

Congress of the United States
Washington, DC 20510

November 24, 2008

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

Commissioner Thomas Hill Moore
U.S. Consumer Product Safety
Commission
4330 East West Highway
Bethesda, MD 20814

Dear Acting Chairman Nord and Commissioner Moore:

We write to express our strong concerns with the analysis by General Counsel Cheryl A. Falvey, dated November 17, 2008, regarding the retroactivity of phthalate restrictions approved in the Consumer Product Safety Improvement Act (CPSIA) of 2008. This decision is directly contrary to the plain language of the CPSIA. We request that the Consumer Product Safety Commission correct this interpretation to reflect true Congressional intent and protect the health of children.

As you know, Section 108 of the CPSIA prohibits the sale of certain children's products containing phthalates. Section 108(a) bans the sale of specific products containing phthalates,

“Beginning on the date that is 180 days after the date of enactment of this Act, it shall be unlawful for any person *to manufacture for sale, offer for sale, distribute in commerce, or import into the United States* any children's toy or child care article . . .” (emphasis added)

This critical language is repeated again in Section 108(b) regarding the interim prohibition:

“Beginning on the date that is 180 days after the date of enactment of this Act and until a final rule is promulgated under paragraph (3), it shall be unlawful for any person *to manufacture for sale, offer for sale, distribute in commerce, or import into the United States* any children's toy that can be placed in a child's mouth or child care article . . .” (emphasis added)

This language unambiguously restricts not only the manufacture of these products following enactment, but also the retail sale of any children's toy manufactured before this deadline.

The General Counsel's letter relies on the regulatory framework for a consumer product safety standard under the Consumer Product Safety Act in determining how the phthalate restrictions should be applied. The CPSIA, however, clearly states that the provision should take effect 180 days after enactment. This clear statement should supersede the older and more general statute, the Consumer Product Safety Act. The Supreme Court has affirmed that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 141 (2000); quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-531 (1998). While Congress may have structured the phthalate provision as a consumer product safety standard, and therefore differently than the CPSIA lead provisions, the intent to ban all sales of children's products containing certain phthalates 180 days after enactment of the underlying legislation is clearly stated in the statute.

We strongly disagree with the letter's concern that the products in the supply chain were manufactured prior to any indication that children's products containing phthalates would be restricted. On the contrary, toy manufacturers had many indications that products with phthalates could not be widely sold in the United States beginning in early 2009.

Legislation banning phthalates in children's products became law in California in September 2007, with an effective date of January 1, 2009. The ban imposed by that law applies to all inventory, not just to products manufactured after the deadline. In addition, leading toy retailers, including Toys "R" Us and Wal-Mart, announced earlier this year that they would phase out the sale of toys containing phthalates. Finally, the passage of the CPSIA gave manufacturers the clear guidance that they would not be permitted to "offer for sale" or "distribute in commerce" toys with these phthalates 180 days after enactment. Consumers should not be responsible for the toy manufacturers' decisions to continue to manufacture toys with phthalates following the enactment of the CPSIA and voluntary action by the nation's leading retailers.

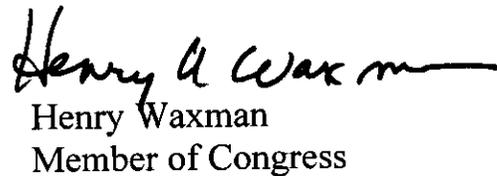
We urge the Consumer Product Safety Commission to act immediately to overturn this flawed analysis and clarify that no toy or children's product containing more than .1% of certain phthalates may be legally sold after February 10, 2009. Without action, parents will have no way of determining whether a product they

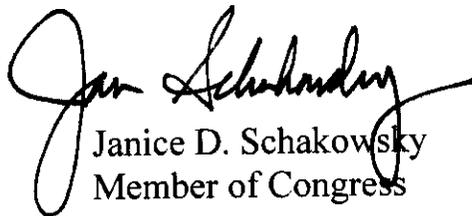
purchase was manufactured before or after the deadline, or whether it contains these hazardous chemicals. Consumers may erroneously believe that dangerous products will be removed from store shelves once the CPSIA takes effect; that will not be the case if this analysis is allowed to stand. It is not practical to require consumers who wish to avoid phthalates to contact individual toy manufacturers to learn when a specific product was manufactured and whether it contains phthalates. That is precisely why the authors of this legislation specified in clear terms that the prohibition would apply to all inventory sold after February 10, 2009.

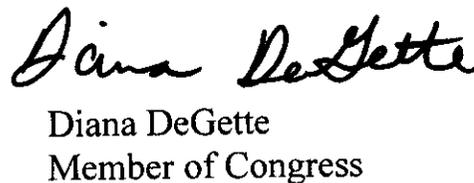
This interpretation of this clearly-worded statute is contrary to the plain language of the Act. It also contravenes the understanding shared by those who authored this legislation and participated in conference committee negotiations. We urge you to immediately overturn this decision. Thank you for your consideration, and we look forward to your timely response.

Best regards,


Dianne Feinstein
United States Senator


Henry Waxman
Member of Congress


Janice D. Schakowsky
Member of Congress


Diana DeGette
Member of Congress