

House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
April 29, 2010

Re: The Consumer Product Safety Enhancement Act

Statement of
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STATEMENT OF RICHARD M. WOLDENBERG
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As an operator of a small business making educational products and educational toys, I have had a front row seat for the evolution and implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA). On the occasion of your consideration of the Consumer Product Safety Enhancement Act of 2010 (CPSEA), I want to highlight the economic damage and other unintended consequences wrought by the CPSIA on the corporate community without achieving any material improvement in safety statistics, and outline how market order can be restored without adversely affecting consumer safety.

Children are our business. As educators, as parents and as members of our community, we have always placed the highest priority on safety. We would not be in the business of helping children learn if we didn't care deeply about children and their safety. Our 25-year safety track record is sterling as a result of continuous effort to manage safety risks in our business. Nevertheless, the CPSIA has dramatically impacted our business model, reduced our ability to make a profit and create jobs, pared our incentive to invest in new products and new markets, and generally made it difficult to grow our business. We would accept the burdens placed upon our business if this law made our products safer, but the fact is that it hasn't. Our company, Learning Resources, Inc., has recalled a grand total of 130 pieces since our founding in June 1984 (all recovered from the market). Our management of safety risks was highly effective long before the government intervened in our safety processes.

The precautionary approach of the CPSIA attempted to fill perceived "gaps" in regulation by making it illegal to sell children's products unless proven safe prior to sale. Yet the law has yielded few quantifiable safety benefits other than a reduction in recent recall rates for lead-in-

paint. [Interestingly, lead-in-paint has been illegal in children's products for decades.] Recall statistics can be highly misleading because the rate and number of recalls depend on many factors and do not generally correlate to injuries to children. Thus, it is entirely possible for recall rates to fall precipitously while injuries to children remain steady or even increase. Whatever peace of mind has been generated by this precautionary approach came at a very high price.

The CPSIA significantly broadened the reach of federal safety regulation well beyond the lead-in-paint toy violations of 2007 and 2008. Under the CPSIA, the definition of a "Children's Product" subject to regulation now encompasses ALL products designed or intended primarily for a child 12 years of age or younger (15 U.S.C. §2052(a)(2)). This definition ensures that virtually anything marketed to children will be subject to the restrictions of the Consumer Product Safety Act (CPSA), irrespective of known or quantifiable risk of injury. Put another way, this definition ensures that many product categories with a long tradition of safety will be subject to the withering requirements of this law for the first time simply because they fall within the overly broad definition of a Children's Product. It is difficult to characterize this change as an "unintended consequence" but these safe products certainly span the U.S. economy, like books, t-shirts and shoes, ATVs, bicycles, donated or resale goods, pens and educational products.

The apparent justification for the broad definition of Children's Products is the presumption that a young child might gain access to the toys of older children in a so-called "common toy box" and somehow be harmed by lead content in an older child's possessions. How this assertion justifies the inclusion of products outside the toy category has never been made clear (e.g., how often is an ATV or kids' work boots found in a toy box?). To my

knowledge, there is no data to support the claim that the “common toy box” is a real threat because of their contents. Notably, while the “common toy box” theory emphasizes the “threat” posed by lead, it seems to accept the much more profound risk posed by small parts. Small parts are illegal in products suitable for children under three years old, but are perfectly legal for products for older children. If the common toy box is such a serious issue for lead, it is presumably an even more serious threat because of small parts. Of course, no one is calling for small parts rules to extend beyond three year olds – that would put an end to the LEGO era. Yet, on this flimsy justification, the overly broad definition of Children’s Products swept up many products that never posed any risk from lead.

The consequences of the change in the consumer safety laws to a precautionary posture has had notable negative impacts and promises to create further problems, namely:

- a. Increased Costs. The new law creates a heavy burden for testing costs. From 2006 to 2009, our company’s testing costs alone jumped more than eight-fold. We estimate that our testing costs will triple again after the CPSC lifts its testing stay in 2011. Testing costs are often thousands of dollars per product. Many of our safety tests are repeated endlessly and are often performed on materials that will never fail the test (e.g., testing for the presence of phthalates in polystyrene, natural wood or steel alloys, see <http://www.cpsc.gov/ABOUT/Cpsia/componenttestingpolicy.pdf>). Having employed one person to manage safety testing and quality control for many years, we now have a department of four, including me, plus an outside lawyer on retainer. This staffing is likely to increase just to manage more paperwork.

Personnel, legal and other out-of-pocket safety expenses (besides testing) have more than quadrupled in the last three years.

- b. Increased Administrative Expenses. The CPSIA requires that all products include tracking labels on both the packaging and the product itself. This is yet another precautionary measure meant to facilitate more precise recalls of defective products. While seemingly analogous to date labels on cartons of milk, in broad application to the vast array of “Children’s Products” under the CPSIA, tracking labels are nothing but pure economic waste. As noted, our company has a virtually unblemished 25-year track record of safety. In addition, our products are not durable, heirloom-style products, nor do they pose a proven risk of injury. Thus, for our business, tracking labels promises to add no possible value, just purposeless government-imposed overhead. We will have to devote the efforts of several employees to track and manage this process to ensure accurate recordkeeping and execution. Because each change in product or packaging is essentially a “product development project” at our company, we fully expect to see true new product development decline because of the capacity absorbed by useless tracking label changes. Given that we make many short production runs, we will have to manage overwhelming complexity in our component inventory to ensure matching serial numbers and data between packaging and the product. This massive investment will be totally useless unless we ever have a recall. With the increasingly strict laws governing product composition, we believe the already low chance of a product recall has been reduced further. Thus, we consider the entire tracking labels exercise to be bureaucracy gone wild.

An equally frustrating bureaucracy has sprung up around recordkeeping under this law. Burdensome requirements spawned by the government's new involvement in our quality control processes will mean considerable new and unproductive investments in information technology. In addition, the CPSC policy on component testing promises to convert the simple task of obtaining a complete suite of safety test reports into a major recordkeeping chore. We will be forced to manage each component separately, tracking each test report on each component one-by-one. This will multiply our recordkeeping responsibilities – and the related risk of liability for failing to comply – by more than an order of magnitude.

- c. Reduced Incentive to Innovate. The increased cost to bring a product to market under the CPSIA will make many viable – and valuable – products uneconomic. To cover the cost of developing, testing and safety-managing new products, the prospective sales of any new item (“hurdle rate”) is now much higher than under prior law. This will mean that low volume items will be less likely to come to market and many new small business market entrants may find themselves priced out of the market. In other words, it will be much harder to start a new business in the children's market now because the rules so heavily favor big business. We think that increasingly companies will be forced to abandon specialty and niche markets to concentrate on the mass market. Because of CPSIA transactional costs, high volume items now have a huge advantage over low volume items. This will hurt many small but important markets like educational products for disabled children. Our company, with its 1500 catalog items, is probably now a dinosaur

under the CPSIA – we have a strong economic incentive to restructure our product line to 50-150 items, a manageable undertaking under the new CPSIA rules, and focus on high volume markets only. Schools would suffer from the loss of our niche products.

- d. Crippled by Regulatory Complexity. Our problems don't end with testing costs or increased staffing. We are being crippled by regulatory complexity. More than 20 months after passage of the CPSIA, we still don't have a comprehensive set of regulations. Please consider how mindboggling the rules have become. The CPSC rules that pertained to our business until 2008 totaled 186 pages. These rules clearly defined our responsibilities and could be taught to our staff. Compliance with law was a focused, manageable task. Today, the rules and interpretative documents total almost 2500 pages. And the rules keep changing and are still being written. For instance, the CPSC has published over 600 pages of rules and explanations in the last month alone. We are acutely aware that each word in every rule is a potential source of liability now, up to and including jail time. How can we master these rules and teach them to our staff while still doing the full-time job of running our businesses? Ironically, the recalls of 2007 and 2008 were never a "rules" problem – those famous recalls were clearly a compliance problem. Imagine what will happen now with a twelve-fold increase in rules.

The confusion from this tangle of rules and regulations hurts us every day. We spend an inordinate amount of time arguing with customers over the rules, often having to call lawyers to resolve disputes. It makes doing business slow,

tedious and very expensive. Many companies are tiring of the continual fighting – and are dropping products and vendors. The loss of these products and relationships will shrink our markets permanently.

- e. Small Business Will Certainly Suffer. The CPSIA is written for big companies, but impacts small and medium-sized companies very negatively. Our company has already lost customers for our entire category on the grounds that selling toys is too confusing or too much of a “hassle”. This is our new reality. The highly-technical rules and requirements are beyond the capability of all but the most highly-trained quality managers or lawyers to comprehend. Small businesses simply don’t have the skills, resources or business scale to manage compliance with the CPSIA. The “small batch manufacturer” provisions of the CPSEA offers little relief (if any) from the burdens of the CPSIA and in any event, target companies well below the economic threshold where they could reasonably be expected to handle these responsibilities.

There is no longer a level playing field for small business making children’s products. Unfortunately, small businesses bear the greatest risk of liability under the law, despite being responsible for almost no injuries from lead in the last decade. The double whammy of massive new regulatory obligations and the prospect of devastating liability are driving small businesses out of our market.

The CPSIA went off track by taking away the CPSC’s authority to assess risk. If the CPSC could again regulate based on risk, safety rules could focus on those few risks with the real potential to cause harm to children.

I recommend several steps to reduce cost, liability risk and complexity all without sacrificing children's product safety:

1. Restore the CPSC's authority to base its safety decisions, resource allocation and rules on risk assessment by giving the Commission the discretion to set age and product definition criteria for the 300 ppm lead standard and phthalate ban. Freeze the lead standard and lead-in-paint standard at their current levels unless the CPSC determines that a change is necessary to preserve public health and safety...

2. The definition of "Children's Product" should not include anything primarily sold into or intended for use in schools or which is used primarily under the supervision of adults. Other explicit exceptions should include apparel, shoes, pens, ATVs, bicycles, rhinestones, books and other print materials, brass and connectors. Exclusions from definition should take these products entirely outside the coverage of the CPSIA (including mandatory tracking labels).

3. Lead-in-substrate and phthalate testing should be based on a "reasonable testing program", not mandated outside testing. The tenets of a reasonable testing program should be set by the reasonable business judgment of the manufacturer. Resellers should be entitled to rely on the representations of manufacturers. Phthalate testing requirements should explicitly exempt inaccessible components, metals, minerals, hard plastics, natural fibers and wood.

4. Definition of "Children's Product" should be limited to children six years old or younger and should eliminate the difficult-to-apply "common recognition" factor of Section 3(a)(2)(c) of the CPSA. Definition of "Toy" (for phthalates purposes) should be limited to children three years old or younger and should explicitly refer only to products in the form used in play.

5. Eliminate CPSC certification of laboratories (rely on the market to provide good resources). Fraud has only very rarely been a problem with test labs, and in any event, the CPSC already has the resources and authority to deal with fraud.

6. Impose procedural limits to insure fairness in penalty assessment by the CPSC under the CPSIA. Completely reformulate penalties to restrict them to egregious conduct (including patterns of violations), reckless endangerment or conduct resulting in serious injury.

7. Rewrite the penalty provision applicable to resale of used product such that violations are only subject to penalty if intentional (actual knowledge or reckless endangerment) and if the violation led to an actual injury. Eliminate the “knowing” standard with its imputed knowledge of a reasonable man exercising due care.

8. Mandatory tracking labels should be explicitly restricted to cribs, bassinets, play pens, all long life “heirloom” products with a known history of injuring the most vulnerable children (babies). Tracking labels should not be mandatory for other Children's Products and if tracking labels have been used, can be used by the manufacturer to limit the scale of recalls.

9. Public injury/incident database should be restricted to recalls only. Private, confidential database should be used for other incident reports to assist the CPSC in gathering market data. The proposed public database promises to be deadly to small businesses ill-equipped to manage a process designed for mega-corporations. The interests of the corporate community in this database **MUST BE PROTECTED**.

I urge your committee to address the fundamental flaws in the CPSIA to restore order to the children’s product market and to protect small businesses from further damage. I appreciate the opportunity to share my views on this important topic.