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Congress of the United States  
House of Representatives  
Washington, DC 20515-4326

COMMITTEE:  
ENERGY AND COMMERCE  
SUBCOMMITTEES:  
HEALTH  
ENERGY AND ENVIRONMENT  
OVERSIGHT AND INVESTIGATIONS

**JOINT ECONOMIC COMMITTEE**  
CONGRESSIONAL HEALTH CARE CAUCUS,  
CHAIRMAN

September 17, 2009

The Honorable Henry Waxman  
Chairman  
Energy & Commerce Committee  
2125 Rayburn  
Washington, D.C. 20515

The Honorable Bobby Rush  
Chairman  
Subcommittee on Commerce, Trade and Consumer Protection  
2125 Rayburn  
Washington, D.C. 20515

Dear Chairman Waxman and Chairman Rush:

Over a year has passed since Congress enacted H.R. 4040, the Consumer Protection Safety Improvement Act (CPSIA). In the immediate ensuing months, we have seen a small agency beleaguered by their attempts to comply with the legislation written by this Congress.

I voted for this bill. At that time, I was compelled by the arguments we should work diligently to bring the Consumer Protect Safety Commission into the 21<sup>st</sup> century by addressing the problems with lead in toy products. But my intent, and I would say the intent of this Congress, was to give assurances to American families that their child's toy does not have lead.

Sadly, this intent has ushered in a virtual avalanche of unintended consequences.

Daily, if not weekly, we hear from small business, large businesses and other individuals who say their very livelihood is over because this law mandates a lead standard which hardly anyone can test and, as such, they would rather not risk selling something which may, or may not, have lead regardless of whether their product is traditionally considered harmless. From non-profit organizations such as Goodwill who recently told me they would suffer loses close to one billion dollars worldwide as a direct result of implementation of H.R. 4040 to the hundreds of small business owners in Texas – and the many thousands across this country – who are struggling to comply with the requirements to test products such as library books, children's clothing or hair ribbons, all of which fall under the broad language of this bill.

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During a time of recession and staggering job loss, they are suffering while the CPSC is moving at a staggering snail pace to implement the 42 required actions under this law.

This has caused me to regret my vote for the nebulous language in this bill. In our zeal to protect children from lead in children's toy products, we have endangered an entire industry.

But I have not sat idyll. I have worked diligently to introduce legislation to correct my mistaken vote. I introduced H.R. 1587 to exempt youth model ATVs from the CPSC lead standard. I co-sponsored H.R. 968 to amend the CPSIA to provide regulatory relief to small and family-owned businesses. I co-sponsored H.R. 1692 to amend the CPSIA to exempt ordinary books from the lead limit in such Acts. I also introduced H.R. 3533 to address the marking issue which is at the heart of an op-ed written by Walter Olson in September 14, 2009's Wall Street Journal, a copy of which I am enclosing for you.

But none of these bills have been taken up by this Committee.

Why is this? Clearly, there have been unintended consequences of this legislation and, as the authors, Congress must intervene. No less than the esteemed Chairman Emeritus of this honorable Committee sent a letter on March 4, 2009 to the former head of the CPSC Nancy Nord. Congressman Dingell stated he was "in particular ... troubled that the Act (CPSIA) includes unrealistic deadlines for rulemaking and compliance, as well as too little implementation discretion for the Consumer Product Safety Commission (CPSC), both of which are exacerbated by CPSC's lack of adequate resources, both in terms of funding and staff."

Since this letter was written, Congress voted to give the CPSC supplemental appropriations of approximately 40 million dollars; however, none of this funding was dedicated solely to the implementation of the CPSIA but rather given to the agency as a whole for operation. None of this funding was dedicated to the sheer hiring of staff – staff which will have to go through the long process used by the Office of Personnel Management to hire federal employees. In fact, I would ask we must inquire how many people the CPSC needs to fully implement the CPSIA as it is currently written, and how many people the CPSC currently employs just for the sake of implementing the CPSIA.

Thankfully, Mr. Dingell did ask Nancy Nord to answer "what levels of funding and staff does CPSC believe necessary for proper implementation of this Act" so we have a general idea about the number of CPSC staff needed to implement this act. She delivered her answer to that and nine other questions to all of the Members of the Energy

and Commerce Committee on March 20, 2009. I have evaluated her answers, and it is startling to note the pleading in her tenor and tone.

She stated that, as of March 20, 2009, a mere 59 employees are needed to implement this Act. Yet I wonder how many of those 59 have been hired? CPSC has been opaque in their employment numbers. Congress must act swiftly to give the CPSC the funds they need to hire these 59 employees. There is no reason for this delay.

Furthermore, Ms. Nord stated numerous times that her hands were tied at the CPSC due to the language of the CPSIA. This complaint is one that, regardless of whether it is true or not, needs to be addressed. The CPSC should not have to spend all their time fielding exclusion requests from the application of the CPSIA. The CPSC should be implementing, enforcing and punishing for lead in toy products. Not for clothes, not for shoes, not for books, not for wooden jewelry and not for all-terrain-vehicles.

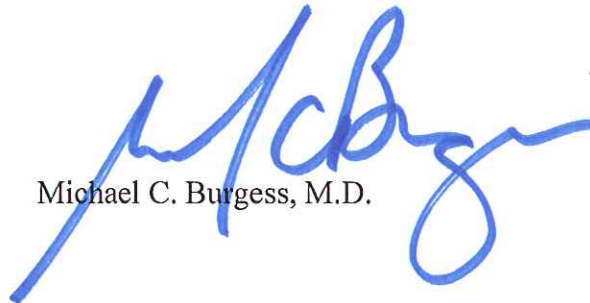
Last week's Energy and Commerce hearing on the "vision" of the new Commissioner of the CPSC was insufficient to address the crisis-at-hand. Anyone who wanted to know her vision could have watched her Senate confirmation hearing this past summer. Instead, we should have had the former head of the CPSC – or one of the three standing Commissioners – talk about her struggles with implementation of the CPSIA. We should have had members from the private sector, such as small business owners, librarians and even large companies who are struggling with implementation of the CPSIA. We should have had third party testers who could explain to us how the CPSC is validating their ability to test these products, and then they should have testified how they are going to test this multi-billion dollars industry every minute, of every hour, of every day, of every year until Congress addresses this issue.

We can not say we are addressing the problems as a result of our own actions with having a hearing with one panelist. We should have held the hearing which was noticed for December 10, 2008 at 10 am but then immediately cancelled. That hearing was titled "Implementation of the CPSIA: Urgent Questions about Application Dates, Testing and Certification, and Protecting Children." Why was this hearing not held last week instead of the vague and nebulously titled hearing "Consumer Product Safety Commission Oversight: Current Issues and a Vision for the Future?"

I respectfully request we hold a hearing on the problems with implementation of the CPSIA, but not just to hold a hearing. Congress must swiftly act to make any technical corrections to the law and prevent any more harm from occurring as a result of passage of H.R. 4040.

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With regards,

A handwritten signature in blue ink, appearing to read 'M. Burgess', is written over the printed name.

Michael C. Burgess, M.D.

Enclosure

cc: The White House

The Honorable Joe Barton  
Ranking Member  
Energy and Commerce Committee

The Honorable George Radanovich  
Ranking Member  
Subcommittee on Oversight and Investigations





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## A Destructive Toy Story Made in Washington

*A dubious safety law is hammering small business, but Congress refuses to fix the mess it created in 2008.*

By WALTER OLSON

Last Thursday, the House Energy and Commerce Committee finally held a hearing on the highly controversial Consumer Product Safety Improvement Act, the children's-product-safety law that took effect on Feb. 10. Chairman Henry Waxman (D., Calif.) allowed a single witness: Inez Tenenbaum, the newly installed chair of the Consumer Product Safety Commission (CPSC), who, like himself, is a strong advocate of the law. Not one of the thousands of craftspeople, retailers and small manufacturers the law has sent reeling was permitted to testify.

This law has saddled businesses with billions of dollars in losses on T-shirts, bath toys and other items that were lawful to sell one day and unlawful the next. It has induced thrift and secondhand stores to trash mountains of outgrown blue jeans, bicycles and board games for fear there might be trivial, harmless—but suddenly illegal—quantities of lead in their zippers and valves or phthalates in their plastic spinners. (Phthalates are substances that add flexibility to plastic.) Even classic children's books are at risk: Because lead was not definitively removed from printing inks until 1985, the CPSC has advised that only kids' books printed after that date should be considered safe to resell.

Yielding to a business outcry, the agency postponed until next February the law's highly onerous product-testing requirements, which many small manufacturers have said will impose costs exceeding their annual profit or even revenue. It also has postponed enforcement of the law's effective ban on kids' bikes and power vehicles, which unavoidably contain leaded brass or similar alloys in certain components.

Nevertheless, the law's latest shock hit businesses on Aug. 14. That's when the law's tracking-label mandate went into effect, requiring that makers of children's goods "place permanent, distinguishing marks on the product and its packaging, to the extent practicable." The idea is to facilitate recalls and make it easier to trace safety problems. The result will be to capsize yet more small businesses.

According to the CPSC, the new marks must allow users to ascertain the identity of an item's manufacturer, "location and date" of production, and "cohort information" such as batch or run numbers. An adhesive sticker on the product won't qualify as "permanent" since consumers might peel it off, while other provisions of the law greatly discourage the use of paint or similar coatings on children's products. Makers of wood, ceramic and glass items may therefore need to consider alternatives such as etching and branding.

Much of the guesswork arises from Congress's vague command that products carry distinguishing marks "to the extent practicable." The CPSC got more than 500 pages worth of comments on the provision from affected parties, many from disgruntled small-business people. When the small-town owner of a producer of baby carriers in Michigan checked out the availability of suitable printed labels, she found they had to be ordered in minimum sets of 100 (at \$30 per set)



though her four-employee firm has never produced more than 30 carriers at a time, and often produces single-item "batches." A South Carolina maker of school assignment sheets and other classroom supplies predicted that if enforced with rigor the law would require changing labels "hundreds of times a week" at its two facilities at "crippling" expense.

On July 20, only three-and-a-half weeks before the rules were to take effect, the CPSC announced some lenient if vague interpretive guidelines. The agency said it didn't think individual marking was required for very small objects and items in sets, such as wooden blocks, and agreed that harm to a product's functionality or aesthetics might be a possible reason to reject marking as impracticable. So long as handcraft and small-production-run makers keep careful control of components, it seems, they might not even need to set up batch numbering systems.

During a "period of education," at least, the commission expects to avoid penalizing makers who have put in good-faith efforts to comply with its guidelines. That's a step in the right direction. But the 50 state attorneys general can enforce the law independently, and they have never promised to be reasonable.

The CPSC touched off another furor this summer when it confirmed that Mattel, the giant toy maker whose many recalls helped set off the lead-in-toys panic, had qualified for an exemption from onerous third-party (outside laboratory) testing of its products under the law, and would instead be allowed to test in its own in-house labs. (Mattel had successfully lobbied for such a provision.) Of course, most companies do not operate on a scale that will make such an exemption feasible.

Why did Congress rush to pass this bill, and why is it so reluctant to amend a law whose burdens fall mostly on products that have never been linked to poisoning? One reason is the skill of antibusiness groups claiming to speak for consumers. Groups such as Public Citizen and the Public Interest Research Group seized on and promoted the Chinese toy panic for their own legislative ends and have taken credit for some of the law's most extreme provisions. (The tracking-labels provision was added by then-Sen. Barack Obama.)

Some of the same groups are active in the coalition now pushing for "traceability" principles in food and farm safety. New mandates being talked of include everything from machine-readable leg tags on backyard chickens to batch labeling of orchard fruit. Before ideas of that sort pass into law, one hopes the farm and food communities will study closely the experience of the Consumer Product Safety Improvement Act.

**Mr. Olson is a senior fellow at the Manhattan Institute. He's covered the CPSIA controversy extensively at his blog [Overlawyered.com](http://Overlawyered.com).**

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