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

**Re: Draft language amending the Consumer Product Safety Improvement Act of 2008**

Dear Chairman Waxman:

I appreciate your request for reaction from commissioners at the U.S. Consumer Product Safety Commission to the draft language your staff has floated for amending the Consumer Product Safety Improvement Act of 2008. From my experience as a Member of Congress, I know that Congress frequently must revisit legislation to refine the scope or adjust the application of a law to avoid consequences that were neither intended nor foreseen by the original drafters. Although this initial effort contains some positive steps—and I applaud your willingness to try to fix a broken scheme—I believe the draft falls woefully short of resolving the problems with the statute I have witnessed since joining the Commission last August.

For example, the proposed functional purpose exemption does not provide the kind of broad exclusion flexibility that the CPSC unanimously sought from Congress in our January report. Specifically, one criterion for the exception you are suggesting is that it "will have no measurable adverse effect on public health or safety." But if a product, component part, or material will have no measurable adverse effect on health or safety, then what reason does a government *safety* agency even have to regulate it? Why must a company also then show that the item "requires the inclusion of lead"? Why show that it is "not practicable or not technologically feasible to manufacture" with lower amounts of lead when the current level already has no measurable adverse effect on safety? Why demonstrate that "making the lead inaccessible" is not practicable or technologically feasible? Why prove that the item "is not likely to be placed in the mouth or ingested"? Isn't the mere fact that the item will have "no measurable adverse effect on public health or safety" sufficient to allow its use?

The effect of requiring all the other costly and complicated additional factors is to continue to prohibit many products that pose no risk to children, which is the very problem with the CPSIA that the

exemption purports to solve. Piling on such criteria just makes it more difficult to apply for exclusions—so much so that it raises the question whether deterring petitions for perfectly safe products is precisely the point. Regulating lead below levels that pose a health or safety concern, for whatever ulterior motive, is not appropriate for a safety agency and doing so takes significant attention and resources away from genuine safety issues. Moreover, it makes absolutely no sense to require safety warning labels on *exempted* products when a criterion for granting an exemption in the first place is that the product is safe.

Ironically, the items specifically excluded from the thrift stores relief section—children's metal jewelry, painted children's toys, and items composed primarily of accessible vinyl—illustrate that we understand this is where the real risk lies. Children's metal jewelry and painted children's toys are precisely the areas where the CPSC has previously found genuine lead exposure risk to exist, which is why your draft language within the otherwise broad thrift store relief provision does not include those items (and maintains the ban on selling recalled items). These limits make sense, but they also show that the law has it entirely backwards. Rather than (1) ban the sale of lead-containing items, and then (2) exclude thrift stores from this general ban, and then (3) exclude certain specific items from the general thrift store exclusion, it would be *much* simpler to only have the CPSIA apply in the first place to children's metal jewelry, painted children's toys, and other items whose lead content the CPSC finds to be hazardous.

In addition, the language does nothing to fix the CPSIA's misguided statutory limits for total lead content. Government health agencies like the CDC, EPA, and NIH do not advise parents of children at risk for elevated blood lead levels not to buy clothes with metal zippers or furniture with brass handles. These cutting-edge public health agencies do not instruct parents to prevent their children from riding bicycles, playing brass instruments, or playing with metal toys. Why not? Because these agencies know lead in the substrate of such items poses no real risk to a child. No government agency responsible for reducing lead levels in children has found that embedded lead in the substrate will raise blood lead levels from normal hand-to-mouth transfer. The CPSC can regulate lead in paint and hazardous swallowable items without imposing draconian total lead content limits on all children's products.

The functional purpose and low-volume manufacturing exemptions contained in the draft bill are too narrow, expensive, and uncertain to provide much relief. Just as regulating non-existent risks wastes millions, so too it wastes millions to force companies that want exceptions to jump through cumbersome and complicated narrow hoops to get them. For example, the functional purpose exception is not broad enough to allow the agency to categorically exempt older children's books in libraries and used children's books in used bookstores from the CPSIA lead ban. Making the 100ppm lead content limit prospective at least avoids the needless market disruption caused by the retroactive 300ppm limit, but the bill should repeal the 100ppm limit for lead in substrates altogether. After all, removing lead from some substrates will make them work less well (*e.g.*, furniture hardware will not be as strong, zippers will not slide as easily, axles in rugged toy trucks will bend more readily), and there is no reason to make those trade-offs where safety is not at issue.

While forcing companies to invest millions to comply with such lead content limits achieves nothing in terms of increased safety, it wastes dollars that could be put toward innovation, cost reduction, and workability. Another effect of a needlessly expensive exemption process is to ensure that only large or well-heeled manufacturers can take advantage of it, because they are the ones who can spread out the cost over many products. Nor do most companies have the in-house expertise (metallurgic, etc.) to make the kind of showings that would be required to meet the burden of proof for an exception. So just as the exorbitant

testing costs of the CPSIA favor large companies (who manufacture overseas) over small ones, so too will the exemption process favor the large companies with greater mass production.

The proposed exemption process also creates uncertainty, something which already abounds in the CPSIA. The agency is not required to undertake any action on its own. The petitioning process will consume considerable time, making the lead time for introducing some new products infeasible. Permitting the agency to require warnings and expiration dates for any exceptions granted further deters seeking exemptions, because an applicant cannot be certain at the outset what the value of an exemption will be even if one is granted. In the event that larger companies inundate the agency with exemption requests, the bill does not provide sufficient staff or budget for the agency to process those petitions in a timely manner—and the agency is not likely to prioritize those overwhelming requests when real dangers require its attention.

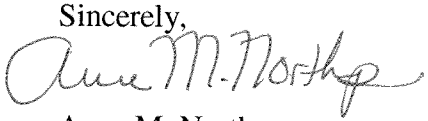
Not only does regulating lead content so minutely waste taxpayer dollars that could be put toward policing genuine risks, but worse yet it is also a colossal waste of finite compliance resources to have the agency play gatekeeper over which harmless products can or cannot demonstrate a functional need for the lead embedded in them. Forcing a component-by-component review of exceptions does nothing to enhance safety, and it converts the Commission from a safety oversight agency (like the FAA) into a product approval agency (like the FDA). That will slow the pace of innovation and dramatically increase the cost and lead time for bringing new products to market.

By defining a low-volume manufacturer as one who makes no more than 2,000 units per year of anything *and* has gross receipts of no more than $200,000, testing relief is being offered to an exceedingly small slice of the manufacturing community. Since the CPSC would pursue any company, regardless of its size, that made an unsafe product, there is no need to be so stingy (or prescriptive) with the testing relief. The agency should have the flexibility to try different approaches and see what produces the best combination of workability and compliance.

While I support the creation of something akin to the draft bill's Office for Business Education, Outreach, and Advocacy, Congress does not need to mandate this. The Commission already has begun planning for such an entity. Furthermore, writing it into law could freeze in place a position that may become unnecessary over time or less valuable than other demands, thereby preventing the agency from allocating its education, outreach, and advocacy resources most efficiently.

I appreciate your time and attention to these important issues. Please contact me or my staff if you have questions or if we can be of further assistance. We are eager to continue working with you and your staff to fix the CPSIA.

Sincerely,



Anne M. Northup
Commissioner

Cc: All Senators and Members of Congress