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

NANCY A. NORD
COMMISSIONER

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

April 29, 2010

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

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

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
2109 Rayburn House Office Building
Washington, DC 20515

The Honorable Ed Whitfield
Ranking Member
Subcommittee on Commerce, Trade and Consumer Protection
U.S. House of Representatives
2411 Rayburn House Office Building
Washington, DC 20515

Dear Sirs:

This letter is to comment on Congressional efforts to enact much needed refinements to the Consumer Product Safety Improvement Act (CPSIA). I request that it be made part of the record of the April 29, 2010 hearing on The Consumer Product Safety Enhancement Act of 2010 before the Subcommittee on Commerce, Trade and Consumer Protection.

The CPSIA provided a much needed modernization of the statutes administered by the Consumer Product Safety Commission (CPSC). However, our experience in implementing the statute has shown that additional flexibility would be helpful to better protect the public while minimizing the significant regulatory burdens that have resulted from the law. Amendments giving the agency additional flexibility are needed in four areas: (1) the lead provision needs to be amended to give the agency more flexibility to address unintended consequences; (2) the scope of the lead provision is too broad; (3) the lead and phthalates provisions should be applied prospectively, rather than retroactively; and (4) the mandatory testing requirements need to be amended to allow the agency to require testing in a more appropriate manner.

Lead Exclusions:
There is no disagreement over the need to limit children's exposure to lead. The agency has been working diligently to achieve this result over many years. However, the language of the CPSIA is drafted so tightly that the exclusions and exemptions process is not workable. The law limits the agency's ability to focus on products that present actual injury or harm to children, forcing us to consider and regulate products that may not meet the statutory lead limits but which do not pose real harm. The CPSC scientific staff has told us that they are not aware of any product that could meet the exceptions requirements in Section 101(a)(1) of the CPSIA and hence have been forced to recommend denial of each of the petitions for exclusion that have been considered. This is in spite of the fact that the staff has told us with each petition that the products in question do not present a risk of harmful exposure to lead. This experience has shown that more flexibility is needed and all five CPSC commissioners agree on this fact. The question is how to fashion an amendment to give the agency more flexibility.

The draft legislation being circulated proposes a "functional purpose" exception process with a three part test that must be met before the agency could approve a product that exceeds the statutory lead limit. That three prong test includes: (1) that the product requires the lead and it is not practicable or technologically feasible to remove it; (2) that the product is unlikely to be mouthed by the child; and (3) that there will be no adverse impact on safety by granting the exception. The only relevant test is the third prong – that is, that there will be no adverse impact on safety. If a product is unsafe, then it should not be sold no matter what function the lead plays. Conversely, if the product does not pose a risk, then the analysis should stop. Why should the federal safety agency be using scarce public resources to regulate safe products?

However, putting aside that basic concern, the exception language in the draft bill has serious problems that should be addressed before final legislation is enacted. The meaning of the term "not practicable" is very unclear. While the dictionary meaning of the term is "not capable of being done," draft committee report language being circulated suggests that cost could be a factor in determining practicability. While the reference to the *State Farm Mutual Insurance Co*. case (463 U.S. 29 (1983)) is somewhat helpful in establishing cost as an element of practicability, the draft committee report language goes on to suggest that, in our cost analysis, we would need to find the viability of an entire class of products to be in jeopardy. Based on our experience in dealing with petitions for products from individual companies, this showing would be very difficult for an individual company to make.

The second prong of the test – that a product is not likely to be mouthed or ingested – is redundant since, if such behavior will add to the risk, that behavior will be considered when we are doing the safety analysis required under the third prong. Just because a product can be mouthed does not make it, by definition, unsafe. Any harm that the second part of the test is designed to address will be addressed by the third.

The exception language of the draft bill is subjective, will favor large companies who can better afford the extensive and expensive process, and will be resource intensive for the agency to administer, with little true safety progress to be gained. A much more science-based and objective approach would be to recognize the

expertise of the agency to define what is an unacceptable risk based on whether the child's interaction with the product results in a measurable increase in blood lead levels. That approach is highly protective of children's health, one of the underlying principles of the CPSIA.

Scope of the Law:
Experience has found that the scope of the law is too broad. There are certain products – children's metal jewelry, for example – that warrant aggressive regulation with respect to lead. There may be others – books, sporting equipment and apparel, for example – where there is less concern. The agency has extensive experience dealing with the ways that children of different ages interact with different types of consumer products. However, the CPSIA does not allow the flexibility for the agency to utilize this expertise. It treats all children – infants to pre-teens – the same and, as a result, our regulatory decisions cannot be tailored to apply the most effective solution for the greatest risk and exposure. Lowering the age requirements of the statute and making clear the agency's ability to regulate upward as safety circumstances warrant, would go a long way to solving many of the problems in the law and keeping the agency's resources focused on providing protection for consumers.

Retroactivity:
Contrary to the direction in the Consumer Product Safety Act that regulations be applied prospectively, the lead and phthalates provisions of the CPSIA have been applied retroactively, sweeping up products that were legal and considered safe when manufactured, and deeming them to be unsafe and unsaleable. This has cost the country's economy billions of dollars, stranding safe inventory that cannot be sold, with questionable safety payback to consumers. The impact of this aspect of the law is being felt especially by retailers, particularly small retailers (without the market power of a national "big box" store brand that can force suppliers to take back product and transfer the loss), and by resellers, including charities. Even libraries have been swept up in the broad reach of the retroactive aspect of the law. Clearly the economic harm done by the retroactive nature of the law is one of the unintended consequences that need to be corrected. While the draft bill includes provisions to address the harm being done to resellers, a better way would be to make clear that the law applies prospectively, understanding that the agency has the ability to take products off the market that present real risks of injury. All commissioners agree that retroactivity should not apply when the lead provisions of the statute transition from 300 ppm to 100 ppm next year. It is unfortunate that this correction could not have been made sooner to forestall the economic losses that have already been suffered.

The phthalates provisions of the law should also apply prospectively since these provisions are contributing, in a major way, to the concern and confusions that surrounds this law. The testing process to determine the presence of phthalates is much more difficult than is that for lead. Unlike lead, there is no screening test to more easily determine the presence of phthalates. It is unreasonable to require that retailers and resellers either face potential liability or go back through their inventory to try to determine the presence of phthalates without the tools to make this a practical option. On a related matter, the provision in the draft bill clarifying that the phthalates ban in the CPSIA does not apply to inaccessible parts of a product is a helpful clarification.

Testing and Certification:
The agency and the Congress have heard from many small manufacturers and crafters who are being severely and adversely impacted by the CPSIA. The testing and certification requirements of the law are at the heart of these complaints. The law requires that all children's products be tested by an independent third party testing laboratory approved by the CPSC and certified as meeting all applicable standards. The law also requires that the product, once tested and certified, undergo periodic testing as defined by regulation. We are now in the process of rulemaking to implement this ongoing testing requirement. The agency's initial analysis of the proposed rule is that the third party testing requirement will add terrifically to the cost of making a children's product. The analysis states that the cost of testing, in some instances, will exceed the expected profits of the

product. As a result, the analysis indicates that it will not be unexpected that some small manufacturers will leave the market altogether. It is unlikely that it was Congressional intent that testing costs be so significant as to drive small businesses out of the children's products markets, further concentrating the market in the hands of large global companies.

The agency has worked hard, within the confines of the law, to deal with the issues small businesses face as they struggle to implement the CPSIA's many requirements, but our options are limited. First, in the rule dealing with ongoing testing, we are providing for special treatment for low volume manufacturers, defined as annual production under 10,000 items. The draft statutory language is inconsistent with this proposal; any final legislation should be written so that the agency has the flexibility to define the applicability of the testing requirements in a way that is driven by the facts elicited in the rulemaking process.

Second, the agency is working to develop the concept of component testing as a way to reduce the burden of testing and certification. Under this proposal, if components are tested and certified as meeting safety standards, redundant testing of the final product would not be needed. If a market can be developed for tested components, then this has the potential to help drive down testing costs of the final product manufacturer.

While independent third party testing is the most robust way to provide assurance of compliance, it is also the most costly and least efficient. In spite of the efforts we are making at the agency to address costs, the requirement that all children's products be third party tested has raised the costs and added to the complexity for many small producers of children's products. Given this, Congress should consider whether child safety can be served by other testing alternatives that will assure adequate compliance without the cost and complexity of third party testing. While the draft bill hints at this result for the very smallest companies, the provision should be expanded to allow the agency to establish alternative testing requirements for certification under section 102 of the CPSIA, as long as those requirements provide for a reasonable testing program and afford reasonable assurance of compliance with underlying safety standards.

Conclusion:
Although modest, these suggestions would go a long way to achieving the objectives of the CPSIA while minimizing the excessive regulatory burdens the law now imposes. These recommendations are given in the spirit of finding a path forward that assures parents that the products they buy are safe, that their choices have not been limited and that unnecessary costs are not imposed by regulation that does not advance true safety. I stand ready to provide whatever assistance the Committee may require.

Sincerely,

Nancy A. Nord
Commissioner