Natural Resources Defense Council, Inc. et al v. United States Consumer Product Safety Commission Doc. 16 Att. 1

Exhibit A

Letter from Georgia C. Ravitz & Scott A. Cohn, Arent Fox LLP, to
Nancy Nord & Cheryl A. Falvey, Consumer Product Safety Commission
(Nov. 13, 2008)

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November 13, 2008

VIA FEDERAL EXPRESS AND ELECTRONIC-MAIL

The Honorable Nancy Nord
Acting Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Cheryl A. Falvey, Esq.
General Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: **Retroactive Application of the Consumer Product Safety Improvement Act to Inventory**

Dear Chairman Nord and Ms. Falvey:

On behalf of several wholesale and retail entities that our firm represents, and in response to Ms. Falvey's statement at the November 6, 2008 public meeting soliciting comments, we are filing this urgent plea with the Consumer Product Safety Commission (CPSC) to reconsider the staff advisory opinion issued concerning the retroactivity of the lead content restrictions set forth in Section 101 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) to inventory of children's products containing lead as of February 10, 2009. We would also like to request that CPSC consider not applying the phthalate restrictions set forth in Section 108 of the CPSIA retroactively to inventory as of February 10, 2009. Our clients have asked to remain anonymous and we hope that you understand the sensitivity of this matter to these companies; however, we have been authorized to provide you with data from these companies that you may find useful in your review process.

Arent Fox

CSPC's interpretation of the CPSIA with respect to inventory will result in significant financial hardship to companies nationwide, especially retailers, which sell, distribute, manufacture, or import children's products. The following points summarize these companies' concerns and form the basis for our urgent request that CPSC reconsider its interpretation that products containing lead (as well as phthalates, which has not yet been addressed by CPSC in terms of retroactivity) above the limits specified in the CPSIA cannot be sold from inventory or store shelves after February 10, 2009:

- ***Industry Will Suffer Significant Financial Hardship If Required to Sell or Dispose of These Products Before February 10, 2009.*** Companies are currently acting in good faith by evaluating product lines to determine whether they can comply with the new standards. However, this process has revealed to most companies that there are enormous costs involved in such compliance that had never been (and should not have been) contemplated at the time their products were ordered and distributed to retail stores.

    - ***Costs In Evaluating Products.*** Companies are incurring significant legal and technical costs in evaluating product lines to determine if they may be subject to the new lead and phthalate restrictions, and the costs of testing inventory to verify compliance are extraordinary.

    - ***Companies Will Not Be Able to Sell Through Large Amounts of Inventory that Was Manufactured Before Congress Enacted the CPSIA.*** Retailers often place orders for products many months prior to actual retail sale, and retail cycles can extend for months after delivery and placement on store shelves. In this case, many retailers will carry inventory beyond February 10, 2009 consisting of merchandise that was manufactured prior to the August 14, 2008 effective date of the CPSIA. Companies that otherwise comply with all applicable product safety laws or regulations will either have to reduce prices significantly in an attempt to sell existing inventory prior to the deadline or remove all products from sale and suffer enormous revenue losses to comply with CPSC's recent interpretation.

    - ***Companies Are Suffering from the Current Economic Crisis and Will Not Be Able to Sell These Products Before February 10, 2009.*** The current economic crisis has affected both businesses and consumers. Economists, investors, and companies expect consumer spending to decrease sharply over the next few months, especially during the upcoming holiday season. Indeed, we are inundated with news reports indicating that retailers are bracing for the worst holiday season in years. **As a result, the normal movement of goods during the holidays will slow and inventory aging will increase markedly.**

- ***Examples of Company Projections of Costs and Losses:***
    - *"Company X: Retailer"* A major national mass-merchandise retailer that is a client of our firm has advised that its costs and projected losses would be enormous, as follows:
        - Estimated costs of testing inventory: **$1.4 million**
        - Projected value of at-risk inventory as of 2/10/09: **$140 million**
        - Projected losses due to write-off of inventory if required (inclusive of internal recalls and disposing of goods): **$30 million**
    - *"Company Y: Wholesaler"* A major wholesale entity that is a client of our firm has advised that its projected write-off of unsalable inventory would be approximately **$7 million.**

- ***Congress Did Not Establish the Lead or Phthalate Limits as Immediate Bans and Companies Should be Allowed to Sell Through During the Normal Retail Cycle.*** There is no indication that Congress intended products manufactured before the CPSIA was even enacted to be removed from the shelves beginning February 10, 2009. As Ms. Falvey's memorandum notes, *"Congress recognized the need for an orderly marketplace transition when it phased in the lead limit on a rolling basis"*. If Congress had believed that the ban was necessary for the safety of the general population, it could have done so. As such, we believe that CPSC can consider the extenuating facts and circumstances presented herein, not the least of which involves the current economic crisis. CPSC has already implemented regulations that reinterpret statutory provisions of the CPSIA in light of difficult logistical circumstances raised by the industry (e.g., the Final Rule concerning General Conformity Certifications and the requirement that only importers and domestic manufacturers are required to be issuers of certifications). We believe that CPSC has authority to act in a similar fashion in this context.

We greatly appreciate CPSC's willingness to consider industry concerns with respect to implementation of the CPSIA and especially to reconsider its initial advisory opinion on the retroactivity issue. In view of the significant financial hardship that a significant number of retailers and wholesalers would suffer just to initially ascertain whether their goods were in compliance (not even factoring in the magnitude of expenses related to possible removal and disposal of inventory), and in view of the threat of staggeringly high penalties under the CPSIA for non-compliance, we respectfully urge CPSC to reconsider its interpretation of the CPSIA with respect to inventory, and permit industry to sell through any inventory that may contain levels of lead (as defined by Section 102 only) or phthalates (as defined by Section 108) in excess of limits to be imposed as of February 10, 2009.

Thank you for your consideration of this matter.

Sincerely,

Georgia Ravitz

Georgia C. Ravitz
Scott A. Cohn