

**\*Consumers Union\*Consumer Federation of America\* \*Kids in Danger\*U.S. Public Interest Research Group\* \*National Research Center for Women and Families\* \*Public Citizen\***

**Changing Positions: From Ardent Approval to a Demand for Widespread Changes**

August 2008

In August 2008, the Consumer Product Safety Improvement Act was passed with overwhelming bipartisan support in Congress, signed by President Bush and enthusiastically backed by consumers, public interest organizations and industry representatives. In a publicly released statement, the Toy Industry Association (TIA) applauded the president's signing of the bill. Its president Carter Keithley said at the time: "With the health and safety of children our primary concern, the toy industry supports the creation of a uniform national standard for product safety and testing, upon which consumers across the nation can rely."

As TIA's Keithley affirmed, the new law has achieved something important. It added safety and testing requirements for consumer products, and children's products in particular, including the gradual elimination of lead and a ban of phthalates in toys and children's articles.

*Industry Already Moving to Conform.* The law granted a six-month period for industry to ready their goods in compliance with the new ban on toxic chemicals in children's products. Compliance with the new lead standards and phthalates ban would begin on February 10, 2009. On the day President Bush signed the law, the Toy Industry Association said in a statement "Toy manufacturers and major retailers are already moving to conform to the legislation..."

But since the CPSIA became law, industry has strongly resisted these new safety requirements:

September 2008

*Industry Seeks to Sell Unsafe Products in Inventory Before February 10.* The Consumer Product Safety Commission held its first public meeting to discuss implementation of the new reforms. At this meeting, industry representatives expressed concern that they would be unable to sell non-compliant products that remained in inventory before February 10, 2009 – the effective date of the ban on selling toxic lead and phthalates. At least one member of Congress rebuked the CPSC staff for indicating to industry representatives that they could flood the market with unsafe products during the six-month transition period.<sup>1</sup>

November 2008

*Industry Attempts to Sell Unsafe and Illegal Products Before and After February 10.* Industry next sought to delay and weaken the ban on phthalates by asking the CPSC to allow them to sell products containing banned phthalates after February 10, if they were manufactured before the deadline. Despite the clear

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<sup>1</sup> September 11, 2008 Letter from Rep. Jan Schakowsky (IL-9)

language of the law, the CPSC general counsel granted industry's request.<sup>2</sup> A court settled the issue by referring to the plain language of the law which said that phthalates were not permitted to be sold to consumers in certain children's products after February 10.

### December 2008

*NAM Blames the CPSC's "Chaotic Implementation" and Absence of Guidance.* In December 2008, the National Association of Manufacturers filed a petition on behalf of an industry coalition requesting that CPSC implement rules to comply with the new lead requirements in the CPSIA. NAM said that "(a)ction by the Commission is urgently needed" and specifically complained of absence of guidance by the agency. NAM asked for a "defined regulatory regime predicated on sound test standards and science-based exclusions that protect children..." NAM noted that the absence of a regulatory scheme would threaten small business and their employees, and that "Congress did not reasonably intend such consequences from a chaotic implementation of the CPSIA."

### December 2008 and January 2009

*With Lack of CPSC Guidance, Small Manufacturers Begin to Worry.* In December 2008, with the February 10 deadline nearing and little word from the CPSC on how to proceed, small businesses grew concerned over the compliance process, such as testing and certification costs. Web sites, blogs and columns sprouted up; and in growing numbers, they sent word to public officials at the agency and in Congress urgently asking for assistance. Members of Congress also sent many messages to the Commission asking it to immediately provide regulatory guidance to these stakeholders.

In response, the CPSC issued a document in January 2009 that delayed enforcement by the Commission of the testing and certification requirements for lead until February 10, 2010. According to the agency, the one-year delay in the effective date of the new testing and certification requirements for the lead and phthalate regulations gives the staff more time to finalize proposed rules which could relieve certain materials and products from lead testing and to issue additional guidance on when testing is required and how it is to be conducted.

*CPSC Authority to Exclude Certain Materials from CPSIA Requirements.* Handmade toy and apparel makers also questioned whether they should have to test materials that clearly contain no lead. Congress anticipated this possibility, and had included language in the CPSIA that **already** empowered the agency to provide exclusions for certain materials.

The CPSC has the power **right now** to exempt certain materials from testing and certification requirements, to relieve those manufacturers who are in no danger of violating the new standards. In January, less than a month prior to the standards' effective date, the agency began to set forth exclusions from the lead testing requirements for children's products made of natural materials. The agency also indicated that it is considering other reasonable regulations, such as component testing and certification. Such guidance from CPSC is currently pending.

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<sup>2</sup> November 17, 2008 letter addressed to Ms. Georgia C. Ravitz, and Mr. Scott A. Cohn of Arent Fox LLP, in which CPSC General Counsel Cheryl Falvey indicated her belief that the phthalates ban did not apply to existing inventory or products on shelves on February 10, 2009, but would only apply to products *manufactured* after February 10, 2009.

*Further CPSC Clarification Needed.* Other stakeholders in the American market sought guidance to ensure compliance with the new law. Second-hand retailers, such as thrift stores, feared that they could not sell children's products because of uncertainty as to whether or not their products would comply.

The CPSC, after urging by Congress, consumer groups, and others, finally clarified that second-hand retailers are not required to test and certify products. It also provided guidance on how to prioritize and handle items in their inventory so as to comply as best as possible with the necessary standards. Specifically, the CPSC stated in a January 2009 press release that “[w]hile CPSC expects every company to comply fully with the new laws resellers should pay special attention to certain product categories. Among these are recalled children's products, particularly cribs and play yards; children's products that may contain lead, such as children's jewelry and painted wooden or metal toys; flimsily made toys that are easily breakable into small parts; toys that lack the required age warnings; and dolls and stuffed toys that have buttons, eyes, noses or other small parts that are not securely fastened and could present a choking hazard for young children.”<sup>3</sup> This type of appropriate guidance was something that consumer groups had been seeking from the agency for some time.

*CPSC Clarification Finally Has Begun, Now Industry Doesn't Want to Comply.* After receiving tremendous criticism from Congress, as well as consumer, science, and industry groups for its sluggish efforts, the CPSC began issuing rulemaking proposals, guidance documents, responses to exemptions and other documents to assist and inform the public. At this time, industry groups began to argue that the standards they first lauded and said would keep children safe had now become a burden to their businesses.

#### February 2009

For example, industry has asserted that children's books and youth ATVs will be off the shelves and market, respectively because of the CPSIA's lead requirements. The CPSC issued a lead enforcement policy where it said it would not “impose penalties against anyone for making, importing, distributing, or selling”: “a children's product to the extent that it is made of certain natural materials, such as wood, cotton, wool, or certain metals and alloys” which it has recognized rarely, if ever, contain lead; an ordinary children's book printed after 1985; or dyed or undyed textiles (not including leather, vinyl or PVC) and non-metallic thread and trim used in children's apparel and other fabric products, such as baby blankets. As demonstrated by the action taken by the agency -- just four days before the new lead requirements were to become effective -- the CPSC already is authorized by the CPSIA to issue reasonable guidances, exemptions, and regulations to accommodate these concerns.

#### March 2009

In more recent communications from NAM, which previously sought “safety-based exemptions” from the CPSC, the new law is now characterized as containing “unrealistic” deadlines. The TIA, which previously promised that manufacturers had begun to comply with the CPSIA standards last year, now says that “CPSIA's lack of clarity, along with the unexpected retroactive application to inventory, has caused

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<sup>3</sup> “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*, January 8, 2009. See <http://www.cpsc.gov/cpscpub/prerel/prhtml09/09086.html>.

widespread confusion and expense across the toy industry.” This statement is surprising, considering TIA’s and NAM’s awareness of the pending law, and their in-depth involvement as stakeholders, long before the law was finalized and passed. Further, industry had six months after passage of the CPSIA to comply with the law’s relevant provisions.

#### August 2008 to present

*A Stunning Failure of Leadership.* The Consumer Product Safety Improvement Act is a strong, much-needed safety law – and was recognized as such after millions of toys and children’s products were recalled due to dangerous levels of lead and other hazards. Congress imposed strict standards, testing requirements and other protections to ensure that consumers, especially children, would be safe from further harm. The CPSC was tasked with implementing the new law. Its Acting Chair, Nancy Nord is in charge of the law’s implementation. Nord is on record as stating that despite the massive recalls and certain proof that the CPSC struggled to keep up with the necessary actions and failed to protect children who were injured or died from dangerous products, her agency did not need additional resources from Congress.

Her leadership has drawn criticism from numerous public and private entities and individuals due to the agency’s delayed efforts in issuing reasonable regulations and guidance under the law. In a March 27, 2009 letter to Nord, Senator Dick Durbin criticized the acting chair for recent comments where she disparaged the new law. Durbin noted that “[n]oticeably absent from the majority of [her] public remarks is an emphasis on protecting consumer safety, which happens to be the mission of the agency [she] leads.” Instead, he said, her recent comments “grossly mischaracterize the law and the serious problems it addresses.” The CPSC urgently needs new, more effective leadership to guide industry in its compliance efforts while protecting consumers.