LEARNING RESOURCES®

February 24, 2009

The Hon. Bobby L. Rush, Chairman
The Hon. George Radanovich, Ranking Member
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Washington, DC 20515

Re: Revisiting the Toxic Substances Control Act of 1976

Dear Chairman Rush and Ranking Member Radanovich,

As a parent and as a member of my community, I am concerned about chemical safety in the United States. As a businessperson, I am concerned that a well-intentioned modification of the Toxic Substances Control Act (TSCA) will make American businesses less competitive and less financially strong at the worst possible time economically, all without materially improving product safety. I do not feel endangered by the current state of TSCA, by the behavior of American businesses or by the current regulatory approach of the EPA or other Federal or State agencies. I worry that the Subcommittee may take action to fix a problem that does not truly exist under the current format of TSCA.

In your evaluation of TSCA for possible revision and amendment, I would like to add a note of caution over the potential adverse consequences of a change to a "precautionary" approach to regulation of chemicals. The expense and disruption of this change could be very damaging to our economy at a very difficult time in our country's history. That damage could be irreversible and have a lasting impact on jobs.

I have recent experience dealing with a precautionary law and have learned to fear an open-ended regulatory approach for its cost and administrative burden that are out of proportion to the stated objective of improved safety. Our business serves the school markets for children aged 2-13 years of age. Recently, our business was severely impacted by a new law, the Consumer Product Safety Improvement Act (CPSIA), signed into law by President Bush on August 14, 2008. This groundbreaking law was crafted to address the concern over a large number of toy recalls in 2007 relating to lead-in-paint and juvenile metal jewelry.

The new law attempted to solve the perceived "gaps" in regulation by making every product intended for children suspect until proven otherwise. This proved very costly indeed. Under the CPSIA, the definition of a "children's product" subject to regulation was widened to encompass ALL products designed or intended primarily for a child 12 years of age or younger (15 U.S.C. §2052(a)(2)). The breadth of this definition ensures that virtually anything marketed to children will be subject to the very specific restrictions of the Consumer Product Safety Act (CPSA), regardless of known or quantifiable risk of injury. By casting such a wide net without regard to quantifiable risk, the CPSIA is classic "precautionary" law. In addition, the CPSIA requires that all "children's products" be tested

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by a certified independent laboratory prior to importation or sale (15 USC §2063(2)). Thus, not unlike certain proposed changes to TSCA, all children's products must be demonstrated "safe" prior to sale. All violations of the CPSA and the Federal Hazardous Substances Act (FHSA) must be immediately self-reported to the CPSC (15 USC §2064(b)). The CPSIA therefore renders all violations of the law an emergency, irrespective of risk of injury. This costs money – but produces few benefits to anyone.

Notably, the CPSIA (essentially) prohibits exceptions allowing the sale of materials or products in excess of the new standards (see http://cpsc.gov/about/cpsia/101lead.pdf). Thus, the sale of materials or products with phthalates and/or lead in excess of standards is now a *per se* violation of the CPSA, whether or not there is any evidence of risk or danger associated with the use of such materials or products. No matter the miniscule risk for a particular material or product, the CPSIA does not allow any "taking chances." It is the ultimate precautionary law – but is that in anyone's interest?

The CPSIA is written to require all manufacturers to prove with reasonable certainty the safety of their children's products prior to sale. This effort might be worth the trouble and expense if it was clear that the products being tested were likely to cause harm. If the linkage between the harm and the testing is weak, the expense is by definition economically wasteful. Please consider the following perplexing examples:

a. Ordinary books printed before 1985. The record does not contain a single instance of lead poisoning from a book since Mr. Gutenberg invented his printing press. See http://bookshopblog.com/2009/02/14/cpsia-book-banning-in-the-guise-of-safety/ and http://farm4.static.flickr.com/3409/3279001383_d861b3462f_o.jpg.

b. Ballpoint Pens. The brass ball at the tip of a ballpoint pen may contain lead. Children that suck on that end of a pen have other problems, not to mention blue teeth. Should ballpoint pens be illegal for children? If they are, as the CPSIA seems to require, then the only ballpoint pens permitted on the U.S. market will be pens created for "general use". Pens for "general use" will include the same brass ball at the "ink end" of the pen. Those "general use" pens can be purchased and supplied to children. Why? Because nothing restricts the sale or use of general use items under the CPSIA.

c. Bicycle Seats. The vinyl in bicycle seats may contain lead in trace amounts above the lead standards for children's products. Were bicycle seats a baby bottle nipple, that might be a legitimate safety concern. However, bicycle seats are not for sucking. It is rather unusual for children to lick bicycle seats after a long ride. Should bicycle manufacturers be forced to replace bicycle seats to meet an arbitrary standard? Is this precaution adding materially to safety in our society, or is the law in this application simply a drag on our economy? [Remember, there are NO exceptions for materials that exceed the lead standard since the law does not take into account quantifiable risk of injury.]

d. ATV Spare Parts. Metal alloys often contain lead. Lead is an essential element in certain critical alloys and is chemically bound into the metal alloy. Should ATVs for children be illegal if the metal alloys in nuts and bolts securing tires contain lead? And what real world harm is being protected by such a rule? ATV enthusiasts insist that the only sickness possible from using an ATV is the common cold. Colds are not caused by metal alloys containing lead.

e. Aluminum Foil. Aluminum foil is a commodity used in many school science kits. Aluminum foil is sold to consumers in grocery stores without regulation or required pre-sale testing, all for use in the preparation or storage of food. Its use in baking applications is well-known and common. Should school suppliers have to test aluminum foil to satisfy a precautionary law like the CPSIA? What safety objective is being served by testing this food grade material again and again?

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. To make this point, we have submitted quotes to Congress for as much as $24,050 to test a single telescope under the CPSIA. Even allowing for new test specifications recently announced by the CPSC, the cost for a typical complete suite of CPSIA tests is likely to exceed $1,500 per average sku. Many of these tests will be repeated endlessly and are often performed on materials that could not fail the test (e.g., testing for the presence of phthalates in polystyrene, wood or steel alloys). In our business, we have more than 2,000 catalog items. In our group of companies, we have more than 40,000 inventory items. The prospective testing cost for our inventory is staggering. It is worth noting that we have a virtually unblemished track record of safety since the founding of Learning Resources, Inc. in 1984, so this massive expense is highly unlikely to improve our safety record - or affect safety whatsoever.

b. Increased Administrative Expenses. The CPSIA requires that all products include tracking labels on both the packaging and the product itself (as of August 2009). This is yet another precautionary measure meant to facilitate more precise recalls of defective products. As noted, our company has a virtually unblemished 25-year track record of safety, so tracking labels will be nothing more than useless (and excessively expensive) decoration in our view. We will have to employ several employees to track and manage this process to ensure accurate recordkeeping and execution. Each change in product or packaging is deemed a "product development project" in our company – we fully expect to see the flow of innovative new product development decline to accommodate this new rule. We will also incur

additional expenses supervising numerous factories in their production runs for compliance with this rule. Given that we make many short production runs, we will have to track and manage component inventory to ensure matching serial numbers and data between packaging and the product. This massive investment will be wasted unless we have a recall. Our company regards product recalls as something embarrassing, to be avoided as a high priority. With the increasingly strict laws governing product composition, we believe the already low probability of a recall has been reduced further. Thus, we consider every dollar spent on lot traceability labels to be WASTED.

c. Reduced Incentive to Innovate. The increased cost to bring a product to market will make many viable – and valuable – products uneconomic. To cover the cost of developing, testing and safely managing new products, the prospective sales of the new item will need to be much higher than before. This will mean that low volume items won't be produced and new market entrants may find themselves priced out of the market. We think that increasingly companies will be forced to abandon specialty and niche markets to concentrate on the mass market. Over time, only high volume items will survive. This will hurt many important, but small, markets like educational products for the blind or the deaf. Our company, with its 2,000 catalog items, is probably now a dinosaur under the CPSIA – we have a strong incentive to reduce our product line to 50-150 items, a manageable undertaking for the new CPSIA rules, and focus on high volume markets only. The incremental profit from selling only in large runs to large volume customers will drive many enterprises to abandon business models requiring large product lines.

d. Increasing Bureaucracy Will De-motivate. The tedious, repetitive and uninformative activities required under the CPSIA to justify the sale of perfectly safe products tend to demoralize and frustrate our associates. Our team is drawn to our education company with a sense of mission. By converting a job oriented toward making the world a better place into a job of filling out forms and being afraid of who will investigate you next under the CPSIA, Congress made de-motivation into a serious business issue. We believe finding and retaining top talent will become increasing difficult in the children's products industry because of creeping bureaucracy and the associated frustration from dealing with picky rules unrelated to our goal, objective product safety.

e. Misallocated Resources Result in Higher Prices and a Lower Standard of Living. The prospect of liability (civil and criminal) under the CPSIA is driving a refocus of children's product businesses away from product development, marketing, sales and infrastructure investment toward bureaucratic excellence. The diversion of resources toward unproductive, liability-minimizing activities certainly violates the Pareto Principle (80/20),

which dictates that a properly organized business will allocate its resources to the activity which produces the greatest economic return. The precautionary CPSIA creates inefficient incentives which favor heavy investment in unproductive, non-revenue producing overhead – and passes along these inefficiencies in the form of higher prices to an unsuspecting public. The illusion of improved safety cannot overcome the reality of dollars that won't go as far, buy as much or provide as high as standard of living as prior generations enjoyed.

f. Small Business Will Certainly Suffer. The CPSIA is written for big companies, but applies to small and medium-sized companies with dramatic and negative impact. The hyper-technical rules and requirements are beyond the capability of all but the most highly-trained quality and legal staffers to comprehend. Small businesses don't have the resources to manage compliance with such laws, and will throw their hands up over compliance. 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. We know of businesses that employ retail managers who earn $8.50 per hour. That kind of manager is not equipped to deal with a law of this complexity, regardless of CPSC "guidance". It is completely unrealistic to assume that a precautionary law will not affect the economics of small businesses permanently ill-equipped to deal with it.

There are other aspects of the CPSIA that provide a "watch out" for any modification of TSCA. The implementation timeline of the CPSIA was wholly unrealistic. The CPSC was unable to keep up with the myriad of expectations for rulings and advice contemplated by Congress. In addition, even if the CPSC had met the unrealistic expectations of Congress under the law, the businesses affected by the law were unable to absorb so many changes in such a short period. Even today, it is virtually impossible for operating businesses to keep up with the seemingly daily releases and requests for comments by the CPSC while still administering their business through an epic economic downturn. At a time of basic economic survival for many companies, Congress put the massive children's products industry on the clock!

It is likewise notable that the retroactive application of the new standards also added much economic pain to the already monstrous chore of complying with the new law. By giving only six months to sell off merchandise soon-to-be-deemed contraband under the law (without any quantification of risk of injury), Congress imposed a terrible cost on industry and incited a trade war between retailers and manufacturers over who would be "stuck" with the un-saleable inventory. [Notably, the advanced warning of the retroactive effect of the law on phthalates was actually only two business days (see http://cpsc.gov/about/cpsia/nrdcopinion.pdf).] The short time period to sell off the newly illicit inventory is FAR SHORTER than was offered by the Eighteenth Amendment and Volstead Act in 1919 when alcohol was banned in the Prohibition, the culmination of a nearly 100 year anti-alcohol campaign. Clearly, there are significant dangers in the

imposition of retroactive bans, which should be avoided in any revision to TSCA to spare needless business and job losses.

The dangers of changing a long-standing risk-based statute such as TSCA to a precautionary approach via legislation are clearly demonstrated by the impact of the CPSIA on the children's products industry. The CPSIA shows the damage that can be done to law-abiding businesses, particularly small and medium-sized businesses, as a result of unintended consequences when regulations are upended. While it may ease the mind to eliminate any possibility of risk before taking a chance on commerce, the cost to confirm the safety of products known to be safe is such an economic depressant that the business community may well lose its vitality. Arguably, in a legal environment where manufacturers have strict liability for their role in the chain of commerce, strong and sufficient incentives exist to drive conscientious corporate good citizenship under risk-based laws. The imposition of precautionary testing and certification on responsible companies already responding to incentives in our legal system will only replicate the problems we are experiencing under the CPSIA.

Not unlike the CPSIA, a revised TSCA could cause great economic harm by moving away from a risk-based approach to a purely precautionary approach. I urge the Subcommittee to carefully consider these issues and to act to balance the interests of all Americans in an appropriate expectation of risk assessment with their interest in the health of their economy and the many employment opportunities provided by industry. I hope you will exercise all due caution in making any change to TSCA that will distance it from a risk-based approach.

Thank you for considering my views on this important subject.

Sincerely,

Richard M. Woldenberg
Chairman
Learning Resources, Inc.

cc. The Hon. Henry Waxman, Chairman
The Hon. Joe Barton, Ranking Member
House Committee on Energy and Commerce