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Ways and Means Committee Office
1102 Longworth House Office Building
Washington, DC 20515

Letter for the record: U.S. – E.U. Trade and Investment Partnership Negotiations

Overview

The Handmade Toy Alliance (HTA) was formed in response to the Consumer Product Safety Improvement Act (CPSIA) passed in August of 2008 by the U.S. Congress. We are an alliance of 780 independent specialty toy stores, small batch toy makers and children's product manufacturers from across the United States and Europe who want to preserve access to unique handmade and small batch toys, clothes, and all manner of children's goods. The HTA seeks to:

- lend a voice to specialty toy stores, small batch toy makers and children's product manufacturers;
- assist in raising awareness of the issues that directly impact HTA members;
- provide HTA members access to their larger scale peers;
- support and promote HTA members.

The U.S. Consumer Product Safety Improvement Act drastically changed the landscape for producing and retailing specialty toys and children's products in the United States. Business is hampered by an arduous journey through a morass of regulations. Plentiful options of unique specialty products for filling store shelves withered away. Similarly, producers of small batch children's products in Europe saw their markets shrink and opportunities for expansion to the U.S. evaporate.

At the same time, there is a growing group of consumers who prefer durable toys that cater to a child's imagination and creative ability. Rather than entertain, small batch specialty toys encourage exploration, stimulate creativity and problem solving, promote playing together with others and allow growing confident at the child's own pace.

Specialty small batch toys reach consumers at several thousand independently owned toy stores all across America and Europe. Generally, the inventory for these stores comes from three sources;

1. toys from the E.U. produced in small quantities by second tier companies,
2. domestically manufactured toys produced in small quantities by second tier companies,
3. and to a lesser extent – toys produced in larger quantities in the US, Europe and the Far East.

The CPSIA has negatively affected two of the three supply sources for specialty retailers. The primary cause of the supply chain disruption for these types of toys is similar but differing safety regulations in the U.S. and the European Union, (E.U.) As a result, many specialty toy stores have been forced to close or alter and rescale their businesses¹.

¹ See listings - Partial List of Retail Businesses Altered or Closed Due to CPSIA - in the Appendix



Independently owned specialty toy stores are economically viable because they differentiate themselves from mass market retailers selling children's products mass produced in the Far East. Providing unique and distinctive children's products affords them opportunity as well as a reason to exist. Without this distinction there is no practical way to compete with mass market retailers, no business opportunity, and no reason to exist.

The Handmade Toy Alliance (HTA) represents these specialty retail stores and they comprise 25% of our membership. We also represent the domestic small batch producers and those who import and produce European small batch items.

The E.U. Predicament

Certainly there are small batch toy manufacturers all over the world, but by-and-large, those large enough to consider international markets are concentrated in the European Union. These second tier companies often produce toys by hand within Europe and not in completely automated factories. They employ workers from their communities and are important in their local economies. Typical yearly revenue for a second tier manufacturer ranges from €3 million to €30 million.

The countries that make up the E.U. already have stringent toy regulations in place as does the U.S.

European Union – EN-71 European Toy Safety Standard and the recent Directive 2009/48/EC.

United States – CPSIA and ASTM F963-11 Toy Safety Standard

These toy safety standards share some commonality, but because the standards are not identical, small batch manufacturers in Europe and the U.S. are forced to perform multiple additional tests in Consumer Product Safety Commission (CPSC) approved labs. The economic burden of additional tests required by the dissimilarities makes it extremely difficult to economically bring these products to market in the U.S. or the E.U. Many small batch toy suppliers from the E.U. have been forced to cease exports to the U.S. or limit the number of products they export². It is not that the products these companies produce are not safe, but that the economics of compliance with two differing safety standards is unaffordable. The CPSIA and EN-71 place a trade barrier between European small batch manufacturers and U.S. specialty retailers and to a lesser extent also between U.S. small batch manufacturers and European specialty retailers.

Typical testing costs for compliance and certification to EN-71, the European Union toy safety standard, range from \$1,000 to \$3,000 per product. The additional costs for third party testing for certification to the CPSIA and ASTM F963 range from \$750 to \$2,500. When manufacturing batch quantities that are typically less than 500, the amortization of these costs results in price increases that cannot be borne by the manufacturer, the importer, nor the consumer. It's an easy to understand equation:

$$\text{Additional cost to manufacture each product} = \text{additional batch testing cost} / \text{batch size.}$$

Large multinational companies producing toys have found ways to comply with both U.S. and E.U. regulations without significant economic burden through special rulings like firewalled labs and batch sizes that are well past 10,000 units, even into the hundreds of thousands. These companies also have the legal staff and infrastructure to navigate the myriad of regulations that apply. Second tier companies have none of these possibilities available to them.

Yet these small batch toys and these countries have not been the source of unsafe products. The safety record of small batch toys produced in Europe and the U.S. is exemplary. The Consumer Product Safety Commission's recall data show no recall activity from small batch manufacturers in these jurisdictions in 2011 and 2012. In the past four years, out of 155 recalls for toys, only 2 have been from the European

² See listings - Partial List of Businesses within E.U. Limiting or Ceasing Export to the USA - in the Appendix



Union and neither of those from a small batch manufacturer. We must go all the way back to 1999 to find a recall from a small batch manufacturer in the E.U.

It is clear that both U.S. and E.U. toy safety standards work to provide excellent protection for consumers in both regions. The HTA supports a process of mutual recognition of toy safety standards by each jurisdiction to restore free and unencumbered trade of these products.

The H.R.2715 Attempt at U.S. Recognition of EN-71

For three years, the Handmade Toy Alliance worked on Capitol Hill for a legislative fix for these unintended consequences caused by the CPSIA. We wrote letters, worked on language, testified before Congress, attended hearings and markups, visited Senators and Representatives, all to have our collective voice heard. There was wide agreement within Congress that relief should be provided for businesses represented by the HTA. This culminated in the passing of H.R.2715 in August of 2011 that has provisions that are a direct outgrowth of our work.

Specifically, attempts at legislative relief for the international small batch supply chain appear in two sections of the Consumer Product Safety Act (CPSA) as amended by H.R.2715.

- First, section 14(d)(3)(A)(v) under REDUCING THIRD PARTY TESTING BURDENS,
"... (A) ASSESSMENT.— Not later than 60 days after the date of enactment of this paragraph, the Commission shall seek public comment on opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. The request for public comment shall include the following:
...
(v) The extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations applicable under this Act.
..."
- and second, 14(d)(4)(A)(iii) under SPECIAL RULES FOR SMALL BATCH MANUFACTURERS.
"...(A) SPECIAL CONSIDERATION; EXEMPTION.—
...
(iii) CERTIFICATION.—In lieu of or as part of any alternative testing requirements provided under clause (i), the Commission may allow certification of a product to an applicable consumer product safety rule, ban, standard, or regulation, or portion thereof, based on documentation that the product complies with another national or international governmental standard or safety requirement that the Commission determines is the same or more stringent than the consumer product safety rule, ban, standard, or regulation, or portion thereof. Any such certification shall only be allowed to the extent of the equivalency with a consumer product safety rule, ban, standard, or regulation and not to any other part of the consumer product safety rule, ban, standard, or regulation.
...
(E) DEFINITIONS.— For purposes of this paragraph—
(i) the term 'covered product' means a consumer product manufactured by a small batch manufacturer where no more than 7,500 units of the same product were manufactured in the previous calendar year; and
(ii) the term 'small batch manufacturer' means a manufacturer that had no more than \$1,000,000 in total gross revenue from sales of all consumer products in the previous calendar year. The dollar amount contained in this paragraph shall be adjusted annually by the percentage increase in the Consumer Price Index for all urban consumers published by the Department of Labor."

The driving force behind this language was the lobbying effort of the HTA for the restoration of small batch supply across the Atlantic. It was a first attempt at mutual recognition, from the U.S. towards the E.U. toy safety directive.

The CPSC has already requested comments as required under the clause 14(d)(3)(A)(v) REDUCING THIRD PARTY TESTING BURDENS and CPSC staff has prepared a document titled "*Consideration of Opportunities to*



Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children’s Products”, dated August 29th, 2012. This document includes the following language:

“Staff recommends that the Commission consider creating, maintaining, and recognizing a list of equivalent tests in international standards, conformity to which would be indicative of conformity to the corresponding test in a CPSC-administered children’s product safety rule.

While no other international standard is identical to a CPSC-administered children’s product safety rule, there are many tests within certain other international standards that are the same, or that are more stringent than, their equivalent test within the CPSC-administered children’s product safety rule. For example, the toy abuse tests in the European standard EN71, part 1, and the International Standard ISO 8124-1 are the same, or more stringent than, their corresponding tests in ASTM F963-11. Recognizing other international standards, or tests within a standard, as equivalent to a CPSC rule, could allow children’s product certifiers to avoid repeating some third party tests for the same product and directly avoid additional testing costs, while assuring compliance to the applicable children’s product safety rules. This scheme could be used for certification, material change, and periodic testing purposes. Harmonized or equivalent tests would be required to be conducted by a CPSC-accepted testing laboratory. Thus, a project to consider establishing equivalency between tests in our regulations and comparable international standards must also consider how third party conformity assessment bodies will be accredited to perform tests to such standards.

It is possible that an effective implementation of this recommendation could result in a significant reduction in third party testing costs that might be realized by many manufacturers.”

Subsequently, the CPSC Commissioners voted to move forward on this issue, but then chose not to fund the effort during the 2013 budget year. It does show that the staff of the CPSC sees significant cost reduction benefit in recognition or harmonization with the E.U. safety standard. This in turn provides opportunity for restoration of small batch toy commerce across the Atlantic.

The subsection (iii) of SPECIAL RULES FOR SMALL BATCH MANUFACTURERS indicates that the CPSC may accept compliance with an international standard as an alternative test when it is determined to be “the same or more stringent” than what is required by the CPSA. The intent being that if a small batch product is already undergoing third party tests to ensure safety and if those tests prove to be adequate, then that small batch product should be allowed entry to the specialty toy market in the U.S.

This small batch rule includes the definition of the size of the manufacturer as one that has revenue of less than \$1 million yearly and produces no more than 7,500 units of the same product in the period of one year. The definition serves to limit the size of a company that can benefit from the small batch rule. Unfortunately the definition excludes second tier small batch manufacturers within the U.S. and those in the E.U. through the revenue cap. This definition of a small batch manufacturer actually only encompasses the smallest of businesses and home-based crafters rather than the manufacturer that actually produces product in small batches.

The CPSC has also interpreted the law so that in cases where a combination of a foreign manufacturer and a domestic importer bring product to the U.S. that the rule applies to both. This interpretation renders any hope that legislative relief might be applicable for a small importer useless as a means for breaking the small batch children’s product trade barrier between the U.S. and E.U. For instance, it was previously common for a small importer to bring products from a few European second tier manufacturers to the U.S. and to distribute those products to specialty retail.

The Birthing of H.R.2715

It is instructive to see the progression of the language chosen to provide relief for European and U.S. small batch producers on the legislative side. The working bill preceding H.R.2715 was H.R.1939, also known as



ECADA. That bill included no language referencing international toy standards. Full markup of that bill was cancelled the morning of June 2nd, 2011, but Congressman Pitts was prepared, with bipartisan support, to offer an amendment to H.R.1939 that allowed for the use of an international toy safety standard for compliance. It included language that read “substantially equivalent or more stringent.”³ This amendment never had opportunity to be offered.

Then on August 1st, 2011, the confluence of three forces caused movement of a different CPSIA fix – H.R.2715.

1. The retroactive 100 ppm lead limit approved by the CPSC two weeks earlier,
2. The need to increase the U.S. debt ceiling to avoid a default a day later,
3. and Congress’ desire to start August recess.

H.R.2715 was created, passed through the House under suspension of rules and then through the Senate by unanimous consent because the collision of these circumstances created a necessity to move quickly without the usual due process. So it is even remarkable that the Pitts amendment, which was never offered, was split into two and included in H.R.2715 as detailed above. This indicates congress does have a desire to remove the trade barrier.

Unfortunately, the degree of equivalency for toy safety standards was tightened to be “same” rather than “substantially equivalent.” It is one step short of recognition of E.U. toy safety standards.

Routes for Relief

We are left to sort out the details and what possibilities are available for relief from this predicament. Under current legislation, this boils down to the following possibilities:

1. Have the CPSC recognize European Union toy safety standards as an adequate alternate test for certification of product – as a “reasonable method” for a small batch manufacturer – and increase the financial cap for definition of a small batch manufacturer to a level that allows actual second tier small batch product to navigate the trade barrier.

This requires legislative action to change the revenue cap for the definition of a small batch manufacturer to include 2nd tier manufacturers in Europe. Alternatively, a method for allowing a U.S. based importer to be subject to the revenue cap once for each foreign company it imports provides a starting point towards a permanent solution.

2. Provide relief through CPSA section 14(d)(3)(A)(v) under REDUCING THIRD PARTY TESTING BURDENS. This is outside the small batch provisions of H.R.2715 and provides a route for relief in a broader context. This includes actively seeking mutual recognition of toy safety standards between the U.S. and the E.U.

The CPSC must be pressured to act on this issue to provide tangible results rather than issuing hollow edicts that go nowhere. The legislation allows for this to occur, but there is presently no willingness within the leadership of the Commission to make the commitment to actually reduce the regulatory burden in this way.

Conclusion

Independently owned specialty toy stores help to ensure diversity and enhance consumer choice in the children’s product marketplace, both in the U.S and the E.U. Toys sold by these retailers encourage and stimulate a child’s imagination and provide alternatives to mass produced toys that simply entertain. Since August of 2008 when the CPSIA was signed into law, the number of specialty toy stores in America has been decreasing, and safe small batch products from the E.U. have gradually left the U.S. market.

³ See text of Amendment to be Offered to H.R.1939 in the Appendix



Requiring these second tier manufacturers who already comply and test to rigorous standards, to do it all over again, and absorb the costs, just to enter the market is a functional trade barrier and causes economic hardship for retailers, importers, and second tier manufacturers and does nothing to improve safety. The end result is: fewer specialty toy shops, less jobs, limited choice for consumers in the U.S., and a shrinking market for small batch producers in the U.S. and the E.U.

To this point, efforts by the U.S. Congress and the CPSC to solve this problem and remove the trade barrier have been ineffective and half-hearted.

We urge Congress, with the Transatlantic Trade and Investment Partnership group and to actively work for mutual recognition of U.S. and E.U. toy safety standards, the most rigorous and comprehensive toy safety standards in the world.

Respectfully,

Randall Hertzler,

Vice President of Handmade Toy Alliance Board of Directors – www.handmadetoyalliance.org

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Appendix

Partial List of Retail Businesses Altered or Closed Due to CPSIA (Compiled 2009 – 2011)

A Cooler Planet – Chicago, IL	Mahar Dry Goods – Santa Monica, CA
A Kid’s Dream – Conway, AK	Moon Fly Kids – Las Vegas, NV
Attic Toys – Naples, FL	Nova Naturals – Williston, VT
Baby and Beyond – Albany, CA	Obabybaby – Berkley, CA
Baby and Kids Company – Danville, CA	OOP! – Providence, RI
Baby Sprout Naturals – Fair Oaks, CA	Oopsie Dazie – South Jordan, UT
Bellies N Babies – Oakland, CA	Phebe Phillips, Inc. – Dallas, TX
Black Bear Boutique – Portland, OR	Red Rock Toys – Sedona, AZ
Creative Hands – Eugene, OR	Storyblox – New Vienna, OH
Curly Q Cuties – Texas	Sullivan Toy Co. – Jenks, OK
Due Maternity – San Francisco, CA	The Green Goober – Mineapolis, MN
Eleven 11 Kids – Santa Rosa, CA	The Kids Closet - Rochester, IL
Essence of Nonsense – St. Paul, MN	The Learning Tree – Chicago, IL
euroSource LLC – Lancaster, PA	The Lucky Pebble – Kailua, HI
Fish River Crafts – Fort Kent, ME	The Perfect Circle – Bremerton, WA
Gem Valley Toys – Jenks, OK	The Wiggle Room – Slidel, LA
Hailina’s Closet – Ellensburg, WA	Toy Magic – Bethlehem, PA
Honeysuckle Dreams – Rockville, MD	Toys From The Heart – Royersford, PA
Kidbean – Asheville, NC	Urban Kids Play – Seattle, WA
Kungfubambini.com – Portland, OR	Waddle and Swaddle – Berkley, CA
LaLaNaturals.com – Bellingham, WA	Whimsical Walney, Inc. – Santa Clara, CA
Lora’s Closet – Berkley, CA	Wonderment – Minneapolis, MN
Magical Moon Toys – Logan, UT	Wooden You Know – Maplewood, NJ

Partial List of Businesses within EU Limiting or Ceasing Export to the USA due to the CPSIA (Compiled 2009 – 2011)

Bartl GmbH dba Wooden Ideas – German	Joal – Spain
Brio – Sweden	Kathe Kruse – Germany
Castorland – Poland	Kinderkram – Germany
Detova – Czech Republic	Margarete Ostheimer – Germany
Eichorn – Germany	Saling – Germany
Finkbeiner – Germany	Selecta Spielzeug – Germany
Gollnest & Kiesel KG (GOKI) – Germany	Siku – Germany
HABA – Germany	Simba – Germany
Helga Kreft – Germany	Woodland Magic Imports – France
Hess – Germany	



Amendment to be Offered to H.R.1939

**AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 1939
OFFERED BY MR. PITTS**

Page 15, line 2, strike “testing” and insert “bases or”.

Page 16, after line 4, insert the following:

1 “(C) ALTERNATIVE BASES.—The alter-
2 native bases or procedures for certification for
3 any product described in subparagraph (A)(iii)
4 may include evidence that the product conforms
5 with a standard or safety requirement, includ-
6 ing an international standard or requirement,
7 that the Commission determines is substantially
8 equivalent or more stringent than the applicable
9 consumer product safety rule.”.

