



Consumer Product Safety Commission: CPSIA Implementation

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Summary

Created in the early 1970s, the Consumer Product Safety Commission (CPSC) is a small agency by Washington standards (less than 500 employees and a \$80 million FY2008 appropriation) charged with a seemingly overwhelming responsibility: to protect American consumers against death or injury from unsafe products, including imported products.

A series of high-profile product recalls during 2007—most notably of children’s toys imported from China—focused attention on the CPSC’s resources, including its legal authority, for the task at hand. In the 110th Congress, legislation (H.R. 4040 and S. 2663) to strengthen the Commission was considered, a conference agreement (H.Rept. 110-787) passed by both chambers, and Consumer Product Safety Improvement Act (CPSIA/P.L. 110-314) was signed into law by President George W. Bush on August 14, 2008.

In the coming years it is widely anticipated by those who drafted the CPSIA, by the CPSC itself, and by those who follow or have a stake in consumer product safety, that the new law will prove to be a turning point in the agency’s history – one which significantly empowered the CPSC to better protect consumers against defective and unsafe products. Over the next several years, many of the more than three dozen provisions included in the CPSIA will be put to the test, not the least of which are restoring the original five-member Commission leadership approach, following the experiment begun in 1982 of reducing the number of Commissioners to three; empowering the 50 state attorneys general to enforce CPSC’s regulations; and requiring the agency to provide consumers with a user-friendly database on deaths and serious injuries caused by consumer products. For the moment, however, one thing seems certain: implementation of the CPSIA is not going well.

The CPSC has been overwhelmed with multiple statutory deadlines. Confusion is rampant among manufacturers, importers, distributors, retailers, and consumers about new lead limits for consumer products intended for children 12 and under. Turmoil is particularly acute among small businesses. Despite agency efforts to provide clarification, consignment shops, thrift stores, and various charitable organizations still fear incurring stiff fines for inadvertently violating the CPSIA, and retailers across the country are contemplating disposing of valuable inventory that may well pose no health risks.

A coalition of trade associations, including the National Association of Manufacturers, petitioned the CPSC to delay a February 10, 2009 effective date and issue guidance to businesses about complying with CPSIA. While Acting Chairman Nancy Nord said she “agree[d] that the effective date of this provision is problematic for many, the Consumer Product Safety Commission does not have the authority to stay the effective date. Any such change must be made by Congress.” Nevertheless, on January 30, the CPSC Commissioners did vote to provide “limited relief” from enforcement of testing and certifications for one year for manufacturers and importers of regulated products, including products intended for children 12 years old and younger. The agency also issued on February 10 a revised guidance document that explains to small businesses, resellers, crafters, and charities their responsibilities under the CPSIA.

House and Senate committee and subcommittee chairmen have exchanged correspondence with the two-person CPSC Commission about how best to resolve numerous compliance and enforcement questions and several bills have been introduced to deal with various issues.

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About the Agency

The Consumer Product Safety Commission is perhaps best understood in the context of the surge of the consumer protection movement of the 1960s. Beginning with Ralph Nader's efforts to dramatize the problems of auto safety, a general interest in product safety was stimulated. Congress responded by passing a series of laws dealing with auto safety, toy safety, radiation safety, fabric flammability, and child resistant packaging for hazardous household substances. These laws—as well as several dating from the 1950s—were, in the opinion of some observers, neither comprehensive in scope with respect to the wide range of consumer products nor adequate in protection.

While industry was originally opposed to a federal regulatory approach, by the early 1970s, the National Association of Manufacturers agreed there was a need for Congress to pass a product safety law.¹ A key reason was because manufacturers were increasingly having to contend with a complex and confusing assortment of state laws, and the prospect of having to deal with a unified regulatory approach appeared attractive.

Although there are other historical factors, the CPSC owes its existence primarily to the work of the National Commission on Product Safety (NCPS). Legislation was introduced in 1966 and the following year P.L. 90-146 authorizing the NCPS was approved. In March 1968, President Lyndon Johnson appointed the seven-member, bipartisan Commission to “conduct a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injuries which may be caused by hazardous household products.”²

The agency's statutory 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.

In addition to the authority assigned to the CPSC by its enabling legislation, major consumer programs were transferred to the new agency from the Food and Drug Administration, the Health, Education and Welfare Department (now known as Health and Human Services), and the Commerce Department. Included were the Federal Hazardous Substances Act of 1960, as amended by the Toy Safety Acts of 1969 and 1984 and the Child Protection Amendments of 1966, the Poison Prevention Packaging Act of 1970, the Flammable Fabrics Act of 1953, and the Refrigerator Safety Act of 1956.

The CPSC was designed to be relatively small. Rather than relying on thousands of inspectors, the agency relies on the onus placed on firms by its enabling statute. Section 15(b), for example, requires manufacturers to report unsafe products to the Commission. This general approach appears to have worked reasonably well for domestically produced consumer products, because of the nation's regulatory regime. When it comes to imported products, however, the absence of key factors may make safety oversight more problematic. In China, for example, inspections

¹ “Product Safety: Stricter Law in Congressional Mill,” *Congressional Quarterly*, Dec. 18, 1971, p. 2629.

² P.L. 90-146, Section 2(a), Nov. 20, 1967.

cannot—with anything approaching confidence—be left to Chinese factory owners. China reportedly suffers from the absence of a rigorous regulatory system, endemic problems of corruption, and a lack of a free press.³

CPSIA: Major Provisions

The Consumer Product Safety Improvement Act represents a comprehensive, far-reaching amending of the 1973 Consumer Product Safety Act. Although a thorough review of the CPSIA is beyond the scope of this report, the principal purpose of which is to provide context and insight into the key problems of the on-going implementation of the new law, it is useful to list the major provisions. [For a detailed examination of the CPSIA, the reader is referred to CRS Report RL34684, *Consumer Product Safety Improvement Act of 2008: P.L. 110-314*, by Margaret Mikyung Lee.] In brief, the CPSIA's major provisions include:

- 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.
- 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.

³ Edwin S. Steinfeld, "The Rogue That Plays by the Rules," *The Washington Post*, Sept. 2, 2007, p. B3.

- Provides whistleblower protections for private sector employees regarding alleged violations of any CPSC-enforced product safety requirements.

Congress Acts to Strengthen CPSC

Although major consumer groups such as the Consumer Federation of America, Consumers Union, and U.S. Public Interest Research Group had been voicing concern about the CPSC's declining budgets (in real terms) and staffing for decades, and had tried for years to persuade Congress to amend and strengthen the agency's powers, until the recent turmoil over dangerous imported products, they had made little headway.⁴ Their concern over the years is not surprising, in light of the agency's congressional appropriations history.

In 1977, a mere three years after the Commission opened its doors, its funding level was \$40 million (\$95 million, in 2009 inflation-adjusted dollars). This amount enabled the CPSC to employ 900 individuals. Beginning in 1980, however, the agency's staffing level declined over the following three decades. By 2007, the agency's \$62.27 million budget (considerably less than half of the \$145 million it would have received had its early budgets kept up with inflation) supported a staff of 393 FTEs (from a high of 978 in 1980).

Throughout the summer and fall of 2007, as more and more news stories focused on consumer injuries and product recalls, appropriators took note of the growing concerns about the adequacy of the agency's funding. At oversight and appropriations hearings in both the House and Senate, witnesses from consumer organizations, industry, and the agency were among those who advocated providing CPSC with more money to get the job done. The House, following the recommendation of the Appropriations Committee, proposed increasing the agency's appropriation to \$66.83 million for FY2008. For its part, the Senate proposed \$70 million. In the end, under the omnibus funding measure (H.R. 2764), CPSC received \$80 million for FY2008, an increase of \$17.7 million for FY2008, or 28%.

The CPSIA authorizes very sizable funding increases over the next five years. The new law authorizes a series of budget increases to \$136 million in 2014, and raises the CPSC's staff to 500 FTEs by 2013.

For FY2010, the Administration has requested \$105.4 million for the CPSC. Of the amount requested, \$17 million is estimated for the new responsibilities and requirement set by the CPSIA, including the development of a consumer product safety database.

⁴ The pattern of legislation being driven by a sudden increase in public awareness is well established. More than a century ago, for example, Upton Sinclair's book *The Jungle* (1906), which dealt with conditions in the U.S. meat packing industry and caused a public uproar, contributed to the passage of the Pure Food and Drug Act and the Meat Inspection Act of 1906.

CPSIA Implementation Plagued by Concerns and Confusion

From its enactment in August 2008 through the fall of 2008, the CPSC's implementation of the CPSIA appeared to unfold relatively smoothly, based on press coverage. Occasional newspaper and magazine stories revealed emerging problems and concerns about possible adverse impacts on certain smaller firms.⁵ Also, the CPSC's General Counsel issued a number of Advisory Opinions and the agency published a host of Federal Register Notices.⁶ However, as the February 10, 2009 effective date for several CPSIA requirements neared—new requirements include lower lead limits of 600 ppm in children's products, phthalates limits of 1,000 ppm for certain products, and mandatory toy standards—more and more stories appeared in print and broadcast media warning about difficulties and expenses associated with complying with the new law.

During January 2009, there was particular focus on the concerns of consignment shops, thrift stores, and charitable organizations. Further, numerous manufacturers and retailers, both large and small businesses, expressed confusion about a wide variety of subjects associated with implementation of the CPSIA, including safety certification of products, deadlines for lower lead limits, and whether some or all of the new regulations would be retroactive. Book publishers and manufacturers and dealers of All Terrain Vehicles (ATVs), motorcycles, and bicycles—among others—were also affected.

A brief chronology of selected correspondence and decisions between and among Congress, the agency, and industry may prove instructive.

The American Library Association (ALA) wrote to the CPSC on December 4, 2008, noting that the agency's General Counsel had sent an opinion to the Association of American Publishers which interpreted the CPSIA to include children's books and stating that "all books designed or intended for children under the age of 12 need to be tested [for lead]"⁷ Subsequently, the ALA has adopted the view that the CPSIA does not apply to libraries—a view which has been supported by a number of Members of Congress, and which has not been refuted by the CPSC.⁸

On December 18, 2008, a coalition of trade associations, including the National Association of Manufacturers, petitioned the CPSC to delay the February 10, 2009 effective date and issue guidance to businesses about complying with CPSIA. More specifically, they urged the agency "to issue a comprehensive direct final rule on the requirements under § 101(b) of the Consumer Product Safety Improvement Act (CPSIA), including rules governing test methods, exemptions, and warning statements."⁹

⁵ For example, see Kiki Fluhr, "New Law to Put Thousands Out of Work," *The Patriot Ledger*, December 13, 2008, p. A9. Also: Lyndsey Layton and Anny Shin, "Toymakers assail Costs of New Law: How Consumer Protections Will Be Implemented is Onerous, Manufacturers Say," *The Washington Post*, December 21, 2008, p. A3.

⁶ Information about implementation of the Consumer Product Safety Improvement Act (CPSIA) available at <http://cpsc.gov/about/cpsia/cpsia.html>.

⁷ <http://www.ala.org/ala/aboutala/offices/wo/woissues/governmentinfo/cpsia/AAP%20letter%20requestin.pdf>

⁸ For an overview of the issue and supporting documents, see <http://www.ala.org/ala/aboutala/offices/wo/woissues/governmentinfo/cpsia/cpsia.cfm>.

⁹ <http://www.toyassociation.org/AM/PDFs/Safety/CPSCPetition1208.pdf>.

The petition noted that many industries supported the CPSIA and its purpose of enhancing children's product safety, but that they had done so with the expectation that the new law "would be implemented in an orderly, comprehensive manner" The petition alleges that the Commission had failed to provide manufacturers with the necessary information they need to comply with the CPSIA, and "[w]ithout a well defined regulatory regime predicated on sound test standards, and science-based exclusions that protect children, the threat to small business and their employees is significant. Congress did not reasonably intend such consequences from a chaotic implementation of the CPSIA."¹⁰

On January 8, 2009, the agency issued a *Guidance Intended for Resellers of Children's Products, Thrift and Consignment Stores*.¹¹ This document emphasized that the Commission's enforcement priorities focused on manufacturers, not on retail establishments which were selling or reselling consumer products. It attempted to dispel confusion by clearly stating that the CPSIA does not require resellers to test children's products in inventory for compliance with lead limits before they are sold. Nevertheless, the Guidance also went on to say: "However, resellers cannot sell children's products that exceed the lead limit and therefore should avoid products that are likely to have lead content, unless they have testing or other information to indicate the products being sold have less than the new limit. Those resellers that do sell products in violation of the new limits could face civil and/or criminal penalties."

The Motorcycle Industry Council asked the Commission in a letter dated January 28, 2009, to issue a temporary final rule to exclude a class of materials found in motorcycles so that those products would not be in violation of the CPSIA.¹² The CPSC's General Counsel responded on February 9, 2009, saying the CPSC lacks the authority to act on the MIC's request because the CPSIA did not grant the agency such powers.¹³ As with several other industry requests, the CPSC maintains that relief can only be provided by Congress.

The question of whether motorcycles present a problem because of their lead content is illustrative of the current debate over the issue of responsibility for implementation of the CPSIA. Currently, dealers around the nation say they have taken roughly \$100 million worth of child-sized bikes off showroom floors. Dealers fear stiff fines for selling non-compliant products—various components (including battery terminals and tire stems) exceed the new lead limits. The motorcycle trade association asked the CPSC to exclude their products. In turning down the request, Chairman Nord noted the CPSIA was "quite prescriptive and gives us little administration flexibility." The CPSC chief of staff, Joe Martyak, says the agency can exclude a product only if regulators determine that the use of the product will not result in the absorption of "any" lead in the human body. The agency says only Congress, by amending the CPSIA, could exempt bikes. Some lawmakers say Congress never intended the law to be applied in this fashion, and claim the CPSC has the authority under the new law to exercise such discretion.

Similarly, although Acting CPSC Chairman Nancy Nord said she agrees the effective date of various CPSIA provisions are problematic for many businesses, with respect to the lead limits,

¹⁰ Ibid.

¹¹ U.S. Consumer Product Safety Commission, *Guidance Intended for Resellers of Children's Products, Thrift and Consignment Stores*, Release #09-086, Washington, D.C., January 8, 2009, <http://www.cpsc.gov/cpsc/pub/prere/Prhtml09/09086.html>.

¹² Available at <http://cpsc.gov/library/foia/foia09/petition/pp37.pdf>.

¹³ CPSC response available at http://cpsc.gov/library/foia/foia09/petition/pp37_resp.pdf.

“the Consumer Product Safety Commission does not have the authority to stay the effective date.¹⁴ Any such change must be made by Congress.”

Nevertheless, on January 30, 2009, the CPSC Commissioners did vote to provide temporary, “limited relief” from enforcement of testing and certifications for one year for manufacturers and importers of regulated products, including products intended for children 12 years old and younger. More specifically, the agency’s enforcement stay applies to crafters, children’s garment manufacturers, and toy makers that had been subject to CPSIA testing and certification requirements.

The NAM coalition was critical of the agency action, claiming the enforcement stay only confuses the issue and “may wrongly suggest to some that additional relief is no longer necessary.”¹⁵ The coalition pointed out that the enforcement stay does not exempt manufacturers and others from complying with the CPSIA requirements, and therefore many retailers would be reluctant to sell products out of fear they might be prosecuted.

The agency also issued on February 10, 2009, a revised guidance document which explains to small businesses, resellers, crafters, and charities their responsibilities under the CPSIA.¹⁶ The document is written in a question-and-answer format, and addresses testing and certification of children’s products, exemptions to the lead content limits, and phthalates. It includes a table of commonly resold children’s products and lists whether they are generally safe to sell.

Despite weeks of back and forth between Members of Congress and the CPSC, it is still far from clear whether the problem is with the CPSIA itself or with the manner in which the CPSC is administering it. And, by the same token, it is uncertain whether the agency could resolve many of the issues itself, or if it is wholly a matter for Congress to decide. In responding to the January 16, 2009 committee chair letter, Nord asserted that the CPSIA was “quite prescriptive and give us little administration flexibility.”

The CPSC lost some of its ability to use discretion in its enforcement of the CPSIA, by virtue of the act’s having empowered state attorneys general to enforce the CPSIA. What that means with regard to the agency’s January 30, 2009 decision to stay certain testing and certification requirements is for now the chief example. The CPSC is powerless to command state attorney general to join in the stay. If a state attorney general decided to ignore the stay—and bring an action against a retailer for violating the CPSIA—the CPSC could not prevent such an outcome. In other words, even though the CPSC says it will delay for one year enforcement of certain testing and certification requirements for manufacturers and importers of regulated products, there is nothing to prevent a state attorney general from prosecuting the retailer for not testing—thereby ignoring the Commission’s stay.

¹⁴ Commission response to NAM petition available at <http://www.cpsc.gov/LIBRARY/FOIA/ballot/ballot09/nam.pdf>.

¹⁵ “CPSC Stays Enforcement of CPSIA Testing, Certification Requirements to February 2010,” *BNA Daily Report for Executives*, February 4, 2009, pp. 21 DER A-13.

¹⁶ Document available at <http://cpsc.gov/about/cpsia/smbus/cpsiasbguide.pdf>.

Congressional Involvement and Legislation

Individually and collectively, Members of Congress have been working to resolve the problems and ameliorate the confusion associated with the implementation of the CPSIA. Committee chairs have written to the CPSC and to President Barack Obama on the subject, and several bills have been introduced in the 111th Congress to address the issues.

On January 16, 2009, four Congressmen who chair committees and subcommittees with jurisdiction over the CPSC wrote to Acting Chair Nord and Commissioner Thomas Moore to implore the agency to quickly address CPSIA implementation issues.¹⁷ In addition to relating concerns held by the children's books and apparel industries, Senators John D Rockefeller and Mark L. Pryor and Representatives Henry A. Waxman and Bobby L. Rush asked that the agency speak to questions about

- guidance to re-sellers of children's products such as thrift and consignment stores;
- component part testing;
- and guidance to small businesses generally.

Acting Chairman Nord¹⁸ and Commissioner Moore¹⁹ responded separately (in letters dated January 30 and February 3, respectively), with the latter saying that the two of them held different views and that, unfortunately, the agency did not speak with one voice. While both appear to be in complete agreement that the agency's staff has demonstrated hard work and professionalism in their effort to accomplish the CPSIA's ambitious goals, it also appears that Acting Chairman Nord alone thinks Congress needs to amend the CPSIA in several areas. She says "the timelines in the law are proving to be unrealistic"²⁰ and only Congress can change the lead ban's retroactive application to existing inventories of charities, gift stores, and other small retailers. Further, mirroring what a number of critics have voiced, Nord noted the agency staff "are finding that there are problems and issues that were not discussed, and presumably, not contemplated, by Congress."²¹

In turn, in a letter dated February 4, 2009, the four Congressmen stressed the critical need, in their view, for the CPSC "to (1) establish a clear timeline for its decisionmaking in the coming year, spelling out what the Commission will need to accomplish in order to fully implement the law and (2) address continued confusion in the marketplace."²²

¹⁷ Letter to Acting Chairman Nord available at <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/nord%20moore%202009%201%2016.pdf>.

¹⁸ Acting Chairman Nord's response (hereafter cited as Nord January 30 letter) available at <http://www.cpsc.gov/PR/nord013009.pdf>.

¹⁹ <http://www.cpsc.gov/PR/Moore020309.pdf>

²⁰ See Nord January 30 letter, p. 2.

²¹ Ibid.

²² Members letter to Nord and Moore available at http://www.bamababiesandbirthdays.com/blog/waxman_to_nord_moore_020409.pdf.

The previous day (February 3) the same four Congressmen wrote to President Obama on the subject of the CPSIA, expressing their view that the CPSC needed a new Chairman, to wit:²³

Unfortunately, the implementation process of the CPSIA has been grossly mishandled by Acting Chairman Nancy Nord. Without your intervention, the successful implementation of the CPSIA is not assured, and the policies and rules to protect the public health and safety of millions of children may not be realized. Therefore, we are writing to request that you ask Nancy Nord to step down from her current position as Acting Chairman of the CPSC, and that you immediately appoint a new Chairman who will vigorously and properly implement the CPSIA while addressing the other safety issues before the Commission.

In their letter the Chairmen and Subcommittee Chairman of the Senate and House committees responsible for overseeing the CPSC argued that Nord's lack of leadership at the agency—particularly in ensuring that certain industries and firms received the information they need to comply with the CPSIA's safety requirements—had allowed misinformation to circulate about the new law, “causing undue fear among businesses and consumers alike.”²⁴

The concluding paragraph of the three-page letter to the President spoke to the long-standing clash of views between Nord and the current congressional leadership of the committees with oversight responsibilities for the agency:²⁵

The CPSC has been limited by leadership that has philosophically contradicted strengthening and improving this agency for far too long. Its mission is far too vital to rely on an Acting Chairman whose personal ideology, explicit acts, and deliberate inaction run counter to the very policy goals the CPSIA was intended to advance. For these reason, we respectfully request that you ask Nancy Nord to step down from her position as Acting Chairman and that you immediately present a designee for Chairmanship of the CPSC to the Senate for its approval.

Most recently, Congressman John D. Dingell, chairman emeritus of the House Committee on Energy and Commerce, requested in a March 4, 2009 letter to Acting Chairman Nord and Commissioner Moore that they respond to ten questions having to do with CPSIA implementation.²⁶ First, speaking in general terms, Representative Dingell said:

In particular, I am troubled that the Act (CPSIA) 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 the CPSC's lack of adequate resources, both in terms of funding and staff.

²³ Members letter to the President available at http://i.usatoday.net/money/_pdf/09-02-05-lead.pdf (hereafter cited as Obama letter)

²⁴ Obama letter, p. 1

²⁵ Obama letter, p. 3.

²⁶ Rep. Dingell's letter to Nord and Moore available at http://www.house.gov/apps/list/press/mi15_dingell/090305CPSC.shtml.

Saying that he would appreciate their “candid responses,” the letter’s questions included these (excerpts):

- *Question 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 [are] necessary for proper implementation of the act?
- *Question 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?
- *Question 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?
- *Question 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?
- *Question 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?
- *Question 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?
- *Question 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?

Although the letter imposed a March 13 deadline, an extension was subsequently negotiated among the parties.

In a 21-page letter dated March 20, 2009, Acting Chairman Nord and career agency staff responded to Representative Dingell’s letter, noting that “we are seeing unanticipated issues arise” with each step the CPSC takes to implement the CPSIA.²⁷ Indicating that matters are likely to get worse before they get better, Nord described something akin to a perfect storm. Saying the

²⁷ Acting Chairman Nord’s letter to Rep. Dingell available at <http://cpsc.gov/about/cpsia/dingell032009.pdf>

agency's being required to implement concurrently the CPSIA, the Virginia Graeme Baker Pool and Spa Safety Act, and the Children's Gasoline Burn Prevention Act, in combination with funding delays and limited personnel, has "severely overstretched the agency staff and has begun resulting in delays in implementation."²⁸

More specifically, the agency's response to the above questions included the following points:

- *Question 1:* Despite the CPSC's submission in August 2008 of an amendment requesting \$21.1 million to the then-pending President's Budget Request through the Office of Management and Budget, as well as directly to Congress, to begin implementation of the CPSIA (with another request in November 2008), the agency received no additional funding during the crucial first six months. While the FY2009 omnibus appropriations conference report (H.R. 1105) includes \$105 million for the CPSC (a \$25 million increase over FY2008 funding), "the six-month delay in funding will cause continued deferrals until such time that the agency fully absorbs the new appropriation."²⁹
- *Question 2:* In response to the question about how practicable the deadlines are and what does the CPSC suggest, the letter states that "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."³⁰ The result: "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 impose."³¹ The letter makes two suggestions, "ideally in combination," to ameliorate the problems noted. First, allow the CPSC to use risk assessment methodology to establish priorities, provide for common sense exemptions, and set CPSIA implementation deadlines. And, second, give the agency the discretion to move CPSIA effective dates.
- *Question 3:* While acknowledging that it only possesses anecdotal cost estimates, generally provided by industry, the agency nevertheless places the CPSIA's economic impact for inventory losses, lost sales, disposal costs, and other costs likely to be incurred by small manufacturers "in the billions of dollars range."³² Suggesting the merits of defining the risk for given products by means of foreseeable use data plus mouthing and ingestion data, the staff notes: "This approach would exclude items such as bikes and ballpoint pens from the discussion [so the agency] could focus on items like 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."³³

²⁸ Ibid, p. 1-2.

²⁹ Ibid., p. 2.

³⁰ Ibid, p. 3.

³¹ Ibid., p. 4.

³² Ibid., p. 6.

³³ Ibid., p. 8.

- *Question 4:* The agency staff’s key suggestion for mitigating the CPSIA’s economic impact on small firms is to develop a robust component certification program. This would mean that companies would not need to test a product if the components have already been tested and shown to be compliant. In addition, Congress could choose to apply the new lead and phthalates limits *prospectively* to mitigate the impact on inventory existing prior to enactment.
- *Question 5:* With regard to second-hand products, the three principal problems facing consignment shops and thrift stores are delineated: testing everything they receive is not a practical solution; resellers cannot spread testing costs across many units of the same type; and, the standard tests for lead and phthalate content are destructive. Potential solutions, if they are to rectify the core problem, must address the retroactive nature of the law, according the CPSC staff. And inasmuch as such a fix is—in the opinion of the staff—beyond the agency’s authority to solve, Congress must act.³⁴
- *Question 7:* In response to Representative Dingell’s question about All-Terrain Vehicles (ATVs), the CPSC staff noted the possibility of significant lead exposures from the vehicles as “remote at best,” and it proposed five ways Congress could mitigate the impact of the new standards, including direct exemptions and granting the CPSC greater discretion to create exceptions.³⁵
- *Question 10:* Finally, as to whether the CPSC was given too little discretion in implementing the CPSIA, the staff response could not be more direct: “The CPSIA provides too little implementation discretion for the agency.”³⁶ The letter goes on to state, “The CPSIA forsakes the core strengths of the CPSC’s original statutory framework [The Consumer Product Safety Act, P.L. 92-573] 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.”³⁷

In conclusion, the CPSC’s March 20 letter suggests that three changes would resolve many of the major difficulties identified in the 21-page response:

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.

³⁴ Ibid., p. 12.

³⁵ Ibid., p13-15.

³⁶ Ibid., p. 18.

³⁷ Ibid., p. 20.

The NAM Coalition, citing the exchange of letters between Representative Dingell and the CPSC, urged Congress to hold hearings on the CPSIA and the agency's implementation of the new law.³⁸ A March 24, 2009, statement by NAM's president, John Engler, said "The law's unrealistic compliance deadlines made it impossible for industry or the CPSC to adequately prepare before the law went into effect. Its unprecedented decision to retroactively apply the new lead standards and phthalates ban to inventory already sitting in stores and warehouses is causing massive disruptions to industries across the board, particularly small and medium-sized companies."

In a March 27, 2009, letter to Acting Chairman Nord, Senator Dick Durbin took issue with several comments she made recently disparaging the CPSIA, and said, in part, "As Chairman of the Financial Services and General Government appropriations subcommittee, I increased funding levels for the CPSC from \$62 million for Fiscal Year (FY) 2007 to more than \$105 million for FY2009. It distresses me that these new resources are being sent to an acting chairman who disdains the authority and opportunity the new law and funding provide."³⁹

Acting CPSC Chairman Nord responded to Senator Durbin's letter, stating while "the CPSIA contains a number of needed modernizations to the statutes administered by the Consumer Product Safety Commission," the law "also contains a number of new requirements for the agency that have unrealistically rigid deadlines...."⁴⁰ She also emphasized that the assessments and recommendations included in the agency's March 20 letter to Representative Dingell were those of the "career staff of the agency."⁴¹

A rally was held on Capitol Hill on April 1, 2009, by a number of individuals representing various interests—including apparel makers, educational toy manufacturers, ATV dealers, motorcycle enthusiasts, book publishers, librarians, crafters, and other small business owners, as well as Members of Congress—who called on House and Senate leaders to amend the CPSIA.⁴²

Major CPSIA concerns discussed by rally participants included the following:⁴³

- **CPSIA Lacks Concept of Risk Assessment:** the new law contains inflexible standards which are difficult or impossible to modify. Without consideration of quantifiable risk of injury, far too many safe products are swept up into the safety legislation's overly broad reach.
- **Retroactive Application of New Standards:** applying the new law retroactively caused widespread market chaos and significant business losses in a range of industries, as demonstrated by the range of rally participants.

³⁸ NAM statement re: CPSC response to Rep. Dingell is available at <http://www.shopfloor.org/page/2/?s=CPSIA+Update>.

³⁹ Sen. Durbin's March 27 letter to Nancy Nord available at <http://durbin.senate.gov/showRelease.cfm?releaseId=310660>.

⁴⁰ Acting Chairman Nord's letter available at http://designer-entrepreneurs.com/blog/illustrations/nord_responds_to_durbin.pdf.

⁴¹ *Ibid.*, p. 1.

⁴² Information about the rally is available at: <http://amendthecpsia.com>.

⁴³ http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20090401005397&newsLang=en.

- **Unreasonable Implementation Timeline:** the CPSIA left insufficient time for firms to sell off inventory or transition manufacturing standards. Lack of lead time led to large business losses. Further, CPSIA implementation deadlines did not provide the CPSC with sufficient time to manage the deluge of questions, certifications, rulemakings, etc.
- **Overly Broad Definition of Children's Products:** by defining children's products to include all consumer goods intended or designed for use by children up to 12 years of age, the CPSIA incorporates many categories of products not previously subject to regulation or know to present a quantifiable risk of injury to children.

In addition to the congressional involvement noted above, several bills have been introduced in the 111th Congress which concern problems and issues associated with the implementation of the CPSIA. They are, as follows:

- **S. 374:** To amend the Consumer Product Safety Act to provide regulatory relief to small and family-owned businesses, including exempting second-hand sellers from certain provisions, delaying various effective dates, waiving certain third-party testing requirements, and suspending enforcement pending the issuance of final regulations.
Status: Read twice and referred to the Committee on Commerce, Science, and Transportation.
- **S. 389:** To establish a conditional stay of the ban on lead in children's products, and for other purposes
Status: Read twice and referred to the Committee on Commerce, Science, and Transportation.
- **S. 608:** To amend the Consumer Product Safety Improvement Act to exclude secondary sales, repair services, and certain vehicles from the ban on lead in children's products, and for other purposes.
Status: Referred to the Committee on Commerce, Science, and Transportation.
- **H.R. 968:** To amend the Consumer Product Safety Act to provide regulatory relief to small and family-owned, including provisions similar to **S. 374** (above) as well as waiving certain civil penalties for good-faith violations.
Status: Referred to the House Committee on Energy and Commerce.
- **H.R. 1027:** To exempt second-hand sellers of certain products from the lead content and certification. Also directs the Government Accountability Office to conduct a study on the application of consumer product safety standards, rules, and bans to specified used products and the impact that such application has on second-hand sellers.
Status: Referred to the House Committee on Energy and Commerce.
- **H.R. 1046:** To ensure the effective implementation of children's product safety standards under the Consumer Product Safety Act. The bill also calls for the mandatory exclusion of fabric products from lead limits and for special considerations in the enforcement with respect to small businesses, thrift stores, and charities.
Status: Referred to the House Committee on Energy and Commerce.

- **H.R. 1465:** To amend the Consumer Product Safety Act to provide regulatory relief to small and family-owned businesses.
Status: Referred to the House Committee on Energy and Commerce.
- **H.R. 1510:** To amend the Consumer Product Safety Act to provide an exemption for certain All-Terrain Vehicles, and for other purposes.
Status: Referred to the House Committee on Energy and Commerce.
- **H.R. 1692:** To amend the Consumer Product Safety Act to exempt ordinary books from the lead limit in such Act.
Status: Referred to the House Committee on Energy and Commerce.
- **H.R. 1815:** To clarify the applicability of certain provisions of the Consumer Product Safety Act, including prospective application of lead limits and third-party testing requirements.
Status: Referred to the House Committee on Energy and Commerce.

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