



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

Thomas Hill Moore
Commissioner

February 3, 2009

The Honorable John D. Rockefeller, IV
Chairman, Commerce Science and
Transportation Committee
United States Senate
531 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Henry A. Waxman
Chairman, Committee on Energy and Commerce
U.S. House of Representatives
2204 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Mark L. Pryor
Chairman, Subcommittee on Consumer Affairs,
Insurance and Automotive Safety
United States Senate
255 Dirksen Senate Office Building
Washington, D.C. 20150

The Honorable Bobby L. Rush
Chairman, Subcommittee on Commerce, Trade
And Consumer Protection
U.S. House of Representatives
2416 Rayburn House Office Building
Washington, D.C. 20515

Dear Senators Rockefeller and Pryor, and Representatives Waxman and Rush,

This is in response to your letter to me and Acting Chairman Nord, dated January 16, 2009. I understand that Acting Chairman Nord has sent her own response, but I felt it was incumbent upon me to express my views on these matters.

I was extremely pleased in August of last year when the Congress passed by a nearly unanimous vote, and the President signed into law, the Consumer Product Safety Improvement Act of 2008 (CPSIA). Congress passed the legislation after holding numerous hearings, conducting meetings with the various stakeholders (including representatives of consumer groups and the regulated community) and consulting with the staff of the Consumer Product Safety Commission (CPSC). The Act represented a bipartisan compromise to the problems that had surfaced so publicly about the Commission's inability to cope with the influx of products being made abroad and our need for greater flexibility to deal with the complexities of the world marketplace. It gave us much needed new authorities, signaled congressional intent to restore the agency to a funding level commensurate with its responsibilities and responded to the understandable consumer outrage over the numerous recalls of children's products, which made it all too clear that some businesses were ignoring long standing lead paint prohibitions.

Everyone, even business groups, recognized that the agency, which had been underfunded almost to the point of extinction, needed to be rejuvenated and that consumers had to have more assurance of the safety of the products they bought, especially toys and other children's products. When the bill passed the Congress, the Toy Industry Association issued a statement quoting their President, Carter Keithley, who called the new legislation "a historic change for the industry. It adds a remarkable level of additional toy safety assurance." Their release went on to say, "TIA applauds Congress for working hard to develop this legislation, which we have supported through educational outreach to legislators, committee testimony, meetings with third-party agencies and grassroots efforts."

As you know, the Act set many ambitious goals for the agency and its staff. I can't say enough about the professionalism and hard work of our employees. Thus far they have met every challenge, despite still being short-handed, and despite being inundated with requests for relief from the Act's provisions, many of which the Commission simply cannot grant. This might be tolerable for them if the agency was speaking with one voice on the implementation of the Act, but unfortunately that is not the case. The statements issued last Friday by me and Acting Chairman Nancy Nord on the agency's recent stay of enforcement on testing and certification point out the difference in our approaches.

The stay was the Acting Chairman's proposal. While I would have preferred not to issue a stay of enforcement, I felt it was a necessary step that could give small businesses more time to come into compliance with the law's new testing and certification requirements and, at the same time give our agency an opportunity to provide more detailed guidance to business before those requirements went into effect. I saw it as a way to calm the legitimate fears in the small business community and took the opportunity to try to allay those fears. In part, I said:

“This stay of enforcement does not stop the testing and certification requirements from going into effect, nor does it suspend the underlying product safety requirements. Thus, if during the stay period a company does not test and certify, our agency will not take enforcement action against the company on that ground. However, if the company puts a violative product into the market and that product causes injury to a child, rest assured that we will take whatever action is necessary to protect the public. This may seem like a Catch 22 to some people, but it really will not be for most of the smaller manufacturers who are so worried about the law’s application. If they have a history of making products that have caused no harm, as so many assure us in their communications, then they have no reason to fear this interim period. The Commission is not interested in putting small manufacturers out of business; we just want them to make safety one of their guiding principles. If there is one message a small manufacturer should take from the Commission’s action today it is this: If you have been making products without receiving any safety-related complaints, you should go on making and selling your products. You should, however, begin to look for and demand that the components you buy are certified as not containing lead or banned phthalates, as your demands can help to bring the component market into compliance. You also must familiarize yourself with all of your obligations under the various laws this agency administers. It is my hope that during this stay our agency will provide **detailed** guidance, particularly for the home-based manufacturers, on how to comply with requirements of the law.”

It seemed to me essential to focus on the positive, rather than the negative; to allow small businesses a genuine sense of relief about requirements that were causing them concern and to also give them guidance about positioning themselves to be ready to comply when those requirements are enforced starting in February of 2010. Instead, the message coming from the agency seems to be that the stay does not do very much (it doesn’t deal with thrift stores or libraries, for example), that our hands are tied by the requirements of the law, and that Congress needs to take action to change certain provisions in the Act. Different signals are also being sent out about the termination date of the stay. The language of the stay says it will remain in effect until February 10, 2010, “at which time the Commission will vote to terminate the stay.” I indicated in my statement that I do not foresee voting for anything other than termination at that time. I very much doubt the new Chairman will want to prolong the stay either. The message being sent out from other quarters of the agency as to when the stay ends makes it seem uncertain. I made it clear before I voted for the stay that I wanted an end date that was certain for businesses to focus on. I did not want to leave the impression that if business kept pressing for changes in the Act’s implementation, as opposed to starting to comply with it, that the stay would be continued. Absent extraordinary *internal* issues, which I cannot imagine at this time, I will vote to terminate the stay by February 10, 2010, and businesses who are not in compliance by that date will find themselves in violation of the law.

I am sure you are aware that, in addition to the legitimate concerns, there are orchestrated campaigns to undermine the Act. They are sowing the seeds of confusion that are upsetting so many small businesses. They are seizing on the Commission’s lack of positive guidance to cause some Members of Congress who voted for the legislation to forget why they voted for it in the first place—to protect children and families who cannot protect themselves from defective or hazardous products. Some of the very

businesses who are now behind the campaigns to change the Act were the ones whose actions led to its passage.

It is true that there are many things that the Commission cannot do. It cannot change the lead or phthalate limits, for example. However, it can provide much needed interim guidance during the stay of enforcement to various businesses on how to comply with the law to the best of their ability. The agency is working on some of these issues, but the tone and timing of them will be especially important. To the extent we can get them out by February 10th, and I think they are all in a position to be issued by then, we should issue guidance to libraries and sellers of used children's books, to sellers of other used products, and to small businesses in general.

Libraries are extremely concerned about the impact of the lead provision on the children's books on their shelves. I believe that our staff has come up with a supportable "bright line" to guide libraries as to what books we will deem not to pose a problem and which ones should be sequestered until we get more information from the publishing and ink manufacturing industries. The book publishers have asserted that children's books pose no problems, but we know that the ink used in children's books prior to the 1980's **did** contain lead.

We have not gotten the kind of information we need about all the components of children's books to be able to issue them a blanket exemption. The industry has made assertions and done very limited testing, but the Act requires more, as it should, before we can exempt a children's product from the lead content requirements of the law. We cannot act on the "everyone knows children's books don't contain lead" and "historically there has never been a problem with lead in children's books" assertions, particularly when we now know that children's books have indeed contained lead in the past. Our staff has asked the book industry to provide us with additional information. They need to provide all of the information that our staff believes is necessary in order for the Commission to act based on sound science and comprehensive market coverage. Book publishers, book stores and book buyers alike, all need to know with certainty, well before the enforcement of the testing and certification requirements begins in February of next year, whether or not those requirements will apply to children's books. I would think they should be able to provide us with the information we are seeking so that we can resolve this issue, one way or the other, by April of this year.

The requirements of the CPSIA have alerted many small crafters to their responsibility to make sure that they provide safe products to consumers. While we do have a section on our web site dealing with small business issues, it is not the most user-friendly information for a business that has never dealt with our agency before. Our staff is in the process of updating the web site information, trying to address the concerns of the small business community, many of whom profess a lack of understanding of their responsibilities under the prior law, as well as the new one. I am hoping we can use our

staff's updated information to walk a small business through our regulatory process and give them the confidence they need to know that they are making a safe product.

We also need to do more to let the small crafters know that if they take certain steps in good faith and to the best of their ability to ensure that their products meet the law's requirements that we will take that into account if their products are found to be violative. During the stay, it is only if their product causes an injury or has the potential to cause one, that we would focus our attention on their product. Our response will be, as it always is, a measured response that takes into account the particular set of circumstances with regard to that product, its manufacture and its distribution. My personal staff will be working with others at the agency to try to get this guidance out prior to February 10th of this year. However, this will be a continuing project as we will need to add information to our web site and to our accompanying small business publications as the Commission acts on upcoming issues in the CPSIA that impact the small business community.

My personal staff has also initiated a rewrite of the Thrift Store Handbook, which is presently in the agency clearance process. Again, I think there is much positive and helpful information we can give to product resellers to help them to sort through their inventory of products and to screen incoming products. I am hopeful, and pressing, so that this information can also be cleared and ready for dissemination by the 10th of this month. Since resellers are not subject to the testing and certification requirements, they need practical guidance on what to look for and what products pose the most risks. For example, as a seller of used products they need to check their products to make sure they have not been subject to a recall. Most people would be amazed to learn that selling a recalled product had not been a prohibited act prior to the passage of the CPSIA.

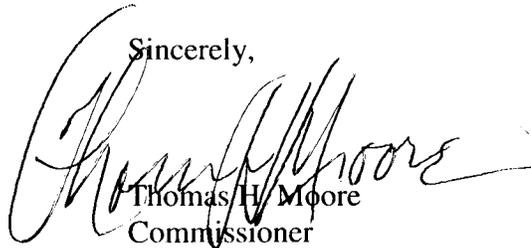
The apparel manufacturers have also been seeking an exemption from the lead limit. The data they have provided thus far with regard to textiles is encouraging, but not definitive. It appears that the items most likely to contain lead in a garment are zippers, snaps, buttons and other items of that nature. Major retailers of children's garments are working to resolve these lead issues with their suppliers, but this may take some time. In the meantime the Commission needs assurance that the textiles presented to the agency as tested and complying represent the vast majority of the textiles on the market. Staff needs the information in a timely fashion in order to make a recommendation to the Commission so that the issue as to whether all textiles can be exempted from the lead testing requirements is resolved well in advance of the termination of the stay. I would like to see the Commission resolve this issue, one way or the other, by April of this year.

The Commission has four pending rulemakings involving lead. After conversations with staff, I would hope these could all be finalized by April and some may be done earlier. It is certainly my intention to move forward with these four rulemakings in a prompt fashion, after staff has had the opportunity to analyze all of the comments

and refine their recommendations. I understand that our staff is working toward sending a proposal to the Commission on component testing with regard to lead in children's products in March or April. They will also be working on more specific testing requirements (sample sizes, testing frequency, etc.) as these need to be finalized by November so businesses and testing labs have time to make any necessary adjustments to their testing procedures prior to the end of the stay. The stay of enforcement should allow us to meet the other deadlines in the Act that come due in the first fifteen months after enactment.

The agency needs to be focusing the business community's efforts on complying with the much needed new requirements of the law and not contributing to an atmosphere of confusion and obfuscation. I view our mission as implementing the law as it was written to protect consumers, while making compliance with it as simple as we can for the business community.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas H. Moore". The signature is written in a cursive style with a large initial "T".

Thomas H. Moore
Commissioner