

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

January 16, 2009

Ms. Nancy A. Nord
Acting Chairman
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Mr. Thomas Hill Moore
Commissioner
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Chairwoman Nord and Commissioner Moore:

We write to express our concerns regarding implementation of the Consumer Product Safety Improvement Act (CPSIA). We appreciate the hard work done by your staff in the months since enactment, and we recognize the resource constraints facing the Commission. However, as you are aware, a great deal of confusion and misinformation have arisen around this law, and we believe that it is essential for the Commission to speak clearly and quickly on issues that will affect consumers and businesses across the country. We urge you to act expeditiously to resolve these issues and to make this information widely available to the public in a clear and understandable manner.

As you work to address a number of pending issues regarding implementation, we want to highlight four specific concerns for greater attention and response from the Commission. Each of these must be resolved quickly as they all relate to the lead limits that will go into effect on February 10, 2009. These issues are: (1) Applicability of testing and certification requirements to certain children's books and certain children's apparel; (2) Guidance to resellers of children's products such as thrift and consignment stores; (3) Component part testing; and (4) Guidance to small businesses generally. With respect to each, we believe that greater communication and expedited action by the Commission will improve compliance with the law and lead to more effective and efficient achievement of the law's goals.

**Applicability of Testing and Certification Requirements to
Certain Children's Books and Certain Children's Apparel**

As the CPSIA makes clear, any consumer product that is designed or intended primarily for a child aged 12 or under is a "children's product" and is subject to the new limits on lead content.¹ As of February 10, 2009, it will be unlawful to manufacture, sell, offer for sale,

¹ Consumer Product Safety Improvement Act, Section 101, Public Law 110-314, 122 Stat. 3016 (Aug. 14, 2008).

Ms. Nancy A. Nord
Mr. Thomas Hill Moore
January 16, 2009
Page 2

distribute in commerce, or import into the United States any such product that contains more than 600 parts per million (ppm) of total lead.²

To ensure compliance with the lead limits and other safety standards, the CPSIA requires that manufacturers of children's products test and certify that their products meet all applicable federal product safety rules, including the new lead limits.³ With respect to lead content, this testing and certification requirement will go into effect on February 10, 2009. After an initial period during which manufacturers can self certify, manufacturers will be required to secure third party testing of their products. This requirement will go into effect on a rolling basis, as CPSC establishes requirements for accreditation of third party assessment bodies charged with testing products to specific safety rules.

To date, the Commission has established rules for accreditation of third party conformity assessment bodies for lead testing of paint and painted products as well as children's jewelry.⁴ For all other categories of children's products, the Commission has not yet established such accreditation requirements. Manufacturers of these products may still satisfy the CPSIA by providing a General Conformity Certification based on a reasonable testing program.⁵

In a Notice of Proposed Rulemaking approved by the Commission on January 6, 2009, the Commission proposed a process through which it could determine that some products — those that do not contain lead or contain lead at levels that do not or would not exceed the law's limits — do not exceed the limits and thus are not subject to the requirement for third party testing.⁶ We encourage the Commission to seriously consider making such a determination with regard to two specific categories of products:

² *Id.*

³ *Id.*, Section 102.

⁴ Consumer Product Safety Commission, *Third Party Testing for Certain Children's Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies To Assess Conformity With Part 1303 of Title 16, Code of Federal Regulations*, 73 Fed. Reg. 184 (Sept. 22, 2008); Consumer Product Safety Commission, *Accreditation Requirements for Third Party Conformity Assessment Bodies To Test To the Requirements for Lead Content in Children's Metal Jewelry as Established by the Consumer Product Safety Improvement Act of 2008*, 73 Fed. Reg. 246 (Dec. 22, 2008).

⁵ Consumer Product Safety Improvement Act, Section 102, Public Law 110-314, 122 Stat. 3016 (Aug. 14, 2008).

⁶ Consumer Product Safety Commission, *Children's Products Containing Lead; Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion*, 74 Fed.

1. Children's books that have no unusual components or materials beyond those of an ordinary book; and
2. Children's apparel that consists entirely of dyed or undyed fabric that is unlikely to contain excess amounts of lead and does not include metal, plastic, or painted components that may contain amounts of lead in excess of the law's limits.

The Commission has already taken steps toward allowing this relief for manufacturers from testing and certifying certain products or materials. On January 6, 2009, the Commission voted to publish a Notice of Proposed Rulemaking that proposed that certain materials — those that inherently do not contain lead or contain lead at levels that do not or would not exceed the law's limits, such as precious gemstones, untreated wood, and natural fibers — be determined by the Commission not to exceed the new limits.⁷ Also on January 6, 2009, the Commission voted to publish a Notice of Proposed Rulemaking to propose a standard procedure through which the Commission could determine additional products or materials to be relieved of the testing and certification requirements based on a similar finding that the product or material inherently does not contain lead or contains lead at levels that do not or would not exceed the law's limits.⁸ The effect of such a determination would *not* be to exclude the subject materials or products from the

Reg. 10 (Jan. 15, 2009). The Notice of Proposed Rulemaking was preceded by a memorandum and recommendations from Commission staff to the Commission on December 23, 2008 (online at www.cpsc.gov/library/foia/foia09/brief/leadprocedures.pdf).

⁷ Consumer Product Safety Commission, *Children's Products Containing Lead; Proposed Determinations Regarding Lead Content Limits on Certain Materials or Products; Notice of Proposed Rulemaking*, 74 Fed. Reg. 10 (Jan. 15, 2009). The Notice of Proposed Rulemaking was preceded by a memorandum and recommendations from Commission staff to the Commission on December 23, 2008 (online at www.cpsc.gov/library/foia/foia09/brief/leadlimits.pdf).

⁸ Consumer Product Safety Commission, *Children's Products Containing Lead; Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion*, 74 Fed. Reg. 10 (Jan. 15, 2009). The Commission also voted on January 6 to issue a proposed Interpretative Rule regarding evaluation of products or materials for exclusion from the lead limits under section 101(b) of the law concerning inaccessible component parts and a Notice of Proposed Rulemaking regarding exclusions from the lead limits under section 101(b) of the law certain electronic devices. *Children's Products Containing Lead; Interpretative Rule on Inaccessible Component Parts*, 74 Fed. Reg. 10 (Jan. 15, 2009); *Children's Products Containing Lead; Exemptions for Certain Electronic Devices; Notice of Proposed Rulemaking*, 74 Fed. Reg. 10 (Jan. 15, 2009).

Ms. Nancy A. Nord
Mr. Thomas Hill Moore
January 16, 2009
Page 4

lead limits, which would continue to apply. Instead, such a determination would serve only to relieve the manufacturers of such materials or products from the testing and certification requirements established by the law.⁹

We encourage the Commission to move forward and reach a final conclusion on these proposals as quickly as possible. We further encourage the Commission to expedite consideration of such a determination for children's books and children's apparel that contain no painted, plastic, or metal components. While children's books and children's apparel that bear painted, plastic, or metal components are not likely to qualify for such a determination, products that bear no such components may satisfy the Commission's standards for such a determination. The Commission is the appropriate authority to consider making such determinations and should do so based on careful evaluation of all available scientific evidence.

Due to the effect that the Commission's decisions will have on businesses across the country, we urge the Commission to make this determination prior to the February 10 deadline. Given the imminence of this deadline, we urge the Commission to work closely with the children's book and children's apparel industries and other children's product manufacturers to ensure efficient and effective enforcement of the law.

Guidance to Thrift Stores

On January 8, 2009, the Commission issued a press release affirming that, under the CPSIA, sellers of used children's products — like all retailers — are not required to test or certify that their products meet the law's new lead limits.¹⁰ The Commission emphasized that retailers, including resellers such as thrift and consignment stores, remain legally responsible if they sell products that violate safety standards, including the new lead limits. This is the same legal framework that has applied to all retailers, including resellers, for many years.

We encourage the Commission to continue to discuss compliance issues with resale stakeholders such as thrift and consignment stores. In particular, we urge the Commission to work with such resellers to ensure compliance with the new lead limits while avoiding unnecessary testing of low-risk products. To a large extent, this continued cooperation with stakeholders may overlap with the Commission's consideration of a determination to relieve certain apparel manufacturers of the lead testing and certification requirements, since many thrift

⁹ Consumer Product Safety Commission, *Children's Products Containing Lead; Notice of Proposed Procedures and Requirements for a Commission Determination or Exclusion*, *id.*

¹⁰ Consumer Product Safety Commission, *CPSC Clarifies Requirements of New Children's Product Safety Laws Taking Effect in February; Guidance Intended for Resellers of Children's Products, Thrift and Consignment Stores* (Jan. 8, 2009).

Ms. Nancy A. Nord
Mr. Thomas Hill Moore
January 16, 2009
Page 5

and consignment stores sell large volumes of apparel. It is critical that the Commission work with stakeholders to increase understanding of the law in order to ensure compliance with the lead limits and to provide them with guidance on appropriate measures of due diligence to avoid liability under the statute.

Component Part Testing

As noted, the CPSIA requires manufacturer testing and certification of compliance with all applicable safety standards, including the new lead limits.¹¹ For most children's products, the law currently requires only that the manufacturer certify compliance based on "a reasonable testing program."¹² In the coming months and years, as the Commission establishes third party testing accreditation standards, more precise third party testing requirements will apply. Under these third party testing requirements, manufacturers must "submit sufficient samples of the children's product, or samples that are identical in all material respects to the product," to an accredited third party conformity assessment body.¹³

On December 15, 2008, the Commission issued a request for comments and information on the question of allowing component part testing to satisfy the law's third party testing requirements.¹⁴ Then, on January 9, 2009, in a letter to the Association of American Publishers, the Commission's General Counsel advised that the testing and certification requirements currently applicable to children's products (other than jewelry and painted products) "[do] not necessarily require tests of the final product."¹⁵ The letter also stated that "not all manufacturers would be able to rely on component testing" to satisfy the current General Conformity

¹¹ Consumer Product Safety Improvement Act, Section 102, Public Law 110-314, 122 Stat. 3016 (Aug. 14, 2008).

¹² *Id.*

¹³ *Id.*, Section 102(a)(2).

¹⁴ Consumer Product Safety Commission, *Request for Comments and Information; Mandatory Third-Party Testing for Certain Children's Products; Section 102 of the Consumer Product Safety Improvement Act ("CPSIA")* (Dec. 15, 2009) (online at www.cpsc.gov/ABOUT/Cpsia/ComponentPartsComments.pdf).

¹⁵ Letter from Cheryl Falvey, General Counsel, to Allan Adler, Vice President for Legal and Government Affairs, Association of American Publishers (Jan. 9, 2009). The General Counsel repeated and affirmed this statement in a letter to Mr. Adler on January 15, 2009. Letter from Cheryl Falvey, General Counsel, to Allan Adler, Vice President for Legal and Government Affairs, Association of American Publishers (Jan. 15, 2009).

Ms. Nancy A. Nord
Mr. Thomas Hill Moore
January 16, 2009
Page 6

Certification requirement, but “many could.”¹⁶ Furthermore, with respect to the third party testing requirements that eventually will apply to such products, the General Counsel stated:

The Commission staff has been considering the issue of whether component testing can be sufficient for certification of products based on third-party testing. We anticipate addressing component testing by rule or guidance before the third-party testing requirements go into effect for lead content in August.¹⁷

We encourage the Commission to move more quickly in its consideration of this issue. The Commission’s request for comments and information was an essential first step in considering whether or not component part testing can adequately ensure compliance with the law. In addition, the General Counsel’s January 9 letter provided critical guidance that component testing is considered sufficient to satisfy the current certification requirements for some products, but not all. Now the Commission must provide clearer guidance on this issue, and it must do so with greater speed than it has exhibited thus far. We do not believe that reaching a decision by August 2009 represents a sufficiently timely resolution of this issue. Instead, the Commission should seek to provide guidance to consumers and manufacturers on this question before the February 10, 2009, deadline, especially with respect to the General Conformity Certification requirements that would become applicable to most children’s products.

Small Business Education and Outreach

Finally, we encourage the Commission to strengthen its efforts to contact and educate small businesses about the legal and practical impact of the new law. While we recognize that the Commission has limited resources, we believe that the Commission must make greater efforts in this area. Small businesses involved in making and selling children’s products need greater guidance with respect to the meaning of this law, specifically with respect to the new lead limits. The Commission is the appropriate authority to provide this guidance, and should do so in an extremely expedited manner.

We appreciate the work already done by the Commission to implement the CPSIA and to achieve its goals. We also recognize the agency’s significant resource constraints. We believe, however, that the Commission can and must do more to provide information and guidance to

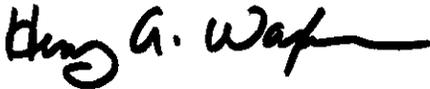
¹⁶ Letter from Cheryl Falvey, General Counsel, to Allan Adler, Vice President for Legal and Government Affairs, Association of American Publishers (Jan. 9, 2009).

¹⁷ *Id.* See also Letter from Cheryl Falvey, General Counsel, to Allan Adler, Vice President for Legal and Government Affairs, Association of American Publishers (Jan. 15, 2009).

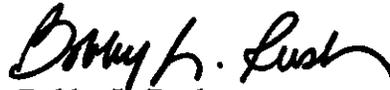
Ms. Nancy A. Nord
Mr. Thomas Hill Moore
January 16, 2009
Page 7

those affected by this important law. It is the fundamental responsibility of the Commission to interpret and carry out the CPSIA. We urge you to demonstrate greater leadership in fulfilling that responsibility, and to do so with great urgency as we approach the February 10 deadline.

Sincerely,



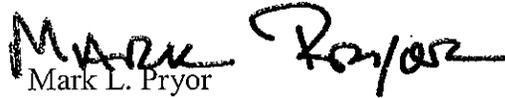
Henry A. Waxman
Chairman
Committee on Energy and
Commerce



Bobby L. Rush
Chairman
Subcommittee on Commerce,
Trade, and Consumer Protection



John D. Rockefeller, IV
Chairman



Mark L. Pryor
United State Senator