U.S. CONSUMER PRODUCT SAFETY COMMISSION
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March 20, 2009

The Honorable John D. Dingell
U.S. House of Representatives
2328 Rayburn House Office Building
Washington, DC 20515

Dear Representative Dingell:

Thank you for your letter of March 4, 2009, regarding the U.S. Consumer Product Safety Commission's (CPSC) implementation of the Consumer Product Safety Improvement Act of 2008. Recognizing and respecting the knowledge that the CPSC career staff has acquired in implementing this new law, I asked them to prepare answers to the important questions that you asked in your letter. Their responses are enclosed.

Since its passage last August, the CPSC staff has been working tirelessly to implement this comprehensive legislation in the most efficient and effective manner possible given the limits of our resources and the time constraints mandated in the law. As you will note in their responses, they have identified some proposed refinements to the law based on their front-line experience with it.

We share your commitment to better protection of our nation's consumers, and we very much appreciate your long-standing advocacy and support of the CPSC. After reviewing the staff's responses, please let me know if you have additional questions or comments.

Sincerely,

Nancy A. Nord
Acting Chairman

Enclosure

cc: Commissioner Thomas Moore

Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
Representative Bart Gordon
Representative Bobby L. Rush
Representative Anna G. Eshoo
Representative Bart Stupak
Representative Eliot L. Engel
Representative Gene Green
Representative Diana DeGette
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Senator Johnny Isakson
Senator David Vitter
Senator Sam Brownback
Senator Mel Martinez
Senator Mike Johanns

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Date: March 20, 2009

TO : Acting Chairman Nancy Nord
Commissioner Thomas Moore

FROM : General Counsel CAF
Assistant Executive Director for Compliance VEM
Assistant Executive Director for Hazard Identification and Reduction rjh
Assistant Executive Director for Financial Management, Planning and Evaluation CEQ

SUBJECT : Responses to Letter from the Honorable John D. Dingell

Chairman Nord has asked us to respond to the questions recently received from Representative Dingell. The following responses have been prepared by career staff at the U.S. Consumer Product Safety Commission (CPSC).

1. To what extent has robust implementation of the Act been hampered by CPSC's lack of resources? What levels of funding and staffing does CPSC believe necessary for proper implementation of the Act?

The CPSC has made implementation of the Consumer Product Safety Improvement Act (CPSIA) our highest priority. Since August 2008, the agency has initiated and advanced over 20 rulemaking activities required by the CPSIA which is an unprecedented number for this agency or any other of this size, published enforcement guidance and policies to enhance compliance with the new law, conducted numerous meetings with stakeholders, developed a special website dedicated to the CPSIA, responded to questions from the public numbering in the thousands, and generally focused the agency's limited scientific, legal, technical, educational, training and administrative resources on CPSIA implementation requirements.

Because requested funding for implementation of the new law was not forthcoming during the critical first six months when many of the CPSIA requirements needed to be initiated or completed, implementation of the CPSIA has impacted our ongoing safety mission by delaying and deferring work in many other areas. While work has been deferred or delayed on these activities -- such as rulemaking activities on portable generators and voluntary standards work on electrical, fire, mechanical, chemical and children's hazards -- some of CPSC's ongoing safety work such as hazardous product investigations and recalls could not be deferred. This has limited our ability to advise you on how to fully reallocate existing staff resources to implementation of the CPSIA.

Moreover, issues related to the accreditations of laboratories and the increasing number of requests for exclusions from the Act's provisions have caused unanticipated additional demands on staff resources, at the same time that the staff has been implementing the Virginia Graeme

Baker Pool and Spa Safety Act (which became effective in December 2008), and the Children's Gasoline Burn Prevention Act (which became effective in January 2009). This has severely overstretched the agency staff and has begun resulting in delays in implementation that will continue until we are able to fully hire and otherwise maximize the resources that have just been provided to the agency for the second half of fiscal year 2009.

Three examples of the burden and complexity presented by the work on these issues are: (1) the continuing need to process and review applications for laboratory accreditation, including applications from government and proprietary firewalled laboratories, a process initiated by the CPSIA and one that the agency is handling for the first time in its history; (2) the need for further refinement of guidance on the scope of the phthalates ban and, in particular, defining a testing method and dealing with compliance questions regarding the chemistry and carbon chain branching that determines whether a product contains a banned phthalate; and (3) the engineering issues raised by the Pool and Spa Safety Act and the need to reconcile state regulations on health and safety issues such as water quality with the need to replace drain covers as required by that Act. The Commission staff cannot address these and similar matters all at once, yet delay has serious economic impacts on the affected parties which no one anticipated would happen at the same time as the current economic downturn.

As we implement each new requirement, we are seeing unanticipated issues arise, and we are learning more of the far-reaching effects of the CPSIA and there will undoubtedly be more to learn. In August 2008 following passage of the Act, staff estimated that it would require a full annual increase of $21.1 million and 59 FTEs to begin implementing the new legislation in Fiscal Year 2009. That same month, the Commission submitted an amendment in this amount to the then-pending President's Budget Request through the Office of Management and Budget, as well as directly to Congress. In November 2008 a revised amendment was provided to Congress to reflect CPSC's requirements for only the second half of the fiscal year. Through the first six months of implementing the CPSIA, none of this additional funding was received by the Commission.

The funding amount in the Commission's revised amendment has just been approved by Congress. While we will use these funds to immediately and aggressively hire and train new staff, the six-month delay in funding will cause continued deferrals until such time that the agency fully absorbs the new appropriation. For Fiscal Year 2010 the Commission has requested additional funding to continue implementation of the CPSIA.

2. Given the paramount importance of ensuring children's safety and the overall mission of the CPSC, to what extent are the deadlines in the Act practicable for CPSC and industry to meet acting with all deliberate speed? If these deadlines are not practicable, what revision does CPSC suggest?

Mandated Deadlines: Effect on Safety Priorities and Staff Workloads

In the CPSIA, Congress set an aggressive regulatory agenda for the CPSC over the course of the first two to three years after enactment. The work required by the CPSIA is in addition to the

Commission's ongoing regulatory activity in a variety of areas, including upholstered furniture, portable generators and other important standards development activities, as well as our ongoing compliance work in evaluating and recalling products that present hazards to consumers. As with any regulatory agency, CPSC's safety work must be prioritized to deal with the most significant risks; however, the deadlines mandated in the CPSIA have jeopardized our ability to meet Commission priorities and proven to be too much for a relatively small agency to handle all at once. Timely implementation is important, but the flexibility to prioritize our work to deal with the most serious risks is equally important to maximize effectiveness and do the greatest good with the resources that we have been given.

While the CPSIA mandates more than 40 separate action items for the Commission to undertake, that number understates the agency workload that results from each of those mandates. For example, there is no requirement to adopt an interpretative rule defining "child care article" and "toy" under section 108. Yet the Commission has been inundated with thousands of product specific inquiries about what types of products fall within those definitions, from shoes to sporting goods to electronic games. An interpretive rule is our recommended way to address this issue and adds to our rulemaking burden.

The action item count also does not include acting on requests for exemptions from the lead limits provision, nor does the list contemplate making "determinations" on classes of materials or products not covered by the ban on lead in children's products. Because the statute did not permit the agency to exempt products from the scope of the definition of children's product, the staff has been engaged in a process of narrowing the scope of materials likely to include lead in order to provide relief to small businesses and home crafters faced with crippling costs of testing and certification requirements. Many of those businesses are now asking the Commission to begin the same process of exemption of materials with regard to phthalates. As another example, consideration of component testing is not a part of the list of rulemaking activities in the CPSIA, yet it is a challenging issue to consider in implementing its requirements.

There are other activities required of the Commission in the CPSIA that require resources and time that are not evident in the list of required rulemakings. The resource needs have been enormous, ranging from projects so basic as educating headquarters and compliance field staff on the scope of the new regulatory requirements of the Act to the more complex work of updating the Commission's regulations to permit the use of its new authorities with regard to refusing admission of imports. Updating our regulations and coordinating with Customs and Border Protection to allow for a process for a hearing upon refusal of admission requires significant agency resources, as does developing a process for bonding shipments to cover the cost of destruction and related import activities.

Suffice it to say that each of the various initiatives in the Act -- whether it be the lead and phthalates limits, the testing and certification regime, the import provisions, or the new database and information technology upgrades -- will require significantly more time to implement than anyone originally anticipated. Having all of that done simultaneously would have taxed the agency even if we had been given additional funding from the start. Moreover, the agency has significant ongoing work that remains, as well as two other new statutes that it must implement

this year, the Virginia Graeme Baker Pool and Spa Safety Act and the Children's Gasoline Burn Prevention Act.

The deadlines have proven to be impracticable for our staff to meet and are presenting significant problems for the agency to solve. The Commission staff must have some relief from the deadlines imposed.

Practical Solutions: Prioritizing Workload Based on Risk or Extending Deadlines

The following suggestions, ideally in combination, would help ameliorate the issues discussed above.

- Use of Risk Assessment to Establish Priorities

Use of risk assessment methodology would allow the Commission to establish priorities, provide for common sense exemptions, and set CPSIA implementation deadlines. Congress took this approach, to some degree, when setting the initial testing and certification deadlines. Using recall frequency and, to a lesser degree, the severity of possible injuries, Congress determined that cribs, pacifiers, small parts, lead in paint, and lead in children's metal jewelry would lead the children's product testing and certification effort.

However, by this June the Commission must accredit laboratories for third-party testing to all other children's product safety rules, which includes any new or previously existing rule applicable to a product intended for children 12 years of age or younger. The agency will be pushed to meet that deadline as the staff will need to issue accreditation procedures, and all related testing procedures, for the many rules applicable to children's products at that time, including the enormously complex requirements of the ASTM F963-07 Toy Safety Standard. All of this will take place simultaneously with work we are doing to open CPSC's new laboratory facilities.

Examples of Inefficiencies: Furthermore, inefficiencies have been created given the tight timeframes of the Act. For example, under section 102 of the CPSIA, the Commission is required to publish accreditation procedures for laboratories testing baby walkers, bouncers and jumpers by March 12, 2009. However, the existing regulations for baby walkers and bouncers are outdated. The Commission through its enforcement actions has been requiring compliance to the voluntary standard rather than the outdated regulations, and for the most part industry is complying with the voluntary standard. It is inefficient for the staff to accredit laboratories to test to outdated regulations.

The baby walker standard will be one of the first two rules the Commission handles under the series of new consumer product standards required for durable infant products under CPSIA section 104, and therefore, the most efficient (and common sense) resource allocation would be to accredit laboratories for testing when we announce the new baby walker standard in February 2010. Because the statute was written without such flexibility, we must develop an approach to deal with the outdated baby bouncer, walker, and jumper standard, which may include withdrawing the outdated standard to avoid accrediting laboratories to standards no one follows

and to clarify that there is no need for industry to take a step backwards to test to standards that will be updated in a matter of months.

From our standpoint, an ideal solution to these challenges faced by our staff would be for Congress to let the Commission decide what level of testing is required for which products, allowing the Commission to prioritize based on risk and tackle any problems that need to be addressed in the most efficient manner. Alternatively, Congress could continue to require certification and third-party testing for all children's products but allow the Commission to prioritize as to when the testing to each children's product safety rule will begin, so that it can roll those out on a timetable that is based on its discretion and expertise. To do this right, we need to:

- provide our stakeholders with a list of all standards that are applicable to a children's product;
- identify which children's products need to comply with which standards;
- define the test methods for each standard and whether they make sense for all of the different products covered;
- accredit the laboratories for testing to each standard; and
- develop a process for inspecting certificates.

All of that takes time and the ten months the CPSIA gave us to accomplish this task has not proven to be workable.

The wholesale release of "all other" children's product standards in June 2009 may further stress manufacturers, importers, and retailers while providing marginal improvement in children's safety for many of the products. A methodical, pragmatic approach to the release, based on priorities determined by CPSC staff, would facilitate a smoother rollout while addressing first the products presenting the greater risk to children. This allows CPSC staff the flexibility to prioritize tasks, manage our workload, and assure greater safety without an unnecessarily burdensome impact on product sellers.

- Extend Deadlines

Another alternative is to move certain of the dates for implementation in the CPSIA to allow the Commission the time to provide additional implementation guidance. The most challenging deadlines for compliance were those that went into effect on February 10, 2009, requiring retroactive compliance to the new lead and phthalate content limits. The breadth of products covered by the definition of children's products covered by the lead limit, *i.e.*, any product designed or intended primarily for a child 12 years of age or younger, implicated numerous industries that had not understood that their products would be subject to the new lead provisions.

The question asks us to comment on the impact of the deadlines on industry. Whether it be makers of books, bikes, or baseball bats, every industry needed more time to determine which, if any, of its products were covered under the definition of children's product, test those products for compliance, and develop new methods of manufacture to eliminate the lead if it was present

in the product. The scope of products covered by the new regulation and the amount of inventory implicated went well beyond what many may have contemplated. Our information is incomplete but we are told that millions of products wait in storage warehouses for return and destruction. Retailers have indicated that most of these products do not contain accessible lead, and a real question exists in our staff's mind as to whether they contain accessible lead in a sufficient amount to be anything other than a *de minimis* risk but simply were unable to meet the standards that took effect in February. It will be even more difficult for these products to meet the stricter standards to come. These challenges faced by industry have a direct impact on CPSC staff resources and our ability to meet deadlines given the need to respond to their inquiries.

Another approach to the deadlines is to allow the Commission more discretion to move an effective date for a given product or class of products in certain circumstances. The CPSIA does not permit the Commission to delay the effective date of any of the new standards to deal with a problem such as the lead in bike tire valves where the risk to a child is exceedingly small but still measurable, and the economic impact is substantial. In cases such as these, some reasonable amount of time should be allowed to reengineer the product to develop an alternative that can meet the new lead limits.

3. Does CPSC have quantitative data concerning any negative impact of the Act (i.e., the lead and phthalate limits and testing requirements) on small manufacturers of children's products, and if so, would CPSC please provide them? What information does CPSC have on any such negative impact of a more anecdotal nature?

CPSC staff does not have data on the total value of impacted inventories, lost sales, disposal costs, and other costs likely to be incurred by small manufacturers because of the CPSIA; however, information of an anecdotal nature, that has not been verified by CPSC staff, puts the impact in the billions of dollars range.

Industry Estimates

For example, the Motorcycle Industry Council reported in a February 26, 2009, press release that the new lead rules would result in an annual impact of $1 billion on their industry. In a request for a moratorium on the retroactive application of the lead ban, the American Chamber of Commerce in Hong Kong estimated that the impact on their members producing children's wearing apparel would run in excess of $300 million. In a letter to the CPSC, counsel to a major mass retailer stated that a client estimated their cost to test inventory at $1.4 million and projected inventory losses of $30 million. Another client estimated the value of their unsalable inventory at $7 million. It was also reported in a March 5, 2009, article in the Wall Street Journal, that the Toy Industry Association estimated inventory losses valued in the range of $600 million.

CPSC Testing Estimates

CPSC staff has estimated that the cost for third-party testing of product for lead and phthalates would range from several hundred dollars to several thousand dollars per product tested,

depending on the number of product components requiring testing. Based on information obtained from testing laboratory price lists and quotes, the cost to test for the lead content of a substrate appears to range between about $50 and $100 per tested component. In a recent public meeting, industry representatives stated that testing of the 233 various components of a bicycle, valued at $50, cost one of their members approximately $14,000. Less information is available about the cost of testing products for phthalates, but the limited information obtained from price quotes and laboratory presentations to CPSC staff suggests the best estimate for the cost of phthalate testing at this time ranges from $300 to $500 per tested component. The cost to test for phthalates appears to vary widely from market to market. In a recent CPSC public meeting on phthalates, one participant told of receiving quotes for the testing of a product ranging from $7,000 in Asia to $22,000 in the United States. Because these tests tend to be destructive, manufacturers also bear the expense of lost material, labor, and overhead associated with production of the products tested.

Economies of scale provide an advantage to larger volume manufacturers, relative to their smaller volume counterparts, as they can absorb these testing costs over a larger production volume. Spread over this larger volume, the incremental increase to the cost of each product is much smaller for the large manufacturer versus the much smaller manufacturer. In short, the heavier burden falls to the smaller volume business. When the Commission establishes random sampling requirements (as part of the required rulemaking on periodic testing in Section 102(b)), testing costs will increase over current levels for manufacturers of all sizes.

The exclusion of most fabric from the third-party testing requirements will provide only limited relief for apparel manufacturers, including small manufacturers. In a public meeting with CPSC staff, several apparel retailers reported finding virtually no lead in fabric, but they did find lead in about 2% of the tests on hard items, such as buttons, zippers, snaps, and fasteners. Since most apparel items have some non-fabric items, there will still be testing requirements for most apparel items. Moreover, under the new restrictions the presence of lead in fasteners used on clothing has had a negative impact on the second-hand market for children's clothing in the United States.

Although testing children's products, as applicable, for lead and phthalates has received the most attention, many products will be subject to additional third-party testing requirements. For example, cribs must be tested for compliance to the crib safety standards at 16 CFR part 1508. Toys are also subject to testing for compliance to applicable provisions of the Toy Safety Standard, including testing for additional heavy metals, such as arsenic, cadmium and chromium. We have no quotes for these tests; however, it is probable that the major factor in the cost of the tests will be the labor time required to conduct the tests. Once again, given the destructive nature of the testing, the manufacturer will also bear the expense of lost material, labor, and overhead.

<u>It is important to keep in mind the wide expanse of goods falling under the definition of "children's products" and subject therefore to third-party testing requirements.</u> Beyond toys and durable infant and toddler products, items such as books, bicycles, clothing, youth-sized motorized off-road vehicles, school supplies, and Scout equipment and accessories are subject to lead and/or phthalates testing. Likewise, all products for children 12 years of age or younger that are made by crafts people, stay-at-home moms or dads, charitable church groups and the like,

must meet the new limits and be tested for compliance or their products are banned. This has completely upset the business model for many of those small businesses and charitable organizations. Because of the retroactive nature of the regulations, many retailers began turning back product with more than 600 ppm well in advance of February 10, 2009, in order to ensure their shelves were free of non-compliant product. As a result, many small manufacturers, who failed to recognize the true scope of the law or were unprepared for the retailers' reaction to the CPSIA, now find they have inventory they cannot sell.

Retailers Accelerating Deadlines

Retailers continue to move well ahead of the deadlines established in the CPSIA. For example, it is staff's understanding that Wal-Mart stopped receiving product with more than 300 ppm lead in January 2009. These actions have stranded inventory that may be compliant today but will be banned in August as the lead limit drops to 300 ppm. In addition to the risk that these products may become obsolete and will need to be reworked or destroyed, manufacturers of all sizes are incurring expenses to hold this inventory while they decide how to move their product. The cost to carry this inventory varies by business, but typically runs about 25% of the on-hand inventory value.

As retailers pull product from their shelves, many consumers have also been negatively impacted. For example, CPSC staff have received numerous emails from consumers stating they could no longer purchase parts for their child's youth model motorcycle because of retailer concerns over the lead content of the parts. More than one consumer has noted the possibility of consumers' purchasing vehicles sized for older children or adults if they could no longer service their current motorcycle or ATV. This reaction potentially places these children in a situation of increased risk of injury or death.

Solution: Risk-based Assessments That Consider Age and Exposure

It may be too late to mitigate the significant economic impact of the February 10, 2009, ban on children's products containing more than 600 ppm total lead content, by weight, for any part of the product. However, some relief could be provided to deal with the impact on thrift shops and second-hand sales, and Congress still has time to act to prevent the even greater impact that will occur when the lead limit drops to 300 ppm in August 2009. For example, toxic substances limits are better regulated based on the possibility of exposure in relation to age. Foreseeable use data, combined with mouthing and ingestion data at various ages, would define the group at risk for any given product.

This approach would exclude items such as bikes and ballpoint pens from the discussion and we could focus on items like metal jewelry and other objects likely to be mouthed or ingested. By granting the CPSC the flexibility to determine the relevant hazards, flexibility in determining exemptions based on assessment of risks, and the discretion to adjust the age limit for certain groups of products where the exposure is low, resources can be properly focused on areas of greater risk, yielding maximum reductions in consumer risk of death and injury.

4. Does the CPSC have any suggestions for how to mitigate any such economic impact of the Act on small manufacturers of children's products (e.g., component testing for lead and phthalate content) that, in accordance with the intent of the Act and the CPSC's mission, will not compromise the health and safety of children using them?

In light of the concerns expressed by small business owners and employees, CPSC staff has been considering what relief might be provided for them without compromising safety. The first challenge was to define what is meant by "small business" in the context of the manufacture of children's products.

For example, with regard to children's apparel, there are not good statistics differentiating those firms that make all apparel versus those firms that make apparel intended only for children 12 years of age or younger. With regard to toys, the analysis of those businesses that are focused on the manufacturing of products solely for children is more reliable. Bureau of the Census (2006) data shows that there are 776 firms that manufacture dolls, toys, and games (NAICS 33993); 403 of those firms (51.9%) have fewer than 5 employees, 632 (81.4%) have fewer than 20 employees, and 963 (98.3%) have fewer than 500 employees which is the standard definition of a small business. Only 13 of the firms (1.7%) that produce toys would not be considered small businesses by the Small Business Administration. All (or almost all) of these firms are likely to produce children's products and all are affected by the current economic downturn.

Another group significantly impacted by the CPSIA is small crafters of products for children, many of whom work out of their homes. Based on a 2000 survey conducted by the Craft Organization Directors Association, there were an estimated 106,000 to 126,000 craftspeople in the United States. Additionally:

- The average gross sales revenue was $76,000 per craftsperson.
- The median household income of craftspeople was $50,000 per year, with about half coming from craft activities.
- 64% of craftspeople worked alone, 18% work with a partner or family member, and only 16% had paid employees.

Component Certification

The cost of testing and certification is a huge burden on these small businesses and a robust component certification program would be extremely helpful. However, any component testing rule would have to apply across the board to all businesses, small and large, and to our global trading partners in compliance with international trade laws. Furthermore, we have to design a program we are confident will avoid the switch of components during manufacture which is the very problem that Congress was intending to fix by requiring testing of children's products in the CPSIA. Component testing presents real challenges since many of the components used in children's products are not children's products on their own and do not require third party testing. Snaps could be used on a hand knitted sweater that were not produced primarily for use in children's products, and we cannot be sure given the expense of testing, that a market will develop for certified compliant materials for use by crafters.

Potential Solutions

Recognizing that the Commission always has the ability to take action to address unsafe products in the marketplace, Congress could take many different approaches to mitigate the effects on small businesses. Congress could apply the new lead and phthalates limits prospectively to mitigate the impact on inventory existing prior to enactment. It could allow for a more flexible exception process based on balancing of risks against the burdens of the costs of testing and certification but that could overburden staff. Another option would be to allow the Commission the flexibility to decide what children's products require testing and certification.

5. What information has CPSC received about the impact of the Act on the availability of second-hand products for children, especially clothing? It is my understanding that many second-hand stores now refuse to sell children's products. Does CPSC have any suggestions for how to mitigate any negative effects of the Act on second-hand stores for children's products, especially in light of the economic downturn and the consequent increased need for low-cost sources of children's clothing?

CPSC staff has only limited, anecdotal information concerning the impacts of the Act on second-hand stores. Major resellers such as Goodwill Industries and the Salvation Army have estimated impacts, including both lost sales and disposal costs, totaling hundreds of millions of dollars. Many smaller resellers have indicated that under present circumstances, they cannot afford to continue selling children's toys or apparel, which account for much of their revenues. Even church bazaars and neighborhood yard sales are adversely affected.

The major problem for second-hand stores and other resellers is that the CPSIA prohibits the sale, distribution or export after February 10, 2009, of any children's products exceeding the applicable lead or phthalate limits regardless of when they were made. Second-hand stores are typically selling items that were manufactured years earlier. Thus, a large percentage of a reseller's current inventory of children's products may have been manufactured long before the stringent new limits took effect, and it may now be impossible to dispose of such items lawfully except by destruction (which itself may be costly, particularly for non-profit organizations). To make matters more difficult, there is often no cost-effective way to determine which products can lawfully be sold and which cannot.

Unlike other retailers, resellers generally have little or no control over the compliance of the goods that they obtain. Most are donated. Even where they have regular donors, resellers cannot practically establish specifications for children's products as major retailers can for their regular suppliers. Testing everything they receive is not a practical solution either. Like small, home-based manufacturers, resellers cannot spread testing costs across many units of the same type; at any given time, they would usually have on hand no more than a few items of the same type. The standard tests for lead and phthalate content are destructive, so if one tests a single item to determine whether it can be sold, one no longer can sell that item.

Screening devices, such as x-ray fluorescence (XRF) machines, can help in weeding out children's products that have excess lead, without destroying products that comply, but the new technology is still expensive. No such screening device yet exists for identifying phthalates. Even if such technology can be developed quickly, it remains a disproportionate burden to test every unique item in inventory. Some internet resellers and auctioneers do not even have access to the products that are offered for sale by third parties on their website and so could not feasibly test them by any method.

The second-hand store problem will get worse for several years before it may ultimately get better. The lead content limits will drop to 300 parts per million in August 2009 and to 100 ppm in August 2011 (unless the Commission determines that such limit is not technologically feasible for a class of products). Products manufactured after these dates will be in use for some years before they are donated to second-hand stores. So, it will probably take many years before children's products that comply with these stringent limits make up a sizable majority of the products for sale at second-hand stores.

Potential Solutions

Under the circumstances, merely postponing the effective date of the lead or phthalate limits for everyone, while this would help alleviate some problems we are seeing, would not be very helpful to resellers because it would allow products with excess lead and phthalates to continue being made, and thus add to the number of noncompliant products that may eventually find their way to resellers and so postpone the day of reckoning.

The most effective way to help resellers is to address the issue of retroactivity, requiring that manufacturers meet the statutory limits for products manufactured after the effective date but that retailers and resellers be allowed to continue sale. If this suggestion were adopted, it would be important to note that resellers could not sell recalled products and that the Commission retains its authority to stop sale of any product if it finds an exposure that presents an unreasonable health and safety risk to children.

A law like the CPSIA that outlaws sales of previously lawful products will, by its nature, hurt retailers more than manufacturers and hurt resellers even more than other retailers (given the fact that products are typically in consumers' hands for several years at least before they reach second-hand stores). While dealing with retroactivity across the board would be the most effective way to deal with the inequities presented by the current law, other suggestions include such things as establishing a separate rule for resellers. For example, the ban on selling children's products with excess lead or phthalate content could take effect at a later date for second-hand sellers than for retailers generally. Or, resellers (or some subset of them, such as individual consumers or non-profit resellers) could even be exempted entirely from the provision that makes it a prohibited act to sell products containing more than trace amounts of lead or phthalates. Children's products that would have been banned under prior law should not be exempted in any case, and there may be categories of products, for example, children's metal jewelry, that should be handled more strictly. While consumers are accustomed to the notion that used goods are sold "as is," it might be appropriate to require a label or other type of

warning at the point of sale if resellers are allowed to continue to sell older children's products that do not comply with the new limits.

Lest there be any question, CPSC staff does not favor exempting second-hand sellers from the prohibition against selling recalled products (including children's products that are recalled for excess lead paint, or excess lead or phthalate content). The staff believes that resellers can reasonably be expected to keep abreast of CPSC recalls by signing up to receive CPSC's recall press releases and to remove any recalled products from their shelves. Similarly, where Congress has unambiguously directed application of new regulatory requirements to a discrete class of used children's products, such as cribs, CPSC staff believes that resellers no less than others must take steps to comply, even if that means deciding not to sell the products in question.

The Commission has adopted an enforcement policy on lead limits and has issued other guidance to second-hand stores to address many of the recurring issues. In the staff's view, however, the core problem is caused by the retroactive nature of the law and is beyond the agency's authority to solve.

6. Does CPSC believe that the age limit contained in the Act's definition of "children's products" (i.e., 12 years and under) is appropriate? If not, what should the age limit be? Further, should CPSC have discretion to lower the age limit for certain groups of children's products for which the risk of harm from lead or phthalate exposure is remote (e.g., snaps or zippers on children's clothing)?

The term "children's product" has significance for several different provisions of the CPSIA. It specifies which products are subject to the lead content limits. Indirectly, it plays a role in defining which products are subject to the phthalate limits. It governs the scope of products that require certification based on third-party testing and those that will require tracking labels "to the extent practicable."

CPSC staff believes that for purposes of defining which products are subject to lead limits, the boundary age could reasonably be lower than 12, at least in most cases. The Senate bill (S. 2045) deemed age 7 a satisfactory upper limit. CPSC staff understands that the conferees ended up agreeing to age 12 primarily because of the so-called "common toy box problem" – *i.e.*, the concern that a product intended primarily for older children might nonetheless be available to younger ones in the same home. This choice had the effect, however, of applying the lead limits to a much larger population of products, including many that are not toys and even including outdoor products such as dirt bikes or ATVs that would rarely be accessible to younger children under any circumstances.

CPSC's Regulations Established Age Limits by Product Class

CPSC's own regulations have used a variety of different ages to define what group of children's products will be subject to a standard or ban, and these precedents may be useful to consider. For example, the small parts ban applies to products that are intended for children under 3. Toys that are intended for ages 3 through 5 are allowed to have small parts, provided that they have

cautionary labels to warn that they are not suitable for youngsters under 3. In general, toys that are intended for children 6 and older do not require cautionary labeling except in a few specific cases such as balloons and small balls. The lead paint ban (16 CFR part 1303) applies to children's products without a specific age definition. Despite this broad applicability, the scope of the lead paint ban has rarely if ever, generated controversy. This is probably so because it is limited to children's products that have paint or similar surface coatings, and such products are much fewer in number and more easily identified than children's products generally.

Both the likelihood of exposure and the route of exposure are factors to consider in deciding what products should be subject to lead limits. Lead presents an acute hazard when direct ingestion is possible. For this reason, CPSC staff has long treated children's metal jewelry as warranting special concern. In other applications, brass and many other metals often have some lead content, particularly to improve workability, corrosion resistance and other properties. Where such objects can be mouthed but not swallowed, they generally pose a lesser risk, and objects that can be licked but not mouthed pose still less risk. There are some products where mouthing or licking is unlikely but where some lead exposure may result from touching and inadvertent transfer of lead from hand to mouth. A child's exposure to lead from zippers and snaps will depend on the type of garment and the child's age, among many other factors.

Practical Solution: Commission Discretion

One way to address these issues would be to give the Commission more discretion to grant exclusions from the lead or phthalate limits. Under the law as currently written, a material having more than 600 parts per million lead cannot be excluded unless touching the product will not result in the absorption of *any* lead. Taken as a whole, the language of section 101 appears to rule out treating even very low levels of absorbable lead as negligible. Congress could modify this exclusion criterion to allow *de minimis* levels of absorption or to change the focus to preventing any significant increase in blood-lead levels of a child, particularly for children who are of the age of the intended user.

Giving the CPSC discretion to lower the age limit for certain classes of products might be more efficient than dealing with many requests for exclusion, which is a resource-intensive process. Another resource conserving approach would be for Congress to lower the age limit across the board and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

7. Although some youth all-terrain vehicles (ATVs) and youth motorcycles are intended for use by children under 12 years of age, does CPSC believe it is necessary that these products be tested for lead and phthalate content? Similarly, does CPSC believe that these products present a risk to children for the absorption of phthalates or lead?

CPSC staff is aware that many different parts of youth ATVs and youth motorcycles have lead content, some of which may exceed the 600 or 300 ppm level. Some of these parts are inaccessible, and some parts may qualify for the higher limits applicable to certain electronic components. Other parts, however, appear to be accessible and may not qualify for any

exclusion under section 101 of the CPSIA. These youth vehicles may also have some phthalate content, but they do not appear to be covered by the section 108 bans, which are limited to certain toys and child care articles.

The possibility that children will suffer significant lead exposures from these classes of vehicles appears to be remote at best. First, the vehicles are generally stored outside the home, where younger children would rarely be allowed unsupervised access. The vehicles are generally designed for children of at least 6 years of age and older. These children are far less likely to ingest or mouth components of a motorized vehicle – even those that are physically exposed – than something that fits readily in the mouth, such as a jewelry chain or charm. Children may still be exposed to some lead as a result of touching seats, handle bar grips or other places and then inadvertently transferring some of the lead to their mouths from their hands, either directly or indirectly, as for example while eating. For most children, however, this type of exposure is not likely to result in significant absorption of lead. This is particularly true where children are wearing appropriate protective riding gear, such as gloves and helmets.

Broadening the Exemptions for Metals

In section 101(b)(4), Congress recognized that it might not be technologically feasible for certain electronic devices to meet the lead limits applicable to children's products generally and gave the CPSC authority to adopt other requirements for such devices. The Commission has exercised this authority on an interim basis and established higher limits for certain electronic components where it concluded that such parts cannot be made inaccessible and it is not technologically feasible to substitute other materials at this time. These include metals such as steel, aluminum and copper alloys as used in electronic devices. In adopting these alternative limits, the Commission made reference to exemptions recognized elsewhere, such as the European Union directive 2002/95/EC known as RoHS. It is worth noting that in Europe, the RoHS exemptions are equally applicable to non-electronic uses of these metals, but the staff believes that section 101 gives us no flexibility to apply the same exemptions outside the realm of electronics. This means that children's products containing these metals and metal alloys manufactured for the U.S. market cannot employ recycled metal to the same extent as they can in Europe; rather, the manufacturers for the U.S. market must obtain supplies of primary metal, forcing vastly higher energy consumption and higher costs, or they must quickly switch to substitutes whose properties are poorly understood and may even pose more significant safety risks to children.

Under the current law, CPSC staff believes that an exclusion for youth ATVs would be very difficult to justify. Some have argued that if youth-sized ATVs cannot be sold for an extended period of time, owing to lead limits, then more children may end up riding adult-sized ATVs. A child using an adult ATV as a substitute would face a far graver and more immediate risk than that of the possible lead exposure from the youth ATVs.

Potential Solutions

The ATV situation is illustrative of a number of product classes that may not qualify for an exclusion. Congress could moderate this situation in several different ways. These include one or more of the following (not in priority order): (1) postponing the deadline for sales (not

manufacture) of children's products containing lead above the new limits; (2) lowering the age limit for children's products (as discussed in the response to question 6); (3) exempting some or all children's products that are usually not kept in the house, such as bicycles and ATVs; (4) giving the CPSC greater discretion to exclude from compliance with the lead limits any materials or products that pose a negligible risk to children (as discussed in the response to question 6); or (5) allowing materials that are eligible for special treatment when used in electronic devices to receive similar treatment in other children's products when the justification is equally compelling.

8. In light of recent court decisions that the lead and phthalate content restrictions are retroactively applicable, does CPSC have concerns about the effect on the environment of the disposal of inventories of non-compliant children's products?

This issue lies within the authority and expertise of the Environmental Protection Agency (EPA).

9. I understand that, since early December 2008, CPSC has had access to a large number of lead content results for finished "ordinary books" (i.e., books published in cardboard or paper by conventional methods and intended to be read by or to children age 12 and under) and their component materials (i.e., paper, paperboard, ink, adhesives, laminates, and bindings). Has CPSC staff reviewed those test results? What do those test results indicate about such ordinary books and component materials in connection with the statutory lead limits prescribed in section 101(a) of the Act? Does CPSC have any recommendations regarding how to mitigate the burdens that testing and certification requirements of the Act, and especially the retroactive applicability of those requirements to inventory, could otherwise impose on publishers, printers, and retail sellers of such ordinary books, as well as on libraries schools, charities and other secondhand distributors of such ordinary books, including those published before 1985?

Lead Testing and Printing Ink: The Publishing Industry's Challenge

Given the breadth of the definition of children's product in the CPSIA, the Commission received thousands of questions over the past six months regarding the scope of applicability of the retroactive lead limits and the required third–party testing of such products. At the same time, retailers began demanding certificates of compliance for products likely to be on their store shelves on February 10, 2009. The publishing industry claimed to have been unaware that the definition of children's product would encompass books until retailers started asking for certificates of compliance and we posted a response to one of the frequently asked questions regarding the application of the CPSIA to books intended or designed primarily for children. Because of the variety of colors of inks used in making children's books printed on paper and cardboard, the requirement of testing for compliance to the new lead limits proved costly and onerous. Some retailers were demanding separate certificates of compliance for each book title.

The issue of lead in printing ink and other products used to make a book is not new. Indeed, in 2007 the publishing industry issued a statement on lead in books to respond to any concerns

raised about books related to that year's toy recalls for excessive lead in paint. (See American Booksellers Association statement of November 29, 2007, Bookselling this Week: Getting the Lead Out: Consumers Question Books Made in China, found on March 15, 2009 at http://news.bookweb.org/news/5695.html.) The Commission has occasionally recalled such products for excess lead; for example, a recall was conducted in February 2008 for excess lead in paint on the colored spiral metal bindings of several sketchbooks. In July of 2004, the Commission issued a warning regarding the hazards of lead in candy wrappers that contain lead or bearing lead-containing ink.

The "Ordinary Book" Exemption

The Commission staff wanted to provide some relief to the book publishing industry given the extraordinary impact of third-party testing for lead and because the publishing industry maintained that the Commission had never considered ordinary children's books to be a health hazard. However, given the requirements of the CPSIA, the staff felt that they needed some representative data upon which to base a decision to exempt children's books from the requirements. The number of requests for relief from the retroactive effect of the CPSIA was so high that the staff felt that in fairness, any determination that the law did not apply to a material or class of products should be based on science and supported by test results.

It is not the case (noted in your question) that the Commission staff has had access to a "large number of tests on finished 'ordinary books'," but rather we have had access to a very limited data set on which the publishers have based their request for an industry-wide exemption from testing to the new lead content limits. The publishing industry association provided the staff with 152 separate entries representing testing done on approximately 157 books conducted anywhere from 2004 to 2009. The books tested range from the ordinary books to books with handles, stickers, kits or other accessories. The staff reviewed those test results, and initially concluded that many of the tests were done for European standards and/or did not test for total lead content as required by Section 101 of the CPSIA. The staff of the CPSC asked the industry to provide more data for total lead content and demonstrate that the data submitted was representative of all of the millions of ordinary books sold to children 12 years of age or younger.

The additional data submitted suggests that modern book publishing using offset lithography does not result in books with lead levels in excess of the 300 ppm limit that goes into effect in August of 2009. However, the Commission staff has not had the time or resources to look at the issue completely or comprehensively and has been hopeful that more data would be submitted by industry particularly with respect to books published in the 1960s and 70s. The Commission staff has been assured that the publishers now all use inks that result in children's books that fall below the statutory limits for lead. While the staff does not have a statistically valid basis for a wholesale exclusion of children's books at this time, its determination to exclude them from testing and certification does not mean that any children's book can exceed the lead limit. All children's books must meet the lead limit.

Making a determination that ordinary books cannot and will not exceed the lead limits appeared to be the only means of providing immediate relief. Such an exemption from testing also should

provide relief from the retroactive application of the standard to all books in schools and libraries that are provided to children for their use. In the meantime, the publishing industry was given a conditional enforcement waiver on the testing and certification requirements for lead, pending staff's review of the data and any additional data that may be submitted. That exemption was limited to books manufactured after 1985 because the publishing industry has not provided any test data on books published in the 60s and 70s. Instead, the industry has pointed to the fact that lead was removed from printing operations in this country due to federal statutory restrictions on worker exposure to lead in printing operations which went into effect in the late 70s. The very limited testing the Commission staff has done indicates that the lead content of these older books can occasionally exceed the 300 ppm limit that goes into effect in August 2009 but that data may not be representative. At this time the Commission staff has not had the time or resources to prove that books made more than twenty years ago do not exceed the lead limits as staff has needed to focus its resources on its investigations of deaths and injuries to children and other emerging risks and health hazards.

Library Books and Used Book Resellers

The retroactivity of the lead provision is particularly problematic in the area of books and other printed materials. We have done very limited testing of books from the 60s and 70s. It suggests that the lead content hovers around the 300 ppm mark. Anecdotal evidence received by the agency suggests that on occasion books from this earlier period may contain lead in excess of the lead limits in their binding materials. The only way to determine the total lead content in these books is to test them.

Under the CPSIA, however, sellers of used children's books, including used book stores and thrift shops, are not required to test or certify that children's books meet the new lead or phthalates limits. The CPSIA does not require resellers to test children's products in inventory for compliance with the lead limit before they are sold. However, resellers cannot sell children's books intended primarily for use by children that exceed the lead limit.

The Commission had hoped that an exemption for "ordinary books" plus its announced enforcement policy for lead would alleviate this situation. Based on information received from the trade associations with information regarding books in libraries and schools, the Commission staff understands that most textbooks in schools are less than ten years old. Likewise, the information received suggests that most library books lent to children are recycled approximately every 18 lending cycles or three years. Thus, it appears that few of the books being provided to children in their schools and from libraries would be more than 20 years old.

Potential Solutions

Staff has considered children's behaviors with books and concluded that after about 19 months of age, children may occasionally put part of a book in their mouths, but they typically are taught to care for their books so that they can continue to be used for reading and learning. This information suggests that any exposure to lead from contact with books diminishes as children age. We believe an exemption is the only way to provide relief under the CPSIA. Congress could limit the testing of books to only those picture books provided to children much younger

than 12 since this is the population of children that would be most likely to interact with their books in a way that could expose them to inks with higher lead content. Lowering the age limit would be extremely helpful to staff in dealing with books and many other products by narrowing the scope of products covered. Lowering the age limit would also provide relief to schools who face retroactive application of the lead provisions not just with regard to books but also the wide variety of other educational materials they provide to school-aged children.

The CPSIA establishes that any children's product no matter when it was made is a banned hazardous product if it exceeds the lead limits and the law does not have an exemption procedure other than one based on scientific proof that there will not be absorption of any lead. One solution would be for Congress to create a waiver process allowing the Commission to "grandfather" in products made prior to the date of enactment if the Commission concludes those products present only a *de minimis* exposure level and, therefore, a negligible risk. This could be used to solve the problem of used books as well as other products commonly sold second-hand such as used clothing or youth bicycles. It creates an administrative burden that the Commission may not be able to handle without some delay, but it would provide relief without having to undo the retroactive effect of the law altogether.

10. In general, does CPSC believe that the Act was written with too little implementation discretion for the Commission? If this is the case, for which issues (e.g., third party testing requirements) does CPSC require more discretion?

The CPSIA provides too little implementation discretion for the agency. One of the major problems with implementation has been the statute's reach across a variety of industry sectors quickly and simultaneously by virtue of its broad definition of "children's product." The lead limits reach literally every product intended or designed for a child 12 or younger. The breadth of the statute's reach has made it difficult for the Commission to address industry specific concerns in the few areas where the agency has discretion. The Commission needs room to address toy industry concerns separately from those of the apparel industry, from those of the publishing industry, and separately again from those of industries that make outdoor products for children such as motorized recreational products, playground equipment and bikes.

The lead limits and testing and certification provisions could be implemented much more smoothly if the Commission had the discretion to roll out those requirements on a product class basis. The same will soon be true for tracking labels where each industry has specific concerns about how additional labeling requirements will work given existing and multiple other labeling requirements. Congress can direct the agency as to how to determine priorities and work to a specific schedule as evidenced by section 104 which gave some flexibility to the Commission in pursuing the congressional mandates for new durable infant product standards. A similar approach to implementing all of the Act's new rules and requirements would ease the implementation burden. Indeed, the stay of enforcement of certification and testing was the agency's only means to get the breathing room it needed to deal with the various unanticipated issues that arose given the breadth of the industries affected.

Some have argued that the Commission should have a more relaxed approach to exclusions from the lead limits. However, the lead provision of the CPSIA restricts the agency's discretion at a variety of points in the statute. It allows for exemptions in three limited circumstances described in section 101(b). That section allows exclusions for inaccessible component parts of children's products and also allows the Commission to exempt electronic devices where lead is necessary for their functionality and cannot be made inaccessible. Beyond those exclusions, however, the statute leaves very little flexibility. Section 101(b)(1) of the CPSIA provides that the Commission may, by regulation, exclude a specific product or material that exceeds the lead limits established for children's products under § 101(a) of the CPSIA 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 result in the absorption of any lead into the human body," given reasonably foreseeable use and abuse of such product, including swallowing, mouthing, breaking or other children's activities or the aging of the product, "nor have any other adverse impact on public health or safety." (Emphasis added.)

The clear language of the statute is rigid; an assessment of whether there is absorption of "any lead" cannot be based on a risk based assessment because that language does not appear to allow any amount of lead, no matter how insignificant, to be absorbed in the human body. While the courts have occasionally upheld agencies applying a *de minimis* standard and exempting trivial risks from regulation, that has been permitted only when Congress has not unambiguously denied agencies that authority.[1] Here the act specifically limits the exclusion to an application supported by peer reviewed science supporting a demonstration that there cannot be absorption of *any* lead. Moreover, section 101(e) appears to restrict the agency's ability to use enforcement discretion while exclusion requests are pending, by stating that a pendency of a rulemaking to consider a request for exclusion "shall not delay the effect of any provision or limit . . . nor shall it stay general enforcement" of the lead limits.

Those who argue that common sense exclusions are permitted by the CPSIA would have to ignore sections 101(b)(1) and 101(e). Yet as the unanticipated consequences of the retroactive effect of the law have demonstrated, some ability to provide for *de minimis* exclusions would be helpful in implementing of the Act. The effort to deal with the *de minimis* risks given the speculative yet conceivable routes of exposure presented by certain products such as bike tire valve stems distracts attention from more serious health and safety problems that the agency must address. Recently proposed legislation banning BPA recognizes the need for such flexibility to provide relief when a manufacturer cannot comply because it is not technologically feasible to do so in the timeframes permitted. Yet such a waiver or exemption process could prove to be too resource intensive and divert agency resources to handling thousands of exemption requests when staff should instead be dealing with other risks that deserve attention such as identifying emerging hazards.

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[1] *Compare Les v. Reilly*, 968 F. 2d 985 (9th Cir.1992) and *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) with *Ohio v. EPA*, 992 F.2d 1520, 1534-35 (D.C. Cir. 1993). *See also* Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, U Chicago Law & Economics, Olin Working Paper No. 150. This paper can be downloaded without charge at: http://www.law.chicago.edu/lawecon/index.html.

The CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks and the actual consequences of the hazard. Congress should permit the agency to exempt certain products from the limits established by the CPSIA, to ease the burdens of testing and certification on products unlikely to present more than a negligible health risk, and to regulate on a timetable influenced by the seriousness of the actual risks not artificial deadlines. A more flexible exception process would avoid regulation of *de minimis* problems both prospectively and retroactively.

Moreover, this would allow the CPSC to consider the impacts of the regulatory requirements of the CPSIA, like the balance between the adverse effects on second-hand sales of children's clothing or bicycles and the potential risks from exposure in such products, which is especially important during the current economic crisis. It should also allow the Commission to balance risks such as balancing the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV. Given that exceptions would be made on a notice and comment basis, the underlying analysis and support for any exceptions will be public allowing for transparency and accountability. Finally, relaxing certain deadlines in the Act will allow for better priority setting which will allow Commission resources to be put towards the most serious health risks first.

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CONCLUSION

The staff has set forth in its answers to specific questions above numerous approaches to dealing with the issues raised. In our view, we have been confronted with three major issues in implementing the CPSIA: (1) the retroactive application of requirements to inventory; (2) the broad reach of the legislative mandates given that "children's product" is defined as a product for children 12 years of age or younger; and (3) the impact of the new testing and certification requirements for all consumer products and the third-party testing requirements for children's products. You have asked us to consider possible solutions to the problems raised in the letter, and make our best recommendation as to productive solutions recognizing that these are ultimately policy decisions for others to make. We concluded that the following three changes would resolve many of the major difficulties identified above:

- Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children.

- Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

- Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities and a phase-in schedule.

As discussed above, there are many ways to address the challenges of implementation and meet the important goals of the statute. Regardless of the path chosen, some legislative changes would be helpful to allow the agency to set risk-based priorities given the finite resources available to the Commission.