OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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C O N T E N T S

OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION

THURSDAY, AUGUST 2, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:40 a.m., in room 2322, Rayburn House Office Building, Hon. Mary Bono Mack (chairman of the subcommittee) presiding.

Members present: Representatives Mack, Blackburn, Bass, Harper, Lance, Guthrie, Olson, McKinley, Pompeo, Kinzinger, Barton, Butterfield, Schakowsky, Sarbanes, and Waxman (ex officio).

Staff present: Paige Anderson, Commerce, Manufacturing, and Trade Coordinator; Kirby Howard, Legislative Clerk; Brian McCullough, Senior Professional Staff Member, Commerce, Manufacturing, and Trade; Gib Mullan, Chief Counsel, Commerce, Manufacturing, and Trade; Andrew Powaleny, Deputy Press Secretary; Shannon Taylor Weinberg, Counsel, Commerce, Manufacturing, and Trade; Michelle Ash, Democratic Chief Counsel, Commerce, Manufacturing, and Trade; Felipe Mendoza, Democratic Counsel, Commerce, Manufacturing, and Trade; and William Wallace, Democratic Policy Analyst.

OPENING STATEMENT OF HON. MARY BONO MACK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. BONO MACK. Good morning. The subcommittee will now come to order.

It has been a year now since Congress, at the urging of our subcommittee, approved key reforms to the Consumer Product Safety Improvement Act of 2008. Today we are going to check under the hood, talk to members of the Consumer Product Safety Commission, and see how it is working.

And the Chair now recognizes herself for an opening statement. And I appreciate that general counsel changed the clock from 86 minutes to 5 minutes, but I will keep it to 5 minutes.

So, established in 1972, the Consumer Product Safety Commission is an independent agency created by Congress to protect consumers against unreasonable risks of injuries associated with consumer products. By and large the CPSC does an admirable job of protecting Americans, and I remain very supportive of its work, but on occasion the agency makes some puzzling, head-scratching deci-

sions which create economic hardships for U.S. businesses without appreciably improving the safety of certain products.

By law the CPSC has the authority to regulate the sale and manufacture of more than 15,000 different consumer products, ranging from baby cribs to toys and from all-terrain vehicles to swimming pools. Without question the CPSC has very broad authorities, which makes congressional oversight critically important. The agency has the power to ban dangerous consumer products, issue recalls of products already on the market, and research potential hazards associated with a wide range of consumer products.

Today the CPSC learns about unsafe products in several ways. The agency maintains a consumer hotline and Website through which consumers may report concerns about unsafe products or injuries associated with products. It also operates the National Electronic Injury Surveillance System, which collects data on product-related injuries treated in hospital emergency rooms.

The broad reach of the CPSC was on full display in 2007, which has been referred to as the "year of the recall" in the U.S. Fueled by the Chinese toy scare, the CPSC alone imposed a record 473 recalls in 2007, many of these recalls involving lead in toys and other children's products. These much-publicized safety issues prompted Congress to take action and resulted in passage of the Consumer Product Safety Improvement Act of 2008, also known as CPSIA.

Among other things, CPSIA increased funding and staffing for the CPSC, placed stricter limits on lead levels in children's products, restricted certain phthalates in children's toys and child-care articles, and required the CPSC to create a public database of their products. The public database, saferproducts.—excuse me, yes, saferproductsdot.gov—no, OK, staff thinks I wouldn't notice saferproducts.gov—thank you, staff.

So, this remains a source of controversy. Manufacturers continue to express their concern that most of the complaints are not vetted by the CPSC before they are made public, opening the door to all kinds of mischief, whether to fuel lawsuits or to try and ruin a competitor's brands.

Within months of enactment of CPSIA, it became clear that implementing a number of provisions would be extremely problematic, prompting the agency to issue several significant stays of enforcement prior to 2011, including the imposition of lead limits for ATVs, off-road-use motorcycles and snowmobiles. Why the agency even considered such limits is one of those puzzling, head-scratching decisions. So last year, after several hearings, and after bicameral and bipartisan negotiations, both the House and the Senate passed H.R. 2715, offered by myself and my good friend and colleague Mr. Butterfield. On August 12, 2011, President Obama signed that legislation into law. Our purpose was to relieve unfair and costly burdens imposed on American businesses, while still maintaining critically important consumer safeguards. Today I am very anxious to learn how well that new law is working.

[The prepared statement of Mrs. Bono Mack follows:]

The Statement of the Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade
Hearing on
"Oversight of the Consumer Product Safety Commission"
August 2, 2012

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scare, the CPSC alone imposed a record 473 recalls in 2007 – many of these recalls involved lead in toys and other children's products.

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The public database...saferproducts.dot.gov...remains a source of controversy. Manufacturers continue to express their concern that most of the complaints are not vetted by the CPSC before they are made public, opening the door to all kinds of mischief, whether to fuel law suits or to try and ruin a competitor's brand.

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Mrs. BONO MACK. And with that, the gentlelady from Illinois is now recognized for 5 minutes for her opening statement.

Ms. SCHAKOWSKY. Thank you.

Let me just say that Mr. Butterfield will be here. He is on the floor and unable to come now, but I want to yield first to Mr. Waxman, who is the ranking on the full committee, for his opening statement.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Ms. Schakowsky, for your courtesy in allowing me to go ahead of you at this time because of scheduling problems that I have.

I want to thank you, Madam Chair, for holding this hearing to conduct oversight on the activities of the U.S. Consumer Product Safety Commission, and I am pleased that we have all four Commissioners here today to provide testimony.

This month will mark 4 years since enactment of the Consumer Product Safety Improvement Act of 2008, or what is called CPSIA. It will mark 1 year since enactment of Public Law 112–28, which gave the Consumer Product Safety Commission additional flexibility in implementing the law.

This law was a landmark piece of legislation. It fundamentally changed how we protect children from potentially dangerous products. Implementation of this law has been the predominant focus of the Commission. The goal of the law was to transform the agency's mission. The Commission used to be an underfunded, ineffective, reactive agency. Today the Commission is still underfunded, unfortunately, but it is no longer ineffective and reactive. Today the agency is on a path toward anticipating risks to children and acting to prevent them.

No transformation is easy, and this has been no different. There were some rough waters in the early days of implementation, and a year ago we had to act to pass some targeted fixes to the law. But make no mistake about it, this law has been a success. Thanks to this safety law, we now have strong standards for products used by infants and children, including cribs, toddler beds, walkers, and bath seats. We now have a product registration system that enables manufacturers or retailers of durable infant and toddler products to contact parents with recall or other safety information.

We now have a consumer products safety information database where the public can file and view reports about harm from consumer products. And we also have testing of products to ensure that they are safe before they ever make it into our children's hands.

And the results of the law are clear. Toy-related deaths have fallen, recalls due to lead have declined by 80 percent, and recalls overall have continued to decline as products have become safer. Border enforcement is also up.

These protections matter to parents. They matter to children. So I look forward to hearing—the hearing today from the Commissioners about their continuing work. While I may not be able to be here throughout your testimony, I certainly will have a chance to

review it after you have given it, as I have for your statements that have been entered into the record. And I thank all four of you for being here and yield back the balance of my time.

Mrs. BONO MACK. Thank the gentleman.

And at this point I will recognize Ms. Schakowsky for 5 minutes for a statement. We have nobody requesting time on our side.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Well, I thank you, Madam Chairman, for holding this hearing. I think it is important for the subcommittee to hear from the Consumer Product Safety Commission about its activities, and particularly the ongoing implementation of the landmark Consumer Product Safety Improvement Act.

A few weeks ago, I joined Chairman Tenenbaum, and Danny Keysar's mother, Linda Ginzel, at a press conference to mark the adoption of the strongest standard in the world for play yards. The play yard standard is significant because it was a dangerous product that led to Danny's death at his day-care center when it really was used as a crib, collapsed and choked him. And the portion of this CPSIA that I authored and that mandated the new standard bears his name.

I mention the play yard standard because it is a specific example of how the CPSIA's safety standard for toys and children's products will save lives. That was our goal at the outset of drafting the legislation, and it is the one that we met.

Last year we passed a bill with some narrow fixes so that implementation of the law could continue smoothly. And I welcome today's opportunity to review progress, but want to say clearly that I believe it is absolutely critical that we continue to support and uphold the fundamentals of this historic legislation.

I want to highlight that CPSIA was a bipartisan effort. It passed the House 424 to 1, from the beginning to the end, and is a model for what this Congress can achieve on behalf of the American people.

And, Chairman Tenenbaum, I commend you for your leadership on implementing the safety standards for children's products, and also for your ongoing work to improve the safety of table saws and window coverings, and I thank you for leading this Commission in a way that continues to provide safety and security to the American consumer. And I also deeply thank Commissioners Adler, Nord, and Northup for their service, and for being here today. And I yield back the balance of my time.

Mrs. BONO MACK. I thank the gentlelady.

And we turn our attention now to the panel that we have before us today. Each of our witnesses has prepared an opening statement that will be placed into the record. You will each have 5 minutes to summarize the statement in your remarks, but I am sure you all are very familiar with this—the way it works.

Our distinguished panel includes the Honorable Inez Tenenbaum, Chairman of the Consumer Product Safety Commission, and we thank you very much for postponing or changing your travel plans to be with us today, and thank you very much for that.

We also have with us the Honorable Robert Adler, Commissioner at the CPSC; the Honorable Nancy Nord, Commissioner; and our former colleague, it is great to see her again, the Honorable Anne Northup, another Commissioner at the CPSC.

So good morning. Thank you all very much for being here today. And with that, Chairman Tenenbaum, you may begin with your 5 minutes.

STATEMENTS OF INEZ M. TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION; ROBERT S. ADLER, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; NANCY A. NORD, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; ANNE M. NORTHUP, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

STATEMENT OF INEZ M. TENENBAUM

Ms. TENENBAUM. Thank you. Good morning, Chairman Bono Mack and members of the Subcommittee on Commerce, Manufacturing, and Trade. I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's operations and activities to keep consumers safe from dangerous and defective consumer products.

The agency is in the strongest position to meet its mission than it has been in more than a decade. In the limited time I have today, I would like to focus on a few recent achievements as well as look ahead to 2013.

The first area I would like to use is the CPSC's ongoing work to ensure that infant and toddler products meet some of the world's strongest safety standards. In the years leading up to the passage of the CPSIA, there were numerous instances of injuries and deaths to infants and small children in defective infant and durable nursery equipment. As a result the CPSA contains section 104, which requires mandatory safety standards for most infant and toddler products.

When I assumed the chairmanship of the Commission in the summer of 2009, there were no mandatory safety standards for any of these products. Since then I have moved to implement this mandate as quickly as possible. In December 2010, the Commission passed the toughest crib safety standard in the world. Subsequently we also passed mandatory safety standards for baby walkers, baby bath seats, bed rails, toddler beds, and play yards.

In addition to infant and toddler products, the Commission has also implemented the CPSIA's requirement that all children's products in the market be subject to periodic independent assessment of the safety by a third-party testing laboratory. We provided manufacturers with a great amount of flexibility and choice on how to comply as long as they have a high degree of assurance that their children's products are compliant. We are currently reviewing our staff's report on the potential ways to reduce third-party testing costs consistent with ensuring compliance as required by Public Law 1228.

I am also very proud of the work by Commission staff to implement and maintain the publicly searchable database saferproducts.gov. Overall saferproducts.gov is a model of open gov-

ernment and consumer empowerment, and I appreciate the hard work by many of this subcommittee to further improve saferproducts.gov during the Public Law 1228 debate.

The best way to ensure that dangerous consumer products never get into the hands of consumers is to ensure that they never enter the United States. As Chairman I have place special emphasis on the past year on the continued development of the CPSC's Office of Import Surveillance. This office works hand in hand with U.S. Customs and Border Protection officers in major U.S. ports of entry to inspect and detain shipments that violate U.S. Consumer Product Safety standards. In fiscal year 2011, CPSC import surveillance staff was able to stop approximately 4.5 million units of violative and hazardous consumer products from entering the United States.

In 2013, funding permitted, I am optimistic that the CPSC will be able to take additional steps toward full implementation of a fully integrated targeting system, often referred to as the risk assessment methodology, or RAM. This will allow CPSC staff to analyze a greater number of import shipments, identify those that are more likely to violate consumer safety laws, and ensure that our limited resources are dedicated to those shipments.

I would also like to highlight a number of positive collaborative relationships we have established. The first is in the area of educating parents to ensure that infants have a safe sleep environment. As part of this I have reached out to major retailers who sell sleep products like cribs and play yards to ask them to join me in educating parents that the safest way for their baby to sleep is alone in a crib on its back.

Accidental ingestion of coin and button cell batteries is another area in which we are keenly focused. We had very productive meetings with the major battery manufacturers, and a range of possible solutions from design changes to safer packaging have been discussed.

The third collaborative model is occurring in youth sports, particularly in the area of head injuries in football. I am very pleased that after much hard work initiated by my office, a group effort led by the National Football League is under way to provide economically disadvantaged youth football programs with new helmets, and to conduct an education campaign to bring about a culture change in this sport.

In the coming months and years, I see a CPSC addressing hazards I have already mentioned as well as moving to address emerging hazards. At CPSC we are carrying out a statutorily required, proactive regulatory agenda, and consumers are safer because of this approach.

With an increasing focus at the ports, with more meaningful standards coming online, and with even greater public/private efforts, I envision safer and safer products in the hands of consumers. They deserve no less.

Chairman Bono Mack, thank you for the opportunity to testify. I am happy to answer any questions you may have later. Thank you.

Mrs. BONO MACK. Thank you very much.

[The prepared statement of Ms. Tenenbaum follows:]

Statement of
Inez M. Tenenbaum
Chairman
U.S. Consumer Product Safety Commission

Before the
U.S. House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade

"Oversight of the Consumer Product Safety Commission"

August 2, 2012

Good morning, Chairman Bono Mack, Ranking Member Butterfield, and Members of the Subcommittee on Commerce, Manufacturing, and Trade. I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's (CPSC) operations and activities to keep consumers safe from dangerous and defective consumer products.

The past year has been yet another active and challenging one for the Commission and our professional staff—and I am pleased to report that once again we have risen to the challenge. The agency is in the strongest position to meet its mission than it has been in more than a decade. In the face of a flat budget, the CPSC's professional staff has worked tirelessly to implement the remaining provisions of the Consumer Product Safety Improvement Act of 2008 (CPSIA), as well as the clarifying amendments in Public Law 112-28. At the same time, the Commission has also continued to engage extensively with outside stakeholders in the consumer, manufacturing, and international communities to both educate and engage on new ways to improve our safety mission.

In the limited time I have today, I would like to focus on a few recent achievements, as well as briefly look ahead to where I believe we will be in 2013:

The Strongest Juvenile Product Standards in the World

In the years leading up to passage of the CPSIA, there were numerous instances of injuries and deaths of infants and small children in defective durable infant and toddler products. No parent should ever have to experience such a tragedy, especially if government can play a meaningful role in addressing these hazards. As a result of the leadership shown by Congresswoman Jan Schakowsky and many others in Congress, the final version of CPSIA contained section 104, which requires mandatory safety standards for most infant and toddler products.

When I assumed the Chairmanship of the Commission in the summer of 2009, there were no mandatory safety standards for any of these products. Since then, I have moved to implement this mandate as quickly as possible. In December 2010, the Commission passed the toughest crib safety standards in the world. Subsequently, we also passed mandatory safety standards for baby walkers, baby bath seats, bed rails, and toddler beds.

One of my proudest moments as Chairman came just a few weeks ago. As many of you know, section 104 is also called the "Danny Keysar Child Product Safety Notification Act" or "Danny's Law." In May 1998, Danny was placed in a previously recalled play yard at his child care center when it collapsed, trapping his neck in the "V" of its folded rails and suffocating him. Danny was only 16 months old.

On the morning of June 27, the Commission unanimously honored Danny's memory by passing new, mandatory play yard safety rules. That afternoon, I met with Danny's mother, Linda Ginzel, and we were able to personally let her know that after 14 years of her advocacy we finally had a new standard that would prevent the deadly rail collapse that took Danny's life—and the lives of nearly 20 other small children.

I accepted this position to help make a difference, and I believe we are. But, we are not done. Section 104 commands that we address other priority items, and Commission staff has now turned their attention to rules for bassinets, cradles, strollers, and infant carriers.

I recognize that we are in a period of some economic uncertainty and that some want a moratorium on any new federal regulations. I understand and appreciate these views, but I would also ask them to step into the shoes of Danny's mother—or other parents who have lost children in similar preventable tragedies. These regulations may add some small, additional costs to these products. But the cost of inaction is much higher and is not something I am willing to accept as Chairman.

Continued Commitment to Other Critical Safety Issues

In addition to the durable infant and toddler safety standards, the Commission also continues to make progress on several other key safety rules.

Last October, the Commission fulfilled the capstone of the CPSIA by implementing the requirement that all children's products on the market be subject to a periodic, independent assessment of their safety. Congress required this rule, and after much thoughtful deliberation and discussion, the Commission approved a very balanced approach to achieving the rule's purpose. We provided manufacturers with a great amount of flexibility and choice in terms of how they wish to comply, as long as, in the end, they have a high degree of assurance that their children's products are compliant.

We are currently awaiting our staff's report on potential ways to reduce third party testing costs consistent with ensuring compliance. I look forward to working with my fellow Commissioners on this issue to see if there are areas of consensus that can assure compliance and children's safety.

At the same time, however, I believe Congress got it exactly right both when passing CPSIA and then reaffirming the overall third party testing requirement in Public Law 112-28. Parents deserve to know the products their children use are being independently tested and are safe.

I have also accelerated efforts to finalize our upholstered furniture flammability rule. CPSC staff has proposed a rule that would address the risk of injury or death resulting from smoldering fires, often caused by cigarettes, without requiring the use of flame retardants. I was pleased to read that the Governor of California recently directed that state's Bureau of Home Furnishings to revisit state rules that effectively require the use of flame retardant in many household upholstered furniture items, and I know Commission staff is monitoring this work closely. I am hopeful that Commission staff will generate a rule that will bring safer, more fire resistant upholstered furniture into homes across the nation.

Additionally, the Commission recently initiated rulemakings to deal with two other critical safety issues. The first is table saw injuries. Every day, 11 people on average suffer amputations from power saws. Through this rulemaking, Commission staff will explore technological solutions that could help save consumers from these life altering injuries.

The second is liquid gel fuels and firepots. Last December, the Commission voted unanimously to publish an Advance Notice of Proposed Rulemaking, just months after nearly all bottles of pourable gel fuels used in firepots were recalled. The recall was prompted by at least 65 serious incidents that resulted in two deaths and at least 34 victims who had to be hospitalized due to second and third degree burns to the face, hands, and other parts of the body. The ANPR is examining whether it is possible to make pourable gel fuels safe for consumers to use.

I would also like to briefly address the issue of small rare earth magnets. While I am not able to comment on the matter publicly, I can say that recent action by the Commission to authorize legal action to protect children from serious hazards associated with the ingestion of rare earth magnets is consistent with the approach Congress sought when enacting CPSIA.

SaferProducts.gov—Transparency for Consumers

I am also very proud of the work by Commission staff to implement and maintain the publicly searchable database of product safety reports required by section 212 of the CPSIA—SaferProducts.gov. I realize the roll out of the database in March 2011 caused some concern in certain segments of the regulated community. After almost 17 months of operation, however, I think SaferProducts.gov has gained wide approval and acceptance.

As of July 27, 2012, almost 10,000 reports of harm had been collected in the database, and posted to the public portal on SaferProducts.gov. Approximately 97 percent of those reports were submitted by consumers. Many of these reports contain detailed information on the product involved; and, utilizing the procedure specified in the Public Law 112-28 amendments, approximately 88 percent of the reports eligible for posting now contain a nonblank value for the model or serial number, and 73 percent of eligible reports contain numeric content for the model or serial number. In addition, approximately 85 percent of the report submitters agreed to have their contact information shared with manufacturers.

Business interest in the database has also grown. As of July 27, 2012, 3,487 entities are registered for the SaferProducts.gov business portal. These registrations allow companies to receive fast, e-mail notification of consumer incident reports. The business portal also allows companies to file section 15 product incident reports and provides companies with the capability to submit retailer incident reports. The general public has also come to see

SaferProducts.gov as a resource with over two million visits to the database since its launch.

Overall, SaferProducts.gov is a model of open government and consumer empowerment, and I appreciate the hard work by many on this subcommittee to further improve SaferProducts.gov during the Public Law 112-28 debate.

Robust Surveillance of Imported Consumer Products

One of the best ways to ensure that dangerous consumer products never get into the hands of consumers, especially children, is to ensure that they never enter the U.S. stream of commerce in the first place. Congress recognized the importance of import surveillance in section 222 of the CPSIA, and as Chairman I have placed special emphasis in the past year on continued development of CPSC's Office of Import Surveillance (OIS).

This office works hand in hand with U.S. Customs and Border Protection (CBP) officers in major U.S. ports of entry to inspect and detain shipments that violate U.S. consumer product safety standards. As of July 25, the Commission has 20 full-time employees located in 15 U.S. ports of entry, along with approximately 30 other employees who support their mission through testing and analysis activities.

While this is a small group, they have demonstrated extremely impressive performance metrics for the American people. During fiscal year 2011, OIS staff screened nearly 10,000 products at the ports, collected almost 1,800 samples, and found over 1,100 violations of safety standards. As a result, CPSC staff was able to stop approximately 4.5 million units of violative or hazardous consumer products from entering the United States. Many of these products were toys that had lead above the statutory limits or small parts that could present a choking hazard for children younger than three years of age.

In the coming year, CPSC will continue to deepen its relationship with the U.S. Department of Homeland Security and CBP. In 2011, CPSC became the first agency to receive data for incoming shipments through the International Trade Data System's (ITDS) Interoperable Web Services program. This data allows CPSC staff to view port shipment information in near real time, and develop targeting rules to identify the highest risk shipments. In recent months, OIS staff has been working with the ITDS data and CPSC case data to come up with baselines of effectiveness for targeting.

In 2013, funding permitting, I am optimistic that CPSC will be able to take additional steps toward full implementation of the section 222(a) mandate through a pilot test of the operation of a fully integrated targeting system—often referred to as the Risk Assessment Methodology or "RAM." This will allow CPSC staff to analyze a greater number of import shipments, identify those that are more likely to violate consumer safety laws, and ensure that our limited resources are dedicated to those shipments.

The benefits of a full roll out of the RAM are two-fold. First, the RAM will allow us to deploy limited resources toward suspect shipments and increase the correlation between samples collected and violations found. Second, it will have positive effects for "known" importers and members of the business community who would hopefully face fewer delays through better advance analysis of import data and risk metrics before products arrive at ports.

Constructive Collaborations to Address New and Emerging Issues

Another key area of achievement is the pursuit of public-private collaborations and consensus based solutions, whenever we can, to new and emerging product safety issues. While this is not always possible, I think we have made great strides in several areas.

The first is in the area of educating parents to ensure that infants have a "safe sleep" environment. As part of this, I have reached out to major retailers who sell sleep products like cribs and play yards to ask them to join me in educating parents that the safest way for their baby to sleep is alone, in a crib, on their back. So far, I have been pleased that several retailers have been enthusiastic about working with CPSC to get out the safe sleep message on their websites and in their brick and mortar stores, as well.

Retailers have suggested creative ideas including, but not limited to, displaying cribs absent of pillows and blankets in their stores, showing our safe sleep video on a continuous loop in their baby departments, adding safety information to their baby registry packets, and including safe sleep tips in the crib assembly instructions that come with new cribs. I believe this education effort, combined with the new, mandatory safety standards discussed earlier, will play a critical role in ensuring that all babies can sleep safely.

Accidental ingestion of coin and button cell batteries is another area on which we are keenly focused. We are seeing an alarming increase in the severity of the injuries associated with these batteries, which we all know have become commonplace in our homes. They are found in our remote controls, our key fobs, our watches, and many other household products. Children are swallowing them and the results can be devastating in as little as a few hours. Specifically, the larger, 20 millimeter (mm) sized batteries are posing the greatest harm. The 20 mm batteries are coin sized and likely to lodge in a child's esophagus upon ingestion. At that point, time is of the essence, as the resulting chemical burn that occurs can—and has—led to severe injuries and death.

Along with our professional staff, we have had very productive meetings with the major battery manufacturers about a range of possible solutions, from design changes in the longer term to safer packaging and other steps in the shorter term. I am hopeful that these efforts, as well as many that are happening independently by industry, will yield tangible safety results in the near future.

The third example of this constructive, collaborative model is occurring in youth sports, particularly with the issue of head injuries in football. I am grateful for the increased

attention and awareness associated with this issue. The consequences of a brain injury can be severe and long lasting. I believe addressing its risks require a true team effort. Along those lines, I am very pleased that, after much hard work initiated by my office, a group effort led by the National Football League (NFL) is underway to provide economically disadvantaged youth football programs with new helmets and to conduct an education campaign intended to accelerate the much needed culture change in that sport.

While this program is in its infancy, I have great hopes that our bringing the NFL, the NFL Players Association, the National Collegiate Athletic Association (NCAA), helmet manufacturers, helmet reconditioners, the helmet standards body, and others together can serve as a model of effective, collaborative public-private problem solving.

Responsible Regulatory Review

Before I look ahead, I would also like to address the Commission's ongoing efforts to review our existing rules and regulations. As I noted earlier, I strongly believe that we needed new mandatory safety standards in several areas, such as infant and toddler products, and I am very pleased Congress, through the CPSIA, gave us the authority to act quickly in those areas. At the same time, however, I also recognize the need to responsibly review those rules and either modify or delete outdated rules when it is in the public interest.

In April 2012, the Commission's professional staff presented an extensive regulatory review package to the Commission. In this package, Commission staff formulated a plan that not only incorporated the elements drawn from the President's Executive Orders (EO) 13579 and 13563, but also set forth a defined method and schedule for identifying and reconsidering any Commission rules that are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or ineffective, or that otherwise require modification without sacrificing the safety benefits of the rules. The plan also encourages public input and participation to find the right balance of priorities and resources. Furthermore, the plan incorporates the requirement in Public Law 112-28 that the Commission seek and consider comments on ways to reduce the cost of third party testing requirements.

Commissioners Nord and Northup have expressed concern over the scope of the staff proposed regulatory review plan, and have called for additional resources to be dedicated to the rule review process. I respect these views, but I am unwilling to put at risk efforts underway to achieve the mission of the agency, namely protecting consumers. The proposal by the Commission's professional staff is a very fulsome and appropriate review plan and notes that the diversion of additional staff resources to this project could delay some of the Commission's key safety activities. This is not acceptable to me, nor should it be acceptable to America's consumers, especially parents.

Even with the staffing improvements brought about through the enactment of CPSIA, the CPSC is still a small agency with finite resources. Then Acting Chairman Nord recognized these limitations in 2007 when she completely suspended the CPSC's

retrospective rule review process citing resource constraints. As Chairman, I am pleased that we have been able to reinvigorate this process—and stand by the balanced approach presented in the Commission staff's proposed regulatory review package.

The Road Ahead: Continuing to Restore Confidence in the Safety of Consumer Products

At CPSC, we are carrying out a statutorily required proactive regulatory agenda, and consumers are safer because of this approach. While we have made great strides in a number of areas, I assure you, that we will continue to accelerate reasonable and rational safety efforts at every opportunity. In the coming months and years, I see a CPSC addressing hazards I have already mentioned, as well as moving to address emerging ones. With an increasing focus at the ports, with more meaningful standards coming online, and with even greater public-private efforts, I envision safer and safer products in the hands of consumers. They deserve no less.

* * * * *

Chairman Bono Mack, thank you again for the opportunity to testify on the Commission's ongoing efforts to keep American consumers safe from defective and hazardous consumer products.

I am happy to answer any questions you may have.

Mrs. BONO MACK. Commissioner Adler, you are recognized for 5 minutes.

STATEMENT OF ROBERT S. ADLER

Mr. ADLER. Thank you very much. Good morning.

Mrs. BONO MACK. If you can just pull it much closer for—a little bit closer. And is it turned on?

Mr. ADLER. I have no idea. The one that says push?

Mrs. BONO MACK. Thank you.

Mr. ADLER. Let me try that again.

Good morning, Chairman Bono Mack and members of the Subcommittee on Commerce, Manufacturing, and Trade. Thank you for the opportunity to testify today along with my fellow CPSC Commissioners. I am pleased to be here today to discuss an agency that I have been associated with in some fashion since its establishment in 1973 and have been a Commissioner at since August of 2009.

This October will mark the 40th anniversary of the passage of the landmark Consumer Product Safety Act, and looking back now, I believe Congress and the agency should take great pride in what the agency has accomplished, especially considering the immense scope of our mission, which is to protect the public from any and all unreasonable risks associated with roughly 15,000 categories of consumer products.

What has the agency accomplished? As a starting point I would cite the estimated 30 percent reduction in the rate of deaths and injuries associated with consumer products since the agency's inception. And I would particularly point to the dramatic drop in death and injuries to children, such as the reductions of over 90 percent in childhood poisoning deaths and crib-related deaths.

In short, CPSC has produced an excellent return on investment. By our calculation this drop in deaths and injuries has resulted in over $16 billion in reduced societal costs, or many, many times the resources the CPSC has been given to do its job. And as a very small agency, we have had to produce these benefits at very low cost.

Of course, even efficiency has its limits. As of 5 years ago, the CPSC had shrunk to a skeleton crew of less than 400 and a budget of $62 million. To Congress' credit, in 2008, almost unanimously you passed the CPSIA, providing the agency with more tools and directing it to do more work and do it faster. Put simply, the CPSIA revitalized an agency that was underfunded and undermanned, and for that I am sure consumers across the country are grateful.

Undoubtedly the biggest change felt by the children's product community has been the mandate in the CPSIA that all children's products be tested by third-party independent laboratories before they enter the market, and on a continuing basis thereafter. Let me assure you that we at the Commission have worked very hard to implement this mandate in a thoughtful and measured way, and I can report that we finally reached the point where the final rule will take effect in February.

Of course, such a strong safety step forward carries broad implications for our regulated community, and we know that and are

fully aware of our need to work closely with them as we implement the law.

As we approach the fourth anniversary of CPSIA, it is worth reflecting on two common themes in the law. The agency needed more resources and other tools to accomplish its safety mission, and it needed to change its approach to vulnerable populations, particularly children. I think we will keep this in mind as we move forward into the future.

I do want to note one particular provision in the CPSIA because it is something the Congress changed in the CPSIA. I believe that in section 9 of the CPSA, and other sections of our laws, we have the most burdensome cost-benefit requirements in the entire Federal Government. Under these requirements, by my count, the Commission has managed to issue a grand total of nine safety rules in 31 years, or roughly one every 3 ⅓ years.

The Congress recognized this, and Congress took major strides to lessen the burden. Congress didn't abolish the need for cost-benefit; Congress retained it in the Regulatory Flexibility Act. And to drive the point home, you prescribed extraordinarily short deadlines for the promulgation of rules for children's products. This approach, to me, clearly has succeeded. By the most conservative count possible under these procedures, we have issued 10 safety rules in the past 4 years, or 2 ½ rules every year as opposed to 1 every 3 ⅓ years.

In closing, I want to share one major concern about a growing and increasingly vulnerable population, older Americans, of which I am now one. In fact, despite being only 13 percent of the population, older Americans suffer 60 percent of the deaths and injuries associated with consumer products. The fact that I now fit within this demographic has definitely helped me understand what a serious challenge we face in the coming years as America ages.

I look forward to working with my colleagues and the members of this subcommittee as we focus on our mission to protect our citizens from risks of unreasonable injury or death.

Thank you very much.

Mrs. BONO MACK. Thank you, Commissioner.

[The prepared statement of Mr. Adler follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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Statement of
Robert S. Adler
Commissioner
United States Product Safety Commission

Before the
House Committee on Energy and Commerce
Subcommittee on
Commerce, Manufacturing, and Trade

August 2, 2012
Rayburn House Office Building, Room 2322

"Oversight of the
Consumer Product Safety Commission"

Good morning Chairman Bono-Mack, Ranking Member Butterfield, and the members of the Subcommittee on Commerce, Manufacturing, and Trade. Thank you for the opportunity to testify along with my fellow CPSC Commissioners. I am pleased to be here today to discuss an agency that I have been associated with in some fashion since its establishment in 1973 – and I have been a Commissioner at since August 2009.

Agency Accomplishments

In May 1973, the CPSC opened its doors following the recommendations of the 1970 Final Report of a Congressionally established study commission, the National Commission on Product Safety (NCPS). The NCPS recommended the creation of a conspicuously independent federal regulatory agency given extensive authority to issue regulations and mandatory safety standards for a wide variety of consumer products. There was a need for such a body because, at the time, product safety was regulated sparsely and only by a patchwork pattern of laws that extended to a very small portion of consumer products.

This October will mark the 40th anniversary of the passage of the act that brought to life the recommendations of the NCPS — the landmark Consumer Product Safety Act (CPSA). Looking back now, I believe Congress and the agency should take great pride in what the agency has accomplished, especially considering the large scope of our mission – to protect the public from any and all unreasonable risks associated with roughly 15,000 categories of consumer products found in stores, homes, schools, and recreational settings. Another way to think about our responsibility is if a product is not food, or a drug, gun, bullet, boat, plane, or a car – we are probably responsible for it.

What exactly has the agency accomplished? As a starting point, I note an estimated 30 percent decline in the rate of deaths and injuries associated with consumer products over the last 30 years. And I would particularly point to the dramatic drop in death and injuries to children. For example, we have seen:

- a 92% drop in childhood poisoning;
- a 92% reduction in crib deaths;
- a 100% reduction in child suffocations from abandoned refrigerators; and
- an 88% reduction in baby walker injuries.

Additionally we have seen improvements such as a 92% reduction in fatal electrocutions and a 46% reduction in residential fire deaths. In short, the CPSC has produced an excellent return on investment. By our calculation, this drop in deaths and injuries has resulted in over $16 billion in reduced societal costs – or many, many times the resources the CPSC has been given to do its job. And, as a very small agency, we have had to produce these benefits at a very low cost.

Of course, even efficiency has its limits. As of five years ago, the CPSC had shrunk from its 1980 high of 978 employees to a skeleton crew of less than 400 employees and a budget of $62 million. To Congress' credit, you saw that the agency increasingly suffered from too much to do and too little to do it with. So, in 2008, almost unanimously, you passed the Consumer Product Safety Improvement Act (CPSIA), providing the CPSC with more tools and directing it to do more work - and do it faster.

Update on Implementation of the CPSIA

The CPSIA, which will mark its fourth anniversary in two weeks, has sometimes been referred to as a "toy bill" - but in truth it is a law that is broad in scope and has served to save an agency that was underfunded and undermanned. And, for that, I am sure consumers across the country are grateful for this legislation.

For example, in 2007, despite over $600 billion per year of consumer products being imported, including more than 70% of the toys sold in the United States, the agency had no employees stationed full-time at our nation's ports. That year, CPSC collected a grand total of 723 samples of imported consumer products and was finding violative products in its collected samples at a rate of less 42%. Today, because of the CPSIA, we have a division at the CPSC devoted solely to import compliance, and we have personnel stationed full-time at 15 of the country's busiest ports of entry. As opposed to the meager numbers of 2007, during the first half of 2012 alone, we screened almost ten times as many samples (6,600) and prevented more than 1 million units of violative or dangerously defective products from entering the United States. And in the tradition of CPSC, we have become significantly more effective at our job, finding violative products in our collected samples at a rate exceeding 60%. Unquestionably, a large part of this success has been because of our partners at U.S. Customs and Border Protection (CBP), but it is also because of increased funds, personnel, and authority provided by the CPSIA.

Among other non-children's product requirements, the CPSIA:

- Made the sale or distribution of a recalled product illegal, which created a tremendous incentive for retailers to become even stronger safety partners with the agency (which they have);
- Raised the maximum civil penalty amount for violations from $1.825 million to $15 million;
- Required the promulgation of a mandatory ATV standard which banned three-wheeled ATVs and required all ATV manufacturers or importers to submit an action plan to the Commission prior to distribution;
- Funded the upgrade of our siloed information technology systems, allowing the agency to lay the groundwork for 21st century technology solutions to help us more quickly identify hazard

patterns from the wide variety of data the agency receives. The CPSIA also required the creation of a public consumer product hazard database. This database allows consumers to almost simultaneously inform the CPSC, the product's manufacturer, fellow consumers, other manufacturers, retailers, and the media of hazardous (and potentially hazardous) products. The need for such a database was a direct result of the ultra-restrictive "section 6b" of the CPSA. This provision inhibits, to the point of virtual prohibition, the CPSC from releasing to the public in a timely fashion manufacturer specific safety information that almost every other federal health and safety agency releases on a regular basis; and

- Increased CPSC staff to over 500 FTEs and its budget to just over $100 million.

Of course, there is no question that the CPSIA also changed the landscape for children's products. The law required the promulgation of a number of mandatory federal safety standards, where none existed for toys and other durable nursery products. The CPSIA also set maximum levels for lead paint and lead content in children products at 90 and 100 parts per million, (respectively) and banned the use of certain phthalates in children's toys and child care articles.

Undoubtedly, the biggest change felt by the children's product community was the law's requirement that all children's products be tested by a third-party independent laboratory before they enter the market — and on a continuing basis thereafter. This section of the law, often referred to as the "testing and certification requirement," mandated the agency write regulations to accredit third-party laboratories and establish procedures for manufacturers to comply with the law's testing requirements. Clearly, such a strong safety step forward carried broad implications for the regulated community. And that's why we have worked long days (and sometimes, nights) to implement this mandate in a thoughtful and measured way. And I can report, after much review and many re-drafts, we have finally reached the point where the final rule on continued third-party testing and certification will take full effect on February 8, 2013.

The CPSIA was the first major overhaul of the Commission and its authority and priorities in almost 20 years. Looking at the law as a whole, I see two common themes: the agency needed more resources and other tools to accomplish its safety mission, and it needed to change its approach to vulnerable populations, particularly children. I believe both of these themes remain important considerations not only as we near the completion of the bulk of our CPSIA rulemakings but also as we look to the future.

Resources for CPSC Personnel

When we talk about the tools the agency possesses to accomplish our safety mission we are mainly talking about resources and rulemaking authority. The CPSIA had a major impact on both. Over two-thirds of the CPSC's budget goes to our personnel. Accordingly, when the agency fell below 400 employees in 2007, this translated into fewer compliance officers out in the field conducting investigations and inspections; fewer engineers and toxicologists and

epidemiologists to make hazard determinations and help write performance standards; and it also meant there was no money for staff to be stationed full-time at any of our nation's 300 plus ports.

The increase in our budget over the last few years has translated directly into action because it means technical experts and law enforcement officials can be hired to help us fulfill our mission. We now have a state-of-the-art testing lab, but it must continue to be staffed appropriately to optimize its potential. Our fire engineering staff has made great strides in research regarding fires associated with cooktops and space heaters, and our carbon monoxide team has done some compelling work on portable generators and gas furnaces. Without continued funds for these talented scientists, the projects are likely to stall. Highly skilled technical experts must be hired and retained to allow us to stay on top of existing or emerging hazards, whether the material is a heavy metal (including lead), a chemical like phthalates, or new discoveries like nanotechnology.

After our engineers and other technical experts, the largest part of the CPSC budget goes to our compliance activities. As described above, we now have an import division and have 20 staff members full-time at 15 ports – but we need still more resources. Despite our tremendous progress, we are inspecting less than 1% of the 14 million consumer product shipments that enter the United States every year. We recently submitted a report required by the CPSIA that details a seven-year plan to implement a complete risk management program across the country. It will cost real money, but if we do it right, it will save more money than it costs, and of course it will save many lives.

The same is true for our domestic compliance activities – more resources translate directly to more law enforcement at the retail and consumer level. Our field staff covers the entire country as best they can, but there are still 12 states in which we do not have even one field officer. There is no substitute for having trained investigators on the ground, getting to know their territory every-day instead of just flying or driving in on an emergency basis.

All of this said, I fully recognize that you have many difficult budgetary decisions facing you in the months ahead, and this is a time of limited resources for all Americans and therefore all federal agencies as well. But, I ask that when you consider the CPSC, you keep in mind that the return on investment received for our budget is lives saved, injuries prevented, and unnecessary societal costs reduced – especially for the nation's most precious asset: our children.

A Reasonable Rulemaking Process

The other major tool CPSIA sharpened for us was making a particularly significant modification in how we engage in rulemaking. Given the CPSIA's focus on moving expeditiously on children's safety, the law directed the agency to use section 553 of the APA (Administrative Procedure Act) when promulgating CPSIA rules. This was a significant change because under

normal circumstances, the agency is required to suffer through the broad and extravagant set of cost-benefit requirements added in 1981 to the CPSA (and other acts enforced by the CPSC) when promulgating consumer product safety rules.

While there was no specific mention of the rationale for this decision in the CPSIA, it seems logical to conclude that Congress understood that CPSC's normal-cost benefit provisions make efficient rule promulgation almost impossible. This is because they easily surpass in their stringency and scope the cost-benefit provisions of the various Executive Orders on cost-benefit analysis recommended by the Office of Management and Budget, including Executive Orders 12866, 13563, and 13579. In fact, in the 31 years since the CPSC was saddled with these unique requirements, we have managed to promulgate a total of only 9 consumer product safety rules – or roughly one every 3 1/3 years.

In order to move the rulemaking process with respect to toys and other children's quickly, the CPSIA substituted the much more streamlined and focused cost-benefit procedures of the Regulatory Flexibility Act (RFA). And to drive the point home for us, the law prescribed extraordinarily short deadlines for the promulgation of a toy standard as well as specific children's product safety rules such as cribs, infant walkers, baby bath seats, toddler beds, toddler bed rails, and portable play yards, among other children's products.

Significantly though, by giving the CPSC the authority to promulgate all of these rules under Section 553 of the APA, Congress made sure that the RFA's analysis of the impact to small businesses would be considered. In other words, the agency's cost-benefit analysis would focus on the group that was least likely to have had a voice in the writing of the voluntary standard – small businesses.

Put another way, Congress pointed to a different set of procedures when it wanted us to promulgate rules quickly – procedures that do not include the 1981 added cost-benefit requirements. I believe this approach succeeded. By the most conservative count possible, the CPSC has issued 10 consumer product safety rules in the last 4 years that would have otherwise been subjected to our usual snail-like rulemaking process. This experience has only reinforced my belief that the type of rulemaking contemplated by section 553 of the APA or even under the relevant Executive Orders makes for a more reasonable regulatory process than the one laid out in the CPSC's statutes.

Unfortunately, I do not need to go back into the Commission's ancient history to find examples of non-children's products where rulemaking that is in the interest of protecting consumers has been significantly delayed because of these unique cost-benefit obstacles. In October 2011 the Commission unanimously published an Advance Notice of Proposed Rulemaking (ANPR) on table saws, more than eight years after receiving a petition on the hazard. A final rule, which

would attempt to address a product associated with almost 40,000 annual emergency department treated injuries, including 4,000 amputations, is likely to be several years away, in no small part because of CPSA's onerous section 9 cost-benefit requirements.

Vulnerable Consumers - Children

Congressional desire for the CPSC to change its approach to vulnerable consumers is also evident from the way it described children's products to include "a consumer product designed or intended primarily for children 12 years of age old or younger." This was a wider range than we had previously been using to address children's products. The level of concern regarding this population was also clear from the requirement for pre-market, independent third-party testing of children's products. This process is a sea change in product safety in the United States because it demands for the first time that all children's product manufacturers (not just the extra cautious ones) test and certify their products are safe prior to placing them on store shelves. I believe over time this change will pay dividends in reduced death and injury costs for the public *and* manufacturers.

It has not been surprising that there has been a lot of concern in the regulated community regarding third-party testing because it was such a significant change in the way children's products have been brought to market. It is nearly impossible to contemplate the imposition of third-party testing and not realize that there would be increased costs to producers of children's products. Yet, I have long believed that for most manufacturers the increased costs would be minimal because they were already engaging in many of these safety processes pre-CPSIA, except they were testing their products at an even more sophisticated level than the one required by the CPSIA. But for many manufacturers, particularly the medium and smaller firms, this new requirement caused significant change. This is why I have been so pleased by our staff's efforts to continually walk the extra mile, or two miles, for small and medium sized businesses, both in the rules and in the guidance documents we provide. At every step of the process, I believe we have tried to maintain the necessary, but delicate, balance of new safety requirements with new burdens.

The CPSIA's direction to CPSC regarding extremely strict lead limits was another example of how hazards for vulnerable populations were going to be addressed differently from the past. By now, everyone is aware that children's products may not contain more than 100 parts per million (ppm) of lead. And I hope everyone is aware that lead is a powerful neurotoxin that accumulates over time. Even low levels of lead are widely associated with learning disabilities, decreased growth, hyperactivity, impaired hearing, and brain damage.

There are two observations that I'd like to make on this issue: First, by mandating that we drop the lead level, unless the Commission determined it was not technologically feasible for a product or product category to meet the 100 ppm total lead content limit, Congress took a very

proactive approach to this chronic hazard. The law basically said we will not wait for bodies to pile up 20 years from now only to discover that it was because of slow, but steady, lead accumulation from products, including children's products. I have previously noted that, were it my decision, I might have recommended a slower and less precipitous drop in levels, but all things considered, I believe Congress got it right. Along those lines, I am pleased that we at the CPSC continue to look for easier and less costly ways for all manufacturers to test for lead – and was supportive of P.L. 112-28's changes regarding testing relief for small batch manufacturers.

Second, I hope we have put to rest the notion that lead content level was set arbitrarily or without safety levels in mind. There was clear evidence at the time Congress chose 600, 300, and 100ppm that they were selected for well-considered reasons. I note that this past spring, the Centers for Disease Control and Prevention (CDC) revised their lead guidelines *downward*, so that any child with more than 5 micrograms of lead per deciliter of blood would be considered at risk of lead poisoning. I believe that, as scientific methods increase in sophistication, we are going to see health experts recommending even lower limits over time.

Vulnerable Senior Consumers – Looking Ahead

In addition to mandating that our agency take new approaches to consumer product safety, I also believe that there was another underlying message in the CPSIA: attend to all vulnerable populations, wherever you find them. While this concept has been an important part of the agency's make-up since its founding, the passage of the CPSIA was a clear message to reinvigorate this priority.

Accordingly, of late, I have become increasingly concerned by what I feel has been a lack of focus regarding injuries to an overlooked vulnerable population – older Americans. Our data demonstrates that this critical demographic is the second most vulnerable group after children, particularly those Americans over age 75. The fact that I now fit in this demographic has definitely helped me understand what a serious challenge we face as America ages. In fact, here are some underreported facts about older Americans:

- Despite making up only 13 percent of our population, older Americans suffer 60 percent of the deaths associated with consumer products and Census statistics predict that by 2030, one in five Americans will be 65 or older.
- Today, roughly 40 million people in the U.S. are ages 65 and older. This number is projected to more than double to 89 million by 2050;
- Today, the "oldest old" – those 85 and older – have the highest growth rate in the country: twice that of those 65 and older and almost four times that for the total population. This group now represents 10% of the older population and will more than triple in number by 2050.

And, unfortunately, this explosive population growth brings some unwelcome news on the health and safety front. CPSC's data show that injuries and death from consumer products begin to accelerate dramatically once we hit age 75. In fact, the rate of emergency room-treated injuries for those 75 and older is approximately twice that of 65-74.

I recently called for a National Action Plan to address injuries to seniors modeled on a similar plan put together by CDC regarding injuries to children. Unfortunately, there is no comprehensive plan for this group that often faces similar vulnerabilities. I believe such a plan is needed, for example, to prevent the type of falls that take place every day in and around seniors' homes that lead not just to bumps and bruises, but to hospitalizations and fatalities. The CDC estimates that one out of every three people in the U.S. age 65 or older will suffer a fall this year, resulting in more than 19,000 deaths and a cost to society of more than $28 billion.

The other leading cause of injuries and deaths to seniors is fire. The CPSC's staff report that almost 400,000 fires occur annually, resulting in roughly 2,500 deaths, 12,600 injuries and $6.43 billion in property loss. But, the problem is more serious for seniors. The U.S. Fire Administration estimates, for example, that adults age 75-84 are nearly four times as likely to die in a home fire. And, adults over age 84 are nearly five times as likely to die compared to the general population.

In 2007, there were more unintentional fire and burn deaths to older Americans than any other demographic category, and the odds of surviving fires get worse as we get older. Our nation's firefighters and emergency responders are brave, dedicated, and proactive, but they cannot prevent these fire deaths alone.

In short, the hazards to our seniors occupy many fronts. Sometimes products that seem benign to youth may take on a more ominous character when older Americans use them. Other times there's a product like adult bedrails that appear to be associated with an entrapment hazard that looks similar to the hazard that our recent children's bed-rail rule was written to address, but sadly appears to have a much higher death and injury count.

Next year CPSC will be issuing a report on injuries and deaths to older Americans to help us identify which products we should focus our energies on first. The last time we undertook such a project, in 2004, we estimated that the combined injury and death costs to older Americans totaled more than $100 billion per year. I believe our new data will assist in a larger national effort where all stakeholders work to determine which hazards to our seniors are easily addressable and which hazards require new types of technology and consumer education.

But even with good data and a renewed focus, these societal wide issues cannot be solved by our small agency alone. Addressing injuries to this vulnerable population will take an enormous

effort by a range of experts, every-day citizens, non-governmental organizations, families, foundations, and federal, state, and local governmental actors. I look forward to working with my colleagues and interested members of this Subcommittee as we focus on our continued mission to protect vulnerable citizens of all ages from risks of unreasonable injury or death.

Thank you for the opportunity to testify today and share my thoughts on the Consumer Product Safety Commission. I look forward to your questions.

Mrs. BONO MACK. And welcome, Commissioner Nord. You are recognized for 5 minutes.

STATEMENT OF NANCY A. NORD

Ms. NORD. Thank you so much. I am delighted to be here.

You have in front of you four different statements representing the views, the opinions, the observations and, in some cases, the criticisms of the four Commissioners of the CPSC. And yes, we all agree on many things. Of course, we all agree that children are our most vulnerable consumers and, more importantly, our most precious asset.

Of course, we all agree that increased resources for engineers, compliance officers, scientists, port inspectors, and yes, dare I say, some lawyers has allowed us to really bump up our game in carrying out our mission.

Of course, a state-of-the-art testing lab, which I am very proud to have initiated the efforts for, has met with rave reviews, and moving our information technology systems into the 21st century has met with strong approval.

Indeed, we find common ground in dealing with serious issues like mandatory safety standards for infant and toddler products and using our new authorities to address hazards like drawstrings. And we are all very, very proud of the great work that our staff is doing, especially in the ports and out in the field.

So in many cases it is not the what, it is the how. And I am very concerned that we are falling short on the how, whether it is on big items or things with smaller significance.

As I mentioned in my written statement, I have major concerns about how we develop the testing and certification rule; how we have defined children's products; how we have justified dropping the lead content limits from 300 parts per million to 100 parts per million. That is 99.99 percent lead free.

I have concern about how our limited resources are being used. Did we really need to spend almost $2 million on consultants to tell us how to rewrite our strategic objectives and our mission statement? Will we know how we are going to be spending our funds come the October 1st beginning of the fiscal year if we have yet to establish our priorities in an operating plan?

But more importantly than resources, it is how rules are being proposed, considered, and promulgated. If staff strongly suggests the Commissioners not move forward with finalizing the testing rule, but rather seek public input as directed by Congress, and the majority ignores that and puts a rush on the rule, how can we say that that is thoughtful and measured decision-making?

When Commissioners decry the use of cost-benefit analysis and say, well, the Regulatory Flexibility Act is all we need because that focuses the impact on the impact on small businesses, yet consistently turns around and disregards the information that is in the Regulatory Flexibility Act because it doesn't lead to a desired regulatory result?

When a claim is made that section 6(b) of our law is ultra-restrictive and inhibits to the point of virtual prohibition releasing information to the public in a timely way, yet the agency in the past year three times has released inaccurate and misleading informa-

tion, contrary to 6(b), that almost jeopardized the major recall in one case and caused the agency to do a public retraction in another?

We can all agree that each Commissioner here today has a strong commitment to safety, and that differences of opinion as to regulatory issues should not be viewed as a lack of commitment. And believe me, I am not looking for trouble from my colleagues, but I am very troubled about how we approach issues.

Interestingly, I note that one of my colleagues with whom I often disagree in the statement says, quote, "The necessary but delicate balance of new safety requirements with new burdens."

I agree it is necessary. I agree it is delicate. I think that the agency's actions, over the past 2 years in particular, fall quite wide of the mark and have created a great imbalance between safety and new burdens, and as a result American consumers are overpaying for safety. We cannot close our eyes to the harm that we are causing many businesses that produce perfectly safe products and pretend that that harm does not exist. I think we need to work harder to find the balance that is missing.

Thank you.

Mrs. BONO MACK. Thank you, Commissioner.

[The prepared statement of Ms. Nord follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD

Statement before the
Subcommittee on Commerce, Manufacturing, and Trade
of the Committee on Energy and Commerce of the
United States House of Representatives:

August 2, 2012

Saving lives and reducing injuries wisely

I would like to thank the Chair, Congresswoman Bono Mack, and the Ranking Member, Congressman Butterfield, for holding this oversight hearing today at a critical time for the agency. Congress created the Consumer Product Safety Commission to protect the public against unreasonable risks of injury associated with consumer products in a manner that would provide for efficient regulations that were minimally burdensome to manufacturers and importers.[1] Balancing the dual goals of safety and efficiency is a challenging task, not to be treated lightly. Although we all share the same goals, I am deeply concerned that we have over-read our congressional mandate and failed to consider the effects our actions have on the important balance between safety and efficiency. I believe that the agency needs to rethink its approach, especially in view of the increasing demands on our agency's limited resources. [2]

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[1] *See, e.g.*, H.R. Rep. No. 92-1153, at 25 (1972) ("The Commission's decisions under this legislation will necessarily involve a careful meld of safety and economic considerations. This delicate balance, the committee believes, should be struck in a setting as far removed as possible from partisan influence.").

[2] *See* U.S. Consumer Product Safety Commission, Estimates of Hospital Emergency Room-Treated Injuries Associated with the Use of Certain Consumer Products, *2011 & 2010 Annual Report to The President and Congress.*

Congress made changes to our statutes in 2008 through the Consumer Product Safety Improvement Act (CPSIA), and our small agency, with increased but limited funding, has been working hard to implement it. CPSIA provided the agency with more resources, greater powers, and specific directives to address several types of hazards. (The law included a number of changes that I had recommended.) At the same time, the new law attached some stringent requirements that unduly restricted the agency in its mission to reduce risks based on severity and exposure.

Although the CPSIA's dramatic redirection of the agency has resulted in some safety improvements, the redirection also led to major problems in the form of unrealistic deadlines, workload prioritization difficulties, project delays, and numerous unintended consequences. Wise implementation was called for.

The art of good management is making wise choices that focus the resources of regulators and manufacturers to achieve maximum safety in a cost-effective manner. We could have reached our shared goal of consumer safety, particularly for children, without the needless expense, job loss, and businesses closure that we have seen. Unfortunately, our agency is forcing consumers to *overpay for safety* through passed-on costs for unnecessary testing, limited choice, and limited safer alternatives. More circumspection would have avoided this over-regulation.

Examples of over-regulation

The Testing Rule

The best example of over-reading the law is the Testing Rule.[3] Implementing one of the key provisions of CPSIA, the Testing Rule read an overly broad mandate into the statute: that all testing of children's products—including ongoing periodic testing—must always be performed

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[3] Testing and Labeling Pertaining to Product Certification, 76 Fed. Reg. 69,482 (Nov. 8, 2011) (codified at 16 C.F.R. pt. 1107) (citations here refer to the staff's briefing package, available at http://www.cpsc.gov/library/foia/foia11/brief/certification.pdf).

by a third party. Had the Commission not insisted on this approach, the agency could have developed a testing protocol that considered the risk of the product and the testing needed to assure compliance with related safety rules, thus maintaining a balance between achieving safety goals and doing so cost-effectively.

This is particularly important because the Testing Rule is such a costly one. The Commission's staff conducted a limited but eye-opening analysis of some of the costs of this rule in a Regulatory Flexibility Analysis. Here is some of what the staff told us:

- *Who is impacted*—Staff explained that the rule "will have a significant adverse impact on a substantial number of small businesses,"[4] and a "disproportionate impact on small and low-volume manufacturers."[5] Our staff told us that firms are likely to mitigate "the adverse impacts [of the rule by] . . . rais[ing]their prices to cover their costs."[6] American families should expect to bear the brunt of this rule's impact.
- *Size of the costs*—"The costs of the third party testing requirements are expected to be significant."[7] "A typical profit rate is about five percent of revenue . . . . Therefore, a new cost that amounted to one percent of revenue could, all other things equal, reduce the profit by 20 percent."[8] According to our staff's analysis, a small manufacturer would hypothetically spend 11.7% of revenue on these testing costs.[9] These estimates point to a negative revenue result for small manufacturers.
- *Manufacturers' options*—Staff said the following:

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[4] *Id.* at 198

[5] *Id.* at 178.

[6] *Id.* at 134.

[7] *Id.*

[8] *Id.* at 187.

[9] *Id.* at 188 & 193.

- "[S]ome manufacturers might attempt to redesign their products . . . by reducing the features . . . used in the products."[10]
- "Manufacturers and importers could also be expected to reduce the number of children's products that they offer."[11]
- Some manufacturers and importers would "exit the market for children's products entirely"[12] and others "may go out of business altogether."[13]
- "The requirements of the final rule could be a barrier that inhibits new firms from entering the children's product market."[14]

And then there are the additional costs to consider, including

- costs of testing plans deemed insufficient by *post hoc* agency judgments about what should have been done, and
- costs for administrative work related to the periodic testing, which staff estimated could reasonably be expected to add 15% to 50% to testing costs. [15]

Confounding the situation was the majority-dictated procedure to promulgate the Testing Rule *before* seeking public comment about costs (as directed by H.R. 2715). It did not matter that Congress specifically, just weeks before, directed the agency to re-examine the specific balance between safety and efficiency. Nor did it matter that our technical staff strongly recommended against the approach the majority took to put the rule out and receive comments later.

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[10] *Id.* at 196.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id* at 153.

These results could have been avoided while still assuring compliance with safety rules if the Commission had not overreached in its implementation of the testing rule, ignoring any balance.

Changing random sampling to representative sampling

Congress told us in H.R. 2715 that periodic tests on children's products could be performed on "representative samples," rather than "random samples," as our statute previously read.

Unfortunately, while the Commission unanimously agreed on language defining "representative samples", which is what Congress told us to do, Commissioner Northup and I could not agree with our colleagues to impose burdensome new recordkeeping provisions that have high estimated costs and little estimated value. This new recordkeeping would be in addition to the significant recordkeeping burden already imposed by the Testing Rule. So rather than advance the agreed upon definition, two of my colleagues chose over-regulation and let the whole effort fail. No doubt this unnecessary and burdensome provision will be back before the Commission when the Democrat majority is restored in October.

Definition of *children's product*

The pattern of implementing CPSIA without attempt to balance between safety and efficiency has been repeated over and over. In promulgating an interpretive rule about the definition of the term *children's product*, the Commission listed four factors but indicated little about how they might be applied. Yet, even the five commissioners themselves could not agree on whether particular products fell in the definition. But a manufacturer must decide early on—at the design and manufacturing stages—whether their product is a children's product for tracking label and third-party testing purposes, knowing that this decision can be second-guessed by the CPSC at some later point. Safety is not advanced here, and the costs for product sellers in the "truth or consequences" definition guessing game are real and severe.

100 ppm limit for lead content

Another clear example of regulatory imbalance was the Commission's decision to drop the lead content limit for children's products from 300

parts per million (ppm) (99.96% lead free) to 100 ppm (99.99% lead free). This decision was particularly disturbing because the Commission had specific leeway in the statute to impose some balance through its judgments concerning the technological feasibility of such action. The majority once again chose imbalance and ignored warnings about the consequences.

The Commission's failure with respect to the lead limit is compounded by the testing variability that staff described (and which we have heard about from manufacturers and importers).

- "Testing variability means that ensuring compliance with the 100 ppm limit may require that lead in components or products are, in fact, significantly below the limit."[16] "Levels significantly below 100 ppm may not be technologically feasible for some products."[17]
- "The economic implications of test failures may be quite significant and include needless scrapping of failing materials, as well as the potential for increased recalls."[18]

Among the potential economic impacts, highlighted by staff, of lowering the lead content limit to 100 ppm are the following:

- "Cost increases are likely to be reflected . . . as a combination of price increases and reductions in the types and quantities of children's products available to consumers . . . . In some cases, the price increases could be significant." [19]
- "[S]ome firms may reduce the selection of children's products they manufacture or exit the children's market altogether. In some cases, the firms may even go out of business." [20]

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[16] U.S. Consumer Product Safety Commission Staff, Briefing: Technological Feasibility of 100 ppm for Lead Content, 29 (June 22, 2011) (available at http://www.cpsc.gov/library/foia/foiall/brief/lead100tech.pdf).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id* at 30.

- "[I]t is likely that the costs will have relatively greater consequences for smaller manufacturers and artisans . . . ."[21]
- "The higher costs associate with metal components will probably result in efforts to substitute lower cost materials. Plastics, for example might be substituted for metal parts in some products. Certain substitutions might affect the utility of the products. The use of plastic . . . may reduce a product's durability in some applications . . . ." [22]

Noteworthy is the fact that the Commission specifically rejected a safe-harbor remedy suggested by staff to ameliorate these impacts. "A safe harbor would be *unlikely to result in any adverse health effects but could provide some relief to manufacturers of children's products.*"[23]

Congress's direction to examine the balance of safety and testing costs

Almost a year after H.R. 2715 (Pub. L. 112-28) became law, we now hope to soon receive a staff report addressing public comments and making recommendations about how to reduce third party testing burdens. I, like over 25 other commenters from a wide range of industries and organizations, submitted cost reduction proposals for staff to consider (see Attachment A). It has been illuminating to see the different issues raised by both small and large businesses, domestically and internationally. Among several common themes is the overarching message that the costs of third-party testing are severely impacting the global supply chain without a commensurate advancement in safety—the balance is out of whack.

Here is a sample of concerns illustrating common themes.

- *Harmonization*—One of the largest complaints from the public is the lack of alignment of international, federal, and state standards. That lack of alignment results in higher costs without additional safety.

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[21] *Id.*

[22] *Id.*

[23] *Id* at 31 (emphasis added).

- *Small volume testing*—Many companies still endure high testing costs on their small volume productions because they are not so extremely small so as to qualify for the small-batch exemption. The result? Companies cease to produce small runs, innovation is thwarted, and the consumer choice is limited to fewer useful products.
- *Inter-lab variability*—Commenters from several industries reported inaccuracies among laboratory results, especially with such minute levels as the 100 ppm lead requirement. How is safety advanced when everyone agrees there are continuing discrepancies?
- *Reducing testing redundancies*—Because of liability concerns many large retailers require testing to be done by specific third party testing laboratories. So if a manufacturer sells to five different retailers, then the manufacturer may be required to perform the same exact test on the same exact product five times.
- *Over-defining standards*—Unnecessary testing has been required due to overreaching, expansive statutory interpretations, including the over-broad identification of children's product safety rules.

One possible solution to consider is a testing regime that allows manufacturers to focus their resources on riskier elements of their products, rather than testing benign elements with the same frequency and intensity as more dangerous elements. Elements of such a testing regime could include first-party testing and production controls, in addition to the option of third-party testing. The current testing rule does not provide that flexibility. Another solution would be to exempt partially or wholly from third-party periodic testing products for which compliance with applicable safety standards is known to be high without mandatory testing. I believe that Section 3 of CPSIA may give the agency the ability to reduce testing costs in this manner while assuring compliance with safety rules.

Conclusion

No one wants to turn back the clock on safety. To say otherwise is stretching for a straw-man argument. What is real, however, is the unnecessary economic harm our CPSIA regulations have on those who manufacture and sell consumer products (see attachment B), and by extension, consumers who buy and use them. The balance between safety

and efficiency could have been achieved with wise, careful rulemaking. As regulators and consumers, we do not live in a risk-free world. Wise decisions need to be made about what risks are acceptable, what exposures are unavoidable, and what costs are necessary to achieve consumer safety.

Attachment A

Commissioner Nancy A. Nord

Cost Reduction Proposals

Cost Driver: Excessive Testing

- Use risk analysis to determine extent of testing and when third party testing should be required, on rule by rule or other basis
- Provide small volume testing exemption
- Make clear (through rule and accompanying enforcement policy) that retailers may and should rely on testing done by manufacturer or importer
- Permit first party after-sale confirmation testing in some instances or other quality control/quality assurance mechanism to enable manufacturer to line up back-up component suppliers
- Establish and implement trusted vendor program
- Implement staff-proposed alternatives referenced in Testing Rule briefing package

Cost Driver: Third Party Testing

- Rules of general applicability are not children's product safety rules and products subject to them need not be tested by third party
- Periodic testing need not be performed by third party testing lab unless agency determines otherwise for a specific rule.
- Clarify periodicity requirements in rule

Cost Driver: Variability of Testing Results

- Establish range within which results will be accepted. Clarify status of de minimis variations

Cost Driver: Lead, Phthalates and Other Chemical Testing

- Correlate testing requirements to safety and risk—that is, adopt solubility standards instead of content standards
- Use content testing as safe harbor with solubility testing as a backup
- Permit Agency to recommend appropriate lead level
- Permit recycled materials to meet 300 ppm limit rather than 100 ppm limit for lead

Attachment A

- Use more expansive and clearer definition of "inaccessibility"
- Implement staff alternatives referenced in briefing package on 100 ppm
- Implement more extensive use of screening tests

Cost Driver: Differing Regulatory Requirements

- Evaluate adequacy of the testing regime in the European Union's toy safety standard, EN71 and, if adequate, consider it to be substantial equivalent of US standard
- Align definition of "child care article" with European definition
- Apply substantial equivalency principle to requirements from other jurisdictions
- Adopt more expansive preemption provisions to address differing state and local requirements

Attachment B

Companies decreasing product lines due to 3rd party testing burdens

The Handmade Toy Alliance

[Randall Hertzler, The Handmade Toy Alliance, Comments submitted to CPSC re Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens, (January 18, 2012)]

"The economic burden of additional tests required by the CPSIA makes it extremely difficult to economically bring these products to market in the US. Many small batch toy suppliers from the EU have been forced to cease exports to the US or limit the number of products they export."

As of January 9, 2012-

Partial List of Retail Businesses Altered or Closed Due to CPSIA *(46 companies listed)*:

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

Attachment B

Partial list of 2nd Tier Small batch Manufacturers within EU Limiting or Ceasing Export to the USA due to the CPSIA (*25 companies listed):*

Barti GMbH dba Wooden Ideas – German
Brio – Sweden
Castorland – Poland
Detoa – Czech Republic
Eichorn – Germany
Erzi – Germany
Finkbeiner – Germany
Gluckskafer Kinderwelt – Germany
Gollnest & Kiesel KG (GOKI) – Germany
Grimm's – Germany
HABA – Germany
Helga Kreft – Germany
Hess – Germany
Joal – Spain
Kallisto Stoftiere – Germany
Kathe Kruse – Germany
Keptin-Jr – The Netherlands
Kinderkram – Germany
Margarete Ostheimer – Germany
Nic, Bodo-Hennig – Germany
Salin – Germany
Selecta Spielzeug – Germany
Siku – Germany
Simba – Germany
Woodland Magic Imports – France

International Sleep Products Association

[Christopher Hudgins, International Sleep Products Association, Comments submitted to CPSC re Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens, (January 23, 2012)]

Due to CPSIA and CPSC's new requirements for third party testing:

"...expensive tests that can cost $850 to $1650 each to conduct, including the value of the product destroyed during the test...If the new rules require a manufacturer to conduct even 20 tests annually, that could add over $30,000 in additional testing costs.

These added costs occur at a time when many mattress manufacturers are struggling to recover from the recent economic recession, which has significantly reduced sales and forcing many employees to lay off workers. Our market, measured in terms of wholesale dollars and units, shrank from 2007 to 2009 by nearly 20% and the industry lost more than $1.2billion in sales. Although the industry began to recover in 2010, the uncertain economic and regulatory outlook has made employers in the industry cautious about expanding too fast. In the last few years, mattress producers and suppliers of every size have either closed their doors, undergone bankruptcy, or restructured and downsized. Many still struggle to remain in business."

Fashion Jewelry and Accessories Trade Association

Attachment B

[Sheila Millar, Fashion Jewelry and Accessories Trade Association, Comments submitted to CPSC re Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens, (January 23, 2012)]

"FJATA recently conducted a survey of its members to assess the impact of testing and certification requirements. The results emphasize the nature and scope of the burden that third party testing imposes.

- Almost 70% of FJATA members responding to the survey reported that products failed third party testing at amounts *within* 5% of the target levels. Nearly 50% reported that the test results were *just over the limit*. Another 20% reported that test results were *within 10%* of target limits.
- Most of the testing failures involved lead.
- 92% report having to implement price increases as a direct result of the new burdens imposed by CPSIA.
- More than 62% have had to change suppliers to ensure compliance with CPSC requirements.
- 24% have substantially reduced product offerings for children as a result of CPSIA.
- 16% have eliminated children's products from their product lines entirely."

"With the exception of a few significant multi-national vendors, the majority of FJATA's members are small businesses, many of which remain family owned."

Mrs. BONO MACK. And again, a welcome to our former colleague. It is great to have you here. And, Commissioner Northup, you are recognized for 5 minutes.

STATEMENT OF ANNE M. NORTHUP

Ms. NORTHUP. Thank you. I am delighted to be here, and as the Commissioner that is rotating off the Commission at the end of October, this will probably be my last opportunity to share with this committee some of my observations and concerns as we go forward.

I appreciate the remarks of the other three Commissioners that preceded me. I agree with Commissioner Nord, who talked about many of the accomplishments that we have done, the durable goods standards, the mandatory standards, our work at the borders and imports. All of those are claims that I think all of us are very supportive of.

But I am going to specifically talk about several examples of the impact of what this Commission has done and share it with the committee so that they can judge whether or not that is what they anticipated when they passed the CPSIA and as they have funded this Commission.

The dropping from 300 parts per million to 100 parts per million was done last year. August 1st it took effect. That meant we reduced from 99.97 percent lead free, to 99.99 percent lead free. Our staff found—and I am taking this right out of their proposed package—that it contributed minimally to the overall lead exposure of children. That is the benefit of it. Conversely, the Commission's economist concluded that mandating the lower lead limit would have significant adverse economic impacts, including the use of more expensive low-lead materials, costly reengineering of products to use lower-lead materials, increased testing costs, increased consumer prices, reduction in the type and quality of children's products available to consumers, businesses exiting the children's market, and manufacturers going out of business.

There is no question that these effects have been felt. Unfortunately the businesses that have left the market or that have gone out of business are no longer here to testify to you and to provide information to you because they have left the market.

What did this do? This created an enormous new hidden tax on consumers and parents. Many, many manufacturers have shared with us the bells and whistles that they took out of their products, the lack of choices, the fewer models that they offer, the cost increases that they have had to pass on to consumers for something that has almost no measurable benefit to a child.

That is the kind of decision that has concerned me throughout my term, this sort of out-of-context rulemaking that we do. I know, as Members of Congress, that as you pass legislation, you consider what is good for consumers. At the same time you consider the unemployment rate, the cost of living, all of the other global impacts that you have that you bear on your shoulders. But when you are at the Commission, no one has to think about any of those other things. In the name of safety, this Commission has taken actions that far overreach any necessary protection to consumers.

Probably the biggest decision that we made that I have found so discouraging, and I think it is important to share with you, is our

reversal on unblockable drains. The Virginia Graeme Baker Act required that we protect children, protect the public from deaths in pools where—it is called evisceration, where a blockable drain can trap a child or an adult so that they cannot become free, and they are eviscerated. And after you passed this law, you gave us a great deal of choice. We could have backup systems or any other technology that we thought was equal to that. In the meantime American inventors came up with several inventions with the ability to change a blockable drain to an unblockable drain. And the Commission found that that met the requirement.

After a year, and at great cost to many the pool owners that adopted this new technology, the Commission reversed itself because one Commissioner changed their vote. And it meant that that unblockable drain cover no longer satisfied the law. And so now everyone has to have a backup system. A vacuum alert, which is the primary system they use, is not dependable. It goes off when it shouldn't. It doesn't go off when it is supposed to, as it didn't in Tennessee just last month. It is not available to private pools. It is much more expensive. We were overwhelmed with the number of letters that came into us and told us that this was a less safe direction to take, and yet we proceeded down that direction at great cost to the public.

We estimate over 1,100 pools have closed—not our agency, but the association that oversees pools. We know that many States have said they simply can't bring pools into compliance, and here there was a much less costly, much more available technology that could have been available to pools, but was reversed by our Commission. I can certainly answer more questions about this if there is more time.

In the end, though, this Commission has made many decisions, many rules, completely disregarding the cost, the lack of choice it is going to give consumers, the inability of small companies to comply with these regulations all in the name of children's safety despite the fact that our staff has told us many of these will not increase safety for children.

[The prepared statement of Ms. Northup follows:]

Testimony of Anne M. Northup
Commissioner
United States Consumer Product Safety Commission

Hearing: "Oversight of the Consumer Product Safety Commission."

Before the

U.S. House of Representatives
Committee on Energy and Commerce

Subcommittee on Commerce,
Manufacturing, and Trade

August 2, 2012

Chairman Bono Mack and Ranking Member Butterfield, thank you for the opportunity to provide testimony to this Subcommittee in connection with your Oversight of the Consumer Product Safety Commission. I have testified before this Committee several times since my tenure as a Commissioner began in August 2009. On those occasions, I have brought to your attention the severe economic impact of the Commission's regulations on the American marketplace, and, in particular, the unforeseen adverse consequences of the Consumer Product Safety Improvement Act (CPSIA). While I do not intend to repeat that testimony today, **attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data.

Since the passage of the CPSIA, both President Obama and Congress took action intended to reduce the economic burdens of excessive and unjustified regulation. In January and July 2011, President Obama issued Executive Orders 13563 and 13579 calling on regulatory agencies to "afford the public a meaningful opportunity to comment" during the rule-making process, "use the best, most innovative, and least burdensome tools for achieving regulatory ends" and to "take into account benefits and costs [of regulation], both quantitative and qualitative." E.O. 13563. The President also asked independent regulatory agencies to formulate plans for the retrospective review of existing regulations in order to "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives." E.O. 13579.

Congress, for its part, passed in August 2011, H.R. 2715, which requires the Commission to (1) consider opportunities to reduce the cost of third party testing and permits it to prescribe new or revised third party testing regulations if it determines doing so will reduce third party testing costs consistent with assuring compliance with applicable product safety rules, bans, standards, and regulations; (2) report to Congress those opportunities to reduce third party testing costs that would require new legislative authorization; (3) exempt from third party testing, or provide an alternative testing requirement for, covered products produced by small batch manufacturers; and (4) issue standards and protocols calling for "representative" rather than "random" samples to be selected for periodic third party testing to ensure continued compliance following initial certification testing.

While the intent of the President's Executive Orders and H.R. 2715 are admirable, both have fallen short of having the desired impact on the CPSC. Over the past 18 months, the Commission's majority has done nothing to slow the feverish regulatory pace that has become the norm at our agency and refused to provide an opportunity for public comment on several of our most controversial and sweeping rules. It also has yet to formulate a plan for retrospective rule review that embraces the President's call for meaningful regulatory burden reduction. Instead, we are hearing new calls for the Commission to be free from the obligation to rationally justify its rulemaking.

Another Year of Regulatory Overreach

Just since August 2011, the Commission majority:

- reduced the acceptable limit of lead in a children's product from 300ppm to 100ppm, notwithstanding CPSC staff's determination that no health benefit would result, while businesses would incur substantial compliance costs;
- finalized its very complex and burdensome rule implementing the CPSIA requirement that manufacturers periodically procure third party laboratory tests of every component of every children's product to ensure continued compliance with all applicable safety standards, irrespective of any risk posed by the product or of the cost of the testing, proceeding despite Congress's passage of H.R. 2715 requiring the Commission to seek public comment on ways to reduce the cost of third party testing, letters from members of Congress urging the Commission to consider ways to reduce the costs of third-party testing *before* implementing the rule, and the recommendation of its professional career staff that the rule should be reproposed to permit consideration of public comment;
- without allowing for notice and a comment period, changed its interpretation of the term "unblockable drain" in the Virginia Graeme Baker Pool and Spa Safety Act, resulting in the closures of hundreds of pool throughout the country, and an *increase* in the risk of pool drain entrapment; and
- sought to impose additional burdensome record-keeping requirements with no offsetting benefit to product safety, in its interpretive rule defining the term "representative sample".

Moreover, none of these actions were preceded by any effort to determine the qualitative or quantitative costs, let alone by consideration of whether the benefits justified the costs, or whether less burdensome alternatives were available. Clearly, Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, was not talking about the CPSC when he wrote in a 2011 op-ed for *The Wall Street Journal*: "This insistence on pragmatic, evidence-based, cost-effective rules is what has informed our [the Administration's] regulatory approach over the past two and a half years."[1]

The Decision to Reduce the Children's Product Lead Limit from 300 ppm to 100 ppm.

A 3-2 majority of the CPSC voted in August 2011to require every single children's product component to be 99.99% lead free, down from 99.97% lead free. Commission scientists determined that the newly banned products containing between .03% and .01% lead contributed minimally to the overall lead exposure of children (a.k.a. the benefit). Conversely, the Commission's economists concluded that mandating the lower lead limit would have significant adverse economic impacts, including the use of more expensive low-lead materials; the costly reengineering of products to use lower lead materials or to

[1] Cass Sunstein. "21st Century Regulation: An Update on the President's Reforms," *The Wall Street Journal*. May 25, 2011.
http://online.wsj.com/article/SB10001424052702304066504576345230492613772.html

make newly noncompliant components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility and durability of products (a.k.a. the cost). This is a rule that would have failed the cost-benefit test.

The Premature Finalization of the Periodic Testing Rule.

H.R. 2715 was enacted on August 12, 2011, and contains a number of provisions to lessen the cost and burden of third-party testing and certification of every component of a children's product. These provisions include exempting certain products entirely from third-party testing and certification, directing the Consumer Product Safety Commission to provide relief to small batch manufacturers, and requiring the Commission to seek public comment on ways to reduce the cost of third-party testing for all manufacturers and importers. H.R. 2715 thus signaled Congress's intent to reduce such testing whenever possible consistent with assuring product safety.

The decision to finalize the third-party testing rule based on the original 2008 CPSIA statutory language, rather than repropose it to solicit public comment on the new issues raised by H.R. 2715, complicates compliance by an already overburdened regulated community. The third-party testing rule (often referred to as the Fifteen Month Rule), codified at 16 C.F.R. § 1107, is the largest and most widely applicable rulemaking the Commission has ever undertaken. It includes the promulgation of protocols and standards for the *additional* third-party testing *after certification tests of sufficient samples have already been performed* of a certified children's product to ensure continued compliance with all applicable safety standards. It applies both when there is a material change in the product and periodically, during production, even in the absence of a reason to believe a certified product is no longer compliant. This rule may be the most intrusive imposition of requirements on a segment of the manufacturing community ever. Its prescriptive mandates insinuate the Commission deeply into the production process of any company that manufactures a children's product for the United States market.

According to the CPSC's economists, "[t]he costs of the third-party testing requirements are expected to be significant for some manufacturers and are expected to have a disproportionate impact on small and low-volume manufacturers." Just the costs of testing alone -- excluding the costs of samples consumed in destructive tests, the costs of shipping the samples to the testing laboratories, and any related administrative and record keeping activity – is expected to consume over eleven percent of a small manufacturer's revenue. Given that a typical profit is only about five percent of revenue, it is reasonable to expect a large number of small business closures resulting from the third-party testing requirement. They cannot simply raise their prices and remain competitive.

Further, Commission economists predict that in response to the "significant increase in their costs due to the final rule", manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit the children's product market, or go out of business completely. The costs associated with the new rule are also expected to be a "barrier that inhibits new firms from entering the children's product

market", including, in particular, ones serving a niche market, such as products for children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."

By hastily finalizing the testing and certification rule, the Commission finalized the rule without considering the cost reducing measures urged by Congress, let alone ensuring that its benefits justify its substantial costs.

The Revocation of the More Protective Definition of Unblockable Drain.

The VGB Act requires public pools and spas with a single main drain which is small enough to be completely covered by a human body and thus create a life-threatening suction (known as a "blockable drain"), to be equipped with a system to prevent entrapment. These systems are often referred to as "backup systems". Although five systems/devices are enumerated in the Act as permissible backup systems, the Commission has long recognized the safety vacuum release system to be the most commercially viable and therefore most likely to be used by pool owners. "Unblockable drains" were exempt from the requirement to have one of these back-up systems, because their size and/or configuration prevented a deadly suction from ever occurring

In April 2010, following extensive input from the public, the Commission issued a final rule that interpreted the phrase "unblockable drain" to include an "unblockable drain cover." As a result, pools and spas with a single main drain equipped with an appropriately sized "unblockable drain cover" were not required also to be equipped with a vacuum release or other back-up system.

The Commission adopted this definition based on the recommendation of its staff of career technical experts. In their opinion, an unblockable drain cover is superior to a vacuum release back-up system because it *prevents* all entrapments. A vacuum release system, in contrast, only protects against one kind of entrapment (evisceration), only *stops* an entrapment incident after it has already occurred, and does so only after a delay of up to 4 seconds. As a consequence, once an evisceration takes place, it is already too late for a vacuum release to save a child. And the back-up system does not protect against other types of entrapments such as hair entrapment, mechanical (i.e., necklace) entrapment, or limb entrapment.

Besides the built-in limitations of the vacuum release systems, their unpredictability in practice has been well documented by those who are responsible for aquatic systems, including pool managers, pool maintenance companies, public safety experts and public and private recreation managers. The repeated complaints of malfunction include unwarranted shut off, failure to shut off, incompatibility with the filtration and cleaning systems and regular disconnection as a result of repeated failures. Just last month in Tennessee a child was rescued just in time after the vacuum system backup failed to engage.

The Commission acted in accordance with the expert advice of its technical staff. It did so only after also considering the contrary views presented by the inventor of the vacuum release system, who wanted the Commission to mandate the use of his product; pool safety advocates, many of whom were influenced and mobilized by the backup system manufacturer; and, a few members of Congress who had been lobbied by the back-up system manufacturer. While these parties argued that an unblockable drain cover does not provide the "layers of protection" required by the VGB Act, a majority of Commissioners recognized that the VGB Act's overriding intent to prevent child drowning was best served by reasonably and lawfully interpreting "unblockable drain" to include these newly invented systems that cover a blockable drain and convert it to an unblockable drain. The wisdom of their judgment is confirmed by the fact that, since that time, there has not been a single entrapment incident in a pool equipped with a compliant unblockable drain cover.

Then, in September 2011, Commissioner Bob Adler, who had previously voted with the majority, placed on the agenda a vote to revoke our original interpretation of "unblockable drain" to no longer permit consideration of these new covers. Moreover, Commissioner Adler and his two Democrat colleagues did so without notice to the public or any opportunity for public comment, and without a public briefing before the vote. They even refused my colleague Nancy Nord's request to at least notify, prior to the vote, the state agencies responsible for pool administration and safety and obtain their input. And after the majority rushed through this significant change, the Chair took the virtually unprecedented step of choosing not to issue a press release even informing the public of the Commission's decision.

While the vacuum release systems can be expensive to purchase, the real cost can be their integration with the other complicated systems including the compressors, the pump, the filtration cleaning process and the state health codes that require water turnover at specific rates. At the pool to which I belong, the price of compliance went from an original price of several thousand dollars to almost $50,000 for final installation. It is therefore not surprising that we later learned from numerous municipal park and recreation departments, as well as nonprofit groups created to promote aquatic recreation safety, that, as a result of the Commission's precipitous and inexplicable action, many state, municipal and other public pool operators will be unable to afford this new and expensive mandate coming shortly on the heels of the expensive work required to come into compliance with the Commission's original interpretation. As a result, many public pools opened late or closed, with the brunt of the losses suffered by economically-disadvantaged regions. There have been no injuries associated with compliant pool drains since 2008. But the CPSC estimates that 4400 children under 15 suffered emergency room treated submersion injuries in 2011. Children cannot learn to swim in closed pools, and economically disadvantaged children are at the greatest risk of drowning.

To date, over 1100 pools have closed throughout the country as a result of the cost of maintaining their operation.[2] This outcome is inconsistent with even the most basic concepts of rational cost-benefit based rulemaking.

This abrupt change in the law has also put out of business the manufacturers of unblockable drain covers, who no longer have a market for their product. Cash strapped public pool owners required to install vacuum release systems will not also bear the additional cost of an unblockable drain cover when it is no longer required. Unfortunately, the absence from the market of unblockable drain covers also leaves private pool owners without the most effective means to prevent drain entrapment in pools with single main drains. And many who are unable to afford even the inferior protection of a vacuum release system will be left with no protection against drain entrapment. Ironically, the Virginia Graeme Baker Act was named after a little girl who was eviscerated in the drain of her family's private pool. The Commission's reinterpretation makes it more likely other families will suffer the same tragic loss.

The Attempt to Impose Unjustifiably Burdensome Recordkeeping Requirements with the Interpretation of "Representative Sample".

In H.R. 2715, Congress changed the sampling requirements for periodic testing from using random samples to representative samples. This provided significant relief to manufacturers, because "random" sample has a highly technical/mathematical meaning in manufacturing processes, as distinguished from "representative' sample, which has only a common usage meaning. Congress directed the Commission to establish protocols and standards for testing "representative samples".

The Draft Final rule for the testing of representative samples prepared by CPSC staff properly recognized Congress' intent by defining "representative" according to its common meaning. It afforded manufacturers the flexibility to select samples that best suited their product and production process, so long it provided a basis for inferring the compliance of the untested samples.

But the Draft Final rule also included costly new record keeping requirements that were not mandated by law. The draft final rule would have required the creation and maintenance of records that our own economists estimate would cost manufacturers $32.3 million in the first year alone, with another $1.3 million to $6.5 million every year thereafter. And this cost is in addition to the enormous burden of the record keeping already required by 16 C.F.R. part 1107 – Testing and Labeling Pertaining to Product Certification. Regardless of which of the three alternative testing intervals a manufacturer selects to comply with the continued testing requirement under that rule, it must create and maintain for five years extensive records that far exceed what is necessary to ensure continued compliance under the CPSIA and to facilitate enforcement.

[2]Mick Nelson, USA Swimming. Personal Interview, July 24, 2012

These additional recordkeeping burdens were not imposed because my colleague Nancy Nord and I were able to block approval of the rule. But there can be little doubt that when the Democrats regain their majority at the end of my term in October 2012, there will still be no cost-benefit analysis, and the recordkeeping requirements of the representative sample rule will become law.

Little Hope for the Future

Opportunities remain for the Commission to ameliorate the unjustified burdens it has imposed on the industries it regulates, but I fear the formation of a majority with the will to do so is doubtful. The Commission has yet to formulate a plan for meaningful rule review, and the Chair is seeking new opportunities to regulate without regard for cost.

The Failure to Complete a Rule Review Plan

In July 2011, the President gave each independent regulatory agency 120 days to develop and release to the public a plan for the periodic review of its existing significant regulations to determine whether any should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives. Under Chairman Tenenbaum's leadership, staff did not present a draft plan to the Commission until the end of April 2012. Since that time, I have become increasingly pessimistic about the prospects that a Commission majority will agree to undertake *meaningful* rule review within the spirit of the President's request.

I have two principal concerns with the draft plan released to the public that, unless there is a change in the regulatory philosophy of the Democrats on the Commission, are unlikely to be allayed. First, rule review should, as the President requested, focus on the reduction of regulatory burdens, with prioritization for review given to those rules that impose the greatest burden on commerce. The goal of regulatory review should be to *meaningfully* reduce regulatory burdens. Instead, the draft plan expands the scope of the rules subject to review to include very minor provisions, and does not call for prioritization based on cost or any other measurable burden. In fact, the Democrats recently made the disingenuous claim in an op-ed that they were doing more than the President requested by potentially selecting for review any Commission regulation, not just significant ones. But this expansion in scope has already had its intended effect: the draft plan calls for the retrospective review of two minor and obsolete rules that have long since been superseded by other requirements. Thus, by claiming to do more, the Democrats seek political cover for a plan that does less. It also places equal, if not greater emphasis, on selecting rules with the intent to "strengthen" them and thereby increase the burdens they impose. .

Second, a full cost-benefit analysis – in the President's words, both qualitative and quantitative – should be performed on those rules that are selected for review. Otherwise, the President's goal of ensuring that benefits justify costs cannot possibly be achieved.

In deference to the Commission's internal rules discouraging public disclosure of private deliberations, I will not detail the Commissioners' efforts to negotiate a compromise rule review plan. Suffice it to say that we would not still be negotiating three months after receiving staff's draft plan if a Commission majority shared these core principals.

Efforts to Exempt More Rules From Cost-Benefit Analysis

Under existing law, the CPSC cannot promulgate a consumer product safety rule until it has performed an analysis of the potential benefits and costs of the rule. That analysis must then show that the benefits expected from the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirement to reduce the risk of injury. However, the CPSIA took the extraordinary step of exempting the Commission from those requirements as we established new mandatory rules governing certain toddler and infant products.

Having had the freedom to regulate without the need for a rational justification, the Chair now seeks to expand those powers. In her July 17, 2012, testimony before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, Chairman Tenenbaum urged the Subcommittee to amend the Flammable Fabrics Act to permit "this type of flexibility for rules regarding flammability of upholstered furniture" because it "would be very helpful and may allow for expedited consideration of the proposed rules."

The Commission has been studying means to address the risk of the flammability of upholstered furniture and contemplating potential rulemaking *for over twenty years*. Action has yet to be taken because it is such a complicated issue, both in terms of demonstrating the efficacy of risk reduction alternatives, and ensuring that they do not have unintended and more harmful consequences, such as has occurred with the introduction of potentially hazardous flame retardant chemicals in California.

There is no doubt that a proposed rule addressing the flammability of fabrics could be "expedited" if there was no need to establish the efficacy of the rule, or that its quantitative and qualitative costs are justified. But such rulemaking would likely close businesses, increase the cost to American consumers, and reduce choices and options in the market, all for unproven benefits. This is exactly what both Congress and the President recognize is undermining the country's economic recovery.

Many speeches have been made and much has written by both the current administration and Congress urging federal regulatory agencies to reduce the crushing costs of excessive regulation by following the simple common sense approach of measuring the costs and benefits of regulation, and only imposing justified burdens. Three years as a Commissioner has taught me how difficult such a seemingly simple approach can be, when it is obstructed by individuals whose regulatory philosophy is: more is better, and don't bother me about the cost.

Mrs. BONO MACK. Thank you, Commissioner, and again, I thank you all very much for your testimony and for your hard work and your dedication to these issues.

And now I recognize myself for 5 minutes for questioning and would like to direct my first question to Commissioner Tenenbaum. It might be a little bit outside of the ordinary question you get, but something that I have been looking at and you all came screaming to mind is the problem with bath salts. In recent months the news has been overflowing of the reports on the health implications of designer drugs that are sold and labeled as bath salts. The CDC has reports on file that date back to 2010 showing numerous instances of people being hospitalized and even dying from these substances. Despite the fact that the DEA has banned some ingredients, online pharmacies and small minimart-type stores continue to sell them. They are labeled bath salts, and they clearly say on them "not for human consumption." And it is an attempt to avoid the DEA ban. And despite that fact, there is no legitimate purpose as a bath salt.

Does the CPSC have any jurisdiction to regulate the sale of products like legitimate bath salts?

Ms. TENENBAUM. Thank you, Madam Chairman.

That may fall under the category of cosmetics under the Food and Drug Administration, but I would like to check with our legal staff when I return to the Commission and get you an answer for that. But it might be a cosmetic and, as such, would not be under our jurisdiction.

Mrs. BONO MACK. Has this ever risen to the level of your interest? Have you seen it out there? Have you seen the stories and said, "Can I take a look at that?"

Ms. TENENBAUM. I have seen the stories. I don't believe our staff has investigated it because it might not fall under our jurisdiction.

Mrs. BONO MACK. Could you possibly take a look and see if there is—I mean, these have very seriously——

Ms. TENENBAUM. Certainly, I certainly will.

Mrs. BONO MACK [continuing]. Dangerous substances that are out there, and I would hope that Commissioner Adler as well would take a strong look at that and see how we can throw the kitchen sink without these dangerous bath salts.

Ms. TENENBAUM. And we also could meet with the FDA to talk about how jointly we could address the hazards. So we will follow up on that for you.

Mrs. BONO MACK. I appreciate it very much.

Also something, I did send you a letter, Commissioner Tenenbaum, about the thought of launching a Facebook fan page. Can you tell me what the status of the Commission's plans are? Did you happen to send a letter back to me on this matter?

Ms. TENENBAUM. No. First of all, all the Commissioners have voiced support for the concept of having social media and using social media to educate the public on risks such as soft bedding, carbon monoxide, drowning, and furniture tip-overs. There is an issue, however, on whether or not Facebook would violate section 6(b) of the CPSA, which requires us that if we obtain information on a manufacturer, that we cannot give that information out publicly without obtaining the consent of the manufacturer. So the issue is

can someone—if we had a Facebook, and a person posted something about a manufacturer as a comment, would that mean we obtained information; as such would we have to scrub all of that information and ascertain its accuracy before it is posted? That would require too much resources from the Commission.

So we have not made a decision. Our general counsel's office is continuing to work on all of the issues, and we will provide you with that memorandum when or if we decide to go forward with Facebook.

Mrs. BONO MACK. So to clarify, the general counsel just has not opined on that matter yet at all?

Ms. TENENBAUM. She and her staff have worked hard on that, and it is not completed. Other offices in the Commission, other Commissioners had raised other legal issues that required more legal research, and so they have not finished that memorandum.

Mrs. BONO MACK. Thank you.

And Commissioner Northup?

Ms. NORTHUP. Madam Chair, I think it would mislead, misrepresent the position of at least myself and maybe Commissioner Nord that we are all in support of opening a Facebook page. While we acknowledge that we can understand the benefit, I, at least, and, I think, Commissioner Nord, believe it absolutely would violate the overarching rules in our Commission, and that 6(b) is not exactly as the chairman described it. That sort of misrepresents 6(b)'s requirements.

But I would also point out to you that the database, in the database, that you all suspended the 6(b) requirements for the database, and then we wrote that rule, and it is now under attack in the courts. Someone has filed suit against us that they have not—that we have violated the laws. If we lose that case, it would almost certainly say that any putting up of Facebook would violate the protections of 6(b).

And I might say it will make—if we lose that case, we could possibly undo millions of dollars of work we have done on this and have to rewrite the rule, something that I claimed all the way through the process.

Mrs. BONO MACK. Thank you very much.

At this point I will recognize Mr. Butterfield for 5 minutes.

Mr. BUTTERFIELD. I thank the chairman, and also thank the gentlelady from Illinois for sitting in the Chair for me this morning. I have had a very busy morning, and I thank her very much.

In March 2011, I wrote a letter to Chairman Upton and to the chairman of this subcommittee asking that the subcommittee hold a hearing concerning questions about the level of protection new and used football helmets provide athletes of all ages. In particular, concerns had been raised around this time about what kind of injuries can be prevented with the football helmet, and about whether used helmets continue to provide a sufficient level of protection against the injuries they are designed to guard against.

So far this subcommittee hasn't acted to look further into these issues. I understand the CPSC has been engaged on these issues since they first drew scrutiny, and that you plan to become more engaged through a new initiative with the NFL and the CDC, among others. So I am going to ask the Chairman, Chairman

Tenenbaum, can you please discuss all aspects of the work the CPSC is doing in this area, the status of that work, and where you plan or might like to see these efforts go?

Ms. TENENBAUM. Thank you. I would be happy to talk about our work with the NFL. Like you, I am very concerned with the brain injuries in football and sports, especially those that affect young people, high school and college athletes. Because these injuries have such devastating consequence, this issue has been a priority for me. And our efforts have a short-, medium-, and long-term focus.

In the short term, we would like to have a partnership with the NCAA, and the NFL, and the CDC, major manufacturers, and the voluntary standards to see what kind of reconditioning steps that we can take. All manufacturers with the exception of one have agreed to put a label on the new helmet which says the date that the helmet was manufactured, and gives a date that it should be reconditioned, optimally within 10 years.

We also have worked with the NFL and will be making announcements this weekend in order to drive a culture change and have education in terms of how to avoid head injuries when playing football. Also, the NFL has funded a program for four communities where they will give helmets to schools where economically disadvantaged youth play. So these new helmets will help tremendously as well.

Mr. BUTTERFIELD. Well, thank you for your work in that area. Is there anything we can or should do legislatively to support what you are doing?

Ms. TENENBAUM. Well, we have—the research on helmets is not complete in terms of we have not found that there is a helmet that will prevent concussions. So we hope to monitor that. We hope this committee will stay interested in that and work with us on it because that would ultimately prevent injuries.

Mr. BUTTERFIELD. Thank you.

Mr. Adler, is there anything that you can add to this conversation about helmets?

Mr. ADLER. What I want to add is my personal thanks and commendation to the Chair for taking this on as a personal task and for dedicating a very valuable staff person to go around the country and work on this. I think what you have heard from the results that she has discussed are really wonderful results. I think she deserves almost total credit for doing that, and I think it is an important endeavor, and I hope it continues.

Mr. BUTTERFIELD. Well, when I met with her in my office a few months ago, she told me it was one of her priorities.

Mr. ADLER. Well, it is, and I think she and her staff have done an excellent job.

Mr. BUTTERFIELD. Yes. All right.

Let's see. One of the biggest victories for consumers, consumer advocates, and those of us who believe in government transparency was the creation through CPSIA of the publicly available Consumer Product Safety Information Database. This database launched in March of last year at www.saferproducts.gov. There consumers can both file safety complaints about consumer products and view complaints by other consumers that have met the stand-

ards for inclusion in the database. And before Congress mandated creation of this database, the American public had almost no access to information provided by consumers to the CPSC about injuries from the products they use.

Let me ask the Chairman or Mr. Adler, can you please discuss some of the statistics and trends you are seeing related to the database, like how many complaints are being filed and what types of complaints, et cetera?

Ms. TENENBAUM. We receive on average 600 per month. In total we received a little over—almost 9,600 reports of harm posted on the saferproducts.gov as of July the 27th of this year. Over 1,000 of these reports have been assigned to follow-up by our investigators, resulting in 875 completed investigations to date.

There were some on the Commission that said this would be a place where trial lawyers would try to salt the database. We have found that 97 percent of all reports are of consumers who own the product and who have had experience personally with the product. The three top categories have been kitchen appliances, 33 percent; nursery equipment or supplies is about 8 percent; and toys are about 5 percent.

When you amended the CPSA to Public Law 112–28, you asked to us require the serial number. We found that the model of the serial number now, 88 percent are filling that portion in; 88 percent is nonblank. So we have used it to recall two products, and we think that it has been generally well accepted.

Mr. BUTTERFIELD. Thank you. I believe my time is expired. I thank you, and I thank you all of the Commissioners for the service that you render to our country.

I yield back.

Mrs. BONO MACK. Thank you, Mr. Butterfield.

The Chair recognizes Mr. Guthrie for 5 minutes.

Mr. GUTHRIE. Thank you, Madam Chairman, for the recognition, and thank you for my colleague from Kentucky here with us today, and who some of you may know, or may not know, her sister was one of our great Olympians in 1984. And so talking about swimming pools and athletes here today, it is really—how proud she made Kentucky and how proud she made America.

There is another Louisvillian, I can tell this, Chris Burke. Many of you know about Chris. He played at St. X. He hit the walk-off home run for Houston to beat the Braves. And somebody said about him, said when he was like 6, he was out hitting the ball every day. And they said he lived a moment of a lifetime, but he spent a lifetime getting to that moment. You know how hard our Olympic athletes are working to get there, and it is always great to praise your sister. Those great billboards in Louisville are always fun to see.

In Shelby County in my district, there is a table saw manufacturer, and I am not going to ask a question, I just want to bring up—and their concern, you were going down—the Commissioner is looking at table saw technology, and nobody is saying that what—the technology you are looking at is not safer and makes things safer. Their concern is, is it patented, and the expense of it. So just making sure that there are some—as we look at new standards as opportunities for other types of technologies and things move for-

ward, that creates the same kind of safety standards. So I just wanted to bring that forward.

But I want to talk to Commissioner Northup on the President has issued Executive Orders on regulations, and he talked in the State of the Union how the regulations are strangling the economy in a lot of ways, and putting forth opportunities to move forward. I think there were two Executive Orders, and I guess my question—I can tell you what they are, but I think you guys are aware of them; if not, I can go through. But I just want to know what the CPSC has done to implement the Executive Orders of the President on reviewing regulations.

Ms. NORTHUP. Well, we are considering a package right now, although it has been a couple of months. It has been sort of dangling out there without agreement.

Let me just say that the President and Mr. Cass Sunstein have both written extensively about it. They have both said their primary purpose, and I have a quote right here, is to insist on pragmatic, evidence-based, cost-effective rules. They specifically talked about looking at major rules, rules that affected a significant portion of the economy. They also talked about doing cost-benefit analysis.

You have seen both in the previous testimony of the Chair in the Senate and now Commissioner Adler today the sort of resistance to cost-benefit analysis, that the benefit has to justify the cost. And this has been something we have publicly debated. I think that in the name of safety, you can just about adopt the most expensive, as we have seen, new standards that drive businesses out of business. So I believe we ought to do some cost-benefit analysis on the rules that we look at.

The second thing is we need to look at major rules, and this year, for example, we have talked about two retrospective ones. One is the testing of toy caps. Toy caps, that is an old standard, was—has long been out of date. Nobody uses it. It was absolutely a nothing regulation. Nobody was using it. It has been overcome by the new F963 toy standards, new testing standards. And so to say we used retrospective review to bring the toy cap standards into modern times is to ignore, in my opinion, the intention of the Executive Orders and the spirit of them.

And so as we talk about what our plan is going forward, I think we should agree that we are going to look at major rules, rules that have a significant economic impact as the President and Mr. Sunstein have talked about in their articles and, secondly, agree that we will do some cost-benefit analysis, and the conclusion of cost-benefit is that the benefit will be in proportion to the cost.

Right now we have Reg Flex analysis. You will hear some of the Commissioners talk about, well, isn't that enough? But we have blown through rule after rule where it is clear that the analysis of the economic impact does not justify the new safety. It didn't matter. With Reg Flex analysis, all you have to do is the analysis; you don't have to create a finding that it is justified.

Mr. GUTHRIE. Well, thank you. I am about out of time. And I just want to say, as we look at the reg review process in your Commission and all over, in terms of just the number of regs that we were looking at, what is actually hurting the economy? And there is a

cement plant, Louisville Cemex over on Dixie Highway, that is in my district actually that is threatened by some regulations coming forward. So we can look at numbers of regs to look at or what actually makes big impact, and we need to look at ones that make big impact on the economy.

I yield back.

Ms. NORTHUP. Of course, I agree.

Mrs. BONO MACK. Thank you.

And, Ms. Schakowsky, you are recognized for 5 minutes.

Ms. SCHAKOWSKY. Thank you.

You know, I am looking at your testimony, Commissioner Nord—no, I guess it was Northup—and you have in there "the feverish regulatory pace." You know, we passed the CPSIA 4 years ago, and this idea that somehow we are in a feverish regulatory pace—and it was in Mr. Adler's testimony that in the 31 years that—since the CPSC was saddled with unique requirements, I think you are talking about the emphasis on cost-benefit analysis, there were nine consumer product safety rules, over roughly one every 3 ½ years. And so in the last 4 years, I am happy to say there is 10 safety rules that came out.

And, you know, I mean, I have worked with kids in danger on this crib stuff for a very long time, and the play yards for a very long time. I don't think that most consumers would think this is about a feverish regulatory pace of finally getting this done.

So I want to ask you, Chairman Tenenbaum, how would the old way have impacted your ability to improve the safety of durable infant and toddler goods? Would you have been able to promulgate the crib rule as quickly as you did, or the play yard rule, and what impact would that have had on the safety of our children, which ought to be, it seems to me, the chief focus of the hearing today?

Ms. TENENBAUM. Thank you, Congresswoman Schakowsky.

We would not have been able to promulgate the infant durable nursery equipment rules on the schedule that Congress mandated that we promulgate them. We are required under the CPSIA to put forth two rules every 6 months on durable nursery equipment. Since the CPSC—CPSIA passed, we have written 41 rules, all of which were required by the law. We have not gone off afield and created rules. All of the rules were required of us under the CPSIA. So had we not been able to work with the standards committee and industry to write the standards for the crib and then adopt it as our rule, it would have taken years to do cost-benefit analysis.

I am not against cost-benefit analysis. I think sometimes it is justified, but when you are looking at trying to have rules that protect the safety of children and infants as this Congress—as Congress passed under CPSIA, having the Administrative Procedures Act helped us expedite the process, and we worked hand in glove with industry. Industry helped write these rules.

Ms. SCHAKOWSKY. Thank you.

Ms. NORTHUP. May I respond?

Ms. SCHAKOWSKY. Actually I have a question for Mr. Adler on a totally different subject, and I just want to get it in, because I have a—I am cochair of a seniors task force of the Democratic Caucus. And you briefly mentioned about older Americans and a particular

vulnerability, and I am just wondering if you could explain that a little further.

Mr. ADLER. Yes. One of the things that the Congress has been particularly sensitive to is vulnerable populations. And as it turns out, the vulnerable population we have been dedicating our attention and resources to over the years, properly so, has been infants. But as part of this growing, almost exploding demographic, I have been very concerned about the impact of dangerous products on the senior population.

If you look at the injury patterns for seniors, they almost always exceed the population at large. It is not as though—and falls are a huge part of it, and fires are another huge part.

There are a number of products that we could probably take some measures to help the elderly with, and I will give you just one quick example. The Commission just wrote a section 104 rule for infant bed rails. Well, as it turns out, the elderly suffer death at a much greater rate from bed rails than infants do.

And it may well be that the fix for adult bed rails is not too different from infant bed rails. In other words, there are many, many projects that we ought to be addressing themselves to.

The CDC just came up with a national plan for dealing with childhood injuries, and I have called for a national plan with CDC for adult injuries as well. It is a very, very important issue, and I hope to convince my colleagues to pay more attention to it. And I thank you for asking.

Ms. SCHAKOWSKY. Thank you.

I am out of time, and I yield back.

Mrs. BONO MACK. Thank you, Ms. Schakowsky.

The Chair recognizes the vice chair of the subcommittee, Mrs. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Madam Chairman; and thank you all for being with us this morning. Nice and timely. I will have to say you have created quite a little stir in the last week over an issue of Buckyballs. And I would just like to ask, Madam Chairman, how it is that you have taken such a hard-line stance against Buckyballs.

And I tell you, reading all this and looking at it after the information came out, and having two grandchildren, one that just turned four and one that just turned three, you can compare this to toys like Hungry Hungry Hippo, which comes with all these marbles. It has been on the market for about 30 years. There is a Fishing Well that also comes with marbles. It has been on the market for a long time. These are toys that we play with.

So you know what I am having a hard time doing is understanding how you could come down against Buckyballs and Buckycubes when it is clearly noted that they are for children ages 14 and above and Hungry Hungry Hippo and Fishing Well are for children that are 3 and above. So it doesn't make a whole lot of sense to me as to what you are doing. So I was wondering: Why?

Ms. TENENBAUM. Well, I appreciate that question. It certainly is timely.

I want to explain to you why we cannot comment on the merits. We did not ban Rare Earth magnets, which is what Buckyballs and

the category that they are. We referred the matter to an administrative law judge. That administrative law——

Mrs. BLACKBURN. I am going to stop you right there, if I may, please, ma'am.

You made the decision to go ahead with the recall, didn't you?

Ms. TENENBAUM. No, we did not. We made the decision to refer the matter to an administrative law judge. That judge will make the determination what to do with the product.

Mrs. BLACKBURN. What caused you to make that decision? We as Members of Congress have the right to ask you that question.

Ms. TENENBAUM. Well, we will be the appellate body if the administrative law judge's decision——

Mrs. BLACKBURN. All right. Then let's talk about the administrative law judge.

Ms. TENENBAUM. I just wanted to lay the groundwork why I can't really get into the merits. Because we will be the appellate judges, so to speak.

So let me say that we have a well-documented record as being alarmed by the serious and hidden hazards to children. The difference between Rare Earth magnets and marbles is that marbles do not cling together in the intestine. Children have had—a large number of children have had invasive surgery to remove these balls once they are in their intestine because they clamp, causing a huge blockage.

Mrs. BLACKBURN. They are clearly labeled "Not for Children." So let me ask you this: What about sparklers? We have just had July 4th. So why don't you outlaw sparklers?

Ms. TENENBAUM. We do set limits on sparklers in terms of the heat they can generate. We do have rules.

Mrs. BLACKBURN. But you have injuries. You don't issue recalls.

We have just built a playhouse for the grandsons. My husband engineered this great thing. He had all sorts of power tools out there, and they had their little Black & Decker play set. What about power tools?

Ms. TENENBAUM. There are a number of hazard in the marketplace. That is why the Consumer Product Safety Commission exists.

Mrs. BLACKBURN. What about alcoholic beverages?

Ms. TENENBAUM. There certainly are.

Mrs. BLACKBURN. You have always got these alcohol poisoning cases and things of that nature.

So let me go back to this administrative law judge.CPSC does not have an administrative law judge, correct?

Ms. TENENBAUM. No, we referred this to an administrative law judge for a hearing, and that judge will determine whether or not the product——

Mrs. BLACKBURN. Where is that judge going to come from?

Ms. TENENBAUM. That judge would be right here in Washington, DC, probably, or it might be in Maryland.

Mrs. BLACKBURN. So when this case is filed, the lawyers who try the case have to be separated from those who advise the Commission, correct?

Ms. TENENBAUM. That is correct.

Mrs. BLACKBURN. OK. Now that the lawyers all work together in the Office of the General Counsel, how will you ensure appropriate separation with these two groups of lawyers?

Ms. TENENBAUM. Our Office of Legal Counsel has set up a wall, and we are all abiding by that.

Mrs. BLACKBURN. A physical wall or an understood——

Ms. TENENBAUM. A wall within the legal context so there will be no communication.

Mrs. BLACKBURN. All right. And the Director of Compliance recently left that position and is now working with the Office of General Counsel also, is that correct?

Ms. TENENBAUM. That is correct, but I can't comment on the involvement of that official.

Mrs. BLACKBURN. And who is now the Acting Director of Compliance?

Ms. TENENBAUM. Marc Schoem. But he has recused himself and has not been involved in this case.

Mrs. BLACKBURN. Is he a lawyer?

Ms. TENENBAUM. No, he is Acting Director.

Mrs. BLACKBURN. It is supposed to be a lawyer. The CPSA requires that a lawyer be the Director of Compliance.

Ms. TENENBAUM. We do. And it is in transition. And so we have, I believe, 90 days.

Mrs. BLACKBURN. So you have got 90 days to make that right.

Ms. TENENBAUM. We have 90 days in order to fill the position with a lawyer.

Mrs. BLACKBURN. OK.

Ms. TENENBAUM. I am saying it is 90 days. It could be more. I have to look at the statute.

Mrs. BLACKBURN. The Commission authorized the filing of the complaint against Buckyballs last month, right?

Ms. TENENBAUM. Yes. It was a bipartisan decision.

Mrs. BLACKBURN. And it was signed by the executive director?

Ms. TENENBAUM. Yes.

Mrs. BLACKBURN. Is he a political appointee?

Ms. TENENBAUM. Yes, he is. An SES as well.

Mrs. BLACKBURN. We have got other questions. I am out of time. You have been generous. Thank you, Madam Chairman.

Mrs. BONO MACK. I thank the gentlelady.

The Chair recognizes Mr. Kinzinger for 5 minutes.

Mr. KINZINGER. Thank you, Madam Chair.

Ms. Nord, if I have some time at the end, I will let you to respond to my colleague from Illinois.

I want to thank the Commissioners for being here. I want to touch on a topic that has the potential to impact several manufacturing sectors, which is important to my district.

As the Commissioners are aware, phthalates are important components in products ranging from wire coverings, flooring, and in automobiles. The Chronic Hazard Advisory Panel's review of phthalates could set a precedent for the use of the product outside of children's toys, and I want to ensure the science that is used is transparent, properly peer-reviewed, and publicly available.

Chairman Tenenbaum, OMB has described peer review as one of the important procedures used to ensure the quality of published

information meets the standards of the scientific and technical community. To ensure the scientific integrity of the document, the draft report should be released for public comment before it goes to peer review, stakeholder participation should be encouraged, and the peer reviewer should be provided with all the data and studies provided to the CHAP.

Can you ensure us that the peer review of the CHAP's draft report will be conducted in accordance with current OMB guidelines for peer review of highly influential scientific assessments, with particular attention to the need for transparency and public participation?

I think this should probably be a fairly quick answer.

Ms. TENENBAUM. The Chronic Hazard Advisory Panel is continuing its work. We keep an arm's-length relationship with that panel because they operate independently. I would like to talk with our Office of General Counsel to see how they are proceeding in terms of the peer review and write you a letter and get back with you.

Mr. KINZINGER. That would be great. I would love to hear back. Because I think obviously to have that as an open and transparent process for something so big and so important is essential. We will stay on top of that, and I appreciate your responding to that, too.

Do you believe that the CHAP should review all relevant data, including the most recent best available peer-reviewed scientific studies?

Ms. TENENBAUM. I certainly do.

Mr. KINZINGER. What procedures have you put in place to ensure that the CHAP and the Commission are weighing all relevant data and the best available science?

Ms. TENENBAUM. Again, the Chronic Hazard Advisory Panel was mandated under CPSA, and we created it to look at phthalates, the three that were temporarily banned and other phthalates if they so find that others should be in the report. We are awaiting their report. The Commissioners do not interact with the CHAP because it has to be an independent body, but our staff has been there to make sure they follow appropriate procedures.

If you have questions, if you will just submit them to us, we will write you and give you the full detail on how the CHAP has operated.

Mr. KINZINGER. You all specifically, though, comply with OMB's peer-review process and everything like that, right?

Ms. TENENBAUM. The peer-review process was vetted through the Office of General Counsel, and they were advising the CHAP on how to proceed with that.

Mr. KINZINGER. Can you assure me, before the Commission issues its final rules under section 108, that you will publish a proposed rule for comment first?

Ms. TENENBAUM. I will have to get back with you on that. I don't know that that is the procedure that we will follow. We will receive the report and then—but we will answer your questions fully on the procedure.

Mr. KINZINGER. But prior to that what would be your concerns with publishing a proposed rule for comment?

Ms. TENENBAUM. Well, I want to first make sure that the CHAP operates independently and that it has no undue influence by any of the Commissioners and that it makes its best scientific findings. And then we will also, in the spirit of transparency, which we operate at the Commission, we will follow what the advice is of counsel on how to proceed.

Mr. KINZINGER. We look forward to staying in touch with you.

Ms. TENENBAUM. We will certainly answer your questions in written form, too, so that you will have these.

Mr. KINZINGER. Ms. Nord.

Ms. NORD. Thank you.

In responding to the question about a feverish regulatory pace compared to what we were doing before, I just would like to draw the committee's attention to the information in Commissioner Adler's statement about all the accomplishments of the agency from 1972 through the 30 years following and how big an impact this agency has made. So I don't think that we were acting at a snail's pace.

With respect to the crib standard, first of all, I supported the crib standard. All of us did. In fact, I initiated when I was the acting chairman the AMPR that got the thing rolling. What I am concerned about is the manner in which we implemented the standard, and I think it flows directly from the fact that we didn't do the hard workup front.

Just to give you a flavor of this, the staff came up with an effective date. The staff in their Reg Flex analysis said that they didn't anticipate that small retailers would be impacted. The retailers had worked out a deal with manufacturers for a retrofit kit. We did not even approve the use of that retrofit kit until about a month before the rule goes into effect. Another group comes in and says, oh, we can't meet the effective date; can we have longer time? We give them 2 years. Another group comes in 2 weeks before the effective date and says, we can't make this date. We give them another year.

It was just a very sloppy rollout of a rule. And that is of concern.

Mr. KINZINGER. Thank you.

Thank you, Madam Chair.

Mrs. BONO MACK. Thank you, Mr. Kinzinger.

Mr. Sarbanes, you are recognized for 5 minutes.

Mr. SARBANES. Thank you. Thank you, Madam Chair.

Thank you, Chairman Tenenbaum and Commissioners, for being with us this morning.

There is a staggering number of products, obviously, that we import, and in certain categories of percentages it is equally staggering when you think of it. Apparently, as I understand it, 99 percent of toys, 96 percent of apparel, 95 percent of fireworks, 78 percent of electrical products sold in the U.S. are manufactured someplace else. So the task, the charge, the responsibility of the Commission to kind of keep its eyes open as these imports are coming in to make sure that the standards we would like to see are being applied, obviously, that is an important part of what the Commission does.

And you have taken steps, I know, to improve that oversight and monitoring. In fact, as a result of the CPSIA and the increased au-

thorization levels for the Consumer Protection Safety Commission, I think you have now increased the number of employees that are posted at U.S. ports of entry to do this kind of oversight, and monitoring has gone from zero, which, of course, was completely ineffectual, to now 20. The U.S. has more than 300 ports of entry.

So the question is, if you have got, as I understand, employees posted in only about 15 of them, how is this going? From what I have heard, you have made great strides in the oversight, but I would be interested, Chairman Tenenbaum, in your perspective on the effort and is having the kind of coverage you now have producing a kind of deterrent effect with respect to the other ports of entry so that you know that the things coming in meet the standards. What other things can we do on that front?

Ms. TENENBAUM. Well, thank you, Congressman.

You are right. We have 20 members of our Ports Surveillance Team. And we have over 300 ports of entry. That is why it is very important that we have the methodology to target succinctly products that we think are violative coming into the ports and also that we have a very strong relationship with Customs and Border Protection.

CBP allowed us to be the first agency to have a memorandum of understanding. We now have live streaming data through their CTAC office, their Center, so that we know when shipments are coming into the port and what are in those containers before they reach the port.

With the pilot project that we have implemented, Risk Analysis Methodology, we are able to then look at repeat offenders, also products that are highly suspect or those that we monitor closely like electronics and fireworks, and we are able to with pretty great accuracy target those shipments before they are even into port and then interdict them and not let them be unloaded.

Mr. SARBANES. Would your experience—if you caught something at one of the 15 ports that you are monitoring, I guess what I am hearing is you are then in a position to be alerted to those kinds of imports coming into many other ports of entry and take action.

Ms. TENENBAUM. We are. We know repeat offenders. We also know if there is a company that doesn't have a record with us.

We are hoping to establish—and we have already created this Importer Self-Assessment Product Safety Program with CBP where we know those that are consistently in compliance, and we don't hold those shipments up. And we can let them go through the port and unload quickly. But those where you have suspect cargo or cargo that is repeatedly in noncompliance or repeat offenders, we are able to target them.

The most-stopped products are children's products. The largest categories are lead, continuing to see lead violations, flammability, and small parts that pose a choking hazard. So we are able to, with our RAM and working with CBP, be highly effective.

Mr. SARBANES. And over time is there a plan—again, I don't understand your methodology, because I haven't studied it—but would the ports of entry that you are covering with your personnel, would you rotate that? Or the ones that have been chosen ones that you want to continue to monitor always because of the nature of them? How does that work?

Ms. TENENBAUM. Well, with 20 people, we also rely on our field investigators. So we have 90 field investigators in 38 States. If we know a shipment is coming in, we can move those investigators to that port to work with CBP and the person already stationed there. So we can move people around.

And I think that is why it is so important that we get this data before the ships enter the port where this live streaming data that CTAC provides us, we know the contents of the container before it reaches us.

Mr. SARBANES. Thank you.

I yield back.

Mrs. BONO MACK. Thank you very much.

The Chair recognizes Mr. Pompeo for 5 minutes.

Mr. POMPEO. Thank you, Madam Chairman.

I am not surprised.

Now I will talk about the database a little bit. I still contend that it is happy hunting ground for the plaintiffs bar, in direct contrast to what Ms. Tenenbaum said. She said in her written statement: I think the saferproducts.gov has gained wide approval and acceptance.

I know there is a lawsuit. Ms. Nord, do you agree with that statement, that it has gained wide approval and acceptance?

Ms. NORD. I don't. I have heard a number of concerns expressed that indicate that there is not wide approval and acceptance out there.

With respect to plaintiffs using the database, when this thing rolled out and I was given a briefing on it by a consultant, the consultant went into the database and very randomly pulled up a record. The consumer was listed as a law firm. And so that has since intrigued me. And just 2 weeks ago I asked our staff if they had any idea of how many of those so-called consumers were actually law firms, and they said they had no way of knowing, but they assumed quite a few.

When the chairman says 97 percent of the users of the database or submitters of the database are consumers, you should understand that consumer is defined so broadly to mean any living person. And you don't have to have a relationship with the product or any interaction with the product in order to file a complaint as a consumer.

Mr. POMPEO. I appreciate that.

Ms. Northup, there is a lawsuit filed by some businesses. Has the court yet ruled on whether the agency has misinterpreted the law? I certainly think that it did. But has the court ruled?

Ms. NORTHUP. We don't have that information yet. As I said earlier, when we wrote the rule I wrote extensively at that time that I thought that we were writing the rule in a way that we would be vulnerable to a lawsuit. The claims made in the lawsuit were litigated publicly, and the claims they made were the very ones that we made in our argument that I think will stand. I agree with them.

If we do lose that, it will mean that our rule will have to be rewritten. It means our software will have to be redesigned. It means we could be vulnerable to a class action lawsuit by other people that feel that it has been arbitrary and capricious, was the idea

what I wrote extensively about. And so this is why paying attention to the law and not rushing to regulate and glossing over facts is important.

Another fact that is important not to gloss over is that when you say 88 percent of the items have something in the model or serial number, you should know that in many cases it is not the model or serial number. And we know that. And it is important that we give that information honestly to you. It might say: yellow high chair. And so, of course, if good information is good for consumers, bad information is really harmful to consumers.

Mr. POMPEO. I appreciate you clarifying some of the responses Ms. Tenenbaum gave.

Ms. Tenenbaum, yes or no, if the Federal court rules against the CPSC in the pending database lawsuit, will the agency pledge to immediately take down the database?

Ms. TENENBAUM. Will you repeat your question?

Mr. POMPEO. Yes, ma'am, I certainly will.

Yes or no, if the Federal court rules against CPSC in the pending database lawsuit, will the agency pledge to immediately take down the database?

Ms. TENENBAUM. No. That is not the scope of that lawsuit.

Mr. POMPEO. I appreciate the answer.

Ms. TENENBAUM. The lawsuit is under seal, and we cannot talk about it.

Mr. POMPEO. I understand. So your answer is no.

When we passed H.R. 2715 last year, it gave the CPSC authority to take steps to reduce the cost of complying with CPSIA and particularly the cost of third-party testing. I am very concerned about it. Why has the agency not done anything about that yet?

Ms. TENENBAUM. We have done something. In fact, under this Public Law 112–28 we were required within 60 days to go out for comment, and we did. We went out for comment, we received those comments, and the staff is writing now the report, which we will receive any day now. So we have done that.

In terms of rule review, the executive orders ask us to look at any rule that has an impact of a hundred million dollars annually on the economy. That is one of the rules that we are going to look at in terms of rule review.

So we have followed what Congress passed.

And regarding the model numbers for the database, 73 percent have a numeric value. So 73 percent——

Mr. POMPEO. Is it an accurate numerical value?

Ms. TENENBAUM. Yes, I assume it is. If it is in there as accurate. It doesn't say "yellow high chair." It gives the model number.

Mr. POMPEO. I appreciate that.

Ms. Nord, I hope you will encourage the Commission to do more under the authority to reduce the cost of third-party testing. Are there other things you all could be doing?

Ms. NORD. There are a number of things we could be doing. In fact, I submitted a whole list of about 40 items to the staff.

But I think the takeaway for you all should be that third-party testing is really, really expensive. So let's use that for the riskiest items. Let's have the most aggressive testing for the riskier items, and let's ease off for things that have less risk or where we know

there is high compliance. We can adjust that under the statute as it exists now.

Mrs. BONO MACK. I hate to cut you off, but your time has expired, and we are trying to get in as many members and questions before we have a series of votes on the floor.

Just to let members know, it is my hope we can get everybody through. So if we try to stick to under the gavel even, that would be great.

The Chair recognizes Mr. McKinley for 5 minutes.

Mr. MCKINLEY. Thank you, Madam Chairman.

I think it is always broad looking at the consumer product safety. I am not always sure what all that incorporates. It is consumer product safety. Do those little compact light bulbs, do they fit under your purview?

Ms. TENENBAUM. Are you talking about button batteries or the light bulbs?

Mr. MCKINLEY. The compact fluorescent units, CFBs.

Ms. TENENBAUM. Yes.

Mr. MCKINLEY. They have mercury in them. And we know that a typical household with 30 of those is the equivalent of a ton of coal being introduced inside your house. Same amount of mercury in a ton of coal as in 30 light bulbs. I just wonder, are people actually following the rules? They are taking them in a little bag and taking it up to a special disposal? Or how many of them are just throwing them in the trash can and they go to the landfill?

Ms. TENENBAUM. I don't have that data, but I share your concern.

Commissioner Adler, did you have anything to add?

Mr. ADLER. No, other than to say those definitely are our jurisdiction. Our jurisdiction is incredibly broad, as the chairman noted.

Mr. MCKINLEY. I don't know where you are going with it, because I don't think anyone is adhering to the guidelines. And the fact that we have such a fear right now of the mercury poisoning from burning coal but yet we just put 30 light bulbs in our house that bring in as much mercury as—I hope you will take it more seriously about the direction.

But let me add a couple of other things, if I could.

The lead in Chinese marbles, I understand that not too long ago there were some lead—lead was detected in some children's marbles, and those marbles obviously were rejected, appropriately. But the United States manufacturers who had never had marble detected in there now are going through some very draconian testing to see that they stay in compliance, but they have never not been in compliance. So they are being punished because of what China was doing.

Ms. TENENBAUM. The law, as passed by Congress, requires all children's products to undergo third-party testing to make sure that the lead content is below 100 parts per million, and that was set by statute as well. So domestic and imported——

Mr. MCKINLEY. Do you determine the frequency of testing to make sure? Surely you are not going to test every marble.

Ms. TENENBAUM. No. You have to test a sample initially. You pull a sample and test that. If you have a material change in the manufacturing——

Mr. MCKINLEY. Who pays for that test when you come into a plant?

Ms. TENENBAUM. The manufacturer has to pay for it.

Mr. MCKINLEY. So here is a manufacturer that has never had a violation, but maybe once a quarter they have had someone come in and do some testing. But now we are up to less than once a month they are coming in, and it is costing you $3,000-some for every one of those series of tests. And they have done nothing wrong. There has been no grounds for this other than the fact that China was trying to—once again, like they did with drywall, now they have done it with marble, that has caused this company now to spend thousands of dollars. Is that reasonable?

Ms. TENENBAUM. Well, under the law that Congress passed, all children's products must be third-party tested initially, if there is a material change, and periodically. And that is the law.

Mr. MCKINLEY. Well, there is no change on this.

So let me go to the next, the indoor air quality. Would indoor air quality be a product safety—the fact that we have carpet formaldehyde, resins, cleaning agents, other things that—we seem to be so concerned with—and rightfully so—the health of our children and adults, and we put them in an indoor air quality that has—90 percent of your time you are spending indoors, and they are exposed to all these elements. And we say, but they get asthma when they go outside. They get asthma when they go near a coal-fired powerhouse. But they spend 90 percent of their time in a home.

Ms. TENENBAUM. That is the jurisdiction of the EPA, just as the disposal of the mercury containing lights.

Mr. MCKINLEY. You just kind of wash your hands.

Ms. TENENBAUM. No, I don't. I respect the jurisdiction of other agencies.

Mr. MCKINLEY. Then you support that? Of having—you have some standard. You say it falls under your purview, but yet the disposal of it is not. You give that to the EPA.

Ms. TENENBAUM. The law gives it to the EPA.

Mr. MCKINLEY. Would you change the law?

Ms. TENENBAUM. Well, we work in partnerships with many agencies.

Mr. MCKINLEY. Would you change the law so that it stays under you so you can have control over it? Because it sounds like you——

Ms. TENENBAUM. No, you have to change the law. I am an executive branch. I follow the law.

Mr. MCKINLEY. Would you change the law? Because you seem like you say I am ready to get rid of it.

Ms. TENENBAUM. No, that is not at all what I said. I was just trying to clarify the jurisdiction of EPA and our agency.

Mr. MCKINLEY. Thank you.

I yield back my time.

Mrs. BONO MACK. The gentleman, Mr. Lance, you are recognized.

Mr. LANCE. Thank you very much, Madam Chair; and Chairman Tenenbaum and distinguished members of the Commission, thank you for your service to the Nation.

I am interested in how we can explore ways to increase efficiency and decrease costs and reduce red tape burdens without compromising safety. Commissioner Nord, thank you for the suggestions

that you have made regarding this, particularly for small-volume manufacturers.

Can you speak, Commissioner Nord, to the timeframe in which we might implement the changes you have suggested, considering the fact that Commissioner Northup may be leaving the Commission?

Ms. NORD. Yes. I am so sorry to see Commissioner Northup leave our body, because she has made such a contribution.

Mr. LANCE. I certainly agree with that.

Ms. NORD. When we were considering the testing and certification rule, the rule that was put out for comment had a low-volume exemption from testing in it. That was removed from what came up to the agency for a vote. I offered an amendment to put that back in. That amendment failed on a 3–2 vote. At that point, we had another Commissioner.

And so certainly a low-volume exemption would certainly be a way to get at this. I have been talking with a number of people who have said we have just stopped doing low-volume manufacturing because we can't afford the testing costs. I was out in southern California talking to a clothing manufacturer, and they were very explicit about it.

There are a number of other things that we can do to help companies that are struggling with how to comply with this rule. It is a very broad—overly broad, in my view—rule that imposes costs without real benefits. So I hope that the agency will reconsider its position.

Mr. LANCE. Thank you. I would urge the agency to do so. I would be happy to work with all members of the Commission on this issue, because I think it is important moving forward.

On recreational vehicles, off-highway vehicles, would you please comment, Commissioner Nord or Commissioner Northup, on the fact that if the CPSC is going to include a pass/fail test as the main criteria to evaluate the stability of these vehicles, this might cause some challenges. Shouldn't a test that is meant to pass or fail a vehicle be repeatable so that one can be assured that the same result is achieved?

Ms. NORD. Of course, any test that we would mandate, regardless of the product, has got to be repeatable. You can't put in place a testing method that nobody can predict the results from. So of course we must have repeatable tests.

Mr. LANCE. Thank you.

Commissioner Northup, do you have an opinion on that as well?

Ms. NORTHUP. No. I have not participated in the ATV because I have a conflict of interest with my husband's company.

Mr. LANCE. Thank you.

Madam Chair, I will cede the minute and a half I have left to colleagues.

Mrs. BONO MACK. We thank you very much and recognize Mr. Harper for 5 minutes.

Mr. HARPER. Thank you, Madam Chair, and thank you, Chairman, each of the Commissioners, thank you for your time, your service.

Chairman Tenenbaum, if I may ask you a few questions, I was certainly pleased to read your op-ed in The Hill last week where

you indicated that you were taking a more collaborative approach with the window covering industry regarding cord safety. I am further pleased that you have spent the time visiting manufacturing facilities to better understand the difficulties in eliminating cords for all products. Can you tell me, without revealing any proprietary information, about these visits and what you have learned?

Ms. TENENBAUM. Thank you.

It was my pleasure to travel across the United States and meet with the three major manufacturers as well as the major retailers of window coverings. I have expressed concern about the strangulation hazard for children publicly, and the Window Covering Manufacturers Association and other stakeholders are in the process of rewriting a voluntary standard, which we will have in September.

But what I have learned is that there is concern from the industry about the strangulation hazard. There are many new technologies which would remove completely this hazard. However, the industry also is—they are willing to work with us; however, they don't want to see a standard that completely does away with the cord. They can make the cord where it is not accessible to children and there are all kinds of technology that they share with us, but they don't want to eliminate having a cord entirely.

However, I am very optimistic, meeting with retailers and with the association, that everyone wants to do a massive education campaign. So that if you are buying shades and you have children at home, then you would go cordless. You would go cordless or have no shades. You could have shutters or draperies. But you remove the hazard if there are children in the home. So I am very encouraged by my conversations with them.

Mr. HARPER. How are you proposing that we move forward from here?

Ms. TENENBAUM. In September, we will receive the standard from the Window Covering Manufacturers Association. They will have voted on it. And we will continue to work with them to see how we can more and more eliminate the hazard.

We also want to work with major retailers so they can train employees at the point of sale, so that there are kiosks online that have baby registries that can also bring to the attention of people that if you have a child in the home you need to go cordless. But see if we can't address some of the fatalities and reduce the number of fatalities by an educational program that was robust.

Mr. HARPER. I am certainly a big supporter of cooperation between government and industry, particularly when it comes to some of these safety issues and how best to achieve the safest product possible.

You also discussed in your op-ed your efforts to better educate the consumer. With this in mind, can you tell me about your plans for the rest of this year and next with the Window Covering Safety Council and your efforts to educate new parents about potential hazards to children associated with window covering?

Ms. TENENBAUM. We are in the process of working with major retailers and also associations to draft that plan. So that is in process, Congressman. But we are committed. I am personally committed, because I think we can reduce the number of fatalities with a robust education program and collaboration with the industry.

Mr. HARPER. Does the Commission plan on utilizing any of its funds towards this education effort?

Ms. TENENBAUM. Well, we have limited funds. Unlike the pool safety campaign, where Congress gave us a direct appropriation, we don't have one for this. But it would be a great help to us to have one. But I think working with industry and with the retailers we can accomplish a lot without extra funding.

Mr. HARPER. Are promoting education and raising awareness some of the best tools that you have in your arsenal?

Ms. TENENBAUM. No question about it. That is how social media fits in, as well as working with people, so that we can all have a strong education campaign on any hazard.

Mr. HARPER. Thank each of you for being here, and I yield back, Madam Chair.

Mrs. BONO MACK. Thank you very much.

The Chair recognizes Mr. Olson for 5 minutes.

Mr. OLSON. I thank the Chair. I understand that votes have been called, so my comments will be brief.

But I want to thank the witnesses. Thanks for coming. Thanks for your expertise.

Chairwoman Tenenbaum, nice to see you again outside of a big storage facility outside the Port of Houston. Nice and cool here as opposed to the heat we had, even though it was the fall. Good to see you again.

As my nameplate says, I am from Texas. As you all know, Texans love the outdoors. They like to go tubing on the Hill Country rivers. They like to fishing on our lakes, the Gulf of Mexico. They like to go out there and do some hunting. Or just look at the bright stars of the Texas night sky. And one way to get access to all these great things is with ROVs. So I am very concerned when I hear that the Federal Government may be threatening the quality of life in my home State.

And so my question is for you, Commissioner Tenenbaum. I would like follow up with the line of questions by my colleague from New Jersey about the pass/fail stability tests. I understand CPSC staff supports adoption of a pass/fail stability based on the CPSC methodology. In a recent meeting, however, CPSC revealed that it has conducted no repeatability testing of its methodology or results. Do you agree to it being appropriate to base a mandatory pass or fail standard on the sample size of a single test—one test?

Ms. TENENBAUM. Well, let me premise this by saying I will need to get back with you on what the staff is talking to the Recreational Off-Highway Vehicle Association and manufacturers.

One of the things that has been brought to our attention is the number of deaths and injuries in 7 years, between 2003 and 2010. We had 165 deaths and 329 serious injuries from ROVAs is what we call, or ROVs. And 70 percent involve lateral stability turnover.

So we are looking and working with industry to develop a stronger lateral stability test. We have issues of understeerage and occupant protection. I do hope that the industry will work with us to develop a standard. My staff met with the ROVA representatives on July 19, and we are saying that we need to upgrade that standard to prevent the turnovers. And we could go to a mandatory

standard, but it is always better if we can agree with industry and come up with a strong voluntary standard.

Mr. OLSON. Yes, ma'am. I am sorry I cut you off. I am running out of time here.

Commissioner Nord, any comments on that line of questioning, ma'am?

Ms. NORD. Well, lateral stability has been just a really perplexing problem not only with ROVs but also withATVs, and it has been something that we have been struggling with for years. So if we are going to be putting forward a standard that addresses lateral stability, we have got to make sure we have get it right, got to make sure we solve the problem, and we have got to make sure that we have a test that works and is repeatable. And I think that is where we are working forward.

I fully agree with my chairman when she says that it is best to try to work cooperatively with industry to come up with something in a voluntary mode, and I hope that we can do that.

Mr. OLSON. In working cooperatively with industry, are we allowing the industry representatives to observe the testing to have some firsthand knowledge of what you are doing there so they can respond right on the scene?

Ms. TENENBAUM. Well, collaboratively means that we share information. They have shared their stability tests with us. They came in and shared it with us, and the staff had some issues with it. We need to be very open and collaborative in sharing these tests, and also the industry should realize that and say, "Yes, we have a lot of lateral turnovers, and we want to address it voluntarily."

Mr. OLSON. Sharing is a two-way street. Industry shares with you. You share with them.

I yield back the balance of my time.

Mrs. BONO MACK. I thank the gentleman very much.

As you all have heard, our votes have been called. We are down to the wire. So to begin to sum things up, I ask unanimous consent that a letter from the National Association of Manufacturers be included in the record of the hearing. It has been previously shared with Democrat staff.

Without objection, so ordered.

[The information follows:]

Rosario Palmieri
Vice President
Infrastructure, Legal and Regulatory Policy

August 1, 2012

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable G. K. Butterfield
Ranking Member
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Bono Mack and Ranking Member Butterfield:

On behalf of the National Association of Manufacturers (NAM), the largest industrial trade association and the voice for 12 million men and women who make things in America, I submit these comments for the record for the hearing to be held by the Subcommittee on Commerce, Manufacturing and Trade entitled, "Oversight of the Consumer Product Safety Commission," scheduled for August 2, 2012.

One year ago today, the House of Representatives and Senate both passed your legislation—H.R. 2715 (Public Law No. 112-28)—to provide relief of burdens imposed on manufacturers and retailers by the Consumer Product Safety Improvement Act (CPSIA) of 2008. We applaud your leadership in improving the safety of consumer products while seeking to minimize the burdens imposed on stakeholders. Manufacturers of consumer products are committed to providing safe products and ensuring a well-functioning and credible product safety regime—one that gives all stakeholders the confidence they need that products meet all applicable safety standards and regulations.

As the Subcommittee discusses the progress of the Consumer Product Safety Commission (Commission or CPSC) as it implements the requirements of H.R. 2715, we urge the Subcommittee to include in its oversight other CPSC actions that pose significant costs and challenges to manufacturers. At risk are jobs and the health of U.S. companies who make consumer products.

Reducing Regulatory Burdens

Manufacturers strongly support efforts to reduce third-party testing burdens as the Commission implements the CPSIA and H.R. 2715. With the passage of H.R. 2715, Congress

directed the Commission to identify ways to reduce "third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations." Congress clearly intends for safety in consumer products to be maintained without imposing an undue burden on manufacturers, retailers and consumers. In July 2011 the President issued Executive Order 13579, asking independent regulatory agencies to comply with the provisions of Executive Order 13563. The latter order states that our regulatory system "must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends."

Since the passage of H.R. 2715, stakeholders in the business community have submitted comments and participated in meetings with the Commission to encourage actions that would significantly reduce third-party testing burdens. The business community is concerned that, despite a directive by Congress, the Commission has been slow to adopt significant burden-reducing initiatives since H.R. 2715 was adopted.

Pursuant to H.R. 2715, in November 2011 the CPSC requested public comments on reducing the burdens associated with third-party testing. The business community has offered a number of suggestions to the Commission in response.

We are pleased that the Commission appears to embrace the wider adoption of alternative technologies, such as X-ray fluorescence (XRF) spectrometry and High Definition (HD) XRF. H.R. 2715 also modified Section 108 of the CPSIA to exclude inaccessible component parts from the phthalates limits, much as they are excluded from lead limits. The CPSC has voted to issue a Federal Register notice soliciting comments on guidance that generally mirrors the inaccessible components exception for lead. We urge the Commission to act on the other recommendations submitted and to promptly take the following steps to assure safety while reducing the costs and burdens of testing:

- The Commission should adopt a clear statement of statistical uncertainty with respect to tests results, particularly heavy metal and phthalates tests. Since the initial adoption of CPSIA, manufacturers have faced problems with inconsistent test results where products may pass one test but fail another. Products fail lead tests if any laboratory reports a single result above 100 parts-per-million (ppm), no matter how small the margin. Statistical variability in test results is a known problem and guidance from the Commission would help avoid costs of the destruction and retesting of safe products.

- We encourage the Commission to further promote non-destructive testing and to assess how manufacturers who have invested in alternative technology can rely on it directly. Currently, manufacturers who have invested and use XRF equipment in-house must still have products tested at third party testing laboratories unless they register as firewalled accredited laboratories. Even where XRF is used, destructive testing is still often necessary because products with many components must be disassembled in order to properly test them.

- The Commission should exclude paint and surface coatings present in a product at extremely low total weight from testing requirements when no risk of harm exists. Manufacturers report that the current testing regime requires them to make and supply products solely for destructive testing purposes. This is because where a product contains very small amounts of paint, laboratories must scrape surface coatings from

many products to generate an adequate sample. The toy safety standard, ASTM F963, mandated by CPSIA, includes an exemption for small amounts of paint for testing all other heavy metals, apart from lead, only because the Commission has not adopted a similar risk-based exclusion. Where a product does not contain enough paint, even in composite form, to provide a sufficient sample for a laboratory to test, it is surely an example of a situation where the enormous expense of testing, including product destruction, cannot be justified.

- The Commission should consider mechanisms to rely on other agency requirements to establish compliance with CPSIA standards. Many consumer products are effectively regulated by agencies such as the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC). Executive Order 13563 stresses improved coordination across agencies to reduce costs and simplify and harmonize rules. The Commission, however, has been slow to work with other federal agencies in identifying areas of regulatory cooperation that could greatly reduce burdens.

- The Commission should expand its efforts to identify the types of plastics that do not contain one of the prohibited ortho-phthalates. Phthalate testing is particularly expensive, and the inaccessible components parts exception for phthalates will lead to significant reductions in third-party testing burden without sacrificing safety. By exempting materials known to not pose a health risk from unnecessary, expensive testing, the Commission can reduce third-party testing burdens without posing a risk to consumers.

As originally enacted, CPSIA required periodic testing of "random samples" of children's products. After the Commission proposed to implement the random sampling requirement by establishing an elaborate scheme of statistical selection that was incomprehensible to most companies, and especially to small businesses, H.R. 2715 modified this requirement by substituting the term "representative samples." Recently, the Commission deadlocked on a vote to issue a rule that offered a definition of "representative samples," largely because the rule also included additional detailed recordkeeping requirements that arguably provide minimal value at high cost. We all agree on the need to guard against the risk of testing pre-selected "golden" samples. The Commission should avoid complicating a relatively simple and straightforward standard by adding significant and unnecessary paperwork.

SaferProducts.gov: Confidentiality and Material Inaccuracy

Section 212 of the CPSIA requires the Commission to establish a publicly available database "on the safety of consumer products, and other products or substances regulated by the Commission." Consumers can report incidents involving consumer products in the database known as SaferProducts.gov. The reports are then published. Because the accuracy of information available through this database is critically important, Congress required that the Commission provide the manufacturer of a consumer product a submitted report for the database before its publication. Manufacturers are to be provided the opportunity to object to publication of confidential materials or materially inaccurate information.

Regulations adopted by the Commission as it implemented the database requirements of the CPSIA provide a procedure allowing manufacturers to request the deletion of confidential material and the exclusion of materially inaccurate information. See 16 C.F.R. § 1102.24; 16

C.F.R. § 1102.26. Both types of requests are made electronically via web-based forms within the database portal, and responses to those requests are transmitted via email from a generic mailbox. The identity of the Commission staff person or persons making the determination and transmitting information associated with the requests is not revealed.

The Commission's regulations do not provide a process of review or appeal from the original finding of the anonymous staff member, and Commissioners have acknowledged publicly that no review or appeal process exists within the agency. Information in the database about a company's products is important to manufacturers, and it is vitally important that confidential or inaccurate information not be published with the imprimatur of a government-maintained database. That is why Congress established the protections against these types of disclosures in the enacting legislation. At present, the process of reviewing requests to delete confidential or materially inaccurate information is completely opaque, and decisions are made anonymously. Once the decision is made, there is no opportunity for review or even an opportunity to identify who made the decision.

Manufacturers are sensitive to the information on their products that is available publicly. Unfounded negative or inaccurate information could be devastating. A company dissatisfied with the staff-level determinations on publishing confidential or materially inaccurate information has no alternative to respond other than litigation, which is authorized by the statute. See 15 U.S.C. § 2055a(c)(2)(C)(ii); 16 C.F.R. § 1102.24(h). Few companies are willing to bear that cost, and our court system should not be clogged with disputes that could be easily resolved by an inter-agency review process.

To ensure the accuracy of information submitted to the database, we urge the Commission to establish an internal process by which companies could seek review of denials of claims of confidentiality or material inaccuracy.

Coercive Use of Section 6(b) in Recall Cases

Section 6(b) of the Consumer Product Safety Act (CPSA), as amended, requires the CPSC to provide notice to a manufacturer or private labeler before the public disclosure of information. See 15 U.S.C. § 2055(b). The CPSIA shortened the time period for notice from 30 days to 14 days. It also amended the prohibition against releasing information reported to the Commission by firms under section 15(b) of the CPSA concerning products that are non-compliant, defective or create an unreasonable risk of serious injury or death by allowing the Commission to make disclosures of that information if the Commission had made a public interest finding that the public health and safety requires a lesser period of notice than the 14 days provided. See 15 U.S.C. § 2055(b)(5).

CPSIA amendments to this section were not intended to fundamentally change the obligation of the Commission to provide a rational process for comment and agency evaluation before potentially damaging and misleading information is released about companies and brands. To the contrary, the Commission has used the release of information to force product recalls before affording product manufacturers due process going to the merits of a claim. Manufacturers are sometimes forced to choose between unreasonable Commission demands—even if there is not a threatening hazard justifying drastically limited due process procedures—or having a demand for a product destroyed by a CPSC press release. This is particularly harmful to small firms.

Section 15 of the CPSA allows the CPSC to order a recall after a firm has an opportunity for a hearing on whether its product has a defect that creates a substantial hazard. However, not infrequently, the staff has preliminarily determined that a product presents a defect and substantial product hazard with little technical data or evidence. The Commission then has used the threat of a public interest health and safety finding and notice under section 6(b) to coerce firms—especially small businesses—to undertake recalls of their products. A firm has no opportunity to formally make its arguments to the Commissioners before they make their findings. The firm instead faces an ultimatum that results in either the destruction of product or damage to its reputation. Most small firms do not have the resources to file a Federal Court action to attempt to enjoin such a press release on short notice.

An initial determination of potential risk posed by baby slings and the tactics of the CPSC led to at least one recall and subsequent shut-down of a business. The CPSC subsequently changed course under united pressure and educational efforts from the industry and parents who understood the virtues of the products. Similar threats have been effective against many other firms making the actual issuance of such public health and safety notices a relative rarity.

The Commission should use public health and safety notices sparingly in cases of the most serious risks. It should issue such notices not based on gut feelings about risk but based on solid technical evidence and careful consideration of the firm's position. The staff should not have wide latitude to threaten such notice as a way of coercing firms into undertaking product recalls. Section 15 hearings should be the rule to ensure due process to firms before such notice and recalls except in rare, extreme cases.

Use of Social Media

Manufacturers, particularly small manufacturers, of consumer products are sensitive to the type of information publicly available through the internet. Small businesses do not have the resources to monitor and respond to digital information that can spread quickly among consumers. When information is inaccurate or harmful to a business, the results can pose a significant burden on that business and, in the case of small businesses, inflict irreversible damage.

We urge the Commission to modify initiatives to expand the use of social media that would enable information to be published on a public website without having been fully vetted by the Commission and in accordance with applicable laws and regulations. A rise in popularity of social media is not an appropriate reason for the Commission to engage in activities that are outside the scope of its governing statute and existing policies on information dissemination. Providing vehicles to publish unverified information on a website endorsed by the Commission would circumvent well-defined protections for manufacturers and trivialize efforts by Congress and the Commission to ensure the accuracy of information published by the agency.

We are concerned with the Commission's use of social networking and microblogging services to disseminate information subject to section 6 of the CPSA. The agency routinely publishes information identifying products and companies ahead of a formal press release and seemingly in violation of statute and CPSC-established regulations on the disclosure of information.

Civil Penalty Investigations

Traditionally, the Commission had an informal policy that information reported to the Commission by firms under section 15 of the CPSA, as amended, would be reviewed for timeliness within one year after the recall was announced and that an investigation would be commenced within that period. This practice enabled companies to have certainty about whether a penalty would be sought within a reasonable period of time after an issue arose. The CPSC recently has abandoned that practice without any notice to stakeholders and is commencing penalty investigations in cases where recalls occurred two, three or even four years ago.

The Commission staff also now asserts a broad document retention requirement when communicating with companies about reports filed or cases closed, advising companies to "preserve all information, documents, records and samples, now in existence or created hereafter, related to" the product at issue. This broad document preservation request, coupled with the potential for initiating penalty investigations up to five years after the product issue arises, leads to tremendous expense and uncertainty for companies without adding to product safety. Penalty investigations can be conducted soon after a recall is commenced, when the issue is fresh in the minds of those concerned, and persons familiar with the issue are still available, and applicable documents are readily located. Whether or not a violation occurs, expansive recordkeeping requirements and burdensome document requests place a significant burden on businesses.

Upon identifying a potential issue with a product, a firm engages in voluntary and costly corrective actions to minimize risk. Cases through the Commission's Fast Track Product Recall Program receive increased scrutiny for penalties merely because the affected firm does not contest the hazard determination at the beginning. These firms, that try to do the right thing and quickly remove potentially hazardous products from the marketplace, now face a lengthy and costly penalty investigation for their efforts. The Commission's actions are a major disincentive to companies to engage in the successful Fast Track recall process.

Rulemakings to Establish Mandatory Standards

Over the past few years, the CPSC has proceeded with rulemakings to establish mandatory standards for a variety of consumer products despite the prevalence of effective industry standards. Pursuant to the CPSA, in order to issue a mandatory rule, the Commission must find that an existing or voluntary standard would not be adequate, the benefits of the rule bear a reasonable relationship to its costs and the rule is the least burdensome requirement that prevents or adequately reduces the risk of injury. To issue a mandatory standard, the Commission also must make a finding that an existing voluntary standard would not prevent or adequately reduce the risk of injury in a manner less burdensome than the proposed CPSC mandatory standard. See 15 U.S.C. § 2058(f)(3). Despite the law, the CPSC has begun rulemaking proceedings that lack support and threaten industries.

Recreational Off-Highway Vehicles

In October 2009, the CPSC began a rulemaking to establish a mandatory safety standard for a relatively new class of vehicles called recreational off-highway vehicles (ROVs). Despite industry efforts to develop ANSI-accredited voluntary safety standards, the CPSC is moving forward with a mandatory standard without adequate data supporting the restrictive

design standards the agency is demanding. Industry analysis has shown that at least 90 percent of serious incidents with ROVs would not have been affected by the CPSC proposals, but were instead caused by operator actions. In addition to robust design standards, the industry has implemented a comprehensive safety plan and education initiative, which includes a hands-on driver course and state-of-the-art online education program, intended to address driver and passenger behavior that has contributed to crashes resulting in avoidable serious incidents. The CPSC's insistence on a mandatory standard will compromise the mobility and utility of the vehicles in the off-highway setting for which they are intended, negatively impacting consumer demand and costing thousands of domestic manufacturing and retail jobs. With its command and control regulatory policy, the CPSC will greatly harm an entire class of recreational vehicles with no clear improvements to safety and no justification for the costs the agency seeks to impose on manufacturers and consumers.

Table Saws

On October 11, 2011, the Commission initiated a rulemaking to establish mandatory safety standards for table saws. The rulemaking, in its current trajectory, would seek to impose a standard that could only be achieved through the use of one patented technology, thus creating a government-sponsored monopoly for the patent attorney who owns the technology. Regulation should not be used to advantage one technology or one company over another.

The Commission is proceeding with a rulemaking despite no finding that the existing voluntary standard would not prevent or adequately reduce the risk of injury in a manner less burdensome than the proposed CPSC mandatory standard. To address concerns by the agency, the industry recently updated the Underwriters Laboratory (UL) voluntary standard so that since 2010 all table saws sold must meet the new safety standard. Data used by the CPSC on table saw injuries are outdated and are not relevant to the new voluntary standards. In fact, the data used by the CPSC to proceed with the mandatory standard was collected from table saws that met the old standard. If the CPSC proceeds with a mandatory standard, such action would undermine industry's incentive to develop new alternative table saw safety technology and would impose unnecessary increased costs on consumers. Unfortunately, this rulemaking illustrates a trend at the agency where the CPSC fails to conduct adequate cost-benefit analyses with its rulemakings and imposes prohibitive costs on manufacturers and consumers without accounting for the actual risks associated with products.

Window Coverings

For the past 15 years, CPSC staff has participated in industry efforts to update the voluntary standards for corded window coverings and assisted in a nationwide education campaign to reduce the risks posed to small children. We are encouraged by the Commission's involvement in the standards development process, and the improved voluntary standards will effectively reduce the risk of injury in a manner less burdensome than a mandatory standard.

There are efforts in Congress to add authorizing language to the Financial Services and General Government Appropriations bill that would require the Commission to promulgate a rule mandating the elimination of corded window coverings. The CPSA, the Federal Hazard Substances Act and the Flammable Fabrics Act require the Commission to regulate various products through an open and transparent process. That process requires assessing the voluntary standard to see if there is substantial compliance and conducting a cost-benefit analysis. The appropriations rider is unique because it essentially amends the underlying statute

by specifying administrative procedures not currently applicable to the CPSC. This legislative provision was not discussed at a Congressional hearing, and industry was not provided the opportunity to present its position.

The Commission has not publicly responded to this effort that removes its discretion to regulate products within its jurisdiction and takes away jurisdiction from the Energy and Commerce Committee. We urge the Commission and lawmakers to oppose these attempts to force the CPSC to issue mandatory standards and to subvert the well-established and effective voluntary standards-setting process.

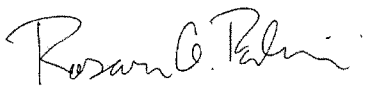
Addressing Complicated and Contradictory State and International Regulations

Companies face an expanding array of laws and regulations between states and among different countries. The proliferation of current and planned regulations at the state and local level within the United States has made it next to impossible for companies to comply with one regulation while at the same time not violating another. For example, 28 states have introduced chemical legislation for consumer products. Testing and compliance costs associated with differing requirements could strangle small businesses, and contradictory regulations will force companies to choose between two states to sell their products. Although the Commission and the Administration have stated goals of improving international regulatory cooperation, the patchwork of state, local and federal regulatory requirements increasingly disconnect the U.S. from the global marketplace. We encourage the CPSC to work with local and state officials to ensure consistency with state and federal regulations and that standardized testing requirements flow from federal requirements to minimize testing costs.

Conclusion

The decisions and actions of the Consumer Product Safety Commission greatly impact manufacturers, who support effective regulation and share the Commission's mission to protect consumers. The business community looks forward to working with the Subcommittee in ensuring the Commission implements the provisions of law as Congress intended, while protecting consumers and minimizing regulatory burdens imposed on U.S. businesses. Thank you for your consideration of these comments.

Sincerely,



cc: Members of the Subcommittee on Commerce, Manufacturing and Trade

Mrs. BONO MACK. And, again, I would like to thank all of the Commissioners very much for your time today. I think you have shed a lot of light on some very important consumer product safety issues. I know that our committee looks forward to an ongoing and productive dialogue.

I would like to thank my colleagues, especially Mr. Butterfield and Ms. Schakowsky, for working together in a bipartisan fashion to pass H.R. 2715 last year. We enacted a very good bill that saved a lot of American jobs while providing important protections to U.S. consumers. We call that a win-win around here.

So I will be asking questions for you to submit back to us. Specifically, Ms. Northup, I had one all teed up for you. I will ask you in writing, if you could submit in return, simply to give us your conclusions in writing about your service. And thank you for your service as you leave the Commission. We are going to ask a big softball question for you. Say all you want. How would you improve the world of consumer product safety? So we look forward to that in writing.

I remind members they have 10 business days to submit questions for the record. I ask the witnesses to please respond promptly to any questions that you receive.

I wish you all a very wonderful August and safe travels.

The hearing now is adjourned.

[Whereupon, at 11:16 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

STATEMENT OF CONGRESSMAN G. K. BUTTERFIELD
DEMOCRATIC RANKING MEMBER

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

HEARING: "OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION"
AUGUST 2, 2012

Chairman Bono Mack, thank you for holding today's hearing on oversight of the Consumer Product Safety Commission. The CPSC serves as the watchdog on behalf of American consumers, ensuring that the products that we use every day in our homes and offices are safe and do not pose an unreasonable risk of injury or death.

In 2008, Congress provided the Commission with expanded enforcement authority, ratcheted down on the amount of lead allowed in children's products, mandated safety standards for durable infant and toddler products, and created a public consumer product safety information database. We did all this through the Consumer Product Safety Improvement Act of 2008, the C-P-S-I-A (sip-see-uh), which passed the House by a vote of 424 to 1 and was signed by President Bush in August 2008.

However, as we all know so well in Congress, sometimes our good intentions result in some unintended consequences. For example, some very small businesses were impacted by CPSIA that perhaps should not have been.

To fix some of these problems, without compromising significant health and safety protections, Chairman Bono Mack and I, over the span of many months, worked out legislation to give the CPSC more flexibility in implementing CPSIA. That law, enacted a year ago, provided targeted relief for ATVs, bicycles, books, and made the strong lead content limit prospective so that products manufactured prior to August 14, 2011 could be sold at the 300 parts per million level in an effort to take some pressure off of retailers and manufacturers who still had inventory that would violate the law.

Chairman Tenenbaum, I know with CPSIA, and the amendments to CPSIA passed last year, Congress has given the CPSC many important tasks. But I want you to know that I am proud of the Commission that you lead. The CPSC has oversight over more than 15,000 consumer products. That's no small task. Under your leadership, we finally took steps to remove drop-side cribs from the marketplace. Newborns and infants were dying at an alarming rate in these cribs after sliding between the mattress and side of the crib and suffocating to death.

Under your leadership, we've seen agency staff utilized in ways that are proactive, such as by putting them at ports of entry to inspect products and prevent dangerous products from ever making it to store shelves.

Thank you, Chairman Tenenbaum, for leading this Commission in a way that continues to provide safety and security to American consumers. I also thank Commissioners Adler, Nord, and Northup for their service and for being here today.

Madam Chairman, I yield back the balance of my time.

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

CHAIRMAN INEZ M. TENENBAUM

November 9, 2012

The Honorable Mary Bono Mack
Chairman
House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and
Trade
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack:

Attached please find responses to the written questions for the record submitted by you and certain other Members of the Subcommittee in connection with the August 2, 2012, hearing entitled "Oversight of the Consumer Product Safety Commission." An electronic version of these responses will also be provided to Mr. Brian Kirby Howard, Legislative Clerk for the Subcommittee.

Thank you again for the opportunity to testify before the Subcommittee. Should you have any questions or require additional information, please do not hesitate to contact me or Christopher Day, Director of Congressional Relations, at (301) 504-7660 or by e-mail at cday@cpsc.gov.

Very truly yours,

Inez M. Tenenbaum

Attachment

The Honorable Mary Bono Mack

REDUCING REGULATORY BURDENS AND COSTS

1. **H.R. 2715 granted you the authority to exempt products, or classes of products, from the tracking label requirements. Has the Commission granted any exemptions? Has the Commission conducted any analysis on what products or classes are likely candidates to exempt from the requirement? If not, why not?**

   Section 6 of H.R. 2715 (now P.L. 112-28) stated that "the Commission may, by regulation, exclude a specific product or class of products from the requirements in subparagraph (A) [tracking label requirement] if the Commission determines that it is not practicable for such product or class of products to bear the marks required by such subparagraph." To date, the Commission has not issued any regulations under this new authority. Instead, the Commission issued a Statement of Policy (SOP) concerning tracking labels on July 20, 2009. (A copy of the SOP is available at http://www.cpsc.gov/about/cpsia/sect103policy.pdf.) In that Statement, the Commission noted that no specific labeling system was required. ("At this point, the Commission is not imposing any such uniform requirements, but expects that manufacturers will use their best judgment to develop markings that best suit their business and product.") The Statement also recognized six circumstances where it might not be practicable for manufacturers to include tracking labels on a product, including products sold in bulk vending machines.

   The Commission also noted its desire to reduce burdens posed by the tracking label requirement, particularly by avoiding duplicative requirements. To that end, the Statement provided: "The Commission believes that required information already permanently marked either to brand the product or otherwise to comply with other Commission or federal regulations, such as those promulgated under the Textile, Wool and Fur Acts or country of origin labeling rules, could be considered part of the 'distinguishing marks' called for by Section 103(a). Any such marking would have to be permanent as required by Section 103(a)." Given the flexibility provided in the Statement of Policy, the lack of stakeholder requests for exemptions, and the need to take action on safety priorities, the Commission has not yet conducted an analysis of candidates that could be exempted from the tracking label requirement.

2. **Using the authority H.R. 2715 provided, the Commission voted to approve a petition and grant a functional purpose exemption from lead content limits for certain metal components of children's ride-on tractors. Would the reasoning of this exemption extend to other products? Is the Commission going to reconsider previously submitted petitions or take the initiative to exempt other materials provided the exemptions will result in no measurable impact on public health or safety? If not, please explain.**

   Under the new authority provided, the Commission granted a functional purpose exemption for certain metal components of children's ride-on tractors. 77 FR 20614 (April 5, 2012). In addition, the Commission granted the same exemption to similar children's products such as other children's ride-on products that contain similar aluminum alloy component parts. Any

future petition would likely be factually unique, thus making it difficult to predict the likely disposition of future petitions. In the ride-on-tractor petition, however, I was pleased that this petitioner identified and requested only a minor increase in the permissible lead content limits for a few specific components of the children's ride-on tractors produced by his company.

The Commission has not considered previously submitted petitions because the new authority requires certain findings that were not required prior to H.R. 2715. However, the Commission will consider any petition resubmitted in accordance with the requirements for parties wishing to resubmit any previously submitted petitions set forth in section 101(b)(1)(F) of the CPSIA.

The Commission, subject to resource allocations in future operating plans, has also directed CPSC staff to undertake certain work to reduce third party testing costs consistent with assuring the compliance of children's products. Among the materials to be reviewed for possible determinations regarding lead content limits include adhesives in manufactured woods and synthetic food additives.

3. **We passed H.R. 2715 in part due to the huge financial burden manufacturers have had to face in regards to testing costs since the passage of CPSIA. Does the CPSC know how many jobs were lost or how many companies are not able to invest in new jobs (except testing companies) due to this new financial hardship? Has the Commission undertaken any analysis of the effect of increased costs on innovation and product development?**

The Commission has implemented the third party testing provisions as mandated by Congress in CPSIA and the H.R. 2715 amendments. The Regulatory Flexibility Act (RFA) statement associated with the third party testing rule contains staff economic impact projections. After discharging our statutory duty pursuant to section 14(i)(3)(B) of the CPSA (as amended by P.L. 112-28) to review public comments associated with the reduction of third party testing costs consistent with assuring compliance, the Commission voted to direct staff to further investigate, pending resource allocations in future Commission operating plans, a number of options that staff indicated potentially may reduce third party testing consistent with assuring compliance.
See http://www.cpsc.gov/library/foia/ballot/ballot13/3rdparty.pdf.

4. **H.R. 2715 required the Commission to seek comments on ways to reduce third party testing costs and to issue new or revised testing regulations within one year - which was August 12. The Commission noticed a request for comment last November. Where is the Commission with respect to revising or issuing new testing regulations?**

On August 29, 2012, CPSC staff submitted to the Commission a briefing package, "Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products." On October 10, 2012, the Commission voted to direct staff to further investigate, pending resource allocations in future Commission operating plans, a number of options that staff indicated potentially may reduce third party

testing consistent with assuring compliance. *See* http://www.cpsc.gov/library/foia/ballot/ballot13/3rdparty.pdf.

5. **Has the CPSC considered allowing compliance with the European Toy Safety directive (EN-71) to be regarded as an acceptable demonstration of compliance with the US Toy Standard (ASTM F963)? If not, why not?**

   As part of the vote mentioned in response to your previous question, the Commission directed the staff, pending resource allocations in future Commission operating plans, to draft a Request for Information (RFI) for publication in the *Federal Register* to determine which, if any, tests in international standards are equivalent to tests in comparable CPSC-administered children' product safety rules. *See* http://www.cpsc.gov/library/foia/ballot/ballot13/3rdparty.pdf. The provisions of EN-71 would very likely be included within the scope of any undertaken RFI on this subject and would be considered accordingly.

6. **CPSC's periodic testing rule will take effect in February 2013. This rule will exponentially increase the testing, record keeping and other burdens imposed by the CPSIA. We are aware that there has been a proposal to offer--free-of-charge for small businesses--privately developed software that could help enable compliance with this extremely complex new regulation. This would be very similar to the IRS "Free File" program, which makes available, free-of-charge, tax filing software for millions of moderate-income Americans every year.**

   a. **How does the Commission view such a program? Would such a program require Commission approval?**

      While nothing prohibits private companies that wish to offer such a service from doing so, the Commission cannot endorse a company's privately developed software. Because 15 software companies participate in the IRS "Free File" program, the government is not in the position of favoring a particular company in that instance.

   b. **Testing for phthalates is expensive, averaging between $300 and $500 per toy or product component. Last year the Commission, in an apparent attempt to reduce this burden, excluded from testing "materials known not to contain phthalates." Has the Commission developed a list of such materials? If not, why not?**

      On August 17, 2009, the Commission published a notice of availability regarding a Statement of Policy (SOP) for testing component parts for phthalates (74 FR 41400). The SOP includes lists of materials that "do not normally contain phthalates and, therefore, might not require testing" for phthalates. The Statement of Policy is available at http://www.cpsc.gov/about/cpsia/componenttestingpolicy.pdf.

      On October 3, 2012, the Commission directed the staff, pending resource allocations in future operating plans, to explore certain opportunities to reduce third party testing costs consistent with assuring compliance. One of the nine activities approved by the

Commission is to research the feasibility of a list of materials determined not to contain prohibited phthalates. Another activity is to investigate the use of Fourier transform infrared spectroscopy to determine compliance to the phthalates content limit. The staff briefing package describing these activities is available at http://www.cpsc.gov/library/foia/foia12/brief/reduce3pt.pdf.

7. **Also with respect to phthalates, H.R. 2715 requires the Commission within one year after enactment to address inaccessibility, either by adopting the same guidance as applies to lead inaccessibility or by promulgating a rule providing new guidance for phthalates. What is the status of the Commission complying with H.R. 2715?**

   On July 31, 2012, the Commission published "Proposed Guidance on Inaccessible Component Parts of Children's Toys and Child Care Articles Containing Phthalates." 77 FR 45297. The comment period on the proposed guidance closed October 1, 2012. CPSC staff is currently in the process of reviewing the comments and developing a staff briefing package with proposd final guidance for the Commission's consideration.

8. **We have been told that the there was a staff effort to develop guidance on what products constitute a "toy." What is the status of that effort?**

   The Commission published staff draft guidance on which children's products constitute "toys" on Feb. 12, 2009. *See* http://www.cpsc.gov/about/cpsia/draftphthalatesguidance.pdf. The Commission has considered the possibility of publishing additional guidance but there are no plans for staff to send a new briefing package to the Commission at this time.

9. **The proliferation of conflicting product safety standards at the State level has become a significant issue for manufacturers and retailers. How does the CPSC plan to address this rapidly growing patchwork problem?**

   Several of the Commission's statutes contain explicit provisions concerning the federal preemption of state standards (*see, e.g.* section 26 of the Consumer Product Safety Act, section 18 of the Federal Hazardous Substances Act, section 16 of the Flammable Fabrics Act, and section 7 of the Poison Prevention Packaging Act). The CPSIA also added some provisions concerning preemption (for example, section 106(h) of the CPSIA regarding state toy standards). Whether any particular state product safety standard would be preempted by a particular CPSC standard would be a question for the courts in an individual case. A court would likely look to these statutory provisions in resolving such a question.

10. **The CPSIA requires that the CPSC issue accreditation requirements for test labs at least 90 days before a standard goes into effect. The publication of accreditation requirements triggers a 90-day clock at the end of which a manufacturer will be required to certify products to the standard based on third party testing. I understand that an updated version of the toy safety standard (ASTM F963-11) has gone into effect but the CPSC has yet to publish corresponding accreditation requirements.**

a. Is the Commission of the opinion that the deadline for issuing accreditation criteria does not apply if a standard is revised?

Staff has interpreted that the 90-day deadline stated in section 14(a)(3)(B)(6) of the CPSA does apply when the Commission issues accreditation criteria for revised standards, such as the now-mandatory standard ASTM F963-11. As of August 14, 2011, the Commission is required to follow the rulemaking procedures of the Administrative Procedure Act (5 U.S.C. § 553) to issue notices of requirements for accreditation of third party conformity assessment bodies. Accordingly, on May 24, 2012, the Commission published "Proposed Requirements Pertaining to Third Party Conformity Assessment Bodies." 77 FR 31086. That *Federal Register* notice included a proposed revision to the notice of requirements for the ASTM F963-11 revised standard. CPSC staff intends to forward to the Commission a draft final rule for "Requirements Pertaining to Third Party Conformity Assessment Bodies" before the end of this year.

b. If the Commission does intend to issue new accreditation criteria, will it also continue to recognize results from labs that were accredited under the prior version of the standard?

For those tests that are equivalent (unchanged), or are functionally equivalent in the older and newer versions of the standard, test results from testing laboratories accredited to the older version of the standard will be accepted for children's product certification purposes. For new tests that were not in the older version of the standard or for tests that were substantially changed, accreditation to the newer version of the standard will be required for test results to be accepted for children's product certification.

11. I understand that some manufacturers maintain that CPSC lacks jurisdiction over infant car seats, even if they can also be used outside of a vehicle, because they are "motor vehicle equipment" subject to the exclusive jurisdiction of the Department of Transportation. Does the Commission have a memorandum of understanding with DoT about this? Do you believe that it would be helpful for us to clarify the Commission's jurisdiction over child seats?

We do not have a memorandum of understanding with the Department of Transportation, but CPSC staff has been working with ASTM and representatives from the National Highway Traffic Safety Administration (NHTSA) to revise the hand held carrier standard. CPSC staff also intends to send the Commission a package proposing to make it a mandatory rule under section 104 of the CPSIA.

The hand held carrier standard focuses on injuries that occur when the carrier is used outside the vehicle as a carrier, infant seat, or attached to a stroller. However, because the product is dual-use, CPSC is careful not to recommend design or labeling changes that may impact the carrier's function as a car seat, or conflict with NHTSA's regulations. Car seats are, however, covered by the product registration card rule in section 104 of the CPSIA.

At the time the product registration card rule was proposed, we received comments from car seat manufacturers requesting that we harmonize our requirements with NHTSA in light of its program for car seat registration. As a result, we made some changes to the rule and discussed those changes in the preamble to the final rule. 74 FR 68668, 68671 (December 29, 2009). However, clarification of the Commission's jurisdiction of infant car seats used outside a motor vehicle would be helpful.

12. **One factor driving up the cost of third party testing is that different retailers often demand that testing be done by their own lab or one that they have special trust in. An individual test may cost $250, for example, but the manufacturer may need to have the same $250 test done by six different labs to satisfy all the different retailers. That adds up to a whopping $1500. Is this an area where the CPSC can help reduce costs?**

No. The scenario described above is an independent business relationship that a manufacturer has established with the retailer.

REGULATORY REVIEW

1. **Has the CPSC taken into consideration Executive Orders 13563 and 13579 in the rules it has enacted since these Executive Orders were issued? If not, why not?**

Executive Order 13579, "Regulation and Independent Regulatory Agencies" (E.O. 13579), focuses specifically on independent agencies. Section 1 of the Executive Order sets out a general policy for "wise regulatory decisions," noting that "[t]o the extent permitted by law, such decisions should be made only after consideration of their costs and benefits." It states that independent regulatory agencies should promote the goals, and to the extent permitted by law, comply with the provisions of Executive Order 13563, "Improving Regulation and Regulatory Review" (E.O. 13563). Except for rules that Congress has explicitly directed the Commission to issue under the CPSIA, the rules that the Commission has proposed or finalized since the President issued the Executive Orders follow the principles and policies set forth in E.O. 13579 and 13563. For rules required by the CPSIA, the Commission makes its decisions based on the considerations directed in that law.

2. **The Commission has now issued a number of mandatory standards for durable nursery products such as cribs. Those standards are exempt from some of the rulemaking requirements that usually apply to consumer product safety standards. Do you think that these durable nursery standards nevertheless impose the least burdensome requirements that adequately reduce the risk of injury?**

Because rules issued under section 104 of the CPSIA were specifically exempted by Congress from the procedures and findings required for rules issued under section 9 of the CPSA (codified at 15 U.S.C. §§ 2051–2089) and are statutorily required to provide the highest level of safety that is feasible, Commission staff has not done an analysis to determine whether these rules impose the least burdensome requirements that adequately reduce the risk of injury. I note, however, that most of the rules the Commission has issued

under this provision to date are substantially the same as the relevant voluntary standards for those products that are developed by the industry.

3. **Does CPSC have any authority to regulate bath salts when used for non-therapeutic purposes? Does it make any difference if there is proof that the manufacturer or seller is aware of the misuse? How can CPSC coordinate efforts with the Drug Enforcement Administration or the Food and Drug Administration to address the sale and consumption of synthetic chemicals found in household products, such as bath salts, K2 and spice?**

   The product you ask about goes by the street name "bath salts" because they are sold in powder form and may look like bath salts. However, they are in fact designer drugs that have effects similar to amphetamine and cocaine. Chemically, they are entirely different from actual bath salts. We do not consider these to be a household product under the regulatory authority of CPSC, but rather are drugs under the authority of the Drug Enforcement Administration. DEA provides a fact sheet concerning bath salts on its website (http://www.justice.gov/dea/druginfo/drug_data_sheets/Bath_Salts.pdf).

4. **In a recent Op-Ed you stated the CPSC would turn to tip-over issues in the coming months. Every year there are a few incidents involving kitchen ranges tipping when installers do not install the provided anti-tip brackets, the use of which is prescribed in most building codes. Tipover events can result in grievous harm, particularly to children or to the elderly. A number of these incidents occur in low income housing, including HUD-supported housing. Have you reached out to HUD on this issue? Would you consider establishing a joint initiative with HUD to require its employees and contractors to install anti-tip brackets in HUD-supported housing and to set up programs to check existing ranges for compliance?**

   In Fall of 2011, CPSC worked with the U.S. Department of Housing and Urban Development's (HUD) Healthy Homes Program to communicate CPSC information on tipover safety through HUD's newsletters. In 2013, CPSC will work to develop and implement an initiative with HUD, and possibly with retailers, aimed at installing anti-tipover devices on ranges in public housing.

5. **How often has the staff used the threat of a Commission press release under the public interest health and safety provision to encourage firms to agree to conduct a recall?**

   On three occasions, the Commission staff has determined the public health and safety required the release of safety information to the public and sought Commission approval for a release of such safety information to the public.

   a. **Has the CPSC instituted any procedural changes or given staff any guidance to guard against abuse of this tool of persuasion? If yes, please submit for the record copies of any such guidance or procedure documents. If no, please explain why the CPSC has not crafted such official staff guidance or procedure documents.**

The reasons for issuing a press release where the Commission has found that the public health and safety requires a lesser period of notice than set forth in section 6(b)(1) of the CPSA, and the circumstances where it may be appropriate to make such finding, are detailed in Commission regulations at 16 CFR 1101.23.

b. When the CPSC decides to meet to consider issuing a press release under its public interest health and safety authority, does the Commission notify the relevant product manufacturer? If not, why not?

If the Commission considers issuing a press release and making a public health and safety finding in that release, it does so pursuant to the requirements of section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055(b), which requires CPSC to provide notice to the manufacturer.

c. Before issuing a press release under its public interest health and safety authority, does the Commission give the relevant manufacturers an opportunity to be heard or submit evidence? Does the Commission automatically receive all materials provided to the staff?

If Commission staff recommends use of this authority, the Commission votes to issue a press release that makes a public health and safety finding, shortening the time period for disclosure. As part of the decision to make such a finding and shorten the section 6(b)(1) time periods, the Commission will receive the relevant information and background materials from staff.

d. What factors does the Commission use to determine when a hearing under section 15 is appropriate versus use of a press release?

Use of a press release to warn the public about a hazard does not inhibit the Commission staff's ability to also seek further notice and a remedy through an administrative proceeding under section 15 of the CPSA. In cases that present a significant risk of injury to the public, it may be beneficial to first provide a warning to the public about the hazard before the Commission staff is ready to commence with an administrative proceeding.

6. The Commission's resources have roughly doubled since 2008 under the CPSIA. Despite the growth of the Commission and its budget, we repeatedly hear there are not enough resources to accomplish everything the Commission would like to accomplish.

a. How does the Commission prioritize investigations and enforcement matters? Do you prioritize those hazards that present the greatest risk to the greatest percentage of the population?

Yes, the Commission prioritizes those hazards that present the greatest risk to the greatest percentage of the population. The Office of Compliance and Field Operations and the Office of Import Surveillence are responsible for enforcing mandatory rules and

requirements as well as the surveillance of consumer products on the market and at ports of entry to ensure that hazardous products do not enter the distribution chain. Enforcement of existing and newly mandated rules and targeted surveillance activities allow for a multidisciplinary approach to enforcement. Identifying those products that present a risk (in an effort to be more preventive than reactive) through review of incident reports, trade complaints and other information sources requires close and constant interaction with technical and epidemiological staff.

b. How does the Commission identify those hazards? Is the CPSC using data-driven, fact-based analysis, or is the Commission following something more like the precautionary principle?

CPSC collects data from a variety of data sources to aid in the identification of hazards associated with the use of consumer products. This data is used to identify hazards and develop appropriate mitigation strategies. The Commission applies the criteria in 16 CFR 1009.8(c) to establish Commission priorities.

7. Over the last 10 years, the number of traffic fatalities and injuries has declined significantly. In fact, the most recent data from the National Highway Traffic Safety Administration (NHTSA) shows traffic fatality rates at a 60-year low. Part of this may be attributable to the sluggish economy, but there have been significant advancements in safety, too. How do the injury and fatality statistics for CPSC compare? Are deaths and injuries relating to consumer products declining significantly also?

A significant decline in reported consumer product-related deaths and estimated injuries in the past ten years does not appear evident in available data. The age-adjusted consumer product-related rates of deaths and injuries have increased in the most recent decade for which data are available. However, the CPSC's work to ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters, and household chemicals—has contributed to a decline in rate of deaths and injuries associated with consumer products over the past 40 years.

8. In working with voluntary standard organizations, the CPSC staff often provides incident data, including its own in-depth investigations of incidents, to help inform the process.

a. How meaningful are these anecdotal data?

Anecdotal incident data provide a meaningful minimum number of known incidents. What is unknown is the degree to which this might understate the actual number of incidents that occurred nationally.

The value in the anecdotal data comes from the detailed descriptions of the hazard scenarios that they can provide. In particular, through in-depth investigations, staff can obtain answers to important questions that normally are not included in media reports, death certificates, or the CPSC's National Electronic Injury Surveillance System

(NEISS) cases that are coded from medical records. Collection of anecdotal incident data also accelerates staff's awareness of fatal incidents as the lag for reporting via death certificates differs by state. It should also be noted that not all data used by CPSC is anecdotal. NEISS, for example, is a national probability survey that supports national estimates of consumer product-related injuries seen in U.S. hospital emergency facilities.

b. If the data are not statistically representative of a problem, why do the standards need to address the problem?

If even the minimum number of known incidents is suggestive of an unreasonable risk to public safety, then it is our duty to address these risks. The greater concern might actually be how many incidents are occurring that are not reported.

c. Does it mean that the standards are protecting against problems that are rare, making the products more expensive than they need to be?

No. Our evidence based standards take into consideration the severity of injury and the addressability of the hazard that are suggestive of an ongoing risk to public safety. The general limitation of our anecdotal incident data is the degree to which it understates the actual occurrence of serious incidents.

d. Do you think a standard should protect against every risk that has ever happened, no matter how rare? If not, how do you determine when the standard should guard against a risk and when it is unnecessary to do so?

As a matter of public record, you will not find a statement from CPSC staff or the Commission stating that standards should protect against every risk that has ever happened no matter how rare. Standards development involves a multidisciplinary team that conducts not only a review of reported incidents but often includes testing and research on the products, input from health and behavioral scientists, and economic assessments of the potential costs to manufacturers and importers of proposed standards. The general concern lies with the likelihood of *future* occurrence and the potential severity of these incidents. The Commission must determine which risk areas of public safety to address in a given year, with our limited resources, and prioritize accordingly.

9. According to an October 2011 CPSC memo available on the Commission's website, both total injuries and injury rates to children from toys have increased during the period from 2006-2010, which covers the period since the CPSIA was enacted providing the CPSC new authorities and additional resources. While more injuries may not be indicative of defective or unsafe products, can you explain why the injury rate is increasing?

The October 2011 Toy-Related Deaths and Injuries Calendar Year 2010 report (http://www.cpsc.gov/library/toymemo10.pdf) showed an increase in the estimated number

of toy-related emergency department treated injuries for all ages and for children younger than 15 years of age and younger than five years of age. However, neither the five year trend since 2006 nor the year over year comparison between 2009 and 2010 indicates that the increases ares statistically significant. While the estimated injuries appear to increase, Commission staff cannot rule out that the apparent differences observed in the estimates are attributable to random variation. Therefore, because Commission staff cannot establish that a true change has occurred, any attempts to pinpoint causal factors would be speculative.

10. **The largest manufacturer of portable gas cans recently declared bankruptcy, due mostly to questionable liability suits. As a result, there may be a shortage of new gas cans manufactured in the U.S., but people will still need to fuel their lawn mowers and deliver gas to vehicles on the side of the road. It is a distinct possibility that people will return to using milk jugs or other inappropriate containers that can lead to very serious harm. Is there anything the CPSC can do to head off this grave problem? Do you require any additional authority to act?**

I do not believe there is any need for action from the CPSC with regard to this company's filing for bankruptcy. According to the company's website, it filed for reorganization under Chapter 11 of the Bankruptcy Code this past summer, has been continuing as an ongoing concern while in Chapter 11, and, as the company's Q&A on its website states: "It is business as usual." *See* http://www.blitzusa.com/chapter11/Customer%20Q&A%20FINAL%20110811.pdf.

More recently, news reports indicate that another company has bought the manufacturing plant and plans to resume manufacturing gas cans there. *See* http://www.tulsaworld.com/business/article.aspx?subjectid=461&articleid=20120915_461_E1_MIAMIO656046.

11. **Last September, the Commission voted to reverse its April 2010 interpretive rule on the term "unblockable drain" as used in the Pool and Spa Safety Act. The CPSC apparently determined that certain drain covers were insufficient to comply with the law, requiring any public pool owner/operator – including state and local governments - to install an additional backup drain system at considerable additional expense.**

    a. **How many times has the CPSC called for a vote to switch a previous Commission vote?**

    While I am not able to provide an exact count, occasionally the Commission changes a previous vote. For example, the Commission has sometimes voted to initiate rulemaking and later decided to terminate the rulemaking. In 1988, the Commission published an advance notice of proposed rulemaking (ANPR) to enlarge the dimensions of the small parts cylinder used to evaluate whether toys or other articles intended for children under three years of age contain small parts. 53 FR 20865. In 1990, the Commission voted to terminate the rulemaking. 55 FR 26076. In 1985, the Commission published an ANPR concerning all-terrain vehicles (ATVs). 50 FR 23139. In 1991, the Commission voted to terminate that rulemaking. 56 FR 47166. In 1994, the

Commission published an ANPR to amend the baby walker standard. 59 FR 39306. In 2002, the Commission terminated that rulemaking. 67 FR 31165.

b. Did the Commission seek legal advice as to whether there should be notice and comment prior to reconsidering the interpretation? If yes, please provide a copy of such advice for the record.

Any memorandum containing legal advice to the Commission is confidential and protected from disclosure by the deliberative process attorney client privileges. The Commission has not waived its privileges to disclose the contents of any legal memorandum, and we would respectfully suggest that providing any such memo in response to a request where it will be included on the public record would waive the privilege.

c. After reconsideration, the CPSC established May 28, 2012 as the new compliance deadline. Does that remain the official compliance deadline? How many pools are currently compliant with the CPSC's revised determination?

The compliance date for facilities that relied on the Commission's interpretive rule for unblockable drains and installed large, compliant, unblockable drain covers over smaller outlets (sumps) was extended and noticed in the *Federal Register* by the Commission on May 24, 2012. The new compliance date is May 23, 2013.

Staff is still reviewing files to identify previously compliant facilities that used unblockable drain covers in the manner defined by the interpretive rule. Staff has conducted almost 6,200 inspections and has found approximately 100 facilities that would no longer be considered compliant based on the revocation of the interpretative rule.

d. Please provide for the record an estimate of how much pool owners and operators spent on unblockable drain covers to comply with the original interpretation. Please also provide for the record an estimate how much more will those same pool owners and operators have spent or need to spend on modifications to comply after CPSC's about face.

CPSC staff does not have the necessary data available to provide such an estimate.

12. There were a number of media reports in July reporting the CPSC had filed a lawsuit against the makers of "Buckyballs." At the hearing, you testified that the case would be heard by an administrative law judge. Vice Chairman Blackburn inquired from where the administrative law judge would be selected. In response, you replied from "Washington, D.C., probably, or it might be in Maryland."

a. From which agency will the administrative law judge be borrowed? Does the CPSC specify from which agency they would like to borrow an administrative law judge? Does the CPSC specify any particular criteria such as background or

expertise when it requests an administrative law judge? If yes, please detail your request (agency or particular criteria) for the record.

The Commission staff did not specify from which agency it wanted to borrow an administrative law judge. The Commission staff was notified by the Office of Personnel Management that the administrative law judge would be loaned from the U.S. Coast Guard. The Acting Chief of Administrative Law Judges for the Coast Guard selected the judge(s) to be loaned to the Commission in this matter.

b. **In recent years, the lawyers of the Compliance staff have been transferred en masse to the Office of the General Counsel. The one exception was the head of the Office of Compliance, who must by law, be an attorney. Recently, however, the head of Compliance was also transferred to the Office of General Counsel. What steps is the Commission taking to ensure appropriate segregation of the attorneys prosecuting the case from those that must advise the Commission?**

The position of Director, Office of Compliance and Field Operations was not transferred to the Office of General Counsel but instead continues to report to the Deputy Executive Director, Safety Operations. It should also be noted that the former Director, Office of Compliance and Field Operations requested reassignment to the Office of General Counsel thus vacating the position of Director, Office of Compliance and Field Operations.

The former head of Compliance and Field Operations is an attorney in the Regulatory Affairs Division of the Office of the General Counsel and is not advising the Commission on the Buckyballs litigation. The Office of General Counsel maintains a separation of functions in which attorneys prosecuting the action will not be advising the Commission. *See* 16 C.F.R. 1025.68.

c. **Why was the complaint in the Buckyballs matter signed by the Executive Director of the agency? Doesn't that associate him with the prosecution of the case such that he will have to be separated from the Commission too?**

The Acting Director of Compliance and Field Operations is recused as a matter of law from participating in this matter. Because there is no person occupying the position of Assistant Executive Director for Compliance and Field Operations and the Acting Director is recused by law, a majority of the Commission agreed to have the Executive Director sign the complaint. The Executive Director does not render a decision in an adjudicative proceeding and does not advise officials who render such decisions, as explained in Commission regulations at 16 C.F.R. 1025.68.

The Honorable Charles F. Bass

1. **I'm aware that there is a proposed ruling to allow use of X-Ray Fluorescence (XRF) to certify products as lead free. It's my understanding that there are multiple XRF**

techniques, including handheld XRF and so-called HD XRF. It appears from the proposed rule that both techniques would be acceptable, but can you confirm to the committee that the rule will enable use of both the widely-accepted handheld XRF techniques which are deployed across the supply chain, as well as the emerging HD XRF methods?

The "Proposed Rule: Requirements Pertaining to Third Party Conformity Assessment Bodies" includes provisions to widen the use of both "HD XRF" (a common shorthand for Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams, as described in ASTM F2853-10e1) as well as "handheld" XRF (more generically known as Energy Dispersive X-Ray Fluorescence Spectrometry, as described in ASTM F2617-08) for third party testing for certification. These provisions would enable the use of either type of XRF, with limitations as described in the proposed rule, for measuring lead in homogeneous metals, glass, crystals and other materials. This proposed rule would not widen the use of "handheld" XRF to include determinations of lead in painted surfaces of consumer products because at present no XRF method is available other than HD XRF (ASTM F2853-10e1) for determining compliance to 16 CFR part 1303 for painted surfaces on children's products with respect to the limit of 0.009 percent lead by weight.

2. **Knowing that one of the priorities of the CPSC is to increase public awareness around the dangers of carbon monoxide poisoning, would you please share with the Committee what activities the Commission is currently undertaking?**

Prevention of carbon monoxide poisoning deaths and injuries caused by consumer products is a key priority for the CPSC. To comprehensively address this hazard, the Commission has taken a two-pronged approach that focuses on both product innovation and consumer outreach and education.

On the product innovation side, CPSC staff has focused a great deal of effort on reducing carbon monoxide poisoning deaths from portable gasoline generators. In just the three year period from 2006 to 2008, there were an estimated 233 non-fire carbon monoxide poisoning deaths to consumers associated with the use of portable gasoline-powered generators in the United States. In September of this year, CPSC staff released a report detailing the development and demonstration of a prototype portable generator that can dramatically reduce carbon monoxide (CO) emissions from certain common portable gasoline-powered generators. When the prototype was tested in the common fatal scenario of a generator operating in the attached garage of a single family home, health effects modeling performed on the results showed that the prototype increased the hypothetical garage occupant's escape time interval to 96 minutes compared to only eight minutes provided by the original, unmodified unit. A copy of this report may be found on the CPSC website. (http://www.cpsc.gov/LIBRARY/FOIA/FOIA12/os/portgen.pdf)

CPSC also engages in robust education and outreach using a variety of outlets. The Commission communicates the dangers of carbon monoxide poisoning through the use of earned media, conducting television, radio and print interviews most often as rapid response in conjunction with major, power-disrupting storms such as hurricanes and snow storms,

when greater use of generators exposes more people to the hazard. We also use social media outreach, e-publication downloads from the dedicated CO Information Center page on CPSC.gov and the distribution of messages to grassroots partners through our Neighborhood Safety Network. Twice a year CPSC issues reminders to install fresh batteries in CO and smoke alarms in conjunction with daylight savings time.

In addition, CPSC has used its OnSafety blog, YouTube, Twitter and its FireSafety.gov website to promote new developments in technology including making CO alarms more effective and, this year, new developments in reducing CO emissions in generators. These efforts have resulted in an estimated audience impression of more than 100 million people during FY2012. This year, Congressional District offices in areas generally impacted by hurricane season were provided CO informational safety packets to share with their constituents. This information is also posted to the CPSC's website. Field staff has also provided Congressional offices with informational materials in the wake of severe weather events causing power outages. As the winter season approaches, CPSC will continue to promote CO awareness by warning consumers of dangers associated with home heating equipment. During FY2013, CPSC will also begin staging a second CO Poster contest for school children that became the most popular contest on Challenge.gov when first held.

The Honorable Greg Harper

1. **Chairman Tenenbaum, I was pleased to read your op-ed in The Hill last week where you indicated that you are taking a more collaborative approach with the window covering industry regarding cord safety. I am further pleased that you have spent the time visiting manufacturing facilities to better understand the difficulties in eliminating cords for all products. Can you tell me, without revealing any proprietary information, about these visits and what you learned? How are you proposing to move forward from here?**

Commission staff has recently participated in several meetings with the Window Covering Manufacturers Association (WCMA) and individual members. In addition, I traveled this past summer to personally meet with the leadership of several manufacturers and to tour their production facilities. During these meetings, we discussed the types of window covering products currently on the market, as well as individual manufacturer efforts to redesign window coverings to eliminate or substantially reduce the strangulation hazard posed by some corded window coverings.

Overall, my discussions during these visits were positive and indicate a willingness to work together towards consensus solutions. It is my hope that we can use these discussions as a springboard to work cooperatively to meaningfully improve consumer awareness of the strangulation risk corded window covering products can pose to young children, as well as resolve outstanding concerns regarding the current WCMA window covering safety standard to address the stragulations risk from corded window coverings.

2. **Chairman Tenenbaum, I am a big supporter of promoting government and industry cooperation. I think it is important for both to understand the need for safety and how best to achieve the safest product possible. You also discussed in your op-ed your efforts to better educate the consumer. With this in mind can you tell me about your plans for the rest of this year and next with the Window Covering Safety Council and your efforts to educate new parents about potential hazards to children associated with window coverings?**

   CPSC has again partnered with the Window Covering Safety Council to jointly launch safety messaging during Window Covering Safety Month in October 2012. This year's collaborative efforts included my participation in the Council's public service announcement and a statement for its media release. CPSC has also tweeted safety messages, direct responses to consumers' questions, and links to reference materials during the October 9, 2012, #Cord Safety Twitter party hosted by the Window Covering Safety Council. In addition, a newly launched window covering safety information center on CPSC's website promotes repair kits offered by the Window Covering Safety Council along with other information.

   a. **Can you tell us more about the CPSC's collaborative programs with the Council?**

      Please see previous answer.

   b. **Aren't promoting education and raising awareness some of the best tools the Consumer Product Safety Commission has in its arsenal?**

      Promoting education and raising awareness is part of our comprehensive effort, along with enhancing voluntary standards, encouraging technologocial safety innovations,and ongoing compliance initiatives designed to ensure the highest level of protection for children. Identifying and addressing the most pressing consumer product safety priorities, working with stakeholders to build safety into products, timely and accurate detection of risks, and quick response to remove hazards, all work with our goal of raising awareness to reduce product-related deaths and injuries.

<u>The Honorable Brett Guthrie</u>

1. **As you know, the power tools industry developed a revised set of voluntary safety standards in November of 2007 for table saws. Products using those new standards were introduced to the marketplace thereafter and were required to meet those standards beginning in early 2010. That voluntary standard was enhanced in October of 2011 with improved performance standards under a broader set of cutting conditions.**

   a. **Is it accurate that the CPSC had not collected any data from the current products that are compliant with the current voluntary standards, and that the CPSC based**

its advanced notice of proposed rulemaking for a mandatory rule on data from older, noncompliant saws?

The Commission published an advance notice of proposed rulemaking (ANPR) concerning table saw blade injuries on October 11, 2011. 76 FR 62678. The voluntary standard was revised in October 2011. Thus, incident data reflecting the new voluntary standard is not yet available for the staff to review. Any subsequent steps in the rulemaking that the Commission decides to pursue (notice of proposed rulemaking and final rule) would include a review of data available at those stages.

b. **Is CPSC now collecting more up-to-date information on accidents incurred under the 2007 voluntary standard for table saws?**

CPSC staff continuously receives reports related to consumer products through various means, including news clippings, death certificates, and consumer submitted reports. Table saw-related incident reports are reviewed by CPSC staff to leverage any information available. These reports are anecdotal and may or may not be related to a table saw that is compliant under the 2007 voluntary standard. CPSC staff also collects emergency department-treated injury data via the National Electronic Injury Surveillance System (NEISS).

Though this system does collect information about table saws, it is not possible to differentiate pre- and post-2007 voluntary standard-compliant saws within the data. A special study would be required to gather this level of detail—similar to the special study that was performed on stationary saws in 2007-2008. Another study of this nature is not planned for table saws. However, CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard.

c. **If so, will this data be weighed equally when considering a proposed mandatory safety standard for table saws?**

The data that CPSC staff will be collecting is from a convenience sample of new table saw users who will be recruited to participate in the study. This study will not be in the same form as the previous table saw injury study, and it cannot be used in the same manner. CPSC staff's goal in collecting this data is to better understand if and how consumers are using the modular blade guard system that is part of the current voluntary standard. This information will be used along with additional information collected to guide CPSC's staff recommendations during the rulemaking process. In addition to the information gathered from this study, CPSC staff will consider any and all other relevant incident data that is available when it considers a possible proposed standard for table saws.

2. **Doesn't the CPSC need to gather data on the <u>compliant</u> saws using the current voluntary standard before you can move forward with a mandatory standard? As I understand it, the CPSC is statutorily directed to rely on voluntary standards over a**

mandatory standard as long as "compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." (15 U.S.C. § 2056(b))

The CPSC must consider the adequacy of, and level of compliance with, applicable voluntary standards before it can issue a final mandatory consumer product safety standard for a product. CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard. This will aid staff in determining whether the current voluntary standard would eliminate or adequately reduce the risk of injury addressed. The study will be completed prior to the issuance of any final mandatory rule.

a. **How would the CPSC be able to judge the risk of injury under, and substantial compliance with, the new voluntary standards if you have not collected and analyzed data on the table saws using those standards?**

   The ANPR is the beginning of the rulemaking process. As the rulemaking progresses, the CPSC will collect and analyze the data that become available, including compliance with any applicable voluntary standards. Prior to the issuance of any final mandatory rule, CPSC staff will complete an analysis of the effectiveness of current voluntary standards.

3. **Following up on the CPSC advanced notice of proposed rulemaking for table saws, one of the main options CPSC asks for comments on for a mandatory rule is a patented technology, owned and controlled by one company, based on blade contact flesh detection technology. I understand it was this company's CEO who originally petitioned the CPSC to consider rulemaking in this area.**

   a. **Is CPSC aware that the Federal Trade Commission recently testified before Congress raising concerns about a patent holder using adopted standards to demand higher royalties or licensing fees as result of a standard? The FTC testimony noted that "[i]ncorporating patented technologies into standards has the potential to distort competition by enabling [standard essential patent] owners to use the leverage they acquire as a result of the standard setting process to negotiate high royalty rates and other favorable terms after a standard is adopted that they could not have credibly demanded beforehand." (http://www.ftc.gov/os/testimony/120711standardpatents.pdf)**

      The ANPR presented three regulatory alternatives to address table saw blade contact injuries: (1) a voluntary standard, (2) a mandatory rule with performance requirements, and (3) a labeling rule specifying warnings and instructions. The Commission has not determined which, if any, option to pursue. We note that section 7 of the CPSA requires the Commission to express any mandatory consumer product safety standard in terms of performance requirements, rather than mandating any particular design.

b. **Are you concerned that a single patent holder, such as the single patent holder in possession of flesh detection technology for table saws, could demand higher royalties or refuse to license on reasonable and non-discriminatory terms if their patented technology is incorporated into a mandatory standard? Does the CPSC share the FTC's concern about incorporating patented technologies into standards?**

Please see the previous answer.

The Honorable Pete Olson

1. **I understand that the Commission has spent $566,360.00 on a contractor by the name of SEA Ltd. to conduct testing of ROVs and that SEA issued a report about its initial work in April 2011. Despite multiple requests from the Recreational Off-Highway Vehicle Association and its member companies to meet with SEA and to learn more about its work and despite the fact that industry has initiated several meetings with CPSC to share information and discuss the issues, CPSC waited 15 months to hold a meeting between SEA and industry, and that meeting finally occurred just a few weeks ago. Is withholding information and access to CPSC consultants funded at taxpayer expense your idea of government transparency? How do you expect industry to be responsive to CPSC's positions when you withhold critical information from it?**

   The CPSC has maintained openness throughout this process and has not withheld information collected by SEA Ltd. In April 2011, CPSC staff published a 494 page report with SEA's test methodology and test results on nine recreational off-highway vehicles (ROVs) of different makes and models. The vehicles were tested between May 3, 2010, and October 12, 2010. The six months between the completion of testing and publication of the data involved analysis of the data, drafting a final report, and agency clearance to publish documents. In August 2011, CPSC staff published additional results for a tenth vehicle that was tested in May 2011. Furthermore, in July 2012, CPSC staff hosted a public meeting to allow SEA to present its data and to answer questions from ROHVA.

   The CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process.

2. **I understand that, while industry was waiting for 15 months to get more information about SEA's work, ROHVA proactively conducted extensive testing on its own to evaluate the testing approach described in the SEA report. During the long overdue meeting, I understand that SEA revealed details regarding its testing methodology that had not been previously disclosed, which may require ROHVA to conduct more testing to effectively evaluate the SEA testing approach. Extensive time and resources were wasted as a result of CPSC's failure to disclose information about its contractor's work. I understand that SEA also has conducted other testing for CPSC that still has not been disclosed to ROHVA. Will you commit to providing timely and complete disclosure of**

all information regarding the work of CPSC contractors with respect to ROVs and to change course and work collaboratively with industry to promote safety?

As noted above, in April 2011, CPSC staff published a 494 page report with SEA's test methodology and test results on nine recreational off-highway vehicles (ROVs) of different makes and models. The vehicles were tested between May 3, 2010, and October 12, 2010. The six months between the completion of testing and publication of the data involved analysis of the data, drafting a final report, and agency clearance to publish documents. In August 2011, CPSC staff published additional results for a tenth vehicle that was tested in May 2011. In July 2012, CPSC staff hosted a public meeting to allow SEA to present its data and to answer questions from ROHVA.

CPSC staff has not received any reports with test methodology or test results from ROHVA on any of the testing it has performed. In public meetings with the CPSC, ROHVA has only presented slides with selective data. In addition, CPSC staff believes that the limited data that ROHVA has provided is based on an incorrect formula to calculate a key value. For reasons unknown, ROHVA did not use the correct formula used by the National Highway Traffic Safety Administration (NHTSA), by SEA, and by ROHVA's own voluntary standard (ANSI/ROHVA 1-2011).

I note again that CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process.

3. **I assume you would agree that a pass-fail test must be reproducible from one lab to another and that the government cannot mandate that all testing be conducted by a single entity at a single facility. Has CPSC or its contractors conducted any testing to determine whether its pass-fail test methodology and results are reproducible at facilities other than the one SEA used?**

CPSC staff agrees that a pass-fail test must include a protocol that is repeatable and can be performed by any qualified test facility. The ANPR for ROVs began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. As part of the ongoing rulemaking effort on ROVs, CPSC staff has performed standard vehicle dynamics tests that have been developed by NHTSA to gather information on the dynamic characteristics of these vehicles. If and when requirements are finalized, they will include performance requirements that can be tested with a protocol that is repeatable and can be tested by any qualified test facility.

4. **Has the CPSC attempted to establish a correlation between vehicle characteristics that will be dictated by its proposed tests and standards and the incidents that you say you are trying to prevent? What were the results of the correlation analyses? Do you intend to move forward with a mandatory standard in the absence of evidence of such a correlation?**

The CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs) on October 28, 2009. 74 FR 55495. The ANPR

began a rulemaking process, one result of which could be a mandatory standard for ROVs. CPSC staff is assessing public comments received in response to the ANPR and is evaluating other relevant data and information to develop a staff briefing package for the Commission. The Commission will consider the staff's briefing package when determining whether to issue a notice of proposed rulemaking (NPR).

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. This analysis will be part of the staff's briefing package for a possible NPR. If the Commission decides to issue an NPR, the public would have another opportunity to comment, staff would prepare a briefing package with all relevant data and information concerning a possible final rule, and at that point the Commission would decide whether to publish a final rule.

5. **I understand that in the early 1990s CPSC conducted a multi-disciplinary study of ATV incidents to determine the causes of crashes, but that CPSC has not conducted such a study of ROV incidents. Since CPSC has not conducted such a study, ROHVA again proactively conducted its own multi-disciplinary study of ROV incidents. In November 2011, ROHVA presented its analysis to CPSC staff that concluded the testing standards in dispute would have had absolutely no impact on the occurrence of at least 90% of serious incidents. Does CPSC have any evidence that contradicts ROHVA's finding?**

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. Using the results of this analysis, CPSC staff is working to create standards that would reduce these identified hazard patterns.

6. **Has CPSC done any analyses comparing the relative safety of ROVs that existed when CPSC issued its ANPR in 2009, ROVs that conform to the current voluntary standard, and ROVs that would conform to CPSC staff's proposed mandatory standard?**

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs). 74 FR 55495. The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. CPSC staff has not completed the rulemaking effort on ROVs and has no current proposed mandatory standard.

The ROVs that existed when CPSC issued its ANPR in 2009 meet almost all the requirements in the current voluntary standard.

7. **I understand that federal law reserves mandatory standards for those products where industry fails to develop voluntary standards to prevent unreasonable risks of injury. If that is the case, why would CPSC move forward with a mandatory ROV standard when industry has been proactive in developing standards and has tried repeatedly to work with your agency? If CPSC believes that the current voluntary standard does not**

adequately address unreasonable risk of injury related to ROV use, what exactly is inadequate about the voluntary standard? What data does CPSC have to support its claim that those aspects of the voluntary standard are inadequate?

As stated above, the CPSC published an ANPR in 2009 that discussed a voluntary standard, as well as a mandatory standard, as regulatory options. Before the Commission could issue a final mandatory rule in the proceeding it would need to determine that either (1) the voluntary standard is not likely to result in the elimination or adequate reduction in the risk of injury, or (2) it is unlikely there will be substantial compliance with the voluntary standard. At this point, the Commission has only issued an ANPR and has not made any determinations about the adequacy of the voluntary standard.

CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process. CPSC staff's comment letter to ROHVA dated March 10, 2011, summarizes CPSC staff's concerns with the voluntary standard in the areas of lateral stability, vehicle handling, and occupant protection. (A copy of the letter is available at http://www.cpsc.gov/volstd/atv/commcanvass03102111.pdf.)

The Honorable Mike Pompeo

1. ***Database/ Facebook / 6(b)***

What is the status of the lawsuit brought against the CPSC last year by anonymous companies over the agency's botched interpretation of the database language in the Consumer Product Safety Improvement Act of 2008? Would you please notify the subcommittee and my office as soon as there are further developments in that case?

CPSC was sued by a single anonymous company, Company Doe, as reflected in the publicly available docket for the case (Case No. 11-2958, D. Md.). A redacted version of the decision in the case, dated July 31, 2012, was posted on PACER on October 22, 2012. The portions of the case not on the public docket are under seal and CPSC cannot comment further.

On September 28, 2012, the government filed a notice of appeal at the district court as shown on the publicly available docket for the U.S. Court of Appeals for the Fourth Circuit, docket number 12-2210. The agency cannot comment beyond what is available on the public docket because the case is under seal.

Has the court decided whether the agency misinterpreted the statute, as the companies claimed—and as I believe?

A redacted version of the decision in the case, dated July 31, 2012, was posted on PACER on October 22, 2012. The case is under seal and the Commission cannot comment on the decision beyond what is in the redacted version of the decision.

In your written testimony you stated: "I think SaferProducts.gov has gained wide approval and acceptance." How can you say that in the face of a lawsuit by industry? How many regulations issued by CPSC in the last 5 years have led to lawsuits? Doesn't the presence of a lawsuit tend to argue against the idea that the database has gained wide approval and acceptance?

The lawsuit involves one single anonymous company and a singular report, not a lawsuit by industry. With more than 11,000 reports of harm or potential harm publicly posted to date, the SaferProducts.gov consumer database continues to serve as a vital safety tool for use by parents, doctors, emergency responders, and consumers across the country to alert the public to potentially hazardous products. None of the underlying regulations the Commission has issued in the last five years, including the database rule, has been challenged in court. No party has sought judicial review of any regulation issued during that time period.

In your oral testimony, you indicated that if the federal court rules against the CPSC in the pending database lawsuit, the agency will not pledge to immediately take down the database that was constructed in violation of the statute. Why not? Please explain what remedy you believe would be appropriate, what remedy the plaintiffs are seeking, and what remedy the agency's professional staff recommends in the event that the agency loses the lawsuit.

Section 6A of the CPSA requires the Commission to maintain the publicly available database, and by law the Commission may not take it down. The recent decision concerning one incident reported to the SaferProducts.gov consumer database does nothing to change the agency's statutory mandate and enduring commitment to provide the public with a timely and searchable database containing reports of harm relating to the use of consumer products. Consistent with the remedy set forth by the decision, the Commission did not post the individual report.

Is the agency still considering starting a Facebook page that would violate the requirements Congress has put in place for any kind of public database?

I believe that the CPSC has the authority to provide the public with product safety information through the use of Facebook—a free resource with almost one billion followers that almost all other federal agencies already use. Furthermore, I believe that using Facebook will allow CPSC to reach new audiences with critical information that will save lives and prevent injuries. However, I plan to further study this subject prior to deciding whether to authorize the CPSC's Office of Communications to use Facebook as an additional means to distribute critical consumer product safety information.

I am told that the agency is refusing to accept appeals over material inaccuracies. If true, why?

Section 6A(c)(4) of the CPSA, 15 U.S.C. § 2055a(c)(4), sets forth Commission procedures for determining claims of material inaccuracy for reports of harm or comments that are

submitted to CPSC. No provisions of the CPSA or Commission regulations provide for appeals of Commission determinations regarding claims of material inaccuracy.

I am told that the agency does not remove duplicate references on the database to the same underlying incident. If that is true, why not?

We do not publish two reports that are exactly the same. When we do publish two different reports that are about the same incident we link them. Linked reports are displayed in the database as "associated reports" and count as a single report in search results.

2. ***Phthalates/ testing lab irregularity***

We have heard from manufacturers that they frequently experience instances where products pass lead or phthalates tests at one laboratory and fail at another laboratory.

Apart from the testing costs themselves, costs of these failures to the manufacturer include, among others: 1) costs of removal from store shelves, 2) costs of destroying failed products, 3) costs of reformulating products, and 4) costs of notifying CPSC because the products are non-compliant.

CPSC has been asked repeatedly to issue a clear statement on statistical uncertainty with regard to testing results. Some industry groups have said that addressing statistical uncertainty bands for laboratory test results to deal with the known problem of inter-laboratory variability may be the single most important action CPSC could take to help reduce costs associated with CPSIA testing and certification requirements. When and how does the Commission plan to address this concern? Why has the agency thus far refused to establish statistical variability parameters?

Perhaps some industry groups are unaware that there are many international guidelines in use that deal with the issue of measurement uncertainty. These include documents such as the ISO Guide to the Expression of Uncertainty in Measurement; the EURACHEM/CITAC Guide: Use of uncertainty information in compliance assessment; ASME B89.7.3.1-2001, Guidelines for Decision Rules: Considering measurement uncertainty in determining conformance to specification; and ILAC-G8:03/2009, Guidelines on the reporting of compliance with specification.

Current ILAC guidelines, which are consistent with the other international guidelines, and ISO/IEC 17025 clearly address the matter of statistical uncertainty and how testing labs should give appropriate consideration to measurement uncertainty when assessing compliance with specification. These requirements ensure the specification limit mandated by Congress, for both lead and phthalates, is not breached by the measurement result plus the expanded uncertainty.

CPSC methods require testing Certified Reference Materials (CRMs) that closely match the material of the tested product, along with samples, to verify the test method. CPSC methods require the results for the CRMs yield relative standard deviations well within

±20 percent. CPSC staff experience is that this is easily achieved for these well characterized materials.

In some cases, firms may be referring to measurement uncertainty where material variability is actually the driving factor for differences seen between laboratories as different samples are tested and different results are obtained.

3. *Third Party Testing Relief*

When this Congress passed H.R. 2715 last year, it gave the CPSC authority to take steps to reduce the costs of complying with the CPSIA—and particularly the costs of third party testing. Did the agency's professional staff recommend issuing the third party testing rule despite H.R. 2715? Or did the staff recommend making adjustments to the rule and/or seeking additional public comment before issuing the rule in the wake of H.R. 2715? If the agency's professional staff recommended that the third party testing rule be revised to take advantage of the authority given in H.R. 2715, what recommendations for further relief did the staff offer that the Commission declined to accept?

The agency's professional staff did not recommend issuing the rule at that time. However, at the time the recommendation was made to repropose the rule, staff did not have recommendations for further relief developed.

In H.R. 2715 Congress gave you the authority to address the exorbitant cost of third party testing. Based on our directive and your existing authority, do you have sufficient authority to solve the third party testing cost problem? Why has more relief not been granted even though Congress acted to enable it? Do you believe the agency is prevented from granting further relief? If so, what legal changes are needed to enable further relief from third party testing costs? Where exactly are you barred from providing relief?

Based on the language of H.R. 2715, the staff developed a set of recommended potential opportunities for Commission consideration regarding reducing third party testing costs consistent with assuring compliance. Fifteen of the sixteen recommended opportunities did not require additional authority to be granted to the Commission.

The Request for Comments was published in the *Federal Register* on November 8, 2011. *See* http://www.cpsc.gov/businfo/frnotices/fr12/3ptreduce.pdf. After the comment period ended, the professional staff considered the comments and conducted its own examination of the testing and labeling (16 CFR part 1107) and component part testing (16 CFR part 1109) rules. Within one year of the passage of H.R. 2715, the project team completed its work and presented to the Commission a set of recommended opportunities for third party testing burden reduction consistent with assuring compliance. As noted, the Commission recently voted, pending resource allocations in future operating plans, to direct the staff to pursue nine of the actions it had identified. The staff will proceed with that direction pursuant to Commission direction in subsequent operating plans.

I believe the Commission lacks the authority to implement one of the staff recommended opportunities regarding the use of process certification techniques for children's product certification purposes. Section 14 of the CPSA requires third party testing for children's product certification, material change, and periodic testing. All of the tests in the applicable children's product testing rules require third party conformity assessment body testing. The statute does not allow the Commission to alter the basic requirement of third party testing.

What specific changes did the agency make to its third party testing rule specifically by taking advantage of the authority given in H.R. 2715? In other words, what new relief did the agency provide in the rule that it was not going to provide anyway before that statute passed?

No specific changes have to date been made to the testing and labeling rule (16 CFR part 1107) in response to H.R. 2715 (other than moving forward with addressing the statutory change from random samples to representative samples) because the rule was at the final rule stage, and further changes would not have been subject to notice and comment. The Commission published a Request for Comment, as directed by section 14(i)(3) of the CPSA (and amended by H.R. 2715), regarding reducing third party testing burdens consistent with assuring compliance. The Commission also issued a notice of proposed rulemaking regarding the testing of representative samples.

4. ***Phthalates / Chronic Hazard Advisory Panel***

The Chronic Hazard Advisory Panel appointed by the CPSC Commissioners is late in submitting its report on phthalates. I am hearing from manufacturers that use phthalates that the CHAP process has not been transparent. Chairman Tenenbaum, you promised transparency at the CPSC. Will you pledge to release the results of the peer review done on the CHAP study as well as the charge given to peer reviewers by the CPSC?

The report of the CHAP is a highly complex scientific document. As such, it has taken the CHAP members longer to complete because of the breadth of the data that needed to be analyzed and the nature of the analysis itself (a cumulative risk assessment involving a variety of different phthalates and exposures). In addition, one of the CHAP members became seriously ill during the first several months of 2012. CPSC staff would disagree with the assertion that the CHAP process has not been transparent. In fact, in the two and a half years since the CHAP was convened, virtually every meeting, phone call, piece of correspondence, and all data submitted has been made available to the public on the CPSC website (http://www.cpsc.gov/about/cpsia/chapmain.html). The CHAP invited prominent research scientists to present their latest results and heard public testimony and written comments from interested parties. The CHAP members even agreed to an industry request to submit and discuss additional scientific studies at one of its public meetings, which took additional time.

The CHAP members also encouraged stakeholders to make their actual data (versus summaries of data) publicly available so that the CHAP might consider that data along with all other available public information. Some stakeholders chose not to release the more detailed data, because of concerns about proprietary business information. The CHAP evaluated any and all relevant data made available to it, including information provided by the industry that was made public.

Staff will continue to strongly support and encourage the open and transparent process CPSC has employed since the inception of the CHAP as the CHAP concludes its work.

Will peer reviewers be given all of the supporting information and not just the risk assessment itself to conduct their peer review?

The very nature of a scientific peer review requires that all relevant data, supporting information, and the full public record be made available to peer reviewers so that they can be as informed as possible in understanding the scientific approaches taken and conclusions reached.

Will CPSC consider the CHAP report a Highly Influential Scientific Assessment (HISA) and treat it accordingly?

CPSC understands the scientific importance of the CHAP report and will comply with the requirements regarding the report and the ensuing rulemaking set forth in section 108 of the CPSIA.

For example, to the extent that the CHAP's analysis relies on cumulative risk assessment, will the agency ensure that the framework of the cumulative risk assessment is itself peer reviewed?

Assessing the cumulative risk assessment approach taken by the CHAP would be one of the elements of a scientific peer review.

Will the CPSC refrain from issuing an interim rule when it issues the CHAP report, instead allowing full opportunity for public comment on any proposed rule that follows the CHAP report?

Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." After the CHAP issues its report, the Commission plans to pursue rulemaking in accordance with these requirements.

5. Obama Executive Order

President Obama issued an Executive Order instructing all federal agencies, including independent agencies like the CPSC, to find ways to reduce the costs of regulations

already on the books. It is my understanding that the CPSC intends to fulfill that requirement in the upcoming year by taking a look at existing regulations on mid-sized rugs and on animal testing.

Is that true? When is the last time the CPSC even performed animal testing? Please ask the professional staff to estimate the percentage of the total cost of complying with all CPSC regulations that is represented by complying with these two regulations. Do you believe that these two regulations are among those whose revision promises to meet the goal of the executive order to reduce the onerous costs of the regulations put out by your agency, or does it make a mockery of the executive order to pick these two relatively minor regulations?

On July 11, 2011, President Obama issued Executive Order 13579, Regulation and Independent Regulatory Agencies (E.O. 13579)." The Executive Order stated that "independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." E.O. 13579 further stated that independent regulatory agencies should develop and release a public plan for the periodic review of existing significant regulations. CPSC staff drafted a plan for retrospective review of existing rules. (The Commission was not able to agree on a plan, voting 2-2 on the staff's draft plan.)

The staff's draft plan set forth criteria for choosing rules to review and, as directed by OMB memorandum M-11-28, included an initial list of candidate rules for review over the next two years. The initial selection of rules was based on the staff's assessment of resources available and the limited period of time remainingin the fiscal year. The draft plan provided for review in FY 2012 of the toy caps rule, animal testing rules, and an assessment of burdens related to third party testing. The draft plan proposed and sought public comment on the potential for review of the following rules in FY 2013: (1) continued assessment of how to reduce burdens related to third party testing; (2) alternatives to third party testing that would be available for small batch manufacturers; (3) clarifying size definitions under the carpet and rug flammability standards; and (4) eliminating requirements related to the Federal Caustic Poison Act.

The CPSC has not performed animal testing since September 2008. CPSC staff considered this to be an example of "outmoded, ineffective" regulations that should be modified and updated as contemplated by E.O. 13579. With regard to the carpet and rug flammability standards, under current regulations there is a gap in coverage that has created confusion for manufacturers, particularly now that third party testing is required for some carpets and rugs. CPSC staff cannot estimate the total cost of complying with all CPSC regulations that is represented by complying with these two regulations. I note, however, that E.O. 13579 is not focused solely on reducing costs of existing regulations, but also asks agencies to "modify, streamline, expand, or repeal" those rules that "may be outmoded, ineffective,[or] insufficient." I also note that the CPSC staff's draft plan called for review of burdens related to third party testing, requirements that several public commenters felt impose significant costs that should be reduced.

6. *ROVs (Recreational Off-highway Vehicles)*

Why does the CPSC seem intent on pressing forward for a mandatory standard on ROVs rather than working with industry the way NHTSA does with the automobile companies to devise meaningful safety tests with repeatable results?

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs). 74 FR 55495. The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. Throughout this process, CPSC staff has repeatedly met with industry representatives to facilitate an exchange of information and improvements to the voluntary standard as evidenced by multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process. As the CPSC continues with the rulemaking process, one of the considerations will be the adequacy of the voluntary standard. Under section 9(f)(3)(D) of the CPSA, before the Commission can issue a final mandatory consumer product safety rule it must make certain findings about the adequacy of the relevant voluntary standard and the likely level of compliance with the voluntary standard.

7. *Buckyballs*

The CPSC routinely relies on the sufficiency of warning labels to keep children away from other adult products like, say, gasoline cans. Why then does the agency believe that warning labels are not an adequate solution to deal with the safety risk posed by a desk toy marketed to adults like Buckyballs? Has the agency taken steps to ban Buckeyballs and similar products as a banned hazardous substance, akin to lawn darts? If not, why not?

On September 4, 2012, the CPSC published a notice of proposed rulemaking (NPR) proposing a safety standard for magnet sets. 77 FR 53781. The preamble to the NPR (and the staff's briefing package upon which the NPR is based) explains why the Commission believes the standard it proposes is necessary to address the risks posed by sets of small, powerful magnets and why warning labels are not likely to adequately reduce the risk of injury. Specifically, the preamble notes that these magnets pose a unique hazard that many children, adults, and health care providers may not recognize. The injuries resulting from swallowing these magnets can be far more severe than swallowing other small items. When magnets are ingested they become attracted to each other, trapping intestinal tissue, and resulting in perforation of the intestine or bowel. Furthermore, while the magnet sets are marketed to adults, they have a strong appeal to children and are widely available to children.

While warning labels are appropriate in certain circumstances, the CPSC does not believe that they would be adequate to reduce the risk of injury with this product. The preamble to the proposed rule discusses the limitations of warnings for this product (*see* 77 FR at 53788-89). For example, magnet sets are likely to become separated from their packaging, and the magnets could not be individually labeled. Thus, users and parents may not see the warnings. Another limitation is the difficulty conveying in a label the unique and more severe hazard

that ingesting powerful magnets present compared to swallowing other small nonmagnetic objects. Furthermore, among the users of this product are adolescents who may swallow the magnets while imitating body piercings. Parents may not understand the risk posed to adolescents and may allow them to have the product in spite of warnings, and adolescents may not heed the warnings.

The magnet set NPR was issued under sections 7 and 9 of the Consumer Product Safety Act. (We note that the ban of lawn darts was mandated by Congress. P.L. 100-61, 102 Stat 3183, November 5, 1988.) The proposed rule would set size and strength requirements and would prohibit magnet sets that do not meet those requirements. Under the proposal, if a magnet set contains a magnet that fits within the CPSC's small parts cylinder, magnets from that set would be required to have a flux index of 50 or less, or they would be prohibited.

8. ***Budget***

How many agency employees attended the ICPHSO meeting in Orlando, Florida in February, 2011? What was the total cost of their travel and attendance at the conference?

Twenty-six agency employees attended the ICPHSO Training and Symposium Conference in Orlando, Florida in February, 2011. The total cost of their travel and attendance was $35,641.20.

Staff attendance at ICPHSO was a critical element in our global education and outreach efforts involving many of our stakeholders. The staff attending this conference participated in and led multiple interactive workshops and plenary sessions reaching over 700 stakeholders in one training session. These stakeholders included manufacturers, importers, distributors, retailers, consumer advocates, testing laboratories, trade associations, and domestic and international regulators (attendees represented over thirty countries).

How much money has the agency budgeted (and how much has it already spent) for redesigning its logo and ordering items featuring the new logo?

The final cost for the CPSC logo was $7,829.44. There are no additional expenditures planned. No new items have been ordered specifically to replace items with the existing seal. The new logo is currently being used on the agency's website, in staff presentations, on social media platforms, and other public facing platforms. As new publications, videos and agency products are being ordered or replaced, use of the agency logo will be included in the design and production.

How much money has the agency budgeted (and how much has it already spent) for consulting services for the agency's new strategic plan?

The contract support costs for the Strategic Plan required by the Government Performance and Results Act was $977,155. The contract costs for the Operational Review was $919,079. The total contract costs were $1,896,235. The last invoice was paid in November 2010. There is no money budgeted for a strategic plan in FY 2013.

How much money has the agency budgeted (and how much has it already spent) on an editor to ensure that documents reflect your preferred writing style? How does the agency justify this expense given that anything published in the Federal Register will be edited according to the style of that publication anyway?

The agency has one career employee that, as part of his/her job responsibilities, reviews documents, reports and other written materials that are disseminated to the public and Congress. However, this employee is, first and foremost, a seasoned attorney who serves in the Office of the General Counsel. This employee's legal duties include reviewing contracts and contract solicitations for legal sufficiency; participating in the development of procedural rules for various aspects of Commission activities; providing legal review and advice on budget, appropriations, directives, and other general law issues; coordinating with other federal agencies having concurrent jurisdiction with the Commission (based upon direction from the Commission and key staff personnel), including negotiating and drafting memoranda of understanding with other federal agencies; and providing legal guidance on responses to petitions and advising on legal aspects of decision making on these petitions. In addition to these legal duties this employee serves as CPSC's legal editor and its Plain Writing Officer, per the Plain Writing Act of 2010. This position is a GS-14.

<u>The Honorable Adam Kinzinger</u>

1. **I understand that CPSC is in the process of finalizing a Standard for the Flammability of Residential Upholstered Furniture that would allow furniture manufacturers two options for fulfilling the national requirements. One option would be through compliance with a smoldering-ignition test, known as "Type I." The second "Type II" approach would require the use of an interior barrier to meet both a smoldering and an open-flame test.**

    a. **What data supports allowing the Type I smolder-only option, given that open-flame risk for upholstered furniture is still a concern in American homes based on National Fire Protection Association data?**

    As stated in the 2008 Notice of Proposed Rulemaking (NPR), addressable residential upholstered furniture fires resulting from smoking material (primarily cigarettes) were responsible for 90 percent of deaths and 65 percent of injuries in the 2004-2006 period. The focus of the 2008 NPR was to address the primary ignition scenario based on the national fire data.

2. **Dr. Matt Blais of Southwest Research Institute recently issued a paper demonstrating that flame retardants in foam not only help to prevent a fire from starting, but also limit the overall heat release from an upholstered furniture fire. This is significant because reducing the overall heat release from a burning piece of furniture may delay the time to "flashover" in a room.**

In view of this research, do you agree that limiting the use of flame retardants in furniture would forfeit this added critical function that flame retardants provide?

Recent open flame ignited large scale tests conducted by CPSC included FR foams that met the California Technical Bulletin 117 (TB-117) requirements. The flame retardant (FR) foams tested by CPSC have not shown much improvement in flammability performance when tested in bench and large scale. It is important to note, however, that these large scale test results did not intend to represent all TB-117 or FR treated foams and the results are relevant to these specific materials. Furthermore, it was not within the scope of this test program to investigate the reason for the poor performance of the TB-117 foams.

It is possible that the FR technology applied for the TB-117 foam reported in Dr. Blais' study far exceeded the minimal requirements of TB-117.

A presentation in early 2012 from a researcher from Underwriters Laboratories at a NIST workshop showed that foams reported to meet TB-117 had reduced burn duration in cone calorimeter (small scale) tests, lower heat release in mockup tests, and did not show much improvement in full scale performance. All FR chemicals are not equally effective in reducing fire risk.

3. **Section 108 of the CPSIA requires the CHAP (and ultimately the Commission) to consider the possible health effects of any alternative plasticizers. Phthalates have been widely evaluated, by the Commission and other agencies, and found to be safe for intended uses– whereas many potential substitutes have not undergone significant scientific review. We are very concerned about the potential hazards to consumers of banning chemicals whose hazards we know only to replace them with chemicals whose possible hazards we don't understand. What is the Commission's policy regarding the possible replacement of phthalates with chemicals that have not been equally reviewed or assessed?**

CPSC staff reviews all possible chemical hazards, including possible phthalate replacements, using a standard risk assessment approach. The staff bases a recommendation to the Commission for regulation of a chemical under the FHSA on an assessment of both exposure and risk, not just the presence of the chemical. In considering exposure, the CPSC considers several factors: total amount of the chemical in the product; bioavailability of the chemical; accessibility of the chemical to children; age and foreseeable behavior of the children exposed to the product; foreseeable duration of the exposure; and marketing, patterns of use, and life cycle of the product.

The CPSC also assesses the toxicological data by evaluating available data from animal studies; human exposure data, if available, with specific attention to issues such as the routes of exposure; length of exposure (i.e., acute or chronic time frames); specific form of chemical; and dose-response relationships. CPSC staff estimates doses that correspond to substantial personal injury or substantial illness, for assessment under the FHSA. Staff evaluates all of the information and data collected in the product, toxicological, and exposure assessments to make conclusions about whether a product may be a hazardous substance.

4. **The CPSC's mission is to protect the public against unreasonable risks, not all risks, from consumer products. The CPSIA likewise mandates "using sufficient safety factors to account for uncertainties regarding exposure and susceptibility of children, pregnant women and other[s]." We are concerned that the CHAP is favoring a precautionary approach and departing from the reasoned, scientifically-based approach that is contemplated by the governing statutes. For example, there has been discussion in public CHAP meetings about using uncertainty factors that are significantly more conservative than the factors tbat would be employed under CPSC guidelines – more in line with European precautionary standards. This approach goes against the U.S. standard of judging substances or products for actual risks and could have serious economic consequences if it is adopted by CPSC or elsewhere in the U.S. government.**

   a. **Will the Commission adhere to a scientific, risk-based approach rather than the precautionary principle as it conducts rulemaking under Section 108?**

      The Commission will adhere to the statutory criteria set forth in Section 108 of the CPSIA as it conducts its rulemaking.

   b. **What steps, if any, is the Commission taking to ensure that the final rule issued is based on sound science and not simply precaution?**

      The Commission will adhere to the provisions set forth in Section 108 of the CPSIA to ensure the final rule is promulgated pursuant to the law.

5. **The CPSC is charged with regulating over 15,000 products worth billions of dollars to the American economy each year. According to President Obama's executive order 13579 on Improving Regulation and Regulatory Review, the agency is responsible for "developing a regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." As you prepare a rulemaking on phthalates and phthalates alternatives in children's products, your agency should use its regulatory oversight responsibilities consistent with Executive Order 13579 and work to limit unnecessary burdens on small businesses and America's innovators. Please explain the measures that the CPSC will employ to ensure that any rulemaking associated with the CHAP's report will not stifle economic growth, innovation, competitiveness, and job creation.**

   Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." After the CHAP issues its report, the Commission plans to pursue rulemaking in accordance with these requirements. Public input will inform the rulemaking process and provide the proper balance between economic growth, innovation, competitiveness, and job creation and the statutory requirements regarding phthalates mandated by the CPSIA.

6. **According to OMB's Peer Review Bulletin, a scientific assessment meets the criteria to be considered "highly influential" if "the agency or the OIRA Administrator determines that the dissemination could have a potential impact of more than $500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest." Because state, federal and international regulatory agencies have expressed significant interest in the CHAP's scientific report, and because this report could profoundly affect future rulemakings with widespread impacts, this report clearly meets the criteria of a "highly influential" scientific document.**

   a. **Please explain whether the Commission plans to treat the CHAP's scientific report as "highly influential"? If not, why?**

      CPSC understands the scientific importance of the CHAP report and will comply with the requirements regarding the report and the ensuing rulemaking set forth in section 108 of the CPSIA.

   b. **Was OMB consulted on this decision?**

      Staff has consulted with OMB on the Peer Review Bulletin.

7. **OMB's Peer Review Bulletin requires a high level of transparency and public involvement in the peer review of "influential scientific assessments," like the CHAP report. According to the OMB Bulletin:**

> **In order to obtain the most expert reviewers, agencies must "consider requesting that the public, including scientific and professional societies, nominate potential reviewers." This public involvement is crucial to assuring that the reviewers meet other criteria in the OMB Bulletin, including assuring that the reviewers "shall be sufficiently broad and diverse to fairly represent the relevant scientific and technical perspectives and fields of knowledge" and be independent of the agency.**
>
> **agencies are also instructed, "[w]henever feasible and appropriate," to "make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review (or during the peer review process) and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public."**
>
> **This last obligation is echoed in the CPSC's rules, which state that: "In order for the Consumer Product Safety Commission to properly carry out its mandate to protect the public from unreasonable risks of injury associated with consumer products, the Commission has**

determined that it must involve the public in its activities to the fullest possible extent."

CPSC's clearance procedures underscore the need for transparency in the case of complex assessments like the CHAP report. According to the clearance procedures, CPSC's staff and contractor technical reports related to health science and other issues having potentially high impacts on important public policies and private-sector decisions, "should be highly transparent." CPSC's clearance procedures also stipulate that "CPSC places great emphasis on its review process to ensure the quality of information disseminated." These procedures specify that "a report prepared by a contractor to the Commission [must be] subject to a review process by Commission staff."

a. **Please confirm that the CPSC will organize a peer review of the CHAP report that meets the requirements of OMB's Peer Review Bulletin.**

A potential peer review plan is currently under development but has not yet been finalized.

b. **Has the CPSC solicited nominations of prospective reviewers? If so, what process was used and when?**

In August, 2011, CPSC asked the National Academy of Sciences (NAS) to provide names of scientists with expertise in areas relevant to the work of the CHAP on phthalates. NAS provided names to CPSC which were then vetted within the CPSC Office of the General Counsel for any possible conflicts of interest.

c. **How will CPSC assure that its reviewers fairly represent the relevant scientific perspectives and fields of knowledge?**

CPSC conveyed to the NAS information regarding the nature of the scientific issues to be considered in the CHAP report and trusted the knowledge and expertise of the NAS to nominate the most appropriate scientists for the peer review work. Based on CPSC staff's knowledge of the risk assessment and phthalates scientific literature, staff believes the nominees who will peer review the CHAP draft report have the appropriate range of expertise to undertake that work.

d. **Will CPSC make the CHAP report publicly available for comment so that reviewers can gain the benefit of the public's scientific views and knowledge?**

The very nature of a scientific peer review requires that all relevant data and information be made available to the peer reviewers so that they can be as informed as possible in understanding the scientific approaches taken and conclusions reached by the CHAP members. The peer reviewers are highly trained scientists and experts in the

same areas as the CHAP members. Peer reviewers will have access to the full public record and will be provided all supporting information including all reference papers cited in the report.

e. **Will CPSC hold a public meeting on the CHAP report?**

Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." After the CHAP issues its report, the Commission plans to pursue a rulemaking in accordance with these requirements. A public meeting is one additional option CPSC could use as a forum for public input.

f. **If CPSC does not intend to peer review the CHAP report, how will it "involve the public . . . to the fullest possible extent" and be able to say that the "information in the reports [is] highly transparent"?**

Please see the answers to the questions above.

g. **If the CHAP conducts a peer review using undisclosed reviewers, and uses a charge that no one has seen, does CPSC intend to claim that this is "its review process", will constitute a "CPSC-established review procedure", and will meet the requirement of the OMB Peer Review Bulletin that "each agency shall conduct a peer review on all influential scientific information that the agency intends to disseminate"?**

A potential peer review plan is currently under development but has not yet been finalized.

8. **CPSC's rules also provide that, "[t]o ensure public confidence in the integrity of Commission decision-making, the Agency, to the fullest possible extent, will conduct its business in an open manner free from any actual or apparent impropriety." You echoed this commitment during your confirmation hearing, pledging that the agency "will work to ensure that the Chronic Hazard Advisory Panel conducts an impartial . . . study . . . as required by the CPSIA." Without full transparency, the "peer review" process that the CPSC apparently is planning could appear to the public and key stakeholders as an attempt to use like-minded allies to add a veneer of scientific reliability to a biased process. If the Commission allows this to occur, or relies upon it to discharge the Commission's own responsibilities, how can the Commission claim that the process is "impartial," let alone "free from any actual or apparent impropriety"?**

A potential peer review plan is currently under development but has not yet been finalized.

CPSC staff believes that the CHAP process has been transparent. In the two and a half years since the CHAP was convened, virtually every meeting, phone call, piece of correspondence, all data submitted, etc. has been made available to the public on the CPSC website

(http://www.cpsc.gov/about/cpsia/chapmain.html). The CHAP invited prominent research scientists to present their latest results and heard public testimony and written comments from interested parties. The CHAP members even agreed to an industry request to submit and discuss additional scientific studies at one of its public meetings, which took additional time.

The CHAP members also encouraged stakeholders to make their actual data (versus summaries of data) publicly available so that the CHAP might consider that data along with all other available public information. Some stakeholders chose not to release the more detailed data, because of concerns about proprietary business information. The CHAP evaluated any and all relevant data made available to it, including information provided by the industry that was made public.

9. **The OMB Peer Review bulletin instructs that, "[w]henever feasible and appropriate," agencies should "make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review (or during the peer review process) and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public." The CPSC echoes this point in its own rules and has said it must involve the public in its activities to the fullest extent possible in order to properly carry out its mandate to protect the public from unreasonable risks of injury associated with consumer products.**

   a. **How does the CPSC plan to involve the public in the review process?**

      A potential peer review plan is currently under development but has not yet been finalized.

   b. **If CPSC does not solicit public comment, how will it: "[E]nsure that [the report] is accurate and not misleading" and otherwise "ensure the quality of information disseminated" in the report?**

      CPSC will follow the statutory criteria set forth in Section 108 of the CPSIA in discharging its statutory mandate regarding the CHAP report and the ensuring rulemaking.

10. **Section 108 of the CPSIA clearly calls for the CHAP to prepare a thorough report that provides an accurate characterization of the scientific data for six phthalates and alternatives. As highlighted during the hearing, the law states that the CHAP must review "all relevant data, including the most recent, best-available, peer-reviewed scientific studies . . . that employ . . . objective methods." During the hearing, I asked you specifically about this language and whether you personally support that the CHAP review encompasses the full weight of scientific evidence. To that question, you affirmatively responded, "I certainly do."**

    a. **Please explain what measures the Commission will utilize to ensure that the CHAP does not omit certain pieces of scientific research, and instead identifies and**

actively considers all relevant data in determining what is the best-available science.

It is the responsibility of the CHAP to conduct the examination and I have confidence its work will satisfy the requirements of Section 108 of the CPSIA.

b. Please explain how the Commission will properly consider the full weight of scientific evidence and literature.

Section 108(b)(3) of the CPSIA provides that, not later than 180 days after the Commission receives the CHAP's report, the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule based on the CHAP report." Once the final CHAP report has been submitted to the Commission, CPSC staff will pursue rulemaking in accordance with the requirements of Section 108 of the CPSIA.

The Honorable G. K. Butterfield

1. **At the Subcommittee hearing on August 2, 2012, you briefly addressed the CPSC's decision to file an administrative complaint in order to stop Maxwell & Oberton from continuing to distribute Buckyballs and Buckycubes because of the serious injuries to children resulting from the ingestion of the high-powered magnets that compose these products. I understand that you are limited in your ability to respond to questions concerning this matter because it is currently being litigated, but to the extent possible, can you please provide the Subcommittee with additional information about the types of injuries caused by these products when they are ingested by children?**

   On September 4, 2012, the Commission published a notice of proposed rulemaking (NPR) concerning magnet sets. 77 FR 53781. The preamble to the NPR provided information about the injuries that can result when children swallow these products (*see* pp. 53784-86). The NPR is available on the Commission's website at: http://www.cpsc.gov/businfo/frnotices/fr12/magnetnpr.pdf.

   Detailed information on specific cases that involved young children requiring surgical intervention, including abdominal surgey and intestinal resectioning, is provided on pages 17-21 of the CPSC staff briefing package, available at: http://www.cpsc.gov/library/foia/foia12/brief/magnetstd.pdf.

   The North American Society for Pediatric Gastroenterology, Hepatology and Nutrition (NASPGHAN) also released the results of a member survey on October 23, 2012, that details injuries reported in 480 magnet ingestion cases over the past 10 years. A summary of this survey is available at: http://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/Warning-Labels-Ineffective-at-Preventing-High-Powered-Magnet-Ingestions.aspx.

2. **In her written testimony, Commissioner Nord criticized the Commission's determination that it was technologically feasible to limit total lead content for children's products to 100 parts per million as specified by Congress in section 101 of the Consumer Product Safety Improvement Act of 2008 (Pub. L. No. 110-114). Commissioner Nord stated: "This decision was particularly disturbing because the Commission had specific leeway in the statute to impose some balance through its judgments concerning the technological feasibility of such action." Can you please explain what the statute actually allowed the Commission to do and how the Commission arrived at its determination?**

   In the CPSIA, Congress established a very high threshold for the agency to exempt any children's product or component thereof that does not comply with the current statutory lead limit of .01 percent (100 parts per million). The statute states that beginning on August 14, 2011, all children's products must comply with the reduced lead limit "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category. The Commission may make such a determination only after notice and a hearing and after analyzing the public health protections associated with substantially reducing lead in children's product." Rather than leave the definition of "technological feasibility" to the discretion of the Commission, the statute provides an explicit definition, stating that the reduced lead limit *shall* be deemed technologically feasible with regard to a product or product category if:

   > (1) A product that complies with the limit is commercially available in the product category;
   > (2) Technology to comply with the limit is commercially available to manufacturers or is otherwise available within the common meaning or the term;
   > (3) Industrial strategies or devices have been developed that are capable or will be capable of achieving such a limit by the effective date of the limit and that companies, acting in good faith, are generally capable of adopting; or
   > (4) Alternative practices, best practices, or other operational changes would allow the manufacturer to comply with the limit.

   If *any* one of the four criteria was satisfied, the Commission could not make a finding that it was not technologically feasible for a product or product category to meet the .01 percent lead limit. Our staff worked extensively to solicit input from the regulated community concerning the technological feasibility of compliance with the .01 percent lead limit for children's products and categories of children's products. Based on their analysis of all the information sought out by and submitted to the agency, our professional staff could not recommend that the Commission make a determination that it was not technologically feasible for any children's product or category of children's products to meet the .01 percent lead limit based on the statutory criteria necessary to support such a finding.

3. **In her written testimony, Commissioner Northup stated: "The goal of regulatory review should be to *meaningfully* reduce regulatory burdens." (Emphasis in original.) Her testimony suggests no other goals for regulatory review.**

a. Do you believe that the only goal of regulatory review is the reduction of regulatory burdens, as suggested by Commissioner Northup?

I believe the reduction of regulatory burdens is one of many goals of regulatory review. However, I do not agree with my former colleague that the single most important criterion for setting priorities should be the cost of the regulation to business. While I agree that cost should always be a significant factor, I do not believe any one factor should automatically take precedence over the others except, perhaps, for preventing or reducing deaths and injuries. That said, I note that the staff draft plan for prioritizing candidates for retrospective review includes numerous criteria that recognize the importance of costs in the reviews. Among these criteria are the cost of the regulation, including the impact on small businesses; the cost associated with the regulation; overlapping regulatory requirements; and the paperwork burden associated with the regulation.

In addition to these cost related criteria, staff has recommended a number of noncost related factors, including advancements in technology, age of a regulation, and input from stakeholders. I believe that all of staff's proposed factors should be considered when selecting rule review projects.

b. Do you believe that the Commission's proposed regulatory review plan provides the type of balanced approach called for in the President's Executive Orders? Please explain the benefits of this type of balanced approach compared to the one advocated by Commissioner Northup.

I believe the proposal by the Commission's professional staff is a very fulsome, balanced, and appropriate review plan. In the package presented to the Commission, staff formulated a plan that not only incorporated the elements drawn from the President's Executive Orders (EO) 13579 and 13563, but also set forth a defined method and schedule for identifying and reconsidering any Commission rules that are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or ineffective, or that otherwise require modification without sacrificing the safety benefits of the rules. The plan also encourages public input and participation to find the right balance of priorities and resources. The plan also incorporates the requirement in Public Law 112-28 that the Commission seek and consider comments on ways to reduce the cost of third party testing requirements.

Furthermore, the plan contemplates the agency's finite resources, specifically considering ways to address review without diverting staff resources from some of the Commission's key safety activities. As I said in my testimony, diverting resources from our core safety mission is not acceptable to me, nor should it be acceptable to America's consumers, especially parents.

COMMISSIONER

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

October 19, 2012

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn Building
Washington, DC 20515

Dear Chairman Bono Mack,

Thank you for inviting me to testify at your Thursday, August 2, 2012 hearing entitled, "Oversight of the Consumer Product Safety Commission." I appreciated the opportunity to share my views with Members of the Subcommittee. Attached are my answers to the Subcommittee's questions for the record.

Sincerely,

Robert Adler

Robert S. Adler
Commissioner

Attachment

cc:
G.K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Brett Guthrie

1. **As you know, the power tools industry developed a revised set of voluntary safety standards in November of 2007 for table saws. Products using those new standards were introduced to the marketplace thereafter and were required to meet those standards beginning in early 2010. That voluntary standard was enhanced in October of 2011 with improved performance standards under a broader set of cutting conditions.**

   Is it accurate that the CPSC had not collected any data from the current products that are compliant with the current voluntary standards, and that the CPSC based its advanced notice of proposed rulemaking for a mandatory rule on data from older, noncompliant saws?

   The Commission published an advance notice of proposed rulemaking (ANPR) concerning table saw blade injuries on October 11, 2011. 76 FR 62678. The voluntary standard was revised in October 2011. Thus, incident data reflecting the new voluntary standard is not yet available for the staff to review. Any subsequent steps in the rulemaking that the Commission decides to pursue (notice of proposed rulemaking and final rule) would include a review of data available at those stages.

   The comment period for the ANPR closed March 16, 2012. I am hopeful that all of the relevant stakeholders, including table saw manufacturers, have submitted any data in their possession regarding any injuries associated with saws that are compliant with the newer voluntary standard. I eagerly await CPSC staff's review and evaluation of the comments received in connection with the ANPR.

   a. **Is CPSC now collecting more up-to-date information on accidents incurred under the 2007 voluntary standard for table saws?**

      CPSC staff continuously receives reports related to consumer products through various means, including news clippings, death certificates, consumer submitted reports, etc. Table saw-related incident reports are reviewed by CPSC staff to leverage any information available. These reports are anecdotal and may or may not be related to a table saw that is compliant under the 2007 voluntary standard. CPSC staff also collects emergency department-treated injury data via the National Electronic Injury Surveillance System (NEISS). Though this system does collect information about table saws, it is not possible to differentiate pre- and post- 2007 voluntary standard-compliant saws within the data. A special study would be required to gather this level of detail; similar to the special study that was performed on stationary saws in 2007-2008. Another study of this nature is not planned for table saws. However, CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard.

Additionally, I am hopeful that all of the relevant stakeholders, including table saw manufacturers, have submitted any data in their possession regarding any injuries associated with saws that are compliant with the newer voluntary standard during the extended open comment period for the ANPR.

b. **If so, will this data be weighed equally when considering a proposed mandatory safety standard for table saws**?

According to CPSC staff the data that we plan to collect is from a convenience sample of new table saw users who will be recruited to participate in the study. This study will not be in the same form as the previous table saw injury study, and it cannot be used in the same manner. CPSC staff's goal in collecting this data is to better understand if and how consumers are using the modular blade guard system that is part of the current voluntary standard. This information will be used along with additional information collected to guide CPSC's staff recommendations during the rulemaking process. In addition to the information gathered from this study, CPSC staff will consider any and all other relevant incident data that is available when it considers a possible proposed standard for table saws. In particular, I am hopeful that the relevant stakeholders that have access to data the CPSC is not aware of regarding any injuries associated with saws that are compliant with the newer voluntary standard submitted this data during the extended open comment period for the ANPR.

2. **Doesn't the CPSC need to gather data on the compliant saws using the current voluntary standard before you can move forward with a mandatory standard? As I understand it, the CPSC is statutorily directed to rely on voluntary standards over a mandatory standard as long as "compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." (15 U.S.C. Sec. 2056(b)).**

The CPSC must consider the adequacy of, and level of compliance with, applicable voluntary standards before it can issue a final mandatory consumer product safety standard for a product. CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard. This will aid staff in determining whether the current voluntary standard would eliminate or adequately reduce the risk of injury addressed. The study will be completed prior to the issuance of any final mandatory rule.

a. **How would the CPSC be able to judge the risk of injury under and substantial compliance with the new voluntary standards if you have not collected and analyzed data on the table saws using those standards?**

The ANPR is the beginning of the rulemaking process. As the rulemaking progresses, the CPSC will collect and analyze the data that become available, including compliance with any applicable voluntary standards. Prior to the issuance of any final mandatory rule, CPSC staff will complete an analysis of the effectiveness of current voluntary standards.

3. **Following up on the CPSC advanced notice of proposed rulemaking for table saws, one of the main options CPSC asks for comments on for a mandatory rule is a patented technology, owned and controlled by one company, based on blade contact flesh detection technology. I understand it was this company's CEO who originally petitioned the CPSC to consider rulemaking in this area.**

   a. **Is CPSC was aware that the Federal Trade Commission recently testified before Congress raising concerns about a patent holder using adopted standards to demand higher royalties or licensing fees as result of a standard? The FTC testimony noted that "[i]ncorporating patented technologies into standards has the potential to distort competition by enabling [standard essential patent] owners to use the leverage they acquire as a result of the standard setting process to negotiate high royalty rates and other favorable terms after a standard is adopted that they could not have credibly demanded beforehand." (http://www.ftc.gov/os/testimony/120711standardpatents.pdf)**

   Speaking only for myself, while I was aware of the FTC's testimony, I am not convinced that the issue to which the FTC was speaking is directly related to the question of a voluntary or mandatory table saw safety performance standard. The Commission's ANPR presented three regulatory alternatives to address table saw blade contact injuries: (1) a voluntary standard, (2) a mandatory rule with performance requirements, and (3) a labeling rule specifying warnings and instructions. We have not yet determined which, if any, option to pursue. With any option the Commission pursues, we are required under section 7 of the CPSA to express any mandatory consumer product safety standard in terms of performance requirements, rather than mandating any particular design.

   b. **Are you concerned that a single patent holder, such as the single patent holder in possession of flesh detection technology for table saws, could demand higher royalties or refuse to license on reasonable and non-discriminatory terms if their patented technology is incorporated into a mandatory standard? Does the CPSC share the FTC's concern about incorporating patented technologies into standards?**

   As mentioned in the previous answer above, when the CPSC writes mandatory product safety standards, we do not mandate a particular technology. We write performance standards and allow manufacturers to decide how to meet them. Ultimately, I am not in favor of a monopoly if such a result is avoidable. It is my understanding that while there is a patented flesh sensing technology that appears

to eliminate the risk of serious blade contact injuries, I have also heard there are other competing technologies that I am hopeful will be brought to market to provide both consumers and manufacturers with a variety of means to address this very serious consumer hazard.

The Honorable Charles F. Bass

1. **I'm aware that there is a proposed ruling to allow use of X-Ray Fluorescence (XRF) to certify products as lead free. It's my understanding that there are multiple XRF techniques, including handheld XRF and so-called HD XRF. It appears from the proposed rule that both techniques would be acceptable, but can you confirm to the committee that the rule will enable use of both the widely-accepted handheld XRF techniques which are deployed across the supply chain, as well as the emerging HD XRF methods?**

   The "Proposed Rule: Requirements Pertaining to Third Party Conformity Assessment Bodies" includes provisions to widen the use of both "HD XRF" (a trademarked name for Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams, as described in ASTM F2853-10e1) as well as "handheld" XRF (more generically known as Energy Dispersive X-Ray Fluorescence Spectrometry, as described in ASTM F2617-08) for third-party testing for certification. These provisions would enable the use of either type of XRF, with limitations as described in the proposed rule, for measuring lead in homogeneous metals, glass, crystals and other materials. This proposed rule would not widen the use of "handheld" XRF to include determinations of lead in painted surfaces of consumer products because at present no XRF method is available other than HD XRF (ASTM F2853-10e1) for determining compliance to 16 CFR part 1303 for painted surfaces on children's products with respect to the limit of 0.009 percent lead by weight.

2. **Knowing that one of the priorities of the CPSC is to increase public awareness around the dangers of carbon monoxide poisoning, please share with the Committee what activities the Commission is currently undertaking?**

   Prevention of carbon monoxide poisoning deaths and injuries caused by consumer products is a key priority for the CPSC. To address this hazard comprehensively, the Commission has taken a two-pronged approach that focuses on both product innovation and consumer outreach and education.

   On the product innovation side, CPSC staff has focused a great deal of effort on reducing carbon monoxide poisoning deaths from portable gasoline generators. In just the three year period from 2006 to 2008, there were an estimated 233 non-fire carbon monoxide poisoning deaths to consumers associated with the use of portable gasoline-powered generators in the United States. In September of this year, CPSC staff released a report detailing the development and demonstration of a prototype portable generator that can dramatically reduce carbon monoxide (CO) emissions from certain common portable gasoline-powered generators. When the prototype was tested in the common fatal scenario of a generator operating in the attached garage of a single family home, health effects modeling performed on the results showed that the prototype increased the hypothetical garage occupant's escape time interval to 96

minutes compared to only 8 minutes provided by the original, unmodified unit. A copy of this report may be found on the CPSC website. (http://www.cpsc.gov/LIBRARY/FOIA/FOIA12/os/portgen.pdf)

Additionally, CPSC staff also recently released a report titled "Evaluation of the Durability and Longevity of Chemicals Sensors Used In-Situ for Carbon Monoxide Safety Shutdown of Gas Furnaces." According to the report, gas furnaces continue to be one of the leading causes of unintentional CO poisoning deaths associated with consumer products. From 2006 through 2008, gas furnaces, including central, wall, and floor furnaces, accounted for 48 percent of the CO deaths associated with all gas-fueled products and 17 percent of CO deaths associated with all consumer products. This report was based on a test program that evaluated the durability and longevity of sensors operating in a gas furnace as a CO shutoff device. The test results demonstrated that, despite being exposed to the operating environment of a gas furnace and the aging conditions of a corrosion test, the catalytic bead CO sensors and the NDIR CO2 sensors maintained their basic electrical operability (*e.g.*, continued sensitivity to target gas, continued strong linear relationship, and a continued ability to distinguish between shutoff and non-shutoff CO or CO2 levels). Based on this, CPSC staff concluded that the sensors were durable enough to withstand the operating environment within a gas furnace and that the results provided an indication that the sensors could reach a lifespan commensurate with that of a gas furnace. In other words, these findings demonstrate that chemical sensors exist that can withstand the harsh operating environment of a furnace and have the potential to survive throughout the lifespan of the furnace. Additional technical work is needed, including an evaluation of the mechanical integrity of the sensors after aging – which was not part of the scope of this test program, but should be considered in future test and evaluation efforts. A copy of this report may be found on the CPSC website. (http://www.cpsc.gov/library/foia/foia12/os/cosensorlongevity.pdf)

CPSC also engages in robust education and outreach using a variety of outlets. The Commission communicates the dangers of carbon monoxide poisoning through the use of earned media, conducting television, radio and print interviews most often as rapid response in conjunction with major, power-disrupting storms such as hurricanes and snow storms, when greater use of generators exposes more people to the hazard. We also use social media outreach, e-publication downloads from the dedicated CO Information Center page on CPSC.gov, and the distribution of messages to grassroots partners through our Neighborhood Safety Network. Twice a year, CPSC issues reminders to install fresh batteries in CO and smoke alarms in conjunction with the change in daylight savings time.

In addition, CPSC has used its OnSafety blog, YouTube, Twitter and its FireSafety.gov website to promote new developments in technology, including making CO alarms more effective and, this year, new developments in reducing CO emissions in generators. These efforts have resulted in an estimated audience impression of more than 100 million people during FY2012. This year, Congressional District offices in areas generally impacted by hurricane season were also provided CO informational safety packets to share with their constituents. This information is

also posted to the CPSC's website. Field staff has also provided Congressional offices with informational materials in the wake of severe weather events causing power outages. As the winter season approaches, CPSC will continue to promote CO awareness by warning consumers of dangers associated with home heating equipment. During FY2013, CPSC will also begin staging a second CO Poster safety contest for school children that became the most popular contest on Challenge.gov when first held.

The Honorable G. K. Butterfield

1. **At the hearing, Commissioner Northup stated that she believed that if the CPSC launched a Facebook page, it "absolutely would violate the overarching rules in our Commission" and that if the Commission loses the lawsuit concerning the public consumer product safety information database the decision "would almost certainly say that any putting up of Facebook would violate the protections of 6(b)." However, the House report accompanying its version of the original Consumer Product Safety Act indicates Congress was concerned with protecting sensitive business information the agency might obtain in carrying out its duties to protect the public from unsafe products. The House report states that the CPSC will have "access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to *trade secrets or other sensitive cost and competitive information*." (Emphasis added.) Do you agree with Commissioner Northup's view that launching a Facebook page would violate Section 6?**

   At the outset, Commissioner Northup has confused two unrelated topics. Any court ruling related to the database has virtually no relevance to the issues surrounding Facebook and section 6(b) of the CPSA. Section 6A(f)(1) of the Consumer Product Safety Act, as amended by the Consumer Product Safety Improvement Act (CPSIA), specifically exempts the disclosure of information in the database from the provisions of section 6(a) and 6(b) of the CPSA. Since section 6(b) does not generally apply to the disclosure of information in the database, I fail to see any connection between the database lawsuit and 6(b) issues relating to Facebook.

   With regard to Facebook, I note two points. First, Facebook requires any and all entities creating a Facebook "fan page" to permit members of the public to comment on any postings by the entities – no exceptions. Accordingly, were the CPSC to create such a page on Facebook, we would have no choice but to permit public comments to be posted on Facebook irrespective of any desire we might have that Facebook not post the comments. Second, every other federal health and safety agency of which I am aware – e.g. FDA, FTC, OSHA and NHTSA – all have Facebook pages. In fact, the CPSC is one of the very few federal agencies that <u>does not</u> have a Facebook page. This means that, unlike other agencies and most members of Congress, CPSC currently has no ability to share – at no cost to the agency or taxpayers – its critical safety messages with the approximately 1 billion Facebook users in a medium with which they interact on a daily basis.

   As a matter of law, I disagree with Commissioner Northup's view that launching a Facebook page would violate section 6(b). Section 6(b) applies only to information "obtained under the [CPSA] or to be disclosed to the public in connection therewith...." In my opinion, comments filed at a page where Facebook – not the CPSC – publishes the comments regardless of the wishes of the agency are neither "obtained" under the CPSA nor are they "to be disclosed to the public in connection with" the CPSA. They are Facebook's records, not the agency's records. I

understand that a wide array of independent and executive branch agencies have adopted a similar view and treat such postings as Facebook's records, not theirs. And because CPSC will neither control nor vouch for any comments posted on Facebook, section 6(b) simply will not apply to a CPSC page on Facebook.

It is my strong hope that the CPSC will take immediate steps to set up a Facebook page. I propose that we establish a strong, clear disclaimer immediately viewable on the web site that makes unequivocally clear that CPSC neither controls nor vouches for any comments posted on Facebook. Moreover, to make sure that members of the public find a place to share their injury experiences, I believe the agency should place a prominently displayed link, to our database, SaferProducts.gov, so that they can file a report of harm about a specific consumer product.

2. **At the hearing, Commissioner Northup criticized your decision to have the Commission revisit its interpretation of the term "unblockable drain" in the Virginia Graeme Baker Pool and Spa Safety Act. As a result of your decision, the Commission voted to bring its interpretation of the Act in line with what Congress intended; that is, public pools and spas with single main drains must be equipped with drain covers and secondary anti-entrapment devices. Can you please respond to Commissioner Northup's criticism of your decision to revisit this issue and the Commission's decision to bring its interpretation of the law line with Congress's intent?**

Before I explain the reasons for switching my vote, I need to address Commissioner Northup's demonstrably false accusation that my vote led to the closure of 1100 pools throughout the country. Anyone knowledgeable about the state of public finances knows that the problem in recent years has been state and local budget cutbacks that have led to the firing of teachers, fire-fighters and police officers, as well as the closure of some municipal pools. These budget challenges are the main reason for public pool closures, not Commission actions to implement the Congressionally-directed requirements of the Virginia Graeme Baker Pool and Spa Safety Act (VGBA).

Moreover, as far as I can tell, after the Commission's original vote, very few public pools actually chose the installation of unblockable drain covers as their method of complying with the VGBA. According to CPSC compliance investigators, less than five percent of the pools they have inspected installed such drain covers. The reason for such modest numbers is that unblockable drain covers have turned out to be more expensive than most secondary anti-entrapment devices, so where cost is a critical factor, almost no one has purchased unblockable drain covers.

Perhaps even more dispositive of Commissioner Northup's claim is the fact that no public pool has ever faced closure by the CPSC for having purchased an unblockable drain cover. At my urging, the Commission granted an extra year to those pool owners who had bought an unblockable drain cover to bring their pools into VGBA compliance. In fact, they have until May 2013 to bring their pools into VGBA

compliance. It's hard to see how a requirement that has yet to be enforced could have forced any pools to close.

With respect to my changed vote, I will simply say that I carefully studied the legal issues before the first vote and cast my vote in good faith. After I cast that vote, I was contacted by numerous pool users and by several Members of Congress, including Representative Debbie Wasserman Schultz, one of the prime supporters of this legislation, who insisted that I had misinterpreted the law. Having carefully listened to their arguments, I promised to reconsider the issue. I thereupon spent almost a year contacting and consulting with numerous parties, including pool owners, trade associations, water park owners, consumer groups, drain cover manufacturers, SVRS manufacturers, congressional staff, and CPSC staff. As I spoke to the various parties, I slowly became convinced that the concept of "unblockable drain covers" as a method of complying with VGBA arose primarily as a post-enactment idea, not as anything contemplated by the authors of the bill at the time they wrote the legislation. To be sure of this, I researched the entire history of the VGBA so that I could be as certain as possible about the correct interpretation of the law. Given my conclusion, I found it hard to maintain my original view that an unblockable drain cover could be considered an "unblockable drain" under VGBA.

Having reached the conclusion that I had misinterpreted the term "unblockable drain" in the VGBA, I felt that fairness and deference to the will of Congress required me to change my vote. This was entirely my decision based solely on my new reading of the law. I deeply regret any inconvenience or extra costs that any pool owner will face as a result of my vote.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD

October 31, 2012

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing and Trade
U.S. House of Representatives
2416 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Bono Mack:

Attached are responses to additional questions submitted by Members of the Subcommittee on Commerce, Manufacturing and Trade for the record of the hearing held on August 2, 2012. In some instances, the questions request technical information. In those cases I have requested that the CPSC staff technical experts provide the information requested and I have noted that the response is from the CPSC staff.

It was my pleasure to testify at this important hearing and I am pleased to provide any additional information that may be helpful to the Subcommittee.

Sincerely,

Nancy A. Nord
Commissioner

cc: The Honorable G.K. Butterfield
Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Brett Guthrie

1. *As you know, the power tools industry developed a revised set of voluntary safety standards in November of 2007 for table saws. Products using those new standards were introduced to the marketplace thereafter and were required to meet those standards beginning in early 2010. That voluntary standard was enhanced in October of 2011 with improved performance standards under a broader set of cutting conditions.*

   Is it accurate that the CPSC had not collected any data from the current products that are compliant with the current voluntary standards, and that the CPSC based its advanced notice of proposed rulemaking for a mandatory rule on data from older, noncompliant saws?

Staff's response

The Commission published an advance notice of proposed rulemaking (ANPR) concerning table saw blade injuries on October 11, 2011.[1] The voluntary standard was revised in October 2011. Thus, incident data reflecting the new voluntary standard is not yet available for the staff to review. Any subsequent steps in the rulemaking that the Commission decides to pursue (notice of proposed rulemaking and final rule) would include a review of data available at those stages.

   a. *Is CPSC now collecting more up-to-date information on accidents incurred under the 2007 voluntary standard for table saws?*

Staff's response

CPSC staff continuously receives reports related to consumer products through various means, including news clippings, death certificates, consumer submitted reports, *etc.* Table saw-related incident reports are reviewed by CPSC staff to leverage any information available. These reports are anecdotal and may or may not be related to a table saw that is compliant under the 2007 voluntary standard. CPSC staff also collects emergency department-treated injury data via the National Electronic Injury Surveillance System (NEISS). Though this system does collect information about table saws, it is not possible to differentiate pre- and post-2007 voluntary standard-compliant saws within the data. A special study would be required to gather this level of detail; similar to the special

[1] 76 Fed. Reg. 62,678.

study that was performed on stationary saws in 2007 through 2008. Another study of this nature is not planned for table saws. However, CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard.

b. *If so, will this data be weighed equally when considering a proposed mandatory safety standard for table saws?*

Staff's response

The data that CPSC staff will be collecting is from a convenience sample of new table saw users who will be recruited to participate in the study. This study will not be in the same form as the previous table saw injury study, and it cannot be used in the same manner. CPSC staff's goal in collecting this data is to better understand if and how consumers are using the modular blade guard system that is part of the current voluntary standard. This information will be used along with additional information collected to guide CPSC's staff recommendations during the rulemaking process. In addition to the information gathered from this study, CPSC staff will consider any and all other relevant incident data that is available when it considers a possible proposed standard for table saws.

2. *Doesn't the CPSC need to gather data on the compliant saws using the current voluntary standard before you can move forward with a mandatory standard? As I understand it, the CPSC is statutorily directed to rely on voluntary standards over a mandatory standard as long as "compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." (15 U.S.C. Sec. 2056(b)).*

Staff's response

The CPSC must consider the adequacy of, and level of compliance with, applicable voluntary standards before it can issue a final mandatory consumer product safety standard for a product. CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard. This will aid staff in determining whether the current voluntary standard would eliminate or adequately reduce the risk of injury addressed. The study will be completed prior to the issuance of any final mandatory rule.

a. *How would the CPSC be able to judge the risk of injury under and substantial compliance with the new voluntary standards if you have not collected and analyzed data on the table saws using those standards?*

Staff's response

The ANPR is the beginning of the rulemaking process. As the rulemaking progresses, the CPSC will collect and analyze the data that become available, including compliance with any applicable voluntary standards. Prior to the issuance of any final mandatory rule, CPSC staff will complete an analysis of the effectiveness of current voluntary standards.

3. *Following up on the CPSC advanced notice of proposed rulemaking for table saws, one of the main options CPSC asks for comments on for a mandatory rule is a patented technology, owned and controlled by one company, based on blade contact flesh detection technology. I understand it was this company's CEO who originally petitioned the CPSC to consider rulemaking in this area.*

   a. *Is CPSC was aware that the Federal Trade Commission recently testified before Congress raising concerns about a patent holder using adopted standards to demand higher royalties or licensing fees as result of a standard? The FTC testimony noted that "[i]ncorporating patented technologies into standards has the potential to distort competition by enabling [standard essential patent] owners to use the leverage they acquire as a result of the standard setting process to negotiate high royalty rates and other favorable terms after a standard is adopted that they could not have credibly demanded beforehand." (http://www.ftc.gov/os/testimony/120711standardpatents.pdf)*

Staff's response

The ANPR presented three regulatory alternatives to address table saw blade contact injuries: (1) a voluntary standard, (2) a mandatory rule with performance requirements, and (3) a labeling rule specifying warnings and instructions. The Commission has not determined which, if any, option to pursue. We note that section 7 of the CPSA requires the Commission to express any mandatory consumer product safety standard in terms of performance requirements, rather than mandating any particular design.

b. *Are you concerned that a single patent holder, such as the single patent holder in possession of flesh detection technology for table saws, could demand higher royalties or refuse to license on reasonable and non-discriminatory terms if their patented technology is incorporated into a mandatory standard? Does the CPSC share the FTC's concern about incorporating patented technologies into standards?*

Staff's response

Please see the previous answer.

The Honorable Charles F. Bass

1. *I'm aware that there is a proposed ruling to allow use of X-Ray Fluorescence (XRF) to certify products as lead free. It's my understanding that there are multiple XRF techniques, including handheld XRF and so-called HD XRF. It appears from the proposed rule that both techniques would be acceptable, but can you confirm to the committee that the rule will enable use of both the widely-accepted handheld XRF techniques which are deployed across the supply chain, as well as the emerging HD XRF methods?*

Staff's response

The "Proposed Rule: Requirements Pertaining to Third Party Conformity Assessment Bodies" includes provisions to widen the use of both "HD XRF" (a common shorthand for Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams, as described in ASTM F2853-10e1) as well as "handheld" XRF (more generically known as Energy Dispersive X-Ray Fluorescence Spectrometry, as described in ASTM F2617-08) for third-party testing for certification. These provisions would enable the use of either type of XRF, with limitations as described in the proposed rule, for measuring lead in homogeneous metals, glass, crystals and other materials. This proposed rule would not widen the use of "handheld" XRF to include determinations of lead in painted surfaces of consumer products because at present no XRF method is available other than HD XRF (ASTM F2853-10e1) for determining compliance to 16 CFR part 1303 for painted surfaces on children's products with respect to the limit of 0.009 percent lead by weight.

Commissioner Nord's further response

On two occasions—with the passage of the Consumer Product Safety Improvements Act and with Public Law 112-28—Congress has signaled that it wants the Commission to use new and emerging technologies to reduce the costs of the testing mandated by the law. XRF technology, and in particular the advanced forms the staff described above, have the potential for significant cost reductions. The Commission currently has a rulemaking underway that potentially could result in allowing wider use of this technology. I am not convinced that regulatory package currently out for comment presents the proper formula for encouraging deployment of this technology across the supply chain. This is an area where, as we consider the proposed rule and consistent with comments received, the

Commission could provide strong leadership for effectively encouraging the development and use of new technologies for reducing the very considerable costs of testing that the law and our regulations now impose.

2. *Knowing that one of the priorities of the CPSC is to increase public awareness around the dangers of carbon monoxide poisoning, please share with the Committee what activities the Commission is currently undertaking?*

Staff's response

Prevention of carbon monoxide poisoning deaths and injuries caused by consumer products is a key priority for the CPSC. To comprehensively address this hazard, the Commission has taken a two-pronged approach that focuses on both product innovation and consumer outreach and education.

On the product innovation side, CPSC staff has focused a great deal of effort on reducing carbon monoxide poisoning deaths from portable gasoline generators. In just the three year period from 2006 to 2008, there were an estimated 233 non-fire carbon monoxide poisoning deaths to consumers associated with the use of portable gasoline-powered generators in the United States. In September of this year, CPSC staff released a report detailing the development and demonstration of a prototype portable generator that can dramatically reduce carbon monoxide (CO) emissions from certain common portable gasoline-powered generators. When the prototype was tested in the common fatal scenario of a generator operating in the attached garage of a single family home, health effects modeling performed on the results showed that the prototype increased the hypothetical garage occupant's escape time interval to 96 minutes compared to only 8 minutes provided by the original, unmodified unit. A copy of this report may be found on the CPSC website.[2]

CPSC also engages in robust education and outreach using a variety of outlets. The Commission communicates the dangers of carbon monoxide poisoning through the use of earned media, conducting television, radio and print interviews most often as rapid response in conjunction with major, power-disrupting storms such as hurricanes and snow storms, when greater use of generators exposes more people to the hazard. We also use social media outreach, e-publication downloads from the

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dedicated CO Information Center page on CPSC.gov and the distribution of messages to grassroots partners through our Neighborhood Safety Network. Twice a year CPSC issues reminders to install fresh batteries in CO and smoke alarms in conjunction with daylight savings time.

In addition, CPSC has used its OnSafety blog, YouTube, Twitter and its FireSafety.gov website to promote new developments in technology including making CO alarms more effective and, this year, new developments in reducing CO emissions in generators. These efforts have resulted in an estimated audience impression of more than 100 million people during FY2012. This year, Congressional District offices in areas generally impacted by hurricane season were also provided CO informational safety packets to share with their constituents. This information is also posted to the CPSC's website. Field staff has also provided Congressional offices with informational materials in the wake of severe weather events causing power outages. As the winter season approaches, CPSC will continue to promote CO awareness by warning consumers of dangers associated with home heating equipment. During FY2013, CPSC will also begin staging a second CO Poster contest for school children that became the most popular contest on Challenge.gov when first held.

The Honorable Mike Pompeo

1. *Database/Facebook/§ 6(b)*

    a. *What is the status of the lawsuit brought against the CPSC last year by anonymous companies over the agency's botched interpretation of the database language in the Consumer Product Safety Improvement Act of 2008?*

The CPSC was sued by an anonymous company. Although the case proceeded under seal, the court released a redacted version of its opinion and order on October 22, 2012, in *Doe v. Tenenbaum.*[3] Among other things, the court granted the company's motion for summary judgment against the CPSC with respect to the agency's decision to publish a report about the company's consumer product. The company complained that the report—in several iterations—was materially inaccurate.

The court found that the CPSC acted arbitrarily and capriciously in deciding to publish the report on SaferProducts.gov. Specifically, the court found that the report of harm did not demonstrate that the product was "related to" the harm at issue in the report. The court found that the agency, through multiple revisions of the report, engaged in speculation—and mere speculation was insufficient to demonstrate actual connection between the product at issue and the harm described. The court further found that the agency's decision to publish the report was inconsistent with previous decisions *not* to publish reports wherein the CPSC's judgment, it would be materially inaccurate to publish a report where "the evidence in the report of harm did not show that the product was the source of the problem."[4]

On September 28, 2012, the government filed a notice of appeal at the district court as shown on the publicly available docket for the U.S. Court of Appeals for the Fourth Circuit, docket number 12-2210.

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[3] No. 8:11-cv-02958-AW, 2012 U.S. Dist. LEXIS 153323 (D. Md. Oct. 22, 2012).

[4] *See id.* at *46–47, *quoting* Government Accountability Office, GAO 12-30, Consumer Product Safety Commission: Action Needed to Strengthen Identification of Potentially Unsafe Products 15 (2011), http://www.gao.gov/assets/590/585725.pdf.

b. *Has the court decided whether the agency misinterpreted the statute, as the companies claimed—and as I believe?*

Yes. As described above, the court found that the CPSC misinterpreted the words "relate to" in the database provision of the CPSIA. The court struck down the agency's speculative finding of a connection between the product at issue here and the harm in the report. Further, the court found that the agency deviated from its past practice in deciding to accept this report, though it had rejected others in the past because they did not demonstrate sufficient connection between the product and the harm alleged.

c. *In Chairman Tenenbaum's written testimony she stated: "I think SaferProducts.gov has gained wide approval and acceptance." Do you agree?*

I do not agree. The lawsuit in this case is only the tip of the iceberg relative to complaints about the database. We regularly receive complaints about materially inaccurate information in reports, and must spend significant resources to address those complaints. Following on the court's decision in this case, CPSC staff is reviewing old reports that are already published to determine whether the connection between the product and the harm alleged in each report is sufficiently strong. Indeed, one analysis of the database done by outside parties found that the "the 'reports of harm' language in Section 6A(b)(1)(A) of the Consumer Product Safety Act (CPSA) is not truly applicable to a substantial majority of the cases reported on the database thus far." More than two-thirds of the reports analyzed did not involve any injury at all, and most of the injuries reported required either no medical attention or only first aid.[5]

Further, we have also failed to address a persistent concern of brand name owners: if their brand is listed in a report, they currently have no ability to complain about any material inaccuracy except by going outside the regular database process, and even then they are not permitted to post a response on the database because they are not considered either the manufacturer or the private labeler of the product. The Commission has long been aware of this problem, but has not yet chosen to address it, citing concerns about the amount of resources required to solve the

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[5] See Lee Bishop & Steve McGonegal, *How Much "Harm" is Reported in Safer Products Database "Reports of Harm"?*, Product Safety Letter (May 27, 2012), http://www.productsafetyletter.com/Free/209.aspx.

problem. But we have known about the problem from the outset, and it seems duplicitous to fail initially to address the problem and then refuse to fix it by citing resource constraints. We should have done it properly in the first instance, and the amount of resources required to address it should not be cited as a reason not to correct it when we have the chance.

When the CPSC's regulations establishing the database were being promulgated, my colleague, Commissioner Northup, and I offered several proposals which, if adopted, would have addressed the problems now becoming apparent with the operations of the database. For example, we proposed that, consistent with the statute, only those who were actually "consumers" in that they purchased or actually used the product or experienced the harm (or their representatives such as parents or guardians) be able to file reports as "consumers." This was rejected in favor of allowing report filing by virtually anyone including advocates, plaintiff's attorneys, journalists, and others with no relation to or knowledge of the incident. As another example, we offered an amendment that would have established an appeal process so that there would be some discipline, consistency, and due process to decisions regarding materially inaccurate information. Unfortunately, each of the amendments we offered was summarily rejected by a majority of Commissioners on a party-line vote.

d. *How many regulations issued by CPSC in the last 5 years have led to lawsuits?*

The only lawsuit that I am aware of against the CPSC, based on its regulations, issued within the last 5 years is *Doe v. Tenenbaum*. In this case, as described above, while the court did not directly address our regulations establishing the database, it did overturn our decision to post the incident. Had our regulations provided a more transparent and less arbitrary process, our decisions might have been different and, hence the outcome of any case, assuming one was filed, might also have been different.

e. *Doesn't the presence of a lawsuit tend to argue against the idea that the database has gained wide approval and acceptance?*

Yes. The database was launched in March 2011, and this lawsuit was filed a scant 7 months later. We have received many complaints about the database, and continue to do so. What is more, it is not clear *who* is using the reports made available in the database. Indeed, to date, more than

hearing about consumers researching products in the database, we are hearing about professionals—defense and plaintiffs' attorneys, consumer advocates, and statisticians—using the database to analyze CPSC activity. Given its rather difficult design, I would not expect many consumers to turn to it to identify safe or unsafe products. Thus, I do not believe that the database has been approved or accepted by the group it was supposed to benefit—consumers.

f. *In Chairman Tenenbaum's oral testimony, she indicated that if the federal court rules against the CPSC in the pending database lawsuit, the agency will not pledge to immediately take down the database that was constructed in violation of the statute. Why not? Please explain what remedy you believe would be appropriate, what remedy the plaintiffs are seeking, and what remedy the agency's professional staff recommends in the event that the agency loses the lawsuit.*

If a court found that the Commission acted arbitrarily and capriciously in promulgating the rule establishing the database, I believe that the Commission would be required to take the database down, at least until appropriate corrections in the rule were implemented. In this case, however, the court only determined that the agency acted arbitrarily and capriciously in deciding to publish a particular report: The court did not make a larger decision about the legality of the database. Instead, because the plaintiff only sought to enjoin the agency from publishing the report, and the court granted the relief, the agency has complied with the court's order by not publishing the report.

g. *Is the agency still considering starting a Facebook page that would violate the requirements Congress has put in place for any kind of public database?*

The Commission and staff have been considering establishing an organization page for the CPSC on Facebook. Because Facebook's terms of service would require the CPSC to allow members of the public to submit comments on any post without first being approved by the agency, establishing a Facebook page could violate § 6(b) of the CPSA. Specifically, by creating posts on Facebook, the agency would—by operation of Facebook's commenting policy—effectively invite the public to submit comments on subjects related to the post (or, for that matter, on any subject under the sun). And because the CPSC created the page, the Commission would be republishing those comments—again, by operation

of Facebook's commenting policy—without going through the § 6(b) clearance process.

The CPSC's clearance process enables the Commission to comply with its statutory mandate to provide only accurate and meaningful information to the public. Currently, information is not to be released either before staff has verified its accuracy or before the company whose information is implicated has had the chance to verify or contest the accuracy and fairness of the information. Establishing a Facebook page and creating posts would necessarily create violations of § 6(b)—and would degrade the Commission's credibility in the eyes of the public and the regulated community.

h. *I am told that the agency is refusing to accept appeals over material inaccuracies. If true, why?*

When the rules establishing the database were considered, Commissioner Northup and I offered an amendment to establish an appeal process. This amendment was rejected on a party-line 3-to-2 vote. I believe that it is my colleagues' position that no appeal process is necessary or required by the CPSIA to address material inaccuracy claims.

But the CPSA and CPSIA do not exist in a vacuum. Background principles of constitutional and administrative law—and the Administrative Procedure Act—establish the requirement that agencies afford due process of law to affected parties. Indeed, the judge in *Doe v. Tenenbaum* construed the agency's actions regarding the database as inconsistent with the decision in the case, leading to the determination that the decision to publish here was arbitrary and capricious. The failure to establish a regular process has meant that there was no guarantee that the CPSC was making material-inaccuracy determinations consistently. An appeals process would help correct that error.

i. *I am told that the agency does not remove duplicate references on the database to the same underlying incident. If that is true, why not?*

Staff's response

We do not publish two reports that are exactly the same. When we do publish two different reports that are about the same incident we link them. Linked reports are displayed in the database as "associated reports" and count as a single report in search results.

j. *What other problems exist with the database as currently constructed, including problems that may not be resolved by the pending lawsuit?*

As noted above, the Commission currently has no regular process for addressing reports that come in tied to brand names whose owners are neither the manufacturers nor private labelers of the products at issue. Because brand-name owners have legitimate concerns about brand deterioration, they deserve the right to contest claims about products bearing their brand that they believe to be materially inaccurate. Our staff has acknowledged that this is an issue worthy of attention, but a supposed dearth of resources has held the CPSC back from addressing it. That should be corrected.

Further, and more fundamentally, I do not believe that the database, as currently designed, benefits consumers as intended. First, it is difficult to use for consumers who hope to obtain information about products, rather than to submit information about products. The database is more likely to be used by attorneys and advocates to mine for their analytical purposes. Consumers Union has used reports in the database to spur the CPSC to look at kitchen-appliance incidents.[6] More skeptical practitioners before the agency have analyzed the database to suggest that it is does not contain much useful information about actual injuries.[7] Companies that are the subjects of reports on the database are finding it more useful than the people it was intended to serve—they are reaching out to consumers who submit reports to attempt to resolve the consumers' complaints. Thus, while it seems there may be some benefits to the database, those benefits do not appear to be accruing to consumers. If the database were cheap and easy to maintain, there might be an argument for it to continue (with necessary modifications) in some form similar to its present form. But the database is neither cheap nor easy to maintain.

While the information that comes directly from consumers is and always has been useful, the resources required to make and sustain a public-facing database seem ill-used. As noted, the database is difficult to

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[6] *See* Consumers Union, *Appliance fires: Is your home safe?*, Consumer Reports (Mar. 2012), https://consumerreports.org/content/cro/en/consumer-reports-magazine-march-2012/kitchen-fire-safety.print.html.

[7] *See* Lee Bishop & Steve McGonegal, *How Much "Harm" is Reported in Safer Products Database "Reports of Harm"?*, Product Safety Letter (May 27, 2012), http://www.productsafetyletter.com/Free/209.aspx.

use—consumers would more readily turn to and be better served by private sources like Amazon or eBay to find information from other consumers about specific products. But the CPSC still plows resources into editing each consumer report. As I have heard from various staffers throughout the agency, the resources dedicated to maintaining the public-facing aspect of the database would be better spent on monitoring and responding to safety concerns.

2. *Phthalates/testing lab irregularity*

> *We have heard from manufacturers that they frequently experience instances where products pass lead or phthalates tests at one laboratory and fail at another laboratory.*
>
> *Apart from the testing costs themselves, costs of these failures to the manufacturer include, among others: 1) costs of removal from store shelves, 2) costs of destroying failed products, 3) costs of reformulating products, and 4) costs of notifying CPSC because the products are non-compliant.*
>
> *CPSC has been asked repeatedly to issue a clear statement on statistical uncertainty with regard to testing results. Some industry groups have said that addressing statistical uncertainty bands for laboratory test results to deal with the known problem of inter-laboratory variability may be the single most important action CPSC could take to help reduce costs associated with CPSIA testing and certification requirements. When and how does the Commission plan to address this concern? Why has the agency thus far refused to establish statistical variability parameters?*

I agree that dealing with variability of testing results is probably one of the most significant actions the CPSC could take in dealing with the costs and burdens of testing. As the question states, the implications of failing test results go beyond just the costs of testing the product. I believe that it is imperative, if the current testing regime is to remain in place, that the Commission address this problem in a more constructive manner than it has to date.

With respect to both lead and phthalates testing, we are requiring that testing be done for what are, essentially, trace levels. Variable test results may come about because of a lack of homogeneity of the materials being tested or because of differing conditions in the laboratories doing the testing. It is no answer to say that in a controlled setting with controlled materials, test results will be the same but that is what has been our

answer to this question when it has been raised. This answer does not address the problem and, as a result, we have seen excessive and expensive testing. We have also seen phasing out of certain materials such as recycled materials since testing predictability cannot be assumed when these materials are used. Further as we continue to roll out testing requirements and certify more labs, this issue may grow.

Use of statistical uncertainty bands would help address the issue. Since we are testing at the trace level, public health and safety would not be impacted by such a strategy. For example, our staff has already told us that any health impacts of lowering the lead limits were probably already achieved at the 300 ppm level so allowing acceptable ranges at a certain percentage above 100 ppm but below 300 ppm would help reduce costs without impacting safety.

I believe that the Commission has the authority to implement such a suggestion. The Commission has put in place public enforcement policies on any number of occasions. However, public Commission discussions on this topic indicate that the current Commission will not do that without direction from Congress.

3. *Third-Party Testing Relief*
   When this Congress passed HR 2715 last year, it gave the CPSC authority to take steps to reduce the costs of complying with the CPSIA—and particularly the costs of third-party testing.

   a. *Did the agency's professional staff recommend issuing the third-party testing rule despite HR 2715? Or did the staff recommend making adjustments to the rule and/or seeking additional public comment before issuing the rule in the wake of HR 2715? If the agency's professional staff recommended that the third-party testing rule be revised to take advantage of the authority given in HR 2715, what recommendations for further relief did the staff offer that the Commission declined to accept?*

The agency's professional staff recommended that, in light of the passage of Public Law 112-28, the Commission delay finalizing the testing rule and instead re-propose it to seek and consider public input about the costs and burdens of the rule. This recommendation was not agreed to, presumably because the term of one of the Democratic members of the Commission was drawing to a close so a Commission majority for controlling the contents and timing of the rule was not assured. Instead

the Commission finalized the testing rule with the rule going into effect in February 2013.

As directed by the Congress, the agency did request input from the public on ways to reduce testing costs. A number of constructive suggestions were made and some of those made their way into the staff recommendations that were considered by the Commission earlier this month. A copy of the staff recommendations is attached.[8] The Commission adopted a minimized version which speaks to just over half of the proposals made by the staff.[9] However, the Commission's final "cost reduction" plan does not address the timing or resources for the staff activity needed to put even this reduced plan into place. Consequently, I believe that it is unlikely that the exercise we have gone through to identify ways to reduce testing costs will result in real cost reductions as Congress envisioned when it passed Public Law 112-28.

b. *In HR 2715 Congress gave you the authority to address the exorbitant cost of third-party testing. Based on our directive and your existing authority, do you have sufficient authority to solve the third-party testing cost problem? Why has more relief not been granted even though Congress acted to enable it? Do you believe the agency is prevented from granting further relief? If so, what legal changes are needed to enable further relief from third-party testing costs? Where exactly are you barred from providing relief?*

In response to the direction given the Commission in Public Law 112-28, Commissioner Northup and I submitted a report outlining statutory changes that would reduce the costs and burdens of testing without impacting safety. That report is attached.[10] To summarize that report, we recommend the following.

- The absolute requirement for third party testing of all children's products should be repealed since the Commission can require such testing in appropriate cases under other provisions of the Act. This would allow the agency and the regulated community to focus testing resources on those products that pose risks

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[8] *See* Attachment A.

[9] *See* Attachment B.

[10] *See* Attachment C.

without burdening products which we do not believe pose a risk.

- The lead limits should be set at 300 ppm rather than 100 ppm. Under this suggestion the Commission would still be able to lower the limit to an appropriate level for particular products based on risk and exposure to more effectively protect public health. This would help address the lab variability issue discussed above. It would also allow greater use of recycled materials, which are effectively prohibited currently. It would give manufacturers of children's products greater flexibility with respect to material choices and result in less costly and more appropriate material choices.
- The definition of "children's product safety rule" should be clarified so that products subject to safety rules of general applicability do not have to be third-party tested. (I believe that the Commission has misread the law in this respect but lacking Commission initiative to correct this error, Congress should act.) There are certain CPSC rules that address general safety issues such as the flammability characteristics of fabrics. It makes no sense to treat a fabric differently because that fabric may at some point find its way into a child's garment rather than an adult garment. Having different testing regimes for the same fabric makes no sense since there is no evidence that third-party testing addresses more effectively any identified safety hazard that was not addressed by the testing regime set out in our regulations which have been on the books for many years and have been working well.

Implementing these three recommendations would allow us to focus our resources on those risks that especially impact children, and would limit the scope of the most expensive and onerous third-party testing requirements to risks that require this attention. Within the category of third party testing, the staff recommended that the Commission request from Congress the authority to equate production plans to third party testing in certain cases. There are other things the Commission could implement now that would minimize testing costs. For example, I believe that the statute does not require that ongoing periodic testing must be done by a third-party testing lab but that is what the rule adopted by the majority requires.

c. *What specific changes did the agency make to its third-party testing rule specifically by taking advantage of the authority given in HR 2715? In other words, what new relief did the agency provide in the rule that it was not going to provide anyway before that statute passed?*

The recommendations the Commission adopted only directed the staff to further investigate certain cost saving ideas.[11] The staff was given no direction as to when these tasks are to be completed. Further I do not anticipate that the FY 2013 operating plan the Commission will soon consider will contain resources for funding this work. I understand that a majority of the Commission believes that by asking for public comments and considering those comments, we have carried out the requirements of Public Law 112-28. In other words no actual work to reduce costs is likely to happen in the foreseeable future. This is not a position that I agree with.

4. *Phthalates/Chronic Hazard Advisory Panel*

a. *The Chronic Hazard Advisory Panel appointed by the CPSC Commissioners is late in submitting its report on phthalates. I am hearing from manufacturers that use phthalates that the CHAP process has not been transparent. Will you pledge to release the results of the peer review done on the CHAP study as well as the charge given to peer reviewers by the CPSC?*

Staff's response

The report of the CHAP is a highly complex scientific document. As such, it has taken the CHAP members longer to complete because of the breadth of the data that needed to be analyzed and the nature of the analysis itself (a cumulative risk assessment involving a variety of different phthalates and exposures). CPSC staff would disagree with the assertion that the CHAP process has not been transparent. In fact, in the two and a half years since the CHAP was convened, virtually every meeting, phone call, piece of correspondence, all data submitted, etc. has been made available to the public on the CPSC website.[12] The CHAP invited prominent research scientists to present their latest results and heard public testimony and written comments from interested parties. The

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[11] *See* Attachment B.

[12] http://www.cpsc.gov/about/cpsia/chapmain.html.

CHAP members even agreed to an industry request to submit and discuss additional scientific studies at one of their public meetings, which took additional time.

The CHAP members also encouraged stakeholders to make their actual data (versus summaries of data) publicly available so that the CHAP might consider that data along with all other available public information. Some stakeholders chose not to release the more detailed data, because of concerns about proprietary business information. The CHAP evaluated any and all relevant data made available to it, including information provided by the industry that was made public. However, the lack of publicly available toxicity data on some phthalates that are currently in use limited the CHAP's risk assessment capabilities for those chemicals.

Staff will continue to strongly support and encourage an open and transparent process as the CHAP concludes its work.

b. *Will peer reviewers be given all of the supporting information and not just the risk assessment itself to conduct their peer review?*

Staff's response

Yes, the very nature of a scientific peer review requires that all relevant data and information be made available to the peer reviewers so that they can be as informed as possible in understanding the scientific approaches taken and conclusions reached by the CHAP members. The peer reviewers are highly trained scientists and experts in the same areas as the CHAP members. The CHAP members requested having their scientific peers give them feedback on the report. Peer reviewers will have access to the full public record and will be provided all supporting information including all reference papers cited in the report.

c. *Will CPSC consider the CHAP report a Highly Influential Scientific Assessment (HISA) and treat it accordingly?*

Staff's response

CPSC staff believes the CHAP report is a highly influential scientific assessment and will treat it accordingly.

d. *For example, to the extent that the CHAP's analysis relies on cumulative risk assessment, will the agency ensure that the framework of the cumulative risk assessment is itself peer reviewed?*

Staff's response

Assessing the cumulative risk assessment approach taken by the CHAP will be one of the important elements of the scientific peer review.

e. *Will the CPSC refrain from issuing an interim rule when it issues the CHAP report, instead allowing full opportunity for public comment on any proposed rule that follows the CHAP report?*

Staff's response

Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." In accordance with the direction of the CPSIA, after the CHAP issues its report, the Commission plans to propose a rule that would request public comment on its proposal before issuing a final rule

5. *Obama Executive Order*
   President Obama issued an Executive Order instructing all federal agencies, including independent agencies like the CPSC to find ways to reduce the costs of regulations already on the books. It is my understanding that the CPSC intends to fulfill that requirement in the upcoming year by taking a look at existing regulations on mid-sized rugs and on animal testing. Is that true? When is the last time the CPSC even performed animal testing? Please ask the professional staff to estimate the percentage of the total cost of complying with all CPSC regulations that is represented by complying with these two regulations. Do you believe that these two regulations are among those whose revision promises to meet the goal of the executive order to reduce the onerous costs of the regulations put out by your agency, or does it make a mockery of the executive order to pick these two relatively minor regulations?

First, it must be said that it is unfortunate but not surprising that the CPSC Commissioners could not agree on a plan to review rules as directed by the President. This was a failure of imagination and leadership.

Despite the Commission's failure to actually adopt any plan, however, the staff still plans to look at rather unimportant rules for "updating," including the flammability of mid-sized carpets and rugs, and labeling requirements under the Federal Caustic Poisons Act. Whatever these rules are, they are not particularly noteworthy and their modification would not reduce or eliminate any notable burden on the economy. Former Commissioner Northup and I proposed a plan that would have focused squarely on the most burdensome rules on the Commission's books.

In reading the President's remarks regarding the relevant executive orders, the heavy emphasis on burden reduction rings through loud and clear. "We know what it will take for America to win the future. . . . We need to make America the best place on earth to do business. . . . [A key] responsibility of government [is] breaking down barriers that stand in the way of your success. . . . [Some of the] barriers we're trying to remove are outdated and unnecessary regulations. . . . [I]f there are rules on the books that are needlessly stifling job creation and economic growth, we will fix them."[13] But the Commission has not followed through on the President's charge. The CPSC squandered this opportunity.

The agency cannot operate without regard to the larger world around us. Rules that impose unwarranted burdens harm consumers by slowing invention and innovation, raising barriers to business and job creation, eliminating safe products and their makers from the market, and raising administrative costs for the businesses that can survive the onslaught of federal mandates. For the Commission's mandates to be taken seriously and followed, they must be well-founded and practical. The plan that Commissioner Northup and I proposed was the opportunity to make sure our rules fit those criteria.

While staff declined to specifically estimate the proportion of the agency's burden on the economy that the rules currently under consideration for "rule review" comprise, allow me to assure you that it is small. There is no question that these reviewing these rules amounts to window-dressing when what is called for—both by the President and by present circumstances—is burden reduction that truly eliminates deadweight regulations.

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[13] President Barack Obama, *Remarks to the U.S. Chamber of Commerce* (Feb. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce.

6. *ROVs (Recreational Off-highway Vehicles)*

Why does the CPSC seem intent on pressing forward for a mandatory standard on ROVs rather than working with industry the way NHTSA does with the automobile companies to devise meaningful safety tests with repeatable results?

Staff's response

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs).[14] The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. Throughout this process, CPSC staff has repeatedly met with industry representatives in open meetings to facilitate an exchange of information and improvements to the voluntary standard. As the CPSC continues with the rulemaking process, one of the considerations will be the adequacy of the voluntary standard. Under section 9(f)(3)(D) of the CPSA, before the Commission can issue a final mandatory consumer product safety rule it must make certain findings about the adequacy of the relevant voluntary standard and the likely level of compliance with the voluntary standard.

7. *Buckyballs*

The CPSC routinely relies on the sufficiency of warning labels to keep children away from other adult products like, say, gasoline cans. Why then does the agency believe that warning labels are not an adequate solution to deal with the safety risk posed by a desk toy marketed to adults like Buckyballs? Has the agency taken steps to ban Buckyballs and similar products as a banned hazardous substance, akin to lawn darts? If not, why not?

On September 4, 2012, the agency published a notice of proposed rulemaking that, if finalized as proposed, would effectively ban powerful magnet sets including Buckyballs and similar magnet products. The rationale for proceeding in this manner is set out in the preamble of the NPR.[15] In brief summary, the agency's staff is of the view that package warnings will not be effective for this product and that an intense

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[14] 74 Fed. Reg. 55,495.

[15] *See* 77 Fed. Reg. 53,781.

educational campaign to warn against this risk will not be effective either. The concern over the effectiveness of warnings balanced against the severity of the injuries to children we are seeing from misuse of this adult product led to the proposal in the NPR.

Banning adult products because they are being misused by children is relatively new territory for the CPSC. Lawn darts do not provide an analogy both because of how that product was used and because that ban was mandated by the Congress.[16] The agency will proceed with this action under sections 7 and 9 of the Consumer Product Safety Act which requires a review of regulatory options. We are also proceeding against the manufacturers of Buckyballs and a similar product to seek a mandatory recall on the basis that these products present a substantial product hazard. We have not gone to court to have these products declared an imminent hazard, an authority we also possess.

My concerns about how the agency is proceeding against powerful magnet sets are discussed in the attached statement.[17]

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[16] *See* Pub. L. 100-61, 102 Stat. 3183 (Nov. 5, 1988).

[17] *See* Attachment D.

The Honorable Pete Olson

1. *I understand that the Commission has spent $566,360.00 on a contractor by the name of SEA Ltd. to conduct testing of ROVs and that SEA issued a report about its initial work in April 2011. Despite multiple requests from the Recreational Off-Highway Vehicle Association and its member companies to meet with SEA and to learn more about its work and despite the fact that industry has initiated several meetings with CPSC to share information and discuss the issues, CPSC waited 15 months to hold a meeting between SEA and industry and that meeting just occurred two weeks ago. Is withholding information and access to CPSC consultants funded at taxpayer expense your idea of government transparency? How do you expect industry to be responsive to CPSC's positions when you withhold critical information from it?*

I do not believe, as a general matter, that it is proper to withhold information developed by a government consultant and to do so is not effective government transparency.

2. *I understand that, while industry was waiting for 15 months to get more information about SEA's work, ROHVA proactively conducted extensive testing on its own to evaluate the testing approach described in the SEA report. During the long overdue meeting, I understand that SEA revealed details regarding its testing methodology that had not been previously disclosed, which may require ROHVA to conduct more testing to effectively evaluate the SEA testing approach. Extensive time and resources were wasted as a result of CPSC's failure to disclose information about its contractor's work. I understand that SEA also has conducted other testing for CPSC that has not been disclosed to ROHVA. Will you commit to providing timely and complete disclosure of all information regarding the work of CPSC contractors with respect to ROVs and to change course and work collaboratively with industry to promote safety?*

Staff's response

In April 2011, CPSC staff published a 494 page report with SEA's test methodology and test results on nine recreational off-highway vehicles (ROVs) of different makes and models. The vehicles were tested between May 3, 2010 and October 12, 2010. The 6 months between the completion of testing and publication of the data involved analysis of the data, drafting a final report, and agency clearance to publish documents. In August 2011, CPSC staff published additional results for a tenth vehicle

that was tested in May 2011. In July 2012, CPSC staff hosted a public meeting to allow SEA to present their data and to answer questions from ROHVA.

CPSC staff has not received any reports with test methodology or test results from ROHVA on any of the testing they have performed. In public meetings with the CPSC, ROHVA has only presented slides with selective data. In addition, the limited data that ROHVA has provided is based on an incorrect formula to calculate a key value. For reasons unknown, ROHVA did not use the correct formula used by the National Highway Traffic Safety Administration (NHTSA), by SEA, and by ROHVA's own voluntary standard (ANSI/ROHVA 1-2011).

CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process.

3. *I assume you would agree that a pass-fail test must be reproducible from one lab to another and that the government cannot mandate that all testing be conducted by a single entity at a single facility. Has CPSC or its contractors conducted any testing to determine whether its pass-fail test methodology and results are reproducible at facilities other than the one SEA used?*

Staff's response

CPSC staff agrees that a pass-fail test must include a protocol that is repeatable and can be performed by any qualified test facility. The ANPR for ROVs began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. As part of the ongoing rulemaking effort on ROVs, CPSC staff has performed standard vehicle dynamics tests that have been developed by NHTSA to gather information on the dynamic characteristics of these vehicles. If and when requirements are finalized, they will include performance requirements that can be tested with a protocol that is repeatable and can be tested by any qualified test facility.

4. *Has the CPSC attempted to establish a correlation between vehicle characteristics that will be dictated by its proposed tests and standards and the incidents that you say you are trying to prevent? What were the results of the correlation analyses? Do you intend to move forward with a mandatory standard in the absence of evidence of such a correlation?*

Staff's response

The CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs) on October 28, 2009.[18] The ANPR began a rulemaking process, one result of which could be a mandatory standard for ROVs. CPSC staff is assessing public comments received in response to the ANPR and is evaluating other relevant data and information to develop a staff briefing package for the Commission. The Commission will consider the staff's briefing package when determining whether to issue a notice of proposed rulemaking (NPR).

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. This analysis will be part of the staff's briefing package for a possible NPR. If the Commission decides to issue an NPR, the public would have another opportunity to comment, staff would prepare a briefing package with all relevant data and information concerning a possible final rule, and at that point the Commission would decide whether to publish a final rule.

[18] 74 Fed. Reg. 55,495.

5. *I understand that in the early 1990s CPSC conducted a multi-disciplinary study of ATV incidents to determine the causes of crashes, but that CPSC has not conducted such a study of ROV incidents. Since CPSC has not conducted such a study, ROHVA again proactively conducted its own multi-disciplinary study of ROV incidents. In November 2011, ROHVA presented its analysis to CPSC staff that concluded the testing standards in dispute would have had absolutely no impact on the occurrence of at least 90% of serious incidents. Does CPSC have any evidence that contradicts ROHVA's finding?*

Staff's response

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. Using the results of this analysis, CPSC staff is working to create standards that would reduce these identified hazard patterns.

6. *Has CPSC done any analyses comparing the relative safety of ROVs that existed when CPSC issued its ANPR in 2009, ROVs that conform to the current voluntary standard, and ROVs that would conform to CPSC staff's proposed mandatory standard?*

Staff's response

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs).[19] The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. CPSC staff has not completed the rulemaking effort on ROVs and has no current proposed mandatory standard.

The ROVs that existed when CPSC issued its ANPR in 2009 meet almost all the requirements in the current voluntary standard.

7. *I understand that federal law reserves mandatory standards for those products where industry fails to develop voluntary standards to prevent unreasonable risks of injury. If that is the case, why would CPSC move forward with a mandatory ROV standard when industry has been proactive in developing*

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[19] 74 Fed. Reg. 55,495.

standards and has tried repeatedly to work with your agency? [If CPSC believes that the current voluntary standard does not adequately address unreasonable risk of injury related to ROV use, what exactly is inadequate about the voluntary standard? What data does CPSC have to support its claim that those aspects of the voluntary standard are inadequate?]

Staff's response

As stated above, the CPSC published an ANPR in 2009 that discussed a voluntary standard, as well as a mandatory standard, as regulatory options. Before the Commission could issue a final mandatory rule in the proceeding it would need to determine that either (1) the voluntary standard is not likely to result in the elimination or adequate reduction in the risk of injury; or (2) it is unlikely there will be substantial compliance with the voluntary standard. At this point, the Commission has only issued an ANPR and has not made any determinations about the adequacy of the voluntary standard.

CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process. CPSC staff's comment letter to ROHVA dated March 20, 2011, summarizes CPSC staff's concerns with the voluntary standard in the areas of lateral stability, vehicle handling, and occupant protection.

Attachment A

Chairman's Motion

Since the passage of Public Law 112-28, the United States Consumer Product Safety Commission ("CPSC" or "the Commission") has been considering opportunities to reduce third-party testing costs consistent with assuring the compliance of children's products with all applicable safety rules, bans, standards or regulations. Subject to the resources allocated by the Commission to carry them out in subsequent CPSC Operating Plans, the Commission approves the following actions by its Staff:

1. International Standards Equivalency to Children's Product Safety Rules: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register to determine which, if any, tests in international standards are equivalent to tests in comparable CPSC-administered Children's Product Safety Rules. The RFI shall include questions regarding how establishing equivalency between tests in CPSC's regulations and comparable international standards would reduce overall third party testing burdens, while assuring compliance with the applicable children's product safety rules, regulations, standards, or bans. The burden of demonstrating equivalence shall be on the submitter of information. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval prior to formally establishing a list of equivalent tests to those in CPSC-administered Children's Product Safety Rules.

2. Determinations Regarding Heavy Metals: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain higher-than-allowed concentrations of any of the eight heavy elements specified in Section 4.3.5 of ASTM F963-11. (The elements are antimony, arsenic, barium, cadmium, chromium, lead, mercury, and selenium.) The burden for demonstrating whether any material qualifies for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted.. Staff shall seek Commission approval regarding a determination relating to any of the eight heavy metals specified in Section 4.3.5 of ASTM F963-11.

3. Determinations Regarding Phthalates: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain prohibited phthalates, and thus are not subject to third party testing. The burden

for demonstrating whether any material qualifies for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval regarding a determination relating to materials that do not, and will not, contain prohibited phthalates.

4. Fourier Transform Infrared Spectroscopy (FTIR): The Commission directs staff to investigate whether Fourier Transform Infrared Spectroscopy (FTIR) can be effective as a screening technology for determining that a plastic component part contains no phthalates. A summary of the results of this investigation, including any additional costs expected to complete the investigation, shall be provided to the Commission no later than 1 year after the investigation has commenced.

5. Determinations Regarding Adhesives in Manufactured Woods: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether any adhesives used in manufactured woods can be determined not to contain lead in amounts above 100 ppm. The burden for demonstrating which, if any, adhesives should qualify for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval regarding a determination relating to adhesives used in manufactured woods.

6. Determinations Regarding Synthetic Food Additives: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether the process by which materials are determined not to contain lead in amounts above 100 ppm can be expanded to include synthetic food additives. The burden for demonstrating which, if any, synthetic food additives should qualify for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval prior to formally publishing a determination relating to synthetic food additives.

7. Guidance Regarding Periodic Testing and Periodic Testing Plans: The Commission directs staff to draft a guidance (in the form of a "FAQ" or similar forms of guidance) to clarify that manufacturers who do not engage in ongoing or continued production of a previously third-party certified product, (such as an importer or a manufacturer with short production runs) are not required to conduct periodic testing as defined in Section 1107. This guidance should also make clear

that those manufacturers who do not engage in periodic testing for the reasons described above are not required to create a periodic testing plan. This guidance shall be provided to the Commission for approval no later than December 31, 2012.

8. Accreditation of Certain Certification Bodies: The Commission directs staff to develop a Staff technical report for Commission consideration on the feasibility of CPSC-acceptance of certification bodies to perform third party testing of children's products as a basis for issuing Children's Product Certificates, and to undertake activities to ensure that continuing production maintains compliance with certification requirements as a basis for increasing the maximum periodic testing interval from 1 to 2 years.

Attachment B

Insert:

9. "Staff Findings Regarding Production Volume and Periodic Testing: The Commission directs staff to report back to the Commission whether, and, if so, on what basis staff is able to make the following findings:
(1) including a low volume exemption of fewer than 10,000 units of a product from periodic testing requirements for a maximum of three years is consistent with assuring compliance with all applicable children's product safety rules, regulations, standards or bans;
(2) the selection of the 10,000 unit figure for such an exemption is based on statistically significant and readily available safety, compliance and/or economic data. If so, staff shall provide the data along with its reason(s) for making the finding based on such data;
(3) providing such an exemption is consistent with providing a high degree of assurance of compliance of all children's products, as required under 16 CFR § 1107 ("the testing and certification rule"); and
(4) providing such an exemption is practicable from an enforcement and compliance standpoint, in light of available resources, anticipated future levels of funding and agency safety enforcement and compliance priorities.

Any staff work on this report would not affect the effective date of 16 CFR § 1107."

Attachment C

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD
AND
COMMISSIONER ANNE M. NORTHUP

Report to Congress pursuant to 15 U.S.C. § 2063(d)(3)(C) on opportunities to reduce the cost of third-party testing consistent with assuring compliance

October 26, 2012

The Consumer Product Safety Commission (CPSC) is implementing the Consumer Product Safety Improvement Act (CPSIA) without attention to the costs of its actions. These costs burden the American economy at the wrong time, often without measurably improving safety. As Commissioners who have seen the unintended consequences of the CPSIA first hand, and pursuant to Congress's request for legislative recommendations that would reduce testing and compliance costs for American businesses without impacting product safety,[1] we recommend that Congress consider the following changes.

1. Repeal the requirement for third-party testing.
2. Increase the permissible limit of lead in children's products to 300 parts per million and direct the Commission to set a lower limit for a particular material, product, or component where it is necessary to protect against a real risk of harm.
3. Change the definition of "children's product safety rules" to rules applicable to products intended exclusively for children.

Background

Last year, Congress directed the CPSC to ask the public for suggestions on ways "to reduce the cost of third-party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation."[2] The Commission was directed then to review the public's comments, and given authority to adopt new or revised third-party testing regulations if it determined that modification would reduce third-party testing costs consistent with assuring compliance with

[1] *See* 15 U.S.C. § 2063(d)(3)(B).

[2] 15 U.S.C. § 2063(d)(3)(A).

applicable rules.[3] Finally, Congress asked the Commission to submit a report to Congress if the agency identified opportunities that it lacked authority to adopt.[4] This report is presented by Commissioners Nancy A. Nord and Anne M. Northup in response to that request.

The Commission's work to carry out these statutory requirements continues. After the agency solicited and received from the public many concrete, specific suggestions for the reduction of testing costs, CPSC staff developed a non-exhaustive list of 16 potential changes to third-party testing rules. As described by staff, many have the potential to reduce costs only for narrow industry segments, or would otherwise not make a significant dent in third-party testing costs. The Commission recently voted to direct staff to investigate further 9 of the 16 suggestions, though it conditioned all of the work on future Commission votes to allocate the necessary resources.

Whether the work will actually be funded and whether the Commission will actually prescribe new or revised regulations is doubtful. Not only is it clear that no cost-reduction changes will be implemented this fiscal year, it also does not appear that the Commissioners will be able to agree on legislative recommendations as Congress requested. Therefore, we identify below legislative changes that we believe would reduce the cost of third-party testing while ensuring compliance with regulations currently applicable to children's products.

1. Repeal the requirement for third-party testing.

The CPSC is responsible for ensuring that noncompliant and potentially dangerous children's products do not reach American consumers. The CPSC has new and better tools to enforce our standards and detect violators, including the use of better technology and collaboration with the U.S. Customs and Border Patrol (CBP). But under current law, businesses large and small face the suffocating burden of third-party testing and certification requirements that do not advance the cause of safety.

Imposing third-party testing on every component of every children's product is an overly broad solution to the problems that arose during the flurry of recalls in 2007. But requiring all children's products to be third-party tested has proven to be a business-crushing and job-killing mandate without any commensurate benefit. And *it is a requirement that no other advanced economy—not even the European Union—has adopted.*

The third-party testing requirement is too burdensome.

According to the agency's economists, in response to the "significant increase in their costs due to the final rule," manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit

[3] *See* 15 U.S.C. § 2063(d)(3)(B).

[4] 15 U.S.C. § 2063(d)(3)(C).

the children's product market, or go out of business completely. The costs associated with the new rule will "inhibit[] new firms from entering the children's product market," including those serving a niche market like children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."[5] Some argue that third-party testing before sale will result in fewer recalls. But *most recalled products contain design or manufacturing defects that are unrelated to the Commission's product- and material-specific safety standards.*

Moreover, the continuing third-party testing requirements make the agency micromanage business and manufacturing operations. Specifically, most manufacturers must undertake a complex analysis and prepare either a periodic-testing plan or a production-testing plan for each product manufactured at each manufacturing site. These plans will be subject to extensive *post hoc* review by the CPSC, with no real guidance on what constitutes an adequate testing plan. And manufacturers who make multiple products at a single site or who frequently change the product will continually need to change their testing plans, potentially every day. The threat of "gotcha" compliance activity is real, and is exacerbated by the extensive record-keeping requirements that add nothing to safety.

Manufacturers must "document [(1)] the production testing methods used to ensure continuing compliance and [(2)] the basis for determining that the production testing plan provides a high degree of assurance that the product being manufactured continues to comply with all applicable children's product safety rules."[6] But businesses have told us that documenting their complicated production processes will be costly and burdensome. For some smaller companies, the documentation requirements are simply impossible. This assessment was borne out both by CPSC economists and by the public's comments.

Indeed, for small businesses, the burdens of the testing requirements will often be insurmountable. Testing alone—excluding the costs of destroyed samples, shipping, and administrative activity—could consume over 11% of a small manufacturer's revenue.[7] Since a typical profit is about 5% of revenue, we expect many small businesses to close because of the testing requirements, particularly after the continuing testing

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[5] Robert Franklin, Directorate for Economic Analysis, CPSC, *Final Regulatory Flexibility Analysis for the Final Rule on Testing and Labeling Pertaining to Product Certification*, 134 (Aug. 25, 2011) ("*Regulatory Flexibility Analysis*"), in Staff Briefing Package, CPSC, *Draft Final Rule for Testing and Labeling Pertaining to Product Certification* (Sep. 21, 2011), http://www.cpsc.gov/library/foia/foia11/brief/certification.pdf.

[6] 16 C.F.R. § 1107.21(c)(2).

[7] *Regulatory Flexibility Analysis* at 127–28.

requirements take effect in February 2013. They cannot simply raise their prices and remain competitive. We already have anecdotal evidence that this is happening.

Moreover, the testing rule's burdens fall most heavily not just on small businesses, but also on the good actors that we should want to help and for whom the third-party testing cost is particularly unjustified. More than ever, today's manufacturers have the tools and incentives to produce safe, compliant products. Modern production processes and quality assurance systems enable manufacturers to produce uniform compliant products without the need for confirming third-party tests. And the damage from noncompliance can be devastating: The cost of destroyed products, brand name damage, loss of future contracts, higher penalties, and class-action lawsuits, have already resulted in overseas manufacturers taking aggressive steps to ensure compliance, regardless of prescriptive government mandates.

The third-party testing requirement disadvantages companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, and domestic American companies who have never had a violation but who nonetheless must pay the most for third-party testing. Indeed, there are entire industries that have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety.

Bad actors, on the other hand, can easily escape the costs of the testing rule. Those who wish to make a fast profit without regard for public safety will not comply with third-party testing requirements, thereby achieving an unfair price advantage. Companies with a casual attitude toward safety standards compliance will be casual about maintaining accurate records to support CPSIA-mandated testing. And because the requirements of 16 C.F.R. § 1107 are so complicated and expensive, it is easy to imagine the many shortcuts a manufacturer could take to reduce its costs while projecting the image of compliance. The CPSC does not have the manpower or the expertise to police manufacturers' internal record-keeping controls, as it would take an army of investigators all over the world to accomplish such a task. Instead, the detection method of ensuring compliance has remained and will remain the default method of compliance for companies producing violative products, while those committed to ensuring compliance and already effectively doing so are bearing the unnecessary additional burden of third-party testing.

Detecting and intercepting products is the key component of the CPSC's strategy.

Advocates for third-party testing characterize it as a "prevention" model that is superior to what they view as the Commission's traditional "detection" model, because they believe that it will keep dangerous products out of commerce in the first place. The evidence does not bear this out. Preventing the manufacture and importation of noncompliant children's products has always been and remains the focus of the CPSC's efforts. The policy disagreement is over the most effective means of doing so.

Mandating third-party testing is based on the out-of-date, "command and control" paradigm that government can and should achieve its policy outcomes by dictating the precise decisions and actions of the private sector. The better policy mandates an outcome and—through a strong enforcement mechanism—demands penalties for noncompliance. This allows the market to find the most efficient means of compliance and encourages a stronger commitment to compliance in the regulated community.

Today, thanks to Congress, the Commission also has vastly-improved enforcement tools relative to those available even a few years ago. The Commission has authority to impose significantly higher penalties for violations. And the agency can confiscate violative products at the border and destroy them. Relatedly, with the advent, in early 2008, of our agency's Import Surveillance Division, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with CBP to maximize the number of products screened at all U.S. ports.

Today, the Commission intercepts non-compliant toys and other children's products through these broader border-control efforts, through the use of x-ray technology, and through a data-driven targeting program that searches ship manifests before they reach port and flags previous offenders and first-time shippers for closer inspection. Using this detailed and timely information, and through closer cooperation with CBP, the CPSC seized and denied entry to 49% more shipments of noncompliant products in 2010 than in 2009. These tools are more effective at ensuring compliance with safety standards than policing all children's product manufacturers for certifications to mandatory third-party tests.

These difficult economic times call for a regulatory regime that carefully balances the costs and benefits of executive agency action. And consumer product regulation, in particular, must take into account the desire of American families for a dynamic marketplace with new products that are also safe and affordable. The requirement that all children's product manufacturers repeatedly third-party test every component of their products threatens to increase the cost and drastically reduce the availability of children's products for parents of modest means. Public and private resources could instead be redirected toward the alternative production processes and enforcement methods that can achieve the same goal much more efficiently. *Indeed the CPSC staff suggested that the Commission request from Congress some flexibility in this area.*[8] Therefore, we recommend a regulatory system that encourages implementation of the quality

[8] DeWane Ray & Randy Butturini, Office of Hazard Identification & Reduction, CPSC, *Memorandum: Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products*, 13 (Aug. 29, 2012), in Staff Briefing Package, *Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products* (Aug. 29, 2012), http://www.cpsc.gov/library/foia/foia12/brief/reduce3pt.pdf.

assurance process that best achieves results for a particular company or industry, without a third-party testing requirement.

2. Increase the permissible limit of lead in children's products to 300 parts per million and allow the Commission to set a lower limit for a particular material, product, or component where it is necessary to protect against a real risk of harm.

The CPSIA lowered the permissible amount of lead in children's products to 600 ppm, and then to 300 ppm, over a fixed period. Congress then directed that the limit be lowered to 100 ppm unless the Commission determined that this was not "technologically feasible" for a product or product category. The CPSIA also directed the Commission to consider "the public health protections associated with substantially reducing lead in children's products." Rather than use the discretion that Congress gave us to consider feasibility and public health, the agency took an approach that turned the statute on its head. The agency interpreted the term "technologically feasible" to require the use of a low-lead material if it exists anywhere in any market, regardless of the suitability of the material for a particular use, the cost of the substitute, or its availability to all manufacturers in the quantities needed. In effect, "feasible" was replaced with "imaginable" in the statute.

The analytical approach taken by the Commission completely ignored economic feasibility. As long as "low-lead materials are available, but are available only at higher prices," the Commission assumed technological feasibility, because "there is no economic basis for determining at what point a cost increase would make production not technologically feasible."[9] But it is inconceivable that the Commission could not identify *any* point at which the cost of manufacturing a product would exceed the price at which a market could exist to purchase it. Such questions are asked and answered every day by every business that manufactures a product. Even if it were plausible that economists cannot identify in the *abstract* prohibitively high production costs, the evidence before the Commission clearly demonstrated that such costs would be imposed by the reduction of the lead limit to 100 ppm. Commission staff concluded that the costs associated with a 100 ppm lead limit would be substantial and would drive products and businesses from the market.

A predictable and troubling result of this decision—related to third-party testing—is laboratory and materials variability. When assessing lead content at the trace level of 100 ppm, laboratories are reportedly finding different results. It is difficult to find low-

[9] Robert J. Howell, Office of Hazard Identification & Reduction, CPSC, et al., *Memorandum, CPSC Staff's Reponse to Commissioner Northup's Questions: Technological Feasibility of 100 Pars Per Million Total Lead Content Limit*, 24–25 (July 8, 2011), in Staff Briefing Package, *Staff Responses to Commissioners' Questions* (July 8, 2011), http://www.cpsc.gov/library/foia/foia11/brief/leadquestions.pdf.

lead materials that consistently meet the 100 ppm requirement in the marketplace, and particularly so for recycled materials. Members of the public raised this issue in response to our request for comments under Public Law 112-28. Since a failing test result can have major financial implications, this result should be of great concern to the Commission. But there has been no inclination to address the problem. Test-result variability drives up costs needlessly—when it comes to public health, the difference between 100 ppm and 300 ppm of lead is virtually nonexistent.

We do not believe that returning to a 300 ppm lead limit would harm children's health. The Commission's staff examined the health impact of the decision to reduce the lead limit to 100 ppm and concluded that "the contribution of products containing between 100 ppm and 300 ppm lead to the overall lead exposure in children is minimal." Claims to the contrary—that swallowing objects containing 300 ppm or less of lead reduces children's I.Q.—are based on an "incorrect characterization of a CPSC staff analysis first released in 2005."[10]

In short, this was a classic example of a regulation being imposed without the scientific data to support it. Because of the significant harm to the economy, consumer choice, businesses and the workers they employ—and in the absence of any public-health justification—the 100 ppm lead limit should be repealed. Congress should instead give the Commission the discretion to set the appropriate lead level for a material, product, or component where the health benefits and scientific evidence justify such a level.

3. Change the definition of "children's product safety rules" to cover only products intended exclusively for children.

The Commission's definition of "children's product safety rule" is a similarly non-risk-based imposition of the costly third-party testing requirement. The CPSIA requires third-party testing for compliance with all "*children's* product safety rules." Prior to the CPSIA, the Commission promulgated numerous "*consumer* product safety rules," such as those governing carpets and rugs, vinyl, clothing textiles, and mattresses. The Commission's majority interpreted the term "children's product safety rule" to include such rules.

Thus, any product made for a child is subject to a "product safety rule," compliance with which must be tested under the third-party testing rule. This means that, for example, a rug with the image of a children's cartoon character must be tested not only

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[10] Dominique J. Williams & Kristina M. Hatelid, Directorate for Health Sciences, CPSC, *Memorandum: Response to Public Comments: Technological Feasibility of 100 ppm Total Lead Content in Children's Products*, 38 (May 11, 2011), in Staff Briefing Package, *Technological Feasibility of 100 ppm for Lead Content* (June 22, 2011), http://www.cpsc.gov/library/foia/foia11/brief/lead100tech.pdf.

for lead and phthalates (rules that clearly are focused on children's safety), but also for flammability (a requirement that covers general safety, not just children's safety). A blue rug that is made of the same material and located in the living room does not, however, have to be subjected to the same tests. This makes no sense.

A clear distinction can and should be made between "children's product safety rules" and more general "consumer product safety rules." Fundamentally, no safety improvement is gained by requiring the third-party testing of a lamp or rug merely because its design makes it suitable for children, when there is a greater risk that a rug will encounter a fire hazard in a kitchen or adjacent to the living room fireplace than in a child's room.

Indeed, the CPSIA defined children's products as those primarily designed or intended for children under 13. To make treatment of products and testing requirements consistent, "children's product safety rules" should be clearly defined by statute to mean safety rules that relate exclusively to children's products, and not to products intended for general use and governed by longstanding consumer product safety rules. There is no risk associated with these products that necessitates *new* third-party testing requirements.

Conclusion

All of us at the CPSC appreciate very much Congress's effort to reform the CPSIA by asking the Commission to consider ways to reduce needless burdens that are destroying jobs and undermining the nation's economic recovery. This report identifies and discusses briefly only a few of the recommendations that we believe would significantly decrease the costs of third-party testing without impacting safety. We would welcome the opportunity to elaborate upon the ideas presented here, and to share additional opportunities we have identified.

Attachment D

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD

Statement on the Commission's decision to publish the Notice of Proposed Rulemaking on a Safety Standard for Magnet Sets

August 27, 2012

I voted to publish the Notice of Proposed Rulemaking on a Safety Standard for Magnet Sets because I believe that rulemaking is the appropriate way to address hazards that may be posed by this product. The hazard pattern described in the NPR deserves the attention and study of the Commission and the public through the rulemaking process. My vote was not without reservations, however, because I am not convinced that the proposal before us—which amounts to a ban on all magnet sets sold today—best reduces or eliminates the hazard while minimizing disruption to manufacturing and commerce as required under our statute.[1]

In particular, the proposed standard proceeds on the belief that warnings do not work for this relatively new product because (it is assumed) warnings are and will be ignored or otherwise not communicated effectively. But in the absence of a robust and comprehensive program to educate and warn about this hazard, it is unclear that warnings will be ineffective and our conclusion that such is the case is speculative. And applying this principle broadly would eviscerate many of the safety standards that the Commission (and Congress) have deemed acceptable. The long-term policy implications stemming from the rationale for the proposed ban on other products subject to warnings have not been explored but are presented by this rulemaking.

I am also concerned that the proposed ban may be overly broad. There are two hazard patterns here: one involving young children and the other involving older children and teenagers. A tailored approach might adequately reduce the risk associated with magnet sets but not eliminate the product from the marketplace. In addition, the proposed standard—particularly as amended by the majority—includes products that have not been demonstrated to pose the same risk. Overinclusive rules needlessly strangle commerce and innovation, and should be avoided. I hope that the comments in response to this NPR will help resolve these concerns, particularly by proposing less-

[1] *See* Consumer Product Safety Act § 9(f)(1)(D), 15 U.S.C. § 2058(f)(1)(D).

burdensome alternatives and by providing data that sheds light on how best to address the different hazard patterns before us.

Despite my concerns about the proposed standard, I voted for this to be put to the public because this is the right way to pursue the regulatory process when a significant hazard involving a class of products is brought to the attention of the Commission. When the Commission believes that a hazard is so imminent that it cannot wait for the results of rulemaking, we have statutory authority to act. In this case, however, instead of using that authority, we have brought compliance actions against certain companies and asked others to withdraw the products from the market in an attempt to reach the entire market. This amounts to back-door rulemaking. Approaching the hazard through the front door—that is, through the rulemaking process—is more appropriate. In this way, we do not take formal or informal actions that reach conclusions about a potential hazard before the Commission has all the relevant evidence and all affected stakeholders have the opportunity to be heard.

Congress created the Commission's regulatory procedures to allow for open and transparent rulemaking, and to ensure that the Commission has the right scientific, medical, and economic analysis before making decisions. That process must not be short-circuited. Thus, I look forward to examining this matter further—and as quickly as possible—once the public has weighed in and we have more data.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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Majority (202) 225-2927
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October 5, 2012

The Honorable Anne Northup
Commissioner
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Commissioner Northup,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade hearing entitled "Oversight of the Consumer Product Safety Commission," held on Thursday, August 2, 2012.

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Friday, October 19, 2012. Your responses should be e-mailed to the Legislative Clerk, in Word or PDF format, at Kirby.Howard@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Mary Bono Mack

Mary Bono Mack
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: G.K. Butterfield, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade

Attachment

Subcommittee on Commerce, Manufacturing and Trade
"Oversight of the Consumer Product Safety Commission"

Questions for the Record Submitted by Chairwoman Mary Bono Mack

1. **Based on your experience as a Commissioner, how do you believe the Commission could both better ensure consumer product safety and do so more economically and efficiently?**

My three years as a Commissioner have opened my eyes to the incredible costs this agency imposes on the regulated community and to the substantial taxpayer resources the agency expends, often with little or no commensurate safety benefit.

In some cases, the two are closely linked. For instance, the third-party testing requirement is an extremely burdensome and ineffective means of ensuring compliance with our safety standards, and has cost the agency an enormous amount of resources to implement. Similarly, the public database requires product manufacturers to focus resources on protecting against inaccurate public reports, and conducting public relations damage control when the CPSC's minimal safeguards do not prevent the publication of false or misleading information harmful to a business's reputation. At the same time, enormous CPSC staff time is dedicated to vetting reports for posting on the public database, despite the existence of far more useful private sector aggregators of product safety information.

Other aspects of the CPSC's operations are costly only to taxpayers, but are no less in need of reform. The overhead associated with maintaining a five member Commission when a single administrator would be more effective and efficient is one example.

Based on these and other observations I have made during my tenure, I have identified a number of reforms to the CPSC that I believe would greatly improve its efficiency while reducing burdens on the regulated community and better protecting the public from unsafe products. Explained in detail below, I recommend the following changes, some of which would require new legislation to accomplish: (1) Repeal the requirement that all children's products be third-party tested irrespective of risk and instead let the Commission exercise its authority to require third-party testing by a manufacturer, or of a children's product or component part, only as it is deemed appropriate based on reasonable risk based guidelines; (2) replace the 5-member Commission with a single administrator; (3) shut down the public facing database at *saferproducts.gov*; (4) reform the CPSIA to allow the agency to focus on risk; (5) remove impediments to the Commission's working toward the international harmonization of safety standards; (6) require that all CPSC rules be justified by a cost-benefit analysis; (7) require products that do not meet an applicable voluntary standard to bear a mark so stating; and, (8) moderate our role in voluntary standards development to not pressure standards bodies to include requirements that would not survive the cost-benefit analysis required for mandatory standards setting.

Repeal the Requirement That All Children's Products Be Third-Party Tested Irrespective of Risk And Instead Let the Commission Exercise Its Authority to Require Third-Party Testing By a Manufacturer, Or of a Children's Product or Component Part, Only As It Is Deemed Appropriate Based on Reasonable Risk Based Guidelines.

Imposition of the third-party testing requirement on every component of every children's product in response to "the year of the recall" was a classic example of legislative overreach. There may be appropriate circumstances for requiring particular manufacturers of particular products to bear the cost of third-party testing and certification in order to protect against the risk of consumer injury, and the Commission has the authority to make that call. But requiring all children's products to be third-party tested has proven to be a business crushing and job killing mandate without a justifying benefit. Through the use of better technology and collaboration with the U.S. Customs and Border Patrol (CBP), the CPSC has new and better tools to enforce our standards without the suffocating burden of the law's new mandates.

The CPSIA was enacted in 2008 in response to a media storm over a large number of Chinese manufactured children's toys that were recalled due to lead in paint that exceeded a standard in place since 1970. No child was injured by lead paint in the toys, and the offending manufacturers were soundly rebuked under existing law, through mandatory recalls, the imposition of the largest penalty in the history of the CPSC, and a thirty million dollar class action lawsuit settlement for one manufacturer.

The news of the recalls created a political climate suited to fulfill a long held goal of consumer advocates: the reduction in the lead content of children's products virtually to zero, the elimination of phthalates without any known risk to children, and the requirement that all children's products be tested by third party laboratories to ensure compliance with these and all other applicable safety standards. Thus, the CPSIA requires, with limited exceptions, that before a children's product enters commerce, sufficient samples of every component must be individually tested by a third-party laboratory and certified as free from lead and phthalates, and compliant with all other applicable product safety rules. Furthermore, the related tracking labels and record keeping are such a complicated morass that only the most sophisticated manufacturers can comply.

The CPSIA also required the Commission to establish protocols and standards for ensuring that after the initial third-party testing, children's products are subject to additional testing during production. The Commission carried out this mandate through the promulgation of 16 C.F.R. § 1107, which requires the additional third-party testing of a certified children's product to ensure continued compliance with all applicable safety standards, both when there is a material change to the product, and periodically during production even in the absence of a reason to believe a certified product is no longer compliant. The rule's prescriptive mandates insinuate the Commission deeply into the production process of any company that manufactures a children's product for the United States market.

Specifically, unless a manufacturer is one of the few large businesses with a ISO/IEC 17025:2005 accredited in-house laboratory, the rule requires it to undertake a complex analysis and formulate either a periodic testing plan or a production testing plan for each product manufactured at each manufacturing site. Manufacturers who make multiple products at a single site or who frequently change the product manufactured at a site will need to continually formulate and update their periodic testing and production testing plans, potentially as often as every day. They also must "document the production testing methods used to ensure continuing compliance and the basis for determining that the production testing plan provides a high degree of assurance that the product being manufactured continues to comply with all applicable children's product safety rules." Businesses have told us that documenting their complicated production processes will be costly, burdensome and simply impossible for some smaller scale companies.

The CPSC is responsible for ensuring that noncompliant and potentially dangerous children's products do not reach American shores. Advocates for third-party testing characterize it as a "prevention" model that is superior to what they view as the Commission's traditional "detection" model, because they believe that it will keep dangerous products out of commerce in the first place. The evidence does not bear this out.

Preventing the manufacture and importation of noncompliant children's products has always been and remains the focus of the CPSC's efforts. The policy disagreement is over the most effective means of doing so. Mandating third-party testing is based on the out-of-date, "command and control" paradigm that government can and should achieve its policy outcomes by dictating the precise decisions and actions of the private sector, rather than mandating an outcome with penalties for noncompliance, implementing a strong enforcement mechanism, and allowing the market to find the most efficient means of compliance.

The more forward thinking and effective approach to ensuring the compliance of manufacturers to consumer product safety law is therefore to create within that community, through a "carrot and stick" approach, a commitment to compliance, enhance the CPSC's partnership with CPB and our use of emerging risk assessment management technology at ports to better target potentially noncompliant products for inspection and prevent them from entering the stream of commerce. Recent technological and organizational advances have markedly improved the efficacy of these enforcement tools, increasing substantially the likelihood that noncompliant products will be detected and destroyed. In addition, modern production processes and quality assurance systems enable manufacturers to produce uniform compliant products without the need for confirming third-party tests. The cost of destroyed products, name brand approval, loss of future contracts, higher penalties, and class-action lawsuits, have already resulted in overseas manufacturers taking aggressive steps internally to ensure compliance, irrespective of prescriptive government mandates regarding the proper means for doing so.

Third-party testing is very expensive for all manufacturers and importers, but its cost burden is insurmountable for many small businesses. According to the CPSC's economists, the costs of testing alone -- excluding the costs of samples consumed in destructive tests, the costs of shipping the samples to the testing laboratories, and any related administrative and record keeping activity – is expected to consume over 11% of

a small manufacturer's revenue. Given that a typical profit is only about five percent of revenue, it is reasonable to expect a large number of small business closures resulting from the third-party testing requirement, particularly after the obligation to conduct periodic and material change tests takes effect in February 2013. They cannot simply raise their prices and remain competitive.

Commission economists predict that in response to the "significant increase in their costs due to the final rule", manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit the children's product market, or go out of business completely. The costs associated with the new rule are also expected to be a "barrier that inhibits new firms from entering the children's product market", including, in particular, ones serving a niche market, such as products for children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."

The requirement that all children's products be tested at a third-party lab, regardless of risk, also disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation, but who nonetheless must pay the most for third-party testing. In the latter regard, there are entire industries that have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. And, of course, those without a commitment to an ongoing enterprise who wish to make a fast profit without regard for public safety will not comply with third-party testing requirements in any event, thereby achieving an unfair price advantage.

While the crippling costs of third-party testing are unquestionable, its benefits are speculative and overstated. Some argue that third-party testing before sale will result in fewer recalls. But most recalled products contain design or manufacturing defects that are unrelated to the Commission's product and material specific safety standards. Moreover, given the Commission's decision to reduce the lead in the substrate of children's products well below a level presenting any risk to health, recalls of products violating the new standard do not even necessarily protect against a real risk of injury.

Additionally, the manufacturers most likely to honor the third-party testing requirement are also the least likely to produce noncompliant products. Good corporate citizens wishing to maintain their market reputation have already improved their internal mechanisms to ensure compliance regardless of third-party testing requirements, but will also incur the cost of third-party testing consistent with their commitment to follow the law. Indeed, the CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. For instance, we have learned that since the discovery in 2007 that the lead paint in certain violative products was introduced through inadequately supervised component suppliers, manufacturers have reduced their number of suppliers, and now

undertake more frequent internal testing. Component suppliers, in turn, take more care to ensure compliance because they are aware that manufacturers will not risk continuing to use a supplier who fails even once to provide compliant components.

In contrast, a "bad actor" with a casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications. Because the requirements of 16 C.F.R. § 1107 are so complicated and expensive, it is easy to imagine all of the shortcuts a manufacturer could take to reduce its cost, creating the impression of compliance. The CPSC does not have the manpower or the expertise to police manufacturers' internal record keeping controls, as it would take an army of investigators all over the world to accomplish such a task. Even now, when the CPSC seizes a noncompliant product at the port through our more sophisticated targeting, we do not investigate the certificate or prosecute the paperwork failure. Thus, the detection method of ensuring compliance has remained and will remain the default method of compliance for companies producing violative products, while those committed to ensuring compliance and already effectively doing so are bearing the unnecessary additional burden of third-party testing.

Today, the Commission also has enforcement tools vastly improved over those available even a few years ago. These are a more effective use of taxpayer dollars to ensure compliance with safety standards than is policing all children's product manufacturers for certifications to mandatory third-party tests. The Commission now has authority to confiscate and destroy at the border products that violate federal safety standards. Since the advent in 2008 of our agency's Import Surveillance Division, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with CBP to maximize the number of products screened at all U.S. ports. Today, the Commission intercepts non-compliant toys through more extensive border control efforts; application of x-ray technology; and, computer databases that search ship manifests before they reach port, flagging for inspection previous offenders and first-time shippers. Using this more detailed and timely information, and through closer cooperation with CBP, the CPSC seized and denied entry to 49% more shipments of noncompliant products in 2010 than in 2009. Clearly then, there is no evidence that the CPSIA reduced the numbers of noncompliant products being made, and the third party tests, certifications and attendant mandates did nothing to contribute to the CPSC's ability to catch them.

The CPSIA also increased the incentive for compliance by increasing the maximum civil penalty amounts from $8,000 to $100,000 for each "knowing" violation and from $1.825 million to $15 million for any related series of violations. As a result, the average out of court settlement reached by the CPSC for violations of its statutes increased 61% between 2008 and 2009, and another 43% in 2010 over the amounts collected in 2009. The CPSC also can now more easily seek criminal penalties, and can require a company recalling a product to give a refund, replacement and/or repair, rather than allowing companies to select the remedy they prefer.

It is well recognized that these difficult economic times call for a regulatory regime that carefully balances the costs and benefits of executive agency action. And consumer product regulation, in particular, must take into account the desire of American families for a dynamic marketplace with new and more interesting products that are also safe and affordable. The requirement that all children's product manufacturers repeatedly third-party test every component of their products is a tremendously costly and not very effective means to prevent violative products from entering commerce. It also threatens to increase the cost and drastically reduce the availability of children's products for parents of modest means. Public and private resources should therefore instead be redirected toward the alternative production processes and enforcement methods that can achieve the same goal much more efficiently.

Replace the 5-member Commission with a Single Administrator

I believe the CPSC could be run more efficiently by a single Administrator, than by a Commission of five or even three. In fact, similar proposals have been considered in the past: http://www.gao.gov/products/T-HRD-87-14. Managing a small agency simply does not require more than an Administrator. Additionally, I have confidence that Chairman Tenenbaum (or a future Administrator) would be able to run the agency much more efficiently without the pressures from her Democrat and Republican colleagues, who wish constantly to influence her actions in one direction or another. Reducing from five Commissioners to an administrator would save the substantial costs of office space, Commissioner and staff salaries, travel costs and all other expenses associated with a Commissioner's office.

The Chairman is already solely accountable for all of the agency's core functions, including setting the rulemaking agenda, public relations, human resources duties, and budgeting. The other four Commissioners may be asked to sign off on these things from time to time as a formality or to provide input, but ultimately all accountability lies with the Chair.

Rulemaking involves the participation of five Commissioners. However, I would argue that this "participation" rarely involves more than duplicative analytical efforts—all of which usually result in a 3-2, party-line vote. This also means five different Commissioners, all their staffs (12 people), plus dozens of technical staff and lawyers are reviewing, editing and analyzing the exact same rule-making documents.

Despite my efforts, I was unable to meaningfully influence the major rulemakings we considered when all five Commission seats were filled. In fact, divided along party lines, the Chair was often pushed to align her position with one or both of the other two Democrat Commissioners. For example, the Commission issued a Notice of Proposed Rulemaking on the Definition of Children's Product that was so ambiguous we might just as well not have defined the term at all. In response, the Commission received many excellent comments from manufacturers and retailers illustrating how the parameters of the definition provided very little, if any, certainty for products that fell around the outer edges of the law's age limit. Then, after weeks of review by technical staff, the Office of

General Counsel, and all Commissioners' staffs, the final rule approved by the Majority was ***worse*** than the proposed rule, in that it unjustifiably broadened the parameters so that even more products fell under the purview of the CPSIA. Without four other Commissioners pulling her in opposite directions, one Administrator would be solely responsible for fair, well-thought-out rulemaking decisions.

Having five Commissioners also means that many day-to-day activities of the Commission must happen five different times, which can drain staff time. Moreover, each Commissioner needs his/her own weekly briefings with various professional staff to remain current on the status of rulemakings, compliance issues, legal matters, public relations, administrative and staffing problems, and other issues. Unfortunately, it is not useful to combine most meetings with other Commissioners, who may have different agendas. Nor is it even legal under the Sunshine Act for more than two Commissioners to meet privately to discuss substantive matters. As a result, professional staff spend much of each week in repetitive "update" meetings with each Commissioner and away from their core duties. They also spend five times more time than necessary answering Commissioner and Commissioner staff questions, when they could be doing so for one Administrator.

During the course of these meetings and through other Commissioner and Commissioner staff initiated contact, CPSC Commissioners seek to influence the agency's professional staff to take or forego actions based on the Commissioner's policy preferences. These conflicting directions can sow confusion and dissention in the ranks of CPSC's career staff. I have learned from CPSC staff that the work environment created by being pulled in opposite directions can be difficult and stressful. A single administrator guiding the staff to advance the presidential administration's agenda would foster a more productive and satisfied workforce.

The CPSC still remains a relatively small agency, despite the new rules it has promulgated and its responsibility to enforce those rules. Other regulatory agencies, such as NHTSA and FDA are run by Administrators that are accountable to Cabinet secretaries and the White House. I could imagine a similar arrangement for the CPSC.

The Public Facing Database at *saferproducts.gov* Should Be Shut Down

Over the last three years, I have worked without success to improve the public facing database authorized by § 6A of the CPSA (§ 212(b) of the CPSIA), so that it would provide reliable and accurate product safety information to inform consumer choice and reduce the risk of injury. Instead, and over my objections, *saferproducts.gov* has become a public website bearing the imprimatur of the Federal Government that is badly designed and hard to navigate, provides incomplete information, and is populated by unverifiable reports of dubious accuracy. Furthermore, it is absorbing a disproportionate share of this agency's time, talent and budget.

In past testimony before Congress, I have advocated for reforms to the law that would improve the database. Specifically, I have proposed that the Commission only publish

reports of harm that are received from individuals with firsthand knowledge of the product, individual or incident giving rise to the alleged risk of harm. I have also asked that reports be required to identify to the CPSC (but not necessarily publicly) the victim or product owner, so that the Commission can conduct an investigation to verify the accuracy of a claim. I have also urged that sufficient information be included to specifically identify the exact product at issue before a report is published. Such information could include the model number, model name and date of manufacture, or other information necessary to prevent consumer confusion. However, even had these reforms been adopted, the data base today would be of little use to American consumers.

Out of all of my suggestions, the single one even addressed by Congress was the need for specific model information. But H.R. 2715 amended the CPSIA to require only that the Commission *try* to obtain product model information; the Commission is still permitted to and does post reports of harm not specifically identifying the subject product. Such reports continue to mislead consumers, potentially doing more harm than would no report at all.

Today, I strongly recommend that the public facing portion of the Commission's new database be shut down. There is simply no safety benefit in making all of our incident reports public, and doing so diverts resources that would be better spent advancing the Commission's safety mission.

This Commission should have a public database funded by taxpayers only if it is different and better than any source of information that already exists in the public domain, such as websites like *Amazon.com* or *Yelp.com*. Unfortunately, our public database is less useful than similar sites that are already available to the public, and is, in fact, more likely to mislead the public. This is because our inability to routinely verify reports leads to the publication of inaccurate information. It is also because we do not permit satisfied customers to comment in response to a report that a product presents a risk of injury, thereby providing a one-sided picture without the balance and sense of proportionality that consumers need in order to choose among competing products.

The contrast between *Amazon.com* and *saferproducts.gov* is illustrative. *Amazon.com* has a much more user-friendly and informative design, giving consumers an intuitive and easy to navigate interface that shows, at the point of purchase, the most popular models of a product, the degree of customer satisfaction (on a five star scale), complaints and comments about the product, and responses to complaints and comments from other consumers that provides a balanced perspective. Consumers contemplating a purchase want to learn about the safety experiences of others who already own the product; such useful information is unavailable on our website. *Amazon.com*'s aggregation of far more comments – both positive and negative – also provides a more accurate view of a product's safety. For instance, on *Amazon.com*, when a product that has sold a million units has a handful of purchasers that question its safety, a potential consumer has enough information to put the complaints in perspective. In contrast, the same number of complaints about a product on *saferproducts.gov,* where there is no way to determine how many products have been sold or the experience of the vast majority of purchasers,

could well lead a consumer to avoid the product. Worse yet, that consumer might instead purchase another product that actually is dangerous, but because of its smaller volume of sales, is the subject of fewer or no reports. *Amazon.com* has the added advantage of sending a hyperlink to everyone who buys a particular product, thereby ensuring both that a broader perspective is provided, and that there is no confusion regarding what exact product is the subject of a comment. A consumer searching the CPSC website for product information, on the other hand, has no way of targeting a particular model, and to the extent he or she finds information that appears to correspond to a particular product, without the actual model number, the product could very well be something else. In fact, we know that consumers posting reports to *saferproducts.gov* occasionally even misidentify the manufacturer, and sometimes this is done with so little specificity that the manufacturer does not realize the mistake.

Today consumers are used to navigating through websites and databases with hyperlinks that are intuitive and do not require the ability to sort data and cull information using very exact terms. The CPSC database is difficult to use and is missing many of the basic programming that is so common today. And that problem is only going to get worse. We are not equipped to maintain, upgrade and build on our public database. It is expensive to contract outside of the agency, and continuity is difficult to maintain, because of budget issues and limitations for contracting through multiple fiscal years. An organization like *Amazon.com* can afford to spend millions of dollars every year to take advantage of emerging technology, build their institutional capacity for programing within their company and stay current with fast changing customer expectations. The CPSC cannot hope to match this investment, and dedicating more resources in an attempt to meet consumers' expectations would just send good money after bad.

Further, the Commission has limited resources for enforcement, and the public database diverts Commission staff time, appropriated funds and product safety focus from addressing genuine risks to screening and preparing the reports for public disclosure. Every report that is entered into our database requires the personal attention of multiple members of our staff to: review and edit for clarity, determine that the report meets the criteria for inclusion (about 40% do not reach this threshold), send the report to the manufacturer for review and possible comment, and make a determination of inaccuracy if the manufacturer so requests. Manufacturer claims of inaccuracy can lead to lengthy and complicated negotations over whether the report can be posted at all, and, if so, how it must be edited to ensure its accuracy.

These time consuming tasks by staff are unrelated to the most important part of our mission, which is to identify unsafe products on the market and to take appropriate action to protect consumers. The agency has yet to estimate the number of new FTEs we may need, year after year, to administer the public database. However, one conservative estimate is that it will take twenty-two new FTEs to handle the case work generated by these requirements, and that does not include complicated cases requiring the investigation and resolution of a material inaccuracy charge by a manufacturer. But there is no question that as more staff has been hired and assigned to process database reports rather than to perform the more important work of watching for trends and catching new serious risks,

our agency has failed both to identify significant emerging risks that have been reported, and to take timely action to prevent severe injuries to additional consumers.

Additionally, because inaccurate database reports are indistinguishable from accurate ones, the media's attention can focus on either inaccurate reports or less serious risks, pressuring the agency to prioritize its efforts based on publicity rather than risk level. Because the reputation of the agency is involved, a single press story can drive our resources to costly and complicated investigations of incidents, even when there has been no serious injury and Commission staff has a high level confidence either that the company has addressed the risk or that human error was at fault.

Shutting down the public database will by no means result in the waste of the substantial appropriations already dedicated to the Commission's IT initiative of the last several years. That initiative involved combining the numerous "silos" of data sources and data management into a single integrated system. That new integrated data system will continue to permit all of the product safety incident data, irrespective of source, as well as the software used to manage investigations of potentially risky products, to share a single format and "talk to each other", so to speak. Staff will retain their new capacity to monitor seamlessly every aspect of an incident and stage of an investigation, whether at the port, in the laboratory, in the office of compliance or in the legal department. These new features will continue to enhance the overall efficiency of the Commission.

Reform the CPSIA to Allow the Agency to Focus on Risk

The best way to allow the agency to perform its core functions—to assess and reduce risk—would be to reform the CPSIA's non-risk based mandates. In addition to the reforms addressed separately in response to this question (including repealing the requirement for the third party testing of all children's products), such reforms should include: repealing the 100 ppm lead content standard; defining children's products for purposes of the heavy metal and phthalate limits as products intended for children 6 and under, rather than for all children under 13; and, defining children's product safety rules as rules applicable to products intended exclusively for children, not general use products with incidental children's themes. Such reforms would free up agency resources to focus on known hazards and to better prioritize our regulatory agenda. It would also free up business resources to expand, build new products and stay competitive with what the marketplace is demanding in the future.

My objections to the 100 ppm lead limit are discussed in detail in response to Question 2, below. With respect to the age-based definition of children's product, the CPSIA defines a "children's product" as any product intended primarily for use by children twelve years old or younger. The CPSIA thus treats all products intended primarily for use by children under thirteen the same, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented by the products used by different age groups, CPSC staff has suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be

one of the most efficient ways to amend the law in order to exclude those products which many believe should be outside its scope.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that the products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced as applied to products for older children who are well past the age when they mouth things or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children age six and under, while giving the agency discretion to raise that age limit for particular materials or categories of products that are found in the future to pose a risk to older children. And in any event, the CPSC would retain the authority to issue a stop-sale order or to recall any product determined to pose a "substantial product hazard" under the Federal Hazardous Substances Act.

The Commission's definition of "children's product safety rules" is a similarly non-risk based imposition of the costly third-party testing requirement. The CPSIA requires third-party testing for compliance with all "*children's* product safety rules." Prior to the CPSIA, the Commission promulgated numerous "*consumer* product safety rules", such as those governing carpets and rugs, vinyl, clothing textiles and mattresses. Over my objection, the Commission's Majority has required any such products intended for use in a children's room to be third party tested to those general consumer product safety rules. For instance, a rug with the image of a Disney character and intended for a child's room that the CPSIA clearly required to be third-party tested to lead and phthalates limits must, because of this interpretation, now also be third party tested to the rug flammability standard; but, a blue rug that is made of the same material and located in the living room does not.

I believe a clear distinction can and should be made between "children's product safety rules" and more general "consumer product safety rules." Fundamentally, no safety improvement is gained by requiring the third-party testing of a lamp or rug based on its design, when there is a greater risk that a rug will encounter a fire hazard in a kitchen or adjacent to the living room fireplace than in a child's room. And children play throughout the house. The CPSIA defined children's products as those primarily designed or intended for children under 13. "Children's product safety rules" should be consistently construed to mean safety rules that relate exclusively to children's products, and not to products intended for general use and governed by a longstanding consumer product safety rule. The Commission did not have to adopt a contrary view, but it did, even though there is no risk associated with these products that necessitates *new* third-party testing requirements. Congress could clarify this.

Remove Impediments to the Commission's Working Toward the International Harmonization of Safety Standards

Congress's imposition of statutorily set mandatory standards for lead and phthalates and its requirement that the Commission make mandatory the ASTM F-963 toy safety standard and standards for durable nursery products, has markedly diminished the Commission's ability to harmonize United States and other international safety standards. We have no flexibility to modify our standards to find common ground, and because our standards are often not risk based and cannot be justified on the basis of a cost-benefit analysis, other jurisdictions are unwilling to adopt our standards. This has resulted in a large number of European and other foreign manufacturers abandoning the American market for children's products and reducing the choice of our consumers. It also erects barriers to entry in foreign markets for American manufacturers, who must incur the cost of compliance and testing to multiple standards.

For example, the ASTM toy safety subcommittee recently established a work group to consider aligning the U.S. and international standards for accessible soluble heavy metals in toys. If adopted by the ASTM toy subcommittee, the new standards would then need to be approved by Commission vote, because the CPSIA made the ATSM F-963 standard mandatory, effective 2009. That the Commission could be an impediment to the ATSM's efforts to harmonize its standards with international norms illustrates how mandatory, government imposed, standards can inhibit the harmonization of international product safety standards. ASTM-F-963 had been a voluntary standard before the CPSIA made it mandatory in early 2009, and it is quite complex. In theory, the greater efficiencies achieved through harmonization should benefit manufacturers and consumers.

When I was in China in 2010 visiting factories and American companies, I saw that they perform three or four different "small parts" tests, all from different heights, simply because of the requirements of different countries. Harmonization would reduce that burden, but the CPSIA's requirement that toys sold in the United States satisfy ASTM F-963 has tied the Commission's hands in its negotiations to "harmonize" with the Europeans. Overall, locking in the ATSM-F-963 standard has severely limited the potential for improvements to safety and efficacy that would otherwise be achievable by learning from and adopting where appropriate the toy safety standards of other countries.

I can recommend several statutory changes that could spur greater global harmonization without compromising product safety. First, Congress could permit the Commission to recognize an exception to a statutory or other mandatory standard in cases where compliance with the analogous foreign standard would not increase the risk of injury. Second, to account for cases where an analogous foreign standard does not provide adequate protection, Congress could authorize the Commission to accept the foreign standard as a baseline, with supplemental requirements as necessary to address risk. In that way, compliance with both jurisdictions' standards could be achieved with the investment necessary to satisfy one, and the marginal additional cost necessary to satisfy the additional requirements of ours. While still more costly than complete

harmonization, the costs of complying with the standards of two jurisdictions under those circumstances would be substantially less than were the two standards completely different. Finally, Congress itself could make a finding that particular European standards provide sufficient protection from injury, and permit manufacturers selling in the United States to satisfy either standard.

Congress Should Require That All CPSC Rules Be Justified By a Cost-Benefit Analysis.

Under existing law, the CPSC cannot promulgate a consumer product safety rule until it has performed an analysis of the potential benefits and costs of the rule. That analysis must then show that the benefits expected from the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirement to reduce the risk of injury. 15 U.S.C. § 2058. However, the CPSIA expressly excepted the CPSC from its existing statutory mandate to perform cost-benefit analyses of its legislative rulemaking under the statute. Cost-benefit analysis was not prohibited, but the majority of Commissioners opposed the exercise and as a result, no cost-benefit analysis was performed of the CPSC's Testing and Certification rule, or the law's new mandatory standards requirements. Nonetheless, the Commission did examine the costs to small businesses of these regulations under the Regulatory Flexibility Act, and determined that they would be crippling. Of course, the RFA requires no consideration of a rule's benefits, and is not an impediment to rulemaking, no matter how economically destructive the cost.

Having had the freedom to regulate without the need for a rational justification, the Chair now seeks to expand those powers. In her July 17, 2012, testimony before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, Chairman Tenenbaum urged the Subcommittee to amend the Flammable Fabrics Act to permit "this type of flexibility for rules regarding flammability of upholstered furniture" because it "would be very helpful and may allow for expedited consideration of the proposed rules."

The Commission has been studying means to address the risk of the flammability of upholstered furniture and contemplating potential rulemaking *for over twenty years*. Action has yet to be taken because it is such a complicated issue, both in terms of demonstrating the efficacy of risk reduction alternatives, and ensuring that they do not have unintended and more harmful consequences, such as has occurred with the introduction of potentially hazardous flame retardant chemicals in California.

There is no doubt that a proposed rule addressing the flammability of fabrics could be "expedited" if there was no need to establish the efficacy of the rule, or that its quantitative and qualitative costs are justified. But such rulemaking would likely close businesses, increase the cost to American consumers, and reduce choices and options in the market, all for unproven benefits. This is exactly what both Congress and the President recognize is undermining the country's economic recovery.

Given the Chair's public posture, and based on my experience as a Commissioner in the political minority, unable to persuade the Democrat majority voluntarily to undertake cost-benefit analyses of its significant rulemaking, it is essential that Congress mandate that a cost-benefit analysis establish that the benefits of a regulation are proportionate to its costs before it is promulgated. This should apply to all economically significant regulatory actions, not only legislative rules.[1] In addition, such analyses should be performed by an independent entity.

Cost-Benefit Analyses of Regulatory Actions Should Be Performed by an Independent Entity.

A federal agency that is required or willing to undertake a cost-benefit analysis of a significant regulatory action is not always equipped to do so. The CPSC, for instance, lacks the expertise and resources to perform thorough economic analyses of all of its rules. Indeed, to my knowledge, the CPSC has only performed one full cost-benefit analysis in its history.[2] For example, if the CPSC had been required to perform a cost-benefit analysis of CPSIA's main testing and certification rule, it would have had to outsource the study, given the sheer scope of the rule and number of different industries impacted.

I do not believe that the CPSC employs professional staff with the expertise to evaluate or identify complex private markets dependent upon each other, the effects of the regulation on international competitiveness, or any of the other factors relevant to a thorough cost-benefit analysis. It is likely that many other Federal regulatory agencies also would be unable to do so.

Even if Commission staff had the knowledge, experience and resources to perform cost-benefit analyses of the CPSC's major regulatory actions, our Economics department is constrained by its lack of independence. The Economics staff must report to the political leadership of the agency whose bias toward a particular outcome is often well-known. As the staff is forced to make basic assumptions in connection with their analysis, they can tilt those assumptions to avoid undeserved but recurring criticism. Furthermore, political leadership is often setting an unrealistic schedule for final rulemaking. Such time contraints preclude the performance of thorough cost benefit analyses of complex regulatory actions.

Finally, cost benefit analysis is not the prime consideration of an agency with a mission unrelated to cost. Fundamentally, regulatory agencies do not view their primary job to be assessing the economics of decisions. Rather, regulatory agencies focus on regulating—

[1] For certain rules, such as "Notices of Requirements" under the CPSIA, where the "Notice" itself may not have costs associated with it, but the act of issuing the "Notice" triggers an underlying statutory requirement to test and certify (imposing huge costs), I would recommend requiring that the agency perform a cost-benefit analysis of ***both*** the rule itself and the underlying statutory requirement that is associated with it/triggered by it.

[2] The Commission's 2006 final mattress rule on flammability (16 CFR Part 1633) contained a cost-benefit analysis.

with the natural tendency to regulate more. In other words, the more "tweaks" or requirements that can be added in the name of safety, the better—and the costs of such decisions, even when considered, are always secondary.

An expert independent entity with its sole purpose to conduct cost-benefit analyses of all economically significant rules taken by any federal regulatory agency would be an effective way to address agencies' lack of expertise, resources and independence. This is similar to the responsibilities of the Congressional Budget Office (CBO) prior to the passage of House Bills and, in fact, a new office could be created within CBO to provide this analysis for regulatory agencies as they implement laws.

I recognize the costs associated with creating a new office within CBO responsible for performing cost-benefit analyses for other federal agencies. But that cost would be partially offset by the fact that "regulatory flexibility analyses" performed under the RFA would no longer be needed. Moreover, a single office performing all cost-benefit analyses would gain efficiency and expertise that would allow the analyses to be done more quickly, more correctly and more independently.

> All Significant Regulatory Actions Should Require a Cost-Benefit Analysis, Not Just Legislative Rules Subject to Notice and Comment Rulemaking Under 5 U.S.C. § 553(b).

Many of the regulatory mechanisms employed by the CPSC that imposed considerable costs on manufacturers were not legislative rules. Indeed, much of the Commission's regulatory activity under the CPSIA has not been through the 5 U.S.C. § 553(b) notice and comment rulemaking applicable to legislative rules. As a result, neither full cost-benefit analyses nor other forms of economic review were required. In fact, some of the most costly (and unnecessary) decisions made by the agency have come through party-line votes on interpretive rules[3], Notices of Requirements[4], and petition decisions. Thus, in considering a requirement that agencies conduct cost-benefit analyses to justify regulatory action, Congress should take into account the full scope of regulatory decisions that an agency makes – not simply the most obvious regulatory vehicle, legislative rules.

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[3] For instance, the Commission voted 4-1 to interpret the word "any" in CPSIA § 101(b)(1)(A) to mean "zero," rendering the absorbability exclusion of the original statute meaningless, and resulting in the rejection of a petition from a manufacturer to exclude the brass axle of a toy car that had *less absorbable lead* than the FDA permits in a piece of candy.

[4] Notices of Requirements (NOR) are ostensibly procedural regulations that provide notice to testing laboratories on how to become CPSC-recognized labs for the purposes of third-party testing under the CPSIA. However, their issuance triggers the underlying statutory requirement that all children's products be third-party tested to the particular standard listed in the NOR—a huge, new, non-risk-based requirement of the statute with sweeping economic impact. The Majority has used them to require manufacturers to third-party test to many general consumer product safety standards that I believe should not have been construed as "children's products safety rules" subject to third-party testing under the CPSIA.

Make It More Difficult for Congress to Suspend the Requirement For a Cost Analysis Before a Bill Becomes Law.

The CBO is charged with the important task of performing cost analyses of proposed legislation. However, in the past, that required analysis has been suspended by a majority vote in the House. CPSIA was such a statute, and its unintended economic consequences attest to the need for the required thorough examination of economic impact before passage. This could be avoided through a requirement that a statutorily required cost-benefit analysis could be waived only by a super majority of Congress.

Products That Do Not meet an Applicable Voluntary Standard Should Be Required to Bear a Mark So Stating.

The CPSC cannot set a mandatory standard where there is "substantial compliance" with a voluntary standard that eliminates or adequately addresses the risk of injury associated with the product. 15 U.S.C. § 2058(f)(3)(D). Consequently, there will always be the potential for some manufacturers not to comply with an applicable voluntary standard, under circumstances where the CPSC cannot impose a mandatory standard.

This lack of universal compliance with voluntary standards creates an unfair trading environment that puts consumers at risk of harm. Compliance with voluntary standards can be a substantial cost component of a product, and manufacturers who do not follow them can therefore charge a lower price for the product. This harms the good corporate citizens who are at a competitive disadvantage because they care about consumer safety, and it harms consumers who are unlikely to be aware that a voluntary safety standard even applies to the product they opt to purchase because it is cheaper.

But making all voluntary standards mandatory is not feasible either. There are thousands of voluntary standards and they evolve as products change in an ever changing market. The voluntary standards committees and the CPSC collaboratively monitor products for emerging hazards and product advancements and develop revisions to the voluntary standards. Mandatory standards lock in product and testing requirements that may not meet future risks. It would be impossible to imagine the CPSC having the resources to undertake continuous rulemaking to revise each and every voluntary standard that is developed and/or revised.

The solution to this problem is a more informed public. Voluntary standards bodies often adopt a mark of compliance that allows those manufacturers who follow the standard to inform the public that the product is compliant. But manufacturers that do not comply with a voluntary standard are not now required to mark their product as not in compliance with an applicable voluntary standard. Requiring them to do so would permit the public to make an informed decision between a cheaper, potentially less safe product, and a product that may cost more, but is compliant with a voluntary standard intended to protect the public from harm.

The Commission Should Not Encourage Voluntary Standards Bodies to Adopt Requirements That Would Not Survive the Cost-Benefit Analysis Required for Mandatory Standards Setting.

A corollary to the need for cost-benefit analysis in all CPSC rulemaking is the prevention of CPSC pressure in voluntary standards setting that can result in unjustifiably costly voluntary standards. Over the last three years, I have heard with increasing frequency and urgency complaints from businesses participating in voluntary standard setting that the CPSC plays with a heavy hand. In particular, CPSC staff are said to use the pressure of threatened mandatory standards and other regulatory and public relations pressure to influence the voluntary standard setting process. The problem with that approach is that it allows the CPSC to dictate "voluntary" outcomes that might not survive the cost-benefit analysis and least burdensome alternative requirements for the establishment of a mandatory standard.

The CPSC can play an important role by sharing its data and the expertise of its scientists and engineers, but it should allow voluntary standard setting bodies to make their own decisions, free from coercive influence. Section 9 of the CPSA authorizes the CPSC to impose more stringent standards than those established by industry consensus when it is in the public interest to do so. And the agency should impose a mandatory standard only after making the findings required by Section 9, including that "the benefits expected from the rule bear a reasonable relationship to its costs" and that "the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated." 15 U.S.C. §2058(f)(3)(E) and (F). Seeking to instead set standards through pressure on voluntary standards bodies improperly circumvents that statutory requirement.

2. Why did you oppose lowering the lead limit for children's products from 300ppm to 100 ppm?

The CPSIA mandated that the permissible amount of lead in children's products be reduced to 600 ppm, and then 300 ppm, over a fixed time period. Congress then gave the Commission discretion to determine whether a further reduction of the lead limit to 100 ppm was "technologically feasible." Specifically, Congress required the Commission to reduce the permissible amount of lead in children's products from 300 ppm to 100 ppm, *unless* the Commission determined that it was not "technologically feasible" to do so for a product or product category. The CPSIA also directed the Commission to consider "the public health protections associated with substantially reducing lead in children's products." I voted against reducing the lead limit to 100 ppm, because I concluded, based on the information presented by the CPSC's expert staff following the required statutory notice and a public hearing, that doing so was not technologically feasible, it would result in no measurable health benefit, and it would have devastating economic consequences.

The Commission majority concluded the reduction to 100 ppm was technologically feasible by erroneously interpreting Congress' direction in CPSIA § 101(d)(1) that it consider whether a "product" complying with the 100 ppm limit is available in "the product category" as referring to raw materials, not children's products. Based on this

incorrect reading of the statute, the Commission was able to rely on raw materials tests with no link to any identifiable children's product as its basis for concluding that "most" children's products on the market today already satisfy the 100 ppm standard.

Although the commercial availability of substitute low-lead raw materials appropriate for use in children's products is a consideration in determining the technological feasibility of 100 ppm children's products under CPSIA § 101(d)(2), the fact that it merely exists is simply not enough. A common sense reading of "technological feasibility", as well as judicial constructions of analogous statutes, confirm that Congress intended the Commission to consider not just the physical possibility of manufacturing a product with 100 ppm of lead, but whether it is economically feasible to produce and market the product.

But the analytical approach taken by the Commission completely ignored economic feasibility. As long as "low-lead materials are available, but are available only at higher prices" the Commission assumed technological feasibility, because "there is no economic basis for determining at what point a cost increase would make production not technologically feasible."[5] Even if it were plausible that economists cannot identify in the abstract prohibitively high production costs, this Commission should at least know it when it sees it. And the Commission had before it evidence, explicit in the published Briefing Package, that the costs associated with a 100 ppm lead limit will be substantial and will drive products and businesses from the market.

According to the Commission's own staff, the significant adverse economic impacts likely to result from setting a 100 ppm lead limit, include: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility of products due to the substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard.

Even without considering economic feasibility, the Commission's conclusion that low-lead materials are available as substitutes for the materials currently used in children's products was inconsistent with the record. The conclusion was supported only by evidence that some suppliers expressed a willingness to provide some quantity of the materials. There is no evidence that the materials offered reliably contain the low-lead level specified, or that they are accessible to the manufacturers that would be required to use them to meet a 100 ppm standard. To the contrary, evidence obtained by the Commission demonstrated that suppliers were unable to provide materials that consistently met the specified low-lead standard, and that materials specified as low-lead were not accessible to many manufacturers.

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[5] Staff Responses to Commissioner Questions, July 8 2011 ("Staff Responses") at 24-25 (Response to Northup Question 15).

The Majority wholly fails to account for the fact that an unavoidable 15% variability in test results at the 100 ppm level causes fully compliant products to fail tests. As a result, a product must have no more than 87 ppm in order to reliably and consistently test at no higher than 100 ppm. And that in turn means that an 87 ppm lead limit must be both technologically possible *and* economically feasible before the 100 ppm limit could be found to be technologically feasible. Neither conclusion was supported by the evidence before the Commission.

The Commission's staff also examined the health impact of the decision and concluded that "the contribution of products containing between 100 ppm and 300 ppm lead to the overall lead exposure in children is minimal." In so concluding, the staff specifically debunked claims made by the American Academy of Pediatricians (AAP) that exposure to children's products containing less than 300 ppm of lead is harmful and, in particular, that swallowing objects containing 300 ppm of lead or less measurably reduces a child's IQ. According to Commission staff, these conclusions by AAP were based on an "incorrect characterization of a CPSC staff analysis first released in 2005." Indeed, the Commission "does not have data showing that children's products containing up to 300 ppm will result in excess exposures to lead." And per the Commission's experts, "no information or studies were presented by [AAP] concerning exposure estimates for children who use specific products containing relatively low concentrations of lead (i.e., up to 300 ppm)."

Because of the significant harm to the economy, consumer choice, businesses and the workers' they employ, I concluded that the reduction in lead from 300 ppm to 100 ppm was not technologically feasible. Further, given the "minimal" lead exposure from products containing between 100 and 300 ppm of lead, and the absence of any scientific basis for concluding that children can be exposed to excess levels of lead from products containing 300 ppm of lead, the evidence before the Commission established that reducing the lead level produced no health benefits. In short, this was a classic example of the costs of a regulation far exceeding the benefits, and for that reason, I could not support it.[6]

a. Why did the Commission grant Joseph L. Ertl Inc.'s petition to permit it to manufacture its children's ride on tractor models using metal containing 300 ppm of lead, given that the Commission adopted without exception the statutory limit of 100ppm?

H.R. 2715 gave the CPSC authority to except from the 100 ppm lead content limit a product, class of product, material, or component part that: (1) requires the inclusion of lead because it is not *practicable* or not technologically feasible to manufacture it by removing excessive lead or by making the lead inaccessible; (2) is not likely to be placed in the mouth or ingested; and (3) will have no adverse effect on public health or safety, taking into account normal and reasonably foreseeable use and abuse. 15 U.S.C. § 1278a(b)(1)(A)(i)-(iii).

[6] A more detailed explanation of my vote not to reduce the lead limit to 100 ppm is available at: http://www.cpsc.gov/pr/northup07202011.pdf.

In April 2012, the Commission concluded that certain children's ride-on pedal tractor component parts made with aluminum alloys by Joseph L. Ertl, Inc. (Ertl) and other manufacturers satisfied the three statutory criteria, and in so doing, belied the conclusions reached by the majority that reduced the lead limit for all children's products to 100 ppm in August 2011. The vote demonstrated bipartisan acceptance, based on the expert advice of CPSC's professional staff, of the principles that (1) lead in children's products presents a risk of harm only to the extent that children can absorb the lead to which they are exposed; and (2) metal substrate containing 300 ppm of lead that is not likely to be placed in the mouth, ingested, or *extensively* contacted by children does not present a health risk, because it does not measurably increase blood lead levels.

Staff's determination that no measurable increase in blood lead level would result from a child's exposure to certain aluminum alloy components of a ride on tractor containing 300 ppm of lead was not a close call. Staff has conducted extensive wipe-testing of metal jewelry items and vinyl bibs containing far more lead – up to 100,000 ppm (equivalent to 10 percent lead), and these tests resulted in average lead transfers per wipe of less than 0.02 micrograms of lead. *See* Staff Briefing Package: Request for Exception from CPSIA Section 101(a) lead content limit for Pedal Tractors from Joseph L. Ertl, Inc., Scale Models of Dyersville Die Cast Divisions (March 21, 2001) ("Ertl Briefing Package") at 30. Based on "[e]xtensive scientific literature and several physiologic models" describing the relationship between exposure and blood lead level, staff estimated that even exposure to as much as 1.2 micrograms per day, in *addition* to default inputs for lead from sources such as diet and soil, does not result in a measurable increase in the blood lead level of children ages 3-7 years. *Id.* at 31. Staff further estimated that a child could have between no contacts and several contacts with a ride on pedal tractor on any given day. *Id.* at 31-32. Thus, even using an average per wipe exposure of materials having far more lead than the component parts at issue here, and the relatively high number of 60 contacts per day (1.2/.02 = 60), there would still be no measurable increase in blood lead levels, and therefore no adverse impact on public health or safety.

Notably, Ertl also satisfied the other two criteria for the grant of an exception to the 100 ppm lead content limit, based on circumstances that are likely present in connection with many other products containing lead in metal substrate. With respect to practicability, the Commission concluded that Ertl could not practicably manufacture the pedal tractor components using aluminum alloy with 100 ppm of lead in part because the minimum quantity available for purchase represented a seven year supply at Ertl's rate of manufacture, and would require about 15% of the company's yearly sales to purchase it. Ertl Briefing Package at 13. Other materials, such as plastic, zinc or steel were determined not to be practicable, because they would either change the "appearance" of the product, result in a much heavier product, or require Ertl to invest in new metal stamping technology and training, which would increase the per unit production cost. Ertl Briefing Package at 3. Staff had a choice between recommending that Ertl be required to use aluminum alloy containing 200 ppm or 300 ppm of lead, both of which were equally attainable in the quantities needed. Staff concluded that 300 ppm was practicable, because the 200 ppm alloy would increase manufacturing costs by 1% over that of the

300 ppm alloy. *Id.* Making the aluminum alloy inaccessible by introducing a covering was deemed not practicable because it "would represent a change in [the] current manufacturing process." *Id.*

While practicability must be assessed on a case-by-case basis, several important principals can be gleaned from staff's approach to the Ertl petition. First, a petitioner may be entitled to retain the current appearance of a product for "aesthetic" reasons, i.e., metal vs. plastic, if its customers prefer it. *Id.* Indeed, significant differences in "general appeal to consumers" can support considering a model made with a different material to be a "different product." *Id.* at 20. In addition, a petitioner need not undermine the functionality of the product in order to reduce its lead content, by, for instance, increasing its weight to an extent that impedes maneuverability. The Ertl case also highlights the importance of cost differentials. The fact that introduction of a new material would increase the cost of manufacture by necessitating a change in the manufacturing process was a factor in favor of granting the petition. Indeed, even a 1% increase in total manufacturing cost justified favoring aluminum alloy with 300 ppm of lead over aluminum alloy with 200 ppm of lead. The accessibility of an alternative with less lead is also key, and in that regard, the mere fact that a market exists does not warrant a finding of practicability. As the Ertl case demonstrates, the need to warehouse amounts in excess of that needed for ongoing manufacturing purposes also weighs against a finding of practicability.

With regard to the likelihood that a component will be placed in the mouth or ingested, the size and location of the component are central considerations. So long as the component is too large to be ingested or placed in the mouth, the only route of lead exposure is through hand to mouth activity. And as staff's health sciences experts concluded, a child's blood lead level is not measurably increased merely through hand to mouth contact with a component containing 300 ppm of lead in metal substrate that the child does not extensively contact. *See* Draft *Federal Register* Notice – Petition Requesting Exception from Lead Content Limits; Notice Granting Exception (as amended March 30, 2012) at 5. Notably, in the case of the Ertl ride on tractor, this included the main body casting, which CPSC's human factors experts determined was the component most likely to be touched by a child playing on the tractor. Ertl Briefing Package at 26.

The Ertl decision highlighted the potential utility of the functional purpose exception included with the 2011 amendments to the Consumer Product Safety Improvement Act, but recognition of the principles underlying the decision comes too late and at far greater cost than was necessary. As originally enacted, the CPSIA permitted the Commission to exclude from the reduced lead limits products that would neither "result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child," nor have any other adverse impact on health or safety. CPSIA § 101(b)(1). It is clear from staff's conclusion in the Ertl case that many product components containing 300 ppm – or even 600 ppm -- of lead in metal substrate that are too large to be ingested or placed in the mouth would not result in the *measurable* absorption of any lead. Yet the Commission determined in 2009 that no material, product

or component qualified for the absorbability exclusion in the law. During the succeeding three years, many businesses that might satisfy the criteria applied in Ertl under the new functional purpose exception have closed, substantially reduced their product line, or compromised the durability or functionality of their products, because they could not practicably reduce the lead in their products, despite the fact that the products presented no risk of meaningful lead exposure.

The Ertl petition vote similarly exposes the unnecessary economic harm caused by the Commission's party-line vote to reduce the lead standard to 100 ppm based on the questionable conclusion that there is no product, class of products, materials or components for which it is not "technologically feasible" to do so. Most obviously, the conclusion was reached for aluminum alloy, which we now know does not present a risk of harm to children at 300 ppm of lead when used in larger component parts. The testing that underlies staff's conclusion that such aluminum alloy is not a health risk could support the same finding for other metal substrate containing 300 ppm of lead when used in a component that is not ingestible or able to be placed in the mouth. But instead of adopting a blanket exception, the Commission has left it to individual manufacturers to bear the expense and delay of petitioning the Commission for relief.[7]

b. The European Union has adopted a standard of 90 ppm? Is that a tougher standard than the US?

No. Although the target ppm number is lower, their standard refers to the amount of lead that can be **released** (as opposed to its content). This measure is referred to as the migration rate, or the leachable level. Thus, the European standard correlates with the actual risk of injury presented by an object containing lead. Our standard limits the total lead content in substrate, regardless of how much of that is or is not bioavailable – i.e., the risk it presents – when touched or consumed. In addition, the European Union does not require the third party testing of children's products to ensure compliance. Manufacturers and distributors selling products within the EU may rely on less costly first party testing to ensure compliance. Notably, I am aware of no evidence that there is any greater prevalence of children's products violating the respective jurisdiction's lead content limits in the EU, where third party testing is not required, than in the U.S., where it is.

Because the American standard requires in practice much lower levels of lead and a certification of compliance based on costly third party tests, it is significantly more expensive to manufacture children's products for the United States market. This puts small American manufacturers, in particular, at a competitive disadvantage. A small European manufacturer can afford the relatively modest compliance costs of selling exclusively in the E.U., until it has grown large enough to reach the economies of scale necessary to profitably absorb the additional cost of selling to the American market. A small American manufacturer, on the other hand, must incur our high compliance costs

[7] A more detailed explanation of my vote on the Ertl petition is available at: http://www.cpsc.gov/pr/northup04052012.pdf.

from the beginning, and as we have learned over the last several years, many will go out of business before growing to a size sufficient to amortize testing costs over a large enough number of products to realize an economically viable profit margin. For the same reason, an entrepreneur contemplating where to locate a new children's product business is now more likely to choose the EU over the United States, due to the formidable barriers to entry created by our much higher compliance costs.

> Since the advent of our 100 ppm lead limit and third party testing requirement, a substantial proportion of European children's product manufacturers have abandoned the United States market. In addition to reducing choices for American consumers, this has resulted in the loss of numerous businesses and jobs that depended on the distribution in the United States of European products. In particular, we have learned from the Hand Made Toy Alliance that a large number of their members who were Mom and Pop retailers specializing in the sale of imported wooden and other specialty European manufactured toys have closed due to the unavailability of stock.

c. How did establishing a statutory lead standard affect our ability to move toward "world standards" through increased harmonization?

Mandating a statutory lead limit, rather than permitting the CPSC to set a limit based on the risk presented by lead in various products and materials as measured by the best available science, has tied the agency's hands in its harmonization efforts. Other countries may not be similarly willing to hamstring their economies with unnecessary regulation, and we are statutorily unable to change our position to reach a consensus around a rational science based standard.

3. **The President's Executive Orders 13563 and 13579 requested that Agencies conduct Retrospective Rule Review. This was part of a broader exhortation that rule-making bodies seek to reduce unnecessary and unjustified regulatory burdens by: a) selecting for review and modifying where appropriate significant rules that have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; b) using "notice and comment" rulemaking to ensure stakeholder participation and fully informed regulatory bodies; c) performing cost benefit analyses both before rulemaking and in connection with reviewing rules already in place; and d) choosing the least costly requirements to achieve regulatory goals. What has the CPSC done to implement these Executive Orders?**

The four Commissioners were unable to reach a majority consensus on a plan for the retrospective review of existing regulations, instead splitting 2-2 along party lines in support of two very different plans.

The Plan for Retrospective Review of Existing Rules supported by the Commission Democrats does not adhere to the President's regulatory principles. Their plan ignores the repeated admonitions by the President and his spokesman that retrospective rule review target the most burdensome rules in order to yield the greatest potential cost savings. Instead, the plan takes credit for cost reduction measures that the Commission is already statutorily obligated under H.R. 2715 to consider, and initiates the review of insignificant additional rules.

Specifically, H.R. 2715 requires the Commission to seek public comment on opportunities to reduce the cost of third-party testing requirements and to prescribe new or revised third-party testing regulations if doing so will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules. H.R. 2715 also requires the Commission to consider alternative third-party testing requirements for manufacturers who meet the statutory definition of "small batch manufacturers." The Commission is obligated to carry out those statutory mandates in 2012 and 2013, and would do so irrespective of the President's Executive Orders.

Once these mandatory measures are stripped away from the rules proposed by the Democrats to be reviewed in FY2102 and 2013, their narrow view of regulatory review becomes apparent. In 2012, they would include as part of the Rule Review Plan the Commission's reconsideration of its Toy Caps Rule and Animal Testing Rules. The Toy Caps Rule was revoked because its requirements were superseded by the Commission's adoption of the more stringent toy caps standard contained in ASTM F 963. In other words, no manufacturer was testing to the standard contained in our Toy Caps Rule, and it therefore imposed no burden whatsoever. Similarly, the Commission's recent revisions to the Animal Testing Rules resulted in very minor changes that had negligible, if any, impact on the economic burden of testing to the rules. The change to Federal Caustic Poison Act regulations promulgated under the Federal Hazardous Substances Act proposed to be undertaken pursuant to the rule review plan in 2013 also amounts to nothing more than a housekeeping measure that will not meaningfully reduce the costs of compliance. Including each of those initiatives among the rules selected for review is incompatible with the intent of E.O. 13579, and would set the precedent that the Commission does not share the President's goal of reforms "with the potential to have significant economic impact."

Even worse, the fourth and final new initiative – contained in the plan supported by the Democrats among the rules to be reviewed in fiscal year 2013 – is intended to strengthen existing rules and would *increase not decrease* the regulation's compliance costs. Specifically, the plan calls for a review of the carpet and rug flammability standards in order to fill a gap in coverage that has permitted some rugs and carpets to avoid testing. While I support the extension of existing rules where necessary to ensure product safety, rule review in response to the President's Executive Order is not the place to do that. Our core mission is to protect product safety, and we should always be on the lookout for opportunities to address product hazards. Rule review, in contrast, is a separate initiative intended to reduce unnecessary economic burdens.

Consistent with the inconsequential rules the Democrats would select for the Commission's first two fiscal years of rule review, their plan sets in place a framework and selection criteria that is unlikely ever to result in meaningful cost reduction. This is because their plan does not explain how the selection of rules for review will be prioritized. This omission would be less important if the Democrats had not also opted to "broaden" the scope of rules potentially subject to review beyond the "significant" rules identified by the President. E.O. 13579 asks independent regulatory agencies to review existing "significant" regulations, defined as those that have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety.[8] Rather than focus on such significant regulations, the Democrats would include as potential candidates for review all of the agency's existing regulations, guidance documents, and unfinished proposed rules, and would even use the regulatory review process to perform clean up on the regulatory agenda – the list of regulatory actions the Commission proposes undertaking in the future. The President asked that agencies "give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork." The plan supported by the Democrats does no such thing, and, by lumping in every action the Commission ever has or ever will take, ensures that the regulatory actions selected for review are unlikely to result in meaningful cost reductions.

Equally damning, no cost benefit analyses would inform the Commission's review of the regulations selected under the plan supported by the Commission Democrats. Without such an analysis, there is no way to ensure that the benefits of a rule justify its costs, or to take appropriate action when they do not. This is a far cry from the Obama administration's vision of "chang[ing] the regulatory culture of Washington by constantly asking what's working and what isn't" based on "real-world evidence and data." Cass Sunstein, *21st-Century Regulation: An Update on the President's Reforms*, Wall Street Journal, May 25, 2011. Where is the "insistence on pragmatic, evidence-based, cost-effective rules" that Cass Sunstein claims has "informed [the Obama administration's] regulatory approach"? *Id.*

The alternative plan supported by the Commission's Republicans would honor the President's request by creating a framework that could lead to real cost reductions while maintaining public health and safety. It would have done so without straining the Commission's resources or substituting housekeeping measures for real regulatory reform.

The Republican Plan recognizes that in both 2012 and 2013, substantial resources will be devoted to carrying out the cost reduction mandates of H.R. 2715. As a result, it does not call for any additional resources to be dedicated to Rule Review in 2012 or 2013. More importantly, it also does not undermine the long term goal of real burden reduction by characterizing housekeeping measures such as revision of the Toy Caps Rule, Animal Testing Rules and Federal Caustic Poison Act Regulations as retrospective rule review. I

[8] 58 Federal Register 190 (October 4, 1993).

do not object to revising those rules, and the Republican Plan expressly acknowledges the importance of such work, so long as it does not substitute for meaningful rule review.

The Republican Plan also ensures that rules selected for review in future years will have the potential to significantly reduce the unnecessary economic burdens of compliance with the Commission's regulations. This is achieved first by requiring, consistent with the President's request, that the Commission's selection of rules for review give priority to "those requirements imposing the highest burden and cost of compliance."

In addition, unlike the plan supported by the Commission's Democrats, our plan requires that cost-benefit analyses be performed during the course of rule review so that rational, informed decisions can be made regarding whether the benefits of a regulation justify its costs. This exercise is particularly important for regulations promulgated under the Consumer Product Safety Improvement Act over the last several years, none of which were required to be justified by cost-benefit analyses. I understand that Congress intended the expedition of certain rules due to a perceived need for immediate action, and that cost-benefit analyses could therefore not be performed. For instance, we could not have issued mandatory standards for two durable nursery and toddler products every six months if such standards needed to be justified based on a cost-benefit analysis. But I do not believe that the President intended the Commission to exclude such rules from a cost-benefit analysis during retrospective review, nor do I think Congress would object. Now that the rules are in place and enforceable, there is no issue of delay impacting safety. And if a cost-benefit analysis of an existing rule reveals that a toddler product safety standard or test has no safety benefit but imposes substantial costs, the rule should be changed.

On the other hand, we could and should have performed cost-benefit analyses before issuing other rules governing the periodic third-party testing of children's products to ensure continued compliance. We were not precluded by statute from doing so, and there was ample time. Retrospective rule review would be our first opportunity to determine whether all of the requirements of those rules can be justified under a cost-benefit analysis, and the Republican Plan would have allowed for that.

Other differences between the Republican and Democrat Rule Review Plans also illustrate our commitment to, and the Democrats' rejection of, meaningful rule review. For instance, their plan repeatedly emphasizes the need for a rule to be in place for a substantial time period before retrospective review is undertaken. Whether intentional or not, such an approach would ensure that our rules that impose the greatest burden – those promulgated over the last several years and which were never justified by a cost-benefit analysis – would not be subject to review. The Republican Plan instead recognizes that retrospective review of even a relatively new rule is warranted where "its burdens quickly prove to be more substantial than anticipated or out of proportion with the benefits realized or because the burden and/or cost of the regulation were never given the consideration required by the EOs in the rulemaking process."

The plan supported by the Democrats is also replete with references to the review of rules whose burdens can only be characterized as trivial compared to our most costly rules. For instance their plan touts minor changes to address manufacturer confusion over our durable infant and toddler product registration program. In discussing the consideration of "technological advances" as a factor in the selection of rules for review, their plan focuses on past revisions of rules "to remove requirements for obsolete testing equipment that is no longer available." But removing requirements for testing that cannot possibly still be performed does not reduce anyone's compliance burden. Such requirements should be removed as a housekeeping measure, not a burden reduction exercise. The Republican Plan correctly focuses consideration of technological advances on the way in which new technology can make a rule less burdensome.

Finally, the plan supported by the Democrats gives equal, if not greater, weight to selecting rules for review in order to strengthen them. Thus, they view the Plan's review processes as "intended to facilitate the identification of rules that warrant repeal or modification, including those that require strengthening, complimenting, or modernizing." While I agree that the Commission could properly conclude after selecting and analyzing a rule that it should be strengthened or complimented, I believe it is inconsistent with the President's intent to target rules in order to strengthen them, rather than to reduce their unnecessary burdens.[9]

a. Before the CPSIA, Section 9 of the CPSA required the Commission to conduct a cost benefit analysis before promulgating a mandatory safety standard for any consumer product. The CPSIA excepted durable nursery products from that requirement, and also empowered the Commission to issue broad regulations governing third party testing, all without any cost benefit analysis. But the requirement that the Commission conduct an analysis of the economic impact of the rules on small businesses under the Regulatory Flexibility Act remained in place. What have you learned from your experience participating in the promulgation of those rules where a cost benefit analysis was neither required nor performed?

I have learned that in the absence of a mandatory cost benefit analysis, this Commission as currently configured will promulgate rules whose costs most likely exceed their benefits, and the Regulatory Flexibility Act (RFA) is no impediment to its doing so. For example, neither the staff packages that came before the Commission proposing mandatory standards for durable nursery products, nor the rules establishing the framework for third party testing of children's products, contained cost-benefit analyses. All of them did, however, contain cost analyses performed under the RFA to determine the rules' impact on small businesses, not the entire market. These economic analyses, although always based on a highly speculative and cursory look at a rule's effects,

[9] A more detailed explanation of my vote on Commission's plan for retrospective review of existing rules is available at: http://www.cpsc.gov/pr/northup08152012.pdf; and http://www.cpsc.gov/pr/northup09192012.pdf.

invariably concluded that the costs to many small businesses would rise significantly, resulting in a large number of business closures and attendant job losses. But unlike traditional cost-benefit analyses, as contemplated by the President in E.O.s 13563 and 13579, and as required under Section 9 of the CPSA, the RFA does not require that the benefits of a rule ever be found to justify its costs. As a result, the RFA does not require agencies to forgo or modify any rulemaking as a consequence of that analysis, and in my experience, the CPSC has never done so, no matter how economically disastrous the impact of a regulatory action was projected to be. Nor have the results ever caused any of my Democrat colleagues to vote against or request a change in a rule.

b. Do you believe the CPSC, as presently configured, would voluntarily perform cost benefit analyses in the absence of a statutory requirement to do so?

No. And the public pronouncements by the Democrat Commissioners confirm the fact. Mr. Adler has stated publicly that the Commission would perform the cost-benefit analysis of CPCS Section 9 when not statutorily obligated to do so, only "over [his] dead body." Chairman Tenenbaum, for her part, is advocating for the exclusion of additional classes of products from the CPSC Section 9 requirement that mandatory standards be justified under a cost-benefit analysis. For instance, she has asked Congress to exempt from Section 9 mandatory standards for upholstered furniture flammability. Notably, this request comes on the heels of mounting evidence that the existing proposals for addressing the problem of upholstered furniture flammability cannot be scientifically proven to do so. Thus, without any proven benefit to be derived from the rule, the Chair would now like to impose the cost anyway. The statutory requirement that a cost benefit analysis is performed to establish the justification for a rulemaking before massive economic disruption is needlessly imposed, is intended precisely to combat that regulatory mindset.

c. At a recent hearing in the Senate on the flammability of upholstered furniture, Chairman Tenenbaum testified that a suspension of the cost benefit requirement of the FFA similar to what Congress provided in the CPSIA for durable nursery products would facilitate rule-making in this area. Do you agree with her position?

No. As discussed immediately above, I believe the suspension of cost-benefit analysis requirement for upholstered furniture would likely lead to a costly rule with no proven benefits.

4. **In March 2010, the Commission voted to allow "unblockable drain covers" to qualify a single main drain as an "unblockable drain" under the Virginia Graeme Baker Pool and Spa Safety Act, so as not to require the use of a backup system. In September 2012, the Commission reversed itself and now requires all pools with single main drains to install a backup system. Why did you oppose that change, given the claim by its proponents that a backup system provides an additional layer of protection?**

The Virginia Graeme Baker Pool and Spa Safety Act is intended to protect against the deadly consequences of excessive spa and pool drain suction, including evisceration when a pool drain is completely blocked by a person sitting or lying on it, and drowning when a person's hair, limb or jewelry becomes ensnared in a drain. VGB Act § 1404(c)(1)(A)(ii) requires public pools and spas with a single main drain of a size small enough to create a life-threatening suction by being completely covered by a human body (known as a "blockable drain"), to be equipped with a device or system to prevent entrapment. These systems are often referred to as "backup systems". "Unblockable drains" were exempt from the requirement to have one of these back-up systems because their size and/or configuration prevented a deadly suction from ever occurring. Although five systems/devices are enumerated in the Act as permissible backup systems, the Commission has long recognized the safety vacuum release system (SVRS) to be the most commercially viable and therefore most likely to be used by pool owners.

In April 2010, following extensive input from the public, the Commission issued a final interpretive rule that defined "unblockable drain" as a suction outlet *and all of its components*, including a cover/grate, that cannot be shadowed by a "Body Blocking Element" intended as a proxy for a human body. As a result, pools and spas with a single main drain equipped with an appropriately sized "unblockable drain cover" were not required also to be equipped with an SVRS or other back-up system.

The Commission adopted this definition based on the recommendation of its staff of career technical experts. In their opinion, an unblockable drain cover is superior to an SVRS because it *prevents* entrapment. An SVRS, in contrast, *stops* an entrapment incident after it has already occurred, and does so only after a delay of up to 4 seconds. As a consequence, once an incident resulting of entrapment, or evisceration takes place, it is already too late for an SVRS to save a child.

SVRS also have a well-deserved reputation for unreliability. Despite the majority's rush to make this change without public input, the Commission received unsolicited letters from pool maintenance companies, many of whom stood to benefit financially by this change, attesting to problems with SVRS and predicting that most of these systems would soon be disabled by pool owners because of the problems they create. Directors of parks and recreation departments from all over the country also wrote advising us that unblockable drain covers are superior to SVRS, from a safety perspective. As these letters explain and Commission staff has confirmed, SVRS are electro-mechanical devices prone to malfunction by stopping pool pumps without cause or simply shutting down completely. The former problem interferes with the essential mixing of sanitation

chemicals in pool water, leading to potentially life threatening bacterial outbreaks. When an SVRS ceases operating completely, a blockable drain once again becomes an inescapable death trap.

In April 2010, the Commission followed the expert advice of its technical staff. This was done only after also considering the contrary views presented by SVRS and other back-up system manufacturers who wanted the Commission to mandate the use of their product, pool safety advocates, many of whom were influenced and mobilized by SVRS manufacturers, and a few members of Congress who had been lobbied by the back-up system industry. In particular, the Pool Safety Council (PSC), made up largely of the vacuum release industry, spent $100,000 on lobbying expenses in 2009. PSC is led by Paul Pennington, President and primary owner of Vac-Alert, one of the least expensive and, according to letters to the Commission, least reliable backup systems. In fact, Paul Pennington testified before the Commission on April 5, 2011, that he helped Representative Debbie Wasserman Schultz draft the original legislation that became the VGB Act. These parties argued that an unblockable drain cover provides unreliable protection due to the risk of dislodgment and does not provide the "layers of protection" required by the VGB Act. Nonetheless, a majority of Commissioners recognized that the VGB Act's overriding intent to prevent child drowning was best served by reasonably and lawfully interpreting "unblockable drain" to include these newly invented systems that cover a blockable drain and convert it to an unblockable drain. The wisdom of their judgment is confirmed by the fact that, since that time, there has not been a single entrapment incident in a pool equipped with a compliant unblockable drain cover.[10]

a. What reasons did the Democrat Majority give for supporting the change, and do you believe those reasons had merit?

Commissioner Adler claims that his mind was changed by letters from interested citizens and members of Congress, and by private meetings he held with Representative Debbie Wasserman Schultz. But in none of these letters or meetings was any *new* evidence or argument presented that was not already considered and rejected by Commission staff as outweighed by paramount safety considerations. And while I am heartbroken for parents who lost their children to drain entrapment incidents, this Commission should not make decisions based on the *ex parte* views of a single interest group or the self-serving *post hoc* rationales of a handful of the hundreds of members of Congress whose votes pass a bill. Our job is to consider all of the relevant evidence in light of the expert advice of the career professionals who have dedicated their lives to consumer safety, not to swing haphazardly in the strongest blowing emotional breeze of the moment.

Representative Debbie Wasserman Schultz's view of what the legislation means is irrelevant after its passage. No court would give weight to her preferred interpretation of a bill that was passed by 435 Members of the House and 100 Members of the Senate and signed by the President. No small group, even the authors, can unilaterally decide that

[10] A more detailed explanation of my vote to oppose the revocation of the Commission's prior interpretation of "unblockable drain" is available at: http://www.cpsc.gov/pr/northup10042011.pdf.

the legislation means only what they intended when they voted for it. Once it is in the hands of the Executive agency, Members of Congress can again influence it only by further refinements of the law passed by all the Members of Congress. Representative Wasserman Schultz's effort to protect children in swimming pools is admirable, but it is the CPSC's responsibility to interpret and administer the law based on our technical expertise and experience in safety. It is doubtful the Rep. Wasserman Shultz heard from the wide array of safety experts that contacted the Commission, or has the technical expertise of our staff. Rather, she appears to have been swayed by the lobbying of the SVRS manufacturer, and Mr. Adler was the conduit for her granting of a political gift.

To the extent any substantive reason was given, none had merit. Particular emphasis has been placed on the possibility that unblockable drain covers can be removed or damaged. But Commission experts were aware of this characteristic of unblockable drain covers and still judged them to provide greater protection than SVRS. Their view of the relative safety of the two alternatives has not changed. Moreover, as the Commission learned from the many unsolicited letters responding to the *Federal Register* notice announcing the revocation vote, advances in drain cover design, construction and installation have substantially reduced, and could completely eliminate, the risk of cover dislodgment. It is in order to consider such new and unknown evidence that notice and comment are required before the promulgation of regulations changing enforceable obligations.

Another red herring is the claim that requiring an SVRS or other entrapment prevention device will ensure the "layers of protection" required by the VGB Act. Revoking the interpretation of "unblockable drain" that permitted the use of an unblockable drain cover did not *add* any protection. Public pools are *not* now required to have an unblockable drain cover *and* a back-up system. With the new interpretation, they are instead likely to have a "blockable drain" with an unreliable SVRS or other back-up system. The sophisticated unblockable drain covers are expensive and their availability may disappear altogether. That means a superior form of protection has been exchanged for an inferior one, not that a new layer of protection has been added.

b. Did the Commission seek and consider public comment before changing its definition of "unblockable drain" to not permit the use of an unblockable drain cover?

No. And the Commission's failure to provide an opportunity for notice and public comment before revoking its prior interpretation of "unblockable drain" almost certainly violates the APA, and without doubt will entitle the Commission's new construction to no deference in court.

Under the APA, a legislative rule must proceed through notice and comment rulemaking; an interpretive rule need not. Although the majority styles its action as the mere revocation of an interpretive rule, much more is at stake for the pool and spa owners impacted by its decision. The revocation eliminates the exemption from the back-up system requirement granted to single unblockable drains equipped with an unblockable drain cover. Moreover, the Commission's *Federal Register* notice announcing the

change clearly signals its intent to enforce the new rule against pool and spa owners who have installed unblockable drain covers but do not also have an additional entrapment prevention device/system enumerated in the Act. Under these circumstances, a court could well deem the revocation a legislative rule and find that the failure to undertake notice and comment violated the APA. *See Jerri's Ceramic Arts, Inc. v. CPSC*, 874 F.2d 205, 208 (1989).[11] At the very least, the revocation is a reinterpretation of statutory language without a rational justification that would be entitled to little, if any, deference. *See Watt v. Alaska*, 451 U.S. 259, 273 (1981) (holding that an agency interpretation that conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view). The fact that extensive public comment was received and considered before the original interpretation was adopted confirms that the Commission also recognized its importance.

Mr. Adler argued that no public input was necessary because his reversal was neither policy nor evidence based, but merely a change in his interpretation of the legislation. There is a word for statutory language that is so susceptible to alternate construction that even a single lawyer cannot make-up his mind about its meaning. And when statutory language is ambiguous, it should be informed by the underlying intent of the law. The VGB Act was passed in order to reduce the risk of children drowning due to entrapment in pool drains. The Commission's reconstruction of "unblockable drain" makes that tragic outcome more likely.

Moreover, Mr. Adler's claimed disavowal of the need for public input or consideration of factors beyond his personal legal views is belied by his own statement on the revocation. After recounting the unsolicited letters, almost all of which are identical form letters, and private meetings that lead him to reconsider his views, Mr. Adler proclaimed that "as a policy maker sworn to uphold the law, I believe it is my duty to listen to all points of view and when a persuasive case is made to reconsider my position. So in response to these requests, I took it upon myself to reexamine both the safety considerations associated with `unblockable drain covers' and the legislative history of the VGBA."

But of course, by refusing public comment, Mr. Adler ensures that "all points of view" will not be heard – only those of the activists whose form letters he reads and the well placed politicians with whom he holds private meetings. And as for "safety considerations", Mr. Adler's position is incomprehensible. He refused to obtain data showing the safety impact of the original interpretation, or input from knowledgeable

[11] In *Jerri's Ceramic Arts*, the court held that a "Statement of Interpretation" expanding the small parts prohibition to cover fabrics in addition to hard components was actually a substantive rule change that required notice and comment rulemaking. The court explained that interpretive rules simply state what the administrative agency thinks a statute means, and only "reminds" affected parties of existing duties, whereas substantive rules impose new rights or duties. It concluded that adding fabric to the small parts prohibition was substantive because it had "the clear intent of eliminating a former exemption and providing the Commission with the power to enforce violations of a new rule.' 874 F.2d at 208. Similarly, removal of the option to use a drain cover to create an unblockable drain eliminates an exemption from the back-up system requirement, and the *Federal Register* notice announcing the change informs pool owners that pools with only an unblockable drain cover and no back-up system will henceforth be considered to be in violation of the VGB Act.

sources about the current safety features of unblockable drain covers. Instead, he appears to have relied on information obtained through public input solicited in 2009 and the one-sided viewpoints presented to him since. Mr. Adler is entitled to change his position for any reason he likes, but the closed procedure leading to this change dispels any pretense of open mindedness.

c. Did the CPSC General Counsel recommend a "Notice and Comment" process?

I am not at liberty to discuss the CPSC General Counsel's privileged communications with Commissioners. However, Congress is entitled to review the written opinion, and I suggest they obtain it in full to learn the GC's advice on the subject.

d. What unsolicited input did the CPSC receive from pool and spa professionals?

The Commission received a large number of unsolicited letters from pool and spa professionals, many of whom stood to gain financially from the Commission's reversal. They overwhelmingly opposed the change as costly and less safe. Here are a few examples:

- David Distad (Environmental Health Specialist, Renwood, MN) stated that SVRS is a large unnecessary expense that may be more than some of his municipalities can handle;
- Linda Bruer (Director of Parks and Recreation for City of Ballwin, MO) estimates $30,000 to comply with SVRS;
- Terrence LeBeau (GM – Halogen Supply Company) states: "My staff of technical support specialists have a good deal of hands on experience with these (SVRS). They are unreliable, inaccurate, and operationally problematic...All of these devices carry some form of cautionary verbiage that states: will not prevent disembowelment";
- Justin DeWitt (Chief of General Engineering, IL Dept. of Health) states: "The Department's experience has been that the majority of SVRS installed fail to operate properly due to lack of testing, maintenance, incorrect installation, disabling or adjustment to avoid nuisance trips";
- James Bastian (Chairman, Westport Pools in MO) states: "We have seen dozens (SVRS) disabled by the pool owner's maintenance personnel because of the unreliability of the systems";
- Susan Campbell (Oklahoma City Health Department) states: "[It is a] sad fact that devices (SVRS) are not maintained and are difficult for us to test";
- Thomas Diven (City of Fenton – Parks and Recreation) states: "[W]hat is being proposed [by the CPSC] may actually increase the risk of drowning...these proposed changes have not been sufficiently researched and are not required";
- Bill Soukup (President, Commercial Pool, Inc.) states: "I can assure you that SVRS will not work as manufacturers have indicated. Many will be disabled shortly after being installed because they are very, very problematic";

- Justin DeWitt (Chief of General Engineer, IL Dept. of Health) states: "The Department's experience has been that the majority of SVRS installed fail to operate properly due to lack of testing, maintenance, incorrect installation, disabling or adjustment to avoid nuisance trips."

e. What is the risk of entrapment and how does that compare with other risks associated with swimming.

There have been no entrapment injuries associated with compliant pool drains since 2008. But there were over 1500 drownings just between May 1 and August 26, 2011. Even counting potentially non-compliant pool drains, three persons of all ages were injured and none died in circulation entrapment incidents in 2010. By contrast, in 2010, 5600 children under 15 were treated in emergency rooms for pool and spa submersion injuries (i.e., those unrelated to drain suction), and between 2007 and 2009, an average of 390 children under 15 died each year due to pool and spa submersion incidents.

We have learned from numerous municipal park and recreation departments, as well as nonprofit groups created to promote aquatic recreation safety, that many state, municipal and other public pool operators will be unable to afford this new and expensive mandate coming shortly on the heels of the expensive work required to come into compliance with the Commission's original interpretation. As a result, many public pools will open late or close, with the brunt of the losses suffered by economically-disadvantaged regions. Children cannot learn to swim in closed pools, and economically disadvantaged children are at the greatest risk of drowning.

5. Section 6(b) of the CPSA prohibits the Commission from releasing to the public information about a consumer product when the manufacturer of the product can be readily ascertained, without first ensuring that the information is accurate and fair, and giving the manufacturer a chance to include comments or other information with the disclosure. The public database authorized by the CPSIA suspended these protections for manufacturers, but put in their place other detailed requirements that provided similar protection to the manufacturers of products that are the subject of database reports. What is your opinion of whether the Commission could host a Facebook account without violating CPSA § 6(b)?

By way of background, *Facebook* is a social media site which is hosted by Facebook, Inc. Account holders manage and control the content of their page, but they cannot prevent the public from uploading comments in real time, and cannot control the information that an individual may submit in a comment other than to remove it after it has been posted. A CPSC *Facebook* page would be part of the agency's overall media strategy, with the goal of attracting as much traffic to the site as possible in order to more widely disseminate product safety information.

I do not believe the Commission could host a *Facebook* account without violating CPSA § 6(b). Section 6(b)(1) prohibits the agency from publicly disclosing any product specific information that is "obtained, generated or received by the agency" and from which the manufacturer or private labeler (hereinafter "manufacturer") of the product can be readily ascertained, without first providing the manufacturer the opportunity to challenge the accuracy of the information and to include with the disclosure any comments or other information it wishes to provide. 15 U.S.C. § 2055(b)(1); 16 C.F.R. § 1101.11(a). In the event the Commission rejects a challenge to the accuracy of the information proposed to be published, it must notify the manufacturer and give it five days to sue to enjoin the publication before the Commission releases the information. 15 U.S.C. § 2055(b)(2) & (3).

These protections could not be afforded manufacturers whose products became the subject of comments posted by the public on the CPSC's *Facebook* page. There would be no opportunity to object to the publication of inaccurate information *before* its publication, either initially to the CPSC, or through an action to enjoin the publication in court. There would also be no opportunity to include a manufacturer's comments with the publication, including after publication. *Facebook* streams comments in the order they are received, so even if a manufacturer wished to add its own comment to a previously posted item, the comment would likely not appear anywhere near the item to which it relates. In addition, even if the CPSC were to commit the immense resources necessary to monitor and remove from its *Facebook* page all product specific public comments, such removal would not cure the § 6(b) violation. Once published, a comment could be copied, forwarded or otherwise preserved and republished in ways over which the Commission could not exert control. And in any event, the initial publication is a violation of the law, regardless of what follows.

Given that §6(b) clearly could not be followed in connection with public comments posted on a CPSC *Facebook* page, the only remaining question is whether such comments fall within the protections of §6(b). Section 6(b) as interpreted by the Commission applies only to information that is "obtained, generated or received by the agency", and then "published" by the agency. I believe comments posted by the public to a CPSC *Facebook* page would meet both of these criteria.

The first condition is easily met, as comments posted to a *Facebook* page hosted and monitored by the agency would necessarily be "obtained" and "received" by the agency.

I also believe, under the circumstances, that comments posted to the website by third parties must be considered to be "published" by the Commission, rather than by Facebook, Inc. Although the site is owned and operated by Facebook, Inc., the Commission would need to affirmatively establish its own page and would exercise control over what it posts to the site and what it chooses to remove from the site. Moreover, the Commission is aware that its *Facebook* page would invite the posting by the public of product safety related information, and that the Commission would encourage the public to view the website to obtain product safety information. Having knowingly created such a forum, the Commission could not reasonably claim that

comments posted to its *Facebook* page by the public should be deemed to be "published" by Facebook, Inc., rather than the Commission.

It would also be unreasonable to deem content posted to the site to be "published" by the commenter. Congress addressed that scenario in the CPSIA when it authorized the Commission to publish on the public facing database *saferproducts.gov* product specific information submitted by the public. It recognized that § 6(b) applied, and waived its requirements provided the Commission afforded other protections against the publication of inaccurate information. In the absence of those protections, *saferproducts.gov* would function very much like a *Facebook* page: product specific information posted by the public would be simultaneously received and disclosed by the Commission. Congress clearly understood that comments posted by the public on a site sponsored by the Commission are "published" by the Commission under § 6(b). Otherwise, the §6(b) waiver Congress provided for *saferproducts.gov* would not have been necessary.

Moreover, because a CPSC sponsored *Facebook* page would not screen postings based on the criteria required for *saferproducts.gov* under the CPSIA, the Commission could not prevent comments that would not be eligible for publication on the database from being posted on its *Facebook* page, in blatant contravention of the will of Congress.

a. Has your General Counsel been asked to provide an opinion as to whether the Commission could host a *Facebook* page consistent with the requirements of the law?

Yes, but I am not at liberty to discuss the CPSC General Counsel's privileged communications with Commissioners. However, Congress is entitled to review the written opinion, and I suggest they obtain it in full to learn the GC's advice on the subject. At an August 2, 2012, hearing before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, Chairman Tennenbaum promised to provide the General Counsel's legal memorandum to the Committee if and when the Commission decides to launch a *Facebook* page. The Subcommittee may wish to consider asking to see it before a decision is made.

b. What is the status of the agency's plan to launch a *Facebook* page?

I have not been updated on the status of the CPSC's *Facebook* initiative in several months. Generally speaking, the Chair does not keep me informed of her deliberations over decisions she deems "administrative", even when, as in this case, I have made clear that I consider a decision to raise policy issues that require a majority vote by the Commission before being implemented. The two Democrat Commissioners have taken the position that a majority is required before a decision can even be characterized as "policy", and therefore have avoided votes on a number of decisions I do not believe were within the administrative authority of the Chair to implement without majority support.

6. H.R. 2715 (codified as P.L 112-28) was passed in an effort to address some of the unforeseen adverse consequences of the CPSIA. In your opinion, has the CPSC taken appropriate advantage of the new law to ameliorate the problems caused by the CPSIA?

Certain provisions of H.R. 2715 *required* the Commission to take action, and being legally bound, the Commission followed the law. For instance, it has exempted "covered products" made by "small batch manufacturers" from third party testing pending its adoption of alternative testing rules or the granting of a permanent exemption. The Commission has also granted an exception to the 100 ppm lead limit to a manufacturer clearly entitled to it under the criteria established by Congress. But with respect to those provisions where the Commission was authorized to exercise discretion in ameliorating the CPSIA's adverse consequences, it has either minimized the opportunity or affirmatively acted to thwart the spirit of H.R. 2715.

The Democrat majority's intent to do so became clear shortly after the passage of H.R. 2715, when they ignored the advice of the Commission's expert staff to repropose the final third-party testing and component parts rules based on the statutory changes, and instead rushed the packages to a vote. The Commission later ignored the will of Congress again when it was unable to promulgate a rule on "representative" samples because the Democrats insisted on unjustifiably burdensome recordkeeping requirements. Finally, the Commission was able to muster majority support to consider further only half of the measures recommended by its staff to reduce the burdens of third party testing.

Signed into law in August 2011, H.R. 2715 gave the Commission one year to seek public comment on opportunities to reduce the cost of third party testing requirements, and, based on the public comments, to consider issuing new or revised third party testing regulations if doing so would reduce third party testing costs while still assuring compliance with applicable standards. Congress even invited the Commission to propose changes to the law to provide it with additional authority to address the costs of third-party testing, if necessary. H.R. 2715 also substituted "representative samples" for "random samples" as the basis for selecting samples for periodic continued testing, and required the Commission to undertake notice and comment rulemaking to define the new statutory phrase.

Draft Final Rule 16 C.F.R. 1107.26(a)(4).

At the time H.R. 2715 became law, the Commission had yet to promulgate a final rule under 15 U.S.C. § 2063(i)(2)(B)(i) establishing protocols and standards "for ensuring that a children's product tested for compliance to an applicable children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts."

Because of the obvious impact on § 2063(i)(2)(B)(i) rulemaking of Congress's mandate that the Commission seek public comment on ways to reduce the cost of third-party

testing, our CPSC career staff recommended that the final third-party testing rule and a rule to permit the testing and certification of component parts be reproposed along with the NPRs on cost reduction and representative samples, so that a final comprehensive rule could emerge that addresses Congress's H.R. 2715 mandate and protects regulated industries from detrimental reliance on a tentative "final" rule. The Commission also received letters from members of Congress urging the Commission to consider ways to reduce the costs of third-party testing *before* implementing the rule.

The Majority instead insisted on a vote and passed the rule governing periodic and material change testing, and the component parts rule, by a 3-2 party line margin. Given the advice of Commission staff and common sense, it is apparent that the Majority's precipitous action resulted from their desire to dictate the content of the rules before they lost their majority upon the then impending retirement of Commissioner Moore. But as a result, the Commission irrationally complicated compliance by the regulated community.[12]

Representative Sample

The Commission was also unable to take advantage of Congress's amendment permitting "representative" rather than "random" samples to be selected for periodic testing. Notwithstanding Congress's intent that the change be part of an overall plan to reduce the unnecessary costs of third party testing, the Democrats insisted on an unjustifiably costly rule that the Commission's Republicans' could not support.

Commission staff prepared a final rule that properly recognized Congress' intent to define "representative" according to its common meaning. The draft final rule would have reasonably afforded manufacturers the flexibility to select samples for periodic testing according to the methodology that best suited their product and production process, so long it provided a basis for inferring the compliance of the untested samples. As staff explained in the preamble to the draft final rule, "various methods can be used to determine that the selected samples are representative, depending upon the rule, ban standard, or regulation being evaluated." Draft Final Rule at 5.

Had the draft final rule stopped there, it would have had my support. Instead, it included costly new record keeping requirements not mandated by law and without adequate justification. The draft final rule would have required the creation and maintenance of:

> Records documenting the testing of representative samples, as set forth in 1107(21)(f), including the number of representative samples selected and the procedure used to select representative samples. Records must also include the basis for inferring compliance of the product manufactured during the periodic testing interval form the results of the tested samples.

[12] A statement explaining my opposition to the periodic testing and component parts rules is available at: http://www.cpsc.gov/pr/northup10262011.pdf.

Draft Final Rule 16 C.F.R. 1107.26(a)(4).

CPSC's economists estimate the aggregate manufacturers' cost of compliance with this additional record-keeping to be $32.3 million for the first year alone, and another $1.3 million to $6.5 million every year thereafter. And this cost is in addition to the enormous burden of the record keeping already required by 16 C.F.R. part 1107 – Testing and Labeling Pertaining to Product Certification. 16 C.F.R. § 1107.21 gives manufacturers three options for satisfying the requirement that, after initial certification, a third party lab conduct periodic tests of every component of every children's product to ensure continued compliance with all applicable children's product safety rules. Each of these options requires the creation and maintenance for five years of extensive records.

These extensive record keeping requirements already far exceed what is necessary to ensure continued compliance under the CPSIA and to facilitate enforcement. Yet the Democrats would have imposed even more, requiring a written record of the procedure used to select the samples and a narrative explaining the basis for inferring compliance of the product manufactured during the periodic testing interval from the results of the tested samples. I am unable to identify any benefit to imposing that additional recordkeeping burden that would justify the tens of millions of dollars it would cost. Given the number of products we regulate and the numbers coming in at the ports that are noncompliant and still result in no enforcement action, the odds of any manufacturer ever having to produce such documents is very slim. Imposing the high record keeping cost on all manufacturers so that a miniscule percentage could be reviewed during an investigation is unjustified. Moreover, the reasons offered by others are unpersuasive.

Proponents of the representative sample record keeping requirement argued that the act of creating these records will encourage manufacturers to think more carefully about sampling issues. However, it is not the Commission's responsibility to regulate good business practices, nor does it have the experience or expertise to gauge what is best for any particular business. And businesses creating such records would need to anticipate what CPSC investigators – with no business experience, let alone with respect to the particular product or manufacturing process -- might look for in the context of a defect investigation or enforcement action, rather than making decisions based on their own experience and expertise.

It was also claimed that the Commission needs the records for enforcement purposes, so that it can learn the sampling procedure and basis for it while investigating noncompliant product. But that information is available to the Commission even without the added burden of the recordkeeping requirement. The CPSC can learn the information orally or through written documents prepared by the target business when and if they are subject to an investigation.

Finally, it has been argued that the CPSC needs records of the representative sampling procedure and basis in order to determine whether the entry into commerce of noncompliant product was caused by nonrepresentative sampling or inaccurate third party testing. But regardless of whether the CPSC were satisfied with a manufacturer's

explanation of its sampling procedure and basis, and irrespective of whether the manufacture maintained the records sought to be required by the Final Rule, laboratory error as a contributing cause could not be ruled out. There will therefore always be the need to investigate laboratories that tested samples from a batch or lot later determined to contain noncompliant product.[13]

Proposals to Reduce the Burden of Third-Party Testing

As required by H.R. 2715, over the past year, the Commission solicited and Commission staff analyzed public comments addressing ways to reduce the costs of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Commission staff then submitted to the Commissioners a briefing package recommending that the Commission direct the further study of 16 ways to reduce third party testing costs. After extensive negotiations among the Commissioners, there was majority support for the continued consideration of only 9 of the 16.

As a result, a lot of good ideas with the potential to reduce testing costs while continuing to protect consumers from the risk of harm were not supported by a majority of the Commissioners. Chief among these were establishing an exception from testing for a *de minimis* amount of paint or plasticized material, modifying the maximum periodic testing interval based on the risk of noncompliance to a regulation or portion of a regulation, and seeking Congressional authorization to permit manufacturers to use production process certification in lieu of third party testing as a basis for certifying compliance.

I do not know whether any of these ideas could successfully reduce third-party testing costs while assuring compliance, but the Commission was not called upon to make that determination through this vote. We needed only to decide whether these ideas should be abandoned forever, or explored further. Based on staff's recommendation, and in light of Congress's intent that we make every effort to reduce the costs of testing where possible consistent with assuring compliance, I can see no justification for ruling them out at this early stage.

Our narrowing the scope of potential cost reduction measures was not warranted by resource constraints. As the language of the ballot makes clear, the Commission has not committed any resources to the actions it has approved. Rather, it has merely identified a list of projects that may someday be undertaken "[s]ubject to the resources allocated by the Commission to carry them out in subsequent CPSC Operating Plans." The Commission's safety priorities as defined by future Commission majorities will always take precedence over the cost reduction projects in the allocation of future resources. And future Commissions will be able to select among the list of cost reduction projects in order to prioritize their completion in whatever order they deem advisable. Under these

[13] A statement explaining in greater detail my opposition to the rule establishing protocols and standards for the testing of representative samples to assure compliance is available at: http://www.cpsc.gov/pr/northup07232012.pdf.

circumstances, current and future resource limitations do not justify refusing even to consider these additional staff recommended ideas.

Finally, we need to step back and recognize the statutory impediments staff faced in formulating their proposals, and the very limited nature of the ideas that resulted. Many of the proposals put forth by staff are caveated with admissions that their applicability may be limited to a very few products or manufacturers, or might turn out to result in only a modest reduction in testing costs, if any. Thus, while the Commission should make the most of the opportunity presented by this exercise and staff's hard work in brainstorming cost saving measures, it is clear that real cost reduction for third party testing, certification and labeling will only be possible through much more substantial changes in the law.[14]

The Future of H.R. 2715

The Commission has undertaken much of the work H.R. 2715 directed the Commission to do to ameliorate the unforeseen negative consequences of the CPSIA. But important work remains to be done, and I am concerned that, once the Democrat majority is restored with my departure, the chance for meaningful reform will have passed.

With respect to the Representative Sample rule, the Democrats were unable to impose unjustifiably burdensome recordkeeping requirements. I expect that they will soon revisit the rulemaking and pass 2-1 those same unnecessary and costly requirements.

I am also not optimistic that the Commission will move forward as aggressively as it should to explore even the fraction of third-party testing cost reduction ideas it has approved. The resources to do so still remain to be allocated, and without a tie vote to provide balance to the Democrats lack of enthusiasm for cost reduction, I expect very little will be done.

7. **Initial third party testing and certification have now been required since January 1, 2012. How is the Commission using this to ensure that all products comply with the lead standard, phthalate standard and the toy standards, to name a few of the new requirements.**

To my knowledge, the Commission has undertaken no enforcement action related to the requirement that all children's products be certified as third party tested before entering commerce. The vast majority of products subject to third-party testing are manufactured abroad and enter the United States via cargo container ship. The Commission uses a sophisticated risk assessment methodology to focus its border enforcement efforts on those imported products that are most likely to violate CPSC safety standards or otherwise present a risk of harm. Products are not stopped at the border to check their certifications, the validity of which would be impossible to spot check in any event. And

[14] A more detailed explanation of my vote on the consideration of opportunities to reduce third party testing costs is available at: http://www.cpsc.gov/pr/northup10112012.pdf.

no enforcement actions based on certificate violations have been taken when products stopped for other reasons have either lacked or had a noncompliant certificate. Nor am I aware of the Commission ever using the information on a certificate that accompanied a noncompliant product to investigate a finished product or component manufacturer, or the lab that purportedly performed the third party tests that certified as compliant the violative product. Furthermore, such investigations would be an enormous waste of resources. In short, to date, third party testing has amounted to a massively expensive exercise borne only by those manufacturers and distributors with the business ethics to comply with the law, while bad actors that continue to sell untested products either at lower prices or with better profit margins face no enforcement.

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