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

February 6, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

We are writing today to respectfully request your support for quick legislative action to correct several deficiencies related to effective dates and agency discretion in the Consumer Product Safety Improvement Act ("CPSIA"). Without swift action, the full impact of this law will cause significant economic injury to retailers and suppliers of children's products in the days ahead.

We are also deeply concerned and disappointed with the February 3, 2009, letter to you from Senators Rockefeller and Pryor and Representatives Waxman and Rush. We disagree entirely with their inaccurate allegations against Chairman Nancy Nord and her agency, the Consumer Product Safety Commission ("CPSC"). CPSC is bound by the words Congress writes; it does not have the legal authority to subvert the confines of the law, but rather has the legal obligation to enforce it as Congress intended. Indeed, past criticisms of CPSC's exercise of discretion in interpreting its authorizing statutes is one of the reasons cited by the Majority for not including much discretion for the Commission in CPSIA. Accordingly, we believe that instead of urging you to replace civil servants, the focus here should be on correcting the shortcomings in CPSIA that have manifested themselves in the last few months.

CPSIA deals explicitly with agency discretion with respect to lead levels. We would note that, in an early draft of the language considered by the House subcommittee of jurisdiction, the proposed exclusionary language provided:

> "COMMISSION AUTHORITY TO EXCLUDE CERTAIN MATERIALS.—The Commission may, by rule, exclude certain materials from the prohibition in paragraph (1) if the Commission determines that the lead content in such materials is of a nature that ingestion of such materials will not result in the leaching of lead from such materials into the human body."

This language would have given reasonable discretion to CPSC to make determinations to exclude things like bicycle tire valves and children's books, which simply are not high risk products when it comes to lead absorption. Unfortunately, and against the wishes of the House Republican conferees on H.R. 4040, the language that ultimately passed was much more stringent and cumbersome:

> (b) Exclusion of Certain Materials or Products and Inaccessible Component Parts-
> (1) CERTAIN PRODUCTS OR MATERIALS- The Commission may, by regulation, exclude a specific product or material from the prohibition in subsection (a) if the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither--
> (A) result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product; nor
> (B) have any other adverse impact on public health or safety.

So, while the law clearly gives CPSC the ability to exclude materials and products; unfortunately it also explicitly states how it must be done: notice; a hearing; and a determination of no risk of lead absorption whatsoever as well as no other adverse health impact. We would also point out the House-passed bill would have allowed the Commission to delay the implementation of the lead standard by an additional 180 days; this extra six months of implementation time was removed in conference, again against the wishes of the House Republican conferees. Thus, the process for exclusion does not allow CPSC to act quickly.

Despite this, in a January 16, 2009, letter to Chairman Nord, Chairmen Rockefeller, Waxman, Pryor, and Rush noted CPSC's use of its exemption authority regarding products that "do not contain lead or contain lead at levels that do not or would not exceed the law's limits" and encouraged the Commission to make additional exemptions.[1] Specifically, the Chairmen requested an exemption for library books and children's apparel made entirely of fabric. We agree these products should be exempted, but unfortunately the law as written does not allow CPSC to exempt products or materials without notice, hearing, and a determination of no risk of lead absorption or any other adverse impact—all of which takes time that the Commission does not have.

This standard was intentionally drafted to set the bar so high it would be nearly impossible for any product containing total lead in excess of the statutory limit to pass muster, and the CPSC would have to be absolutely certain the product or material would not leach any amount of lead. Given this high bar, CPSC General Counsel Cheryl Falvey issued the following guidance to book publishers:

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[1] Letter from Hon. Henry Waxman, Hon. Bobby Rush, Hon. John Rockefeller, and Hon. Mark Pryor, to Hon. Nancy Nord and Commission Moore, Consumer Product Safety Commission (Jan. 16, 2009).

> In order to provide blanket exemptions for paper, paperboard, linerboard, printing inks, laminates, adhesives and binding materials used in books, the Commission needs total lead test data to support the determination that those materials do not contain lead at levels that exceed the CPSIA lead content limits. While the Commission staff has been diligently searching for such data from publicly available sources, it does not at this time have sufficient data on the total lead content of those materials to issue an exemption. Moreover, the staff has raised concerns about issuing exemptions on a commodity or class of materials basis without some data that the test results are representative of such materials as a class based on technical specification or other defined, objective criteria.[2]

We also disagree with the intimation in the February 3, 2009 letter that the CPSC failed to provide sufficient guidance to second-hand retailers. CPSC issued guidance on January 8, 2009, shortly after the second-hand retail concern arose: "any children's product...that contains more lead than [600 parts per million]...shall be treated as a banned hazardous substance under the Federal Hazardous Substances Act."[3] Simply put, it is illegal for *any* retailer – second-hand or otherwise – to sell *any* children's item that exceeds the statutory lead limit.

The Commission offered as much guidance as it possibly could: retailers are not required to test for compliance but they may not sell non-compliant products. Given that the only sure way to discover whether a product is noncompliant is to test it, the CPSC advised retailers to check the recall list as an alternative to testing. The CPSC also offered additional clues for which it looks when identifying potentially noncompliant products.[4] Contrary to the allegations in the February 3, 2009 letter, this is exactly the type of "guidance about what steps they can take to act in good faith and comply with the law."[5]

Finally, our colleagues suggest Chairman Nord and the CPSC have acted in bad faith in executing implementation duties and have actively engaged in a campaign of misinformation. Not only has the CPSC issued guidance on how the law applies to various industries, the CPSC has acted with astounding speed, initiating 14 of the 40 rulemakings required by the CPSIA by publishing notices in the Federal Register in less than six months. This is hardly indicative of a Commission leadership that "appears to be prolonging the development and issuance of guidance[.]"

This feat is even more of an accomplishment given the lack of resources at the Commission. While CPSIA authorized additional staffing, our colleagues on Appropriations never wrote the check and have left the CPSC to effectuate sweeping

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[2] Letter from Cheryl Falvey, General Counsel, Consumer Product Safety Commission, to Allan Adler, Vice President for Legal & Government Affairs, Association of American Publishers (Dec. 23, 2008).
[3] Consumer Product Safety Improvement Act of 2008 § 101(a), Pub. L. No.110-314, 122 Stat. 3016 (2008).
[4] 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).
[5] Letter from Hon. Henry Waxman, Hon. Bobby Rush, Hon. John Rockefeller, and Hon. Mark Pryor, to President Barack Obama (Feb. 3, 2009).

changes without additional personnel. In fact, Chairman Nord has led this small agency to initiate more product recalls over the previous two years than under any previous Chairman. While our colleagues may wish the CPSC to move faster, as a Federal agency, its ability to move quickly is dictated by not only the CPSIA statute, but also by requirements and timelines codified in the Administrative Procedures Act, not to mention the personnel and resource limitations of its operating budget.

Further, it is not the case that retailers have merely "threaten[ed] to close their doors" due to misinformation that has circulated about CPSIA. The law demands this action. Beginning Tuesday, it will be illegal to distribute in commerce any product for a child under 12 if it contains lead in excess of 600 parts per million lead, regardless of when it was manufactured. On Tuesday, books may not be lent unless the materials are lead-free, scientific equipment may not be sold for our children's schools because there are no lead alternatives for certain components, hand-knitted sweaters and hand-made bows may not be sold on eBay because they are not exempt from expensive lead testing requirements despite containing no metal components, and you will be unable to buy even a bike for your daughters because of the composition of the valves in the tires. Perhaps CPSC can eventually exempt these products, but that will take time—which we simply did not give them when Congress passed CPSIA.

Mr. President, as you continue to work with Congress on passing a stimulus package as a way to save and create jobs, we urge you to keep in mind that when CPSIA becomes effective next Tuesday, it has the very real potential to cause job losses and wreak economic havoc on thousands of small businesses if they cannot sell their products. We can prevent all this—without having to spend a single dollar—with some simple and quick legislative fixes to CPSIA, such as: additional implementation time for the CPSC to work through exemptions; modest changes to the exemption authority itself to allow CPSC discretion to exempt products where absorption risk is negligible; or other minimal changes to reduce the cumbersome nature of the current exemption process.

As we wrote to Chairman Waxman on January 21, 2009 we remain strong proponents of improving the safety of our children's products, but as legislators we believe it is our responsibility to correct the deficiencies in CPSIA that we now know exist.

We stand ready to work with you and our Majority in a constructive fashion to quickly correct the flaws with CPSIA. Congress should not change its mind about toy safety, but it can and should change the law to make toys safe without causing unnecessary job losses, and without gratuitously blaming an understaffed, overworked agency that is obligated to follow the law that we write.

Sincerely,

Joe Barton
Ranking Member
Committee on Energy and Commerce

George Radanovich
Ranking Member
Subcommittee on Commerce, Trade,
and Consumer Protection

Cliff Stearns
Ranking Member
Subcommittee on Communications,
Technology, and the Internet

Ed Whitfield
Member
Committee on Energy and Commerce