the fins to relieve teething or to help a child go to sleep. The CPSIA should be amended to

allow products not intended for children 3 and under to be manufactured using certain phthalates.

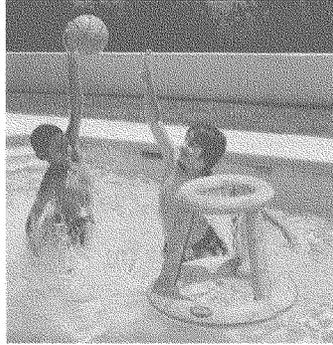
#### **Sporting Goods v. Toys**

Adding further confusion to the marketplace is the exemption of sporting goods from the CPSIA. It is not clear what is defined as a sporting good and what is defined as a toy. The CPSC has offered limited guidance but more detailed criteria are needed. In our experience, retailers are not willing to take a chance and are using a broad brush approach – ‘if it’s for a kid, it’s a toy.’

#### **A Representative Example: Spring Jam Basketball**

Soon after the New York Court’s ruling in February, retailers went into a complete panic. They had 4 days to review their inventory, determine which products were compliant with the CPSIA and remove the merchandise from the shelves. As a result of the severely compressed timeline, broad-brush reactionary decisions were made and manufacturers, like Swimways, were expected to absorb the cost.

Another product we manufacture is called the Spring Jam Basketball. This product is essentially an inflatable floating basketball goal covered in fabric and includes a basketball. We have sold over 750,000 units of this product since 2005. A picture of the product is included below:



In February, a large retailer had approximately 10,000 units of this product in their stores and distribution centers. This inventory was a mixture of products from 2008 that contained the DINP phthalate and 2009 product that is phthalate free. Nevertheless, the retailer immediately removed all of the Spring Jam inventory from their shelves.

We reviewed the item and explored with the retailer whether the product was a sporting good or a toy. We offered to send a team to sort through and separate the 2008 non-compliant inventory from the 2009 phthalate free product.

None of these efforts helped. It eventually came to light that the retailer had destroyed the goods shortly after the February 10<sup>th</sup> deadline. What was even more tragic was that less than 15% of the 10,000 units contained phthalates. But under the hysteria of February and the compressed timeline, the retailer chose not to sort through the products and merely trashed all of the goods. I would make the following observations:

- Under the California Act, these goods would have been compliant.

- If there had been an imbedded phthalate exception in the CPSIA, these goods would have been compliant.
- Had the CPSIA allowed for a greater timeframe to move through existing inventory, this problem would not have occurred.

The retailer is now insisting on a \$100,000 credit for the destruction of the Spring Jam inventory. This is one example with Spring Jam Basketball. Other retailers have destroyed other units of this product. Regrettably, by the destruction of these products, the landfills have been filled but the cause of consumer safety has not been advanced.

#### **Effect of Phthalates on Swimways**

The effect of the CPSIA and its phthalate restrictions for Swimways has been profound.

- (1) A large portion of the inventory in our VA Beach warehouse (approximately 37,000 units) was rendered obsolete and had to be written off. This write-off resulted in a 47% reduction in our profitability for 2008.
- (2) Swimways was required to spend additional resources to rework other inventory in order to make it compliant with the CPSIA's phthalate requirements.
- (3) We received significant chargebacks, returns, destruction charges, re-delivery expenses from retailers that insisted that we credit them for Swimways inventory that was rendered obsolete by the CPSIA.

(4) Orders were cancelled because we could not fulfill the purchase orders with compliant goods (even though non-compliant goods existed in our warehouse).

(5) We will have destruction costs for inventory that will have to be trashed.

The collective financial expense of the CPSIA for Swimways has exceeded \$1,000,000.

In addition to these direct financial hits, Swimways has seen other indirect effects. Hiring at Swimways has been put on hold. Our bank that finances our operations is currently reevaluating its relationship with us because we have not hit our profitability covenant for 2008. Resources that would be spent in growing our business had to be used on compliance with the CPSIA. Personnel have been redirected from the core business to dealing with the aftermath of the CPSIA. Finally, the manpower by Swimways personnel to sort through and comply with the Act and various interpretations and deadlines of the Act reduces our ability to focus on growing the business.

The toy industry is overwhelmingly made up of small businesses like Swimways. The Toy Industry Association has estimated that the cost of this legislation to the toy industry has been \$2,000,000,000. We all need some relief from this Act and we trust that Congress will respond.

Thank you for your time and attention to these matters.

**Testimony for U.S. House of Representatives Committee on Small Business,  
Subcommittee on Investigations and Oversight  
The Consumer Product Safety Improvement Act and Small Business  
May 14, 2009**

Presented by: David McCubbin, Partner; McCubbin Hosiery LLC; Oklahoma City, OK;  
405-236-8351; [dmcubbin@mccubbin.com](mailto:dmcubbin@mccubbin.com)

At the request of The Honorable Mary Fallin, Oklahoma's 5<sup>th</sup> District

First, please accept my sincere gratitude for inviting me to address this committee. The Consumer Product Safety Improvement Act of 2008 (CPSIA), well intentioned to enhance the level of safety in the products Americans purchase for our children, has had massive consequences. The legislation's broad scope has impacted thousands of products for which the measured concerns are not material. Your willingness to review the implications for small businesses in particular is very much appreciated. Indeed my comments today are very consistent with the sentiments expressed last week by the distinguished Chairwoman of the House Small Business Committee, the Honorable Representative Nydia Velázquez. In her letter to the Director of Office of Management and Business, Peter Orszag, last week she wrote, "All too often federal agencies overlook the unintended impact their regulations have on small businesses. To create an environment that fosters entrepreneurship, the regulatory system must be responsive to small business needs." I hope you agree my testimony underscores that message. It is an honor to be included in your esteemed roster of witnesses.

Our company, McCubbin Hosiery, is a family business started by my grandfather 57 years ago. We design, market, and distribute children's and ladies hosiery. Our products are sold in a number of national and regional retail outlets. Our customer base includes Nordstrom, Dillard's, Stride Rite, Kmart, and Payless ShoeSource, as well as hundreds of small independent retailers. McCubbin Hosiery has weathered changing consumer trends, economic volatility, and numerous changes to federal, state and local laws throughout the many years. The CPSIA has the potential to be more devastating to legions of small and medium sized American companies than the challenges we have endured over our past five decades.

I was specifically asked to comment regarding the impact of the law on our business to date; the implications we anticipate in the coming year; and recommendations I would make regarding the CPSIA. Therefore, I will focus on the three aspects of this law we expect affect us most:

- Section 101 - Lead content limits; lack of demonstrated necessity for testing textile products
- Section 102 - General Conformity Certification; impractical expectation of one certificate per style per shipment on a replenishment/high SKU count business
- Section 103 - Tracking label requirements; contrary to rulings of other federal agencies, and potential disclosure of confidential information

## IMPACT TO DATE

Since the act's passage many of the problems we have encountered are due to ambiguities and differing interpretations of this law. The Consumer Product Safety Commission (CPSC) is facing a daunting task answering the deluge of questions from companies doing business across the supply chain. While we appreciate the enormity of the task they are being asked to coordinate we await guidance and rulings that are not keeping pace with deadlines. Retailers very quickly responded to the legislation's implications immediately pushing back on suppliers. Without clear and uniform standards retailers expect suppliers to conform with numerous and individualized requirements formulated from their own interpretation of the CPSIA. We have received dozens of different forms, letters, and guides from our customers asking us to demonstrate our compliance with the laws according to how each retailer has interpreted the legislation. This lack of standardization and fear based on what may happen if they, the retailers, are found to be non-compliant has forced us to undertake a number of different testing and certification measures as we try to respond on-the-fly. The resulting confusion on the part of our staff and our suppliers has caused delays and expenses beyond our budget expectations.

With any legislation as sweeping as CPSIA it is imperative each party has sufficient time to review and digest the changes. Parts of the CPSIA provided only 90 days from publication to implementation; simply not enough time to make intelligent decisions.

Thus far we have been most impacted by the lead content testing requirements.

- We were told early on by industry experts both in the United States and internationally that there are no reliable lead content tests for textiles engendering a scramble to execute any test that would work and could be considered "reasonable".
- Reputable testing labs throughout Asia and the United States differed on their interpretations of what specifically should be tested. Consequently, for a period of about three months we tested all yarns used in every sock at tremendous expense.
- The overwhelming demand on lab time at our origin locations resulted in delayed shipments, increased transportation costs to expedite goods, and strained relations with both customers and suppliers.

The CPSC's decision to issue a one year stay from the lead content testing and certification requirements was tremendously welcomed by the industry; however, according to the retailing community the stay changes nothing. There remains no standard and retailers continue to ask us to test. More definitive relief must be communicated from CPSC to retailers on this issue.

The Hosiery Association, The Hosiery Technology Center and industry executives met with 22 Congressional Offices in March to ask for a decision on excluding unembellished hosiery from lead content testing due to the exhaustive analysis which has been exercised at the request of the CPSC. To date, we have not received a response to our request. Consequently, we continue to spend unbudgeted dollars testing for lead that is not in our products to begin with. We believe this exclusion and other common-sense refinements will enable the CPSC to better serve the public interest.

## IMPLICATIONS IN THE COMING YEAR

### Section 101 - Lead Content Limits –

This section classifies children's products containing more than the allowable limit of lead as banned hazardous substances. This is a worthy and reasonable proposition. However, it has been laid upon the apparel industry, in blanket fashion, without regard to any historical evidence or suggested likelihood that harmful amounts of lead are found in the products. In short, we are being asked to search, at considerable expense, for something that does not exist nor has been alleged to exist. We anticipate this redundant testing will cost us in excess of \$500,000 in the first 12 months.

Further, the current understanding of the law allows for application of this standard to goods already in stock at the retailer's locations as of the effective date. This interpretation would open an avenue for retailers to destroy or return this stock and demand reparations due to non-compliance. Returns of this magnitude could be ruinous to both small and large business owners. In our case, this would all be for products that have never been shown to pose a danger in the first place.

Lead is known to be harmful when ingested or inhaled; neither of which is a concern when discussing hosiery (or textiles in general). In January the CPSC held a public meeting for the Apparel industry to share its findings surrounding lead testing. Attendees included representatives from: The American Apparel and Footwear Association; Wal-Mart; JC Penney; The Children's Place; the National Cotton Council; the Hosiery Technology Center; and the Retail Industry Leader's Association. The presenters offered the results of their exhaustive textile testing over the preceding months. The overwhelming evidence presented demonstrated zero failures of textile items tested. Further, the Hosiery Technology Center's comprehensive testing consistently demonstrates, across the spectrum of hosiery content from diverse origins, lead content test results of less than 63ppm.<sup>1</sup> Simply stated, it has not been demonstrated that lead content in hosiery products poses any manner of safety concern. Yet this law mandates the industry establish an on-going testing process for a non-existent concern. The financial burden is both immediate and ongoing; it unnecessarily impacts business, and ultimately the consumer.

1) Due to retroactive application of the standard if we are unable to prove the goods we have already shipped comply with the lead content limits retailers will return the goods from their floors and their warehouse. Across the industry the consequence to the supplier community will be so devastating many will be forced shutter their doors. Understand the inventory, perfectly good in every respect and completely safe, would be instantly relegated unmarketable. It is doubtful any suppliers have built into their budgets the anticipation of taking back a season's inventory from every one of their retail outlets. Also bear in mind retailers will suffer from bare shelves; their customers denied access to products until the pipeline is recharged.

2) As currently interpreted, testing is required on each color of yarn used in each style of sock each and every time we purchase the item (even if purchased from the same yarn supplier in the same colors previously used and successfully tested). In a replenishment-driven industry such as

hosiery this expense may add 20% to the base cost of the product; again testing for a condition that frankly does not exist.

#### **Section 102 – General Conformity Certification**

This section of the law has been interpreted to mandate that every time we make a shipment each article contained therein must be accompanied by a General Conformity Certificate (GCC) identifying each “rule, ban, standard, or regulation applicable to the product” and certifying each product complies with all regulations. This certification is independent of testing. Even if none of the products in the shipment require testing, a GCC must be available.

Our active customer list contains over 7,000 unique entries. Each of our retail customers strives to keep as little inventory as possible; they want to replenish it as often as they can. This results in multiple shipments to them throughout the year. Conversely, manufacturers demand orders in large quantities as infrequently as possible. Distributors like us are caught in the middle of these two opposing forces.

Keeping this balance means we ship small orders to individual store locations across the US on a weekly basis; and we buy from our suppliers in bulk, tens of thousands of pieces at a time. Further, as we are a fashion driven enterprise our active item list could total as many as 3,000 different products at any given time. Ensuring accuracy and availability of a GCC for every incoming order, and matching that information to a GCC for every item on every order shipped to our customers will result in creation of tens of thousands of certificates annually. This is a daunting prospect for any small business.

#### **Section 103 – Tracking labels**

The apparent intent of this section provides for the identification of the specific manufacturing facility for every given item, and to maintain transparency through to the end-consumer. While this goal appears innocuous we believe it would actually be harmful for our business.

The relatively short window leading up to this requirement and the other changes mandated by CPSIA in the interim have resulted in some confusion regarding the final requirement. We have seen opinions from the CPSC that marking only the packaging of items will not meet the requirement of the law as packaging does not allow for “permanent” marking. However, the nature of our products does not allow for sewn in or printed on labeling. As you may know, most hosiery is exempt from the Care Labeling Rules enforced by the Federal Trade Commission (FTC) due to the “utility or appearance” being “substantially impaired by a permanently attached label”. We believe it is reasonable to expect the CPSC to come to a similar conclusion, regarding tracking labels, however, even with the deadline looming we can not be certain of that.

As we experienced last year with the uncertainty surrounding the lead content testing, retailers are pressing suppliers for an immediate resolution to the tracking label demand. We are hopeful the outcome of the CPSC’s May 12<sup>th</sup> public hearing regarding this requirement will resolve the concerns and answer the questions we all seem to have. Until there is consideration how permanent tracking labeling for hosiery can (or should) be executed we cannot predict the financial impact.

## RECCOMENDATIONS

I respectfully submit the following recommendations to help alleviate the unintended and damaging consequences of the CPSIA on our country's Small Businesses. I will limit my comments to the three areas discussed above.

### Section 101 - Lead Content Limits

**I believe based on the evidence presented above, a move should be made to exclude textile products from lead content testing requirements.** At the CPSC's public hearing on textiles in January credible and overwhelming evidence was presented demonstrating statistically negligible levels of lead exist in textiles. Over the course of thousands of tests performed by different companies on different fiber contents from diverse countries none were found to exceed the lowest limit established in CPSIA.

### Section 102 – GCC

**Allowing this document to be prepared on an annual basis for each style (and each supplier of said style) in a company's offering would vastly simplify compliance with this law without changing the intent.** Retailers would still be confident their suppliers are sending them goods that are in full compliance with all standards and regulations under this system. Suppliers would still be responsible for certifying their adherence to the law. And, ultimately the consumer will purchase items with the full confidence the products are safe and risk free. As a matter of practice, when changes are made to the source content of the product or to the manufacturing facility used the products should be recertified.

### Section 103 – Tracking labels

**The CPSC should follow the precedence established by the FTC with regard to consumer labeling laws allowing legally required labels for hosiery to be included on the packaging only.** In September 2008 the FTC confirmed their earlier position in a letter to the Hosiery Association; they stated, "attaching a label to a hosiery item such as a sock or stocking would result in an uncomfortable, unattractive or damaged article". They confirmed labeling of such articles is impractical because the items don't have waistbands, are too fragile, or are sold in pairs.

Further, the tracking information should be acceptably presented in a manner that allows the importer or domestic manufacturer to internally identify the specific factory or mill used without revealing confidential sourcing information.

## SUMMARY

Small businesses applaud the efforts of the United States Congress to ensure the safety of all citizens. In the instance of the CPSIA, however, unclear and belated interpretation is causing unintended, punitive consequences for our business and thousands like us. Children's products existing in commerce for years should be judged based on their history of consumer safety. The CPSC has expressed severe doubt about their ability to implement the "vast expansion" of

oversight called for in this law given the “extremely short deadline”.<sup>2</sup> Where there is no history of problems, common sense exclusions from the regulations should apply. These exclusions will allow the CPSC to focus their enforcement efforts in areas that yield the greatest return for the public good. When the CPSC is expected to enforce these limits on every children’s product in the country, whether or not it poses a viable threat to safety, their enforcement ability is diluted to the point that the overall marketplace ultimately becomes less safe. There is, as detailed above, sufficient evidence to withdraw the lead content testing requirement from all textile articles.

Retroactive application of these safety standards could ruin hundreds of small businesses that have acted responsibly throughout their history of manufacturing and distributing products with no suspicion of deleterious lead content. Importers and wholesalers will be forced to prove the innocence of their products despite the reality there is no evidence these goods have ever posed a safety threat. And, ultimately, it is the American consumer who will pay the price through higher prices and the limited selections manufacturers will be forced to pass along due to increased production costs.

Let me assure you we intend to fully comply with this legislation. But, we are imploring you to do all in your power to ensure the laws are clear, effective, and do not cause an unreasonable burden to commerce. You can astutely enhance the provisions of the CPSIA to address the economic concerns of thousands of reputable small business owners without endangering the safety of our children.

<sup>1</sup> Hosiery Technology Center’s presentation to the CPSC, January 22, 2009; <http://www.cpsc.gov/about/cpsia/hosiery.pdf>  
<sup>2</sup> Federal Register Vol 73, No 223/ November 18, 2008: pgs 678328-68332

KD Statement

Thank you, Chairman Altmire, for holding this important hearing. In 2007, more than 17 million toy units were recalled by the Consumer Product Safety Commission (CPSC) on account of excessive lead levels. The issue became a major public health concern and led to the passage of the Consumer Product Safety Improvement Act. Unfortunately, in the rush to pass a strong bill to safeguard our children, Congress has created unintended, negative consequences on businesses.

One of the areas that concern me with this Act is the application of lead limits for manufacturers and sellers of all-terrain-vehicles (ATVs) and motorbikes for children. It is now illegal to sell off-road machines designed for children 12 and younger if their parts exceed lead limits, which is unfortunately very common. Although the ATV and motorbike industries have petitioned the CPSC for an exemption to this lead requirement, their request has not been granted. I recently wrote a letter to

Energy and Commerce Chairman Henry Waxman and Ranking Member Joe Barton asking them to review this issue. At a time when our economy is struggling, I am concerned that without this needed exemption, ATV and motorbike manufacturers will lose an important segment of their market.

Let me be clear: I strongly favor limits on lead and phthalates on products sold to children. In fact, I will soon be introducing a companion bill to Senator Gillibrand to examine lead, phthalates and other chemicals in cosmetics sold to children. However, I think that the CPSC should be more flexible with the application of the Consumer Product Safety Improvement Act. When the CPSC can reasonably assess that the risk posed by a product is very minimal, exemptions can be made.

KATHY DAHLKEMPER  
3RD DISTRICT, PENNSYLVANIA  
COMMITTEE ON AGRICULTURE  
COMMITTEE ON SMALL BUSINESS  
COMMITTEE ON SCIENCE AND TECHNOLOGY



WASHINGTON OFFICE  
516 CANNON BUILDING  
WASHINGTON, D.C. 20515  
PHONE: 202-225-5406  
FAX: 202-225-3103

ERIE OFFICE  
208 EAST BAYFRONT PARKWAY  
SUITE 102  
ERIE, PA 16507  
PHONE: 814-456-2038  
FAX: 814-456-0163

Congress of the United States of America  
House of Representatives  
Washington, D.C. 20515

March 24, 2009

The Honorable Henry A. Waxman  
Chairman  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Joe Barton  
Ranking Member  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Waxman and Ranking Member Barton:

I am writing to you concerning an issue about the application of the Consumer Product Safety Improvement Act of 2008, P.L. 110-314 (the Act).

Certainly the Act was an important advance in product safety law; however, I have received a number of complaints about how it works in practice with regard to the youth motorbike and ATV industry. Industry advocates have apparently filed a petition with the Consumer Product Safety Commission, seeking an exemption from coverage under the Act. While they await a ruling, they have also argued that a potential \$1 billion industry is being threatened.

I am respectfully requesting that your committee evaluate the application of the Act to Youth motorbikes and ATV's and determine if the Act can be better tailored to advance the important interests of childrens' safety.

Sincerely,

  
Kathy Dahlkemper



May 14, 2009

The Honorable Jason Altmire  
 Chairman  
 Subcommittee on Investigations and Oversight  
 Committee on Small Business  
 U.S. House of the Representatives  
 2380 Rayburn House Office Building  
 Washington, DC 20515

The Honorable Mary Fallin  
 Ranking Member  
 Subcommittee on Investigations and Oversight  
 Committee on Small Business  
 U.S. House of the Representatives  
 B363 Rayburn House Office Building  
 Washington, DC 20515

Dear Chairman Altmire and Ranking Member Fallin,

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, I want to thank you for holding today's hearing on the Consumer Product Safety Improvement Act of 2008 (CPSIA) and how the Consumer Product Safety Commission can reduce regulatory burdens on America's small businesses.

According to the NFIB 2008 Small Business Problems and Priorities publication, small business owners agreed that "Coping with Government Regulation" is one of their most formidable business problems, ranking it sixth out of 75 small business problems they face. Small businesses lack specialized regulatory compliance staff. Therefore, compliance falls on the owner, in addition to their other responsibilities.

While our members understand that the intent of the 2008 law is to protect children, small businesses are concerned that the law's lead testing policy could cause serious economic hardships for many law-abiding small businesses that manufacture and sell safe children's products. During a time of economic uncertainty, new costs and mandates inhibit economic growth and may force small businesses to raise prices, cut jobs or shut their doors. Given that the maximum penalties for noncompliance are \$100,000 and \$15 million, we believe a delay in implementation and enforcement of this law is reasonable request to ensure that the impacts on small business are thoroughly examined.

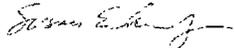
NFIB is pleased that the CPSC has acted to clarify the compliance requirements for resellers of children's products, thrifts and consignment stores. Additionally, we are pleased the Commission is taking initial steps to help the small business community. For example, the publication of a small business guide is helpful to the small business community and we encourage the Commission to continue to update these compliance guides as new information becomes available.

NFIB is optimistic regarding the stays of enforcement the Commission has put into effect. For example, the Commission issued a stay of enforcement for children's off-road motorcycles, all-terrain vehicles and snowmobiles. This stay is effective until May 1, 2011. These are good examples of products that pose an insignificant threat of lead poisoning to children and should be exempt from the CPSIA. NFIB is concerned, however, that small business may still face costly lawsuits. These independent actions signify the Commission's commitment to protect and recognize small business as our nation's job creators. While these actions are a good start, we are hopeful that Congress and the Commission can begin to work together to address additional burdens that may be fixed through the regulatory and legislative process.

NFIB urges Congress to act on legislation that will alleviate the burdens the CPSIA has imposed on small business. In particular, NFIB strongly supports allowing for "component part testing" which is necessary to prevent duplicative and expensive testing. Small manufacturers would be permitted to use the testing and certification that are obtained by their component suppliers (if all components are certified, the final product is certified). NFIB also supports the following legislative proposals: H.R. 968, H.R. 1027, H.R. 1046, H.R. 1465, H.R. 1510, H.R. 1692, H.R. 1815, S. 374, S. 389 and S. 608.

Thank you again for holding this hearing. I look forward to working with you on this issue as the 111<sup>th</sup> Congress continues.

Sincerely,



Susan Eckerty  
Senior Vice President  
Public Policy

cc: Members of the House Committee on Small Business



240 Uran Street  
Hillsdale, Michigan 49242

Phone: 517-437-9100  
Fax: 517-437-9101

Statement of Sean Hilbert  
President  
Cobra Motorcycle Manufacturing

U.S. House of Representatives Subcommittee on Investigations and Oversight of  
the Committee on Small Business

Hearing on  
"How the Consumer Product Safety Improvement Act Impacts Small Businesses"

May 14, 2009

Chairman Altmire, Ranking Member Fallin and members of the Subcommittee,  
thank you for the opportunity to provide comment on the Consumer Product  
Safety Improvement Act of 2008 (CPSIA).

Founded in 1993, Cobra Motorcycle Manufacturing is the world's premier  
manufacturer of youth competition motorcycles and all-terrain vehicles (ATVs).  
Cobra moved to Michigan in 2006 with the aid of a Michigan Mega Grant through  
the Michigan Economic Development Corporation (MEDC). We proudly design,  
develop, and manufacture our products in the USA using over 150 local  
companies to supply services, components, and raw materials. Additionally,  
Cobra has grown considerably over the past five years, and we currently export  
our products to fourteen countries. For the sake of our employees, suppliers, and  
customers, we urge Congress to amend the CPSIA to exclude products like ours  
that pose absolutely no lead risk to children.

As you know, the CPSIA was signed into law on August 14, 2008 and went into  
effect February 10, 2009. It subjects any consumer product that is designed or  
intended primarily for a youth age 12 years or under to the new limits on lead  
content (Section 101). While the CPSIA was passed with laudable intent, it has  
created, according to House and Senate bipartisan letters dated April 2 to the  
Consumer Product Safety Commission (CPSC), "a well-documented safety  
hazard for children, a severe and unwarranted disruption to families who recreate  
together, and a deleterious effect on youth amateur racing. Additionally, the  
inclusion of OHVs has created an economic disaster for an industry which is  
already reeling from the recession, is facing countless lay-offs and is estimated to  
be losing three million dollars per day due the Act."

If large companies like Honda are being dramatically affected by the CPSIA, then  
small businesses are experiencing hemorrhages that are unrecoverable. In the  
case of Cobra, the most damaging part of this law is the cost of compliance. We

**CHAMPIONS**



240 Uran Street  
Hillsdale, Michigan 49242

Phone: 517-437-9100  
Fax: 517-437-9101

are facing a price tag of nearly half of one year's revenue to comply, and that is estimating initial testing costs only. This equates to adding roughly \$2,000 to the price of a \$3,500 unit and doubling the cost of spare parts, which the market will simply not bear. Furthermore, the administration of continually testing approximately 4,000 separate components is a task we have not even begun to get our arms around. As with other small companies, we fear that the burden of compliance will simply cause us to close our doors. This means, in the case of Cobra, I must lay off 35 full-time and 4 part-time employees from our factory located in Michigan, which has the unfortunate distinction of already having the highest unemployment in the Union.

In an effort to alleviate some of the devastating effects of the CPSIA, the youth-model motorcycle and ATV industry sought an exclusion from the Lead Content Limits under Section 101. While the CPSC voted unanimously to deny the request for exclusion they ultimately voted on May 1, 2009, to support a stay of enforcement of Section 101 of the CPSIA regarding youth-model off-highway motorcycles and ATVs. The stay of enforcement is effective from May 12, 2009 through May 1, 2011.

Acting Chairman Nancy Nord stated on April 3, 2009, that she could not support an exclusion "because the clear language of the law requires this result, not because it advances consumer safety." In fact, Acting Chairman Nord said that the "application of the lead content mandates of the CPSIA to the products made by the petitioners may have the perverse effect of actually endangering children by forcing youth-sized vehicles off the market and resulting in children riding the far more dangerous adult-sized ATVs."

While the CPSC Commissioners' vote to stay enforcement of the law, this does not solve the real issue, which is the law itself. Despite the stay, it is unclear whether state attorneys general will also decline to enforce the CPSIA. The sale of youth-model motorcycles and ATVs is still technically illegal. Even though a stay means that small business owners will not be subject to fines or penalties imposed by the CPSC, state attorneys general can still prosecute violators if they chose to do so. Youth-model motorcycles and ATVs should be exempt from the law, and Congress needs to act to make that happen.

The most sensible way forward for Congress to help small companies like Cobra is to have the law repealed or to somehow exclude youth-model motorcycles and ATVs from the law. H.R. 1587, introduced by Rep. Denny Rehberg (R-MT), will do just this and I urge any Representative that has not yet cosponsored this bill to please do so. By cosponsoring H.R. 1587, you will send a clear message of your support for small businesses and youth safety.

**CHAMPIONS**



240 Uran Street  
Hillsdale, Michigan 49242

Phone: 517-437-9100  
Fax: 517-437-9101

Finally, it is my sincere hope that this Subcommittee continues to engage the public in their deliberations regarding the CPSIA's impact to small businesses. Cobra and many dealers, who are also small businesses, stand ready to serve as a resource for you and your staff as you further consider the impacts of the CPSIA.

Again, I wish to thank the Chairman, the Ranking Member and the Subcommittee for holding this hearing on "How the Consumer Product Safety Improvement Act Impacts Small Businesses."

Regards,

A handwritten signature in black ink that reads "Sean Hilbert".

Sean Hilbert  
President – Cobra Motorcycle Mfg. Inc.

**\*Consumers Union \* Consumer Federation of America\*  
\* Kids In Danger \* Public Citizen \* National Research Center for Women &  
Families \* U.S. Public Interest Research Group \***

The Honorable Jason Altmire  
Chair, Subcommittee on Investigations and Oversight  
House Small Business Committee  
2361 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Altmire and members of the Subcommittee:

Thank you for your interest in the implementation of the Consumer Product Safety Improvement Act (CPSIA). The undersigned consumer, public health, and scientific groups fully support aggressive efforts to engage and educate all parties involved in the CPSIA, including small and large businesses, microbusinesses, retailers, and consumers.

In August 2008, this law was passed with overwhelming bipartisan support in Congress, signed by President Bush and enthusiastically backed by consumers, public interest organizations and business representatives. The CPSIA provides much-needed tools for the Consumer Product Safety Commission (CPSC) to guide businesses in producing safe and effective products for their customers.

However, since the CPSIA's passage, the agency's leadership has floundered in ensuring a smooth implementation process, to the detriment of businesses and consumers. Indeed, after months of urging from members of Congress as well as from health, science and consumer groups, the CPSC has begun to develop common sense rules that will ensure the safety of our children while addressing small business concerns, mostly related to testing and certification requirements.

Business concerns that emerged due to the lack of CPSC guidance soon developed into a full-blown demand for major changes to the law. However, the CPSIA does not need to be changed to address these concerns. Congress has included language in the CPSIA that already empowers the agency to provide exclusions for certain materials. The CPSC has the power **right now** to exempt certain materials from testing and certification requirements, to relieve those manufacturers who are in no danger of violating the new standards.

Changing the law would hurt consumers by removing the critical safety protections it provides. It will also hurt businesses by diminishing consumer confidence – and therefore sales – at a time when business can least afford it.

Further, in the last two months, the CPSC has received resources that will help with implementation without need for changing the law. Congress and President Obama have increased funding for the agency. In addition, the President recently nominated a new chair and an additional commissioner. These new resources should enable the agency to implement the CPSIA effectively.

We urge you to resist calls to reopen the CPSIA and instead, to focus on the prompt, clear and sensible implementation of the law. The new CPSC Chair, once confirmed, should be allowed to put in place her vision for the agency's new direction. We look forward to working with you and the new CPSC leadership in ensuring that businesses and consumers all benefit from the CPSIA and its new protections.

Sincerely,

Rachel Weintraub  
Director of Product Safety and Senior  
Counsel  
Consumer Federation of America

Nancy A. Cowles  
Executive Director  
Kids in Danger

Elizabeth Hitchcock  
Public Health Advocate  
US PIRG

Ami Gadhia  
Policy Counsel

Consumers Union

Diana Zuckerman, Ph.D.  
President  
National Research Center for Women &  
Families

David Arkush  
Director, Congress Watch  
Public Citizen



May 13, 2009

Erik Lieberman  
House Small Business Committee

Re: Written Testimony for the May 14, 2009 House Small Business Subcommittee on Investigations and Oversight Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

On behalf of the Handmade Toy Alliance, an alliance now numbering 335 toy stores, toymakers and children's product manufacturers from across the country who want to preserve unique handmade toys, clothes, and children's goods in the USA, we respectfully submit the following testimony for the House Small Business Committee's Hearing on the CPSIA.

Please add this letter and the two pages which follow into the official record of this subcommittee hearing.

We appreciate your assistance in this matter. Please contact us if we can be of any assistance.

Sincerely,

Stacey Wion  
Co-owner, SpielWerk Toys  
[stacey@spielwerktoys.com](mailto:stacey@spielwerktoys.com)



Dear Erik Lieberman and House Small Business Committee:

We are a small brick-and-mortar toy shop located in Portland, Oregon. Our business is currently approaching 3 years in it's operation, while our second shop was opened just this last December.

Our founding concept is that play is the work of childhood, and that essentially, toys are the tools of childhood. Our goal is to make traditional, safe, and high quality toys available to Portland families.

In order to find the safest toys on the market, in some cases we had to look far. Many of our toys are imported from Germany, France, Poland and the like, as these countries continue to support their long-standing traditions of making simple, healthy, traditional toys. We have always trusted these varieties for the strict safety standards they adhere to, set forth by the European Union.

In stating this, you might be wondering how this information pertains to the new law put forth by the CPSIA. Well, here is what is happening:

Toys marked with a "CE" stamping (signifying that they meet EU safety standards) are inherently compliant to the new CPSIA standards by the very fact that their testing is more exhaustive and stringent, yet currently we are requiring these small manufacturers to not only pay for their own testing, but also become compliant with our new CPSIA standards, which not only requires more expensive testing, but also requires very complicated (and again, expensive) batch labeling (which the CPSIA currently does not have guidelines for) for each individual item. Essentially, we are asking them to do everything twice and create a US only tracking system that does not yet exist.

The consequences of this incessant testing are many. Most European exporters still able to afford the cost of small-scale, traditional manufacturing can hardly afford to test once, let alone twice. What we as a US retailer of these toys are experiencing, is an immense loss of product, incredibly higher prices, far longer backorders, and a huge overlapping problem with our competitors as we are now all fighting for the same reduced pool of product. Currently I am experiencing a 30% reduction in CE stamped product, which makes up 80% of my total inventory.

There is a lot of uncertainty at this time. Especially in these extremely challenging economic times, being faced this struggle to retain product and keep our niche in the local marketplace is especially detrimental. We cannot survive this crunch on the traditional toy industry—there are not enough domestic traditional toy makers around to keep us supplied.

And on the subject of domestic product, another more spoken about fault to this new law is the crunch on small domestic toymakers. I do not feel I need to say as much here, as it's opposition to this law has certainly gained momentum. What I would like to add, is that another of our founding goals was to eventually manufacture toys on a small scale, to contribute our concepts to the traditional toy market while also supporting our local crafting community. At this time, due to the extremely high costs involved with testing handmade goods, I cannot embark on this endeavor, nor can I legally support those who currently



make handcrafted items with the hopes of selling through our store.

I urge you please to amend this law. The integrity of the toys we sell have always been the driving concept to our business, it is also the reason why we support small toy manufacturers. Please do not let the poor ethics of the few affect the many. And please, please do not let it happen that we homogenize and water down the unique qualities of our toys as these are the most important tools of childhood.

We request that you:

1. Grant exemption to all "CE" certified products for children,
2. Grant exemptions to all natural products, both raw and compounds made up of natural and certifiably safe materials,
3. Allow "component-based testing" on all products for children putting the costly and timely burden of testing on the manufacturers of toy components (i.e. finishes, fasteners, and processed component materials),
4. Compile and publish clear and simple guidelines for all testing requirements for both retailers, distributors and manufacturers of children's goods,
5. Create small children's toy manufacturers access to financial assistance toward becoming compliant based on the size of their company and production.

I thank you very much for your time and consideration. Please do contact me with any questions or need for further testimony.

Respectfully,  
Stacee Wion  
Co-owner, SpielWerk Toys  
Portland, Oregon  
[www.spielwerktoys.com](http://www.spielwerktoys.com)

Erik Lieberman

House Small Business Committee

Re: Written Testimony for the May 14, 2009 House Small Business Subcommittee on Investigations and Oversight Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

On behalf of the Handmade Toy Alliance, an alliance now numbering 335 toy stores, toymakers and children's product manufacturers from across the country who want to preserve unique handmade toys, clothes, and children's goods in the USA, we respectfully submit the following testimony for the House Small Business Committee's Hearing on the CPSIA.

I am a small retailer who specialized in handmade toys made by US manufacturers as well as manufacturing my own line of fabric related items (aprons, purses, etc) I have been in business for over 10 years and have never experienced a quality issue with any of my vendors. Most of whom are family owned and have been in business for over 10 years. I am strongly against the mandate for all retailers to conduct ADDITIONAL testing for any products they sell as it is duplicative and is too costly for small retailers buying in small batches.

Please add this letter into the official record of this subcommittee hearing.

We appreciate your assistance with this matter. Please contact us if we can be of any assistance.

Sincerely,

Vicki Mote Bodwell  
Owner  
WarmBiscuit.com



May 13, 2009

Erik Lieberman  
House Small Business Committee

Re: Written Testimony for the May 14, 2009 Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

On behalf of the Handmade Toy Alliance, an alliance now numbering 335 toy stores, toymakers and children's product manufacturers from across the country who want to preserve unique handmade toys, clothes, and children's goods in the USA, we respectfully submit the following testimony for the House Small Business Committee's Hearing on the CPSIA.

Please add this letter and the two pages which follow into the official record of this subcommittee hearing.

We appreciate your assistance with this matter. Please contact us if we can be of any assistance.

Sincerely,

Dan Marshall  
Vice President, Handmade Toy Alliance  
dan@peapods.com



## ***Save Small Businesses from the CPSIA***

### ***The Problem***

The Consumer Product Safety Improvement Act (CPSIA) is overly broad in its focus and puts unrealistic testing costs on small businesses that were already providing safe products. The result is a decreased capacity to protect consumers, and severe financial hardship for small business.

### **What should Congress do?**

The CPSC has indicated that they are unable to fix the unintended consequences of the CPSIA without a technical amendment from Congress. We are seeking:

1. ***Component-based testing*** so that suppliers of our raw materials could provide the children's product manufacturer with certification of compliance within the law, which would eliminate the need for redundant and costly unit-based testing. Safety would be improved by driving compliance upstream in the supply chain, catching non-compliant materials prior to distribution, practically eliminating the chance that any given finished unit would be non-compliant.
2. ***Exemptions from testing*** for materials known by science not to pose a lead or phthalate contamination hazard, such as fabrics, certified organic materials, and many natural materials such as wood, paper and bamboo. Manufacturers would be spared the costs of testing these materials, and testing labs and the CPSC could better focus their efforts on high-risk materials such as metals and paints.
3. ***Harmonization with European Standards.*** Accepting the stringent EU standards in the United States as sufficient for the requirements of CPSIA would save countless US businesses that import from or export to the EU from the costs of performing multiple tests. US and EU regulators would be able to work together to oversee the global marketplace.
4. ***Exempt permanent batch labeling*** of products for hand crafted and micro businesses that have small batch runs. While permanent labeling may be efficient with large runs of plastic products, it would be extremely difficult and cost prohibitive for small batches made from wood or fabric.
5. ***Revisit the retroactivity*** of the CPSIA based on a risk-based approach.

### **The Result**

Fixing the CPSIA *now before any more* law-abiding and well-intentioned small companies are forced out of business will preserve the integrity of the original legislation, prevent political backlash, and refocus the efforts of the CPSC to fulfill the law's original purpose. To date, some businesses have discontinued their children's lines or have closed altogether. Libraries are sequestering children's books printed prior to 1985. Thrift stores have removed children's products from their shelves. Several European toy manufacturers have pulled out of the US market. ATV and motor bike manufacturers and storefronts have removed inventory intended for children 12 and under, including replacement parts. Without common sense changes to the CPSIA, the tragic result will in fact not be increased product safety, but the closing of small businesses that were already providing safe products.

### **About the Handmade Toy Alliance**

The Handmade Toy Alliance ([www.handmadetoyalliance.org](http://www.handmadetoyalliance.org)) represents small toymakers, children's product manufacturers, and independent retailers whose businesses cannot survive without repairing the CPSIA. We believe that these changes will not only help our businesses, but many other companies large and small who have been caught in a snarl of unintended consequences, affecting everything from apparel to educational materials for children with disabilities. We need common sense reform to preserve the heart and soul of American toys and children's products.

### ***Risk Based Assessment Amendment to the CPSIA***



Since it was passed into law in August, 2008, numerous industries have felt the impact of the unintended consequences of the Consumer Product Safety Improvement Act (CPSIA). Books, ATVs, thrift stores, school supplies, handmade toys, and clothing have all been negatively affected in ways which do not improve product safety or protect American jobs.

At the Handmade Toy Alliance, we have identified five key changes to the enforcement strategy of CPSIA which would dramatically reduce these negative impacts for our members. These include exclusions from testing for natural materials, component-based testing, and harmonization with EU standards.

However, it is now clear to us that a more fundamental change in the approach of the CPSIA is required in order to ensure the long term viability and diversity of children's products in the USA. Specifically, the Consumer Product Safety Commission (CPSC) should be given the discretion to implement the requirements of the CPSIA such as third party testing, age ranges of covered products, labeling requirements, and applicability of total lead content limits according to a risk-based approach.

This risk-based approach has been used effectively since 1986 in the State of California's landmark Proposition 65 law, giving the state the flexibility to identify and control substances that may pose hazards to children. The CPSC has also relied on this approach since its inception and has used risk analysis to target its research and enforcement initiatives. Under the CPSIA, however, the CPSC must now dedicate overwhelming time and effort to managing compliance for whole categories of products with little history of or cause for concern.

We propose that a technical amendment be created for the CPSIA that would allow the use of risk assessment to establish priorities, provide for common sense exemptions and set implementation deadlines. Under the law as currently written, a product intended for children ages 12 and under must be certified to be under 300 ppm by August of 2009 by a third party laboratory. A product can not be excluded if touching it would result in the absorption of "any lead", even if said contact contains *de minimis* risk or negligible risk of toxicity to the child. The wording of the CPSIA prevents the CPSC to do what they do best – assess risk.

Adding an amendment that outlines solely the regulatory discretion of the CPSC to assess risk while keeping intact the overall provisions of the law would allow for common sense exemptions that both the Commission would like to make and Congress intended to be included. The clear language of the statute as written is rigid. Safety in products is a priority, but without a risk based approach, this well intended children's safety law is irrevocably flawed. Using a scientifically based assessment of risk, the CPSIA will be strengthened, and the Commission can grant much needed and common sense, exemptions to small businesses that are creating safe products. This amendment will allow the CPSC to immediately address the products that pose the greatest risk to children while providing clear guidance to industry for the compliance of all products.

House Committee on Small Business  
Subcommittee on Investigations and Oversight  
May 12, 2009

RE: The Consumer Product Safety Improvement Act and Small Business

Statement of  
Michael E. Warring  
American Educational Resources LLC  
401 West Hickory Street  
PO Box 2121  
**Fort Collins, CO 80522**  
**Chippewa Falls, Wisconsin 54729**  
970-484-7445

**STATEMENT OF MICHAEL E. WARRING**  
President, American Educational Products LLC  
Fort Collins, Colorado and Chippewa Falls Wisconsin

Good afternoon, Mr. Chairman and distinguished Members of the Subcommittee.

As the President of a small 70 employee company serving the educational manipulatives business, I am deeply troubled by the devastating impact of the Consumer Product Safety Improvement Act (CPSIA) on any small business serving the children's products market. As written, and currently implemented, this law will put the lives and well being of small businesses and their employees providing children's products at risk. Ironically, CPSIA will do more harm to children than it will ever prevent, as children begin to use products not designed for their bodies and capabilities, as their 'hands on' options in school programs (before, during and after hours) are significantly reduced, as their parents avenues of meeting their children's needs through thrift stores become limited and as their parents lose their livelihoods when small businesses serving these needs disappear.

This law in effect, makes every children's product dangerous in terms of lead, lead in paint and phthalates until proven otherwise. It applies this standard retroactively, currently and continuously. In other words, existing inventory must be tested, all future production runs must be tested, and conceivably, periodic testing must be done on previously tested inventory. As final nails in the coffin of small business, CPSIA imposes product tracking requirements on all children's products regardless of probable risk or limited annual volumes, as well as generating a documentation requirement that will easily consume one business day per year per product sold. For any single children's product not generating \$20,000 a year or more in product margin, that product will disappear from the market, forever.

Others testifying before you will likely speak or write in generalities around the very real issues of CPSIA: burdensome compliance costs, increased and unmanageable regulatory and complexity issues, and an absurdly uncontrollable liability risk. I will endeavor to lay out a specific example of a product line from my business and how CPSIA will increase my cost on that product line. I will then extend that same set of concerns and costs to the totality of products that my business brings to market and quantify just what investment in testing dollars and additional employment I will need to make (assuming I could) to maintain my products in the market. Next, I will quantify what I can actually do and how that will change the dynamics of American Educational Products (AMEP). Finally, I will provide a real world example of a byproduct that this legislation has introduced to the children's products marketplace that I cannot overcome – fear.

The nature of AMEP's products is one of 'hands on' use by students and teachers to deliver educational content in a form that better engages the student. Products can be as simple as a ring used in a ring toss exercise up to the complexity of a completely self contained botany lab. 99% of our sales go to distribution companies or teacher stores (70% of that goes to 20 large distributors) who then market to teachers or schools. We do not do much in the way of direct sales, we are business to business. The group of products I will use for this presentation will be our inflatable line – products that you can find on our web site ([www.amep.com](http://www.amep.com)) under 'Clever Catch', 'Tumble N. Teach', 'Toss N Talk, and 'Bio2'. The easiest of these to visualize is the 'Clever Catch'. Think of a 24 inch diameter beach ball that has been divided into sections through color changes, geometric patterns, that sort of process. Each small divided area contains a question number and a question. The students toss the ball around and wherever their left thumb lands they read

the question number and the question, then they answer the question. We currently have 74 titles ranging from addition/subtraction all the way up to physics, crossing all curriculum areas. Each of these 77 titles comes from the same manufacturer, using the same materials and color dyes. We purchase them in lots as small as 500 units all of the way up to 3,000 units depending on the annual demand. In 2008, we sold 40,300 clever catches or about 523 of each title on average. Our total revenue on these units was around \$215,000 or about \$2,800 per title. Now let's analyze what CPSIA does to this product line.

On average, each of these titles consists of a plastic valve, a non-latex vinyl ball, an average of six different colors, a vinyl patch kit and a multicolor teacher's guide packaged in plastic bag with a pre-punched header card. All of the dyes used throughout the line are the same, all of the valves are the same, and all of the vinyl balls are of the same base material, as are the patch kits and teacher's guides. CPSIA requires that I test each component of each title separately. An average ball therefore consists of a valve, a ball, six different colors, a patch kit and a teacher's guide or about ten components needing tested. On average, testing currently runs around \$200 per component tested assuming one is only testing for lead, lead in paint and phthalates. There are additional costs to testing for choking and ASTM issues also mandated by CPSIA; however I am not going to consider those tests in this writing. On average then, I can expect to spend \$2,000 per title (ten components at \$200 per component). I need to test existing inventory, I need to test each title each time I have a production run completed and there is still a yet to be defined 'periodic' testing requirement. In the prior paragraph I pointed out that we generate an average of \$2,800 a year in ANNUAL REVENUE on each title. On average then, I really

cannot continue carrying any of these titles, as the product margin generated annually won't pay for one test run on average, never mind a potential future periodic requirement. I cannot spread the cost over a bigger production run because the balls have a shelf life in which time they must be inflated, about three years. There are some titles that sell less than 500 units in three years. Please note that we are THE manufacturer of these titles. Our sales volumes are THE worldwide annual sales volumes. The market will not grow to accommodate the financial ramifications of the legislation's requirements.

Now let's take the same group of 77 titles and test it differently. Component level testing might allow me to submit samples of all titles to be tested at one time and test each of the related components as one component. I would pay for one valve test (\$200) rather than 77 valve tests (\$15,400). The same would apply to colors, the ball itself, patch kits and teacher's guides. Assuming that we use about 60 different colors across the entire line, my total test cost for my existing inventory would be \$12,800 rather than the \$154,000 in the previous scenario. In reality, we may run production on 20 titles a year, so we're really comparing an ongoing cost of \$40,000 (20 titles per production run at \$2,000 per title) versus the \$12,800, annually. That sounds much better - and it is - but in truth the testing cost for 20 titles each production run will consume more than two thirds of the product's annual product margin each year, leaving me one third of the annual product margin to address warehousing, marketing, development and administrative costs – administrative costs BEFORE CPSIA. Those costs have now increased significantly as well, as I will now detail.

CPSIA requires that each consumer product (not just children's products) have a 'General Certificate of Compliance' (GCC) made available to all parties in the supply

chain including the final consumer. Basically, the certificate requires that the manufacturer (or importer) certify that the product meets all regulations and standards applicable to the product, an ever changing target. That same certification will eventually also require that third party testing documents are made available for every test that is required. Finally, this certificate must be updated each time a production run is completed, as production dates and the new testing documents must be made available. As currently written, CPSIA requires that AMEP certify compliance with limits on lead in paint, lead in substrate, six different phthalates, soluble heavy metals not including lead, and ASTM F963 standards including physical, mechanical, flammability and choking requirements. Each requirement must be listed and certified individually, dates and sources of testing must be provided, as well as dates of manufacture. Finally, beginning this August, we must provide rather specific, production lot based permanent labeling on the product for tracking purposes. This is the mandatory administrative burden that has been placed on every producer of a consumer good in the United States by enactment of CPSIA.

I can only guess at the actual cost of administering these requirements. It is my belief that for AMEP this will be one business day per year per product to administrate the GCC, the labeling and the testing requirements. I appreciate that this estimate may sound excessive but the creation of the certificate itself is the easy part. It is the servicing of the certificate that will consume the bulk of our time. Staying with Clever Catches, AMEP sold this line to 456 different customers in 2008, almost all of which are distribution companies. Each year, these companies will require that we provide them GCC's for every product we sell to them. They will also require that I update the information I have provided them anytime any information changes. I can make this information available on

line, I can publish it all on DVD's and mail them out, I can do whatever I want to help my customer help themselves, but in the majority of the cases, my customers will demand that I provide JUST their information to them and in many cases using THEIR forms. It is a nonnegotiable price of getting their business. I think that it will take us 77 days a year to do that for the 77 clever catches. That is six customers a day in terms of providing recurring and revised documents, that is management of testing on two production runs a year (if I'm allowed component level testing), that is managing the digital and paper files to have documents available to anyone in the supply chain, so on so forth.

In total, AMEP sold about 5,700 different products to 2,800 customers using 500 different vendors in 2008. In a good year with our current products, we ship \$12,000,000 to \$15,000,000 in product. Our products must have low price points (our final user is a teacher, after all) and we are a low margin business. On average then, we sell \$2,100 to \$2,600 ANNUALLY for each product we bring to market. On average, most products offer more complexity than the Clever Catch and will have a higher testing cost. When one includes the ASTM testing that is now mandatory, I am being quite conservative in suggesting that the annual cost to test my inventory ONE TIME is equivalent to my ANNUAL REVENUES. Unfortunately, I will have to test my product more than one time a year in at least half of the cases due to multi-year production runs. In addition, I need to hire or dedicate staff hours in the neighborhood of 5,700 person-days annually to administrate the process. At 260 work days per year, I need to add 22 people to my 70 member organization, or find the equivalent in available hours from the existing group or invest in software that might reduce the load to half this number. The reason I need to do this is because federal law now says that it is illegal to sell my product unless I do so, even

though previous CPSC risk assessment methodologies would show that there is no inherent risk to children from most of this product. One day these products were safe, the next day they were 'deadly' unless I can prove otherwise, constantly.

In reality, some of my product is 'exempt' from these requirements – for instance, rock identification kits. Unfortunately, the burden is on me to prove this exemption on an annual basis to up to 2,800 customers. I will have to respond to my customer's demands for GCC's on the product, I will have to ward off the doubts and very real fear (or risk adversity) that a person could pay a \$100,000 fine and/or go to prison for up to five years if AMEP is wrong in its' statements. Within the last month, AMEP lost a quote worth more than \$5,000 and containing 80 hours of labor for a product that consists of three rocks in labeled plastic bag to be used to teach geology. We lost this quote because the end user was concerned about rocks 'being dangerous' to children. Those students will now be learning geology using posters. This event cemented for me that AMEP will be subject to 'death by a thousand paper cuts' because we cannot comply with CPSIA and even if we could, we could not overcome the irrational fear it has produced. I will end up closing one of two facilities, I will end up laying off half the work force and I will end up dropping the 90 or 95% of our products that do not provide sufficient product margin to pay for testing one to three times a year, never mind the increased administrative time, annually. Once we do that, we will be less desirable as a supplier to our distributors. We will eventually have to look at selling more volume directly. At some point, we become little more than a business being run out of a garage by half a dozen employees. It is just a question of how long it takes.

I have written to (and visited with) most of the Congressional Representatives or their staff serving the two House Districts and the two states in which AMEP has facilities. I have written to Secretary Arne Duncan and the President's office. I have communicated with these party's myriad times – and do so again now. I have offered to provide any level of information, anytime, anywhere on this topic. I am pleading with you to apply the necessary energy and political willpower to bring about change on CPSIA. There are businesses out there that consist of an individual working out of their garage addressing very real and needed niches of children's products that will no longer be able to do. There are companies like AMEP that will die a slower death, but will ultimately be shuttered. CPSIA, while well intentioned, is not based on the science of risk assessment but is instead an over reaction to 'fix' a system that was not broken – recalls were invoked and executed, fines were levied, practices were changed by the culpable parties. It was written based on a perception that all children's products are produced and sold in quantities that allow companies like Hasbro, Wal-Mart and Target to support the cost of testing and excessive administrative requirements. I have tried to demonstrate that this is not the case in reality. If I can offer any additional information that will compel action on the matter, please let me know. I will do whatever I can to prevent further harm to our nation's youth from this misguided response called CPSIA to a nonexistent threat. In assisting, you will not only be better protecting our nation's children but also protecting that part of America's small business community that serves the children's market. Thank you for providing the forum and taking the time to consider my views on this matter.

The effects of CPSIA on my resale store:

I am the owner/operator of From My Room in Naperville, Illinois. We opened in November 2006 as a consignment resale store for kids and moms-to-be. We were welcomed by the community and are told on a regular basis that we provide a great community service. Those selling their items are glad to get some cash for them and those buying them are glad to get clothing, toys, books and other items at amazingly low prices. Many people tell me they simply don't have the money to buy new, even at WalMart and don't know where they would buy things if not for my store.

Enter the CPSIA.

This law was thrust upon us with virtually no notice. If I obey the law as it is written, I will no longer be able to sell clothing, toys, books or other items designed for children 12 and under. If I were to follow this law, I would now be out of business. What I have done is to take very few toys but am still taking clothing because people need to buy it. Other neighborhood resale stores are ignoring CPSIA and continuing to sell toys which has hurt my business because I have lost customers to them. I have begun to replace my toy and equipment section with adult clothing to try and offset the loss from other items. This will take some time because people know me as a kids resale store and don't think to come here for teen or adult clothing. In response to the negative publicity surrounding CPSIA, many of my customers now fear buying anything used. And the ones that want to buy toys are disappointed that I have very few to sell. While toys may not seem like a necessity, people with limited incomes want to give their kids some happiness at a low price.

I also have supported local craftspeople by allowing them to sell things in my store. Due to the increased regulations of CPSIA I will no longer be able to do that since they cannot afford the new testing requirements.

So sales are down, when they should be up in response to a poor economy.

When the stay on enforcement runs out in February 2010, I will be out of business unless this law is changed. I have no way to tell which items exceed the lead limits proscribed in the CPSIA so I will be unable to accept any children's items that are more than a few months old. My customers will have greater difficulty finding what they need for their kids.

This effort to protect kids will result in many kids not having the clothes and shoes that they need. Doesn't this have value? The vast majority of children's items do not exceed the limits but all must be refused. Who is harmed by this law? I am harmed. My family is harmed. My consignors are harmed. My customers are harmed. The community is harmed. Who benefits from this? I truly can't think of anyone except perhaps the testing companies. I urge you to consider the harm this law is doing and work to put a stay on the entire law until it can be reviewed and rewritten to provide common sense application and phase-in time. This law was not a partisan issue when it was passed and should not become one now.

If I can help in any way, let me know. Thank you for your attention to this matter.

--Connie

Connie Ballas  
From My Room  
1283 S. Naper Blvd.  
Naperville, IL 60540  
(630) 355-8442  
<http://FromMyRoom.com>  
<http://cpsia2008.blogspot.com>

My name is Melanie Tommey and I am the owner of Mel's Country Crafts in Sand Springs, OK. Let me first state, that I understand the reason the CPSIA was passed by Congress, and I completely support the idea of keeping our children safe from lead and phthalate contamination. However, this law actually does far more than that, and will, if left unchanged, actually do more harm than good, to people's lives and the US economy as a whole, and without actually improving product safety.

I have had my business since 1999. I have steadily worked over the years to expand and grow my business, and last fall, upon learning that I was to be laid off from my primary job, I purchased a home embroidery machine. My goal for 2009 was to expand into embroidered items, such as t-shirts, baby bibs and blankets, towels, etc. I sell my items at the Made In Oklahoma Craft Mall in Tulsa, and I participate in several craft shows each year. I make quality handcrafted items at an affordable price.

The CPSIA will impact my plans. I purchased thousands of dollars worth of supplies for my 2009 goals before I had even heard of this new law. I did not learn of the details until December, after my father saw a brief item on the news. Upon reading the law, I was alarmed at the scope of it and the severe restrictions it places on small businesses such as mine, as well as so many others. I also noted that there is a funding provision to grow the CPSC, and provides for the hiring of 500 inspectors, as well as allowing state's attorney generals to enforce it. The law even mentions yard sales and thrift stores!

To give you a scale of my business, last year, as a part time venture, I only had \$3200 in sales, before expenses. This year, since I'm now taking it full time due to my previous lay-off, I hope to have sales of at least \$15,000 before expenses. But if I have to try to comply with CPSIA, I cannot do that, and would have to stop offering all children's products, write off the supplies as a loss on my tax return next year, and then try to explain to potential customers why I can't make them a baby blanket or bib. And since the majority of this country still has no idea about the CPSIA, nor it's far-reaching consequences, they generally look at me like I've come from another planet when I inform them about the law. Their response, is usually one of surprise and disbelief...and then they state "that's stupid, Congress wouldn't do that". I tell them it's already happened. Also, I assure you, if I do comply and don't sell, others will ignore the law and sell, so by being honest, I'm also penalized by loss of revenue.

Let me address a few of my concerns. There are too many items swept up in this law that do not pose a risk, because they are made from inherently lead free materials. My t-shirts, baby blankets and 100% cotton baby bibs with Velcro closure, fall into this category. In all of the years the CPSC has been issuing product recalls due to lead contamination, I've never heard of a child being lead poisoned by a t-shirt, their blanket or their bib. And if I embroider on it, using 100% polyester thread, it doesn't suddenly become dangerous.

My first concern is the testing requirements. From what I've seen about testing costs, these average about \$75 to \$100 for each part of the product. A blue 100% cotton bib with Velcro closure that uses 4 different colors of thread in the embroidery design, would cost approximately \$500 to test... all for an item that I would most likely sell for about \$5.00. And that's just the lead testing...since this is an "instrument of feeding" for a child under 4, it would also have to be tested for phthalates, a chemical used in certain plastic products. That testing is far more expensive and would be an additional \$1500. So I would have to pay a total of \$2,000 to test each batch of bibs. I'm certain that I will not find a consumer who would pay \$2000 for a simple embroidered baby bib. The way CPSIA is written, as soon as I embroider on that bib, I become a manufacturer, therefore I am responsible for the testing and the certification to prove it is safe to sell. If I do not do this, and I am caught, I am then faced with a fine of at least \$100,000. It wouldn't be because the bib was unsafe...only that I didn't pay to prove it to the government. Under this law, I can have a safe lead free item, but if it's not certified, I've violated the law. This is a technical violation and does nothing to ensure safety. In the state of Oklahoma, if I provide tobacco or alcohol to a minor, I'm only fined \$100 for the tobacco and \$500 on the alcohol violation. It seems a far greater crime to me to provide alcohol to a minor over selling an untested baby bib.

My next concern, is the labeling provision, which is a quagmire of confusing and again, expensive requirements, which would place a huge burden on crafters and small businesses like myself. My items have the labels they came with that the original manufacturer placed on them. But other than a temporary price tag, I don't add any type of label to that. I don't track my inventory with SKU numbers and bar codes. I typically keep a written record, and then enter it into an excel spreadsheet. I make things as I need them, or as people order them, and do not keep a large inventory on hand of finished products. Often my items are one of a kind or personalized. If I have to add labels to my items, that is also cost prohibitive and I cannot do it.

I am asking Congress to make amendments to this law. I suggest that the law be changed to certain items for children 5 years of age or younger, since many studies have shown that most children stop mouthing everything they touch by the age of 3. It should only apply to products and materials that are LIKELY to include lead and/or phthalates. Inherently lead free products and materials should be automatically exempted.

This change alone, would frankly give relief to many of the organizations, industries and individuals that are appealing for changes to this law. Then, for those items that are for 5 and under, component testing must be the order of the day. It is overkill to have a manufacturer test a zipper or a snap, then to expect that same zipper or snap to be tested again when it's actually used in a garment or other product.

My third concern is with the fact that it grants power to each state's Attorney General. Therefore, this law could actually be interpreted and enforced in 50 different ways, and it would depend upon the state you are in, or where you sell your products. Some Attorney Generals have stated they intend to vigorously enforce this law, in spite of what the CPSC even recommends. Businesses and consumers alike should be very worried about this turn of events.

In summary, as a small business owner, who has now taken her business full time, this law could severely hamper my ability to operate. I'm somewhat fortunate in that children's products are only a part of my business, but at a time, when I need to try to make every possible product to earn every possible dollar that I can so that I don't file bankruptcy or lose my house, CPSIA could indeed cause that to happen. The assumption of risks, where there are none, and the prohibitive testing and compliance costs, will only kill small business in America. And in the end, children will not be any safer than they were before. They, and their parents, will just have less choice as consumers, and small businesses like myself could be closed, file bankruptcy and do further economic damage to our already fragile economy.

Thank you for your time and consideration of this very important matter.

Melanie Tommey  
MCC Enterprises  
aka Mel's Country Crafts  
1004 N Lincoln  
Sand Springs, OK 74063  
918-232-3392



251 Snelling Ave S  
St. Paul, MN 55105  
[www.peapods.com](http://www.peapods.com)

Erik Lieberman  
House Small Business Committee

Re: Written Testimony for the May 14, 2009 House Small Business Subcommittee on Investigations and Oversight Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

Please add the following testimony to the Congressional Record for the May 14, 2009 Hearing of the House Small Business Subcommittee on Investigations and Oversight regarding the CPSIA.

My husband and I own a small independent toy and baby goods store in St. Paul, MN. In our eleven years of business, we feel that we have earned the trust of our customers and our community by offering high-quality products made by other small businesses. Whenever possible, we have sought to provide alternatives to products made in China and have helped promote awareness of quality American and European-made products.

After the CPSIA, however, our task has become much more difficult. Because the CPSIA's testing standards are not aligned with European Union standards, we have lost access to many of our small European manufacturers. Many of these companies have already tested their products to EU standards, but simply cannot afford to retest their entire line to CPSIA rules. With the larger companies who have remained available to us, prices have increased dramatically in the past nine months, making it very difficult for us to compete in the current economy.

We are also very concerned about the dozens of small American companies we buy from. Many have attempted to test their products but have found that third party labs are charging exorbitant prices. One of our suppliers, Camden Rose of Ann Arbor, Michigan, was quoted \$4,000 to test a single wooden rattle, of which they manufacture only a few hundred per year.

Although many provisions of the CPSIA have been stayed by the CPSC, we are still feeling the effects of those provisions which have not been stayed, in particular the testing requirements for painted products. We are simply unable to buy anything with paint on it unless it has been made by a company large enough to absorb testing costs. We have discontinued dozens of products from wooden German baby rattles to Amish-made wagons

because of this one rule alone. In many cases, we have actually been forced to buy more from products made in China because non-Chinese alternatives are no longer compliant.

We are very concerned that we will be losing dozens more suppliers if the CPSIA isn't fixed before the CPSC's stay of enforcement expires. The CPSC has made it clear that they lack the authority within the law to offer enough flexibility to protect small businesses.

We strongly support the goals of the Handmade Toy Alliance, which we feel would protect small business without creating loopholes for large overseas manufacturers. These goals include:

- Exemptions from testing for natural materials and materials known by the science not to contain lead or phthalates.
- The allowance of component-based testing, which would allow small manufacturers to test their component parts instead of each finished product.
- Harmonization of US product safety standards with EU standards.
- Exemptions from batch-labeling requirements for small manufacturers.

We feel that these changes, if enacted, would preserve hundreds of unique small businesses and would allow us to continue to offer unique quality products for our customers.

We strongly urge all members of Congress to reexamine the CPSIA and act now to improve the law and save small businesses.

Sincerely,

Millie Adelsheim and Dan Marshall  
owners, Peapods Natural Toys And Baby Care  
St. Paul, MN



STATEMENT FOR THE RECORD

BY

PRINTING INDUSTRIES OF AMERICA, INC.

BEFORE THE

HOUSE COMMITTEE ON SMALL BUSINESS  
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

*“The Consumer Product Safety Improvement Act and Small  
Business”*

May 14, 2009

Printing Industries of America, Inc. is pleased to present this statement for the record before the House Committee on Small Business Subcommittee on Investigations and Oversight, and thanks Chairman Altmire for holding a hearing to examine the important topic of the Consumer Product Safety Improvement Act’s (CPSIA) effect on small businesses.

Printing Industries of America, the world’s largest graphic arts trade association, represents an industry with more than \$174.5 billion in revenue and 1.05 million employees. Book printing specifically employs nearly 50,000 workers and totals more than \$7 billion in shipments.

The CPSIA, intended to keep children’s products safe from dangerous chemicals, will also apply to ordinary children’s books and other printed material, adversely impacting the printing industry despite Congressional intent. Although the deadline to comply with testing and certification requirements of the CPSIA has been delayed for one year, this has not provided necessary, practical relief in the marketplace. Despite the one-year stay, retailers, vendors, and other print customers continue to request that printers test and certify products at this time, well in advance of the February 10, 2010 deadline.

Economic Impact of CPSIA on Small Printers

The CPSIA is economically devastating to the printing industry, especially small printing companies. Consider the following:

- With tests costing approximately \$300 to \$500 per product, and in some cases up to \$1,000 or more for specialty books, without an exemption, the testing costs for printers will be astronomical. Since many printers publish hundreds of titles, they may have to test each separate book, even if the raw materials were identical across an entire line of books. The cost to test for total lead content and phthalates in products could escalate into millions of dollars per printer.
- Currently labs are experiencing a four-to-six-week backlog for results, and as the testing and certification deadline approaches, this delay is likely to increase significantly. Printers cannot afford and are not equipped to store books at warehouses as they wait for lab results.
- Printers and publishers may have to test products both immediately to meet the demands of customers in order to be in compliance and again later in the year when the CPSC announces laboratory accreditation standards. Essentially, the testing costs and delays will be doubled.
- Printing Industries is aware of one instance in which a printer submitted a Section 15(b) report as required by statute for a packaging component that failed to meet the CPSIA phthalate limits. Upon reviewing the case, the CPSC's Office of Compliance notified the printer that the product, "when used as intended as part of a toy product, would not exceed the phthalate limits when tested based on the entire weight of the toy product." This surprising determination by the CPSC's Office of Compliance unfortunately came too late, as the printer had already purchased \$90,000 of new inventory to replace a product that testing had shown failed to meet the CPSIA's phthalate limits. This example highlights the economic impact the lack of clear guidance has caused to the industry.

#### Product Safety Testing & Data

Printing Industries of America, along with the Association of American Publishers (AAP) and other organizations and companies, has been collecting testing data on industry raw materials and finished products. As of April 17, 2009, the printing and publishing industry has submitted over 100 ink, toner, and coating test results, over 50 adhesive and wire test results, and over 255 finished product test results, including over 40 results for other printed material, all without a single negative test result. All 400 tests showed that the raw materials used in and the products manufactured by the industry inherently contain lead and phthalates below the CPSIA limits. This data includes test results on more than 10 books printed before 1985, including books from the 1950s, 1960s, and 1970s. In short, ordinary children's books and other printed material (such as flashcards or paper bookmarks) are child-safe.

#### Industry Request for Determination by CPSIA

The printing and publishing industry has been fully committed to pursuing the appropriate administrative channels within the CPSC in order to achieve a determination that children's

books and other printed material be exempt from the Act's testing and certification requirements, as well as from the Act's lead content limits. Industry representatives have submitted the necessary scientific data to support this request and continue to work diligently so the manufacturing, sales, and consumer use of this proven class of child-safe products remain viable.

Thank you for the opportunity to comment on this important topic.

*For additional information, contact:*

*Julie Riccio*

*Printing Industries of America*

*601 13th Street, NW, Suite 360 North*

*Washington, D.C. 20005*

*202-730-7970*



Fun and functional  
Creations for Children

May 13, 2009

My name is Jill Chuckas and I own a small hand crafted children's accessories business called Crafty Baby (www.craftybaby.com). In December, when I learned that the CPSIA would indeed affect my business, I joined and quickly took on a leadership role within the Handmade Toy Alliance. Currently, I am on the executive board and hold the position of Secretary. Our grass roots alliance of 334 businesses, represent children's product artisans and manufacturers and retailers of children's products throughout the country.

As a hand crafted artist, I am involved in every aspect of my business – from production to sales, advertising and marketing to accounts receivable. When the toy recalls began, my business increased. People were seeking out hand crafted and made in the US products in droves. When Congress first spoke of this "toy safety" legislation, I applauded their efforts along with the rest of the country. In December of 2008, though, I read the fine print. I, along with many others, quickly realized that this law, meant to regulate the companies that had betrayed the countries trust, would effectively put me out of business in less than a year. Not because my products are unsafe, but because I simply can not afford the cost prohibitive, redundant testing protocol that this law stipulates.

For example, I create a soft clutch ball for children ages 4 months and up. Like most small scale manufacturers and artists, I work in small batches – usually about 10 in a production run. The way the law is currently written, as of August of this year, I would need to send one clutch ball of each run in to a third party accredited laboratory to test for lead and phthalates – a component in plastics. There that are no plastics on or in the clutch ball, but because it is intended for children under 3, it would need to be evaluated for this toxin as well. The test is destructive, so I would not get my clutch ball back. And, they would break it down into components – 5 for this product - and perform the tests – to the tune of an average price of \$75 per component for lead and \$250 per component for phthalates. That totals \$1500 to test 1 clutch ball that retails for \$16.50.

Once I receive the test results, I would need to permanently mark each clutch ball with a distinguishing label listing place of manufacture, company information, date of manufacture and identifying numbers for the batch – different labels for every batch, or run, of 10 clutch balls. The tracking on this alone is burdensome in and of itself, and would only prove to increase administrative costs without any safety enhancements. For one-of-a-kind artists, this process would be impossible.

Rather than increasing safety, we would be putting artists and small production businesses out of business. The very people that we as a country have turned to for quality children's products would no longer be available. Instead, we need to put risk assessment back into the CPSIA. A technical amendment, focusing on the issue of risk in products for children, is a logical solution to the problems with the CPSIA. This simple change would ensure that the safety aspects which are essential to our country's children continue to be enforced, but would allow small businesses producing safe products the ability to continue to do what they do best.

Thank you for the committee's willingness to open the CPSIA up for discussion in the House of Representatives. If subsequent hearings are scheduled, I would be happy to come to Washington to discuss these issues further. Please feel free to contact me directly at your convenience.

Best Regards,

Jill Chuckas  
Owner, Designer

65 St. Charles Avenue  
Stamford, CT 06907  
www.craftybaby.com  
203-921-1179  
jill@craftybaby.com



**Statement from American Apparel & Footwear Association  
to the Subcommittee on Investigations and Oversight:  
"How the Consumer Product Safety Improvement Act  
Impacts Small Businesses"**

May 14, 2009

The American Apparel & Footwear Association (AAFA) is the national trade association that represents the apparel and footwear industry, including many small businesses. Our members (which include manufacturers, retailers, distributors, importers, suppliers and service providers, including many small businesses) thank you for holding this hearing to explore how the Consumer Product Safety Improvement Act (CPSIA) impacts small businesses." Implementation of the CPSIA is an extremely important topic and a Congressional hearing to discuss the impact of the legislation on businesses is long overdue.

AAFA's members are committed to supplying and selling safe and compliant consumer products. Our members strongly support the goals of the CPSIA and believe the landmark legislation was an important contribution in efforts to strengthen product safety laws and enforcement to ensure only safe and compliant products are sold to our nation's children. Out of the 6,445,908,000 apparel and footwear items sold in the United States last year, only 0.0082% were recalled. While we believe any recalls are unacceptable, we are proud that this recall rate is so low.

However, while well-intentioned, this legislation contains several provisions that impose new and burdensome requirements that have caused considerable disruption to businesses without adding significant improvements to overall product safety. AAFA respectfully submits the following concerns our members have faced since the implementation of the CPSIA for public record. We further hope that Congress can work together with the Consumer Product Safety Commission (CPSC) to effectively carry out the mandates of the CPSIA while addressing these concerns.

Testing

The CPSIA's extensive third party testing requirement for all children's products is redundant, overly burdensome, and extremely harmful to businesses. Currently, the CPSIA requires products to be tested as finished products rather than at the component level. Under this scenario, the cost of testing exponentially increases as a company has to repeatedly test the same components applied on different products. Product-based testing is particularly problematic for the apparel and footwear industry that not only sells different products, but different styles of products. Further, testing the final product does not actually make a safer product. Our members believe that testing should be done at the beginning of the supply chain when components are sourced so that product safety can be engineered into an article. Thus, if a manufacturer discovers a product defect, resolving the issue is far less problematic.

Understanding the costs associated with the new testing regime mandated by the CPSIA, the CPSC issued a temporary stay of testing and certification for many standards. However, our industry still has to have all children's products with surface coatings (including screen prints, paint, heat transfers, etc.) tested for lead in paint by a third party testing facility. And unless the rules are changed, all children's standards will have to be tested at the product level, when the stay is lifted on February 10, 2010.

#### Lead Standards: Retroactivity and Risk

The retroactive nature of the lead standard that came into effect on February 10, 2009 has created considerable havoc for companies. Companies who manufactured inherently safe products that were compliant with all pre-existing product safety standards now have to figure out at how to apply new standards to inventory in warehouses and on store shelves. This has resulted in significant business disruption, financial losses and disposal/destruction costs for products that may not comply with the new standards but also do not present a demonstrable risk to children's health. To complicate the matter further, because the lead limit retroactively drops to 300ppm in August, 2009, products that are considered "safe" today under the new CPSIA limits are arbitrarily declared "unsafe" once the new standard kicks in.

While the CPSC issued a stay of testing and certification for the lead standard, the stay offers limited relief to companies because the products still have to be compliant with the underlying standard. This creates a bit of a "Catch-22" since the only way a company can be fully sure whether the product is compliant is to test. Moreover, retailer customers, concerned about the ramifications of selling a non-compliant product, expect vendors to certify that their products meet the new standard. In fact, many retailers are requiring manufacturers be compliant with stricter limits and at earlier dates than what is legally required. When a company can not retroactively test or certify a product because the costs are unsustainable, or because it is simply impossible to do so, the products are returned and often destroyed even if the products do not actually present a product safety concern.

Unfortunately, the CPSIA does not appear to allow the CPSC to regulate according to risk. The new lead standard applies broadly to all children's products. Therefore, many non-compliant materials and products have been destroyed at great economic cost even though health and safety concerns are negligible if at all present. For example, materials found in a shoe, particularly one manufactured for an older child, are far less likely to be mouthed than materials in a piece of jewelry. However, the lead standard applies equally to all children's products – regardless of risk and behavior sciences. While the CPSIA does permit the CPSC to exempt certain products from the lead standard, the language is so tight that the CPSC has not yet even been able to issue a ruling exempting inherently lead-free products (such as fabrics and textiles) let alone products that may contain lead but do not present a risk of lead absorption.

#### Guidance and Regulations

Due to tight deadlines and insufficient resources, the CPSC has not been able to publish sufficient comprehensive guidance to help businesses interpret the vague regulatory language and carry out the new requirements. Even though President Obama has planned to increase the CPSC budget, the tight CPSIA deadlines provide little implement relief. Consequently, companies have acted on different, and sometimes conflicting, views on how to comply. For example, the CPSIA lead standard applies to "any part of the product." In other words – every component on the product must be compliant. However, the definition of component remains

vague. Is a zipper a component? Or does a company have to take apart the zipper and test the individual teeth, slide, pull, stopper, fabric, etc.? Other key terms remain undefined like “practicable” and “reasonable testing program” even though these definitions are critical in determining compliance.

Companies similarly are extremely confused about the new tracking label requirement that comes into effect on August 14 – three months from today. Stakeholders still do not have clear answers to basic questions like:

- What does “to the extent practicable” mean?
- What information satisfies the “location” requirement?
- What exactly is the date of production? Can a range be used? How specific does the range need to be?
- How does one account for a product that is manufactured in multiple locations by multiple entities? Some products are manufactured in one factory, shipped, then processed further in another facility. Who needs to label these products?
- What is “cohort information”? How precise does this information need to be?
- What exactly is a “product”? Are multi-item sets considered a single product?

We can draw upon our experience to make several observations how we can go forward with the CPSIA in ways that will benefit small businesses. Where possible, the Commission should immediately use whatever regulatory flexibility exists in the CPSIA. But when that is not possible, Congress must act urgently to make necessary changes through the legislative process.

**First**, Congress must eliminate the retroactive application of product safety standards, including those that apply for lead, lead in paint, and phthalates.

**Second**, the CPSC must move quickly to approve pending determinations that a range of products – including textiles -- do not contain lead. Congress must also modify the law to make sure the CPSC has authority to make commonsense determinations for products that may have lead in excess of the standard but have a *de minimis* risk of lead absorption.

**Third**, the CPSC and Congress need to revise the testing mandates, which are currently costing the industry millions of dollars without any appreciable gain in product safety or public health. The current system created by the CPSIA features redundant and excessive testing and creates severe testing backlogs at the limited number of accredited facilities. With a “test everything” mentality, we no longer have a system that focuses on risk and potential hazards. Instead, the CPSIA treats every article and component equally, regardless of risk. As a result, product safety suffers. We should immediately move to a component-level testing program for only those materials that present risk. Moreover, companies should be able to rely upon the validated certifications of their suppliers – a system that is already operating well with the Flammable Fabrics Act. Finally, the Commission should ensure that more labs and testing protocols have a chance to be accredited and accepted.

**Fourth**, we should delay the effective dates of these new standards until after full regulations are developed and published. Federal safety standards, labeling regulations, and certification and documentation rules under the CPSIA should be created and enforced ONLY after the CPSC has issued comprehensive regulations and educated all stakeholders on the new requirements. We can start by delaying the tracking label regulations that take effect on August 14, 2009.

This is a complex law that will become progressively harder to comply with unless urgent reforms are taken now. We have already seen companies in our industry go out of business, lay off workers, and incur other significant costs with no discernible benefit to public health and safety. Many are still grappling with basic questions or making multi-million dollar decisions based on their best guesses. The current piecemeal system is intolerable and has left our nation's product safety system in a state of considerable confusion and uncertainty. With little direction, retailers have been left to create their own contradictory programs that have added additional costs to manufacturers with no gain in product safety or public health. We can't let this situation persist.

Thank you again for holding this extremely important hearing to discuss the impact of the CPSIA. While it was absolutely necessary for Congress to reform consumer product safety regulations last year, the new requirements have caused a devastating economic impact to the apparel and footwear industry. Going forward, Congress must work with the CPSC to address implementation concerns and establish a strong, risk-based regulatory regime that does not unduly burden compliant companies, including the many small businesses in our industry.



May 13, 2009

I am writing in regards to the Consumer Products Safety Improvement Act of 2008 (CPSIA). I am the owner of a small toy company in Eugene Oregon called Terrapin Toys. We manufacture a kid's product called Mary's Softdough. I have been in business for 20 years and this is one of the biggest challenges I have had. I agree that toy safety should be a high priority but I believe the new Consumer Products Safety Improvement Act of 2008 (CPSIA) went too far and needs to be modified to consider all aspects of toy manufacturing. It is placing a financial burden on small business while not addressing the safety issue. In this economic times we are struggling to stay in business and the new regulations have added over \$5,000 in testing cost alone not to mention the cost to implement the labeling and tracking requirements. I have also spent countless hours on researching and working to try to comply with the new regulations. This is all time and money that I am taking away from my company, while not providing any benefits. I have never had a product recall and because we manufacture all our products locally we have control of the production. Nothing in this new law would improve the safety of our products.

I am writing to ask that you support new reform regulation.

1. Allow small manufacturers to use the testing and certification that their component suppliers have done to certify that the components do not contain an impermissible amount of lead
2. Exempt thrift stores, yard sales, consignments shops and other re-sellers
3. Prevent retro-active enforcement of the act
4. Provide a Good-Faith Exemption
5. Require the CPSC to provide small businesses with a compliance guide (this last one would really help to clarify what is needed)

Again, I really feel that we all need to do something about toy safety but not at the cost of small business. Most toy companies, from toy stores to manufactures, are committed to having safe, fun toys for kids. Please make it a priority to create reasonable regulation for our kids while keeping small companies in business.

Thank You

Mary Newell  
 Terrapin Toys, LLC  
[mary@softdough.com](mailto:mary@softdough.com)  
 541-461-1585

Terrapin Toys, LLC, PO Box 11565, Eugene, OR 97440  
[www.terrapintoy.com](http://www.terrapintoy.com) • [www.softdough.com](http://www.softdough.com)

**WRITTEN TESTIMONY OF STEVE BURNSIDE,**

**OWNER, DSD KAWASAKI,**

**PARKERSBURG, WEST VIRGINIA**

**House Committee on Small Business**

**Subcommittee on Investigations and Oversight**

**Hearing: "The Consumer Product Safety Improvement Act and Small Business"**

**May 14, 2009**

Chairman Altmire and members of the Subcommittee on Investigations and Oversight of the Committee on Small Business, thank you for the opportunity to submit testimony regarding the significant impact that the Consumer Product Safety Improvement Act's lead content provisions have had on motorcycle and ATV dealers.

I represent a small town community: Parkersburg, West Virginia, where I own a little motorcycle and ATV dealership. Some people may not understand that, in our world, this off-road segment of motorcycles and ATVs is used by everybody for farming, fishing, hunting; it's just fun. That's the biggest segment of our business by far and away.

This past couple of years in this downturned economy, we have suffered some losses already that have been tough to overcome. Since the economy took a turn for the worse in the Fall of 2008, we had been waiting for this Spring – our main selling and riding season – to be our salvation.

People are not spending money like they did; what money they do have they are spending on the kids, especially in our segment. But now they can't because of the new law passed by Congress.

Since the CPSIA lead ban on youth motorcycles and ATVs, we have had somewhere from twenty-five to thirty-five percent of our business jerked out from underneath us. But that is not the end of the losses. Many of the people that come to my business will not purchase vehicles for themselves because they cannot buy the proper age-size for their kids. They are just getting out of the game entirely because it is a family sport.

The ones that we really are concerned about are those who are going to put kids on the wrong size product. We do the right thing and tell parents they cannot and should not buy adult vehicles for their kids, but it is a tough spot to be in because we are hungry for sales.

We have embraced families ever since we started our business in 2003. I have had everybody from toddlers to teenagers in my shop and they are not chewing, eating or licking the bike, or anything that will cause them to ingest lead. And even the toddlers, they want to be on the seat and holding the handlebars. That's what they want to do – "Mom and Dad get me up on there," when they're not trying to climb on there themselves. Lead consumption from motorcycles and ATVs is not an issue – we've never seen it be an issue and we don't feel like it's necessary to treat it as an issue.

Last month, the CPSC issued a stay of enforcement of the lead content provisions for ATVs and motorcycles to try to get dealers to start selling again and keep kids off of adult size vehicles. But the stay does not solve the problem. The reality is that this stay of enforcement is simply inadequate to protect dealers, like me, who wish to sell these products.

First, the stay requires manufacturers to provide unnecessary and burdensome information about parts of these vehicles. But the CPSC staff has already found these parts present no health hazard to children. And the manufacturers have already explained functional alternatives to the lead are not available.

In addition, the stay does not prevent state Attorneys General from taking enforcement action against companies who distribute or dealers who sell these products. Youth ATVs and motorcycles sold under the stay are still a "banned hazardous product" in the hands of customers. The stay does not protect dealers from private lawsuits based upon the legal status of these vehicles as "banned" products either. Dealers and other small businesses should not have to face these risks because the CPSC provided inadequate relief and Congress has not yet taken action to fix the law.

Finally, the stay is only temporary, with a stated duration of two years. There is nothing to prevent a Commission with new and different members, like those nominated by the President last week, from revoking it at any time, leaving manufacturers and dealers subject to enforcement for products sold under the stay.

Since the stay does not provide the necessary relief to manufacturers or dealers, some manufacturers and dealers simply will not sell youth model ATVs and motorcycles, resulting in more lost sales and more children 12 and under riding larger, faster, adult-size vehicles where they are at risk of serious injury. Those that do sell face serious business and legal risks.

The CPSC should have granted the industry's petition to exclude ATVs and motorcycles from the CPSIA lead content limits. The petition was based upon science showing that the small amounts of lead contained in metal parts of these vehicles do not present any health hazard to children who use them. Yet, the Commissioners said that they had no authority to grant the petition because of the way the CPSIA exclusion provision is written by Congress.

Now, the only way to obtain complete and permanent relief for manufacturers, dealers and riders from this ban is for Congress to take action. The CPSIA must be amended to grant an exemption for youth ATVs and motorcycles which contain small amounts of lead that present no health risk to children. This is the approach taken by H.R. 1587, a bill introduced by Congressman Denny Rehberg with 38 bi-partisan co-sponsors. A separate bill introduced by Congressman Joe Barton, H.R. 1815, takes an alternative approach by revising the CPSIA exclusion provision to give the CPSC authority to grant exemptions in situations, such as youth ATVs and off-highway motorcycles, where small amounts of lead in components present no health hazard to children.

I urge Congress to provide manufacturers, dealers and riders with a permanent end to the ban on youth model ATVs and motorcycles by adopting such an amendment to the CPSIA.

Thank you for giving me the opportunity to present how CPSIA is impacting my industry and my livelihood.



TESTIMONY OF  
TOY INDUSTRY ASSOCIATION (TIA)  
*SUBMITTED TO*  
**HOUSE SMALL BUSINESS COMMITTEE,  
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT**  
***“THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT  
AND SMALL BUSINESS”***

MAY 14, 2009

[www.toyassociation.org](http://www.toyassociation.org)



The following testimony on the Consumer Product Safety Improvement Act of 2008 (CPSIA), is submitted on behalf of Toy Industry Association (TIA). TIA is a not-for-profit trade association composed of more than five hundred (500) members, both large and small in size, located throughout North America. Roughly 75% of membership consists of small businesses.

TIA and its members have long been leaders in toy safety. In this role, we develop safety standards for toys, working with industry, government, consumer organizations, and medical experts. The U.S.'s risk-based standards are widely used as models around the globe. We also serve to educate industry on these standards so that they comply and educate parents and caregivers on choosing appropriate toys and ensuring safe play.

TIA hopes that this testimony submitted for the record will help serve our goal of ensuring that the dramatic new requirements for marking an enormous array of vastly different children's toys and/or packaging mandated by the CPSIA is implemented in a thoughtful and orderly fashion. TIA requests the Committee note these challenges, as outlined in testimony by many small businesses appearing before it today. Further, we hope these comments will help the Committee recognize that flexible, practical and a common sense solution, grounded in sound hazard analysis is required and that this may have to be an evolving process for the Commission. This is why TIA supported the National Association of Manufacturers (NAM) Request for a Stay of Enforcement and



[www.toyassociation.org](http://www.toyassociation.org)

why TIA believes that great care must be employed, so as not to unduly burden small manufacturers and importers when imposing such regulatory requirements.

Our own extensive survey of members after chaotic implementation of CPSIA requirements in the marketplace demonstrated problems faced by many small businesses. As passed, the new CPSIA requirements appear to have resulted in a \$2 billion negative impact within our industry alone, at the crux of the current economic crisis. We hope that Congress will recognize that the majority of small businesses could use relief from imposition of costly and burdensome requirements in a haphazard manner.

TIA has submitted extensive comments to CPSC in an effort to ensure the realistic and reasonable implementation of many of the CPSIA requirements. We were pleased that the CPSC adopted many of our collaborative recommendations on reduction of costly paint testing by allowing composite testing. Unfortunately this has been the rare exception rather than the rule.



## **CPSIA IMPLEMENTATION ISSUES**

Highly publicized recalls involving only a small fraction of total products made in China in 2007 focused attention on the CPSC's resources, including its legal regulatory authority. In the 110th Congress, legislation (H.R. 4040 and S. 2663) to strengthen the Commission was passed and a conference agreement (H.Rept. 110-787) was reached by both chambers, and CPSIA (CPSIA/P.L.110-314) was signed into law by then President George W. Bush on August 14, 2008. The goal of the legislation is laudable as is the mission of the agency to better protect consumers against defective and unsafe products. The CPSC's statutory original purposes are to (1) protect the public against unreasonable risks of injury associated with consumer products; (2) assist consumers in evaluating the comparative safety of consumer products; (3) develop uniform safety standards for consumer products and minimize conflicting state and local regulations; and (4) promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. The new CPSIA provisions:

- Bans lead beyond a minute amount in products intended for children under 12 years of age.
- Prohibits use of dangerous phthalates in children's toys and child care articles.
- Mandates pre-market testing by certified laboratories of children's products for lead and for compliance with a wide range of safety standards.



**Toy Industry Association, Inc.**

[www.toyassociation.org](http://www.toyassociation.org)

- Requires manufacturers to place distinguishing marks on products and packaging to aid in recalls of products.
- Requires CPSC to provide consumers with a user-friendly database on deaths and serious injuries caused by consumer products.
- Strengthens protections against import and export of dangerous products, prohibits the sale and export of recalled products, improves public notice for recalls, and enhances tools for removing recalled products from store shelves.
- Bans 3-wheel all terrain vehicles (ATVs) and strengthens regulation of other ATVs, especially those intended for use by youth.
- Ensures that CPSC effectively shares information with State public health agencies.
- Bans industry-sponsored travel by CPSC Commissioners and staff, and authorizes a travel budget to address problems raised by the increasingly global market for consumer products.
- Restores the five-Member Commission, authorizes significant budget increases, and provides expedited rulemaking.
- Enhances national product safety enforcement by authorizing injunctive enforcement of federal law by State Attorneys General, preserving State common law causes of action and California's Prop 65 warning requirements.

House Committee on Small Business  
Subcommittee on Investigations and Oversight  
May 12, 2009

Re: The Consumer Product Safety Improvement Act and Small Business

Statement of  
Richard M. Woldenberg  
Learning Resources, Inc.  
380 North Fairway Drive  
Vernon Hills, Illinois 60061

**STATEMENT OF RICHARD M. WOLDENBERG**

Chairman, Learning Resources, Inc.  
Vernon Hills, Illinois

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to provide testimony on the impact of the Consumer Product Safety Improvement Act (CPSIA) on small businesses. My name is Richard Woldenberg and I am Chairman of Learning Resources, Inc. of Vernon Hills, Illinois, a manufacturer and distributor of educational materials and educational toys. We employ 150 people and sell our products in over 80 countries.

As a manager of a small business, I am concerned about the impact of the CPSIA on small businesses serving the children's products market. We have begun to see the destructive economic impact of this precautionary law on small business without providing significant offsetting consumer safety benefits. The CPSIA has the potential to make running an American small business so difficult that many businesses will elect to close or exit segments of the children's product market. In addition, the specialty markets that we serve, like the school market and specialty retail, will become greatly weakened.

The most significant problems caused by the CPSIA for the small business community are (a) burdensome compliance costs, (b) increased regulatory and business complexity, and (c) virtually uncontrollable liability risk. These issues are particularly severe for small businesses, as they have so little infrastructure to manage these challenges, and are often ill-prepared to surmount the complexities created by the law or bear the risk to their invested capital.

I. **Burdensome Compliance Costs:**

A. Retroactive Effect. The first heavy financial blow dealt by the CPSIA was the retroactive application of the new safety standards to existing inventory. By allowing only six months to sell-off merchandise that was "safe" one day and "unsafe" the next, Congress imposed

terrible losses on many small businesses and incited a trade war between retailers and manufacturers over who would be “stuck” with the un-saleable inventory. [Notably, the advanced notice of the retroactive effect of the phthalates ban was even worse – just two business days (see <http://cpsc.gov/about/cpsia/nrdcopinion.pdf>).] The short sell-off period for the newly illicit inventory is FAR SHORTER than was offered by the Eighteenth Amendment and Volstead Act in 1919 when alcohol was banned in the Prohibition, the culmination of a nearly 100 year anti-alcohol campaign. Retroactivity has virtually no precedence in CPSC history. Industry-wide losses are estimated at billions of dollars. See <http://online.wsj.com/article/SB123872361943185291.html>. No reparations have been offered to small businesses harmed by this dramatic change in law. New inventory losses may occur on August 14, 2009 as the law requires a further drop in the lead and lead-in-paint standards which will also be given retroactive effect.

B. Testing Costs. The precautionary regulatory approach of the CPSIA imposes testing costs on small business out of proportion to its stated objective of improved safety. The new law attempts to resolve perceived “gaps” in regulation by considering every product intended for children “hazardous” until proven otherwise. Under the CPSIA, the definition of a “children’s product” subject to regulation was widened to encompass ALL products designed or intended primarily for a child 12 years of age or younger (15 U.S.C. §2052(a)(2)). Thus, the new restrictions encompass library books, ballpoint pens, dissection specimens, shoes, sweaters, ATVs, used children’s bicycles, etc. The CPSIA requires that manufacturers test all “children’s products” for compliance using a certified independent laboratory prior to importation or sale (15 USC §2063(2)). The heavy testing burden will crush small businesses of all types. For instance, we have submitted written quotes to Congressional leaders for as much as \$24,050 to test a single telescope under the CPSIA. Even allowing for new test specifications recently announced

by the CPSC, the cost for a typical complete suite of CPSIA tests is likely to exceed \$1,500 per average product. At our company, we have about 2,000 catalog items. Even with all conceivable efficiencies, the prospective testing cost for our inventory is staggering.

The testing regime under the CPSIA was not designed with small businesses in mind. The low sales volume typical of small business products makes the cost of testing prohibitive and creates an unfair competitive advantage for businesses serving mass markets. Because small businesses bear disproportionately higher production costs from testing, many items will become uncompetitive in specialty markets. The structural advantage of mass markets under the CPSIA will depress the competitiveness and viability of niche markets and niche companies.

The solution to the testing dilemma is not clear cut without a major change in law. The CPSIA eliminates risk assessment as the basis for safety administration and as a result, each product must be individually tested. Small businesses do not have the option to use supply chain management techniques or testing focused on specific risks to achieve safety goals. Repetitive testing of like products for like risks will raise costs significantly for little safety payoff. Even component-level testing offers only limited relief, mainly for the simplest products with few components (assuming component suppliers will cooperate and provide the expensive test reports at all). Notably, Customs inspection of test reports at the time of importation will likely create delays for companies relying on bundles of component test reports. It won't take long for component testing to be exposed as unworkable for imported children's products. This will adversely affect many small importers.

C. Tracking Label Costs. CPSIA tracking label requirements will drive up costs for small businesses. The tracking label provision (15 USC §2063(a)) requires that every item be marked with source and production lot data ostensibly to improve recall effectiveness. The cost of tracking labels is FAR in excess of purported benefits. For instance, we estimate that our

company will spend more than 50,000 times the expected cost of recalls EVERY YEAR to apply tracking labels to our products (based on our 25-year recall rate of 0.00001%). In fact, far less than 1% of all children's products are EVER recalled. With the market comprised of many millions of items, the tracking labels requirement punishes the many for the sins of the few.

In light of the purpose of the new law, the tracking labels provision seems particularly misconceived. The CPSIA is intended to reduce recalls of children's products significantly – so why are tracking labels still necessary? As Wayne Gretzky once explained: "I skate to where the puck is going to be, not where the puck has been." The expected lower rate of recalls will only magnify the damage inflicted on small businesses by the tracking label requirement. We also expect certain high quality factories to stop serving small business customers to avoid the challenge and expense of tracking labels on small production runs of children's products. The loss of these manufacturing resources may curtail many small business activities.

D. No Way to Avoid the New Burdens. Obtaining an exception to the law will be nearly impossible for small businesses. The CPSIA (essentially) prohibits exceptions allowing the sale of materials or items that exceed the new standards (see <http://cpsc.gov/about/cpsia/101lead.pdf>). Thus, the sale of materials or products with phthalates and/or lead in excess of standards is now a *per se* violation of the CPSIA, whether or not there is any evidence of risk or danger associated with the use of such materials or products. While the recent exercise of "enforcement discretion" by the CPSC in granting a two year enforcement stay on ATVs is a possible sign of broader relief to come, it was notably preceded by a lengthy campaign by the ATV industry for relief. The exemption process (<http://cpsc.gov/library/foia/foia09/brief/leadexclusion.pdf>) is so expensive that few if any small businesses can entertain it. The ATV industry effort to obtain relief under the CPSIA for its narrow class of goods may exceed \$5-10 million in cost over more than four years. For small businesses, this exemption door is effectively closed.

E. Reduced Incentive to Innovate. The increased cost to bring a product to market will make many viable – and valuable – products uneconomic. To cover the cost of developing, testing and safety-managing new products, the prospective sales of new items will need to be much higher than before. This means that low volume items can't be produced profitably and new market entrants may find themselves priced out of the market. The blizzard of new legal requirements will reduce the number of new children's product business start-ups. We think that increasingly companies will be forced to abandon specialty and niche markets to concentrate on the mass market. Over time, only high volume items will be cost-effective enough to survive the Darwinian action of the market under the CPSIA. This will hurt many important, but small, markets like educational products for the blind or the deaf. Our company, with its 2,000 catalog items, is probably now a dinosaur under the CPSIA – the law provides a strong incentive to reduce our product line to 50-150 items, a manageable undertaking under the new rules, and focus on high volume customers only. The efficiencies of selling only in large runs to large customers will drive many enterprises to abandon business models involving large product lines.

#### II. Regulatory and Business Complexity:

The complexity of compliance with the CPSIA is excessive for most businesses, large or small, but is particularly unmanageable for small businesses. Even for the tiniest companies, specialized systems will be needed to manage the chore of continually changing lot markings and retaining the data necessary to make tracking labels useful. For most small businesses, specialized staff and expensive specialized software will be necessary to administer the labeling process. The scale of the chore is mindboggling. We estimate for our company that we will face as much as 30,000 label changes per annum. In our group of companies, annual label changes may exceed 75,000 (about 1,500 changes per week). In addition, supply chains will need new manufacturing protocols by product type, material type, packaging type, component type,

assembly strategy, factory location, and so on. Many items produced by small businesses will be challenging to label properly (e.g., items with multiple production dates, multiple sources, many components, small parts, designed for aesthetics or special functionality, etc.). Many small businesses will be defeated by such a tedious bureaucratic undertaking, all to improve on recalls that may never occur.

Small businesses don't have the resources to manage compliance with ultra-complex laws, and will throw up their hands in frustration. Our company has already lost customers for our entire category on the grounds that selling toys is too confusing or too much of a "hassle". This is our new market reality. We know of businesses that employ retail managers who earn \$8.50 per hour. Other stores might have an owner/manager supported by 4-5 hourly workers, often local high school kids. Small businesses like these cannot manage demanding legal compliance schemes among their other burdens. It is unrealistic to assume that a precautionary law will not adversely affect the economics of small businesses ill-equipped to deal with it.

Administering the law is made more difficult by the emerging gap between the law itself and the implementation of the CPSIA by the CPSC. Unfortunately, implementation of the law has become so pockmarked by CPSC exceptions, FAQs, clarifications, letter opinions and stays that the CPSIA itself no longer describes the way it is being enforced. As a consequence, well-intentioned companies may implement the law against themselves at great expense. The apparent insistence of Congress that the CPSC interpret the law with "common sense", rather than amend the law itself to conform to common sense, will hurt small companies ill-equipped to navigate these complicated legal waters.

### **III. Significant Liability Risk:**

A knowing violation of the CPSA, FHSA and other applicable consumer rules enforced by the CPSC can result in civil or even criminal liability under the CPSIA (15 USC §2069-70).

Small businesses know about the potential for liability under the CPSIA and are shying away from behavior they consider “risky”. This is why some thrift stores have begun to discontinue the sale of children’s merchandise. See [www.boston.com/community/moms/articles/2009/02/27/lead\\_law\\_puts\\_thrift\\_stores\\_in\\_lurch](http://www.boston.com/community/moms/articles/2009/02/27/lead_law_puts_thrift_stores_in_lurch).

Risk of liability will cause small business markets to shrink.

Even following the implementation rules of the CPSC is no assurance of avoiding liability under the new law. The CPSIA provides that the State Attorneys General may independently enforce the new law (15 USC §2073). In other words, the actions and views of the CPSC are not enforceable against the State Attorneys General who may enforce their own interpretations of the law. Small businesses have no capacity to monitor the activities of 50 different State Attorneys General and the CPSC, or maintain relations with each of them. This rule introduces uncontrollable random risk and political risk to small American businesses.

Because all violations of the CPSA and FHSA must be self-reported to the CPSC within 24 hours (15 USC §2064(b)), the CPSIA renders all violations of the law an “emergency”, irrespective of risk of injury (if any). The significance of the violation is not a consideration in the self-reporting requirement. As a manufacturer with a product of about 2,000 items, we are fearful of being in a constant state of crisis under this provision. The odds of regularly uncovering technical violations (missing warning label on our website, etc.) is high with so many products in our product line. Each such incidence might constitute a “knowing violation” giving rise to criminal liability unless immediately acted upon. The wear and tear, not to mention the expense, of constant crisis will be a major problem under the new regulatory scheme.

The prospect of liability (civil and criminal) under the CPSIA is driving a refocus of children’s product businesses away from product development, marketing, sales and infrastructure investment toward bureaucratic excellence. The diversion of resources toward

unproductive, liability-minimizing activities certainly violates the Pareto Principle (80/20), which dictates that a properly organized business will allocate its resources to the activity which produces the greatest economic return. The precautionary CPSIA creates inefficient incentives which favor heavy investment in unproductive, non-revenue producing overhead – and passing along these inefficiencies in the form of higher prices to an unsuspecting public. The illusion of improved safety cannot overcome the reality of dollars that won't go as far, buy as much or provide as high a standard of living as prior generations enjoyed.

**Recommendations and Conclusion:**

The dangers of a precautionary approach to legislation are clearly demonstrated by the impact of the CPSIA on the small business community serving children's markets. The solution to the dilemma is to restore the authority of the CPSC to administer safety using risk assessment as its guiding principle. This will allow the agency to refocus its attention on risks that present a danger of actual injury, and avoid wasting resources on pens, library books, bicycles, educational materials, sweaters and shoes, unless they present a quantifiable risk of injury. For the small business community, a more rational system of regulation, with fewer hair trigger liability rules, will also allow productive commerce to resume. Reasonable protection for thrift stores in this proposed common sense safety regime would naturally follow.

To ensure better compliance in the future, the reconstituted CPSC should put more resources into market education and a commercial liaison function. The CPSC in its early days had more "outreach" resources to help companies solve their safety issues without threat or coercion. Improved industrial relations will return a higher dividend than implementation of a penal, restrictive regulatory scheme. I urge the Subcommittee to carefully consider these issues and to encourage the House Committee on Energy and Commerce to reopen this problematic law and fix it once and for all.

Thank you for considering my views on this important subject.

161

