

**OVERSIGHT OF THE
CONSUMER PRODUCT SAFETY COMMISSION:
PRODUCT SAFETY IN THE HOLIDAY SEASON**

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND INSURANCE

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

DECEMBER 2, 2010

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ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION: PRODUCT SAFETY IN THE HOLIDAY SEASON

THURSDAY, DECEMBER 2, 2010

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT
SAFETY, AND INSURANCE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m. in room SR-253, Russell Senate Office Building, Hon. Mark Pryor, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS

Senator PRYOR. I will go ahead and call our hearing to order here, in the Consumer Protection, Product Safety, and Insurance Subcommittee, on the oversight of the Consumer Product Safety Commission.

I want to join my—I want to thank my fellow Senators for joining us today—and I want to join all my fellow Senators in thanking the Commission and the other witnesses for being here today. We really appreciate your time and your attention to these very important issues.

This is a timely discussion, in light of the current holiday shopping season, a time when the safety of products on store shelves is paramount.

I'd like to express my gratitude to Chairman Rockefeller for allowing me to hold this hearing, and to his excellent staff for all the great things that they've done in preparation of this, and also, of course, of the minority staff, because they've been great to work with, as well.

Each year, billions of toys are purchased by consumers and end up in the hands of children. Unfortunately, not all these toys are safe. Last year, 12 children died as a result of injuries related to toys, and thousands ended up in emergency rooms. While it's difficult to prevent all such injuries, it is the mission of the Consumer Product Safety Commission to protect the general public against unreasonable risk of injury and death associated with toys and other consumer products, and to assist consumers in evaluating the comparative safety of those products.

Each year, on average, over 28,000 deaths related to consumer products under the agency's jurisdiction occur. Researchers esti-

mate the cost of deaths, injuries, and property damage associated with consumer products totals more than \$800 billion annually in the United States. Consequently, the importance of this agency and the efforts to reduce these statistics while building safer communities and a safer marketplace cannot be overstated.

I welcome the new leadership of the Consumer Product Safety Commission. Chairman Tenenbaum took the helm in June 2009, and, since then, she's demonstrated impressive initiative and energy in implementing the law and addressing product safety problems. I look forward to hearing her testimony and exploring activities under her direction.

Just last week, the Commission voted to adopt a final rule establishing the CPSC's publicly available product safety information database, as mandated by Congress. A repository of consumer complaints and incident reports, the database is designed to grant all of us timely access to critical product safety information, allowing us to scan for trends or patterns of potentially hazardous product in the marketplace.

As one of the lead authors of the database revision and the law, I support the Commission's final rule, and I'm pleased that the Commission has crafted the rule in a manner that will make this information available widely to the general public. In particular, I endorse the Commission's effort to empower all consumers who have verified information regarding a product safety hazard to report that incident.

I applaud Chairman Tenenbaum's leadership in this area, which is in keeping with congressional intent behind the provision to maximize reporting of product safety incidents and to make this information accessible to the general public as quickly as possible. And I look forward to its official launch in March 2011.

Just as a reminder: Before the Congressional overhaul, the CPSC was an agency in distress. Its staffing levels and funding levels had been choked, over time. On numerous occasions, it lacked a full quorum of commissioners, inhibiting its ability to conduct important official business. Public notification of public hazards was inadequate. The marketplace was replete with dangerous and, in many instances, toxic products that were compromising the safety of American families, not least of all our children. By 2007, news reports were exposing millions of defective toys in the stream of commerce: lead-tainted children's jewelry; tiny magnets posing ingestion hazards; Aquadots that converted to the date-rape drug, once ingested. The CPSC was slow to act to protect Americans, and it was only after newspapers shown a spotlight on infant deaths and injuries that the Commission chose to take action.

Congress, and in particular this committee, responded to the crisis in product safety by overhauling the agency, granting it essential new tools and authorities to enable it to properly execute its mission and protect members of the public. The Consumer Product Safety Improvement Act was the first significant overhaul of the federal Consumer Product Safety laws since the CPSC's inception.

I'd like to now turn it over to the Ranking Member, my neighbor and friend from Mississippi, and say that we look forward to revisiting the CPSIA over the course of this next Congress. And we always have open doors to listen to industry and advocacy groups, to

talk about some of the—maybe some of the things we got right and some of the things maybe we didn't get so right when we passed the legislation.

But, Ranking Member Wicker, thank you for being here. Look forward to your opening statement.

**STATEMENT OF HON. ROGER F. WICKER,
U.S. SENATOR FROM MISSISSIPPI**

Senator WICKER. Thank you, Mr. Chairman. And thank you for that concluding statement, which I think is very valuable and helpful. And I do look forward to revisiting this issue during the next Congress, should you and I be allowed to continue in this capacity. And thank you for holding this hearing.

The CPSC is a small agency with a large but important mission: to regulate more than 15,000 consumer products, keeping the public safe from preventable injuries and deaths caused by unsafe and defective products. As the title of our hearing suggests, we are especially reminded of the importance of this charge during the increased consumer buying that comes with the Christmas season. I thank the Chairman for taking this opportunity to provide oversight and for his commitment to consumer safety.

The CPSC is currently involved in many areas that affect American consumers. From its efforts looking into dangers in certain types of cribs to the continuing investigation into tainted drywall that has significantly impacted many of my constituents, there are many Commission activities which deserve our attention. However, for the last 2 years nothing has dominated the Commission more than the implementation of the CPSIA. The CPSIA was enacted in August 2008, largely in response to concerns over numerous toy recalls for violations of existing lead limits in paint. It represents the most significant changes to the Commission's regulatory environment since it was first created.

The intention was a noble one that I think we all support efforts to improve safety. The law attempts to do so by tightening the regulations over children's products, focused primarily on reducing the content of lead and phthalates. Unfortunately, despite the hard work that was put into the law and the Commission's efforts to implement it, the result has not been what was intended.

The last 2 years have seen this law increase costs and create uncertainty for businesses, requiring significantly increased compliance requirements and unnecessary testing of "safe" products. Some affected businesses report that, prior to the CPSIA, they were responsible for complying with less than 200 pages of rules, but now that number has grown to nearly 3,000 pages. From 200 to 3,000. This will continue to increase as more rules are implemented and rewritten.

For many small businesses, the burden is overwhelming and the cost of trying to comply is simply too much to bear. During a time when unemployment, nationally, hovers near 10 percent, our government should be doing everything possible to promote job creation along with safety. This law has had the exact opposite effect, particularly on small business. The CPSIA has reduced the ability of many businesses to make a profit and create new jobs.

Our second panel today includes Jill Chuckas, who will testify on behalf of the Handmade Toys Alliance, the HTA, about the impact on their members. The HTA provided us with a document called CPSIA Business Casualties, which lists 24 small businesses that cited CPSIA as their reason for closing down, and 11 others that cited the CPSIA as one of the factors in their decision to close.

We will also hear about the numerous other businesses that have barely been able to continue operating under the bill's requirements, many of whom will be forced to close in the next year as different provisions of the law come into effect. Further, the CPSIA has reduced the incentive to innovate and invest in new markets, because it increased the cost of doing business through burdensome and expensive testing requirements.

Another list, compiled by one business feeling the burden of this law, shows 22 different small businesses that have dropped children's product lines because of this Act, limiting computer—consumer options and eliminating jobs.

Neither of these lists includes every business that has been affected. They are simply a small representation of the negative effect of the CPSIA on businesses. These numbers are particularly troubling because the impact has mostly been felt by businesses and products that are not, and have never been, a threat to child safety.

One of the primary concerns with the bill remains its removal of the Commission's ability to use risk assessment in their determinations. Even if the Commission determines that a product is not harmful, no exemption for a product that could result in the absorption of "any" lead, can be used.

I'm concerned with the upcoming end to the stay on third-party testing and the next reduction and retroactive application of the lead standard. Both of these will have significant impacts on small businesses.

I also hope to discuss, with Chairman Tenenbaum and Commissioner Northup, certain decisions that the Commission has made in implementing the law. In some places, where the law actually does allow flexibility to provide needed relief, the Commission has instead chosen to expand the law's reach and requirements, further complicating an already confusing set of rules and regulations. The application of third-party testing under certain general product safety rules the definition of a "children's product," and last week's implementation of the database are three such examples.

While concentrating on the Act, it is easy to forget that, along with these mandates, CPSC must still fulfill the rest of its charges and address other defective products that appear in the marketplace. We need to make sure that the Commission's resources are being used appropriately and are not being forced to focus solely on implementing this law, to the exclusion or detriment of the Commission's other important work. I'm very interested to hear how the CPSC is coping with this challenge.

So, thank you all.

And thanks, to our witnesses, for agreeing to appear today and sharing their expertise with us.

I look forward to a productive hearing.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you.
 Senator Udall.

**STATEMENT OF HON. TOM UDALL,
 U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you, Chairman Pryor. And thank you very much for holding this hearing today, and for your leadership in consumer protection.

I think all of us remember the notorious “summer of recalls” and all the problems with imported toys. And, thanks to your efforts, and especially the landmark 2008 Consumer Product Safety Improvement Act, parents can have more confidence, this holiday season, that their children’s toys are safe.

While we still had plenty of other recalls this summer, I’m pleased that there is a new emphasis on consumer protection and new leadership at the CPSC.

It’s good to see CPSC Chairman Tenenbaum here, and Commissioner Northup, who I served in the House of Representatives with. I think they’re both here for the first time since Senate confirmation. And it’s good to have you here today with us.

I look forward to hearing about the implementation of the 2008 consumer safety legislation.

There is one issue, though, that I would like to focus on, and I’ll be more indepth on it in my questioning, but I wanted to raise a pressing safety issue affecting millions of young athletes. And that’s the issue of football helmet safety. It’s an area where I think the CPSC could help improve children’s safety. And I’ll get—as I said, I’ll get into more detail of that in my questioning.

But, I want to thank our witnesses today, and thank Senator Pryor once again for this hearing.

Senator PRYOR. Thank you, Senator Udall.

Both of our witnesses on the first panel have long and very impressive resumes. But, what I’d like to do, with the Committee’s indulgence, is dispense with the reading of those resumes and just stipulate that they’re very well qualified and we’re very honored to have them here today. But, we have chairman of the Consumer Product Safety Commission, Inez Tenenbaum; and then we have one of the newer commissioners, Anne Northup.

So, Chairman Tenenbaum, would you mind leading off?

Thank you.

**STATEMENT OF HON. INEZ M. TENENBAUM, CHAIRMAN,
 CONSUMER PRODUCT SAFETY COMMISSION**

Ms. TENENBAUM. Good morning, Chairman Pryor and Ranking Member Wicker, members of the Subcommittee on Consumer Protection, Product Safety, and Insurance.

I’m pleased to have the opportunity to testify before the Committee and share with you what the CPSC has done over the past year to make this holiday shopping season safe for families and safe for children. I will provide more details later in my remarks, but parents and consumers should know that there are new safeguards in place that give them more confidence in the children’s products for sale, and that they have fewer hazards than in the past.

Since becoming the Chairman of the CPSC in June 2009, I have focused on specific goals that I want to share with you:

The CPSC has focused on fair and effective implementation of the CPSIA. In less than 2 years, the Commission has published more than 50 rules and interpretive policy statements implementing the CPSIA.

Strategic planning. We recently released the Commission's new 5-year strategic plan, which lays out our goals and objectives that will allow the CPSC to establish itself as the global leader in consumer product safety.

The Commission has created a new Office of Education, Global Outreach, and Small Business Ombudsman to provide various stakeholders, domestic and international, including manufacturers, retailers, resellers, small business, and foreign government, more information. We will have a full-time small-business ombudsman, who will be dedicated to serving the nation's many smaller manufacturer, in the area of product safety.

The Commission's import surveillance division is working more closely with Customs and Border Protection to keep dangerous products out of the United States. The CPSC has increased the number of employees at the ports of entry from 5 to 19, located in 15 different ports.

In addition to these efforts to expand the overall capabilities of the CPSC, we have also focused substantial resources on several specific hazards.

One of the most important is addressing hazards in the infant sleep environment. By the end of this year we will have a new cribs safety rule that will prohibit dangerous drop-side cribs from ever being sold again in the United States. The new standard requires higher quality wood and hardware.

We also have continued our efforts to implement and enforce the Virginia Graeme Baker Pool and Spa Safety Act. Earlier this year, the CPSC kicked off its Pool Safety education campaign, as part of a national effort to reduce child drownings and entrapment in pools and spas. During this past year alone, there have been more than 100 million views of broadcasts and print materials relating to the Pool Safety campaign.

The CPSC is also aggressively continuing efforts to provide relief to homeowners impacted by contaminated drywall. Since becoming the chairman, I have personally visited impacted homes in Florida and Virginia and know the frustration these homeowners are facing. To deal with this, the Commission has conducted the most extensive investigation in history. And I look forward to sharing that with you later on in our question and answer period.

Finally, we have redoubled our efforts to provide rapid response to new and emerging hazards; we have taken aggressive action to police the market for children's products that may contain harmful levels of cadmium. And we will also be glad to share that in detail with you later.

IT modernization. In March 2011, we will also unveil our new public database on the safety of consumer products, which was mandated by the CPSIA. The database will provide a powerful source of information for consumers, allowing them to quickly de-

termine whether the products they already own or are considering purchasing are associated with safety hazards or recalls.

In this holiday season, the true measure of our success at the CPSC is how we can help a young mother or father, who's out shopping for toys, a crib, or a highchair, find safe, reliable consumer products. Here's what the CPSC can promise them: that the toys they buy are now covered by mandatory safety standards; that the lead content and lead paint limits for toys and children's products are among the lowest in the world now; that children's products are now required to be tested for lead by an independent, third-party laboratory; that the infant bath seats and baby walkers they buy are now covered by mandatory safety standards; that the most durable in infant/toddler products, such as cribs, strollers, and play yards, now have to have postage-paid registration cards so that the consumers can fill out and return to be automatically notified for future recalls involving these products; that all children's products, to the extent practical, now have to have tracking labels that make it easier for parents to determine if a product is subject to a recall, even long after the packaging is thrown away.

And, Mr. Chairman, in the past 18 months, we have made the CPSC into a regulatory agency that consumers can trust. We are putting the interest of families first in making sure that the public knows that the CPSC stands for safety.

Thank you again for allowing me to provide this testimony today. I now look forward to answering any questions that you or members of the Subcommittee may have.

[The prepared statement of Ms. Tenenbaum follows:]

PREPARED STATEMENT OF HON. INEZ M. TENENBAUM, CHAIRMAN,
U.S. CONSUMER PRODUCT SAFETY COMMISSION

Good morning, Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee on Consumer Protection, Product Safety, and Insurance. I am pleased to be here today to provide an update to the Subcommittee on the specific actions the U.S. Consumer Product Safety Commission (CPSC) has taken over the past 18 months and the progress we have made to protect American children and families from both existing and emerging product safety hazards.

In August 2008, Congress passed the Consumer Product Safety Improvement Act of 2008 (CPSIA) by overwhelming bipartisan majorities. Passage of the CPSIA sent a strong message to both the Commission and the consumer product manufacturing community: the old, reactive approach to consumer product safety was not working. Instead, CPSIA directed the Commission to pursue a new proactive approach focused on keeping harmful products out of this country and—most importantly—out of the hands of infants and children.

Chairman Pryor, I know you and many other members of this Subcommittee spent untold hours working on this landmark legislation. Since assuming the Chairmanship of the Commission in July 2009, I have worked diligently to implement the CPSIA and use that Act's new authorities in a manner that is both highly protective of consumers and fair to industry stakeholders. In addition, I have focused on changing the CPSC's internal business processes, so that the agency is more assertive and more capable of addressing safety challenges presented by thousands of types of consumer products imported from all over the world.

Here are some specific examples of these efforts:

CPSIA Implementation: In less than 2 years, the Commission has published more than 50 rules and interpretive policy statements implementing the CPSIA. These rules included the implementation of several significant provisions of the CPSIA, such as new durable infant and toddler product standards, new product registration cards that accompany many juvenile products, and implementation of new mandatory toy safety standards. As part of this process, the Commission has also issued several policy statements designed to provide additional infor-

mation on CPSIA requirements to the regulated community, including small businesses.

New CPSC Strategic Plan: During my confirmation hearing last summer, I noted that one of my key goals for the Commission was to align its priorities to the challenges we face in the global economy. To address this, the CPSC launched a comprehensive strategic planning initiative earlier this year to update the Commission's outdated 2003 Strategic Plan. Out of this effort, we recently released the Commission's new 2011–2016 Strategic Plan, which lays out five key goals and also details programmatic objectives that will allow the CPSC to establish itself as the global leader in consumer product safety.

New Office of Education, Global Outreach and Small Business Ombudsman: As Chairman, I have heard from many small businesses and crafters who have asked for additional outreach and support from the Commission as they work to produce safe products and comply with the requirements of the CPSIA. I take these concerns very seriously, and have made providing support and outreach to small business entities and other industry stakeholders a key priority.

On September 22, 2010, the Commission voted to create a new office to coordinate and provide outreach to various domestic and international stakeholders, including manufacturers, retailers, resellers, small businesses, and foreign governments. Within this office, we have a full-time Small Business Ombudsman who is dedicated to serving the nation's many smaller manufacturers in the area of product safety. In particular, special attention will be given to developing information tailored to small businesses and small batch manufacturers so that they can understand and comply with new standards.

Hazards in the Infant Sleep Environment: The overall safety of cribs and the infant and toddler sleep environment is a critical concern of the CPSC and a personal priority of mine. Parents across the country expect cribs to be a sanctuary for their children, regardless of price or size. Unfortunately, that is not always the case. In the past 9 years, there have been at least 32 deaths attributed to drop-side crib failures. That, in and of itself, is a tragic number. However, the majority of crib deaths are still directly linked to the use of soft bedding in the crib.

To address this, I directed Commission staff to embark on a two-prong action strategy. The first prong was to recall old, dangerous drop-side cribs in the marketplace and promulgate new mandatory crib safety rules that will prohibit dangerous drop-side cribs from ever being sold again in the United States. I am pleased to say that the Commission is currently in the final process of reviewing a new mandatory crib safety rule, and it should be approved by the end of the year. This is a promise I have made to parents across the country.

The second prong of this initiative is education: teaching parents and caregivers how to keep the inside of cribs free from suffocation risks like stuffed animals, comforters, and pillows. In partnership with the American Academy of Pediatrics and a child advocacy group called Keeping Babies Safe, we have a wonderful new Safe Sleep video that we are working to have shown in maternity wards and pediatrician's offices around the country. This video is currently available on the CPSC's website, and I urge Members of the Subcommittee to view the video and see its powerful message.

Import Surveillance: Traditionally, the Commission has spent the bulk of its resources investigating harmful products in the marketplace. This will always form a substantial part of the CPSC's activities, but I believe the more effective approach is ensuring that harmful products never even enter the country.

To that end, I have taken a number of steps to add additional technological and human resources to the Commission's Import Surveillance Division. This Division works directly with the Department of Homeland Security (DHS) and Customs and Border Protection (CBP) to keep dangerous products out of the United States.

On the technological side, the CPSC recently executed two interagency Memorandums of Understanding (MOUs) with CBP that allow us to access additional "real time" importer information, and target the most dangerous incoming shipments. The first of these MOUs, signed in April, allows CPSC personnel to work at CBP's Commercial Targeting and Analysis Center (CTAC) in Washington, D.C., and access manifest entry data collected by CBP. This, in turn, allows Import Surveillance Division personnel at the ports to target high-risk shipments prior to their entry into the domestic stream of commerce.

The second MOU, signed with CBP this past August, gives the CPSC access to information in the Treasury Enforcement Communications System (TECS). This will assist CPSC Import Surveillance staff at the ports by providing them with additional information to improve local targeting and interdiction of dangerous products.

The CPSC is also actively involved in supporting the Importer Self Assessment—Product Safety (ISA-PS) initiative that is currently being piloted by CBP. The ISA-PS is intended as a partnership between CBP, CPSC, and importers to ensure product safety compliance. It is based on a voluntary approach that provides meaningful benefits for importers who demonstrate readiness to assume additional responsibility for managing and monitoring their own product safety compliance.

We have also taken steps to increase CPSC's physical presence at ports of entry. In Fiscal Year (FY) 2008, the Import Surveillance Division only had five full-time employees (FTEs), and of those only three FTEs were actually stationed at ports of entry. During FY 2010, we expanded staffing in the Division to 18 FTEs, with 14 FTEs actually stationed at ports of entry. I am very pleased to announce that, as of November 11, 2010, the Division now has 25 FTEs, with 19 FTEs collocated at 15 different ports of entry. Subject to appropriations, we hope to put CPSC staff at even more ports of entry in the future.

Putting more "cops on the beat" has already yielded substantial positive results. In FY 2010, we performed 6,953 screenings at ports, collected 1,776 samples for testing, and of those found 987 that violated CPSC standards. At the same time, we have also seen the number of recalls start to drop—from 563 in FY 2008 to 428 in FY 2010. Maintaining those positive trends is a key goal for the upcoming year.

Pool and Spa Safety: Earlier this year, the CPSC kicked off its "Pool Safely" education campaign as part of a national effort to reduce child drownings and entrapments in pools and spas. As part of this campaign, we partnered with families who lost their children in pool and spa accidents and Members of Congress at events in Florida, Texas, Minnesota, and Washington, D.C. to spread the word that simple safety steps can save lives in and around the water. We also unveiled a new website, *PoolSafely.gov*, as well as new public service announcements to provide the public with information aimed at preventing child drownings and entrapments, as well as educating public pool and spa operators about the requirements of the Virginia Graeme Baker Pool and Spa Safety Act (Pool and Spa Safety Act). During this past year alone, there were more than 100 million views of broadcast and print materials related to the Pool Safely campaign.

In addition to education and outreach, we have also conducted an extensive series of inspections to verify compliance with the Pool and Spa Safety Act. In 2010, the CPSC entered into contracts with local health departments in a number of states, including Florida, Missouri, Kentucky, and Washington, to conduct public pool inspections. Under these contracts, 2,440 pools, spas, wading pools, and water activities at 1,557 sites were inspected. I am pleased to announce that the compliance rate observed was approximately 89 percent, which is higher than the rate observed last year. It also demonstrates that the Commission's outreach, education, and enforcement efforts are having a meaningful effect in the overall effort to prevent pool and spa deaths and injuries.

Contaminated Drywall Investigation: The Commission is aggressively continuing its efforts to provide relief to homeowners impacted by contaminated drywall. Since becoming Chairman, I have personally visited impacted homes in Florida and Virginia and know the frustration that these homeowners are facing.

To deal with this issue, the Commission has conducted the most extensive investigation in its history. As a result of the science produced by this investigation, the Commission, working in conjunction with the Department of Housing and Urban Development, released impacted home identification guidelines in January as well as interim remediation guidance this April. These guidelines have allowed some of the impacted homeowners to start repairing their homes and rebuilding their lives.

To assist in those efforts, the Commission worked with the Internal Revenue Service on a recent Revenue Ruling declaring that contaminated drywall is eligible for a casualty loss. The CPSC's scientific data was also used as part of a recent partial settlement agreement in the Drywall Multi-District Litigation (MDL) in New Orleans, Louisiana. Under the terms of the partial settlement,

a demonstration remediation program has been established that will remediate problem drywall for up to 300 homes in Alabama, Florida, Louisiana, and Mississippi that contain drywall produced solely by Knauf Plasterboard Tianjin.

At the same time, however, I know that these initiatives will not help all of the impacted homeowners. For that to happen, we need the foreign manufacturers involved to come to the table and do the right thing to assist homeowners. On October 26, I personally discussed this issue with Zhu Shuping, Minister of China's General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) during the Second Triennial United States—European Union—China Product Safety Summit in Shanghai, and remain optimistic that Chinese manufacturers will come to the table to resolve this matter. I also appreciate the efforts of several members of this Subcommittee, including Senators Nelson, Warner, Wicker, and Vitter, to provide assistance on this issue.

Rapid Response to New and Emerging Hazards: The Commission has increased its efforts to provide a rapid response to new and emerging hazards. One example of this response is the CPSC's efforts to stop the use of toxic metals in children's products. Earlier this year, it came to our attention that some foreign manufacturers might be using cadmium or other toxic metals as an effort to get around the lead limits for children's products. I sent a strong message to Asian manufacturers and regulators that this was unacceptable and that we would not allow there to be an influx of products with cadmium like we saw a few years ago with lead. The Chinese government sent out a directive a few weeks later on cadmium that used language similar to mine. It appears that we have stayed ahead of this issue.

Despite this early success, however, the Commission will remain vigilant in this area. In response to the possible threat, the CPSC has taken aggressive action to police the market for children's products that may contain harmful levels of cadmium. In addition, Commission staff recently released a guidance document providing Acceptable Daily Intake (ADI) limits for cadmium. We also sent this document to several standards setting bodies—including the Committee that oversees the ASTM F963 toy safety standard—with instructions to take action on this issue. In the coming year, we will also look at the use of other toxic metals such as barium and antimony, and the CPSC will not hesitate to take further action in this area if voluntary efforts prove insufficient.

The year 2010 has been extremely busy for the Commission, but we are not done with our work. As we enter the heart of the holiday shopping season this year, we will remain vigilant to identify hazardous products in the marketplace. In December, we also hope to roll out the first part of our new and improved *CPSC.gov* home page, which will make it easier than ever for consumers to find information on product recalls and common sense tips to keep their families safe.

In March 2011, we will also unveil our new publicly available database on the safety of consumer products, which was mandated by section 212 of the CPSIA. This database will provide a powerful source of information for consumers, allowing them to quickly determine whether products they already own, or are considering purchasing, are associated with safety hazards or recalls. It will also allow consumers to play a critical role in safety by empowering them to report potential product hazards directly into the database.

I recognize that the rollout of this database has caused concern among some in the manufacturing community who believe that it will present "unfiltered" information that will be harmful to the business community. I want to assure this Subcommittee that CPSC staff has worked tirelessly to address these concerns and to ensure that the database is fair to all stakeholders while also fulfilling the intentions of Congress.

First, the database will not include reports of harm submitted anonymously. Any reports filed must include contact information for the CPSC's internal use. Second, the CPSC will give the product manufacturer 10 business days to respond to a report of harm, to provide comment on the report, and to let the Commission know if the submission contains confidential or materially inaccurate information. The rule also requires the Commission to remove or correct information in the database it has determined to be materially inaccurate within 7 business days. Manufacturers also have the right to comment on the reports and to have those comments as part of the publicly accessible record.

At the same time, however, I think it is important to provide a reminder of just how critical a resource this database will be for consumers. Rather than use my words, I would like to repeat the words of Lisa Olney, whose daughter died in a defective portable crib just after her first birthday in 2002. Ms. Olney posted the following on the *Kids in Danger* web blog:

On December 19, 2002, my daughter Elizabeth, just 13 months old, died in a poorly designed play yard. I live my life often looking back through “what ifs” and “should haves,” but I’ve learned to give most of that up in order to save myself from being a horribly miserable individual. Instead, I realize the importance of focusing on efforts to protect our children so that no parent has to suffer what I have, along with too many other victims of unsafe children’s products. The CPSC database is going to protect millions of children, because it provides a place to go when considering the choices parents make when purchasing products, especially those products intended to be beneficial to our children’s safety.

This database will prevent injuries and save lives. Congress recognized this when it added section 212 to the CPSIA, and I look forward to seeing this important tool implemented next March.

Finally, I realize that a lot of the issues I just discussed are fairly technical and involve internal Commission operations. In the end, I know the true measure of success is how each of these items will help the young mother or father find safe, reliable consumer products as they are out shopping this holiday season for a crib, high chair, or toys.

Here’s what the CPSC promises them:

- the toys they buy are now covered by mandatory safety standards;
- children’s products are now required to be tested for lead by an independent, third-party laboratory;
- the infant bath seats and baby walkers they buy are now covered by mandatory safety standards;
- most durable and infant toddler products, such as cribs, strollers, and play yards, now have postage paid registration cards that consumers can fill out and return so they can be automatically notified of any future recall involving these products;
- all children’s products, to the extent practicable, now have tracking labels that make it easier for parents to determine if a product is subject to a recall—even long after the packaging is thrown away; and
- our inspectors will be hard at work in the ports and at retailers, looking for hazards like high levels of lead paint on toys or small parts that can break off and pose a choking hazard.

Mr. Chairman, thank you again for allowing me to provide this testimony today. I now look forward to answering any questions you or other members of the Subcommittee may have.

Senator PRYOR. Thank you.
Commissioner Northup.

**STATEMENT OF HON. ANNE M. NORTHUP, COMMISSIONER,
U.S. CONSUMER PRODUCT SAFETY COMMISSION**

Ms. NORTHUP. Thank you, Mr. Chairman Pryor and Ranking Member Senator Wicker. I’m delighted to be with you today.

This is, of course, my first visit since I had the confirmation hearing, about a year and a half ago, and I have learned a lot and have been very impressed with the work of the CPSC. It certainly is incredibly important. And our Chair has, just, managed and juggled a lot of responsibilities, assessing emerging hazards and setting up a customs program that—Customs and Border Patrol—that intercepts, before they ever get to our shelves, products that might be hazardous to families and children.

But, today I feel like I would be remiss if I didn’t focus most of my comments on what is preoccupying the overwhelming amount of money and time at the Consumer Product Safety Commission—and that is the implementation of the Consumer Product Safety Improvement Act—and to share with you some of the unintended consequences that we have been asked about, both by Members of

the Senate and by Members of the House, certainly by the public, and give you an idea of, sort of, the challenges that we face.

Let me start with the question of lead. We all know that lead is dangerous if it is absorbed by a child. That means in paint, that means in dirt that was—that gasoline—lead-based gasoline got into the dirt, tracked into a house, a child can absorb that lead. We know that it's dangerous if it is a lead charm that is small enough that a child can swallow; and, in fact, it can be fatal.

But, we can't treat all lead alike. And that's the problem with the CPSIA. It treats every component that contains lead exactly the same. It is not dangerous for a child to have lead in their handlebars. It is not dangerous for a child to have lead in a screw that provides strength and machinability and it makes that a more secure product. And so, what we have done in this law, by establishing a lead limit in every single component of every single child's product, is to equate lead in paint with lead in things that are not dangerous.

This has caused a huge disruption of the marketplace. First of all, it has cost jobs. Senator Wicker mentioned some of those, but I would be happy to submit for the record a list of businesses that have closed entirely, businesses that have left the children's product market, and businesses that tell us that, when we lift the stay, in February, for third-party testing and tracking, that—and labeling—that they will be closing their doors.

Senator PRYOR. Without objection.

Ms. NORTHUP. Thank you.

The—it has also caused a huge disruption in choice.

Parents cannot go into stores they went into before and see all the items, many that have been on our shelves for years and are not—have not been dangerous to children, but have not either been able to be remade with lead-free components or the people that make them have just decided to sell them in stores all around the world, including the EU, which has very high standards, but just not endure the expense of complying with our limitations. And let me just say that none of these—many of these companies that have left, have left because they ever had a risky product on the market.

When I was confirmed, Mr. Chairman and all the members of this committee, when I spoke with you, you talked about flexibility and looking for flexibility in the law. But, I can tell you that, in many parts of this law, there simply is no flexibility. And even in the areas where there is some flexibility, usually by a 3-to-2 vote, the Commission has chosen not to exercise that flexibility, out of caution. And so, without changes by the Congress, this law is going to continue to be—to cost jobs, choice, and raise the cost to consumers.

When I was confirmed, I promised you that I would work every day at the Consumer Product Safety Commission as if I were protecting my own six children. And today I have four grandchildren that I'm also thinking of every day. And, while many of the initiatives that our Chairman just delineated for you will make an important difference in our children's and our grandchildren's safety, the—many of the provisions in the CPSIA that are so costly, so complicated, and that are costing jobs, would not be things that I would have welcomed for the sake of my children. And if my hus-

band or I had lost our job because of a business that closed their doors for no—without any regard to safety, I would be heartsick. Thank you very much.

[The prepared statement of Ms. Northup follows:]

PREPARED STATEMENT OF HON. ANNE M. NORTHUP, COMMISSIONER,
U.S. CONSUMER PRODUCT SAFETY COMMISSION

Chairman Pryor and Ranking Member Wicker, thank you for the opportunity to provide testimony to this Subcommittee regarding oversight of the Consumer Product Safety Commission (CPSC). This Commission has a proud history of assessing risk and providing leadership in consumer product safety issues across a variety of industries.

As a Commissioner since August of 2009, I now have a tremendous appreciation for the work that goes on in an agency, including the time and effort that agencies expend implementing the laws Congress passes. It is not a simple task, and my colleague, Chairman Tenenbaum, has put in countless hours to ensure that the Commission meets its deadlines and fulfills the difficult tasks it has been given.

Chairman Tenenbaum has been a strong advocate in working with our partners in China to elevate the priority of product safety and to ensure that manufacturers can implement safety measures as far back in the manufacturing process as possible. She has made progress in our import safety objectives, including an agreement with Customs and Border Protection to allow our staff to view shipment documents earlier in the process before potentially hazardous shipments enter the United States. The Chairman's staff also continues to find creative, useful ways to use social media outlets to advertise product safety messages for families and parents. These achievements are impressive.

CPSIA

Despite areas of progress, I would be remiss as a Commissioner if I failed to mention that the central focus of the agency's time and resources in both 2009 and 2010 has been on implementing a law that has almost nothing to do with improving safety—the Consumer Product Safety Improvement Act of 2008, or CPSIA. Although the Commission is a relatively small agency (FY 2010 funding of \$118 million), its budget has grown by *nearly 48 percent* since the law's passage in 2008, with both old and new resources shifted away from more risk-based priorities to implement the arbitrary, non risk-based priorities of the CPSIA, including the lead-in-substrate ban, phthalates ban, consumer database, and third-party testing, certification and labeling requirements. Today's hearing provides an excellent opportunity to shed light on many of the unintended consequences of this law, its impact on our agency and, more importantly, the economy.

As a bit of background, while we know the context in which the CPSIA was passed in 2008, Members of Congress on both sides of the aisle today acknowledge the need for the law's reform. Both Democrat and Republican Members of Congress have introduced bills to fix the CPSIA. The House Energy and Commerce Committee held a hearing earlier this year on potential CPSIA amendments, and the Appropriations Committees of the House and Senate requested a Report from the five Commissioners back in January on ways to amend the CPSIA to avoid its many unintended consequences. (*See the following link for the Report to Congress and the Commissioners' five statements: www.cpsc.gov/about/cpsia/cpsiareport01152010.pdf*). Thus, to say that the law enjoys the broad support it held in 2008 is simply untrue.

The Commission continues to hear from manufacturers, retailers, and Members of Congress that the CPSIA has impacted products that no one anticipated would be affected and which this Commission would not consider unsafe. For example, the law impacts furniture, bikes, recreational equipment, books, rugs, nuts and bolts used to make these products, clothing, school equipment and supplies—and a host of other categories that fall under the rubric of “children's products.” The law has caused companies to have to reengineer products to be lead-free (with no measurable benefit to safety) to leave the children's market, or to close altogether. I have brought with me a list of such businesses which I will submit for the record.

Risks Associated with Lead

It is important to clarify the risks associated with lead. Some advocates, including witnesses in your second panel today, will say that “there is no safe level of lead” which implies that none of us can ever spend enough time and money to reduce or eliminate lead everywhere. However, an important fact to follow up this statement

would be that there exists an *unsafe* level of lead, which has been established by our leading scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. The fact is, lead that is “absorbable” at greater than *minimal levels* is dangerous, especially to children ages five and under.

In order to determine risk, it is necessary to make a distinction between lead that is absorbable and lead that is not absorbable, at least not in meaningful amounts. In many other laws relating to absorbable lead levels, standards exist to allow for such minimal absorption. For example, the Food and Drug Administration allows for 0.1 microgram of lead in a one-gram piece of candy.¹ The Safe Drinking Water Act declares “zero lead” to be the objective for the amount of lead in water, but the pipes themselves are permitted to be 80,000 parts per million (8 percent) lead—allowing for negligible, trace amounts to exist in the water we drink.² California Proposition 65³ as well as the European Union⁴ allow for a negligible amount of absorbable (or soluble) lead in children’s products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)⁵ is then taken into the body every day through just the food we eat and the air we breathe.

So what lead is actually risky? Lead is risky when it is absorbable into the bloodstream at significant levels. The experts at the CDC and NIH have found that lead paint in old houses as well as lead in dirt⁶ near old gas stations can be very dangerous for small children (<http://www.cdc.gov/nceh/lead/>). In other words, the *risk of absorbability* with lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. In the same vein, a lead-laden metal charm or piece of jewelry that can be swallowed presents a danger since such an item could get caught in the stomach and absorbed. However, none of these agencies, including the CPSC, has ever found that a child touching a brass musical instrument, touching a vinyl lunchbox, or riding a bicycle, could ever rub off enough lead, day after day, year after year, to affect his or her health.

Now let us look at the CPSIA’s lead requirements in comparison to these known lead hazards in the environment today. The CPSIA’s arbitrary lead content limits (currently 300 ppm, and moving to 100 ppm by next August) remove the ability of the Commission to assess risk, or the *absorbability* that exists for a particular product. In other words, the law’s lead content levels dictate that the metal handle bars of a bike that pose *no health risk* to a child be outlawed right alongside lead paint or a solid-lead charm on a piece of children’s jewelry that is dangerous.

The effect of the CPSIA has been to outlaw children’s books published before 1985 that are likely to have lead in the inks, for example, which both the Commission and Congress now feel was an overreach because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed at any discernable level (from hand to mouth touching where miniscule amounts of lead may rub off—not from actually eating the hood, handlebars or hubcaps). Other everyday products such as school lockers, the hinges on a child’s dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens may be outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip.

¹“Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children,” Food and Drug Administration, November 2006: <http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Lead/ucm172050.htm>.

²Environmental Protection Agency, Safe Water Drinking Act, Fact Sheets: <http://www.epa.gov/safewater/sdwa/basicinformation.html>.

³California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65—<http://www.oehha.org/prop65.html>, *Children’s Health at OEHHA*—http://oehha.ca.gov/public_info/public/kids/schools041707.html.

⁴European Committee for Standardization (CEN), EN 71–3 Safety of Toys—Part 3: Migration of certain elements. CEN, Brussels, Belgium, 1994: <http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonisedstandards-legislation/list-references/toys/>.

⁵Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead: <http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22>.

⁶Although lead in dirt is a proven hazard for small children nearby to old gas stations that used leaded gasoline or certain pesticides, it is notable that the Environmental Protection Agency standard for lead in soil is 400 ppm. <http://www.epa.gov/lead/>. This standard for safety is less strict than the current lead content standard provided in the CPSIA for children’s products, which is 300 ppm and scheduled to fall to 100 ppm in August of 2011.

Finally, children do not live cooped up inside of their rooms surrounded only by “children’s products.” Children live throughout the house, run around outside, and are exposed to lead in their everyday environment. In fact, they are surrounded by it: in the car (adult seat belts, window cranks) and in their homes (pots, pans, furniture knobs, door handles, appliances, lamps). These products do not threaten a child’s health because the lead in them is not absorbable. Hence, it makes little sense that the CPSIA bans products with higher than 300 ppm lead content in such products as *children’s* furniture, *children’s* rugs, toys and *children’s* clothing—while children themselves are likely to spend more time outside their room handling the TV remote (an adult product), playing on their parents’ furniture, or playing with just about anything else.

The Costs to the Economy

While there have been no tangible benefits resulting from the CPSIA’s arbitrary lead limits, the costs to businesses have been tremendous—and continue to pile up. In March 2009, the Commission estimated that the economic costs associated with the law would be “in the billions of dollars range.”⁷ Industry associations from furniture and mattress manufacturers to handmade toy makers have told us how they will be saddled with enormous costs since every component of every product they make (down to the screws in the furniture) will have to be sent to a third-party lab to be tested for lead and all other applicable standards. We have heard from businesses that have had to cut jobs to be able to afford the new testing and compliance costs, reduce product lines, leave the children’s market completely, or close—all of this, when the full effects of the law (and I would argue, the most costly mandates) have yet to be felt.⁸

The entire process companies must go through to produce a toy or children’s product has drastically changed. Take, for instance, a child’s doll. To be compliant with the law, a company must pay to have the doll’s body, hair, each color of paint on the lips or eyes, and the doll’s clothing tested in an independent lab for lead content—and soon will have to do the same for phthalates and to every applicable component of the ASTM F-963 toy standard. According to a brief small business analysis by our agency, the cost to test one toy could range from \$3,712 to \$7,348—not taking into account that the toy will likely change to stay competitive for the next Christmas season, or sooner, and every material change triggers a whole new set of tests.⁹ These costs also do not include the cost to add a tracking label, to certify to these third-party tests, and to maintain the data and paperwork to be able to trace each and every component and material back to its specific test and lot number. All of these steps are required by the CPSIA without any regard for the actual risk of a product.

In fact, while the costs to companies to reengineer products to meet the lead limits has been steep, many tell us that the ongoing costs to third party test, label and track every component have been much higher—and without any measurable benefit. For example, one furniture manufacturing company informed us they spent upwards of \$13 million putting together a testing, tracking, and labeling system for their children’s furniture while discovering that not one of their components was in violation of the new lead limits and needed to be replaced. There was clearly no safety benefit, yet they have faced enormous costs. Large and small companies alike have to hire a lawyer or other outside expert just to ensure they understand the extent to which their products may or may not be impacted by various provisions of the law.¹⁰ This is what happens when regulations do not have to be cost-benefit justified.

The CPSIA fails to make any distinction between large and small businesses, or foreign and domestic manufacturing, thus giving an obvious competitive advantage to large manufacturers who produce items overseas, where manufacturing and test-

⁷Letter from Acting CPSC Chairman Nancy Nord to Representative John Dingell, March 20, 2009.

⁸Currently, the Commission has put in place a stay on the lead content testing requirements until February of 2011. A stay was first enacted in February of 2009 following the confusion that ensued after the law’s passage. The Commission voted 5–0 in December of 2009 to continue the stay for another year (until February of 2011). Additionally, the Commission has yet to accredit labs for testing to the phthalates ban or the toy standard, which will impose even greater testing burdens. While these three major testing requirements have not even kicked in, many businesses have been forced to plan ahead for the new costs and have already determined they cannot maintain their business and also comply with the CPSIA.

⁹Regulatory Flexibility Analysis: Testing and Labeling Pertaining to Product Certification, 16 CFR Part 1107, Notice of Proposed Rulemaking, CPSC Docket No. CPSC–2010–0038. May 20, 2010.

¹⁰“Mattel Finds CPSIA to be a Challenge,” *Product Safety Letter*, November 9, 2009.

ing costs are cheaper. As a result, large toy manufacturers have turned a corner to become supportive of the new regulations and clearly see the competitive advantage that the law gives them over their smaller competitors. Meanwhile, the backbone of our economy, small businesses—from screen printers to manufacturers of chemistry sets for schools—are being forced to cut jobs or take other drastic measures due to the cost of compliance. Given the urgency of our economic situation, this Commission would benefit today from hearing from Members of this Committee on whether these results are what you expected.

Role of the Commission

While the Commission has the authority to provide flexibility regarding the frequency of third-party testing requirements under the law, it does not have the ability to exempt companies altogether from burdensome testing requirements that do not improve safety. More specifically, the Commission lacks the authority to exempt manufacturers of otherwise safe products from the following: (1) the initial, third-party test of every product or component to the law's lead, phthalates and other mandatory standards; (2) a new, third-party test of any product or component after any "material change" in the product; or (3) the cost to certify, provide tracking labels, and maintain the data to trace each and every component. *Without changes to the statute, the Commission's hands are tied in addressing these arduous requirements, the main CPSIA costs burdening small businesses.*

When I was confirmed, every Senator with whom I met asked me to look for flexibility in the CPSIA in order to reduce the impact of the law where safety was not compromised. I have taken those conversations to heart. However, given that the majority of Commissioners so far has interpreted this law in an even more sweeping manner than required, I now believe that our ability to reduce the law's economic impact has waned. It is imperative that we inform you of these challenges and encourage the Congress to alleviate any unnecessary economic impacts on small businesses and families.

Thus, in this Committee's consideration of reforms to the CPSIA, I would recommend various ways to give the Commission authority to provide needed flexibility, including: (1) allowing for *de minimis*, absorbable lead in children's products, which, as mentioned previously, would by itself remove harmless products from most all of the burdensome requirements of the law (and would allow us to harmonize our standards with the European standards); (2) allowing small businesses the option of a "reasonable testing program" rather than a third-party test; (3) providing discretion to the Commission to determine the need for any third-party testing or tracking label requirements at all for various product categories; and (4) lower the age range for the types of products impacted by the law to focus on age groups (*e.g.*, under age 6) at risk of meaningful lead exposure. Any of these reforms would improve the existing law and allow the Commission to focus its energy where we know the risks lie.

Costs to the Commission

Not only has the implementation of the CPSIA continued to burden small businesses and derail job growth, but the law clearly has taken us away from our core mission of safety. As a result, this Commission is spending millions in limited resources in implementing and enforcing a law that is not helping consumers—a worrisome situation given the state of our economy and the need for all of us to find ways to reduce Federal spending.

A prime example of wasted taxpayer resources—\$29 million worth in fact—will be the consumer database that the Commission is tasked with implementing early next year. The CPSIA requires that the Commission establish and maintain a database on the safety of consumer products that is publicly available and searchable on the Commission's website. Unfortunately, the majority of the Commission adopted a rule just last week that will make the database useless or worse. Among other problems, the rule defines consumers to include just about everyone, so that reports of harm can be submitted by people with ulterior motives rather than just the actual consumers who suffered harm and have firsthand information about the consumer product. In addition, the rule has interpreted a 10-day deadline in the statute to require agency staff to post reports of harm even though the agency has received credible claims of material inaccuracy, even if the staff has not had time to resolve those claims yet. Finally, since groups with ulterior motives (trial lawyers, competitors, groups wanting to sell a "remedial" product, or an association wanting to lobby Congress for a new mandate) can submit reports into this database without providing the consumer's name, it is unlikely that the Commission will be able to ascertain critical facts related to a product. Such blatant disregard for accurate data will undermine the whole purpose of the database—to assist consumers trying to pur-

chase safe products. It will also raise prices, kill jobs, and damage the reputations of safe and responsible manufacturers indiscriminately.

Chairman Henry Waxman's Proposal to Add a "Functional Purpose" Exemption

It is important to note that Chairman Waxman of the House Energy and Commerce Committee has proposed a very limited "fix" to the problems of the CPSIA, known as a "functional purpose" exemption. Specifically, the proposal would entail giving the Commission authority to exempt a company's products from the CPSIA's lead limits if the company can show that the lead in the product serves a "functional purpose." Unfortunately, this "fix" would do more harm than good.

Adding a "functional purpose" exemption to the Commission's authorities would not provide the kind of broad exclusion flexibility that the Commission unanimously sought in our January Report to Congress. The concept is too narrow, expensive, and uncertain to provide much relief, particularly for small businesses that are unlikely to have the resources available to determine available lead substitutes or even to put together as successful petition to a Federal agency. Most companies will not have the in-house expertise (metallurgic, etc.) to make the kind of showings that would be required to meet the burden of proof for an exception. So just as the exorbitant testing costs of the CPSIA favor large companies (who manufacture overseas) over small ones, so too will the exemption process favor the large companies with greater ability to spread their costs. Furthermore, forcing a component-by-component review of exceptions to the law does nothing to enhance safety, and it converts the Commission from a safety oversight agency (like the FAA) into a product approval agency (like the FDA). That will slow the pace of innovation and dramatically increase the cost and lead time for bringing new products to market.

Conclusion

Today, Americans still enjoy a marketplace that is brimming with new products and a variety of choices in color, cost and complexity—but we are steadily diminishing these opportunities. As a Commissioner, I strive to maintain and expand the type of marketplace that Americans consumers want—vibrancy, choice, and the confidence that consumer products are safe. All of this is possible in a successful market, where consumers demand ever more innovative products from a variety of sources and businesses look for opportunities to meet those demands. However, the CPSIA has and will continue to drastically reduce the number of inherently safe products available in our country. I hope the Congress will restore the responsibility of assessing risk to the experts at the CPSC and allow us to keep our markets both safe and dynamic.

Thank you, Mr. Chairman and members of the Committee for calling this oversight hearing and for inviting me to testify today.

Senator PRYOR. Thank you.

Chairman Tenenbaum, let me start with you, if I may. And I know you've really had your hand full—hands full with the implementation of the CPSIA, and it's just been more than a full-time job for you and the Commission and all of your staffs, and I would say, overall, I think people understand the effort that you put into this, and you guys have done a great job. Not that everybody always agrees on everything, but you guys have worked very, very hard to implement the law.

But, I would like to ask you, Madam Chairman, about your Safe Sleep campaign. And I'm curious about what prompted that, and how it's going, and what kind of results you're seeing around the country.

Ms. TENENBAUM. Thank you, Mr. Chairman.

The Safe Sleep campaign was an effort that we created because of the numerous cribs that were recalled because of the drop-sides. And, getting further into the data, it wasn't just the drop-side cribs where children were being suffocated. The number-one reason why children are suffocated is because of soft bedding, not having anything to do with the product. People fill up a baby bed with com-

forters, toys, and pillows, and the child can roll into these items and suffocate.

So, what we wanted to do was to create this Safe Sleep campaign along with having a new crib standard.

We created a new Safe Sleep team, at the Commission, in the wake of all of the recalls, because the drop-side problems were going back years, even before I came into the Commission. And what this Safe Sleep campaign did was notify the public of 32 deaths reported to the CPSC in the past 10 years attributable to the drop-side. In less than 9 months we negotiated the crib manufacturer and retailers to bring about 18 voluntary crib recalls across all kinds of companies.

So, this month, in December, we will have a new crib standard. We have not had a new one in 20 years. There will be no more traditional drop-sides, those are banned now; we will have new wood strength; mattress support requirements, so the mattress won't fall down; and stronger hardware requirements.

We also joined with the American Academy of Pediatrics and Keeping Babies Safe, a nonprofit organization, and we made a video. Joan Lunden, who used to be on the Good Morning America, hosted the video. The video discusses how to keep your own child safe, not only from a defective product, but also safe bedding. We launched this video last month in New York at one of the hospitals. We'd like to continue to seek private funding so we can have this video in physicians' offices, pediatricians, anyplace—in airports, where you have video playing constantly—so people will know how to keep their own baby safe.

Senator PRYOR. Commissioner Northup, you mentioned, in your testimony a few moments ago, that many parts of the law, of this CPSIA law—many parts of the law have no flexibility in there. Now, you spent some time on lead. What else, in your opinion, has no flexibility with it?

Ms. NORTHUP. Well, let me get to, specifically, one of the questions that I believe you asked me, and also questions that the other members of the Committee asked. And that is about absorbability; it goes to lead. But, you provided exclusions in the law for products that could contain lead. And one of them was lead that was in products where the—where lead could not be absorbed. This would be handlebars; this would be ATVs for example.

Senator PRYOR. Right.

Ms. NORTHUP. And what the Commission has decided is that there's not one single product that would benefit from that exclusion; that the fact that you could rub your hands on a handlebar and get one molecule on your—and that one-tenth of a percent—of 1 percent of that molecule is lead, then you could put it—your hand in your mouth—that that would be absorbability. And so, absolutely no component would qualify for that flexibility.

Now, I guess I presume that, when you write—when you wrote that exclusion into the law, you meant for it to actually mean something, that there actually would be components that would qualify for that exclusion. But, the majority has decided that not one single component does qualify. And that's why every snap, every spoke of a bicycle, every hinge on a dresser, every—

And let me just carry that a little further and point out that a child doesn't stay in a bubble in—with children's products. They get in a car and—for millions of dollars, they refashioned the car seat so that the buckle no longer has lead in it. It provided strength and protection, so reengineering it was very expensive. But, the child can reach right down on the seat and pick up the adult seatbelt and play with it, and it's loaded with lead. And a child is going to crawl right out of their room into the—onto the carpet of the house, into the kitchen, open the drawer, with door handles that have lead on them. And none of this raises our concern, because when lead, in very small amounts, is embedded in metal, it's not going to be absorbable at any measurable level. So, that would be one of the areas.

Senator PRYOR. Right. Well—but, my question was——

Ms. NORTHUP. Yes. Let me give you——

Senator PRYOR. You covered lead——

Ms. NORTHUP.—another one.

Senator PRYOR. You covered——

Ms. NORTHUP. Definition of a “child's product”——

Senator PRYOR. OK.

Ms. NORTHUP.—would be another one. All of the requirements of the CPSIA are extremely expensive; not just that you have to comply with the lead, but also that you have to third-party test, that you have to certify to those third-party tests, that you have to provide tracking labels that make sure—that show every single test that was relevant. So, when it comes to carpet and all these other things, the question is, are you going to put a fence around children's products that capture as many products as you can, including lamps, including, say, something that spins on the ceiling the child could never touch, or are you going to put a fence around fewer products that would be determined to be children's products?

And I guess I felt that we should—if there was no risk involved, that we should have put that fence around the definition of a “children's product” more narrowly so that things like—beyond the tests that are required in the CPSIA—tests for flammability of rugs, tests for other components—now not only are people that make children's products going to have to test them to all the lead/phthalate standards—coating standards—they're now also going to have to do third-party tests for any other applicable standard, that wasn't really clearly mandated in the law. And now we have captured as many of these products as we possibly can in this trap by setting a very broad fence instead of a more narrow fence that might have just focused on risky products.

Senator PRYOR. All right. Let me ask one more thing about your testimony. And I'm—I've overstayed my time, here, but I would like to ask one more question and——

In your written testimony, on page 2, you said that, “It's a law that has almost nothing to do with improving safety.” And, to me, that's an astounding statement, because when we've added staff there—don't you agree that that has to do with improving safety?

Ms. NORTHUP. Let me say that I think that the CPSC has done a fabulous job in——

Senator PRYOR. Now, answer——

Ms. NORTHUP.—improving safety.

Senator PRYOR.—my question.

Ms. NORTHUP. The CPSIA—

Senator PRYOR. Answer—OK, yes.

Ms. NORTHUP.—in particular, what we are working on, which is—we haven't even gotten to phthalates—which is lead, it has not been focused on risk. There's no focus on risk.

Senator PRYOR. Well, that's not what you said here. You said, "a law that has almost nothing to do with improving safety." And my point is that part of the CPSIA was to increase the staff level so that the Consumer Product Safety Commission staff could do more research—

Ms. NORTHUP. Yes.

Senator PRYOR.—to improve your facilities. I would think that you would agree with me that that improves safety. To do all the things that the CPSC is now authorized under the CPSIA to deal with imports—we were—we've been flooded with imports in this country, and many of those have not been safe. And the Commission has taken the lead role in the world to go and make sure that those products coming into the U.S. are safe. And I know you may disagree with some of the lead issues, but, still, those are designed to improve safety. In fact, part of the CPSIA is the ATV rule, which probably predates you being on the Commission, I know, but to get some of these cheap imported ATVs off the market that didn't meet any safety standards that the other ATVs met. I think all of that has to do with improving safety. But, in your statement, you said this law has almost nothing to do with improving safety.

Ms. NORTHUP. I probably should have clarified that. I agree, that is not a well worded statement.

And let me just say that almost every provision in the law was meant to address a real risk, and I recognize that. And I think that the agency has done a good job at addressing risks. But, when it comes to technically implementing the components of this law because of some of the very narrow language or the narrow interpretation, what we're doing has less to do with safety than complying with very regimented requirements that gets away from risk, gets away from an agency that is—has such a proud history. I mean, every night, we get the overnight incident reports of children that have died. And you do see trends and you do see ways of spending our resources in intervening. And the chair, with the Safe Sleep, has been very creative in this. But, that's not what the CPSIA primarily is focused on. It's focused on very regimented requirements that—

You know, I'll give you one other example with the Safe Sleep. The drop-side cribs is—has been masterfully handled, in my opinion. It did risk children's lives. And we did recalls. It's been a very step-by-step implementation. Unfortunately, when we did recalls of drop-side cribs, every single daycare center had to replace, immediately, their cribs that they used that were drop-side cribs. So, they have brand new cribs. Sixty days after we pass this new standard, or if we give them an extension in a year—up to a year, which we possibly might do—they're going to have to carry those brand new cribs out the door and throw them in the trash, because—even though there's no determination that any of them are unsafe—because the bill has an immediate effect rather than say—

ing “just what’s purchased in the market or what has been determined to be risky.” I sort of wonder if that’s what you intended. That is hundreds of thousands of cribs that will be obsolete the day it goes into effect.

Senator PRYOR. Well, I don’t know how that’s going to play out, but what—I’ve overstayed my time—but, we—the CPSI did have a—CPSIA did have a mandatory rulemaking on cribs, and I appreciate you all doing it. But, we need to probably talk about this, you and I, offline at some point. And I know the Ranking Member and I have talked about this before, and we mentioned it a few moments ago, about—we recognize that, you know, this law on the books probably needs to be looked at again. And there are probably some areas that, you know, maybe we should give some more flexibility to CPSC. And the Chairman and I have talked about that a few times. And I know that she’s had discussions on the House side. And I actually talked to Joe Barton yesterday about a little bit of this as well, assuming he’s the Chairman over there. It’s something that, you know, we will work through.

But, anyway, I’ve over—

Ms. NORTHUP. Thank you.

Senator PRYOR.—overstayed my time. So, Senator Wicker.

Senator WICKER. I actually don’t mind at all that the Chair overstayed his time, because I thought it was a very interesting and informative line of questioning.

I want to talk about the budget, the “appropriations” level that you’ve requested over time, and see what we can do about that, in light of the federal government’s deficit, during the past fiscal year of \$1.3 trillion. In 2 short fiscal years, this government has added over \$3 trillion to the national debt. There is a hue and cry from the public for us to do something about that. And I think every agency’s going to have to be involved in that. There was a Debt Commission report yesterday that should trouble every American and every policymaker.

During the last 2 years, the appropriation for CPSC has increased 47 percent. And I know the Chairman and Ms. Northup talked about personnel; I assume that was a large part of that. But, the Fiscal Year 2008 appropriation was \$80 million. That increased some \$25.4 million, to \$105 million, in 2009. The figure reached \$118.2 million Fiscal Year 2010. And there is a request for another \$400,000 more.

With that thought in mind, I’d like to ask both of you what suggestions you can give us of ways the CPSC can actually reduce its budget and be a part of the solution of reducing our federal deficit.

Ms. TENENBAUM. Thank you—

Senator WICKER. Ms. Tenenbaum?

Ms. TENENBAUM.—Senator Wicker. One of the things that was brought about when the Congress passed the CPSIA was the fact that the CPSC was cut so many times that it was unable to fulfill its statutory duties. And so, rather than just have three commissioners, it was decided that five commissioners would be funded, and that we would have a higher authorization, and we would also be encouraged to hire more people.

In fact, our FTE goal this year—and every time I have testified in front of Congress, people want to know, “Where are you?”—was

to be at 530. We are now at 520 FTEs and we have 19 conditional hires. That is because we had the new law, the CPSIA. Not only were we required to pass all these new rules, we also are required to enforce them.

We also needed a new laboratory, and we are opening that new laboratory in April. And we'd love for you and your staff to come tour the new laboratory.

Senator WICKER. I'll certainly do that.

Ms. TENENBAUM. OK, please. Thank you.

We also need more outreach into China. The FDA has put people in China because so much of our food is coming from China. We just opened our office at the U.S. Embassy in China, and have two staff members working with the Chinese on products.

We've asked to be held harmless, in terms of budget cuts, because of the fact that we are just now implementing this very complex law. And we are now seeing a reduction in the number of recalls. Our presence in the ports has gone from 5 people at the ports to 19 people at the ports.

But, all that said and done, we realize that we're a small agency and that we have to contain our budget. And so, what we've done is be much more creative in working with other agencies. Our relationship with Customs and Border Patrol is closer than ever before. We work with them to stop products from coming into the United States.

We also are reaching out to colleges and universities. I've made visits to one university—we're going to another one—to ask them if they could work with us on research, and providing professors to train manufacturers in foreign countries so that they will know what the rules are for products coming into the United States.

We have identified certain line items that could be cut if we need to be cut, and we'll be glad to provide that to you—for you and your staff. We can send it—

Senator WICKER. Could I—

Ms. TENENBAUM.—after—

Senator WICKER.—ask that you provide it for the record?

Ms. TENENBAUM. Sure. We will provide it for the record. We have already sent it—

Senator WICKER. When—

Ms. TENENBAUM.—to OMB.

[The information referred to follows:]

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION
Bethesda, MD, December 2, 2010

Hon. ROGER F. WICKER,
Ranking Member,
Subcommittee on Consumer Protection, Product Safety, and Insurance,
U.S. Senate,
Washington, DC.

Dear Ranking Member Wicker:

Thank you for your questions at today's hearing regarding the U.S. Consumer Product Safety Commission's (CPSC) budget priorities, implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA), and ongoing activities to reduce injuries and deaths caused by defective or unsafe consumer products. I appreciated the opportunity to discuss these issues with you, and the progress we have made strengthening the Commission over the past year.

As discussed at the hearing, I believe that any reduction in the amounts proposed in our Fiscal Year (FY) 2011 budget request would be detrimental to the agency's

mission, and that the CPSC should be “held harmless” in this year’s budgetary process. Actual full time employee (FTE) staffing levels at the Commission dropped from a high of 978 in 1980 to a low of 396 FTE equivalents in 2008. This decline in staffing, combined with annual funding, was devastating to the agency’s overall effectiveness—as was illustrated by the “Summer of Recalls” in 2008.

In the last 2 years, the agency has made great strides rebuilding and working to ensure that the consumer products used by American families are safe. We are extremely grateful for the funding increases provided by the appropriators and have used this funding wisely and judiciously. While our proposed FY 2011 funding level is still almost 30 percent below the 1980 level (adjusted for inflation), I believe the current level positions the agency for success in the future.

Although we have exercised fiscal restraint, I am keenly aware that Congress may consider across-the-board cuts for agencies. Therefore, pursuant to your request, attached please find a list of preliminary FY 2011 budget items that Commission staff have identified should any across-the-board cuts be implemented by Congress. I would note that these items were identified by staff, and have not been approved by the full Commission.

Thank you in advance for your support of the CPSC. Should you or your staff have any questions, please do not hesitate to contact me or Christopher Day, Director of Congressional Relations.

Very truly yours,

INEZ M. TENENBAUM,
Chairman.

FY 2011 CPSC Budget Request Summary
Adjusted to Reflect Potential Mandatory Across the Board Cuts
(Dollars in Thousands)

<i>2011 Request</i>		<u><u>\$118,600</u></u>
<i>Reductions in 2011 Current Services Changes:</i>		
Federal Pay Increase with Related Benefits	(\$937)	
Consumer Hotline	(\$266)	
IT Help Desk	(\$266)	
<i>Reductions From Base</i>		
Operating Expense	(\$225)	
<i>Total Potential Mandatory Across the Board Cuts</i>		(\$1,694)
<i>Total Potential Revised Requirements</i>		<u><u>\$116,906</u></u>

Senator WICKER.—do we normally get those, Mr. Chairman?

Senator PRYOR. We can hold the record open for as long as we want. But, if we want to try to get something—

Senator WICKER. How soon could you provide that—

Ms. TENENBAUM. We could—

Senator WICKER.—list, Ms. Tenenbaum?

Ms. TENENBAUM.—this today.

Senator WICKER. OK.

Ms. TENENBAUM. We can provide—

Senator WICKER. Wonderful.

Ms. TENENBAUM.—it today.

Senator WICKER. Ms. Northup, I wonder this: What if every agency asked to be held harmless? We wouldn’t be able to do anything about the budget deficit, would we?

Ms. NORTHUP. Well, I’m reminded that you and I sat next to each other on appropriations committees for years, so I’m not surprised I got this question.

Let me make a creative suggestion. I would—if—here’s sort of an off-the-wall suggestion: Go from five commissioners to one administrator. I have so much faith in Inez Tenenbaum’s ability to chair this agency. I’m probably the only person who will come before you

and suggest putting me out of a job. But, each one of us have a staff. And it is—the rulemaking is very, very complicated. But, what happens is that we find ourselves, you know, investing great amount of time and effort and research, and our staffs are involved in how to research, say, this rulemaking. On the other side, the Democrats are involved in the same way. And so, rather than the chair being able to just work with the general counsel and the professionals that are at the agency, she is pulled by the Democrat mayor—members to one side; we pull to the side of flexibility. And so, there's great polarization.

And I actually think that her ability to balance the initiatives, all the ones that she has brought up, are probably the things that have had the—made the most difference in safety. They are the things that she is able to do individually, as opposed to the rulemaking. And I think the rulemaking would go smoother; and, quite honestly, I think it would have been more balanced, had it not been five commissioners.

So, I would just say that you have a chance to debate the pros and cons of every single bill. You have people that—on both side of the aisle, that have different opinions, and people that come from different perspectives. Once you write the bill, I'm not sure it's so helpful to have four more commissioners that are debating these same things for hours and hours and hours, hiring their own staff, taking up a lot of office space, keeping the office of the general counsel and the professional staff busy answering all of our questions, when maybe the Administrator should be charged with that responsibility.

Senator WICKER. How large is your staff, Ms. Northup?

Ms. NORTHUP. I have three people to—one that's paid \$150,000 a year, one that's paid \$100,000 a year, and one that's paid \$50,000 a year.

Senator WICKER. Well, I've followed the Chair's example and overstayed my time. Let me just say this. We hear a lot of talk about moving the appropriation level back to the 2008 level of expenditure. What the Chair, Chairman Tenenbaum, has suggested is that this agency be exempted from that. Ms. Northup has suggested what I think would probably amount to modest savings.

I just have to say this. If we're going to be serious about this, and if there are ways that we can provide flexibility, keep people employed in the private sector, and quit talking about products that have never been unsafe and toys that have never caused a problem and lead-containing handlebars that have never harmed one single human being in the history of their manufacture, then we need to think about those solutions. And, if we don't, we're going to have a real problem with doing the simple things of cutting back on discretionary expenditures, much less the excruciating and much more difficult issue of the entitlements.

And I thank you, Mr. Chairman.

I thank these witnesses.

Senator PRYOR. Thank you.

Senator Udall, I believe, has to leave here—

Senator UDALL. Thank you.

Senator PRYOR.—in a few minutes. So—

Senator UDALL. Thank you. Well, thank you, Chairman Pryor.

And it was a very good exchange. But, I think one of the important things, Ranking Member Wicker—when we talk about safety and talk about budgets at the same time, I think it is very important that we give the agency the budget they need in order to protect consumers and to protect safety. And I think that's what the Chairwoman is talking about.

Let me thank you, Chairman Tenenbaum, for your testimony today, and CPSC's work to protect consumers from unsafe products. And I have some additional questions for the record, but I'd like to focus on the safety issue that I brought up in my opening statement.

Senator UDALL. You know, fall is football time in America. And every year, more than a million high school kids put on their gear and take to the gridiron, including about 8,000 in my home state of New Mexico. This weekend, in fact, teams from our larger high schools will compete for the State Championship.

Football is a uniquely American tradition. But, football is a contact sport, and thousands of student athletes are injured every year. Many of those injuries are concussions. For young people between the age of 15 and 24 years old, playing sports is the second leading cause of traumatic brain injury, second only to motor vehicle crashes.

New Mexico actually has one of the nation's best school sports concussion laws. We require athletes—and it was authored by a fine young state senator, named Senator Michael Sanchez—we require athletes who suffer a concussion to sit on the sidelines for one week and until a medical professional approves their return to play.

But, I'm concerned that our young athletes may not be using the best safety equipment. Traditional football helmets—I had a couple here, but I don't want to bring—first, I was just going to bring one up, and then my staff said, "Well, you"—this is our—two-college football—

[Laughter.]

Senator UDALL.—and you can imagine, they compete with each other. And so, they—and I said, "Well, we just need one." And they said, "No, you can't put up one without putting the other." New Mexico—University of New Mexico and New Mexico State. So, anyway—

Senator KLOBUCHAR. And where's the Gopher?

Senator UDALL.—these helmets—

Senator KLOBUCHAR. The Gopher.

Senator UDALL. Where's the—

Senator KLOBUCHAR. Minnesota Gophers.

Senator UDALL. Well, these are Lobos. These—

Senator KLOBUCHAR. Yes.

Senator UDALL. You got a—

Senator KLOBUCHAR. Yes, I know. But—

Senator UDALL.—Lobo and an Aggie—

Senator KLOBUCHAR. Yes, well—

Senator UDALL.—right here. So, yes.

Senator KLOBUCHAR.—you know—

Senator UDALL. OK.

Senator KLOBUCHAR.—we should expand.

Senator UDALL. You can bring your helmets in——

Senator KLOBUCHAR. OK.

Senator UDALL.—if you want.

Senator KLOBUCHAR. Thank you.

[Laughter.]

Senator UDALL. These helmets are primarily designed to prevent serious injury from a severe direct blow that can crack one's head open. However, football helmets are designed to a safety standard that specifically addresses the dangers from less severe impacts and indirect hits that can cause a concussion. More advanced football helmet designs are available, but the voluntary industry standard has not kept up with the latest technology. The current helmet standard is also a one-size-fits-all approach, from kids playing Pop Warner, the youngest kids, to the pros in the NFL. So, one size fits all.

I believe that the CPSC has a responsibility to ensure that football helmets meet safety standards that address concussion hazards and reflect the state-of-the-art helmet technology. And there's a lot of discussion out there with neurosurgeons and other experts.

And really my question to you—I guess I have two questions: Will you review whether the voluntary football helmet standard and certification practices adequately protect high school and younger athletes from concussion? And will you follow up with the football helmet standards organization, NOCSAE, to make sure they address these safety concerns, especially complaints that the standard is out of date?

Please, go ahead.

Ms. TENENBAUM. Thank you, Senator Udall. I completely share your concerns. And I want to provide you and the rest of the members of this subcommittee with some specifics on what we are going to do on this issue going forward.

First of all, in keeping with this mission of protecting consumers from unreasonable risk of serious injury or death from consumer products, including sports equipment such as football helmets, CPSC is committed to working within the standards development community to improve helmet safety standards and testing. More specifically, I felt that it was vital for the CPSC staff to establish contact with the personnel of NOCSAE, the standards-setting body. And we've already made contact with them, and we will continue working with them.

So, based on this initial outreach, the CPSC technical staff will be joining NOCSAE's standards development process in January in order to monitor and help accelerate their efforts to update the appropriate standards. So, we have already started that.

In addition, we continue to consider other avenues to augment this effort. I will use the bully pulpit as Chairman of the Consumer Product Safety Commission, and we will do all that we can to make sure that the standards-making organization is looking at all the best engineering and science.

Every man in my family played football. I still have pictures of my father, in high school and college, wearing his leather football helmet. And we are great football fans. We're looking forward to University of South Carolina playing Auburn for the SEC Championship on Saturday.

But, I'm very concerned, as you are, about the safety of people and the number of concussions. I've followed the news stories about how many people are hurt, and particularly high school students who are just learning how to tackle and can get hurt more seriously. So, we are with you on this and want you to know that we will keep you updated periodically on our progress.

Senator UDALL. Thank you very much. And I went over, a little bit, in my time——

Ms. TENENBAUM. I did, too.

Senator UDALL.—so, I appreciate the courtesies from the Chairman.

But, I really appreciate you moving ahead aggressively, and doing what you've done already, and really look forward to working with you and all of the people, out there across the country, that I think have a great concern about these serious safety issues.

Thank you. Thank you very much.

Ms. TENENBAUM. Thank you.

Senator PRYOR. Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much.

Thank you, to both of you, for your service.

I just remember, back in the early days, when I got here, which is not that long ago, and the issues, as I know Chairman Pryor remembers, with the CPSC, and our frustrations with a lot of the toys that were coming in from China. We had everything from the Aquadots, that were making kids go into a coma, to the little charm that was swallowed by a little boy in Minneapolis; a 4-year-old boy, whose mom had gotten a pair of tennis shoes, swallows the charm and dies. And when they tested the charm, it was 99 percent lead. That kid didn't ask for that charm. The mom didn't ask for that charm. It was given free with a pair of tennis shoes.

And so, we realized, at that point, that we need to update our statutes. And I think, at the same time, with legislation as detailed and sweeping as the CPSIA, it should come as no surprise that certain clarifications and adjustments need to be made, especially as many small manufacturers, retailers, secondhand stores, as well as ATV/bicycle enthusiasts, have been trying to comply with the law, and that there are issues that need to be handled in a pragmatic way.

I know that the Commission granted a one-year stay of enforcement of the testing requirements, and a two-year stay of enforcement for the lead-content limits on youth-model ATVs, snowmobiles, and motorcycles. And so, that is where some of my questions are.

I guess the first one would just be a general question for you, Chairman Tenenbaum. How would you compare the safety of toys today versus in 2007, before the bill was passed? And what kind of information do you think parents should now have available as they go into the holiday season?

Ms. TENENBAUM. Well, thank you, Senator Klobuchar.

We have worked very hard to impress upon manufacturers that they need to get lead out of children's products. And we are seeing

the number of recalls decline; we've seen the number of recall products with lead decline. And that is why we think that given the resources and the renewed vigor that you've provided in the CPSIA, you're going to see even more improvements over time.

I'll focus on just your question and not the issue of lead content. In my earlier statement, I said consumers are safer. One, we have third-party testing. It is onerous for people to have to third-party test. But, you have products coming in from China; 80 percent of all the toys that we sell in the United States are manufactured in China. I have toured factories in China, with American brand names—and they said, “We need the third-party testing because we have a complex supply chain, and it protects us and removes our risk.”

Two, we now have tracking labels. We didn't have a one-size-fits-all approach. We took into account small manufacturers. But, tracking labels will help a consumer, a parent, know where that product was manufactured, if there are problems with them.

We also have worked very hard with small businesses, we've provided seminars, we've had outreach. I have an open-door policy. The first year of my tenure, I had meeting after meeting with all kinds of industry to hear their concerns.

Senator KLOBUCHAR. You know, and—could I just follow up on that a bit? Because, again, I appreciate the work that has been done is—there were a lot of businesses involved in getting this law done, including the ATV industry, which is major in my state. And they actually, as Chairman Pryor mentioned, were very concerned about some of the imports that were coming in from other countries that didn't meet our safety standards. But, what they didn't expect, because of some provisions added at the last minute, that this bill was going to cover, like, thinking kids were going to, like, suck on brake pedals or something. So, I just want to get to some of those concerns—

Ms. TENENBAUM. OK.

Senator KLOBUCHAR.—as well—as you know, I was supportive of this bill, in general. But, I'll start—maybe I'll start with some of the ATV issues. And I do appreciate the stay, with regard to enforcing the CPSIA, against ATVs built for the youth market, until this April. But, what has happened now is, four out of eight major manufacturers have, nonetheless, removed themselves from the youth market. And maybe some people think that's good, but the problem is that I'm afraid that kids are going to ride adult ATVs now. And even the CPSC's own studies show that 90 percent of ATV-related injuries to children occur while riding the larger ATVs.

And so, what do you think we can do to get a permanent solution, here? I know the electronics industry got itself exempted out of this. ATV was supportive of this bill, because of the import issue, and it's ironic, indeed, that there isn't some way to resolve this. And do you think we need legislation? Or what do you think we need to do to fix this?

Ms. TENENBAUM. Well, on a temporary basis, we've asked the ATV industry to provide us with information, because the stay for testing does lift in May for ATVs and bicycles. And we asked them to provide us information on how they intend to comply. If these

manufacturers believe they're not going to be able to comply with the requirements, then they can submit a petition to the Commission asking us to extend the stay. But in meeting several times with the ATV industry, they need a permanent solution.

And so, what—when we all work together—and Commissioner Northup and I disagree on this approach, on a functional-purpose exemption. Under the Federal Hazardous Substance Act, we had a functional purpose exemption. So, if you came with a chemistry set, you had to have types of chemicals in the set in order to make it a functional purpose. So, you were given an exemption by the CPSC, under the FHSA.

We want a functional-purpose exemption. Instead of just wholesale gutting the CPSIA, let's do some surgery on it. Under the functional-purpose exemption, if you came in with an ATV and said, "Look, we need lead in this machine to make it stronger. Children are not going to mouth or swallow any of these components. And it's not going to pose a risk to the health of anyone who rides it, in terms of lead exposure." We could give you an exemption, a blanket exemption for the whole industry, a blanket exemption for bicycles. However, we do not want—to make it more complicated—and Commissioner Northup has pointed this out—you don't need regulations on this. If we have to write rules to have a functional purpose, it will bog us down, and we'll have to go through all this extensive rulemaking.

Just let us give the exemption. We don't have to make it overly burdensome. We don't want people to have to spend thousands of dollars coming up with this petition and proving to us that it's too costly to have something else in the market. Just file the petition, we'll look at it, we'll make a determination.

And that's how we thought we could get ATVs and bicycles and products that are not a high risk out of the lead requirements. But, if you make us do the rulemaking and make it overly burdensome, it's going to be too expensive for industry to comply with the CPSIA.

Senator KLOBUCHAR. OK.

I know Ms. Northup wants to respond. And were we going to have a second round here? Because I have——

Senator PRYOR. I wasn't going to——

Senator KLOBUCHAR. OK.

Senator PRYOR.—but why don't we let her respond——

Senator KLOBUCHAR. OK. All right. Northup.

Ms. NORTHUP. Let me say that I think our goal is the same here, some sort of realistic—allowing the lead content to be whatever it is that's necessary to hold the ATV or the bike or whatever together. But functional- purposes, as it has been proposed, any proposal I have seen for it, has said, "if there is another—no alternative material that'll provide this same thing, if there's no harm to the children."

Well, first of all, I'd just say, if there's no harm to the child, why would there be any other reason anyway to outlaw this screw, nut, bolt, whatever. But, it means that big industries, like ATV—and I respect how important it is to you, particularly—they can summon the money and the metallurgical studies to show that there's nothing that meets that standard, or whatever. But, small businesses

or businesses like—that make school science kits, they don't have the number of products and the price range in order to spread out the cost of a petition, and especially for toys or for science kits that may evolve.

You know, the ATV may get an exemption across the industry, but, so many other companies, this would be far too complicated, far too expensive for them to file a petition, to wait until we can act on it. The petitions we've acted on so far have taken months, and we've turned every one of them down.

So, I would just say, there are people that believe you should never give an exemption, if there is any possibility you don't have to, regardless of risk and—because of the precedent-setting. And you're going to continue that debate if it's just a functional-purpose exemption.

Senator KLOBUCHAR. And I know the Chairman wants to respond, but I am heartened somewhat; you both have the same intent to try—

Ms. TENENBAUM. We do.

Senator KLOBUCHAR.—to be pragmatic about how to respond to this. OK.

Ms. TENENBAUM. We do. And Commissioner Northup gets into, "If it's not a risk, then just exempt it." You can also exempt it. If you want to exempt ATVs out of a piece of legislation—or bicycles—you have the power to do that. If you ask the Commission to go back and look at risk of every product to determine whether or not there's any lead absorbed and whether it changes the blood lead level, we will be back where we were before the CPSIA.

You decided, in Congress, that you would go with a content standard—300 parts per million, it's going to be reduced to 100 parts per million. You did not do a solubility standard, because there were so many variables and there are no known safe levels of lead. An article in this morning's *Washington Post*, was about the lead pipes here in Washington D.C. There is no blood lead level that is considerable safe for children. And so, that's where we are. We go back and forth about, "Well, this isn't a risk." Well, if it's not a risk, and manufacturers have to have it in their product, then we will give them a functional-purpose exemption. We don't have to make it expensive or complicated.

But, you chose the total lead limit instead of solubility, for several reasons. One, bioavailability, which Commissioner Northup talked about, on how much lead you can get by rubbing a bicycle depends on the child. Every child is different. If you're a young child, you're going to absorb more lead. If you're a—

Senator KLOBUCHAR. OK.

Ms. TENENBAUM.—malnourished child—I'm sorry, I'm using your time.

Senator KLOBUCHAR. No—

Ms. TENENBAUM. It also depends on the product. Vinyl degrades with age and produces more lead, and also the viability tests are diverse. And so, there—

Senator KLOBUCHAR. OK. Now—

Ms. TENENBAUM.—were so many variables.

Senator KLOBUCHAR. But—

Ms. TENENBAUM. And that's why you stopped at 300—

Senator KLOBUCHAR. So—right—so, is there some degree of, until we solve this, which approach we want to take here to address these pragmatic concerns? And is another extension a possibility, then? And that's what we'll—

Ms. TENENBAUM. It is a number—a strong possibility—

Senator KLOBUCHAR. OK.

Ms. TENENBAUM.—if we can start this conversation in Congress about making these changes to the law.

Senator KLOBUCHAR. OK—

Ms. NORTHUP. Let me—

Ms. TENENBAUM. It is a strong

Senator KLOBUCHAR. OK—

Ms. TENENBAUM.—possibility.

Senator KLOBUCHAR. Why don't we—do you want to—what I'll do is put some questions in writing, so that we can continue this discussion, and maybe in my office as well, because I know we have another panel waiting. And then I also had some follow-ups, which I can do in writing, of the—Dan Marshall, from my state, is the owner of Pea Pods Natural Toys and Baby Care store, in Saint Paul. They obviously have some concerns with the third-party testing and how that applies to small businesses. And I will raise those in writing, as well.

Senator KLOBUCHAR. And then, the last thing that I wanted to follow up on was, again, to thank the Commission for its work on the Graeme Baker Pool and Spa Safety Act, something I worked very hard on, Senator Pryor worked hard on.

And I know that we're seeing some good compliance rates with the Pool Safety Act, and I wanted to thank you for that, both of you and the Commission, and the work that's going on. It's a very important thing. We had a little girl die in Minnesota, and that bill has meant a lot to the people of our state and that family.

So, thank you.

Ms. TENENBAUM. Thank you.

Senator PRYOR. Thank you, Senator Klobuchar. Thank you for being here.

And our time for this panel is up, so what we will do is, we will leave the record open, because I have some follow-up questions as well, and I know Senator Klobuchar does, and, I want to say, Senator Wicker and a few others that couldn't be here because there's a lot going on today in the Senate. They have the Armed Services Committee hearing, but lots of other things, as well.

So, we'll leave the record open, and we will send you written questions and—how long will we leave it open—we'll leave it open for 2 weeks, but we'd love to get those responses as quickly as possible.

Senator PRYOR. And, as we alluded to before, there'll probably be some other dialogue that happens here, not just in the next couple of weeks, but over the next few months, I'm sure.

But, anyway, thank you all for being here.

I'm going to go ahead and introduce our second panel, but—

Ms. TENENBAUM. Thank you, Senator—

Senator PRYOR.—thank you both—

Ms. NORTHUP. Thank you—

Senator PRYOR.—very much—

Ms. TENENBAUM.—Mr. Chairman.

Senator PRYOR.—for your time and your service.

The second panel, I'm going to go ahead and just read their names and give a super-short introduction for them.

Like the first panel, they all come with great credentials and a great background. But, what I will do, as the staff is rearranging here, and as the folks are coming and going here—

Our first panelist will be Ms. Rachel Weintraub. She's Director of Product Safety and Senior Counsel at the Consumer Federation of America. Second is Mr. Steve Lamar. He's Executive Vice President of American Apparel and Footwear Association. Third is Dr. Garry Gardner, American Academy of Pediatrics Chair, Committee on Injury Violence and Poison Prevention. And, fourth, Ms. Jill Chuckas, Board Member, Handmade Toy Alliance and, I believe, the Owner of Crafty Baby, LLC.

So, what I'd like to do is just do a 5-minute introduction for each one of you all. Then we'll have questions.

So, Ms. Weintraub, you want to lead off, here?

Thank you.

**STATEMENT OF RACHEL WEINTRAUB,
DIRECTOR OF PRODUCT SAFETY AND SENIOR COUNSEL,
CONSUMER FEDERATION OF AMERICA**

Ms. WEINTRAUB. OK. Thank you.

Thank you, Chairman Pryor.

I'm Rachel Weintraub, Director of Product Safety and Senior Counsel with Consumer Federation of America. CFA is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interests through research, advocacy, and education.

I offer this testimony on behalf of CFA as well as Consumers Union, Kids in Danger, and the U.S. Public Interest Research Group.

Thank you very much for inviting me to testify before you today.

Today is the first day of Chanukah, Christmas is just 23 days away, and the holiday buying season has officially begun. Our country's tradition of gift-giving provides a useful perspective through which to comment on the Consumer Product Safety Improvement Act in particular, and the Consumer Product Safety Commission in general.

While consumers should think about how the child interacts with the product, if there are other children in the house, or whether the product has been previously recalled, before a product is purchased, there are some issues that no amount of planning or thought can detect. It is this realm of hidden hazards that the CPSIA and the CPSC have sought to detect and to prevent.

Before passage of the CPSIA, Congress undertook a year-long process to consider the implications of this Act, and the leadership of this subcommittee was an essential and important part of that process. The CPSIA's passage followed a period of a record number of recalls of hazardous products that injured, sickened, or killed vulnerable consumers and sought to repair a weakened oversight agency that failed in its meager efforts to protect public health and safety.

In response, Congress passed the CPSIA, which makes consumer products safer by banning lead and phthalates in toys, creating a publicly accessible consumer incident database, giving the CPSC more resources, increasing civil penalties, and requiring that toys and infant products be tested for safety to strong standards before they are sold and in our children's hands. This proactive approach will benefit the public as well as manufacturers by avoiding costly recalls.

There have been numerous successes in implementing the CPSIA. The mandatory crib standard, close to being finalized, that's required by Section 104, is an important example. We applaud the CPSC for prioritizing the safety of infant sleep environments, in light of the deaths of many children due to poorly designed cribs, bassinets, and cradles, which have led to the recall of more than 7 million cribs over the past 2 years. Only since passage of the CPSA—CPSIA—has an effort been made to strengthen crib standards.

Another success of the CPSIA is last week's passage of the final rule implementing the Consumer Product Safety Information Database. As a result of the CPSC staff's leadership and commitment, consumers will have access to lifesaving information. And the agency will more nimbly be able to identify and act upon safety hazards. The final rule is consistent with Congressional intent, responsive to the public-interest need for disclosure, and protective of a manufacturer's effort to protect their brand and confidential business information.

When consumers purchase toys for children online this year, the same choking-hazard warnings that appear on toy packaging will also appear online. That's an important consumer protection, considering today's shopping trends. The CPSIA requires that infant-durable products, such as cribs, strollers, and highchairs, include a product registration card in their packaging and provide an opportunity to register online. This will give manufacturers information necessary to directly communicate with consumers, the consumers who bought the product, in the event of a recall or other product safety. And this will greatly increase recall effectiveness.

Since passage of the CPSIA there have been challenges: a CPSC that initially moved slowly and gave out confusing information, an economic downturn that has affected businesses, the realization that lead and other heavy metals, such as cadmium, are more pervasive in consumer products than had been expected, as well as concern about the laws implementation consistently raised by manufacturers, small businesses, crafters, and thrift stores.

CPSC has been managing these challenges. They've held numerous public meetings and hearings. CPSC has provided clear information to stakeholders, through numerous publications. In addition, CPSC is establishing a new Office of Education Global Outreach and Small Business Ombudsman to carryout education/outreach activities to stakeholders. The CPSC also issued an interim enforcement policy, related to component testing, that should be finalized soon.

But, some efforts in response to these challenges go too far and would open a series of gaping loopholes in the CPSIA that would allow more lead into a host of children's products.

First, some have argued, or some will argue, that the CPSIA's scope should be limited to children under 6, from what it—it's now 12 years and younger. The reality is that children of younger ages play with their older siblings' toys all the time, and the voluntary standard goes up to 14. Many companies are already applying with those voluntary safety standards.

Second, some have proposed that risk analysis be applied for regulating lead in products. Requiring a piecemeal approach for lead, which is a known toxin, would be wasteful of taxpayer money and government resources. It would reverse the presumption for safety of products and allow all products to be sold and be exempt from testing for lead unless CPSC finds otherwise. This would be a return to the state of the law before CPSIA was passed. CPSC would not act until a child had been harmed by a lead-laden product. This would result in an unreasonable risk to children.

Cadmium has been another challenge. And there is now a voluntary standard that is moving, that hopefully will be proactive. And if that is not proactive enough, CPSC should move on a mandatory standard for cadmium.

We thank you, Chairman Pryor, for your important leadership on product safety issues. We look forward to working together to protect the public from harms posed by hazardous products. And I wish everyone a happy and safe holiday season.

[The prepared statement of Ms. Weintraub follows:]

PREPARED STATEMENT OF RACHEL WEINTRAUB, DIRECTOR OF PRODUCT SAFETY AND SENIOR COUNSEL, CONSUMER FEDERATION OF AMERICA

Chairman Pryor and members of the Subcommittee on Consumer Protection, Product Safety and Insurance, I am Rachel Weintraub, Director of Product Safety and Senior Counsel at Consumer Federation of America (CFA). CFA is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy and education. I offer this testimony on behalf of Consumer Federation of America as well as Consumers Union, Kids in Danger, and the U.S. Public Interest Research Group. Thank you for inviting me to testify before you today.

Today is the first day of Chanukah, Christmas is just 23 days away, and the holiday buying season officially began last Friday. The holiday season, with our country's tradition of gift giving, provides a useful perspective through which to observe and comment on the Consumer Product Safety Improvement Act of 2008 (CPSIA) in particular and the Consumer Product Safety Commission in general. Whenever we make a purchase for our family and friends, most people assume that the product they are considering is safe. While purchasers think about what the person would like, what they want or need or what they requested, an underlying assumption is that the product we are choosing will not cause harm. While consumers do need to think about how the child interacts with the product, if there are other children in the house who may play with the product, or whether the product has been previously recalled, there are some issues that no amount of thought or planning can detect. It is the realm of hidden hazards that the CPSIA and CPSC have sought to detect and prevent.

The bipartisan Consumer Product Safety Improvement Act passed overwhelmingly in the House on July 30, 2008 by a vote of 424–1, in the Senate on July 31, 2008, by a vote of 89–3 and was signed into law by President Bush on August 14, 2008. Before this law passed, Congress undertook a year-long deliberative process to consider the implications of this act: there were approximately 15 hearings and markups in the House and Senate covering issues and products related to the CPSIA, and once each chamber passed its version of the bill, there was a conference in regular order between both Houses of Congress. The leadership of this subcommittee was significant and much needed as this law was moving through Congress. This law institutes the most significant improvements to the Consumer Product Safety Commission (CPSC) since the agency was established in the 1970s.

CPSIA's Significance, New Requirements and Implementation

The CPSIA's passage followed a period of a record number of recalls of hazardous products from the market that injured, sickened, or killed vulnerable consumers. The bill's passage was also in response to a weakened Federal oversight agency that failed in its meager efforts to protect the public's health and safety.

Before the CPSIA was passed, CPSC's past as well as its future was bleak. In 1972, when CPSC was created, the agency was appropriated \$34.7 million and 786 full time employees (FTEs). Before the CPSIA passed, the agency's budget had not kept up with inflation, had not kept up with its deteriorating infrastructure, had not kept up with increasing data collection needs, had not kept up with the fast-paced changes occurring in consumer product development, and had not kept pace with the vast increase in the number of different types of consumer products on the market. CPSC's staff had suffered severe and repeated cuts during the last two decades, falling from a high of 978 employees in 1980 to just 401 in 2007—a loss of almost 60 percent.

For example, CPSC's 2008 Performance Budget document painted a grim picture of the CPSC's future work. The budget document was full of statements such as, "while the CPSC has thus far been successful at facing these new and evolving challenges with diminishing resources, the 2008 funding level will challenge the Commission's ability to maintain its existing level of standards development, enforcement, public information, and international activities."¹ The 2008 Performance Budget document was replete with staffing cuts, limitations to programmatic goals and the absence of previous goals and projects. CPSC's efforts to reduce product hazards to children and families were hindered by the forced reductions in FTEs.

In response to this dismal picture, Congress infused the CPSC with new authority and more resources. It has been over 2 years since the CPSIA was passed. This relatively new law will make consumer products safer by requiring that toys and infant products be tested for safety before they are sold, and by banning lead and phthalates in toys (although implementation of the testing requirement has been twice delayed by the CPSC). The law also authorizes the first comprehensive publicly accessible consumer complaint database due to be launched next March; gives the CPSC the resources it needs to protect the public, such as enabling it to hire additional staff; increases civil penalties that the CPSC can assess against violators of consumer product safety laws; and protects whistleblowers who report product safety defects.

Many consumers believed that products were tested before they were sold—that some entity issued stamps of approval for products before they were sold in the store. However, that was never true. Before passage of the CPSIA, the CPSC for the most part had authority only over products after they were sold. If a problem was identified as posing a risk of harm to consumers, the CPSC could recall the product, but that was only *after* the hazardous product was already in consumers' homes and in their children's hands. The CPSIA significantly changes the reactive nature of the CPSC by requiring that children's products subject to mandatory standards be tested for safety before they are sold. A proactive safety system should benefit the public as well as manufacturers by avoiding costly recalls.

CPSC and CPSIA Successes

Mandatory Crib Standard

While there have been challenges there have also been successes in implementing the CPSIA. One of the most notable examples is the mandatory crib standard that is required by section 104 of the CPSIA. The CPSC is close to finalizing the final rule for cribs. We applaud the CPSC for prioritizing the safety of infant sleep environments in light of the deaths of many children due to poorly designed cribs, bassinets, and play yards. Pervasive design flaws have led to the recall of more than 7 million cribs over the past 2 years. It was essential that the CPSC place safe sleep environments at the top of their mandatory standards-setting list as part of that initiative.

Recalls and corrective actions for cribs have been issued for non-compliance with safety standards; strangulation hazards; risk of head entrapment when side rails, spindles, and slats in side rails become loose; risk of suffocation; choking hazards;

¹&& U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page vii. On the web at <http://www.cpsc.gov/CPSC/PUBS/REPORTS/2008plan.pdf>.

risk of falling; and danger of laceration when fingers become trapped in folding drop gates.²

While the current voluntary crib standards ban the drop-side design in new cribs, only since passage of the CPSIA has there been an effort made to strengthen the voluntary and mandatory standards and require testing and verification of new cribs. The final CPSC crib standard incorporates many provisions that consumer advocates have been supporting for years that replicate the real world use of cribs, such as durability tests, mattress support tests, and tests for the effectiveness of hardware. The resulting proposed CPSC standard is a strong one and is a successful consequence of the CPSIA. In addition, Chairman Tenenbaum and her staff have been successfully reaching out to consumers through the Safe Sleep Campaign and have made it clear to all stakeholders that creating safe cribs and sleep environments is an imperative.

Section 104(c) of the CPSIA seeks to address hazards posed by older model cribs by removing them from the market. This section applies to cribs sold new and used, cribs used in child care facilities, and cribs used in public accommodations such as hotels and motels. The application of this provision means that older cribs that pose significant risks to children will be taken out of the stream of commerce. This provision is based upon laws already in existence in numerous states including: Arizona, Arkansas, California, Colorado, Illinois, Louisiana, Michigan, Minnesota, Oregon, Pennsylvania, Vermont and Washington. This provision extends the protections previously offered in just these states to the entire nation to ensure that children sleep in cribs that meet the most recent and most protective crib safety standards.

We support the CPSC's current language in its proposed crib rule³ regarding a six-month effective date as it applies to manufacturers. The customary 6 months gives manufacturers adequate time to comply with the new crib standards. In addition, we will support an additional 6-month compliance period for child care facilities, allowing them to phase in replacement of non-compliant cribs over the course of 1 year following the publication of the final rule.

Database

Another success of the CPSIA is last week's passage of the final rule implementing the consumer product safety information database. CPSC is required by Section 212 of the CPSIA to establish the database. As a result of the CPSC staff's leadership and commitment to the effectiveness of the database, consumers will have access to lifesaving information and the agency will more nimbly be able to identify and act upon safety hazards. CPSC staff worked hard to formulate CPSC's final rule in a manner that is consistent with Congress' intent, responsive to the public interest need for disclosure, and protective of a manufacturer's effort to protect their brand and confidential business information. The database includes more checks on the information and more opportunities for a manufacturer to comment than other similar databases.

Consumers have been in the dark about the dangers of products regulated by CPSC. CPSC currently collects incident data from consumers in a manner similar to how it will be collected as part of the new database. However, the difference is that now, when consumers go to CPSC's website to look for information, it is not available. All that they can usually find relates to a previous recall. If the Commission has been alerted to the dangers of a product but has not conducted a recall, the product's hazard may never be known to the public.

The database will help change that. Public access to information is vital to safety. Simply allowing consumers access to the safety record of products will increase safety and encourage the speedy removal or redesign of unsafe products. Making it simple for consumers to report into a single database the problems they encounter with products will also help the Commission to do its job of protecting the public from unsafe products more efficiently, which can help save Commission resources.

Online Toy Hazard Warnings

When consumers purchase toys for children online this year, because of the CPSIA, the same choking hazard warnings that appear on the toy packaging will also appear online. This is an important consumer protection considering today's shopping trends. For years, consumers who purchased toys online were at a safety disadvantage because they did not receive all the information they would have received, had they made the purchase in a store. This concern has been solved by the CPSIA.

² Kids in Danger, <http://www.kidsindanger.org/prodhazards/recalls/cribs.asp>.

³ Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs; Notice of Proposed Rulemaking; Proposed Rule, *Federal Register* Vol. 75, No. 141, July 23, 2010.

Product Registration

The CPSIA requires that infant durable products, such as cribs, strollers and high chairs, include a product registration card in their packaging and provide an opportunity to register online. This will give manufacturers information necessary to directly contact consumers in the event of a recall or other product safety issue.

The requirements for the product registration cards and an online registration program are contained in Section 104 of the CPSIA, which incorporates the Danny Keysar Child Safety Notification Act. Danny, whose parents founded Kids In Danger, died in 1998 when the portable crib he slept in at a child care center collapsed and strangled him. The crib had been recalled 5 years earlier, but no one at the child care center, including the mom who donated the crib, had heard of the recall. Too many consumers never hear about a recall of a product that they have in their home. Registering products is an important step that will increase the number of consumers who hear about a recall.

Mandatory Toy Standards

Despite the fact that many conformity assessment bodies have not yet received accreditation to conduct full-scale testing, with the expectation of tighter enforcement down the road, many manufacturers are already adopting robust testing procedures and the safety of toys has been enhanced. The CPSC continues to work on ways to help small manufacturers who have raised concerns about the costs associated with such testing ensure that their toys are just as safe.

Reviewing Past Data

CPSC has also been reviewing old records and taking long-overdue action. Earlier this year, CPSC announced the recall of two million Graco strollers: the Quattro™ and MetroLite™ because of entrapment and strangulation risks. CPSC and Graco had “received four reports of infant strangulations that occurred in these strollers between 2003 and 2005. In addition, CPSC was aware of five reports of infants becoming entrapped, resulting in cuts and bruises, and one report of an infant having difficulty breathing.”⁴ While these strollers should have been recalled years ago, we applaud CPSC for taking the right action now to remove these potentially hazardous products from the market.

CPSC and CPSIA Challenges

Since passage of the CPSIA, there have been many challenges to implementation: a CPSC that initially moved slowly and gave out confusing information; an economic downturn that has affected businesses; the realization that lead and other heavy metals such as cadmium are more pervasive in consumer products than had been expected; and concerns about the law’s implementation consistently raised by manufacturers, small businesses, crafters and thrift stores.

The current CPSC has been managing these challenges. The CPSC has held numerous public meetings and hearings about issues such as the consumer product safety information database and product testing. CPSC has sought to provide clear information to various stakeholders through publications such as the Guide to the CPSIA for Small Businesses, Resellers, Crafters and Charities and the Handbook for Resale Stores and Product Resellers. In addition, CPSC is establishing a new Office of Education, Global Outreach, and Small Business Ombudsman to “coordinate and carry out education and outreach activities to domestic and international stakeholders, including manufacturers, retailers, resellers, small businesses, foreign governments, and consumers.”⁵

The CPSC also issued an Interim Enforcement Policy related to component testing for lead content and lead in paint last December and is working on finalizing the “component part” rule as part of the Testing and Certification Rule that should be finalized next year. The components part rule would especially benefit small manufacturers by allowing the use of certified component parts. In Chairman Tenenbaum’s statement on the Proposed Rules for Testing and Labeling Pertaining to Product Certification and Component Part Testing, she stated that “the Commission is unanimous in its desire to see this rule provide significant relief from testing requirements for both small and large manufacturers while simultaneously moving safety upstream in the manufacturing process. By allowing testing to be performed

⁴U.S. Consumer Product Safety Commission Press Release, “Graco Recalls Quattro™ and MetroLite™ Strollers Due to Risk of Entrapment and Strangulation, Four Infant Strangulation Deaths Reported,” October 20, 2010, available on the web at <http://www.cpsc.gov/cpscpub/prerel/prhtml11/11015.html>.

⁵CPSC Press Release, “CPSC Creates New Office of Education, Global Outreach, and Small Business Ombudsman,” September 23, 2010, available on the web at <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10352.html>.

by component part suppliers and designating component part certificates as certificates issued under section 14 of the CPSA, the Commission has provided great incentive for manufacturers to start utilizing component part testing. At the same time, the Commission has established safeguards such as requiring all component parts to be traceable to their original manufacturers and expressly requiring that manufacturers exercise due care when relying on component part testing certificates.”⁶

The CPSC has been responding to the concerns raised by stakeholders.

Responses to CPSIA Challenges

Some responses to these challenges, however, go much too far and include two proposals that if implemented, would serve to considerably weaken public health. They would open a series of gaping loopholes in the CPSIA that would allow more lead into a host of toys and other products meant for children. We reject these efforts to weaken the CPSIA.

Protections Must Remain for Children 12 and Younger

First, some have argued that the CPSIA should not apply to children’s products for children 12 years and younger but rather should cover only those products for children 6 and younger. This approach was rejected by Congress when it passed the CPSIA. Congress embraced the belief that there is a “shared toy box” in many families’ homes. We agree with this view, as it reflects the reality of what we know to be true in many homes across the United States. Children of younger ages play with the toys of their older siblings. Younger children mouth their older siblings’ toys with frequency. Further, the voluntary standard for toys—ASTM F 963—includes an even broader scope to cover toys intended for children 14 and younger. This means that many companies are already complying with voluntary safety standards that encompass toys intended for children 14 and younger. Thus, the reality that children’s toys and products are often shared by children within a family, plus the fact that many within the industry are already complying with a higher age standard, requires the scope of the CPSIA to remain as it is.

No Known Safe Level of Lead

Second, some have proposed that a risk analysis be applied for regulating lead in products. Requiring the CPSC to conduct risk analysis for lead is not acceptable. In this era of criticism over “government waste,” requiring a piecemeal risk analysis for lead, a known toxin, would be a wasteful and inefficient use of taxpayer money and government resources.

Significantly, a risk analysis would reverse the presumption for the safety of products and allow all products to be sold and be exempt from testing for lead unless the CPSC finds otherwise. This would mean a return to the state of the law before the CPSIA was passed—*i.e.*, CPSC wouldn’t act until a child had been harmed by a lead-laden product. As we witnessed in the years before the CPSIA, the record number of lead-laden products that were recalled from the market proves that this approach resulted in an unreasonable risk of injury to consumers. It will amount to a waste of Commission resources, has been rejected by Congress previously as not being sufficiently protective of public health, and far exceeds the flexibility that the CPSC requested to regulate lead.

The American public demands that children’s products not pose risks for the children who will play with or sleep in those products. Lead is a well-documented neurotoxin that has a wide range of effects on a child’s development, including delayed growth and permanent brain damage. There is no known safe level of exposure. As a society, we have spent years trying to reduce lead levels in our air, soil and homes. We must continue to work to reduce lead in other products where it is not necessary. While some might argue that we should seek to remove lead from all household products, Congress in the CPSIA focused on the products most likely to be in contact with children. Nearly all toys and infant durable products do not require lead, should not contain lead and can be made effectively without lead. In the rare instance that children’s products require lead, the CPSIA provides for a targeted exemption for functional purpose. This exemption is drafted tightly to ensure that children remain protected from harms of lead exposure. We would have grave concerns if any of the limiting factors were removed.

⁶Statement of Chairman Inez M. Tenenbaum on the Proposed Rules for Testing and Labeling Pertaining to Product Certification and Component Part Testing, May 5, 2010, available on the web at <http://www.cpsc.gov/PR/tenenbaum05052010.pdf>.

Cadmium

Cadmium has been recently identified in numerous children's products beginning in January 2010. CPSC has issued five recalls and one warning about six products that contained high levels of cadmium.⁷ Five of these recalls/warnings involved children's jewelry while one involved a drinking glass.

According to the Agency for Toxic Substances and Disease Registry, cadmium affects the following organ systems: Cardiovascular (Heart and Blood Vessels), Developmental (effects during periods when organs are developing), Gastrointestinal (Digestive), Neurological (Nervous System), Renal (Urinary System or Kidneys), Reproductive (Producing Children), and Respiratory (From the Nose to the Lungs).⁸

Toxic materials like cadmium should not be present in children's products and children should not be exposed to dangerous heavy metals when they play with toys, drink from a glass or engage in dress up play.

Earlier this year, CPSC issued a guidance report on cadmium and urged ASTM to issue a voluntary standard for cadmium beyond paints and surface coating. By relying on ASTM to develop appropriate standards to address cadmium hazards in toys and children's jewelry, it allows many stakeholders to participate in the standards-development process.

CPSC should be involved in the voluntary standard-setting process and should issue a mandatory standard limiting the cadmium content in children's products if the voluntary standard fails to be adequately protective of children's health. A mandatory standard enables CPSC to use enforcement tools to ensure compliance with the standard. Finally, mandatory standards provide clear rules for industry to follow as they seek to comply with CPSC rules.

The scope of CPSC's efforts to ban the use of cadmium should be focused on children's products as defined in the CPSIA. Initially, as CPSC begins to limit cadmium in consumer products, CPSC should focus on product categories that are known to be of risk to children: children's jewelry, children's dinnerware, and children's toys.

In addition, the ban on cadmium should be based upon a total cadmium level (not solubility), which, similar to the lead regulations, offers clarity and consistency to manufacturers, CPSC, and testing bodies and offers public health protections to consumers.

CPSC should examine efforts in states such as California, Washington, Connecticut, Illinois, and Minnesota that have restricted cadmium in children's jewelry. While these laws tend to focus on solubility standards rather than total cadmium content and also focus on children's jewelry rather than children's products, they serve as a useful guide. Since laws have passed in five states and with bills pending in at least five other states, it is clear that consumers are asking for mandatory rules to limit cadmium in children's products.

Finally, we urge CPSC to utilize the work it is undertaking to ban cadmium to address bans of other toxic heavy metals in children's products. We hope CPSC efforts effectively stem the tide of substituting one heavy metal for another and curb the use of heavy metals in the manufacturing of children's products.

Congress Must Support CPSC's Mission

CPSC plays an incredibly crucial role in ensuring that consumer products are safe and is responsible for implementing the critical protections of the CPSIA. It is imperative that the agency be appropriately funded at all times to do its job properly. Diminishing CPSC's budget or its authority at this time would hamper the agency from carrying out its primary mission to protect consumers from unreasonable risk of injury caused by hazardous products.

We thank Chairman Pryor for the important leadership role he has played on product safety issues and we look forward to continuing to work together to protect the public from harms posed by hazardous products.

I wish everyone a happy and safe holiday season.

Senator PRYOR. Thank you.
Mr. Lamar.

⁷ See, CPSC Press Releases announcing recalls of products with excessive levels of cadmium: <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10162.html>; <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10297.html>; <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10287.html>; <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10227.html>; <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10257.html>; and <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10127.html>.

⁸ Agency for Toxic Substances and Disease Registry, toxic substances—cadmium, available on the web at <http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=15>.

**STATEMENT OF STEPHEN LAMAR, EXECUTIVE VICE
PRESIDENT, AMERICAN APPAREL & FOOTWEAR ASSOCIATION**

Mr. LAMAR. Hi. Good morning.

My name is Steve Lamar. I'm Executive Vice President of the American Apparel & Footwear Association. We're the national trade association of the apparel and footwear industry and its suppliers.

Thank you, Chairman Pryor, for providing us this opportunity to appear before you on this important topic.

At the outset, let me state our very strong support for a product safety regulatory system that ensures that only safe and compliant products are designed, produced, marketed, and sold. At AAFA, we take our role in product safety education and advocacy efforts seriously. We view this obligation as key to the success of the industry, not only because such an approach is the right thing to do, but because we're also consumers and parents and grandparents ourselves.

I'd like to focus my remarks on the Consumer Product Safety Improvement Act and offer several recommendations for the Subcommittee to consider in the weeks and months ahead.

The CPSIA was a dramatic overhaul to the nation's product safety regulatory regime. While this had a positive impact through increased funding and awareness, it has also led to many unintended consequences that have caused confusion, created compliance burdens, and adversely impacted the business community. Tight deadlines, rigid definitions, retroactively applied standards, requirements that do not reflect risk, and a one-size-fits-all approach are among the many problems that have made CPSIA implementation challenging.

AAFA, as with others in the regulated community, has actively worked the regulatory process to make sure the rules can be understood and implemented. We've had some success in working with the CPSC to use the limited regulatory flexibility that the CPSIA does permit to make some important determinations. In my written testimony, I detailed one such example—the determination that there is no lead in textiles—but, I also pointed out how the fix is still incomplete, and it came at considerable expense to prove what everybody already knew.

The more common experience is that relief is either denied or that the regulatory process proves too burdensome to achieve a truly commonsense result. The stays of enforcement on testing and certification have provided some relief. And we would strongly encourage that they be continued while the rules and a path forward are still being worked out. But, it is becoming clearer every day that Congress needs to step in and make some legislative fixes to address the many concerns that have been raised from all across the private sector. And, because the timetables mandated by the CPSIA are unforgiving, Congressional action is needed immediately.

A number of legislative fixes have been proposed over the past 2 years by stakeholders across the business community, by Members of Congress from both parties and both chambers, and even by commissioners and CPSC staff alike. They include changes to the lead and phthalate rules, the definition of "children's product,"

more flexible testing and certification provisions, stronger preemption to prevent proliferation of contradictory rules at the state level, and clearer mandates for the public database. I could go on. It's our hope that Congress can immediately begin work with all stakeholders to fully identify and implement these fixes.

With a nod toward Chanukah, which began last night, I would like to make eight recommendations for the Subcommittee to consider going forward:

Number one, ensure that all product safety decisions are based on risk and supported by data.

Number two, give the CPSC more flexibility to interpret the CPSIA.

Number three, ensure that new regulations do not contradict existing ones.

Number four, ensure prospective application of all rules.

Number five, establish deadlines that permit and encourage compliance.

Number six, publicize all pending regulatory developments.

Number seven, avoid one-size-fits-all approaches.

And, finally, number eight, remember that there is more to the CPSC than CPSIA.

The most effective product safety system we can have is one that recognizes that the regulated companies are active partners of the CPSC. But, if these companies are constantly subjected to burdensome, costly, and, in some cases, silly requirements, that partnership is severely strained and the public's interests are not served. Ultimately, product safety takes a blackeye.

Mr. Chairman, the CPSC and the regulated community have come a long way since Congress passed the CPSIA. Thanks to your leadership, we now have five commissioners and an agency that is more fully funded. The CPSIA was, indeed, a wake-up call for the agency and for many in the business community to tighten their own product safety regimes. But, the CPSIA also created extraordinary problems for companies who were already doing the right thing in ensuring product safety. In many cases, those problems came with little gain for public safety.

With an eye to maximizing public health and safety, it is our hope that, with a legislative amendment, continued Congressional oversight, and continued dialogue between the agency, industry and other product safety stakeholders, we can create a stable, predictable, risk-based regulatory environment.

Thank you again for providing us this opportunity to testify. I'm available to take any questions.

[The prepared statement of Mr. Lamar follows:]

PREPARED STATEMENT OF STEPHEN LAMAR, EXECUTIVE VICE PRESIDENT,
AMERICAN APPAREL & FOOTWEAR ASSOCIATION

Good morning.

My name is Steve Lamar and I'm Executive Vice President of American Apparel & Footwear Association (AAFA)—the national trade association of the apparel and footwear industry, and its suppliers. Thank you for providing us this opportunity to appear before you this morning on this important topic.

At the outset, let me state our very strong support for a product safety regulatory system that ensures that only safe and compliant products are designed, produced, marketed, and sold. At AAFA, we take our role in product safety education and advocacy efforts seriously. We view this obligation as key to the success of the indus-

try, not only because such an approach is the right thing to do, but because we are also consumers, parents, and grandparents ourselves. We believe very strongly that we should only wear safe and compliant clothes, shoes, and other products. At the end of my testimony I included additional information about AAFA and some of our product safety initiatives, including our extensive global education efforts.

Although product safety is a year-round job, it is appropriate to have this oversight hearing as we enter the holiday season. The focus on consumer spending during the holidays is a natural time to reflect on product safety and compliance. Furthermore, as Congress begins to think through its agenda for the next 2 years, this is a good opportunity to identify what changes can be made to ensure that our Nation's product safety regulatory system is operating effectively. As this is the first oversight Subcommittee hearing on the Consumer Safety Product Commission (CPSC) since passage of the Consumer Product Safety Improvement Act (CPSIA) in 2008—and with more than 2 years of industry experience with implementation of this important law—I'd like to focus my remarks on the CPSIA and offer several recommendations for the Subcommittee to consider in the weeks and months ahead.

The CPSIA was a dramatic overhaul of the Nation's product safety regulatory regime. Its passage put a spotlight on product safety concerns, propelling consumers, regulators and businesses to refocus on making product safety a top priority. Among other things, the legislation provided the CPSC—long an underfunded agency—with much-needed resources to carry out product safety enforcement and educational efforts. It mandated the CPSC to work with other agencies like Customs and Border Protection (CBP) to develop risk assessment methodologies to efficiently target and block potentially unsafe imports. It also ensured that all five CPSC leadership positions were filled—for the first time in years—in an effort to secure a renewed dialogue and healthy debate on how to effectively and efficiently approach and enforce safety regulations. Finally, new content and testing requirements have helped companies better understand the chemicals used in children's products and evaluate and improve their quality control processes to ensure that only safe products are sold. It goes without saying that industry, consumer advocacy groups, bloggers, the media, and various other stakeholders across the spectrum have become more engaged than ever in product safety.

Regrettably, the legislation also mandated a series of controversial changes to the Nation's product safety rules that have created endless confusion, extensive burdens, huge costs, job losses, and irreparable damage to the business community. In many cases, these adverse consequences have come without improvements in product safety or public health. Among other things, the law mandated very strict lead and phthalate content restrictions. It required certifications of compliance for all consumer products for all safety standards, mandating third-party testing for those standards involving children's products (defined as 12 and under). It created a public database of product safety incidents. It authorized enforcement by state attorneys general and created whistleblower provisions. While many of these provisions reflect good intentions, the language of the CPSIA makes many of them difficult, if not impossible, to implement and enforce. Tight deadlines, rigid definitions, retroactively applied standards, requirements that do not reflect risk, and a "one-size-fits-all approach" are all among the many problems that have made CPSIA implementation challenging.

AAFA, as with others in the regulated community, have actively worked the regulatory process to make sure the rules can be understood and implemented. We have had some success in working with the CPSC to use the limited regulatory flexibility that the CPSIA does permit to make some important determinations and offer some clarifying opinions. And while we commend the Commissioners and the staff who have worked tirelessly for more than 28 months to craft regulations that reflect "common sense," many problems either have not or cannot be fixed through the regulatory process. The surrogate for some of these fixes has come in the form of a series of stays of enforcement. And while these stays have provided welcome relief, and should remain in force, they cannot provide a long term solution.

Let me offer one experience—related to the lead substrate standard—to illustrate these points.

Per the CPSIA, the lead restriction applies equally to *any* component of a children's product. Initially, this was interpreted to include all the fabrics, yarns, threads, accessories, and trimmings even though it was commonly understood, and has been known for decades, that there is no lead in textiles and only isolated occurrences of lead in other components, such as buttons, snaps, and zippers. Eventually, and after input from the industry and other stakeholders, the CPSC issued a determination that indeed there is no lead in textiles, regardless of whether the fabric is dyed. And while we were pleased with this determination, please consider the following:

- The determination required the submission of thousands of test results costing hundreds of thousands of dollars. Including the tests that were not submitted, but which companies had to perform because their customers were insisting upon them as a result of their understanding of the CPSIA, the cost rises into the millions.
- The determination was not made until more than 6 months after the initial retroactive lead standard took effect and several weeks after the second (and current) lead standard took effect.
- Since most garments are not made entirely of just fabric, most garments still have to undergo testing for possible lead in most trimmings, even though tests from pre-CPSIA inventories showed that lead occurred in these components in only 3–5 percent of the time. Moreover, in many of these cases, the positive lead tests occurred with components that present no risk, but which are nonetheless covered. The example often cited is the zipper stop at the bottom of the fly in a child's pair of trousers.
- The determination is not complete. Even though the determination applies to dyed fabrics, it does not apply to certain kinds of after treatment processes, such as prints. Yet some of the print processes excluded by this determination have the same non risk of lead as dyes.
- The determination depends on a component part testing rule to operate effectively. That rule, while proposed, has not yet been finalized.
- Testing relief that companies are currently using to navigate through these rules goes away once the stay of testing and certification has been lifted because a company's own reasonable testing efforts—such as the use of XRF style machines—will be insufficient to meet third party requirements.
- These requirements exist along side other rules that were created by the CPSIA or which were strengthened by the CPSIA. So while the fabric in a child's pajama may not have to meet lead testing rules for fabric, it does have to meet requirements for flammability, lead substrate testing in zippers, lead in paint testing for any coatings, and possibly phthalate testing for the non-stick surfaces on the pads of the feet.
- State rules impose a myriad of additional, and contradictory, requirements that are not preempted by these determinations.

It is for this reason that we have been strong supporters of Congressional initiatives to amend the CPSIA and to ensure the proper implementation of the CPSIA. And because the timetables mandated by the CPSIA are unforgiving, Congressional action is needed immediately.

Many throughout the stakeholder community have identified a number of provisions in the CPSIA that need to be amended through either a “tweaking” or through “major surgery.” It would appear that many in Congress, the Commissioners, and the CPSC professional staff also share this view to different degrees. During the 111th Congress, several hundred Senators and Representatives from both parties and both Chambers have written letters or sponsored legislation that seek amendments to the CPSIA. A provision in last year's omnibus spending bill asked the Commission for its advice on legislative changes. Commissioner Nord, during her tenure as Acting Chair, forwarded to Congress a list of professional CPSC staff recommendations for CPSIA changes.

Some proposed changes have focused on specific industries—such as books or ATVs or small batch manufacturers. Others have sought to provide broader industry relief, such as provisions that would apply next year's tighter lead restriction in a prospective manner or which would permit inaccessible components to be exempt from phthalate limits. An incomplete list of other changes needed involve revisiting the definition of children's product, more flexible testing and certification provisions, stronger preemption to prevent proliferation of contradictory rules at the state level, and clearer mandates for the public database.

This is not an exhaustive list. But it is important to note that, with more than 2 years of CPSIA implementation and experience, the regulated community and the regulators have both found significant problems with the law. There appears to be a growing consensus that the CPSIA created many unintended consequences that, if left unaddressed, will continue to do damage to the very entities that bear the burden for compliance. Our hope is that Congress can immediately begin work with all stakeholders to fully identify and implement these fixes.

Going forward, I would like to make 8 recommendations. Many of these will require specific legislative changes or clear direction from Congress that the CPSC shall interpret the CPSIA, using its existing authorities, with more flexibility. All these suggestions are intended to strengthen product safety and public health.

1. Ensure that all product safety decisions are based on risk and supported by data

The CPSIA makes a number of product safety mandates that simply do not reflect risk. Prohibitions against lead in the spokes of a child's bicycle is just one obvious example. Not only does this contradict common sense but it undermines an effective product safety regime and creates confusion among the regulated community and consumers alike. If all products, regardless of the risk, are deemed equally hazardous, valuable resources and time will be spent validating and regulating already safe products. Businesses will not understand which hazards they are trying to prevent if the regulations appear arbitrary, as they currently do under the CPSIA. Moreover, consumers will become so overwhelmed by product safety warnings that they will tune out when real and legitimate concerns do appear. A better approach would be to focus time and energy on those products, components, and materials that do present risk of injury, harm, or death. Then, based on the fact pattern behind that risk, we can construct a regulatory regime to erase or mitigate the hazard. In this vein, the public database scheduled to go live in only a few months raises significant problems because it will inundate the public with erroneous and unsubstantiated claims instead of legitimate product safety problems.

2. Give the CPSC more flexibility to interpret CPSIA

At numerous points during the past 2 years, the regulated community has heard that the CPSIA ties the CPSC's hands. In these cases, the professional staff, and even Commissioners, agreed that a particular outcome is not correct but pointed to the law as the source of their helplessness to address the issue. In some cases, the agency has resorted to contorted opinions or guidance that, although well intended, have often complicated the business community's understanding of the law. The CPSC should be able to respond, quickly, to imminent threats and respond smartly and appropriately to longer term and fact based concerns. In all cases, the rules should be easy to understand so they can be effortlessly implemented and communicated up and down the supply chain. Currently, CPSIA, as interpreted by many at the CPSC and others, does not allow this flexibility.

3. Ensure that new regulations do not contradict existing ones

The CPSIA mandates new testing and certification requirements that alter existing regulations that pre-date the CPSIA, that have worked extremely well and which the industry understands. For many of these standards (including those addressing flammability, small parts, and sharp points and edges), pre-existing quality control programs and regulations were crafted in such a way that they did not hinder the ability of companies to make safe and compliant products. But because the new CPSIA mandates do not efficiently plug into the existing regulatory requirements, considerable confusion has been created with regard to these regulations. This will only be exacerbated as the now delayed 15-month rule and the new third-party testing requirements begin to take effect. On a similar note, incomplete preemption language in the CPSIA means that Federal rules and state rules often work at cross purposes.

4. Ensure prospective application of all rules

The CPSIA imposed new lead and phthalate requirements in a retroactive manner. This caused untold chaos, confusion, and costs as companies were forced to cancel orders, reformulate products, and destroy inventory. Regrettably, the CPSIA's retroactive mandates continue to create chaos. For example, some products lawfully produced today under the CPSIA 300 ppm standard will become banned hazardous substances if they are sold after August 14, 2011, when the standard drops to 100 ppm (and is applied retroactively). Regulations should take effect prospectively, and implemented only after the Commission publishes clear and comprehensive regulatory guidance. The retroactive application of regulations unfairly punishes businesses for making products in good faith, especially when they were made in compliance with a previous product safety standard. It also goes against sound business practices which build product safety requirements into the design at the beginning of the production process rather than treat them as an afterthought at the end.

5. Establish deadlines that permit and encourage compliance

The CPSIA's mandate to the CPSC to undertake dozens of rulemakings in a short period of time has been challenging for both the agency and industry. In many cases, the changes were tied to specific deadlines that have proved hopelessly unrealistic. A proposed 15-month rule, which was supposed to provide some relief in the form of component part testing, is now more than a year late and has been delayed indefinitely. Other deadlines have had to be delayed or stayed. Rather than rely on strict deadlines, the CPSIA should recognize that well thought out and implementable product safety rules take time. A single garment can take nearly a

year to travel down the supply chain. New regulations must give industry enough time to adapt these long supply chains so all parties can understand and clearly communicate changes to all their partners involved in production. Furthermore, time is necessary so the regulatory agency can work with the affected industry to properly develop and implement the regulations.

6. Publicize all pending regulatory developments

The regulated community continues to have a difficult time understanding when various rules and regulations are due to be developed under the CPSIA. The agency is currently in the process of lifting of the stay of enforcement of testing and certification for the children's product safety standards. Yet this is being done in a manner that is catching many by surprise. Product safety standards that work best are those that are created through a transparent and predictable process, especially when they involved technical testing and certification protocols. The product safety community involves a range of stakeholders, all of whom need to participate. If one group appears shut out, the final result may not be credible or accepted by all. This, in the long run, leads to a product safety regime that is not sustainable.

7. Avoid "One-Size-Fits-All Approaches"

One major problem is that the CPSIA treats all products, components, and companies equally, even though there are different risks involved. Product safety rules that were in effect before the CPSIA recognized these differences by tailoring the rules to those products and consumers where the risk of injury or death are greatest. Similarly, while all companies, regardless of size, should be subject to product safety rules, different sized companies can demonstrate compliance using different methods. Not recognizing these differences continues to be one of the major flaws of the CPSIA.

8. There is more to the CPSC than CPSIA

The CPSC should be commended for the enormous amount of work they are doing in implementing the CPSIA. But we are concerned that the resources and time spent on implementing the CPSIA has detracted from other important product safety initiatives, including enforcement of existing standards. Giving the CPSC flexibility to properly implement product safety priorities in the CPSIA will inevitably free up time for the agency to focus resources on the rest of its product safety mission.

Conclusion

Over the past 2 years, AAFA and others have worked closely with the CPSC to implement the CPSIA and we applaud the agency's efforts to work with and educate industry during the rulemaking process.

The most effective product safety system we can have is one that recognizes that the regulated companies are active partners of the CPSC. But if these companies are constantly subjected to burdensome, costly, and, in some cases, silly requirements, that partnership is severely strained and the public's interests are not served. Ultimately, product safety takes a black eye.

Mr. Chairman, the CPSC and the regulated community have come a long way since Congress passed the CPSIA. Thanks to your leadership we now have five Commissioners and an agency that is more fully funded. The CPSIA was indeed a "wake-up" call for the agency and for many in the business community to tighten their own product safety regimes. But the CPSIA also created extraordinary problems for companies who were already doing the right thing in ensuring product safety. In many cases, those problems came with little gain for public safety.

With an eye to maximizing public health and safety, it is our hope that with a legislative amendment, Congressional oversight and continued dialogue between the agency, industry and other product safety stakeholders, we can create a stable, predictable, risk-based regulatory environment.

Thank you again for providing us this opportunity to testify. I am available to take questions.

APPENDIX

Background on AAFA Product Safety Initiatives

AAFA is the national trade association for the apparel and footwear industries, and their suppliers. Our members own, produce for, or market hundreds and hundreds of brands of clothing and footwear. AAFA has about 400 member companies who own, produce for, or market more than 700 brands of clothing, footwear, and other fashion products. Nearly all stakeholders in the industry supply chain are represented in our membership, including large, medium, small, and micro businesses;

retailers of all sizes; designers; manufacturers; importers; wholesalers; private label; brand owners; and suppliers of inputs and services. AAFA members produce and sell in virtually every country in the world.

Educating the apparel and footwear industry supply chain on product safety compliance initiatives has been a top priority for AAFA for decades. The AAFA Product Safety Council, which addresses specifically with product safety issues, is one of our more active Committees. It now boasts over 400 members. AAFA uses the Product Safety Council to distribute information, develop industry positions, create best practices, and keep members up to date on the ever changing product safety landscape.

AAFA is an active participant in legislative and regulatory initiatives involving product safety. Since the passage of the CPSIA, AAFA has participated in numerous regulatory proceedings focused on the apparel and footwear industries, or affecting the broader regulated community.

Over the past 2 years alone, AAFA has conducted nearly a hundred webinars, briefings, conferences and trainings, throughout the United States and on four continents on the CPSIA, restricted substances, and other product safety topics. Just last month, AAFA conducted a CPSIA training session with over 200 factory and compliance personnel in Ho Chi Minh City, Vietnam. AAFA will be returning to China in April of 2011 for our 6th compliance program in that country.

Since 2007 AAFA has published a free, publicly available, peer-reviewed, industry-wide Restricted Substances List (RSL) that helps companies understand international product safety standards and implement a chemical management program. The RSL is updated once every 6 months to ensure the most current information is available for companies in a manner that is digestible and easy to implement. The 7th release of the RSL was most recently published in Vietnamese to coincide with the recent product safety seminar held in Vietnam. Future editions will be published in other languages, including Spanish and Chinese. The RSL is available on the AAFA website—www.apparel and footwear.org—where AAFA staff also post extensive product safety compliance information on the CPSIA and other product safety initiatives, such as REACH and individual state laws, including California Proposition 65. Keeping this information updated is a never ending challenge, particularly in the past several years in light of the rapidly changing regulatory environment.

Senator PRYOR. Thank you.

Mr. LAMAR. Thanks.

Senator PRYOR. Dr. Gardner.

**STATEMENT OF H. GARRY GARDNER, MD FAAP, ON BEHALF
OF THE AMERICAN ACADEMY OF PEDIATRICS**

Dr. GARDNER. Good morning.

My name is Dr. Garry Gardner, and I am proud to represent the American Academy of Pediatrics at this hearing today.

The AAP was pleased to work closely with members and staff of this committee and subcommittee over the course of the development and passage of the Consumer Product Safety Improvement Act. Over a period of close to 2 years, the AAP provided expertise and input on a range of child health and safety issues, including the proposed limitations on lead content and the definition of a children's product. As passed, the CPSIA ultimately rejuvenated a flagging CPSC, gave it additional tools and authority to achieve its mission, and helped improve the safety of consumer products for children.

Let us take a moment to reflect back upon the state of product safety and the CPSC during the 2007 holiday season. Our nation had just experienced a flood of product recalls, including several involving some of the best known and most loved brands and toys. Many Americans were shocked to learn that the majority of toy safety standards were voluntary and not mandatory, with few or no consequences for violations of those voluntary standards. The

CPSC was struggling to perform its mission with limited statutory authority and atrophied staff and a budget of only \$62 million—less than one-quarter of what Congress had allocated for the Hubble Space Telescope, and slightly less than what was spent on Pacific coastal salmon habitat restoration.

Three years later, the state of consumer product safety is very different. The CPSIA has already created a range of new safety standards for toys and other children's products, including strict limits on lead content in all materials. The CPSC has increased its staff, and its budget has almost doubled. Manufacturers will soon be required to test for, and document compliance with, a range of safety standards, giving retailers and consumers a high degree of confidence in the safety of these products. Unsafe cribs have been recalled and dangerous drop-side cribs will soon be banned.

These new safety standards are having a meaningful impact on the lives of children and families, though sometimes in all but invisible ways. We cannot readily see that a toy is now lead-free or that a dangerous feature on a stroller has been reengineered to be safe. It may seem, perhaps, that these are unimportant changes that cause only minor or incremental improvements in safety, but it would be a mistake to fall into the trap of believing that these small changes cannot also be significant. These changes save lives and prevent life-altering injuries. The loss of a few IQ points across the child population has marked impacts on educational spending and future potential.

Over my 37 years in practice, I have seen a dramatic change in the injuries suffered by my patients due to unsafe products. Many of the injuries that used to be relatively common simply do not occur anymore. As a pediatrician, I am grateful to Congress and the CPSC for your ongoing work to make products safer for our children.

I'd like to offer some very brief comments on the subjects of lead, Safe Sleep, cadmium, and emerging hazards.

The AAP has been supportive of CPSC's efforts to implement Section 101 of the CPSIA, which set the first-ever comprehensive limits on lead in children's products. The new lead limits are being phased in over 3 years to allow manufacturers and retailers sufficient time to ensure that their products comply with the new rules. The AAP looks forward to the completion of the standard's implementation when the total lead limit drops to 100 parts per million in August 2011. The CPSIA, and Section 101 in particular, is truly a significant step in protecting children from the real hazards of lead.

Safe Sleep. The AAP is pleased to have partnered with Chairman Tenenbaum and the CPSC on its Safe Sleep initiative, a multifaceted campaign aimed at reducing deaths and injuries associated with unsafe sleep environments. As part of this campaign, the CPSC collaborated with the AAP, Keeping Babies Safe, and journalist Joan Lunden to produce a video, to be aired in hospital and physician waiting rooms, providing recommendations and information to parents and families on safe sleep practices. AAP supports and has submitted extensive comments on rulemaking processes to establish new mandatory safety standards for bunkbeds, cradles, bassinets, and full-size and non-full-size cribs.

Finally, the AAP has consistently recommended that parents not use sleep positioners. And we fully support CPSC and FDA's recent warning to parents about the dangers of these products.

Cadmium. Recent press reports have brought to light the potential danger of another heavy metal in consumer products: cadmium. It appears that some manufacturers have begun adding cadmium to children's products because the CPSIA limited the use of lead. This is clearly a case of abiding by the letter, but not the spirit, of the law. Congress hardly intended for companies to substitute one poison for another.

The AAP urges the establishment of a systematic, transparent process by which CPSC should review the literature and data, consult with experts, and update each of the heavy-metal standards found in the ASTM F 963 toy standard. This process should not be delegated to nongovernmental entities or be inaccessible to the public or stakeholders. Moreover, the standards established should apply to all children's products, and not just toys. The AAP looks forward to engaging with the CPSC throughout such a process and making our members' expertise available to the agency.

And finally, emerging product safety hazards. Ensuring the safety of consumer products requires constant vigilance as the marketplace changes and new products, and sometimes new hazards, are created. Small powerful magnets continue to be a concern, as they can cause serious injuries if more than one is swallowed. The AAP's Committee on Injury is also learning of increasing numbers of reported injuries caused by children's ingestion of so-called "button batteries." The AAP is interested in working with the CPSC and industry to require secure closures on devices that require button batteries, as well as appropriate packaging.

In conclusion, the AAP appreciates the opportunity to offer testimony today. We commend you, Chairman Pryor and the subcommittee, for your leadership on consumer product safety issues. And we look forward to working with you to ensure the health and safety for all children. I'll be pleased to answer any questions you may have.

[The prepared statement of Dr. Gardner follows:]

PREPARED STATEMENT OF H. GARRY GARDNER, MD FAAP, ON BEHALF OF THE
AMERICAN ACADEMY OF PEDIATRICS

Good morning. I appreciate this opportunity to testify today before the Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance at this hearing, "Oversight of the Consumer Product Safety Commission: Product Safety in the Holiday Season." My name is H. Garry Gardner, MD, FAAP, and I am proud to represent the American Academy of Pediatrics (AAP), a non-profit professional organization of more than 60,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. I chair the AAP's Committee on Injury, Violence and Poison Prevention, which is responsible for advising the Academy and drafting its policies on a wide range of injury prevention issues, including consumer product safety. I have been in private pediatric practice since 1973 and am a Professor of Clinical Pediatrics at Northwestern University Feinberg School of Medicine.

Creating Safe, Healthy Products for Children

The AAP was pleased to work closely with the Members and staff of this committee and subcommittee over the course of the development and passage of the Consumer Product Safety Improvement Act of 2008 (CPSIA). Over a period of close to 2 years, the AAP provided expertise and input on a range of child health and

safety issues, including the proposed limitations on lead content and the definition of a children's product. As passed, the CPSIA ultimately rejuvenated a flagging Consumer Product Safety Commission (CPSC), gave it additional tools and authority to achieve its mission, and helped improve the safety of consumer products for children.

Today's hearing provides a valuable opportunity to discuss the CPSIA 2 years after its signature into law. Many of the directives under the law have already been implemented, either in whole or in part, while others remain to come. The AAP appreciates this opportunity to reflect on the successes of the CPSIA to date and opportunities for improvements in the coming months and years.

Let us take a moment to reflect back upon the state of product safety and the CPSC during the 2007 holiday season. Our nation had just experienced a flood of product recalls, including several involving some of the best-known and most-loved brands and toys. Many Americans were shocked to learn that the majority of toy safety standards were voluntary, not mandatory, with few or no consequences for violation of those voluntary standards. Even for a highly toxic substance like lead, the Federal limit was an unacceptably high 600 parts per million, and applied only to paint on children's products. The CPSC was struggling to perform its mission with limited statutory authority, an atrophied staff, and a budget of \$62 million—less one-quarter of what Congress allocated for the Hubble Space Telescope that year, and slightly less than was spent on Pacific coastal salmon habitat restoration.

Three years later, the state of consumer product safety is very different. The CPSIA has already created a range of new safety standards for toys and other children's products, including strict limits on lead content in all materials. The CPSC has increased its staff, and its budget has almost doubled. Manufacturers will soon be required both to test for and document compliance with a range of safety standards, giving retailers and consumers a high degree of confidence in the safety of these products. Unsafe cribs have been recalled, and dangerous drop-side cribs will soon be banned.

These new safety standards are having a meaningful impact on the lives of children and families, though sometimes in all-but-invisible ways. We cannot readily see that a toy is lead-free, or that a dangerous feature on a stroller has been re-engineered to be safe. It may seem perhaps that these are unimportant changes that cause only minor or incremental improvements in safety. But it would be a mistake to fall into the trap of believing that small changes cannot also be significant. These changes save lives and prevent life-altering injuries. The loss of a few IQ points or a small increase in the proportion of children with behavioral problems in the population of U.S. children has marked impacts on educational spending and future potential.¹ Over my 37 years in practice, I have seen a dramatic change in the injuries suffered by my patients due to unsafe products. Many of the injuries that used to be relatively common simply do not occur any more. As a pediatrician, I am grateful to Congress and the CPSC for your ongoing work to make products safer for our children.

The CPSIA has allowed the CPSC to make strides in two particular areas I would like to highlight: lead and Safe Sleep. Additional work remains to be done with regard to cadmium and other heavy metals, as well as emerging hazards. The American Academy of Pediatrics would like offer the following comments on each of these subjects.

Limiting Children's Exposure to Lead

Lead is well-established as a potent neurotoxin and a particular threat to the developing brain of the fetus, infant, and young child, with documented negative effects on behavior and permanent loss of IQ points. Studies have shown that lead has no normal function in the human body, and that a "normal" blood lead level is zero. There is no "safe" level of lead exposure; no threshold for the toxic effects of lead has been identified. When lead accumulates in the body, it is tightly bound to bones and then released slowly over years or decades. Therefore, exposures that may be separated by significant gaps in time have an additive effect on the body's burden of lead.

Damage done by small amounts of lead may be hard to measure and even harder to understand. Children who accumulate lead in their body may not have any physical symptoms, but low lead levels cause a wide array of negative effects, including cognitive, motor, behavioral, and physical harm.² The vulnerability of children to

¹ Bellinger DC. What is an adverse effect? A possible resolution of clinical and epidemiological perspectives on neurobehavioral toxicity. *Environ Res.* 2004; 95(3):394–405.

² Bellinger D. Lead. *Pediatrics.* 2004; 113(4 (Supplement)):1016–1022.

lead poisoning during development of their brain and nervous system has been amply demonstrated, and the literature is very consistent. On average, children whose blood lead levels (BLLs) rise from 10 to 20 micrograms per deciliter (mcg/dL) lose two to three IQ points. More recent studies have shown an even greater impact on IQ of BLLs under 10 mcg/dL. The effects of lead on health do not stop once the child's brain and nervous system mature or the BLL falls. A recent study found that in a group of 7-year-old children exposed to lead before the age of 3 years, IQ continued to fall even after the BLL had declined.³

The AAP has been supportive of CPSC's efforts to implement Section 101 of the CPSIA, which set the first-ever comprehensive limits on lead in children's products. The new lead limits are being phased in over 3 years to allow manufacturers and retailers sufficient time to ensure that their products comply with the new rules. As of February 2009, products designed or intended primarily for children age 12 years and younger could contain no more than 600 parts per million (ppm) of lead. This standard was then lowered to 300 ppm in August 2009. The AAP looks forward to the completion of the standard's implementation when the total lead limit drops to 100 ppm in August 2011. Any children's product on the market that does not comply with the new lead standards will be considered a banned hazardous substance. The CPSIA, and Section 101 in particular, is a truly significant step forward in protecting children from the hazard of lead in toys and other products designed for children.

Creating Safe Sleep Environments for Infants and Children

Cribs, cradles, bassinets, and other infant sleep environments are designed for a parent or caregiver to leave a baby unattended safely for hours at a time. Unfortunately some sleep environments may pose a serious threat to a child's health and safety, thereby negating their intended purpose. Between November 2007 and April 2010, almost 150 fatalities and 1,675 injuries associated with full-size cribs and 6 fatalities and 28 injuries associated with non-full-size cribs were reported to CPSC. Since 2007, CPSC has issued 40 separate crib recalls involving more than 11 million products. Parents deserve the confidence of knowing the crib they purchase is held to the highest safety standards possible. The AAP has worked strenuously to reduce injuries and deaths from unsafe sleep environments by establishing guidelines for parents to use in evaluating these products and we fully support CPSC's efforts to establish strong, mandatory safety standards for cribs.

The AAP is pleased to have partnered with Chairman Tenenbaum and the CPSC on its Safe Sleep Initiative, a multi-faceted campaign aimed at reducing deaths and injuries associated with unsafe sleep environments. As part of this campaign, CPSC collaborated with AAP, Keeping Babies Safe, and journalist Joan Lunden to produce a video to be aired in hospital and physician waiting rooms providing recommendations and information to parents and families on safe sleep practices. In the video, AAP President O. Marion Burton, MD FAAP shared AAP's strong recommendation that all babies be put to sleep on their backs, which has helped reduce the rate of Sudden Infant Death Syndrome (SIDS) by 50 percent over the last 20 years. In addition, Dr. Burton highlighted the importance of never placing pillows, bumpers, sleep positioners, blankets or other fluffy items in cribs, and the need for cribs to have firm mattresses with tightly fitted sheets.⁴

Over the past year, CPSC has undertaken rulemaking processes to establish new mandatory safety standards for bunk beds, cradles, bassinets, full-size and non-full-size cribs, among many other categories of children's products as part of the Safe Sleep Initiative and as directed by Section 104(b) of the CPSIA. AAP strongly supports CPSC's efforts to establish mandatory safety standards for infant and children's sleep environments and has submitted extensive comments on each of these proposed rules.

The AAP has encouraged CPSC to make mandatory the new voluntary ASTM standard for full-size and non-full size cribs, which includes a requirement that sides of a crib be fixed in place, effectively banning drop-side cribs, (a crib design where the side of the crib can be raised and lowered). The AAP is extremely pleased that CPSC has proposed adopting this standard, as failures in this product design have resulted in numerous infant injuries and fatalities. If this proposed rule is made final, it will be unlawful to sell, lease, or otherwise provide a full-size or non-full-size crib that does not meet mandatory CPSC standards. As a result, many es-

³Chen A, Dietrich KN, Ware JH, Radcliffe J, Rogan WJ. IQ and blood lead from 2 to 7 years of age: are the effects in older children the residual of high blood lead concentrations in 2-year-olds? *Environ Health Perspect.* 2005; 113(5):597-601.

⁴Video available online at <http://www.healthychildren.org/English/news/pages/A-Safe-Sleep-for-Babies.aspx>.

tablissements will be required to purchase new cribs and/or eliminate their inventory of noncompliant cribs, including child care centers (including family child care homes), hotels, motels and inns, resale and consignment shops, and crib retailers. While the AAP recognizes the demands the new safety standards may place on child care centers, retailers, and others, these considerations must be balanced against the cost to children, families, and society when preventable injuries and deaths occur in these cribs. The AAP supports CPSC in implementing the new mandatory safety standards in an expeditious, but sensible, timeframe.

Finally, the AAP was pleased that CPSC and the Food and Drug Administration (FDA) recently issued a warning to consumers urging parents not to use infant sleep positioners.⁵ Infant sleep positioners are flat mats with side bolsters or inclined (wedge) mats with side bolsters used to prevent an infant from rolling or turning while asleep. Over the past 13 years, CPSC and FDA received 12 reports of infants who died when they suffocated in sleep positioners or became trapped between a sleep positioner and the side of a crib or bassinet. These products represent a serious risk to the health and safety of sleeping babies. Sleep positioners do not prevent SIDS and in fact can increase the risk of infant suffocation. Manufacturers typically claim these products aid in food digestion to ease colic or the symptoms of gastroesophageal reflux disease and prevent flat head syndrome; however, these claims have not been reviewed and approved by the FDA. AAP has consistently recommended parents not to use these products and we fully support CPSC and FDA's efforts to prevent further deaths or injuries as a result of using infant sleep positioners.

Limiting Cadmium and Other Heavy Metals

Recent press reports have brought to light the potential danger of another heavy metal in consumer products: cadmium. Cadmium is a soft heavy metal used in a variety of industrial and consumer applications. Like lead, with which it shares certain properties, cadmium causes a range of well-documented adverse human health effects. Oral exposure to cadmium is associated with effects on the kidney, liver, bones, immune system, blood and nervous system. Acute cadmium exposure can lead to vomiting, diarrhea and other effects. Long-term exposure to cadmium can cause kidney disease, developmental and neurological deficits, and bone fragility. Cadmium is a known carcinogen.

It appears that some manufacturers have begun adding cadmium to children's products because the CPSIA limited the use of lead. The presence of cadmium at high levels has been found in a range of children's products, most notably toy jewelry and drinking glasses. This is clearly a case of abiding by the letter but not the spirit of the law—Congress hardly intended for companies to substitute one poison for another.

The ASTM's F-963 toy safety standard currently contains voluntary standards for eight heavy metals known to be highly toxic: antimony, arsenic, barium, cadmium, chromium, lead, mercury and selenium. As part of the CPSC's review of the adoption of the F-963 standard as a mandatory standard, each of these standards* should undergo rigorous review, along with the associated testing protocols. The AAP urges the establishment of a systematic, transparent process by which the agency should review the literature and data, consult with experts, and update each of the heavy metal standards. This process should not be delegated to non-governmental entities or be inaccessible to the public or stakeholders. Moreover, the standards established should apply to all children's products, not solely toys. The AAP looks forward to engaging with the CPSC throughout such a process and making our members' expertise available to the agency.

Emerging Product Safety Hazards

As Americans prepare to exchange gifts this holiday season, we should all be able to have confidence in the safety of toys and children's products. As a pediatrician and injury expert, however, I also find myself anxiously awaiting the next emerging product safety hazard. Ensuring the safety of consumer products requires our constant vigilance as the marketplace changes and new products—and sometimes, new hazards—are created.

Small, powerful magnets continue to be a concern, as they can cause serious injuries if more than one is swallowed. These abdominal injuries tend to mimic stomach ailments or other minor illnesses, and can be difficult to properly diagnose. The CPSC is aware of this hazard and has recalled numerous sets of magnetic toys.

⁵ Announcement available online at <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10358.html>.

*Not including lead, which is already covered by the CPSIA.

Given that these magnets are being used in increasing numbers of children's products, however, continued attention to this problem is necessary.

AAP's Committee on Injury is also learning of increasing numbers of reported injuries caused by children's ingestion of so-called "button batteries." Roughly the size of a dime or nickel, these batteries closely resemble a coin when seen on scans. Unlike a swallowed coin, however, a battery must be removed from the body immediately to prevent serious harm. If lodged in the esophagus, severe tissue damage can occur in as little as 2 hours. Button batteries have been identified as the cause of 13 deaths. Between 1990 and 2008, 8,648 battery ingestion cases were reported, of which 62 percent were button batteries swallowed by children under the age of 6 years. Among children in this age group, 12 percent of those who ingest a 20 to 25mm battery can be expected to experience serious complications or death.⁶ The AAP is interested in working with the CPSC and industry to require secure closures for devices that require button batteries as well as appropriate packaging.

In conclusion, the AAP deeply appreciates the opportunity to offer testimony today on the implementation of the Consumer Product Safety Improvement Act of 2008. We commend you, Chairman Pryor, and the subcommittee for your leadership on consumer product safety issues, and we look forward to working with you to ensure the health and safety of all children.

Senator PRYOR. Thank you.
Ms. Chuckas.

STATEMENT OF JILL CHUCKAS ON BEHALF OF THE HANDMADE TOY ALLIANCE

Ms. CHUCKAS. Good morning.

Thank you, Chairman Pryor, for having me before this committee today. It's an honor.

My name is Jill Chuckas, and I own a small handcrafted children's accessory business, located in Stamford, Connecticut, called Crafty Baby.

For the last 12 years, I've been crafting children's products from my home-based studio. When Congress first spoke of toy safety legislation, I applauded your efforts. In December 2008, though, I began to read the fine print. I became acutely aware that this law, meant to regulate large multi-billion dollar companies that had betrayed the country's trust, could effectively put me out of business. Not because my products are unsafe, but because I simply cannot afford the mandatory third-party testing and labeling requirements, which disproportionately affect small-batch manufacturers and specialty retailers. I quickly joined a rising grassroots effort to amend the CPSIA and took on a leadership role within the newly formed Handmade Toy Alliance.

So, today I come before you to speak, not just for myself, but as a board member of the Handmade Toy Alliance, an organization that owes its very existence to the CPSIA. The HTA now represents 592 member businesses, including specialty retail stores, toymakers, and children's product manufacturers from across the country. I'm here today with fellow board members Kate Glynn of a Child's Garden and Impish, in Massachusetts, and Randy Hertzler of euroSource, in Pennsylvania.

The deadline for third-party testing is February 10, 2011, just 10 weeks from now. After that point, our member businesses face extinction. Although many of us have already paid for XRF testing of our products, we simply cannot afford to pay for the services of

⁶Litovitz, et al. "Preventing Battery Ingestions: An Analysis of 8648 Cases." *Pediatrics* 2010; 125:1178-1183.

a CPSC-certified lab. Throughout the last 2 years, we have slowly witnessed many of our members close their businesses or change their business models as to not include children's products.

I have with me today a few examples of these businesses:

First, you see a wooden toy airplane. This toy, made by our member, John Greco, in New Jersey, is made solely from wood. The coming requirement for ASTM testing, in the CPSIA, makes it economically impossible to produce items like this in small batches. Rather than continue to make children's products, Mr. Greco decided to close that aspect of his business this past September. As he shared with me, "I was never looking to get rich making wooden toys. I did it because I enjoyed making toys that made kids happy."

Second, you see an award-winning, custom-designed fabric toy monster created by Stephanie and Michael Estrin, owners of Curly Q Cuties, in Texas. Children and their parents can go online and design their own personal monster. After much research, Curly Q Cuties found that they could never afford to test each unique design to ASTM standards, and decided to close their business at the end of this year. Ms. Estrin cites the reason for the company's closing due, "a law that does not address our particular manufacturing scenario." Put simply, the CPSIA makes no allowances for one-of-a-kind items.

Third, my fellow board member, Randy Hertzler's family business focuses on often hard to find toys, primarily imported from the European Union. These toys, that represented 44 percent of his sales in 2006 to 2007, have disappeared from the U.S. market altogether, because of the CPSIA's lack of alignment with European standards. Many quality European toy companies will no longer sell to companies—to American retailers, like Randy. He fears that he will have to liquidate and close in 2011.

We find it hard to believe that it was Congress's intent, with the CPSIA, to remove products and businesses like these from the marketplace.

While the HTA has worked closely with the CPSC, submitting comments on pending rules, attending CPSC-sponsored workshops, regular e-mail and phone contact with CPSC staff, we feel strongly that the current legislation does not grant the CPSC the flexibility to address our members' needs.

We have offered a number of suggestions that we feel will ensure the safety of children's products, yet amend the CPSIA to be more workable for the businesses we represent. We are more than happy to further discuss these suggestions throughout the day, today.

Two needed changes I'd like to bring up at this time include granting the CPSC the authority to use risk analysis to allow enforcement flexibility of third-party testing and hazardous content limits. High-risk items, like paint or metal jewelry, should be held to higher verification standards than low-risk products, like bike valve stems and brass zippers on children's garments. And, just as the Senate included language in the new food safety bill to exempt small farmers making under 500,000 per year, we ask that Congress make similar allowances for manufacturers who produce in small batches, exempting them from the third-party testing requirements. It's important to point out that these manufacturers

would not be exempted from the standards themselves, only from the third-party testing protocol.

Over the last 2 years, we've been told countless times that the CPSIA was never meant to adversely affect our businesses. We have worked tirelessly, along with many others, to enact common-sense changes within this legislation, always holding onto the fact that the products we create are safe.

On behalf of our members, I thank this committee for addressing this important issue, and urge you to quickly pass meaningful reform of the CPSIA, correcting these unintended consequences.

Thank you.

[The prepared statement of Ms. Chuckas follows:]

PREPARED STATEMENT OF JILL CHUCKAS ON BEHALF OF THE
HANDMADE TOY ALLIANCE

Hello. My name is Jill Chuckas and I own a small hand crafted children's accessories business called Crafty Baby. For the last 12 years, I have been crafting children's products from my home based studio in Stamford, CT. When Congress first spoke of toy safety legislation, I applauded your efforts. In December of 2008, though, I began to read the fine print. I became acutely aware that this law, meant to regulate large, multi billion dollar companies that had betrayed the countries trust, could effectively put me out of business. Not because my products are unsafe, but because I simply could not afford the mandatory third-party testing and labeling requirements, which disproportionately affect small batch manufacturers and specialty retailers. I quickly joined a rising grass roots effort to amend the CPSIA and took on a leadership role within the newly formed Handmade Toy Alliance.

So today I come before you to speak, not just for myself, but as a Board member of the Handmade Toy Alliance, an organization that owes its very existence to the CPSIA. The HTA now represents 592 member businesses, including specialty retail stores, toymakers and children's product manufacturers from across the United States. I am here today with fellow Board members Kate Glynn of A Child's Garden and Impish in Massachusetts and Randy Hertzler of euroSource in Pennsylvania.

The deadline for third-party testing is February 10 of next year—just 10 weeks from now. After that point, our member businesses face extinction. Although many of us have already paid for XRF testing of our products, we simply cannot afford to pay for the services of a CPSC-certified lab. Throughout the last 2 years, we have slowly witnessed many of our members who manufacture products close their businesses, or change their business models as to not include children's products. These equate to lost jobs, not because the company couldn't make safe product, but because the companies couldn't navigate the costly and burdensome regulations the CPSIA puts forth to prove that their products are safe. I have brought with me today a few examples of these businesses.

First, you see before you a wooden toy airplane. This toy, made by our member John Greco in New Jersey, sold for \$110 and is made from Cedar, Oak, Poplar, Birch, and Maple. It is unfinished, so it doesn't need to be tested for lead, but quotes from labs to perform ASTM F963 Use & Abuse testing makes it too costly to continue making. Just one round of testing requires 12 toys to be sent to the lab for destructive testing, resulting in \$1,320 in lost gross sales—and this does not include shipping and lab fees. Rather than continue to make children's products, Mr. Greco decided to close that aspect of his business this past September. As he shared with me, "I was never looking to get rich making wooden toys—I did it because I enjoyed making toys that made kids happy."

Second, you see before you an award winning custom designed fabric toy monster created by Stephanie and Michael Estrin, owners of Curly Q Cuties in Texas. Children and their parents can go on line and design their own personal monster. After much research, Curly Q Cuties found that they could never afford to test each unique design to ASTM standards and decided to close their business at the end of this year. Mrs. Estrin cites the reason for the company's closing due to "a law that does not address our particular manufacturing scenario." Put simply, the fact that this is a one of a kind item, makes it impossible to adhere to all the stipulations within the CPSIA.

Third, my fellow board member Randy Hertzler's family business focuses on often hard to find toys, primarily imported from the European Union. These toys, that represented 44 percent of his sales in 2006–2007, have disappeared from the U.S.

market because of the CPSIA's lack of alignment with European standards. Many quality European toy companies will no longer sell to American retailers like Randy. He fears that he will have to liquidate and close in 2011.

While the HTA has worked closely with the CPSC—submitting comments on pending rules, attending CPSC sponsored workshops, regular e-mail and phone contact with CPSC staff—we feel strongly that the current legislation does not grant the CPSC the flexibility to address our members' specific needs. This was most recently shown by the CPSC definition of a children's product. The final rule was issued in 63 pages of text that we now understand to mean "if it can be construed as a children's product, it is." Our view was that the CPSC could have offered relief to countless small businesses, but the ambiguity of their definition, rather than exempting product categories and providing guidance, has only served to create additional market confusion.

We have offered a number of suggestions that we feel will ensure the safety of children's products, yet amend the CPSIA to be more workable for the businesses we represent. The majority of these ideas were outlined in our January 2010 letter to the CPSC. We are more than happy to further discuss these suggestions throughout this hearing.

Most importantly, Congress should grant the CPSC the authority to use risk analysis to allow flexibility of third-party testing requirements and hazardous content limits. High risk items like paint or metal jewelry should be held to higher verification standards than low-risk products like bicycle valve stems and brass zippers on children's garments.

Second, the definition of what is a children's product should be changed to items intended for children 6 years or younger, except where the CPSC identifies a product requiring a higher age limit based on risk analysis.

Third, educational products intended for use in a classroom environment should be excluded from the definition of a children's product.

Fourth, harmonize CPSIA standards with the European Union's EN-71 standards to remove the regulatory trade barrier which the CPSIA created between the U.S. and the EU. This would include changing the lead content standard from an untenable total lead standard to an absorbable lead standard.

Fifth, exempt manufacturers who make less than 10,000 units per year from all third-party testing requirements and allow them to comply instead with the 'reasonable testing program' requirements which apply to manufacturers of non-children's products under the CPSA. This would protect small batch manufacturers and specialty product manufacturers, including companies that make adaptive products for children with disabilities. These manufacturers would not be exempted from the standards themselves, only from the third party verification requirements.

Sixth, tracking labels should be voluntary except for durable nursery items and products which are most likely to be passed down to younger siblings or resold where the CPSC's risk analysis determines that tracking labels would be most likely to prevent harm. Manufacturers who choose to implement tracking labels would benefit from a lesser burden in the event of a recall.

Seventh, instruct the CPSC to not lower the lead content limit from 300 parts per million to 100 parts per million, a standard so low that it multiplies the difficulties of compliance.

Over the last 2 years, we have been told countless times that the CPSIA was never meant to adversely affect my business or the member businesses the HTA represents. We have worked tirelessly, along with many others, to enact common sense change within this legislation, always holding on to the fact that the products we create are safe. On behalf of our members, I thank this committee for addressing this important issue and urge you to quickly pass meaningful reform of the CPSIA, correcting these unintended consequences. Thank you.

A full list of our 592 member businesses can be found at <http://www.handmadetoyalliance.org>.

Senator PRYOR. Thank you.

Ms. Weintraub, let me start with you, if I may.

On our first panel, we had some discussion about budgets. And folks pointed out some of the concerns with the CPSIA and, you know, some of the bumps in the road on how we drafted it or how it's trying to be implemented. But, you know, one thing, I think, that was missing from that discussion was a context of what life was like before two things happened: before we passed the CPSIA and before Chairman Tenenbaum came on board.

Could—do you mind, sort of, painting—just very briefly, kind of painting a landscape for us of what it looked like before those two things happened?

Ms. WEINTRAUB. Sure, I'd be happy to.

I described what CPSC had suffered as “death by a thousand cuts.” The CPSC’s budget had been decimated and had never been restored. In 1972, when the CPSC was first created, the agency was appropriated \$34.7 million; they had a staff of 786 full-time employees. The agency’s budget, since that time, did not keep up with inflation, did not keep up with its deteriorating infrastructure, did not keep up with the changes in consumer products, and did not keep up with the increasing data-collection needs. The agency suffered repeated and severe cuts during the last 2 decades, falling from a high of 970 employees, in 1980, to just 401, in 2007, a loss of almost 60 percent.

So, what we were all faced with as we were looking to make CPSC more robust was a beleaguered agency that was starved of resources, of legislative authority, and appropriate resources to do what it needed to do to protect the American public. And it’s only with CPSIA that the Commission has been given a boost of all of these things.

Senator PRYOR. Let me ask about one of the things, in the CPSIA, that they’re still in the process of doing. They’re getting closer on it. But, it’s the database. What is your perception of how that has gone? And what the—how useful the database might be, come, what is it, March of next year?

Ms. WEINTRAUB. Yes. The database, thanks to your leadership and the leadership of your staff and this committee—subcommittee and full Committee—will be implemented in March 2011. It is a very important resource for consumers, because—again, looking at the state of the product safety world before CPSIA passed, consumers were, and right now are, in the dark. Because of Section 6(b) of the Consumer Product Safety Act, which is still in effect, CPSC, unlike any other government agency, has to basically ask permission from the manufacturer of a particular product before they can disclose information about that product to the public. That has hampered the agency. That has kept critical safety information, that affects life and death, out of the hands of consumers. And it has really put consumers under a veil of ignorance.

What this database will do, because it is out of Section 6(b), will provide a very useful resource that—consumers, when they have a problem, they can report it, as they do now. However, they can report it online, and it will be public.

Importantly, as was prescribed by this committee and by Congress generally, there’s very specific criteria that is required before a posting can be made. So, the concerns that have been raised about the definition of a “consumer” being broad, all of that is narrowed very much by the fact that, if there is not essential information about the product, about the harm, then the posting will not be available.

So, I think that the impact of this database will be profound.

Senator PRYOR. I must say that yesterday I went on the NHTSA website to look up—I have a 19—I mean—excuse me—I have a 2003 Ford Taurus. And I had looked it up on the NHTSA database,

on their website, because I was having a problem with it, and I wanted to see if others were having the same problem, and if they could give me some direction. So, I found that very helpful.

Dr. Gardner, let me ask you something that—follow up on something that you said in your testimony. You talk about how, you know, you've been a physician, I think you said, for 37 years—

Dr. GARDNER. Yes.

Senator PRYOR.—Correct?—and that you're seeing different types of injuries today. Or, I guess what you're saying is, there were injuries that you used to see in children that you just don't see much anymore. Could you elaborate on that?

Dr. GARDNER. Yes, let me give you a specific example, and that's the issue of walkers. A while back, walkers had wheels, they were small in size, they were mobile. Children loved them, because it made them mobile. Parents loved them, because it was hands-free—they could turn their back on the kids for a minute. The problem was that toddlers are drawn like magnets to stairs. An open stairway is a magnet and pulls them forward. And, unfortunately, when they're in a walker, they'll just go down the stairs in their walker, and often land on their head.

It was very common for me to see significant head injuries, not just concussions, but skull fractures, intracranial bleeds. And the most common cause of head injuries in toddlers—this was several years ago—was, clearly, walkers. And we were forever warning parents that the walkers were dangerous and that they should always supervise, and preferably just never have their child in a walker.

So, that's one example where now walkers are no longer either mobile. They're a stationary object that the child can bounce and play in, but it's not going to move anywhere, or they're so wide that they won't fit through a doorway and allow them to go down the stairs. We still would prefer children not to be in walkers, but they don't create the risk of head injury that they did several years ago.

Senator PRYOR. Right. So, based on, you know, your area of practice, are you seeing fewer injuries to children, based on children's products? Or, can you say that?

Dr. GARDNER. It keeps changing. And I referred to that, a little bit, with emerging hazards. I think we see new risks, and we need to be aware of that. For example, the button battery. There's this new generation of lithium button batteries—

Senator PRYOR. Right.

Dr. GARDNER.—that children perceive as toys or—they swallow coins, and they are very easy to confuse on an X-ray, with a coin. If this lithium button battery is entrapped in the esophagus for a minimum of 2 hours, it causes irreversible damage to the esophagus, can perforate the esophagus or cause bleeding, and that's difficult to recognize. The leading source of those batteries is the TV remote. The TV remote is dropped, pops open, and the battery falls out. That's the leading source of ingestion for children. That's an injury I never saw before. And that's just an example of a new emerging hazard.

Senator PRYOR. Thank you.

Ms. Chuckas, I'm really interested in what you said a few moments ago. And it may be hard to believe, but we did try to, you

know, draft legislation in a way that—we were trying to find the balance of—just because a small company, a craftsman, maybe one person, maybe makes one toy at time and just sells them at, you know, crafts fairs, et cetera, or maybe they sell them in retail stores—but, just because it has made by one person in a—his or her shop, doesn't mean that it's automatically safe. I mean, that toy can injure a kid, just like something made by, you know, one of the big companies.

So, we're trying to find that balance of, you know, How do we provide a safe marketplace and children's safety, but also understand that—you know, we try not to make this too burdensome on smaller companies. And I'm not sure that we got that balance exactly right, but we have tried to do that. And your testimony has been very important.

Also, I was going to ask you—and you may not know, there may not be any way to answer this question—but, I understand, in this very difficult recession, some of these small companies are going to go out of business anyway. Do you have a sense of how many are going out of business because of the economy, versus the changes in the consumer protection laws? Can you gauge that?

Ms. CHUCKAS. It is a hard thing to gauge, because certainly the economy of everything has been a factor within these businesses, as well. But, I think what has happened is that the drive to continue to try to do what one loves has left, because the overwhelming sense of this legislation is something people can't get past. So, it becomes the "straw that broke the camel's back" kind of thing.

Senator PRYOR. Yes.

Ms. CHUCKAS. It was just one more thing they couldn't deal with.

Senator PRYOR. Now, the CPSC has a list of, you know, products that say—they know don't contain lead. And it's—my understanding is that you don't have to do any third-party testing. And wood, I think, is one of those. You—am I wrong on that?

Ms. CHUCKAS. For the lead content, you're correct.

Senator PRYOR. OK.

Ms. CHUCKAS. The issue with the toy is the ASTM safety standards. I submitted, within my written testimony, some quotes from—this wooden toy, for example, sells for \$110. When John contacted a CPSC-approved lab, which—it was difficult for him to find a lab, actually, that he could work with, to begin with, in the United States. He found one. He had to send 12 of this toy. He made 20 of them. So, 12 of them had to be sent, in order to comply with the toy safety standard aspect. And so, that was roughly around \$1,300 worth of inventory he wasn't going to get back, in addition to the shipping, in addition to the lab fees, which—he didn't even get that far with them, what the actual lab costs would be for the multitude of tests that would have to be done on this wooden toy airplane.

Senator PRYOR. When you and your members contact the CPSC about this issue, is it your perception that they're listening, that they're trying to work with you? Or, maybe do they give you a sense that their hands are tied because of the law? I mean, how's the—the how responsive has the—

Ms. CHUCKAS. Extremely responsive. We've spoken directly with four out of five of the commissioners. Chair Tenenbaum, Commissioner Northup, Commissioner Nord, and Commissioner Adler have made them all—have made themselves readily available. Their staffs have been readily available. And, within a week after they appointed the new small business ombudsman, we had a conference call with him. Very readily available. They've been great working with us.

Senator PRYOR. Has it translated into action, though? Or relief?

Ms. CHUCKAS. To some extent. We're waiting, still, on the component safety certification rules to come down. We had really hoped that that would have been done a long time ago, but we recognize the massive rulemaking undertaking that is.

So, we feel that they are listening to our concerns. It hasn't always articulated itself into a ruling that was going to be helpful. But, we do feel that they're listening. They're trying.

Senator PRYOR. Yes. OK, good.

Mr. Lamar, let me ask you, if I may—kind of follow up on that same question. I know that your industry has had a lot of contact with the CPSC. And I'm curious about, you know, if your perception is that they've been receptive and willing to listen. And, even if they have, do they, kind of, come back and say that their hands are tied? So, it's the same question.

Mr. LAMAR. I think they've been extraordinarily responsive. I would agree with Jill, we've had conversations—multiple conversations with commissioners or staff. Several of the commissioners have come and presented at training workshops that we've held throughout the United States and around the world. They've been very eager to help out when they can. Many times the reaction we get is, "You raise some good points, we don't know if we can go that far," or, "You've raised some good points, the legislation doesn't allow us to accommodate it the way you might request so you have to recalculate your proposal."

Sometimes, even when they want to be responsive, they're not able to be as responsive, because there are a lot of other industries asking the same question. Behind me, there are a ton of industry representatives, representing everybody from books to ATVs to science kits to, you name it, and they're all asking the exact same questions; many times, on the same kinds of issues. And there are only so many people at the agency, and I think their ability to respond to all of these questions coming in makes it difficult for them to be as responsive to everybody as quickly as they probably could be.

Senator PRYOR. Right.

Let me ask—you said—one reason I wanted to ask you that question is, you said—in your written testimony, you said, "Product safety standards that work best are those that are created through a transparent and predictable process. If one group appears shut out, the final result may not be credible or accepted by all." And, from that, I guess I was inferring that you guys felt like you'd been shut out or had not been listened to.

Mr. LAMAR. No. I think what I'm trying to describe there is sort of their Nirvana. I think that you want to have a situation where everybody has an opportunity to comment. I think Chair

Tenenbaum mentioned, when she was discussing the cadmium approach—is that they were going to work with the voluntary standards-setting community, so that everybody would have an opportunity to participate, that would focus on the products and the specific risk, rather than trying to create something that's out there. I think that kind of goes back to the comments I made before in some of those eight points.

Senator PRYOR. And one of the things I think you've talked about is zipper testing. Have there been problems with zippers having high lead content? Has that been an issue, either now or in the past?

Mr. LAMAR. Yes. I'm glad you asked that question. There's a lot of confusion. We presented a lot of data to the agency—5- or 6,000 test results, I think it was—it came out to. This was when we did our determination that there was no—or, were seeking the determination that there was no lead in textiles. And, in addition to proving that there was no lead in textiles, we found—and this was pre-CPSIA inventory, so this was inventory that had been produced before people knew what the new lead rules were going to be, even before they even knew that they were being discussed—and the incidents of lead in things like zippers, buttons, snaps, other kinds of accessories on clothing, was about 3 to 5 percent. So, what we found was that it's not in textiles. It may be, in a very, very small, isolated, rare set of circumstances, in some kinds of components. Moreover, what we found is, if it were, like, in a zipper, it might be in the stop at the bottom of the zipper; it wasn't in the pull, the slider, the teeth, all these other aspects of the zipper machinery or equipment. So, you found these very isolated, rare circumstances.

The problem is, this translated, as implementation began—is that the zipper stop, for example—and I brought a pair of pants that illustrates it—might be violative. If that was above the 600 parts per million, then that meant the entire zipper was above 600 parts per million, which meant the entire pair of pants was above 600 parts per million, which meant a whole shipment might be above it. So, it's kind of in a—in a reference to the old children's parable, you know, “For want of a nail, the kingdom was lost”—for want of the zipper stop that was compliant, the entire shipment and the order was lost. And so, a lot of inventory had to get destroyed, because you might find that, in one zipper stop, there was a problem. And that was a significant problem that we had in our industry.

I think, as people knew these rules, they've now started to produce zippers that are compliant. They're going through making sure that the metal used, the processes used, in the future and for future shipments, is going to be compliant with that limit—with the 100 parts per million now, because you're looking down the road.

Senator PRYOR. We actually saw that as we were working on the CPSIA through the process. Some of the companies—manufacturers, retailers—were already making changes, in anticipation of the—you know, the law taking effect. And, you know, hopefully what it does is—in Dr. Gardner's world, it helps create a safer place for everybody.

But, Dr. Gardner, let me ask you about something that was touched on more in the previous panel, but a little bit here, about lead. There was a lot of discussion, in the first panel, about lead. And I assume that you would say that there is no safe level of lead. I mean, we've kind of talked about that before. But, is the real issue with lead solubility or, you know, what—if we're looking at some modification of the existing CPSIA, when it comes to lead, and maybe giving a little more flexibility or a little more direction on this—you know, I guess I—from your standpoint, what are the two, three things we need to know about lead?

Dr. GARDNER. Yes. I think the most important thing for people to realize about lead, in very simple terms, is that it's a neurotoxin that, in simple language, causes brain damage that's permanent and irreversible. The other important medical aspect of lead is that it's accumulative.

Senator PRYOR. It's—does that mean children are more susceptible to it?

Dr. GARDNER. Yes. Particularly younger children, as their brain is developing and they're acquiring their skills, and early brain development. There's a long-lasting impact on their subsequent development and behavior and IQ and function.

Senator PRYOR. Right. So, tell us about the cumulative aspect of—

Dr. GARDNER. Part of the issue is that lead stays in your body for many years, if not decades. And it accumulates. So, one of the difficult issues is that an exposure to a small amount of lead, in and of itself, may not be harmful, but as that adds on, and it's additive, and it continues over a period of time, you can easily reach levels that are harmful, even though those individual exposures are small.

The other thing that's hard to monitor and measure is the starting point of a child's lead exposure. If they're starting with a blood lead level of 8, and they're exposed to small amounts that, over a period of time, take them over 10—as opposed to the child that starts with a blood lead level of 1 and goes to 3. Bioavailability or the absorption is a moving target, in terms of how much is being absorbed and stored over time, and what the vulnerability is of that child or adolescent, or even adult, absorbing that lead.

Lead is a poison. And it's very difficult to talk about safe levels when there, essentially, isn't one.

Senator PRYOR. Right. It has been a difficult topic within the CPSIA and the CPSC, trying to implement this, because, you know, there's a lot of lead in products out there. And, you know, some products, it's just a necessary ingredient, and it's been used for different things at different times. And, you know, some of these parts are not accessible at all. And the CPSC has really been struggling with this and working through a lot of these issues, over time. So, we'll continue that discussion with all of you all—

Dr. GARDNER. There's background lead—

Senator PRYOR. Yes.

Dr. GARDNER.—as well.

Senator PRYOR. Right.

Dr. GARDNER. And you can't eliminate all of the background lead—

Senator PRYOR. Right.

Dr. GARDNER.—so that's adding just the "lead load," if you will.

Senator PRYOR. But, I guess the idea would be, if you can lessen the load, especially in children's products——

Dr. GARDNER. Yes.

Senator PRYOR.—that's a good thing to do, because they do have this other——

Dr. GARDNER. It's essential.

Senator PRYOR. Yes.

Well, listen, you guys have been great. I want to thank all the panelists.

We're going to leave the record open for 2 weeks. We, I'm sure, will have lots of follow-up questions, because I have several more pages. I just don't want to keep you all day. But, I'm sure we'll have some follow-up questions and other questions from the Committee members who couldn't be here today.

So, I want to thank all of you all for everything that you do. And, like we said before, as we go through 2011, we will continue this dialogue, whether it be here in the Subcommittee or in, you know, our offices or just informally, or whatever. But, your input is very important.

We appreciate all of you for being here, and thank you. And have a great holiday season.

[Whereupon, at 12 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF THE PRINTING INDUSTRIES OF AMERICA, BOOK
MANUFACTURERS' INSTITUTE, INC., AND THE ASSOCIATION OF AMERICAN
PUBLISHERS, INC.

PETITION
December 16, 2010

Office of the Secretary,
U.S. Consumer Product Safety Commission,
Bethesda, MD.

Re: Request to Extend the Current Stay of Enforcement for Certain CPSIA Testing
and Certification Requirements for Books and Other Printed Material Chil-
dren's Products

Dear Mr. Stevenson:

The Printing Industries of America,¹ the Book Manufacturers' Institute, Inc.,² and the Association of American Publishers³ (hereinafter "Joint Requesters") hereby request the Consumer Product Safety Commission to extend its current stay of enforcement for certain provisions of Subsection 14(a) of the Consumer Product Safety Improvement Act ("CPSIA") for books and other printed material children's products for an additional 12 months from the February 10, 2011 expiration date of the current stay.

An extended stay is necessary because the Commission to date has not completed several pending rulemaking proceedings, specifically the Testing and Labeling Pertaining to Product Certification (75 FR 28336) and Conditions and Requirements for Testing Component Parts of Consumer Products (75 FR 28208) rules, that are required for implementation of and compliance with Sections 101, 102, and 108 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA") before the current stay expires. Even if the Commission were to publish the final rules today, the effective dates of the rules would not allow for sufficient time for companies to implement these provisions properly.

Over the course of the prior and current stays, the Commission has worked in a determined manner to implement CPSIA, including the publication of more than 50 rules and interpretive policy statements implementing the law. The Commission has also issued several policy statements designed to provide guidance to industry. However, serious implementation problems still exist, particularly in the application of CPSIA to books and other printed children's material, even as the clock ticks down to the current stay's expiration date.

¹Printing Industries of America (PIA) is the world's largest graphic arts trade association, representing an industry with approximately one million employees. It serves the interests of more than 10,000 member companies involved in every stage of the printing industry from materials to equipment to production to fulfillment. Over 80 percent of the printing operations in Printing Industries of America's membership have less than 20 employees, which makes printing a prime example of small business involved in manufacturing.

²The Book Manufacturers' Institute, Inc. (BMI) is the leading nationally recognized trade association of the book manufacturing industry. Our membership is comprised of 80 companies ranging in size of those with less than a hundred employees to those employing thousands. BMI member companies annually produce the great majority of books ordered by the U.S. and Canadian book publishing industries. While our members produce the majority of books used in all publishing markets, our members do manufacture over 95 percent of the books used in the elementary school market.

³The Association of American Publishers (AAP) is the principal national trade association for the U.S. book industry, representing some 300 member companies and organizations that include most major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members include large and small publishers of children's books in the consumer marketplace, as well as publishers of instructional and assessment materials for students at all levels of education.

For more than 2 years, the Joint Requesters have been engaged in meetings, discussions and other communications with the Commission and its staff in an effort to clarify the applicability of the requirements in the various sections of CPSIA to books and other printed material children's products. These efforts have involved the exchange of letters, development and provision of online access to a test results database, and multiple in-person meetings with the Commission's technical, legal, and enforcement staff.

The Joint Responders' interaction with the Commission has been productive in a number of ways, including an August 26, 2009 final rule announcing determinations (74 FR 43031) that certain component materials, such as paper, animal-based glues, and any product printed with four color process inks (CMYK) and others, used in books and other printed material children's products are not required to be tested for lead content under Subsection 102 of the CPSIA.

However, to date many other component materials included in the initial request for determinations made by the Joint Requesters have not received determinations for exclusion by the Commission. These include spot inks, saddle stitching wires, and laminates, among other components.

The Joint Requesters understand the significance of such determinations and deeply appreciate the efforts of the Commission staff to work with us on our additional exclusion determination requests. However, since the typical components of most books and other printed material children's products are comprised of the materials that did *not* receive exclusion determinations from the Commission, the practical result is that *any* of these children's products that includes a component of non-excluded material will have to be tested for certification under the statutory requirements. As a result, the needed relief from the accredited third-party laboratory testing requirement is unavailable for virtually *all* such products.

Other aspects of CPSIA, such as the stringent conditions that must be met in order to demonstrate the "non-accessibility" of certain component materials as a basis for their exclusion from the Section 102 testing requirement, as described by the Commission in its final rule issued on August 7, 2009 (74 FR 39535) have proven too restrictive for virtually *any* books with covers to avoid the testing requirement and remain problematic.

Yet another example of the practical limitation of the current exclusion determinations for component materials involves textbooks. Almost every textbook cover is laminated to maintain product quality and longevity. Since laminates are not included in the list of component materials determined to not have lead contents that could ever exceed the statutory limit, every textbook must be tested for lead content to support the required certification. Considering the millions of textbooks printed each year and the lead-time required to test and deliver them to students in a timely manner, this presents an unrealistic situation for the companies represented by the Joint Requesters. In addition, a large percentage of soft-cover books, which includes the testing books that are required under the No Child Left Behind Act, are printed with spot inks. All of these would also require testing to support the required certification.

Certainly, all stakeholders are aware of these and other examples that have proven challenging in the implementation of CPSIA. In its January 2010 "Report to Congress," the Commission stated it believed it could "more effectively fulfill its mandate under section 101(a) if it were allowed greater flexibility in granting exclusions from the section 101(a) lead limits," particularly as the regulation related to "ordinary books." The report also highlighted the Congressional statement of managers attached to the FY 2010 omnibus bill, in which the Conferees noted their belief that CPSIA may not have been intended to subject ordinary children's books to certain provisions of the law.

Congress has also taken action to address the implementation and compliance challenges surrounding CPSIA. In the 110th Congress, legislation to amend CPSIA was introduced by both Democrat and Republican Members of Congress. The House Energy & Commerce Committee held a hearing on potential revisions to CPSIA April 29, 2010 and the Appropriation Committees of the House and Senate requested the "Report to Congress" referenced above, which was designed to solicit suggestions from Commissioners on possible ways to amend CPSIA to avoid unintended consequences and make the law work in a practical way.

The most recent Congressional examination of CPSIA was on December 2 in a Senate hearing held by the Committee on Commerce, Science, and Transportation. At this hearing, Chairman Rockefeller acknowledged that the Commission "continues to grapple with a few outstanding issues" and stated that the Senate is "taking a hard look at those concerns and recommendations." The Joint Responders are encouraged by this statement, but realize that such action is not reasonably likely to occur until after the 112th Congress convenes next month.

Industry, too, continues to develop for submission additional information supporting further exclusion determinations for component materials used in books and other printed material children's products. For those component materials that will ultimately require testing, extension of the stay would allow the necessary time to develop and implement a sampling and testing program, based on the yet to be issued final regulations, that would minimize product delays and burdensome costs.

With this in mind, we are asking the Commission to extend the stay on enforcement of the testing and certification provisions for books and other printed material children's products, until February 10, 2012. Taking such an action now will provide the Commission, Congress, and industry time to work together to develop additional revisions, policies, and interpretations that maximize the prospects for a useful and cost-effective solution for all stakeholders. During the period of the extended stay, the prohibition against commerce in children's products containing total lead content exceeding the prescribed statutory limits will, of course, remain fully in force. Extending the stay with respect to ordinary paper-based children's books and other printed material children's products will in no way endanger the health and safety of children, as the total lead content of such children's products currently is well below the most stringent statutory limits and publishers and printers will continue to ensure that it remains so.

During the extended stay of enforcement, the book printing, manufacturing, and publishing industries—represented by the Joint Requesters—will continue to work with the Commission and its technical staff on additional exclusion determinations for certain component materials that are used to manufacture books and other printed material children's products, and with Congress as it seeks to remedy unintended consequences of CPSIA.

We would be happy to respond to any questions that the Commission or its staff may have about this request.

Respectfully submitted,

LISBETH A. LYONS,
Vice President of Government Affairs,
Printing Industries of America.

DANIEL N. BACH,
Executive Vice President,
Book Manufacturers' Institute, Inc.

ALLAN ROBERT ADLER,
Vice President for Legal and Government Affairs,
Association of American Publishers.

RETAIL INDUSTRY LEADERS ASSOCIATION,
Arlington, VA, December 2, 2010

Hon. MARK PRYOR, Chairman,
Hon. ROGER WICKER, Ranking Member,
Senate Commerce Committee,
Subcommittee on Consumer Protection, Product Safety, and Insurance,
Washington, DC.

Dear Chairman Pryor and Senator Wicker:

The Retail Industry Leaders Association (RILA) welcomes the Committee's hearing on oversight of the Consumer Product Safety Commission (CPSC) and product safety in the holiday season, and we appreciate this opportunity to showcase the steps that our members are taking to ensure product safety and integrity all along the supply chain—during the holiday season and throughout the year. RILA members place the highest priority on the safety and quality of the products they sell to their customers, particularly toys and other children's products. RILA also supported the sweeping Consumer Product Safety Improvement Act (CPSIA) when it was enacted in 2008, and our members have worked aggressively to implement the law's many new requirements. While implementing the CPSIA, it has become apparent that there are some provisions in the law which do not coincide with best practices and have resulted in unintended consequences. As Congress begins to consider its agenda for 2011, RILA hopes the Senate Commerce Committee will make it a priority to advance legislation to facilitate better implementation of the CPSIA.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the

largest and fastest growing companies in the retail industry which together provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA/British Retail Consortium Consumer Product Standard

Retailers have vigorous quality assurance programs and enforcement mechanisms for their suppliers. In addition to these efforts and implementation of the CPSIA, RILA is seeking to advance product safety efforts by partnering with the British Retail Consortium (BRC) to implement a factory capability assessment of suppliers of consumer products sold in North America. This effort will create a harmonized standard that will be consistently evaluated by a third party-assessed scored audit. RILA believes the RILA/BRC standard will effectively promote global product safety by seeking to ensure that suppliers receive a detailed measurement of their quality management systems.

Improvements to the CPSIA

While RILA recognizes that the CPSIA has had a profound impact in reinvigorating the Consumer Product Safety Commission (CPSC) and enhancing consumer product safety, RILA also believes the 2008 law could be improved. Most importantly, RILA strongly supports the unanimous preference of the CPSC Commissioners to prospectively apply the August 2011 100 ppm lead limit. As currently interpreted by the CPSC, the CPSIA will make it unlawful to sell products that exceed a 100 ppm limit after August 2011, regardless of when the products were manufactured, unless the CPSC determines that the lower limit is not technologically feasible. The retroactive application of this provision creates substantial problems for manufacturers and retailers with large inventories of children's products, as well as for resellers such as charitable thrift stores, and leads to wasteful destruction of safe products because confirmation of compliance for products already on retail shelves often cannot be done in a cost effective manner. Retailers will incorporate new safety standards into their guidance to suppliers so as to ensure compliant products, but it is very difficult to implement new standards on the basis of a sell-by date, particularly when there is uncertainty on whether the CPSC could make a determination that 100 ppm is not technologically feasible. There is significant historical precedent to implement new safety standards on a prospective basis, and RILA has urged the CPSC to implement the August 2011 lead limit on a prospective basis. Nevertheless, Congressional action to clarify its intent for a prospective application would be very helpful for smooth implementation of the law.

RILA also believes the CPSIA should be modified to clarify that inaccessible component parts are excluded from the law's phthalate restrictions. Section 101(b)(2)(A) of the CPSIA clarifies that the lead limits do not apply to any component part of a children's product that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product. Section 108 of the CPSIA does not currently make a similar exception for inaccessibility for phthalates, and RILA understands this omission was inadvertent. RILA believes the prohibition on phthalates should only apply to accessible parts similar to the lead policy. As an example of the problem, phthalates are used in the plasticized coating of internal wiring in electronic toys, such as remote controlled helicopters. The phthalates help to keep the plastic coating soft and pliable to better encase and protect the wires, but does not present a risk of exposure to a child playing with the helicopter because the wires are inaccessible. An clarification that inaccessible component parts are excluded from the phthalates limits would prevent the need for costly and unnecessary testing, and confirm that the remote-controlled helicopter would be CPSIA compliant.

RILA also believes the CPSC should be granted expanded authority to except certain products or materials from the CPSIA's lead limits based on functional purpose of the lead in the product or component whenever the CPSC can also determine that the presence of lead will not affect public health and safety.

In conclusion, retailers work tirelessly to ensure the safety and quality of the products they sell, and to fully implement all the new requirements under the CPSIA. We also hope the Congress will advance legislation in early 2011 to improve the effectiveness of the CPSIA and reduce unnecessary costs for businesses that do not provide additional product safety benefits. We look forward to continuing to work with you on this and other important product safety issues. If you have any questions or concerns, please contact Stephanie Lester, Vice President, International Trade.

Sincerely,

STEPHANIE LESTER,
Vice President, International Trade.

PREPARED STATEMENT OF RICHARD M. WOLDENBERG,
CHAIRMAN, LEARNING RESOURCES, INC.

As an operator of a small business making educational products and educational toys, I have had a front row seat for the implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA) by the Consumer Product Safety Commission (CPSC). On the occasion of your CPSC oversight hearing, I want to highlight the economic damage wrought by the CPSIA without achieving any material improvement in safety statistics. I also want to bring to your attention the open hostility of the CPSC toward the corporate community in the implementation and enforcement of the CPSIA, and conclude with my recommendations for legal reforms to restore common sense to safety administration without reducing children's safety.

Children are our business. As educators, as parents and as members of our community, we have always placed the highest priority on safety. We would not be in the business of helping children learn if we didn't care deeply about children and their safety. The CPSIA has dramatically impacted our business model, reduced our ability to make a profit and create jobs, pared our incentive to invest in new products and new markets, and generally made it difficult to grow our business. We would gladly accept these burdens if the law made our products safer, but the fact is that it hasn't. Our company, Learning Resources, Inc., has recalled a grand total of 130 pieces since our founding in June 1984 (all recovered from the market). Our management of safety risks was highly effective long before the government intervened in our safety processes in 2008.

The precautionary approach of the CPSIA attempted to fill perceived "gaps" in regulation by making it illegal to sell children's products unless proven safe prior to sale. Yet the law has yielded *few quantifiable safety benefits* other than a reduction in recent recall rates for lead-in-paint (already illegal in children's products for decades). Ironically, this progress in reducing recalls has taken place in a 27-month period in which, like the time before the CPSIA, testing of children's products prior to sale was not mandatory. Consumer confidence wasn't dented by the lack of mandatory testing. The justifications for the over-arching and excessively expensive CPSIA regulatory scheme just don't hold water.

In any event, the reduction in recall rates is only a minor triumph and was not due to mandatory testing or harsh new lead standards, but most likely a (hyper) energized regulator and a great deal of publicity. Recall statistics can be highly misleading because the rate and number of recalls depend on many factors and do not generally correlate to injuries to children. In other words, product recalls are not tantamount to childhood injuries. The purpose of the CPSIA is to *reduce injuries, not product recalls*—yet CPSC recall statistics show that there have been almost no reported injuries from lead or phthalates in children's products in the last decade (one death and three unverified injuries from 1999–2010, all from lead or lead-in-paint). The billions of dollars now being spent by the corporate community annually on testing and other compliance activities have not reduced injuries—there weren't any to reduce. Whatever peace of mind has been generated by lower recall rates comes at a very high price.

The CPSIA significantly broadened the reach of Federal safety regulation well beyond what was needed to deal with the lead-in-paint toy violations of 2007 and 2008. Under the CPSIA, the definition of a "Children's Product" subject to regulation now encompasses ALL products designed or intended primarily for a child 12 years of age or younger (15 U.S.C. § 2052(a)(2)). This definition ensures that virtually anything marketed to children will be subject to the restrictions of the Consumer Product Safety Act (CPSA), irrespective of known or quantifiable risk of injury. Put another way, this definition ensures that many product categories *with a long tradition of safety* are now subject to the withering requirements of this law for the first time simply because they fall within the overly broad definition of a Children's Product. The affected safe products span the U.S. economy books, t-shirts and shoes, ATVs, bicycles, donated or resale goods, musical instruments, pens and educational products. The CPSC declined to use its discretion to narrow this definition in its recent "final rule" interpreting "Children's Product," thus ensuring continued market chaos and economic waste.

The consequences of the change in the consumer safety laws to a precautionary posture has had notable negative impacts and promises to create further problems, namely:

- a. *Increased Costs.* The new law creates a heavy burden for testing costs. From 2006 to 2009, our company's testing costs alone jumped more than eight-fold. We estimate that our testing costs will triple again after the CPSC (as anticipated) lifts its testing stay in 2011, and could multiply again if the CPSC enacts (as anticipated) its draft "15 Month Rule" on testing frequency and "reasonable

testing programs.” Testing costs are often thousands of dollars per product. Having employed one person to manage safety testing and quality control for many years, we now have a department of five, including me, plus an outside lawyer on retainer. These jobs are funded by discontinuing sales, marketing and product development jobs—the CPSIA is NOT an ersatz stimulus program. *Personnel, legal and other out-of-pocket safety expenses (besides testing) have more than quadrupled in the last 3 years—all without any change in our super-low recall rates or injury statistics.*

b. *Increased Administrative Expenses.* The CPSIA requires that all products include tracking labels on both the packaging and the product itself. Rationalized as “analogous” to date labels on cartons of milk, tracking labels are in reality nothing but pure economic waste as applied to the vast array of “Children’s Products” under the CPSIA. As noted, our company has a virtually unblemished 26-year track record of safety so tracking labels promise to add little value in the event of recalls that are unlikely to occur. Ironically, with the strict new rules governing product safety, we believe the already low chance of a product recall has been reduced further. As noted above, the money to pay for all this administrative busy work comes from foregone business opportunities. *We are being forced to shrink our company to apply tracking labels that no one will use.* An equally frustrating bureaucracy has sprung up around recordkeeping under this law. Burdensome requirements spawned by the government’s new involvement in our quality control processes forced us to make large new investments in information technology with no return on our investment. In addition, the pending CPSC draft policy on component testing promises to convert the simple task of obtaining a complete suite of safety test reports into a major record-keeping chore. We will now be forced to manage each component separately, tracking test reports on each component one-by-one. This promises to multiply our recordkeeping responsibilities—and the related risk of liability for failing to comply—by more than an order of magnitude.

c. *Reduced Incentive to Innovate.* The increased cost to bring a product to market under the CPSIA will make many viable—and valuable—products uneconomic. To cover the cost of developing, testing and safety-managing new products, the prospective sales of any new item (“hurdle rate”) is now much higher than under prior law. This means that low volume “specialty market” items are less likely to come to market and many new small business entrants may find themselves priced out of the market. The CPSIA makes it much harder to start a new business serving the children’s market because the rules so heavily favor big business. Because of CPSIA transactional costs, high volume items now have a huge cost advantage over low volume items. This will hurt many small but important markets like educational products for disabled children. Our company, with its 1,500 catalog items, is probably now a dinosaur under the CPSIA—the law provides a strong economic incentive to restructure our business around 50–150 items and to focus on high volume markets only. Schools would suffer from the loss of niche educational products.

d. *Crippled by Regulatory Complexity.* Our problems don’t end with testing costs or increased staffing. We are being crippled by regulatory complexity. Almost 28 months after passage of the CPSIA, we still don’t have a comprehensive set of regulations. Please consider how mindboggling the rules have become. There were fewer than 200 pages of safety law and CPSC rules that pertained to our business until 2008. These rules clearly defined our responsibilities and could be taught to our staff (in fact, many were rarely applicable to us). Today, the applicable laws, rules and interpretative documents exceed 3,000 pages. As a practical matter, it is simply not possible to master all of these documents—and yet it’s potentially a felony to break any of these rules. Sadly for us, the rules and CPSC staff commentary keep changing, are still being written and are rarely if ever conformed. How can we master and re-master these rules and teach them to our staff while still doing the full-time job of running our business? Ironically, the recalls of 2007 and 2008 were never a “rules” problem—those famous recalls were clearly a compliance problem. Imagine what will happen now with an unmanageable fifteen-fold increase in rules. No small business “ombudsman” can make that problem go away.

e. *Small Business Will Certainly Suffer.* The CPSIA was written in response to failings of big companies, but hammers small and medium-sized companies with particular vengeance. Our small business has already lost customers for our entire category on the grounds that selling toys is too confusing or too much of a “hassle.” This is our new reality. The highly-technical rules and requirements

are beyond the capability of all but the most highly-trained quality managers or lawyers to comprehend. Small businesses simply don't have the skills, resources or business scale to manage compliance with the CPSIA. For this reason, small businesses bear the greatest risk of liability under the law, despite being responsible for almost no injuries from lead in the last decade. The double whammy of massive new regulatory obligations and the prospect of devastating liability are driving small businesses out of our market.

In implementing and administering the CPSIA, the CPSC created a harsh regulatory environment for the business community over the past 28 months. Consider the following:

1. *Unjustified Recalls.* In June, in response to an inquiry by a Congressman and followed up by media inquiries, the CPSC pressed McDonalds to recall 12 million Shrek glasses for "high" cadmium content, despite the agency's admission on Twitter that the glasses were not toxic. The recall effort was justified as being done "out of an abundance of caution", a frightening regulatory standard when applied to products acknowledged to be safe by the regulator itself. McDonalds lost millions of dollars as a result, not to mention suffering from widespread and persistent bad publicity.

2. *Unjustified Penalties and Coercive Tactics.* The CPSC assessed a \$2.05 million penalty against a hapless Japanese dollar store chain (Daiso) for five separate tiny recalls involving 698 units and 19 items. These items sold for between \$1 and \$4 each. There were no reported injuries from sales of the Daiso trinkets. Ms. Tenenbaum bragged about this extraordinarily excessive prosecution in a speech in March 2010 to the Consumer Federation of America: "We secured an injunction that completely stops Daiso from importing children's products into the country. . . . Daiso has a very high hurdle to jump over to ever get back in the import business again." Regulated companies take stunning examples like Daiso as a warning that out-sized and disproportionate force may be used by this agency with little provocation. The regulated community has also expressed alarm over the threatened use by the agency of unilateral press releases "to warn the public" about alleged dangers in specific products as a way to coerce "voluntary" recalls. Such threats have been used where facts may be in dispute to justify a recall. Under the law, the CPSC may only implement mandatory recalls subject to a court order, a slow process perhaps but also expensive and labor-intensive. "Voluntary" recalls can be much quicker and cheaper, only requiring "agreement" between the agency and the subject company. In more than one case, CPSC has threatened unilateral releases to try to "convince" a firm to undertake a "voluntary" recall but after the firm took the risk of standing up to the staff and the staff conducted further investigation, the CPSC decided that recalls were not even necessary. Not all firms can bear the expense of such a process or take the risk of calling the staff's bluff because issuance of a release would likely damage the firm and their brand, possibly irrevocably. Many supposedly "voluntary" recalls have resulted. Abusive tactics of this nature have severely damaged trust between the CPSC and the regulated community.

3. *Disregard of Public Comments.* The agency has garnered considerable criticism for overlooking or disregarding comments from the corporate community solicited in its public rulemaking processes. Ignoring or disregarding inconvenient public comments contrary to the agenda of the controlling party makes a mockery of the legally-mandated public comment process. Notable instances include the recent approval of interpretative rule on "Children's Products" and the rules implementing the public database of safety incidents. The database debate was so fouled by the majority's refusal to entertain the legitimate concerns of industry that the two minority Commissioners proposed their own draft rule—which the CPSC at first refused to post on its website.

4. *Unjustified Hostile Rulemakings.* The CPSC has implemented rules governing the public database that adversely affect the Constitutionally-guaranteed due process rights of our businesses. There is no adequate public policy justification for the erosion of the remarkable civil rights that distinguish the American legal system among all international legal systems—yet the Commission voted 3–2 to allow falsehoods to be posted without recourse in a database the CPSC will maintain. In other cases, the agency has published draft rules (yet to be acted on) which could force companies like ours to spend as much as \$10,000 per item per year to meet *arbitrary* rules on

testing frequency or “reasonable testing programs”—notwithstanding strong evidence that these rules are wasteful, unnecessary and financially irresponsible. The pendency of rules like this creates destabilizing market uncertainty and forces business decisions that have no basis other than fear of future regulation. For instance, Wal-Mart has already instituted a 100 ppm lead standard months ahead of the *possible* implementation of the standard by the CPSC—simply because the CPSC has been so slow to act. The CPSIA went off track by taking away the CPSC’s authority to assess risk. If the CPSC were again required to regulate based on risk, safety rules could focus on those few risks with the real potential to cause harm to children. All risks were not created equal.

I recommend several steps to reduce cost, liability risk and complexity all without sacrificing children’s product safety:

A. Mandate that the CPSC base its safety decisions, resource allocation and rules on risk assessment. Restore to the Commission the discretion to set age and product definition criteria for the 300 ppm lead standard and phthalate ban. Freeze the lead standard and lead-in-paint standard at their current levels unless the CPSC determines that a change is necessary to preserve public health and safety.

B. The definition of “Children’s Product” should not include anything primarily sold into or intended for use in schools or which is used primarily under the supervision of adults. Other explicit exceptions should include apparel, shoes, pens, ATVs, bicycles, rhinestones, books and other print materials, brass and connectors. Exclusions from the definition should take these products entirely outside the coverage of the CPSIA (including mandatory tracking labels).

C. Lead-in-substrate and phthalate testing should be based on a “reasonable testing program,” not mandated outside testing. *The tenets of a reasonable testing program should be set by the reasonable business judgment of the manufacturer.* Resellers should be entitled by rule to rely on the representations of manufacturers. Phthalate testing requirements should explicitly exempt inaccessible components, metals, minerals, hard plastics, natural fibers and wood.

D. Definition of “Children’s Product” should be limited to children 6 years old or younger and should eliminate the difficult-to-apply “common recognition” factor of Section 3(a)(2)(c) of the CPSA. Definition of “Toy” (for phthalates purposes) should be limited to children 3 years old or younger and should explicitly refer only to products in the form used in play.

E. Eliminate CPSC certification of laboratories (rely on the market to provide good resources). Fraud has only very rarely been a problem with test labs and is already illegal.

F. Impose procedural limits to insure fairness in penalty assessment by the CPSC under the CPSIA. Completely reformulate penalties to restrict them to egregious conduct (including patterns of violations), reckless endangerment or conduct resulting in serious injury.

G. Rewrite the penalty provision applicable to resale of used product so that violations are only subject to penalty if intentional (actual knowledge or reckless endangerment) and only if the violation led to an actual injury. Eliminate the “knowing” standard with its imputed knowledge of a reasonable man exercising due care.

H. Mandatory tracking labels should be explicitly limited to cribs, bassinets, play pens, all long-life “heirloom” products with a known history of injuring the most vulnerable children (babies or toddlers).

I. Public injury/incident database should be restricted to recalls or properly investigated incidents only. Manufacturers must be given full access to all posted incident data, including contact information. The “due process” civil liberty interests of the corporate community *must be protected*.

I urge your committee to address the fundamental flaws in the CPSIA to restore order to the children’s product market and to protect small businesses from further damage. I appreciate the opportunity to share my views on this important topic.

PREPARED STATEMENT OF PAUL C. VITRANO, GENERAL COUNSEL,
MOTORCYCLE INDUSTRY COUNCIL

Chairman Pryor, Ranking Member Wicker and distinguished members of the Subcommittee on Consumer Protection, Product Safety and Insurance, thank you for the opportunity to submit this testimony on the need for amendments to the Consumer Product Safety Improvement Act (CPSIA). My name is Paul Vitrano. I am the General Counsel of the Motorcycle Industry Council. MIC is a not-for-profit, national industry association representing nearly 300 manufacturers and distributors of motorcycles and all-terrain vehicles; motorcycle, ATV and recreational off-highway vehicle parts and accessories; and members of allied trades such as insurance, finance and investment companies, media companies and consultants.

The CPSIA was intended to protect children from ingesting lead from toys. However, the lead provision has had unintended consequences and we are pleased to submit testimony about one of those unintended consequences. The CPSIA has effectively banned the sale of many age-appropriate youth ATVs and motorcycles because of the lead content of certain components. As a result of its broad reach, the Act has inadvertently crippled an industry unrelated to the toy manufacturers that were the intended target of the lead provision. In addition, the unintended ban has resulted in unsafe situations for youth off-highway enthusiasts.

It is estimated that over 13.7 million Americans enjoy riding off-highway motorcycles and over 35 million enjoy riding ATVs. Safety of our riders—particularly our youngest riders—is a top priority of the powersports industry. Vehicles, helmets and other gear and accessories are specially designed for youth riders to allow them to safely enjoy this family-friendly form of outdoor recreation.

In February 2009, however, ATVs and motorcycles designed and primarily intended for youth riders aged 6 to 12 became banned hazardous substances under the CPSIA because small amounts of lead—that pose no risk to youth—that are imbedded in metal parts of those vehicles to enhance the functionality of those components.

As you know, the CPSC concluded that the language of the CPSIA prevented it from making common-sense decisions and resulted in the CPSC denying the powersports industry's petitions for exclusion from the lead content provision. The exclusion was denied despite the fact that the CPSC's own staff acknowledged that there was no measurable risk to children resulting from lead exposure from these products.

The CPSC tried to temporarily address the ban by issuing a stay of enforcement of the CPSIA's new lead content limits in May 2009. Unfortunately, this stay of enforcement has proven unworkable. Due to the risks of selling under the stay, many manufacturers and dealers are no longer selling youth model off-highway vehicles, and there is now a limited availability of these products for consumers. Half of the major ATV manufacturers are no longer selling youth models despite the stay.

The CPSC has acknowledged that the ban on youth off-highway vehicles creates a compelling safety issue because it likely will result in children 12 years of age and younger riding larger and faster adult-size vehicles. For example, CPSC studies show almost 90 percent of youth ATV injuries and fatalities occur on adult-size ATVs. Again, the CPSC's staff scientists acknowledge that the presence of lead in metal alloys in these youth models—needed for functionality, durability and other reasons that are safety critical to the components—does not present a health hazard to children. The Commission also acknowledges that children riding these vehicles only interact with a limited number of metal component parts that might contain small amounts of lead, like brake and clutch levers, throttle controls, and tire valve stems.

As a result, for over 18 months, MIC, its members, their dealers and many of the millions of Americans who safely and responsibly ride their off-highway motorcycles and ATVs with their children have urged Congress to amend the CPSIA to stop this unintended ban on youth motorized recreational vehicles. Off-highway vehicle stakeholders have sent over one million electronic messages and thousands of hand signed letters and made numerous calls and personal visits to Capitol Hill to advocate for a legislative solution to the ban.

Since the CPSIA ban took effect on February 10, 2009, we collectively have urged Congress to act for three important reasons:

First, the lead content in metal parts of ATVs and motorcycles poses no risk to kids. Experts estimate that the lead intake from kids' interaction with metal parts is less than the lead intake from drinking a glass of water.

Second, everyone agrees that the key to keeping youth safe on ATVs and motorcycles is having them ride the right sized vehicle. The CPSIA has unintention-

ally put kids at risk because youth ATV and motorcycle availability is limited. Unavailability of youth models results in what CPSC has described as a “more serious and immediate risk of injury or death” than any risk from lead exposure from these products—youth riders operating larger and faster vehicles designed for adults.

Finally, the CPSIA is unnecessarily hurting the economy and jobs when everyone should be trying to grow the economy and create jobs. MIC estimates that a complete ban on youth model vehicles would result in about \$1 billion in lost economic value in the retail marketplace every year.

In recognition of the need to end the unintended ban on youth ATVs and motorcycles, CPSC Chairman Tenenbaum and the other Commissioners unanimously asked Congress to provide the Commission with flexibility to grant exclusions from the CPSIA lead content provisions, specifically noting the need to address youth ATVs and motorcycles.

As a bipartisan group of 15 Senators wrote to the CPSC in 2009, “[CPSIA] has created a well-documented safety hazard for children, severe and unwarranted disruption to families who recreate together, and a deleterious effect on youth amateur racing. Additionally, the inclusion of OHVs has created an economic disaster for an industry which is already reeling from the recession, is facing countless lay-offs and is estimated to be losing three million dollars per day due to the Act.”

Senator Jon Tester introduced the “Common Sense in Consumer Product Safety Act” (S. 608) in 2009 that would end the ban by amending the CPSIA so that vehicles designed or intended primarily for children 7 years of age or older are not considered children’s products for purposes of the lead content provisions.

We believe that Congress never intended to ban youth model motorized recreational vehicles when it passed the CPSIA. MIC urges the Committee to stop this unintended ban by either granting a categorical exemption for ATVs and youth motorcycles; or passing legislation to limit the parts of the vehicle deemed “accessible” and thus subject to the lead content provision of the CPSIA. In either case, we also urge the Committee to provide as much clarity as possible so that the CPSC is left with no doubt about Congress’ intent to ensure the continued availability of these youth model motorized recreational vehicles.

Thank you.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
HON. INEZ M. TENENBAUM

Question 1. Is the marketplace safe for shoppers this holiday season?

Answer. Overall, I believe the consumer product marketplace was safer for consumers this holiday season. This is the second holiday shopping season that manufacturers, importers, and retailers of children’s products have had to comply with some of the most stringent lead and phthalates limits in the world and mandatory toy standards. Thanks to you and your fellow Members of Congress who crafted and passed the Consumer Product Safety Improvement Act of 2008 (CPSIA), CPSC has more authorities and influence in overseas markets, at the ports, and in the U.S. marketplace. The effect has been increased confidence for parents as they shop for their children.

Question 2. Has the agency seen a dramatic decline in toy recalls since 2008?

Answer. The number of toy recalls has dropped over 70 percent from a high of 172 in FY 2008 to 44 in FY 2010. Toys accounted for 31 percent of all recalls in FY 2008 but only 10 percent of all recalls in FY 2010. The number of toy units recalled declined by over 3.8 million from FY 2008 to FY 2010.

Question 3. Has the agency seen a decline in the number of deaths of children under the age of 15?

Answer. Yes. The numbers of consumer product related deaths for ages 0 to 15 have dropped by over 17 percent, from 3,225 to 2,658, over the period 1985 to 2007 (the latest year of complete death date). Adjusting for changes in the population count, the rate of death for this age group, per 100,000 resident population, has dropped from 6.3 deaths per 100,000 to 4.4 deaths per 100,000.

Question 4. What advice can the CPSC offer to parents to help keep their kids safe from any potential product hazards this holiday season?

Answer. During the 2010 holiday shopping season CPSC issued guidance to parents noting that while recalls and deaths have declined, toy-related injuries are increasing. In 2009, there were an estimated 186,000 emergency room-treated injuries related to toys with children younger than 15, which is up from 152,000 injuries in 2005. Frequently these injuries involved lacerations, contusions, and abrasions that

most often occurred to a child's face and head. Importantly many of the incidents were associated with, but not necessarily caused by, a toy.

To help keep the holiday season happy, safe, and incident-free, CPSC encouraged consumers to adopt a three-pronged safety approach:

1. *Which Toy for Which Child?*—Always choose age appropriate toys.
2. *Gear Up for Safety*—Include safety gear whenever shopping for sports-related gifts or ride-on toys, including bicycles, skates, and scooters.
3. *Location, Location, Location*—Be aware of your child's surroundings during play. Young children should avoid playing with ride-on toys near automobile traffic, pools or ponds. They also should avoid playing in indoor areas associated with hazards such as kitchens and bathrooms and in rooms with corded window blinds.

Some additional safety steps that CPSC advised consumers to follow include:

- *Scooters and Other Riding Toys*—Riding toys, skateboards, and in-line skates go fast, and falls could be deadly. Helmets and safety gear should be worn properly at all times and be sized to fit.
- *Small Balls and Other Toys with Small Parts*—For children younger than age three, avoid toys with small parts, which can cause choking.
- *Balloons*—Children can choke or suffocate on deflated or broken balloons. Keep deflated balloons away from children younger than 8 years old. Discard broken balloons at once.
- *Magnets*—For children under age six, avoid building or play sets with small magnets. If magnets or pieces with magnets are swallowed, serious injuries and/or death can occur.

Once the gifts are opened, CPSC always advised parents to:

- Immediately discard plastic wrappings or other packaging on toys before they become dangerous play things.
- Keep toys appropriate for older children away from younger siblings.
- Supervise children while charging batteries. Chargers and adapters can pose thermal burn hazards to young children. Pay attention to instructions and warnings on battery chargers. Some chargers lack any mechanism to prevent overcharging.

Question 5. Would you describe to the Committee what spurred this campaign in the first place, progress made to protect children from unsafe cribs, and a status update on the Commission's efforts?

Answer. Between November 2007 and April 2010 there were 36 deaths reported to the Commission associated with crib structural problems. Of those, 25 occurred when crib components (often associated with the drop-side hardware portion of the crib) detached, disengaged, or broke ending in the strangulation death of the infant in the crib.

In the wake of these and other tragic incidents involving children's sleep environments, I directed and the Commission supported the creation of the Safe Sleep Team. This team has worked diligently to prevent consumers from being harmed by cribs and infant sleep products and has also contributed to the creation of new standards and regulations for these types of products. Pursuant to the direction contained in section 104 of the CPSIA, I also announced early in 2010 that the Commission would adopt new, mandatory crib safety standards by the end of that year. On December 15, 2010, the full Commission voted unanimously to adopt new crib safety standards that, among other things, prohibit the use of traditional drop-sides in newly manufactured cribs.

Under the rules, the sale, resale, lease or other placement in the U.S. stream of commerce of old cribs that do not meet the new safety standard will be prohibited effective June 28, 2011. The rules will also prohibit the use of old, noncompliant cribs "by child care facilities, family child care homes, and places of accommodation affecting commerce." The Commission, however, recognized that child care facilities and places of public accommodation would require a period of time to purchase new, compliant cribs for use in their facilities. Accordingly the rule gives child care providers and places of public accommodation that use cribs until December 28, 2012, to purchase and start using new compliant cribs in those facilities.

Question 6. When do you expect the Commission will issue a final rule on crib safety?

Answer. As noted above the Commission voted unanimously to adopt the new crib safety rules on December 15, 2010. The rules were published in the Federal Register

on December 28, 2010. (See Consumer Product Safety Commission, “Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs: Final Rule,” 75 Fed. Reg. 81,766 (Dec. 28, 2010)).

Question 7. I’m certain you and your staff spent countless hours working on the final rule that the Commission recently adopted establishing the Publicly Available Product Information Database. Do you believe the publicly searchable database is a victory for American consumers?

Answer. Yes, I believe the rollout of the Database will be one of the most significant steps to advance consumer product safety awareness taken in the history of this agency. First and foremost, the Database will function as an early warning system for dangerous and potentially dangerous products by allowing members of the public to share information about product hazards as quickly as that information becomes known. This is a very positive change from the current system (generally referred to as “section 6(b) procedure”), where the Commission is required to consult with manufacturers and seek their advance approval before warning the public of potentially dangerous items.

The Database will also allow the Commission to use the most modern and effective technology to collect information from consumers and better manage that information internally. This will allow the Commission to monitor the safety of products out in the marketplace in “real time,” and also accelerate the issuance of recalls and other corrective actions where necessary. In the end, I think this is a “win-win” for both manufacturers and consumers, because it will alert manufacturers of potential defects much faster than under the current system and get potentially dangerous products out of the hands of consumers as soon as possible.

Question 8. How will this Database serve to protect the public from dangerous products in the stream of commerce?

Answer. As noted above, the Database will serve as an early warning system for consumers. Product safety incident reports will be available on *SaferProducts.gov* soon after they are filed by consumers who have learned of a dangerous or potentially dangerous product. This represents a very substantial change from current procedure where consumer complaints are often withheld from public access for months or even years due to the “section 6(b) process.”

The Database will also use the most modern IT technology to “data mine” the reports for new and emerging patterns of product defect. This should allow Commission staff to react faster to new and emerging hazards—and reduce injuries or deaths that may be caused by those product hazards.

Question 9. Do you think the CPSC’s recent final rule establishing the publicly searchable database properly balances timely disclosure of important consumer protection information with the need to address legitimate business concerns?

Answer. Yes, I do. Our implementation of the Database has built-in protections and procedures that will allow a manufacturer to have its perspective included in the Database record. In cases where a manufacturer believes a report is either materially inaccurate or contains confidential information, the company can ask that we correct the record or redact the confidential information.

In addition to providing manufacturers with the right to comment on reports, the Database also requires all reports to carry the following disclaimer: “The Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the Consumer Product Safety Information Database, particularly with respect to the accuracy, completeness, or adequacy of information submitted by persons outside of CPSC.”

The result of this is a balanced approach that will allow for the correction of faulty information without requiring the Commission to withhold reports from the public until they are endlessly vetted by outside parties.

Question 10. Is the Database on track to be launched in March 2011?

Answer. Yes, the Database is currently on schedule for a fully functional launch on March 11, 2011.

Question 11. Does the Commission intend to consider extending the stay of enforcement for the third-party testing requirement? Do you think it is necessary to extend the stay of enforcement?

Answer. The Commission is currently considering several petitions and requests, including one from the Handmade Toy Alliance (HTA), for a continuation of the stay of enforcement for third-party testing of lead content. In considering these requests, the Commission will carefully consider the views and concerns of all impacted stakeholders.

Question 12. Within the third-party testing regime, where is the Commission in its efforts to promulgate rules outlining appropriate testing protocols?

Answer. On December 28, 2009, the Commission issued an interim enforcement policy, "Interim Enforcement Policy on Component Testing and Certification of Children's Products and Other Consumer Products to the August 14, 2009 Lead Limits," regarding component testing and certification of children's products and other consumer products to the 90 parts per million (ppm) lead in paint limit and to the 300 ppm lead limit for children's products established in section 101 of the CPSIA.

This interim enforcement policy permits, as part of a domestic manufacturer's or importer's certification of a children's product as being in compliance with the 300 ppm lead content limit, the domestic manufacturer or importer to rely on a test report showing passing test results for one or more components used on the product, based on testing either of them has commissioned from a recognized third-party test lab. The domestic manufacturer or importer may also rely on a certificate from another person certifying that a component complies with the 300 ppm lead limit, provided the component certificate is based on testing of a representative sample of the component(s) by a recognized third-party test lab.

On May 20, 2010, the Commission published a notice of proposed rulemaking, "Conditions and Requirements for Testing Component Parts of Consumer Products," 16 CFR Part 1109. This proposed rule set forth, for Commission consideration, the conditions and requirements under which the Commission will require or accept the results of testing of component parts of consumer products, instead of the entire consumer product, to meet, in whole or in part, the testing requirements of sections 14(a), 14(b), and 14(d) of the CPSA.

On May 20, 2010, the CPSC also issued a proposed rule that would establish requirements for a reasonable testing program and for compliance and continuing testing for children's products. The proposal would also address labeling of consumer products to show that the product complies with certification requirements under a reasonable testing program for nonchildren's products or under compliance and continuing testing for children's products. The proposed rule would implement section 14(a) and (d) of the Consumer Product Safety Act (CPSA), as amended by section 102(b) of the Consumer Product Safety Improvement Act of 2008 (CPSIA).

CPSC staff are currently reviewing and drafting responses to the over 300 comments received on these two proposed rules. Based on the comments and further staff analyses, the proposed rules will be updated and draft final rules submitted to the Commission for consideration in the first half of calendar 2011.

Question 13. Has the Commission proposed a rule allowing for component part testing?

Answer. Yes. On May 20, 2010, the Commission published a notice of proposed rulemaking, "Conditions and Requirements for Testing Component Parts of Consumer Products," 16 CFR Part 1109. This proposed rule set forth, for Commission consideration, the conditions and requirements under which the Commission will require or accept the results of testing of component parts of consumer products, instead of the entire consumer product, to meet, in whole or in part, the testing requirements of sections 14(a), 14(b), and 14(d) of the CPSA.

In advance of the proposed rule for component part testing, the Commission issued an interim enforcement policy, "Interim Enforcement Policy on Component Testing and Certification of Children's Products and Other Consumer Products to the August 14, 2009 Lead Limits," regarding component testing and certification of children's products and other consumer products to the 90 parts per million (ppm) lead in paint limit and to the 300 ppm lead limit for children's products established in section 101 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

This interim enforcement policy, issued on December 28, 2009, permits, as part of a domestic manufacturer's or importer's certification of a children's product as being in compliance with the 300 ppm lead content limit, the domestic manufacturer or importer to rely on a test report showing passing test results for one or more components used on the product, based on testing either of them has commissioned from a recognized third-party test lab. The domestic manufacturer or importer may also rely on a certificate from another person certifying that a component complies with the 300 ppm lead limit, provided the component certificate is based on testing of a representative sample of the component(s) by a recognized third-party test lab.

Question 14. As you know, this year's reports of cadmium in children's products are very troubling. The CPSC has the authority to respond to emerging hazards in the marketplace. Has the Commission reached a final determination as to whether the toxicity of cadmium is sufficient to be considered toxic under the FHSA?

Answer. CPSC staff have concluded that the data concerning the toxicity of cadmium are sufficient for cadmium to be considered toxic under the FHSA due to effects on multiple organ systems and toxic endpoints, including kidney dysfunction.

The conclusion that a substance is toxic is only the first step in the Commission's assessment under the FHSA.

The FHSA is risk-based. To be considered a "hazardous substance" under the FHSA, a consumer product must satisfy a two-part definition. (See 15 U.S.C. § 1262 (f)(1)(A)). First, it must be toxic under the FHSA or present one of the other hazards enumerated in the statute (see statement above). Second, it must have the potential to cause "substantial illness or injury during or as a result of reasonably foreseeable handling or use." Therefore, exposure and risk must be considered in addition to toxicity when assessing potential hazards under the FHSA.

Question 15. You noted in a letter you sent to me earlier this year that you were working with "standards determining organizations" to figure out whether "current standards governing the use of toxic metals in surface coatings or the substrate of toys [were] sufficiently protective of children's health and safety." What has been the outcome of those deliberations?

Answer. The evaluation of the current ASTM F963 toy safety standard, made mandatory by the Consumer Product Safety Improvement Act of 2008, is an ongoing, multifaceted effort by CPSC technical staff, including toxicologists and chemists. Staff has completed toxicity and dose-response analysis of the chemicals regulated by the standard. An external peer review of the analysis is also currently being prepared. In addition, staff is evaluating test methods specified in the standard for their suitability in accurately identifying potentially hazardous products.

Recently the ASTM toy safety subcommittee established a work group to consider aligning the current standard with international standards for accessible soluble heavy metals in toys. The proposed changes in the ASTM standard would expand the requirements for toys, including the scope of the standard, with respect to chemical substances, including cadmium. CPSC staff is actively involved in the discussions and generally supports the expansion of requirements for metals in toys.

Question 16. I was the lead author of the Virginia Graeme Baker Pool and Spa Safety Act here in the Senate, a law that established strict pool safety standards as a response to too many tragic accidents and insufficient safety standards. I understand the CPSC has launched a robust pool safety campaign. Could you update us on the Commission's efforts to protect the public from pool and spa hazards?

Answer. In 2010, CPSC launched the most expansive information and education campaign in its history, which was aimed at preventing child drownings and drain entrapments. Below is a summary of our *Pool Safely: Simple Steps Save Lives* multimedia campaign:

- CPSC awarded a contract to Widmeyer Communications to develop and implement an information and education campaign to fulfill the requirements of Section 1407 of the Virginia Graeme Baker Pool and Spa Safety Act (VGB Act). The comprehensive *Pool Safely* campaign teaches pool and spa safety steps that stress prevention of drowning and entrapment by engaging stakeholders as partners at the national and grassroots levels. Child safety experts work on public and residential drowning prevention programs for parents and children, and industry organizations share VGB Act compliance information with pool and spa owners and operators.
- The *Pool Safely* campaign messages totaled more than 250 million views, which were generated from print articles, online stories, local television broadcasts, and epublications through the CPSC's website. This goal was exceeded due to the exceptional exposure generated by Widmeyer Communications through the production and dissemination of a high-value TV PSA. In addition, numerous print articles, radio stories, and online stories were generated in 2010, which reached millions of readers and listeners. Significant additional views were made via Twitter, Flickr, and YouTube. Metro transit stations in the District of Columbia displayed five illuminated posters, which generated 1.7 million views in September 2010. Billboards with *Pool Safely* campaign messages were placed on streets and highways in Arizona, California, and several other states.
- CPSC staff worked with a contractor on events targeting minorities and high-risk families. These events included focus groups, program announcement press conferences, and events in minority communities in Houston, TX, and Washington, D.C. At these events participating groups included organizations such as Safe Kids, American Red Cross, the YMCA, and local organizations like Bria's House, which provides swimming lessons to underprivileged children.
- A professional Web design services company was contracted to redesign and expand *PoolSafety.gov* into a state-of-the-art, interactive Web resource using the campaign name *www.PoolSafely.gov*. The new site was launched on September 27, 2010. This site has interactive links to all content developed as part of the

Information and Education campaign with special sections for families, industry, state and local officials, and the media.

- Finally, CPSC staff developed and awarded six contracts to leading organizations to create and deliver educational and training programs nationally. Contractors representing top national industry experts were retained to execute training materials for pool owners and operators, manufacturers, and retail outlets, and local and state regulatory entities. Using a combination of live events, webinars, and prepared educational training video programs, each contractor will address issues related to drowning and entrapment prevention for their specified audiences.

Question 17. Could you discuss the issue of the additional layer of protection for pools with only a single main drain?

Answer. CPSC supports the use of layers of protection in and around pools and spas. From fences to door alarms to safer drain covers to suction detection devices, CPSC believes that a system of safety is needed to protect children from drowning and entrapment hazards in and around public and private pools and spas.

As required by Section 1404 of the VGB Act, all public pools and spas that have a blockable drain operating on a single main drain system must install a secondary layer of protection. Pool and spa operators can use one of five options to meet this requirement: a safety vacuum release system, an automatic pump shut off system, a suction-limiting vent system, a gravity drain system, or no drains.

The Commission voted three to two in 2010 to allow for the use of unblockable drain covers to be placed over blockable sized drains on single main drain systems to exempt public pools and spas from having to comply with the secondary protection system requirement. I voted against this decision because I believed that a secondary system was contemplated by the statute for pools with a single main drain and to provide the highest level of protection possible in such pools.

Question 18. Many months ago, an ABC news article reported a pool drain cover safety risk and suggested that despite discontinued manufacturing of certain models of drain covers, consumers were not notified of potentially dangerous drain covers already purchased and installed in pools across the country. Is the Commission aware of this concern?

Answer. Yes, the Commission is aware of this concern.

After learning of possible anomalies in the testing of certain pool drain covers, the Commission took several steps to investigate. On September 3, 2010, the Commission issued subpoenas requesting test data from three independent labs involved in drain cover testing, rating, and certification. This request produced over 17,000 pages of technical documents for staff review, which is currently underway.

CPSC also contracted with a third-party testing laboratory to have the identified suction outlet covers tested (CPSC Contract # S-10-0108). CPSC laboratory staff witnessed the testing to observe the test facility, the test procedures, and the methodology of different technical staff conducting the tests. The results of testing have been reported by the contractor and staff is reviewing the report.

These results will be used to discuss any ratings issues with manufacturers of the identified product whose rating is questionable. In the event that testing results for certain covers indicate any substantial product safety hazards, the Commission may pursue a recall or other corrective action against the manufacturer of the specific cover.

In addition, the CPSC laboratory is also conducting its own independent testing of the identified suction outlet covers and will compare results with those obtained by the contractor as well as those obtained by the original third-party certifying laboratories. These results and review of the procedures will also be used to develop guidance for future testing and rating of suction outlet covers by third-party certifying laboratories.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO
HON. INEZ M. TENENBAUM

Question 1. The Food and Drug Administration (FDA) has three different product classifications for toothbrushes: (1) toothbrush, ionic, battery-powered; (2) toothbrush, manual; and (3) toothbrush, powered. The FDA classifies all toothbrushes as Class I medical (dental) devices. My understanding is that such Class I devices are regulated by the FDA. Under current law, does the Consumer Product Safety Commission (CPSC) have any authority to ensure the safety of toothbrushes, even those that are clearly marketed to children?

Answer. Section 3(a)(5) of the Consumer Product Safety Act (“CPSA”) defines “consumer product” as “any article, or component part thereof, produced or distributed: (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household residence, a school, in recreation, or otherwise. . . .” However, section 3(a)(5)(H) of the CPSA expressly excludes, from the definition of “consumer product,” “drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act)” (“FFDCA”).

Thus, a toothbrush, as a “device” under section 201(h) of the FFDCA, cannot be a “consumer product” and, therefore, is not subject to regulation under the CPSA.

However, the Federal Hazardous Substances Act (“FHSA”) does not contain an exception for devices. (It expressly excludes “foods, drugs, and cosmetics subject to the Federal Food, Drug, and Cosmetic Act.”) Consequently, CPSC could use its authority under the FHSA to address hazardous substances in devices.

Question 1a. Do you believe that all toothbrushes should be classified as medical devices or should some be classified as a consumer product?

Answer. Because the FHSA permits us to exercise jurisdiction over toothbrushes under the FHSA regardless of their classification as a medical device, they receive coverage under both FDA’s jurisdiction and the CPSC’s with regard to their chemical content.

However, toothbrushes are not subject to the CPSIA’s new testing and certification requirements for children’s products since they fall outside the definition of “children’s product” as described above. As a medical device, toothbrushes may be subject to the FDA’s regulations known as current good manufacturing practices. However, we defer to FDA on whether such regulations would apply to toothbrushes.

Question 2. There are a number of battery-powered toothbrushes in the market that have children’s cartoon or live-action characters painted on to the body of toothbrush or attached to the body of the toothbrush (*i.e.*, the on-off switch in the shape of the cartoon character), and are marketed to children. Does the CPSC consider such toothbrushes to be a “children’s product”? Should the CPSC classify these toothbrushes to be a children’s product as they are marketed to children 12 years of age and younger?

Answer. As noted in the response to question 1, a “device” cannot be a “consumer product” under the CPSA. Section 3(a)(2) of the CPSA defines “children’s product,” in relevant part, as “a consumer product designed or intended primarily for children 12 years of age or younger.” (Emphasis added.) Thus, because a device cannot be a “consumer product” under section 3(a)(5) of the CPSA, neither can it be a “children’s product” under section 3(a)(2) of the CPSA.

However, if CPSC staff age grades a toothbrush for use by children, we could assert jurisdiction to regulate the toothbrushes under the FHSA and take appropriate action should they contain a hazardous level of heavy metals in either the surface coating or the substrate.

Question 2a. Does the FDA have any standards for the levels of heavy metals allowed in toothbrushes?

Answer. This question involves interpreting FDA rules and policies, and we must respectfully refer you to that agency for a response to this question.

Question 2b. Hypothetically, if it is reported that lead was found in the colored bristles of a toothbrush with a cartoon character painted on the body of the toothbrush, how would the CPSC respond? Would the FDA have absolute jurisdiction? If the FDA chooses not to investigate the report, does the CPSC have any authority to investigate such a claim independently?

Answer. Under current laws the toothbrush would not be subject to the lead limits in section 101 of the CPSIA because, as stated earlier, the product would be excluded from the definition of “children’s product.” CPSC might be able to assert authority under the FHSA if the product met the definition of a “hazardous substance.” CPSC has the authority to investigate and, if after investigation, including the analysis of testing of the toothbrush, the Commission determined the toothbrush contained a “hazardous substance” it could pursue the remedies set forth in the FHSA and take the appropriate action.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO
HON. INEZ M. TENENBAUM

Question 1. The Consumer Product Safety Commission approved a new mandatory crib safety rule on December 15, 2010. Although the new rule acknowledges that “extra bedding in cribs accounted for the majority of infant deaths in cribs or other sleeping products,” it claims “there are no performance requirements for cribs that can address this issue.” What are your plans for expanding existing education efforts to address the hazards of extra bedding and sleep positioners?

Answer. CPSC is focusing on the influence of video to inform to new parents and change behaviors when it comes to preventing suffocation risks in a baby’s sleep environment. In the aftermath of a joint press announcement with FDA in late September urging parents to stop using sleep positioners, CPSC produced an educational video on the dangers associated with these products, which is now posted on the agency’s YouTube site, and available at the following link: www.youtube.com/USCPSC#p/f/0/3xvdPpKJoMc.

Although the dangers associated with drop-sides have garnered most of the media attention related to cribs in recent years, soft bedding, including pillows, blankets and comforters, cause the most child fatalities. To educate new parents in the recovery room at the hospital or in the waiting room at their pediatrician’s office, CPSC teamed up with the American Academy of Pediatrics, *Keeping Babies Safe*, and renowned journalist Joan Lunden to produce a special *Safe Sleep for Babies* video. This video demonstrates visually and informs orally that a crib should be as bare as possible due to the suffocation risk that soft bedding poses to newborns and infants. This video can be viewed at the following site: www.cpsc.gov/CPSCPUB/PREREL/prhtml11/11021.html.

Shorter versions of the video directed at minority and other underserved populations are posted on our YouTube channel. All of these videos are being disseminated through our Safe Sleep partners and are being highlighted by the agency when conducting media interviews.

Question 2. Although the crib safety rule will be effective 6 months after publication, child care providers will have a total of 24 months to replace non-compliant, potentially dangerous cribs. What are your plans for protecting the safety of children in child care until dangerous cribs are removed from these facilities in 2 years?

Answer. The safety of cribs used in child care facilities will continue to be carefully monitored by CPSC and state child care licensors. First and foremost, it is important to clarify that child care facilities are prohibited by law from using “recalled” cribs unless a repair (provided by the manufacturer as part of the recall remedy) has been installed. CPSC staff monitors all incoming crib incident reports, including incidents which may have occurred at child care facilities and assigns investigators to conduct in depth investigations of such incidents. In addition, CPSC maintains a comprehensive contact list with state child care licensing departments. CPSC will be providing its state partners with information about the new Federal crib rule, recalls, safety alerts, and other crib safety information.

Question 3. You have indicated that the Consumer Product Safety Commission will work with the National Operating Committee on Standards for Athletic Equipment (NOCSAE) on developing new standards for football helmets. NOCSAE has not made significant changes to its helmet standard in 37 years. What is the timeline for the development of a new standard and what steps will you take to ensure the standard incorporates the latest science on concussion prevention for youth and adults?

Answer. I take the issue of helmet safety very seriously, particularly with regard to helmets used in school and youth athletics. To that end, CPSC staff has fully engaged NOCSAE in furtherance of our monitoring of their voluntary standards process. As part of this effort, I directed one of our CPSC staff engineers with significant experience in helmets standards, as well as a senior counsel from my staff, to attend the publicly-available portions of the January 20–22, 2010, NOCSAE board meeting. Overall, I believe CPSC’s oversight has already begun to bear fruit. In particular, I was encouraged by two developments that relate directly to the important issues you raised.

First, Dr. Robert Cantu, NOCSAE’s vice president, presented to its board seven recommendations recently made by a group of medical experts (including Dr. Cantu) that met late last year at the request of NOCSAE. Three of the medical experts’ recommendations addressed areas of research these experts believe are vital to identifying ways to potentially improve the standard for new football helmets in a meaningful way. An additional recommendation touched on the need for research related to a youth football helmet standard. We not only agree with the need for the research these experts identified, but also believe all seven of their recommendations

should be acted on by NOCSAE in a timely fashion. Ensuring NOCSAE moves forward on these fronts is incorporated into our larger oversight effort.

Second, NOCSAE announced at its board meeting that it will be creating a standing scientific advisory committee to direct its concussion-related research. Moreover, NOCSAE invited CPSC to participate in the work of this committee. We are in the process of determining how, and in what way, CPSC can be involved with the Committee in a manner that would further our oversight function of NOCSAE and allow the Commission to be certain that NOCSAE is committed to ensuring the key research occurs as quickly and efficiently as possible.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO
HON. INEZ M. TENENBAUM

Question 1. Does the CPSC support adoption of the product standards for carbon monoxide alarms and detectors as mandatory consumer product safety rules, as reflected in S. 1216/H.R. 1796?

Answer. CPSC staff supports the goals of the bills to encourage the use of CO alarms in residences. CO alarms save lives. They do that by warning consumers of the presence of CO before the onset of debilitating effects.

Question 1a. What additional resources, if any, would be required by CPSC to implement the legislation if it were enacted?

Answer. CPSC staff believes that the current edition of UL 2034 is an effective standard. Making UL 2034 a mandatory standard will level the playing field for manufacturers and give CPSC greater authority to enforce compliance with the standard. Staff believes it will also make it easier for states to adopt installation requirements.

The July 29, 2010, revision of H.R. 1796 (from the 111th Congress) would make mandatory both UL 2034 and UL 2075. Thus, the scope of the House bill goes beyond CO alarms intended for residential dwellings. UL 2075 detectors or monitoring devices may be appropriate for locations outside of residential dwellings, such as indoor parking garages, commercial buildings, testing facilities, or furnace rooms. In addition, because the scope of UL 2075 includes gases other than CO, CPSC staff would need to review the performance requirements for each gas within the scope of UL 2075 to ensure that it adequately addresses hazards to consumers. CPSC resources would be required to thoroughly review the scope and technical provisions of ANSI/UL 2075 related to applicable consumer products. In addition, CPSC staff would need to compare the standards to ensure the CO alarms test conditions and performance requirements in ANSI/UL 2034 preside and coincide with those in ANSI/UL 2075.

That version of H.R. 1796 also states that both ANSI/UL 2075 and 2034 be published in the Federal Register as mandatory consumer product safety standards and take effect 180 days after Federal Register publication. CPSC staff suggest that first, the ANSI/UL 2034 be reviewed and implemented as the mandatory consumer product safety standards in the Federal Register with the associated timelines. Staff suggests that after the ANSI/UL 2034 FR time frames, staff can begin the work associated with ANSI/UL 2075, as the effort to evaluate and define the scope of relevant consumer product safety portions of ANSI/UL 2075 may require a significant commitment of resources.

S. 1216/HR 1796 includes provisions for a grant program for states that adopt CO alarm installation requirements. Additional resources would be required to administer and support such a grant program.

Question 2. Are you aware of any residential CO alarm products being sold on the market that do not comply with UL 2034? Are you aware of any manufacturers of CO detectors who manufacture CO alarm products that may exceed UL 2034?

Answer. CPSC staff is aware that there are low level CO monitoring devices on the market that claim to exceed the ANSI/UL 2034 alarm criteria and aim to protect the population most sensitive to the lowest levels of CO. As designed, these low-level monitors do meet the “do not alarm” requirements in ANSI/UL 2034 that protect against spurious low-level alarms. The ANSI/UL 2075 standard or registration as a medical device may be appropriate for these low level CO monitors. However, CPSC staff is not aware of these devices being certified to any standards.

Question 3. In previous years, CPSC has identified “Carbon Monoxide” as a strategic initiative. In its 2011–2016 Strategic Plan, carbon monoxide is no longer identified as its own initiative. How do you see CPSC’s efforts to raise awareness of carbon monoxide dangers and to promote carbon monoxide detection fitting into the five key goals identified in the Commission’s 2011–2016 Strategic Plan?

Answer. While carbon monoxide (CO) is no longer identified as its own initiative, it is still very much a part CPSC's new Strategic Plan through CPSC's work on safety standards, improved consumer information and hazard identification. In fact, CPSC's activities to reduce CO dangers and to promote CO detection are found for three of the five goals in the Strategic Plan.

CPSC's strategic goal, "Commitment to Prevention" focusing on engaging public and private sector stakeholders to build safety into consumer products, we drive forward our commitment to the prevention of CO-related incidents. The CPSC will work to protect consumers from the dangers of CO poisoning by promoting the production of safe products and the development and implementation of safety standards. This will enable industry compliance with safety standards at various stages of consumer product development and distribution. By encouraging industry leaders and foreign safety agencies to focus on safety early in the global supply chain, the CPSC will help prevent hazards from entering consumer markets.

CPSC's strategic goal, "Raising Awareness" promotes a public understanding of product risks and CPSC capabilities. Under this goal, we seek to gain the attention of consumers through increased awareness of the hazards associated with CO and gas-fired appliances and engine-driven tools and generators. Consumers, advocates, industry, and partner government agencies each desire useful and timely information about consumer product safety issues in order to make informed choices. However, these audiences have different information needs, and each responds best to different methods of communicating information. With the rapid increase in the use of social media and Web-based communications, the options for conveying consumer product safety information continue to grow.

The CPSC will use a wide array of communication channels and strategies to provide the public with timely and targeted information about CO-related safety issues. This information will empower consumers to make informed choices about the products they purchase and how to safely use them, to be aware of hazardous products in the market, and to act quickly if they own a recalled product. Additionally, the information will make industry aware of the hazards they must address to maintain safe products.

Finally, CPSC's strategic goal "Rigorous Hazard Identification" focuses on accurate and timely determination of all hazards posing the greatest risk to consumers, including CO-related deaths and injuries. Staff completes two annual reports, one on CO fatalities and one on incidents associated with associated with generators and engine-driven tools. Both reports help identify new or emerging issues within those sub-areas.

Question 4. Please describe the CPSC's experience in managing Federal grant programs.

Answer. The CPSC has not awarded grants in the last 10 years, and currently does not have the staff and resources available to independently award Federal grants. In 2008, however, Congress passed the Virginia Graeme Baker Pool and Spa Safety Act (VGB Act). The VGB Act authorized CPSC to award grants to states and was funded in the Fiscal Year (FY) 2009 Omnibus Appropriations Bill.

In order to comply with the requirements of the VGB Act, CPSC contracted with the Centers for Disease Control (CDC) to develop the required funding announcement, issue the announcement, make the awards, monitor the award performance and finally report on the results, all following Federal grant regulations. The cost of this service by CDC is estimated at 20 percent of the total grant amount.

Question 4a. To date no grants have been awarded because no states meet the statutory requirements the VGB Act grant program. What unique challenges would S. 1216 pose to the Commission, if any, in administering the proposed grant program under this legislation?

Answer. First, the Commission still does not have grant expertise so we would likely contract again with another Federal agency like CDC. Thus, the funding for the 20 percent contract costs must be obtained by reducing the grant amounts (\$2 million annually) or from specific appropriation.

Second, while we are aware that approximately 25 states have CO alarm legislation, we do not know whether the requirements of that legislation match the requirements of S. 1216. Therefore, it is not whether any state will be immediately eligible to apply for a grant. Accordingly, it may be necessary to spend funds initially in conducting outreach to the states about the grant program's specific eligibility requirements, and then awarding grants in the latter years of the program.

Third, under the VGB grant program, we learned that if the appropriations language funding the grants does not always mirror the authorization language regarding the return of unexpended and unobligated funds. Additional harmonization between the authorization and appropriations language would be helpful in the future.

Question 5. I understand that implementing effective third-party testing and tracking processes may be difficult, and that after 2 years many companies are still trying to figure out workable solutions. I have talked to very small businesses from Minnesota. They are very concerned about implementing the specific third-party testing and certification requirements. Have you given any thought as to whether it is really workable to begin enforcing these requirements against very small businesses when the stay ends this February?

Answer. The third-party testing requirements of the CPSIA have been communicated to the business community. Since August 2008, CPSC staff have met with various industry associations numerous times and provided multiple training seminars and webinars on the new requirements of the CPSIA in an attempt to help industry prepare for the changes brought about by the CPSIA. As one example, on December 10 –11, 2009, the Commission held a two-day workshop to discuss issues relating to the testing, certification, and labeling of certain consumer products pursuant to section 14 of the CPSA (*see* 74 Fed. Reg. 58611 (November 13, 2009)).

As both Ms. Jill Chuckas and Mr. Steve Lamar stated in response to questioning from Senator Pryor at the December 2, 2010 hearing, CPSC Commissioners and staff have been fully engaged with industry, providing training workshops around the U.S. and the world, and being responsive to the issues and concerns facing industry as they move forward with meeting the requirements of the CPSIA. The Commission is committed to continuing to meet with and educate manufacturers and importers as the remaining CPSIA regulations are developed and implemented.

Having said that, the Commission continues to be very sensitive to the concerns of the small business community and is currently considering several requests, including one from the Handmade Toy Alliance (HTA) for a further continuation of the stay of enforcement.

Question 5a. Have you considered the possibility of another extension for these businesses?

Answer. As noted above, the Commission is currently considering several requests, including one from the HTA for a continuation of the current stay. The Commission is carefully considering the views of all stakeholders and will rule on the petitions and requests as soon as possible.

Question 5b. Have you considered ways to make it easier for very small businesses to comply with the CPSIA?

Answer. The Commission has always maintained an open door policy to listen to the concerns of industry and small businesses, and the establishment of the new full-time Small Business Ombudsman is the latest way that the Commission has sought to listen to and address the concerns of small businesses. As CPSIA does not distinguish between the sizes of businesses that must comply with the law, the Commission does not have plenary power to take actions that may alleviate the burdens of compliance on small businesses specifically.

Nevertheless, the Commission is required to conduct regulatory flexibility analyses on each significant rule, which assess the potential impacts of the rules on small businesses. The Commission has, and will continue, to look at areas like the limited lead exemptions and the component part enforcement policy rule noted above to assist small businesses and others where possible and discretion allows.

Question 6. There are certain fibers in apparel that are exempted from flammability testing, including polyester and nylon. Spandex was not in widespread use when the flammability regulations were promulgated, but today it is found in innumerable apparel products. Many have claimed that Spandex has the same flammability properties as fibers that are already exempted. Does it not make sense for the CPSC to investigate adding spandex to the list of fibers that are exempt from flammability testing?

Answer. The Commission issued the Standard for the Flammability of Clothing Textiles (16 CFR part 1610) in 1975 under the authority of the Flammable Fabrics Act (FFA), which prohibited the importation, manufacture for sale, or sale in commerce of any article of wearing apparel, which is “so highly flammable as to be dangerous when worn by individuals.” The Standard, as originally written, did not include exemptions for any fibers or fabrics.

In 1984, the Commission issued a rule amending the Standard to include exemptions based on weight and fiber content. The Commission based these exemptions on years of previous industry and government testing (*See* 40 Fed. Reg. 48,568; Dec. 14, 1984). The exemptions are as follows:

- (1) plain surface fabrics, regardless of fiber content, weighing 2.6 ounces per square yard or more; and

(2) all fabrics, both plain surface and raised-fiber surface textiles, regardless of weight, made entirely from any of the following fibers or entirely from combination of the following fibers: acrylic, modacrylic, nylon, olefin, polyester, wool.

Many plain surface fabrics containing spandex fiber are already exempted from testing due to fabric weight.

In apparel fabric, spandex fiber usually appears as a small percentage of total fiber and it is typically used in combination with other fibers to add “ease” or form-fitting properties. The extent to which spandex fiber may affect the flammability performance of garments constructed of otherwise-exempt-fiber fabrics is unknown; the industry has not provided sufficient data from their own flammability testing to justify amending the Standard to include spandex in a fiber exemption. The Commission does not have evidence to support the inclusion of spandex as an “exempt fiber” and would welcome new data if the industry can provide it. If the Commission were to determine that there was a need for a study on the flammability of spandex fiber in combination with the other exempt fibers, it could direct the staff to proceed with such an investigation.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
HON. INEZ M. TENENBAUM

Question 1. Ms. Tenenbaum, given that CPSC has fewer than 500 employees and that the agency is charged with ensuring the safety of over 15,000 types of consumer products, I would like to know your thoughts on how CPSC can leverage its resources. You note in your testimony that the CPSC is working with other agencies such as the Customs and Border Protection on ensuring the safety of imported goods. As a former attorney general, I would like to ask how you are working with state attorneys general to help ensure compliance with consumer product safety rules. One idea that Commissioner Robert Adler mentioned during his Senate confirmation process was having CPSC potentially host regional conferences of state attorneys general to raise awareness about product safety issues. Are any such conferences or regional meetings planned?

Answer. Shortly after both Commissioner Adler and I joined the Commission, the CPSC hosted in October of 2009 a conference of representatives of the state attorneys general responsible for consumer protection of product safety issues. At that meeting we agreed to hold a monthly conference call to share information and raise awareness regarding Commission product safety priorities. Those conference calls have been successful and will continue in FY 2011. We also recently held a training session for interested state AG offices on investigating children’s products for lead and cadmium hazards. There is a second in person follow-up meeting planned for early Spring 2011.

Question 2. Do you have other ideas about cooperating in other areas to ensure consumer safety?

Answer. In September 2010, the Commission voted to create the Office of Education, Global Outreach, and Small Business Ombudsman, an office I envisioned in my first year as Chairman. The office will make the CPSC more accessible to stakeholders and will play a vital role in helping the CPSC fulfill its mission of protecting the public from unnecessary risks of death and injury from consumer products. The principal function of the office will be to coordinate and provide education and outreach activities to various domestic and international stakeholders, including foreign governments, manufacturers, retailers, small businesses, and consumers. To carry out this mission, the new office will invite partnerships with colleges and universities, state and local governments, nonprofit organizations, standards making organizations, and others to enhance the CPSC’s ability to provide research and training for stakeholders on regulatory and safety standards and best practices, which in turn will result in safer products.

The CPSC has been working with the states and others to come up with creative ways to raise awareness about product safety issues. For example, we have worked collaboratively with the American Academy of Pediatrics to produce a video on crib safety for use with new parents in hospitals and pediatricians offices. I would also like to work with the states to ensure that day care licensing codes are revised to require recall checks to ensure products used in those facilities have not been recalled.

Question 3. Chairman Tenenbaum, since passage of the landmark CPSIA legislation, does the CPSC now have the resources, authority, and cooperation from other agencies that it needs to protect our children from harmful and tainted products imported from foreign countries?

Answer. In the last couple of years the CPSC has received a substantial increase in appropriations, and I am extremely grateful for these additional resources. Since my arrival at the Commission these resources have been put to work on a number of critical initiatives, including increasing CPSC Import Surveillance Division staff at ports of entry, a new CPSC testing facility, and investigating several new and emerging areas of potential consumer product safety hazards.

Having said that, it is important to note that the CPSC is still only has half the staffing that it possessed at its peak in 1980. We have made great strides since passage of the CPSIA, but additional resources would be welcomed.

Question 4. Chairman Tenenbaum, thank you for your assurance that the CPSC will carefully review the issue of football helmet safety, particularly for young children and high school athletes.

In addition to the fact that no football helmet standards exist for youth helmets and for addressing concussion risks, I am concerned that some safety warning labels for helmets are not clearly visible and legible. For example, new and used football helmets are sold with warning labels placed underneath padding inside the helmet where they are not fully visible. My understanding is that the CPSC has provided clear guidelines about the content, legibility, and visibility of safety warning labels for other children's products and consumer products. Will you include a review of the adequacy of current warning labels as you look into the issue of football helmet safety?

Answer. As indicated during my oral testimony, CPSC has fully engaged NOCSAE in furtherance of our monitoring of their voluntary standards process. Labeling is certainly included in the areas we are exploring. We share the desire that labels, both in terms of substance and location, provide meaningful and effective warnings.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KAY BAILEY HUTCHISON TO
HON. INEZ M. TENENBAUM

Question 1. As you know, Section 103(a) of the CPSIA requires the placement of tracking labels on all children's products and their packaging, to the extent practicable. In its July 2009 Statement of Policy regarding enforcement of this provision, CPSC staff indicated that products sold through bulk vending machines would not need to be individually marked, though the package or carton the products are shipped in would. The Statement of Policy further noted that "the Conference Report [accompanying the CPSIA] recognized that marking each individual product in such circumstances may not be practical. See H.R. Rep. No 787, 110th Cong., 2d Sess. 67 (2008)." However, the Commission has not provided any explicit regulatory exclusion from Section 103(a) for bulk vended products. Will the CPSC pursue enforcement actions against bulk vendor suppliers, operators or retail establishments for the absence of tracking labels on bulk vended products? Further, can you please assure the Committee that the CPSC will maintain this position should any state attorney general or other entity seek to enforce Section 103(a) against bulk vended products?

Answer. In the July 2009 Statement of Policy, CPSC staff stated that bulk vended products would not have to be individually marked. The Office of Compliance is following this policy as stated. Staff will consider enforcement action, however, if outer containers were not appropriately marked with the required information.

Question 2. According to an August 2010 ABC news report, the American National Standards Institute (ANSI) found that earlier test results for 4 pool drain covers by 3 brands—Aquastar, Paramount, and AFRAS—were unreliable and that use of the covers could result in serious injury or death to consumers. In the article, the CPSC commented that it was investigating the matter. Please provide an update on the investigation and what the Commission has found to date.

Answer. After learning of possible anomalies in the testing of certain pool drain covers, the Commission took several steps to investigate. On September 3, 2010, the Commission issued subpoenas requesting test data from three independent labs involved in drain cover testing, rating, and certification. This request produced over 17,000 pages of technical documents for staff review, which is currently underway.

CPSC also contracted with a third-party testing laboratory to have the identified suction outlet covers tested (CPSC Contract # S-10-0108). CPSC laboratory staff witnessed the testing to observe the test facility, the test procedures, and the methodology of different technical staff conducting the tests. The results of testing have been reported by the contractor and staff is reviewing the report.

These results will be used to discuss any ratings issues with manufacturers of the identified product whose rating is questionable. In the event that testing results for

certain covers indicate any substantial product safety hazards, the Commission may pursue a recall or other corrective action against the manufacturer of the specific cover.

In addition, the CPSC laboratory is also conducting its own independent testing of the identified suction outlet covers and will compare results with those obtained by the contractor as well as those obtained by the original third-party certifying laboratories. These results and review of the procedures will also be used to develop guidance for future testing and rating of suction outlet covers by third-party certifying laboratories.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO
HON. INEZ M. TENENBAUM

Question 1. What can you tell us about the impact of the CPSIA on small businesses? Even though the CPSIA did not require the Commission to perform cost-benefit analyses of the rules it promulgates, many of the concerns raised from small businesses and from Members of Congress since the law passed have been based on the need for this very information—specifically, the law’s economic impact and unintended consequences. Does the Commission have quantitative data to determine what the impact has been, and what the impact will be in the future as more requirements under the law come into effect?

Answer. While it is true that CPSIA does not contain a separate cost-benefit analysis provision, the Commission is still required to perform a regulatory impact analysis (pursuant to the Regulatory Flexibility Act) of each significant new CPSIA rule presented for the Commission’s consideration. In some cases, the staff has concluded that the rules could have significant adverse impacts on substantial numbers of small businesses. In fact, CPSC quantitative data on the use of cribs in child care facilities and public accommodations (many of which are small businesses) was recently utilized by the Commission to decide how to best apply the new rule on mandatory crib standards to child care facilities and places of public accommodation as required by the CPSIA. Assisted by this data, the Commission gave child care facilities and places of public accommodation 18 months after the effective date of the new crib safety rules to come into compliance with these new standards. This 18 month compliance period will help to ensure that children benefit from safer cribs, while at the same time preventing a serious impact on these kinds of small businesses and causing a potential shortage in available child care for working families.

The Commission is certainly cognizant of and sensitive to the impact of the CPSIA on testing and compliance costs for small businesses. To that end, the Commission has sought to ameliorate the financial burdens through the exercise of sound discretion where the Commission believed that Congress had provided the Commission with that ability and where such accommodations could be shown not to have an impact on product safety.

One example of these efforts is the Commission’s regulation exempting certain types of products from mandatory lead testing. In this case, the Commission met with the business community, examined their specific claims that certain categories of pure products—like certain woods, textiles, and inks—would never contain violative levels of lead in them, and granted exemptions for those categories after independent CPSC analysis. Another example is the Commission’s enforcement policy concerning lead in surface coatings and lead content that allows for the use of properly tested and certified component parts in lieu of final product testing. Both of these examples have provided some relief for small businesses in their sourcing and manufacturing of products.

Question 2. Does the Commission have any plans to assess the negative impacts of the law, and to take necessary actions to alleviate these burdens before they eliminate any more jobs?

Answer. The Commission has always maintained an open door policy to listen to the concerns of industry and small businesses—and the establishment of the new full-time Small Business Ombudsman is the latest way that the Commission has sought to listen to and address the concerns of small businesses. As CPSIA does not distinguish between the sizes of businesses that must comply with the law, the Commission does not have plenary power to take actions that may alleviate the burdens of compliance on small businesses specifically.

Nevertheless, as noted above, the Commission is required to conduct regulatory flexibility analyses on each significant rule, which assess the potential impacts of the rules on small businesses. The Commission has, and will continue, to look at areas, like the limited lead exemptions and the component part enforcement policy

rule noted above, to assist small businesses and others, where possible and discretion allows.

Question 3. You mentioned at the hearing the creation of a full-time Small Business Ombudsman to serve the Nation's small manufacturers in the area of product safety. How will this new position address the concerns of small businesses? Do you believe that this will be enough to alleviate their expressed concerns?

Answer. The full-time Small Business Ombudsman is addressing the needs and concerns of small businesses in many ways. As you heard on December 2, 2010, from Ms. Jill Chuckas of the Handmade Toy Alliance, the Small Business Ombudsman has already been working very closely with small businesses and representatives of small business.

The Ombudsman will serve small businesses through the provision of regulatory and technical guidance to small business inquiries in a timely manner. Furthermore, the Ombudsman will develop educational materials to provide plain English explanations of Federal consumer product safety requirements. The Ombudsman has already fielded many inquiries where he has been able to provide concise, clear guidance as to the regulatory requirements and the response from those businesses, and the business community in general, has been very positive.

The Ombudsman has also made himself accessible for small businesses and their representatives to raise their concerns with the knowledge that the Ombudsman will follow up with the appropriate agency employees to seek a solution. We believe that the creation of the Ombudsman position will be helpful for the Commission to be kept current of small business issues and to find new ways of partnering with the small business community to develop creative and effective solutions within the confines of the law.

Question 4. The Commission's stay on third-party testing for lead content is scheduled to lift in February. Is the Commission prepared to move forward with lifting this stay of enforcement?

Answer. The Commission is currently considering several petitions and requests, including one from the Handmade Toy Alliance (HTA), for a continuation of the stay of enforcement for third-party testing of lead content. In considering these requests, the Commission will carefully consider the views and concerns of all impacted stakeholders.

Question 4a. Do you believe that the health of children has been at greater risk because of this stay of the third-party testing requirements?

Answer. Commission staff has no data at this time to suggest that the risk to the health of children has changed either positively or negatively as a result of the stay of the third-party testing requirements.

Question 5. Do you believe that businesses have been given the information necessary to comply with this requirement? Have they been given enough time to incorporate necessary changes to comply with the requirement by the February deadline?

Answer. The third-party testing requirements of the CPSIA have been communicated to the business community. Since August 2008, CPSC staff have met with various industry associations numerous times and provided multiple training seminars and webinars on the new requirements of the CPSIA in an attempt to help industry prepare for the changes brought about by the CPSIA. As one example, on December 10–11, 2009, the Commission held a two-day workshop to discuss issues relating to the testing, certification, and labeling of certain consumer products pursuant to section 14 of the CPSA (*see* 74 Fed. Reg. 58611 (November 13, 2009)).

As both Ms. Jill Chuckas and Mr. Steve Lamar stated in response to questioning from Senator Pryor at the December 2, 2010, hearing, CPSC Commissioners and staff have been fully engaged with industry, providing training workshops around the U.S. and the world and being responsive to the issues and concerns facing industry as they move forward with meeting the requirements of the CPSIA. The Commission is committed to continuing to meet with and educate manufacturers and importers as the remaining CPSIA regulations are developed and implemented.

With regard to industry being given enough time to incorporate necessary changes to comply with the lifting of the stay in February, it should be noted that the initial stay of enforcement was issued on February 9, 2009, to allow industry time to make the necessary changes. For those products that have been covered by CPSC's stay of enforcement, there has always been a requirement that the products be in full compliance with all applicable product safety rules.

Furthermore, the only way to know that a product complies is to test the product or the components of the product. Many manufacturers and importers have been testing children's products, at the request of their customers, for many months. A full 24 months will have passed when the Commission takes up the matter of lifting the stay in February 2011.

Question 6. Is the Commission going to consider extending the stay in order to ensure that the affected businesses are adequately prepared and that there are enough resources to prevent a negative impact on the businesses affected? If so, when do you plan on doing so?

Answer. As noted above, the Commission is currently considering several requests, including one from the Handmade Toy Alliance (HTA) for a continuation of the current stay. The Commission is carefully considering the views of all stakeholders and will rule on the petitions and requests as soon as possible.

Question 7. The CPSIA draws a clear distinction between general product safety rules and children's product safety rules. Yet the Commission has chosen to apply the requirement of third-party testing to all children's products under the general product flammability rules. Can you tell us why this decision was made?

Answer. The Commission has been consistent in its application of third-party testing requirements to children's products subject to consumer product safety rules. The phrase "children's product safety rule" is clearly defined by Congress and has been consistently interpreted by the Commission to include rules of general applicability as well as those rules that specifically address hazards unique to children. Substituting the actual definition of "children's product safety rule" into the language of section 14(a)(2) of the Consumer Product Safety Act (CPSA) best demonstrates the statute's direction to the Commission.

When read with the definition of "children's product safety rule" inserted, section 14(a)(2) reads:

[B]efore importing for consumption or warehousing or distributing in commerce any children's product that is subject to "*a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance,*" every manufacturer of such children's product . . . shall submit sufficient samples of the children's product . . . to a third-party conformity assessment body . . . to be tested.

This explicit definition of "children's product safety rule" referenced in section 14(a)(2) of the CPSA is plain and unambiguous in that third-party testing is required for any children's products covered by a consumer product safety rule, including standards of general applicability. This is consistent with the Commission's unanimous decisions to require third-party testing of children's all-terrain vehicles, bicycles, and bicycle helmets. These three regulations are also rules of general applicability, and the Commission has voted unanimously to require third-party testing for children's versions of these products. Thus, in addition to the clear definition of the statutory term "children's product safety rule," it is also inconsistent with the Commission's unanimous votes requiring third-party testing for general standards pertaining to youth all-terrain vehicles, bicycles, and bicycle helmets to not also require third-party testing for children's products subject to the general standards pertaining to flammability.

Question 8. The flammability standards have been in place with testing protocols for adult and children's products for some time. Yet the Commission has chosen to apply this additional third-party testing requirement to children's products under those rules. Is there any evidence that the products affected by this ruling, such as carpets or vinyl plastic, were unsafe under the prior testing regime and needed to be subjected to third-party tests to protect children?

Answer. CPSC's 2005–2007 Residential Fire Loss Estimates, dated August 2010, presents estimates of consumer product-related fire losses that occurred in U.S. residential structure fires attended by the fire service. The estimates were derived from data for 2005 through 2007 provided by the U.S. Fire Administration's (USFA) National Fire Incident Reporting System (NFIRS) and the National Fire Protection Association's (NFPA) Survey of Fire Departments for U.S. Fire Experience.

The estimated residential structure fires attributed to floor coverings (as item first ignited) such as carpets and rugs, averaged 4,700 from 2005 through 2007. The estimated residential structure fire deaths attributed to floor coverings (as item first ignited) for this period averaged 100, with injuries averaging 280. The estimated residential structure fire property loss attributed to floor coverings (as item first ignited) for this period averaged \$151.4 million. It should be noted that the Commission's residential fire data do not differentiate children's product vs. non-children's products for carpets and rugs, mattresses and mattress pads, or apparel. A special study would be needed to try to obtain information on the involvement of adult versus children's versions of these regulated products as the first item ignited.

Question 8a. Is there any evidence that children's versions of rugs or other affected products are in more danger than adult versions of those products to necessitate this additional testing standard?

Answer. The Commission's residential fire data do not differentiate between children's product and non-children's products for carpets and rugs, mattresses and mattress pads, or apparel. A special study would be needed to try to obtain information on the involvement of adult versus children's versions of these regulated products as the first item ignited.

Question 8b. Isn't an adult version of an affected product more likely to be subjected to a cigarette or some other igniting source?

Answer. The Commission does not have data to support this assertion.

Question 9. As I noted in my opening statement, I have many constituents who continue to suffer from the effects of tainted drywall that was installed after Hurricane Katrina. Mississippi has the third highest number of reported cases in the Nation. I know the Commission has been involved in the research into the health impact of this drywall. Can you update us on the status of the Commission's health investigations, and what determinations you have been able to make to this point?

Answer. The most frequently reported symptoms are irritated and itchy eyes and skin, difficulty in breathing, persistent cough, bloody noses, runny noses, recurrent headaches, sinus infection, and asthma attacks. Since many consumers report that their symptoms lessen or go away when they are away from their home, but return upon re-entry, it appears that these symptoms are short-term and related to something within the home.

The staff of the CPSC and the Centers for Disease Control and Prevention (CDC) agree that the levels of sulfur gases detected in the affected homes in the CPSC's fifty-one home study were at concentrations below the known irritant levels in the available scientific literature. It is possible, however, that the additive or synergistic effects of these and other compounds in the subject homes could potentially cause irritant effects to consumers. It is also possible that other exposures exist in these homes that could be causing these complaints independent of the drywall.

Our own investigation into deaths of consumers associated with homes that were reported to contain problem drywall found no evidence, based on the limited data available, to support a connection between drywall and the deaths. CDC also conducted an independent review of this limited data, which consisted of available medical records. We have received a report from CDC on their review, and will release it as soon as CPSC staff have reviewed the report. We have also requested the CDC to undertake a comprehensive study of any possible long-term health effects resulting from exposure to problem drywall. I would refer you to CDC for any questions regarding any further work by that agency in this area.

Question 10. What are the Commission's plans for future involvement with tainted drywall and the affected homeowners?

Answer. The Commission is continuing to engage with the Chinese government and Chinese manufacturers to reach a fair and equitable settlement for American consumers that have been impacted by contaminated drywall produced by Chinese manufacturers. On October 25, 2010, I met personally with my Chinese counterpart, Mr. Zhu Shuping, Minister, General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) in Shanghai and spoke with him about the need for further dialogue and movement in this area. On January 10, 2011, I had another follow-up meeting with the AQSIQ Minister in Beijing, and again restated my call for a fair and just resolution of the issue by the responsible Chinese manufacturers.

We are also continuing to engage with private parties involved in the Chinese drywall multidistrict litigation (MDL) in New Orleans, Louisiana. I was pleased that the Federal court and the parties relied on our scientific findings to help develop a demonstration program paid for by the responsible manufacturer to remediate at least 300 homes in the Southeast. This demonstration program was part of a partial settlement agreement reached on October 14, 2010, and I am hopeful that it will be expanded in the near future to cover other impacted homeowners.

As the lead Federal agency in this investigation, we will also continue to work with our sister agencies as they examine any possible long-term health effects of the problem drywall and as our sister agencies and other interested stakeholders work with the private sector to develop more commercialized remediation methods.

Finally, we are working with ASTM International, a voluntary standards development organization, on development of standards to address the corrosive emissions from drywall and on affixing tracking labels to ensure that drywall is more easily identifiable. We believe that both standards will help to protect against future occurrences of this type and, if they were to occur, to quickly address any issues in a targeted and expeditious manner.

Question 11. At the end of November the Commission passed the final implementing rule for the public database required under the CPSIA. While the law specified who can submit reports of harm, the Commission's rule expands this list by defining consumers and public safety entities as essentially anyone who wants to submit a report—even if the submitter does not know who was harmed, the particular product involved, and did not see the incident occur. Therefore, as opposed to the list created by the statute, submitters are no longer limited to people who could have first-hand knowledge of the incident. Why was this expansion done?

Answer. In section 212 of the CPSIA, Congress gave the Commission the ability, in implementing the Database, to fill the gaps in defining statutory terms such as “consumer” and “public safety entity.” Based on how the CPSIA amended the CPSA, I believe that Congress intended the public to have access through this Database to as much information as possible concerning the safety of consumer products.

To have narrowly defined those categories in the final rule, particularly in the way stated in the alternative proposal offered by Commissioners Nord and Northup, would have been contrary to the statute and the overall goal of consumer access. For example, the alternate proposal would have disallowed groups such as the National Association of State Fire Marshalls from reporting incidents in the database. These groups are often technical experts in public safety matters, and often gather extremely valuable information concerning product safety incidents. It also would have prohibited anyone, including the parents of Danny Keysar (who was strangled in a defective portable crib in 2008) and the child care facility workers where he tragically died from reporting his tragic death through the Database. I strongly believe that this type of valuable data, from these kinds of reliable sources, should be available to the public through the Database.

Question 11a. How will allowing individuals who do not have first-hand knowledge of the incident improve public safety and increase the reliability of information in the database?

Answer. As stated above, the alternate proposal put forward by Commissioners Nord and Northup would have disallowed many public safety groups with years of technical experience in public safety reports from making reports. In addition, the proposal may have also restricted the ability of parents whose children are injured by consumer products in environments outside of the home (such as schools and child care facilities) from making reports just because they did not directly observe the specific incident leading to the injury. Additionally, it would render the ability of physician and first responders, from whom we currently receive much reliable data, and who fall under certain of the categories of submitters Congress expressly included in section 212, from making a report because they did not directly observe the specific incident leading to the injury. I do not believe such a result was intended by Congress or contributes to overall public safety.

Question 12. The intention of the database is to provide useful information to consumers. Commissioner Northup's substitute amendment included provisions to improve the accuracy of the data submitted by requiring the inclusion of additional information. This amendment was rejected by a majority vote of the Commissioners. Can you explain your opposition to adding more required fields to the database in order to improve the data's accuracy and usefulness?

Answer. The information requirements for submissions to the Database were carefully crafted to ensure the accuracy of Database submissions without creating barriers that are unduly burdensome to consumers. Overall, I believe the Commission struck the correct balance in requiring the information fields that were detailed in the final rule.

Question 13. A central concern with the CPSIA remains that it takes away the Commission's ability to assess the risk presented by a product. The law focuses on the content of lead in a product, not the risk of negative health effects from even limited exposure to that lead. Do you believe that there is a risk posed to the health of children from exposure to many of the products that are affected by the lead limits in the law, such as ATVs, books, pens, school desks, furniture, or furniture hardware (*i.e.*, the nuts and bolts that hold the furniture together)?

Answer. Lead is a potent neurotoxin that can cause permanent and irreversible brain damage in children. The scientific and pediatric community has thoroughly studied the issue of children's exposure to lead and is near unanimous in the opinion that there is “no known safe level of lead.” Even low-level lead exposure has been shown to affect brain function, lower intelligence, and cause behavior problems and poor school performance.

Throughout my tenure as Chairman of the CPSC, I have urged manufacturer's of children's products to “get the lead out.” The presence of lead in children's prod-

ucts is controllable and where lead is not necessary, it should not be included in a children's product.

Question 14. You voiced support for a functional purpose exemption to the lead standard at the hearing, yet you also pointed to literature that says there is no safe level of lead. How do you reconcile these conflicting viewpoints?

Answer. As stated above, I believe—based on all available scientific and pediatric literature—that there is no safe level of lead for children. At the same time, however, I have learned that there are some circumstances where the exclusion of lead below the levels permitted by section 101 of the CPSIA is problematic. Accordingly, I have stated that it would be helpful for Congress to create a new exclusion to the section 101(a) lead limits that would allow some flexibility in cases where lead is required for a functional purpose and the elimination of lead in a specific component is not practicable or possible.

The fundamental tenet underlying a “functional purpose” type exclusion is very simple: where lead serves no purpose and can be practicably removed or made inaccessible in children's products, the lead should be removed or made inaccessible to children.

Question 14a. Do you believe a legislative fix is needed to allow exemptions from the lead content standard for all products that do not pose a health risk for children?

Answer. As stated in my above response, I believe a functional purpose exception to the current section 101(a) lead content limits would be helpful.

Question 15. The crib rule was mentioned briefly during the hearing. Can you please elaborate on the impact of the crib rule on child care centers due to the retroactive effects of the law?

Answer. On December 15, 2010, the Commission adopted mandatory safety rules for full-size and non-full-size cribs. Between November 2007 and April 2010, there were 36 deaths associated with crib structural problems, and I am confident that these new rules will stop further tragedies from occurring in the future.

At the same time, however, the Commission was very cognizant of the impact that adoption of these rules might have on child care facilities and other places of public accommodation. During consideration of the rules, I urged building enough time into rule enforcement milestones not only to allow new crib inventory to reach the market but also to allow affected entities sufficient time to purchase new cribs.

Under the final rule cribs sold in commerce must comply with the new requirements by June 28, 2011. Child care facilities and other places of public accommodation required to comply with the rule will have an additional 18 months to come into compliance—or until December 28, 2012. In the unanimous Commission decision adopting these rules and compliance dates, I believe the Commission struck the right balance to ensure that children will benefit from safer cribs, while at the same time working to prevent a serious impact on smaller entities and a potential shortage in available child care for working families.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHNNY ISAKSON TO
HON. INEZ M. TENENBAUM

Question. Under your stewardship and that of Commissioner Nord, you have both put forward stays to the so-called third-party testing and certification requirement under the CPSIA. It is now due to take effect in February of 2011. The final rules for testing and certification are still not published, but I am hearing from my constituents that there is confusion in the industry how to implement these requirements. This level of confusion, combined with the 2/11 date, will in my opinion add major new costs to manufacturers in the United States and this will likely lead them to move their operations overseas or even close, at a time when we are at near 10 percent unemployment. Wouldn't it make sense to adopt another one year stay of this requirement and work with Congress and the stakeholders to develop a workable testing regimen that the impacted industries can effectively work with that would NOT drive manufacturers out of business or overseas?

Answer. As noted in my above response to Senator Wicker, the Commission is currently considering several requests, including one from the Handmade Toy Alliance (HTA) for a continuation of the current stay. The Commission is carefully considering the views of all stakeholders and will rule on the petitions and requests as soon as possible.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO
HON. ANNE M. NORTHUP

Question 1. Is the marketplace safe for shoppers this holiday season?

Answer. The safety of every product on the market at any given time is unknowable, and the complete elimination of all unsafe products for all time is unachievable. The CPSC's mission is to spend its resources as efficiently and effectively as possible to identify and remove from the marketplace consumer products that present a demonstrable risk of injury. Data available to the CPSC to identify unsafe products and to measure changes in product safety over time can help it gauge the success of its efforts, and to reallocate its resources when necessary. But the utility of such data is limited. One reason is that many injuries that occur while using a product are unrelated to a product's safety. Another reason is that it takes years to gather data, and comparisons over time periods can therefore only support tentative conclusions. Certainly the available data does not support the conclusion that the CPSIA has made products safer. Rather, directing greater resources toward identifying and removing actual risks, rather than regulating to fixed standards unrelated to actual risk, would be more effective.

Toy-Related Deaths and Injuries

The Commission touted its annual report on toy fatalities and injuries as evidence that toys are safer this holiday season.¹ Unfortunately, this press release was quite misleading. Data on toy-related deaths and injuries illustrates the difficulty in drawing conclusions regarding changes in relative risk.

First, the Commission's data on deaths related to toys is not complete, and always lags by several years. As you can see in the first set of footnotes on page four of "Toy-Related Deaths and Injuries, Calendar Year 2009" (<http://www.cpsc.gov/library/toymemo09.pdf>), the death certificate data for 2009 was only 37 percent complete. For that matter, the death certificate data for 2007 was only 85 percent complete, as of 2009. The number of deaths has always increased in the out years as further data is collected. Thus, it is simply too early to tell what the number of deaths related to toys will be for 2009, or how it will compare to previous years.

Second, it is important to remember that the incident data reflects toy injuries and deaths that are "associated with, but not necessarily caused by" toys. In other words, the hazard may have nothing to do with a consumer product. For example, in the tables on pages four and five of the 2009 report, the data on deaths related to toys show that a number of deaths for children age 15 and under involved *drowning* related to tricycles or powered riding toys. These deaths likely occurred around a pool or other body of water while the child was using the toy, but it is unlikely that the toy was defective and caused the accident. Thus, while such incident data may point to the broader hazard of drowning, it does not establish that tricycles and motorized toys are unsafe. So while the data collected on these broad areas of concern are important for the Commission to understand as we direct resources toward public relations campaigns and enforcement efforts, it is much less relevant in judging whether toys are safer.

Third, this 2009 report shows that there were an estimated 250,100 toy-related injuries treated in U.S. hospital emergency departments that year, which is significantly higher than the annual average of 228,200. So while the incomplete, *preliminary* data for deaths shows a decrease, the number of reported injuries associated with toys has actually gone up. The estimated number of emergency department injuries for 2008 is 235,300. Additionally, the statistics indicate that the injuries in 2008 and 2009 may be slightly more serious. Ninety-six percent of the injury victims were treated and released in both the 2009 and 2008 reports, whereas in 2007, slightly more (97 percent) were treated and released.² Thus, the changes in injury data from 2007 through 2009 do not support the theory that toys are safer today than a few years ago.

CPSIA

There is no evidence that the CPSIA will significantly contribute to increased product safety. This is because the major requirements of this law are *not related to risk*. Recent modifications to products due to the CPSIA may have made the products more expensive, but have not necessarily made them safer. For example, while lead-free zippers may be more readily available in the marketplace today than a few years ago due to the current 300 ppm lead content standard, there is still no evi-

¹ <http://www.cpsc.gov/cpsc/pub/prerel/prhtml11/11042.html>.

² Risana Chowdhury. "Toy Related Deaths and Injuries, Calendar Year 2007," Consumer Product Safety Commission. Pg. 6: <http://www.cpsc.gov/library/toymemo07.pdf>.

dence that touching or mouthing the stay of a zipper with a lead content higher than 300 ppm poses a lead risk to a child.

The interim ban on certain phthalates (§ 108(a)(1)), which are used to make plastics soft, is another requirement that is unrelated to risk. The Commission has already determined that the phthalates most commonly used in toys today (those included under the interim prohibition) did not pose a danger to children and, therefore, should not be federally regulated. Nonetheless, the CPSIA requires yet another Chronic Hazard Advisory Panel (CHAP) to study the issue *de novo*. And pending this new study—which could well obtain the same results as prior tests—the law bans them both prospectively and retroactively. Thus, a chemical that the Commission has studied and determined not to pose a risk, and that will now be studied *again*, is already banned from all toys and child care articles—a step clearly mandated without regard to risk.

It is premature to gauge the safety impact of the CPSIA's requirement, effective early 2009, that the toy standard (ASTM-F963) become mandatory. The full scope of this requirement has yet to be implemented, because the Commission has not issued a Notice of Requirements to accredit labs that will test to this standard. Once the requirement is implemented, toy manufacturers will be obligated to send each component of each toy to a third-party lab to be tested to all applicable parts of the toy standard, potentially requiring numerous extra tests beyond lead and phthalates. But it also appears that the delay in implementation of these third-party testing requirements has not caused toys to be *more unsafe* than in previous years. So it may be preferable to forgo these costly testing requirements for toy manufacturers unless or until the Commission can actually show that they are beneficial in addressing a known risk.

Changing the CPSC's Mission

As a Commissioner, I am concerned that we are spending so much time developing regulations *unrelated to risk* under the CPSIA that our attention will be diverted from focusing on genuine safety hazards. Our agency is charged with “protecting the public from unreasonable risks of serious injury or death” from consumer products—but we cannot fulfill this mission if our time is spent primarily enforcing the CPSIA, including its complex, non-risk-based, testing and certification requirements.

Because the CPSIA's new requirements are not risk-based, manufacturers are spending time and money simply on “compliance,” rather than on improving their products to the benefit of consumers. In fact, many of these requirements amount to massive new paperwork and tracking systems, rather than actual modifications to the products themselves. The American Home Furnishings Alliance writes in a letter to Commissioners:

“ . . . there has not been a corresponding benefit in the improved safety of children's furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008. . . . The testing is simply being done to attempt to prove a negative.”³

Similarly, some industry associations have had very few, if any, safety violations and yet have to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in their public comments on the Component Parts rule:

“As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product's, production of the product's and the manufacturer's unique circumstances. These programs *are effective and do not need to be changed*. To demonstrate, only .0084 percent of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations—a compliance issue that results from lack of information not lack of testing.”⁴

Given the Executive Order⁵ issued by President Obama on January 18, 2011, directing agencies to roll back onerous regulations that have no safety benefit, I hope

³Letter to Commissioners from the American Home Furnishings Alliance. November 8, 2010.

⁴American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

⁵<http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

the Majority at least will consider approaching Congress to remove the law's third-party testing, certification and labeling requirements that are entirely unrelated to risk. The Commission always maintains the authority to impose in the future new testing requirements on any products where a true risk arises.

Question 2. Has the agency seen a dramatic decline in toy recalls since 2008?

Answer.

Toy Recalls by Fiscal Year		
FY	Number of Recalls	QTY
10	44	8,389,276
09	50	1,785,626
08	172	12,246,170
07	63	26,375,370

TOTAL Recalls by Fiscal Year		
FY	Number of Recalls	QTY
10	428	124,700,000
09	465	229,500,000
08	563	60,700,000
07	472	102,200,000

A perennial question for this Commission has been whether it is good or bad to have fewer recalls. A 2004 report by Kids in Danger asserts that a *decline* in recall activity between 2000 and 2003 did *not* indicate that products were becoming safer. Rather, the consumer advocacy organization surmised that the decrease was due to changes in enforcement policy under then CPSC Chairman Hal Stratton. According to Kids in Danger, the decrease in recalls resulted from lax CPSC enforcement that “increase[ed] hazards as the dangerous products stay on the shelves, and in homes.”⁶

But today, a decline in recall activity is suddenly a good sign—and much better than the *increase* in recall activity that took place under Acting Chairman Nancy Nord prior to the passage of the CPSIA. Thus, it would appear that the significance of the agency's number of recalls is entirely subject to interpretation.

In reality, recall data alone cannot conclusively establish whether products are safer or less safe than in previous years. On the contrary, one of the main reasons that the Commission's toy recall data was so high in Fiscal Year 2008 was the media attention surrounding several high-profile recalls. As a result, both industry and the Commission were aggressively testing every toy within their reach. As a result, more violative products were discovered and recalled.

Today, our activities related to enforcement are focused much more broadly. Thus, the difference in recall numbers between FY 2008 and today prove only the obvious fact that the more resources the Commission expends searching for non-compliant products, the more such products it will find. The same is true for any law enforcement activity, whether it is the number of hours a policeman watches for speeders or the number of tax returns audited by the Internal Revenue Service; the more resources allocated, the more violations will be discovered.

Increased Activity at the Ports

The Commission's new enforcement initiative at ports may be contributing to a decrease in recalls. Starting in Fiscal Year 2008, the Commission launched its Import Surveillance Division, which placed staff at U.S. ports to work closely with U.S. Customs and Border Protection (CBP) to identify and examine imported shipments of consumer products. Also, the Commission has embarked on several steps to improve our coordination with the CBP and to combine resources. Since that time, the number of imported products barred from entering the United States has increased. This does not necessarily mean that the decrease in recalls is due to an increase

⁶Safety Shortcuts: Children's Product Recalls in 2003. Kids in Danger, February 2004. Pgs. 2, 11. http://www.kidsindanger.org/publications/reports/2003_recallreport.pdf.

in the quantity of harmful products stopped at the ports, but increased vigilance on our part can only have a positive impact. I therefore applaud Chairman Tenenbaum for the oversight and direction she has provided in the Commission's efforts to better secure our ports against the importation of unsafe products. It is more effective and drastically more efficient for consumers, industry, and the government, for the CPSC to stop harmful products before they enter the country.

Question 3. Has the agency seen a decline in the number of deaths of children under the age of 15?

Answer. Regarding the recent data on toy-related deaths, it is too early to tell what the number of deaths related to toys will be for 2009 and whether this number will be significantly different from previous years. As mentioned in the first answer, the Commission's 2009 data on deaths related to toys is only approximately 37 percent complete.

However, according to our staff's National Center for Health Statistics data, the number of consumer product-related deaths for ages 0 to 15 dropped by over 17 percent, from 3,225 to 2,658, between 1985 and 2007. Adjusting for changes in population, the death rate for this age group has dropped from 6.3 to 4.4 deaths per 100,000.

Question 4. What advice can the CPSC offer to parents to help keep their kids safe from any potential product hazards this holiday season?

Answer. Based on my experience as a CPSC Commissioner and as a mother of six, I am keenly aware of the dangers children can face from consumer products. One of the saddest parts of this job is the overnight incident reports that we receive on injuries and deaths of children.

I would advise parents to be aware of the Commission's www.recalls.gov website or to sign up for recall updates through e-mail. It is also important to provide age-appropriate gifts to toddlers and young children, to supervise their play, and to remember that most incidents can happen in a split second.

Some of our most common incident data include drowning, which can happen not only in pools, but in bathtubs, hot tubs, toilets and even buckets of water. Drowning prevention is an important focus of the Commission, and I am proud to have participated in one of the Chairman's Pool Safety Campaign events in Washington, D.C. I hope that the Commission's education campaign on drowning prevention may extend to settings beyond just swimming pools.

There are a number of other common hazards reported to the Commission and of which I would advise parents to be aware, such as choking hazards for children, including coins and batteries. Additionally, the Chairman launched a "Safe Sleep Campaign" to help educate more parents on crib safety, which I strongly support. Soft bedding placed inside of a crib is a significant hazard, because infants' neck muscles are not strong enough to adjust and they can suffocate. I have supported the Chairman's efforts to focus not only the safety of the structure of cribs but also the other, common hazards related to infant sleep.

Finally, a database limited to first-hand accounts of verifiable incidents involving consumer products would provide an additional, valuable resource for parents. Unfortunately, as I explain in the answers that follow regarding the database, the rule passed by the Majority goes in the opposite direction and will instead make the public database mandated by the CPSIA of little use to consumers.

Question 5. Do you support the Commission's safe sleep campaign?

Answer. Yes. I support the Chairman's efforts to increase the Commission's focus on crib safety and to use our communications resources to educate the public about safe sleep for infants. In particular, I have been supportive of the Chairman's efforts to broaden the campaign to include not only education on the structure of cribs and dangers of drop-sides, but also the more general, unforeseen hazards not related directly to the crib's structure and hardware, such as soft bedding. As we reach new audiences with information about our recalls and the dangers of drop-side cribs, it makes sense to raise awareness of ALL the common dangers related to infant sleep.

Question 6. If so, what role have you played in supporting the Chairman's initiative?

Answer. I have often urged the Commission to do more to educate the public on broad-based safety hazards and through social media. One of my first suggestions as a Commissioner was to broaden our messaging by using posters in other languages, such as Spanish, and working through non-traditional groups, like churches, to increase our outreach to minorities and harder-to-reach populations. The Chairman's staff has done an excellent job using social media (online videos, text messaging, twitter, etc.) and other creative ways to broadcast the Commission's many safety messages, including the Safe Sleep Campaign. I continue to support these efforts.

Question 7. When do you expect the Commission will issue a final rule on crib safety?

Answer. The Commission, with my support, passed a final rule on full-size and non-full-size cribs on December 15, 2010.

Question 8. Do you think it is important for safety advocacy groups or day care centers to be able to submit to the CPSC for inclusion in the database product safety complaints or incident reports?

Answer. *It is important for individuals with first-hand knowledge of incidents involving consumer products to be able to submit reports of harm to the new database.* Groups or individuals with no direct knowledge of the incident, did not see it happen or do not even know the person that was harmed, should not be permitted or encouraged to submit incident reports to the database. There are several reasons why first-hand knowledge is essential, but the primary reason is *accuracy*. A database full of inaccurate reports from individuals who have second or third-hand information is not remotely helpful to consumers using the database to determine which consumer product they should purchase.

Day care centers at which an incident of harm has occurred certainly should be permitted to report to the database. Day care centers and other child service providers also would have been permitted to submit reports under the alternative database rule that I introduced. Additionally, consumers of the product in question, health care professionals who treat the injured person, or emergency first responders at the scene should all be permitted to submit reports of harm to the database—and the statute requires all of these categories of submitters.

However, advocacy groups and other second and third person reporters are not listed in the law as allowable submitters to the database, nor should they be. If they are not themselves consumers of the product that caused the incident of harm, or otherwise a first-hand witness (per the list of submitters in the statute), advocacy groups have no business inputting to a public database information that is intended to be a resource for *consumers*. Not only is adding advocacy groups as submitters contrary to the statute, but it invites dishonest, agenda-driven use of the database—diluting its usefulness for consumers. Advocacy groups, trial lawyers, other non-governmental organizations and trade associations, all of which the Majority has added as allowable submitters, must serve their own agendas and lack an incentive to prioritize product accuracy in their reports of harm. By inviting such groups to input reports of harm (none of which have to be verified for accuracy), this Commission has all but guaranteed that the database will be a tool for policy agendas, lawsuits and trade complaints that will drown out information about product safety that is useful to parents. Why even have a taxpayer-funded database (at a price tag of \$29 million, so far) that will be no more useful than an “Amazon.com” or any of the other hundreds of websites where anyone can submit comments on a product?

There are many advocacy groups and associations that serve a role in public policy, but may have no incentive to provide accurate information on a public database. For example, the National Fire Protection Association (NFPA) supports government-mandated sprinklers in new homes, a controversial policy. One cause of house fires is the use of cigarette lighters, which are consumer products. Thus, the NFPA has a strong incentive to add all reports of house fires caused by lighters to the Commission’s public database. The more incidents in our database, the better case they can make that new fire prevention technology—which their members sell—should be mandated in homes.

But what incentive does NFPA have to ensure that it correctly identifies the brand of lighter in an incident report: A lighter may appear to be the branded product of a particular manufacturer, but instead be a cheap counterfeit. The NFPA is interested solely in reporting house fire incidents; the particular cause is not relevant to its goal of promoting sprinklers. Meanwhile, the company identified in the report as the manufacturer of the cigarette lighter must defend countless inaccurate (or at least unverifiable) claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

I explained in my *November 24* and *April 22, 2010* statements that the Majority’s interpretation of the statute is flawed because it has greatly expanded the list of allowable submitters to the database. This expansion goes against the statutory purpose that the database be “useful” for consumers, and does not comport with Congress’s discussion on the purpose of the law prior to its passage.⁷ Indeed, the

⁷On the Senate floor, during consideration of the CPSIA on March 5, 2008, Senator Pryor stated: “We have tried to find something that is balanced, that provides information, but also

Majority has expanded the list of submitters to such an extent that *anyone* can submit reports of harm—thereby rendering meaningless the statutory language listing permitted submitters.

The problems caused by the overly expansive list of submitters could have been reduced if reports of harm had to be verified, or simply verifiable, before being published. But unfortunately, the Majority rejected the proposals contained in my alternative database rule that would have made these reports more verifiable.

One of my unadopted proposals would have required reporters of harm to include the victim's identity and contact information with a report (to be held confidential, as is current practice). Commission staff could then at least follow up with the victim in response to a manufacturer's claim of a material inaccuracy, in order to verify the report.

In my alternative rule, I also included such additional required fields as the approximate date of purchase of the product and whether the product was purchased "new" or "used." This information would have allowed consumers using the database to gauge the age of the products and know whether the product in question was the one currently in stores or is similar to the model they own. These proposals were not adopted by the Majority.

Finally, while submitters to the database must check a "self-verification" box to assert accuracy, this will do little to discourage or prevent inaccurate reports of harm. The final database rule merely asks the submitter of a report of harm to check a box stating that the report they are submitting is accurate "to the best of their knowledge." The "best" knowledge of someone with no first-hand knowledge is of little value. An individual or group without first-hand knowledge will likely not have the full story of what happened—including the exact type of product, the recent history of the product, or even the precise cause of the incident.

Question 9. Do you think it is important for consumers to be able to scan for trends and patterns of potentially hazardous products in the marketplace by accessing this database so they can protect themselves and their families?

Answer. It is important for Commission staff to be able to scan for trends and patterns of hazards, as they do today through our internal databases and other sources of information. After all, Commission staff is tasked with enforcing existing Federal standards and determining the need for new standards. What is important for consumers is to have access to accurate information. Consumers already have a variety of resources available to them on the Internet with all types of information on products for sale. More importantly, scanning for hazards will not be possible with this new database given that the Majority's database rule ensures that the database will not be an accurate source of information.

There are a number of ways in which the new database could be unhelpful or misleading for consumers. Consider this scenario: Company A sells five million high chairs and Company B sells 5,000 high chairs. Company A has six incident reports on the database and the other has one incident report (all of which are unverifiable). Thus, a consumer could falsely conclude that Company A's high chair is less safe, even though simply due to the number of units it sold, it is more likely that people own that high chair—and more likely that reports on that high chair would make it into our database. Or, it is also possible that some of the reports about Company A's high chair actually pertained to older models of the high chair that are no longer for sale, which means the information may be entirely irrelevant for people using the database to look for safety information about current products on the market.

As a consumer and a grandmother, I do virtually all of my research on baby products (e.g., regarding safety, quality and price) at the point of sale—usually on the website from which I am ordering, such as an "Amazon.com." The hundreds of comments on these websites cover a broad array of useful information. But for most products, I would not slow down my research to look onto a government website for additional, equally unverifiable, information—particularly when I can see safety information right alongside all of the other information I am looking for (wear and tear, usefulness, and warranty information) at the point of sale or the retailer's website. All of these factors are useful to a purchaser.

Trial lawyers or other groups with self-serving motives will use the Commission's database to look for potential trends and patterns of hazards. Under the Majority's database rule, these same groups may also submit to the database false and unverifiable reports to fuel a lawsuit. It is no coincidence that these groups are strongly in favor of this public database and of the Majority's interpretation of the statute, which expressly allows them to submit reports of harm.

has some filtering so we make sure erroneous information is not disseminated. But the goal of this provision is that the public has the right to know when products are dangerous."

Because the Majority's database rule all but guarantees that the database will be flooded with inaccurate reports of harm, it will be less useful for Commission staff in determining hazard patterns than are the current, internal databases we have today. Frankly, this is one of my greatest fears—that Commission staff will be overwhelmed by inaccurate reports (or the reports that get picked up by the media) and unable to use their expertise to search objectively for genuine hazards. As the database is swamped with misleading or inaccurate reports, they will drown out the accurate ones.

Question 10. Did you advocate for limitations on the information that could be included in the database? If so, why?

Answer. As discussed above, I sought to *limit the sources* of information to those likely to be reliable; and, I sought to *increase the scope* of information that could be provided, in order to facilitate verification of the incident reports. The only area where I advocated *temporarily* withholding information received from an appropriate submitter concerned claims of confidential or inaccurate information.

In the latter regard, I supported a valid and more useful interpretation of the statutory 10-day time-frame for evaluating claims of material inaccuracy. Under my interpretation, the brief 10-day window presents a strong incentive for manufacturers to submit any claims of material inaccuracy quickly, and for the information to go up on the database as soon as possible—that is, following the 10th day as long as there has been no claim of inaccuracy. However, if a manufacturer submits by the 10th day an adequately supported claim of inaccuracy, the Commission can and should withhold that incident until the claim is resolved. Under this interpretation, data is not *limited* in the database but better verified before it is posted. I refer you to my *November 24, 2010* statement for further details.

Notably, the Commission's Notice of Proposed Rulemaking on the database originally included an interpretation similar to mine. For example, § 1102.26 of the NPR states: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the Database until it makes a determination."⁸ 75 FR 29180. That language could not have been included in the NPR without a legal opinion supporting the permissibility of the policy choice. That the agency apparently believed at one time that this approach is legally permissible reflects, at a minimum, statutory ambiguity regarding the point.

Not surprisingly given the NPR, many if not most of the commenters assumed that incidents would not go into the Database pending the determination of a material inaccuracy claim. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even consumer groups—argued that the statute legally prohibits the agency from withholding reports from publication for the duration of its investigation. To the contrary, several commenters proposed a more detailed protocol for addressing claims of material inaccuracy, based on their understanding that reports would be withheld from publication while under review for accuracy. And yet the Majority's final rule now forbids delaying publication in those circumstances, and fails to establish any specific protocol for handling requests for determinations.

Finally, it is helpful to remember that the Commission obtains information in addition to that which will be submitted to the public database, such as emergency room data, death certificates, etc. It is acceptable (and probably preferable) for the Commission to continue to absorb as much information on consumer products as it can—and this includes reports from advocacy groups, trial lawyers and trade associations. However, it is not necessary *nor is it statutorily required* that such information, particularly that which is neither accurate nor verifiable, also be posted on the public database. This is one area where my position on the database differs starkly from that of the Majority. I believe inaccurate information in a public database (with the official backing of ".gov") is not *safety* information; on the contrary, it is simply misinformation—and a waste of taxpayer resources.

Question 11. Within the third-party testing regime, where is the Commission in its efforts to promulgate rules outlining appropriate testing protocols?

Answer. On May 20, 2010, the Commission issued Notices of Proposed Rulemaking on (1) Testing and Labeling Pertaining to Product Certification (75 FR

⁸The preamble of the NPR contains analogous language: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the database until it makes a determination." 75 FR 99, at 29161. And this: "We propose that in cases where a claim of materially inaccurate or confidential information is under review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made." 75 FR 99, at 29170 (Response to summary 26)(emphasis added).

28366), and (2) Conditions and Requirements for Testing Component Parts of Consumer Products (75 FR 28208). These proposed rules—referred to by the CPSC as the “15-month rule” and the “component testing rule”—address, *inter alia*, the protocols that will govern third-party testing of children’s products, including random sampling methods and the availability of component parts testing as a means to encourage compliance further up the supply chain and to provide manufacturers with more options. The Commission is just beginning to consider the final versions of these rules.

The delay in finalizing these rules is of concern, because the Commission’s previous stays on lead content testing were implemented principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time. If the stay is lifted prematurely, many small manufacturers, in particular, will be unable to afford to comply independently with the third-party testing requirement, and will stop making certain products or go out of business entirely.

This link between finalization of the 15-month and component testing rules and the lifting of the stay was recognized by Commissioners of both parties. As explained in the Commission’s February 2009 Federal Register notice, the stay on third-party testing of children’s products for lead content was first implemented in response to “confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom.” 74 FR 6396 (February 9, 2009). The stay was thus intended to provide the Commission time to promulgate new rules addressing, *inter alia*, “production testing of children’s products subject to third-party testing and certification . . . including random sampling protocols,” so that “the right tests are run on the right products without unnecessary and expensive testing.”

During the December 2009 public briefings to consider whether to lift the stay, CPSC staff reported that the apparel component manufacturing sector was reluctant to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers were unable to obtain component parts testing because suppliers were reluctant to undertake the tests until the final rules for component testing and certification are in place. In the face of this evidence, Chairman Tenenbaum acknowledged that she “would never agree to lift the stay” until the 15-month and component parts rules are in place. She voted to extend the stay “in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements.” Commissioner Moore also recognized the need to “give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials.” During the December 16, 2009 public briefing on the stay, Commissioner Adler also conceded that the 15-month rule should be in effect before the stay is lifted. Although he retracted that view the following day in his written statement explaining his vote to extend the stay, Commissioner Adler predicated his changed position on his belief that “[n]ow that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner.”

Consistent with the views of all five Commissioners, the Commission “determined that testing of children’s products for lead content by a recognized third-party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011, to allow component testing to form the basis for certifications for lead content . . .” 74 FR 68588 (December 28, 2009).

A year has now passed, but in the absence of final 15-month and component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small manufacturers continue to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail outlets where many small manufacturers obtain component parts. Under these circumstances, a continuation of the stay would be consistent with the stated views of all five Commissioners. Commissioners Northup and Nord, and Chairman Tenenbaum all expressly linked the lifting of the stay to at least the finalization of the 15-month and component testing rules. Commissioner Moore supported extending the stay to give small manufacturers “sufficient time to find sources of lead compliant materials,” and Commissioner Adler predicated his willingness to delink finalization of the 15-month rule from the stay on his expectation that small manufacturers would be able to “rely on component suppliers for compliance with the law.” Given that component part suppliers remain unwilling or unable to provide component part certifications in the

absence of final rules, there is no factual predicate for the Commission to support lifting the stay.

It is also important to emphasize that publication of the proposed rules has not provided the regulated community with any certainty regarding the content of the final rules. Indeed, the CPSC's record of rulemaking over the past year demonstrates that a final rule can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that component parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized.

I therefore intend once again to urge the Commission to vote to continue the stay of enforcement on third-party testing and certification of lead content in children's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between design and production, allowing one year after the two testing rules are finalized is necessary for manufacturers to benefit from the rule. Doing so would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay would not earlier be lifted.

Moreover, lifting the stay before the final 15-month and component testing rules are published would place manufacturers in the untenable position of trying to comply with the proposed rule, while anticipating a potentially much different final rule. This would provide manufacturers with insufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing, due to the rapidly changing requirements.

Finally, a reasonable time after publication of the final rules is necessary in order to afford the regulated community time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. In this regard, it is essential that the Commission retain in the final component parts rule the proposed provision, § 1109.5(g)(1), affording component parts certifications "currency" to allow them to be reasonably relied upon by downstream manufacturers without the need for duplicative testing.

Question 12. Has the Commission proposed a rule allowing for component part testing?

Answer. As explained above, the Commission has proposed a rule on component testing (75 FR 28208). If this rule is finalized as it is written today, it will allow for compliance with the CPSIA by some manufacturers that otherwise may have had no chance to survive under the law's onerous, unnecessary testing and certification requirements. This is because component testing has the potential to allow considerable flexibility under the CPSIA's testing regime for both small and large manufacturers. But it will not offset all of the unintended costs nor eliminate all of the negative consequences of the CPSIA. It may not even be available soon enough to benefit some small manufacturers.

I have been a strong supporter of the policy, and therefore hope that absent a full repeal of the CPSIA's testing and certification requirements, the Commission promulgates a final component testing rule. Until the rule is finalized and has the force of law, however, it is highly unlikely that any suppliers of components like zippers, buttons, or even raw materials will make the investment to become component suppliers. In other words, it is incorrect to assume that a proposed rule (or our previous enforcement guidance allowing component testing) is sufficient to lay the groundwork for component testing to take hold.

Component testing can successfully increase efficiencies and safety up the supply chain, only if children's product manufacturers have *absolute certainty* that they can rely on the certificates received from component part certifiers. If a component part certifier (e.g., a button manufacturer) third-party tests, certifies, and fulfills all continued testing requirements for its buttons, but the doll-maker that receives that certificated component is still held fully liable for the compliance of the component, the doll-maker will always have to re-test every component just to be sure. This creates layers of unnecessary, duplicative testing.

That is why in § 1109.5(g)(1) of the *proposed* component testing rule, the Commission allows component part certificates to have "currency" to be passed through the supply chain. Specifically, this provision allows component part certificates to be treated the same as final certifications issued in accordance with section 14(a) of the Consumer Product Safety Act. While finished product manufacturers relying on component parts certificates still could be liable for a recall, for example, if any component is found non-compliant, they would *not* be held liable for a civil penalty for a violative component if they relied, with due care, on a component part certificate.

The question of liability is central to the ability of component testing to work. Manufacturers already have a strong incentive to work with reliable suppliers in order to prevent unnecessary reputational damage or a costly recall should any unsafe product make its way onto the market. However, if a manufacturer is also liable for a civil penalty associated with a *certified component part* found still to be non-compliant—they simply have no incentive to demand certified components at all. Today, they would still have to re-test any components they receive because § 1109.5(g)(1) of the proposed component testing rule has not been finalized. Moreover, given the Commission’s recent history of changing the direction of its rules between the proposal stage and final stage, there is even more uncertainty surrounding component testing.

For all of these reasons, I strongly support finalizing all of our testing rules prior to lifting the stay of enforcement on lead content testing or issuing any more Notices of Requirements to accredit labs for future CPSIA standards.

Question 13. How does Europe handle cadmium content in children’s products? Are the E.U.’s safety standards governing cadmium content in children’s products more stringent than our own?

Answer. International toy safety standards, including the European standard EN 71–3, cover cadmium in toys. Like the ASTM F963 toy safety standard in the U.S., EN 71–3 limits migration of cadmium from paints and surface coatings. The European standard also includes limits for migration of cadmium from materials other than paints and surface coatings. Additionally, the E.U. restricts the amount of cadmium in parts of vehicles, and electronic and electrical products (with exemptions). It has also announced that it will consider recommendations to restrict the cadmium content of jewelry.

An important distinction between our requirements and Europe’s is that Europe does not have the third-party testing and certification requirements that American manufacturers now have in the United States due to the CPSIA. Because the law’s mandates (almost none of which are based on risk) make the cost to manufacture children’s products much higher for manufacturers selling in the U.S., the law gives a strong competitive advantage to foreign firms over U.S.-based firms. Also, similar to Europe’s lead content standards, enforcement of cadmium limits varies significantly country to country—with some countries enforcing the limits more than others. This uneven enforcement of the EU’s mandatory limits also makes it quite difficult to compare our standards in the United States to those in the EU.

Imposition of the CPSIA’s testing costs on products manufactured for sale in the U.S. also disadvantages American consumers. Major European toymakers have decided to stop selling in the U.S., to avoid the CPSIA’s testing costs. But their products are still available to consumers in Europe and other countries.⁹ The absence of these European children’s products in the American market is not because their products are unsafe, but because these companies choose not to pay for the law’s unnecessary costs to reengineer, third-party test and certify all of their products.

We tend to focus more on the costs of the CPSIA to businesses, rather than to consumers. But as a mother of six, I have an appreciation for the impact on the consumer. Parents have certain expectations when they shop for their children, including that: (1) products they purchase are safe; (2) at least some products are affordable; and (3) a vibrant market exists with new and different toys and children’s products throughout the year. When I shopped for my children, I did not want the same dolls and games in the same colors that I purchased the year before. Unfortunately, the high cost of compliance with the CPSIA, without regard to safety, has meant reduced choices for consumers (including reduced product lines and “despec’ing” of products to reduce colors and accessories)—and the effects are likely to become worse as the Commission continues implementing the law’s testing requirements.

Harmonization

Recently, the ASTM toy safety subcommittee 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 ASTM F–963 standard mandatory, effective 2009.

That the Commission could be an impediment to the ASTM’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 F963 had been a voluntary standard before the CPSIA made it

⁹ <http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cpsia/>.

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 last summer 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 F963 has tied the Commission’s hands in its negotiations to “harmonize” with the Europeans. Overall, locking in the ASTM 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.

Unlike the mandatory toy standard, there is no Federal standard for jewelry at this time in the United States. American companies that serve on the ASTM jewelry standards Committee can therefore negotiate freely with our international counterparts. Harmonization for this product category is still possible.

Question 14. Are children more susceptible than adults to the adverse health effects of cadmium exposure?

Answer. Our staff has found little information that children are more susceptible than adults to the effects of cadmium, although few studies have focused specifically on health effects in children.

However, CPSC staff has focused on children in its risk assessments, because children engage in behaviors more likely to expose them to any cadmium found in consumer products. In particular, children tend to have significant mouthing behaviors, and occasionally may swallow—accidentally or intentionally—small objects. Children also tend to place their fingers in their mouths after touching objects. All of these behaviors increase the chance of migratable material being introduced into the mouth, where it can be swallowed and absorbed by the body.

Question 15. Do you believe cadmium should be declared toxic by the Commission under the Federal Hazardous Substances Act? If not, why not?

Answer. The Commission staff’s conclusion is that the data concerning the toxicity of cadmium is sufficient for cadmium to be considered toxic under the FHSA due to effects on multiple organ systems and toxic endpoints, including kidney dysfunction. However, the conclusion that a substance is toxic is only the first step in the Commission’s assessment under the FHSA.

The FHSA is risk-based. To be considered a “hazardous substance” under the FHSA, a consumer product must satisfy a two-part definition. 15 U.S.C. § 1261(f)(1)(A). First, it must be toxic under the FHSA, or present one of the other hazards enumerated in the statute. Second, it must have the potential to cause “substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.” Therefore, exposure and risk must be considered in addition to toxicity, when assessing potential hazards under the FHSA.

It is important that the Commission’s assessments be risk-based and that the Commission explain and clarify the genuine risks associated with metals like cadmium, particularly when talking to the media. Unfortunately, some articles on children’s products have reported that cadmium is a carcinogen, inferring that it could be a carcinogen when present in children’s products. However, the *route of exposure* of a substance is as important as the type of substance when determining its health effects. If cadmium is inhaled, as in a mine or similar workplace environment for adults, it is a known carcinogen. For this reason, OSHA has strict standards on cadmium inhalation in industrial workplace settings. However, touching, mouthing, or swallowing an object with a high level of cadmium content is an entirely unique route of exposure with unique health effects. As such, cadmium in the substrate of toys, in drinking glasses, or in jewelry is *not* a known carcinogen.

Question 16. Could you discuss the issue of the additional layer of protection for pools with only a single main drain?

Answer. The additional layer of protection for pools and spas provided by the Virginia Grahame Baker Pool and Spa Safety Act (VGBA) is an important issue, and I was proud to support the bipartisan interpretive rule that this Commission promulgated to implement the VGBA.

Under the VGBA, all public pools and spas must be equipped with anti-entrapment devices or systems. VGBA § 1404(c)(1)(A)(i). To further reduce the risk of entrapment, the VGBA also requires public pools and hot tubs with a single main drain to have either an “unblockable drain” or a “system[] designed to prevent entrapment.” VGBA § 1404(c)(1)(A)(ii). Thus, one question before the Commission was how to define an “unblockable drain.”

The Commission's interpretive rule determines that a drain fitted with an unblockable drain cover is an "unblockable drain" within the meaning of the VGBA. I supported the majority's interpretation for the following reasons: (1) I believe that a drain made unblockable via an unblockable drain cover reasonably satisfies the plain meaning of the statutory term "unblockable drain"; (2) I believe an unblockable drain system is equally if not more effective than other "systems designed to prevent entrapment" and; (3) I am convinced that the staff's recommendation to accept unblockable drain covers will save the most lives and prevent the most injuries.

It makes sense to treat drains fitted with unblockable drain covers as unblockable drains under the statute. Drains made unblockable through their design or through use of an unblockable drain cover function equally well to maintain the suction flow of water at a safe level when blocked by a person's body, so we should treat them the same. In either case (*e.g.*, an unblockable drain or a drain with an unblockable drain cover), if the drain cover is removed, the drain ceases to be unblockable—so the issue of an unblockable drain cover dislodging is irrelevant. If unblockable drains do not require back-up systems, then neither should drains fitted with unblockable drain covers.

Even if I were not convinced that the term "unblockable drain" includes drains fitted with unblockable drain covers, § 1404(c)(1)(A)(ii)(VI) of the statute authorizes the Commission to determine whether other systems are "equally effective as, or better than, the systems described . . . at preventing or eliminating the risk of injury or death associated with pool drainage systems." Based on the Commission's public hearing and briefing by staff—and for the reasons discussed below—I would determine that unblockable drain covers are at least equally as effective in preventing or eliminating injury or death from drain entrapments as the other systems described in the statute.

Finally, it appears to me that *unblockable drain covers promise to save more lives and prevent more injuries than other anti-entrapment systems*. An unblockable drain cover with the appropriate flow rating is the only solution that prevents all five types of entrapments identified by the staff (limb, hair, body, evisceration, and mechanical-related). The back-up systems mentioned in the Act only address some of the potential scenarios. For example, some of the back-up systems deal with suction body entrapment and some limb entrapments, but would not release hair, mechanical, or evisceration entrapments. Given the prevalence in the mortality data of hair entrapments, that failing poses a real danger. Moreover, preventing entrapments in the first place is the best solution to the threat of entrapment drowning. Back-up systems require an entrapment incident to begin to occur before they respond, and they may not prevent the entrapment depending on what kind it is and what type of drain system is involved.

I would like to add a few words about the apparent conflict of interest of certain advocacy groups lobbying this issue. Just as health insurance companies lobby Congress and Federal agencies for healthcare solutions that benefit their bottom line, it is not surprising that people who develop and sell back-up systems created an association to promote the use of their product. In fact, the founder of the Pool Safety Council, a group that has lobbied Congress and other organizations to require that all pools have back-up system technology, was the President of a back-up system manufacturer until only this past February.¹⁰

The Pool Safety Council promoted their petition by claiming the CPSC "reversed their guidance of the [VGBA], removing important entrapment prevention requirements." However, as noted previously, unblockable drain covers are the safest form of protection against entrapments. They are the only safeguard against all five types of entrapment and the only choice that prevents entrapment from occurring in the first place.

The Council's petition goes on to say, "The reversal brings into question the influence representatives from the pool industry have in CPSC's decision-making process." In fact, no group has pressured CPSC more than the Pool Safety Council. Speaking for myself, I have had no communication from any pool representative except for those that have a financial interest in requiring back-up systems. The Pool Safety Council lobbies for a tighter definition of unblockable drain because pools with unblockable drains are not required to buy their product. I consider it a triumph of safety over special interests that, despite all the pressure from those who have a financial interest in requiring back-up systems, the CPSC decided to adopt a new, safer technology.

¹⁰ http://www.poolspanews.com/2010/022/022n_svrs.html.

Question 17. The Commission recently voted on rules to implement the public database mandated in the Consumer Product Safety Improvement Act of 2008. The Commission issued a notice of proposed rulemaking (NPRM) regarding the database on May 24, 2010, with a comment deadline of July 23, 2010. After the comment deadline but before the Commission voted on the database rule, you and Commissioner Nord released an “Alternative Database Rule Proposal” and requested comment from the public. Such action is highly unusual with respect to a rulemaking. Is there precedent for members of an independent regulatory agency to issue alternative rule proposals and seek public comment separate from an agency released NPRM?

Answer. Although I am unaware of another alternative rule being publicly vetted during a rulemaking process, it is certainly not uncommon for members of rule-making bodies to express publicly their views on pending regulation. In fact, the Chair routinely expresses her view on pending regulation and is often quoted in the press.

Question 18. How does the release of the alternative proposal and the submission of comment impact the rulemaking proceeding? Did the release of the alternative proposal potentially create grounds for a legal challenge to the rule adopted by the Commission?

Answer. The release of the alternative proposal and the solicitation of “feedback” from the public did not create grounds for a legal challenge to the rule adopted by the Commission.

With respect to the publication of an alternative rule, the APA does not require that agency decisionmakers shield from the public their deliberative processes, including the consideration of alternative language. Moreover, the public interest is arguably better served when an agency’s decisionmaking is made more transparent by such action. The fact that the Majority reposted my alternative on the CPSC website following a thorough legal review confirms that its publication was deemed to be lawful.

The request for public feedback on the alternative rule also did not make the final rule adopted by the Commission vulnerable to legal challenge. So long as all comments considered by an agency in its rulemaking process are made public, the inspiration for a comment, whether it is a formal *Federal Register* notice, or otherwise, is not material. Indeed, we routinely receive comments outside of a notice period and publish them on our website. For instance, unrelated to my alternative rule posting, a comment in response to the database NPR was received after the official deadline for submitting comments, and was posted at *CPSC.gov*.

Ex parte communications that form the basis of agency action and are not made a part of the public record can jeopardize a rule’s enforceability. But my request for feedback was public, and it was always my intent that, like any late filed comment, responses would be posted on CPSC’s website. As it turns out, my alternative rule was not considered by the majority commissioners, and the majority commissioners did not review the letters I received in response to the alternative rule. They thus did not form the basis for CPSC action and have not been made public.

Question 19. Do you anticipate releasing more alternative rule proposals in the future?

Answer. I promoted an alternative database rule, because I believe the rule supported by the majority—and ultimately promulgated—is irredeemably flawed. It is my hope and expectation that in the future, the Commission will be better able to work toward compromises that will obviate the need for the formulation of comprehensive alternative rules. I am unwilling, however, to commit to never publicizing during the rulemaking process policy views that differ from those of the majority. Doing so helps the regulated community better understand the Commission’s policy choices.

Question 20. On numerous occasions, you have posted comments, artwork, and pictures on your blog questioning legislative proposals by Members of Congress and urging the public to reach out to Congress about the CPSIA. Your comments are often questionable in tone and tenor. Do you believe that a post with a picture of individuals drowning next to a ship called the “S.S. Waxman” befits the office of a Commissioner of the Consumer Product Safety Commission?

Answer. I believe that as a Commissioner and citizen, I have the right and duty to articulate my public policy views in whatever manner I deem most effective. And I am troubled by the tone of your question, which appears designed to silence criticism of competing policy views.

I published the “SS Waxman” graphic to illustrate the point explained in the accompanying text posted with it on my blog. This was that Senator Waxman’s proposed legislation to provide relief from the burdensome costs of complying with the

CPSIA was too narrowly drafted. As graphically illustrated, it was designed to provide relief only to the ATV industry, thrift stores, and very small manufacturers. The costs associated with obtaining a “functional purpose” exemption would have been prohibitively excessive for all but the largest manufacturers. In addition, the exemption for low-volume manufacturers had the potential to provide relief to only a small slice of the manufacturing community.

These are legitimate criticisms of the proposed legislation that contributed to the public debate. My role as a Commissioner in no way limits my right to make such observations. Indeed, I would be negligent not to contribute the perspective gained through my position to advance the cause of CPSIA reform.

More generally, I believe that my blog serves an important purpose. It provides a venue for the exchange of information and opinions relevant to the fulfillment of the CPSC’s mission. Commissioners often receive letters from the regulated community expressing general concerns about the CPSIA. In addition to citing the obvious financial burden of compliance, manufacturers of children’s products have reported that the third-party testing requirement is likely to result in reduced product variety. Most importantly, they explain that these consequences are not born of any improvement in safety. These companies are already making safe products; the CPSIA merely requires them to prove it before continuing to sell the same products or introducing product variation. But notwithstanding this input, we lack sufficient specific examples and hard data to allow us to fully understand or to quantify the problem. I therefore use my blog to solicit input from both the regulated community and consumers, in order to better understand the issues facing them, so that I can be a more effective and responsive public servant.

My blog also allows me to communicate my views to consumers and industry. When I was a Member of Congress, I was struck by the degree to which the CPSC and other Executive Branch agencies appeared to regulate without regard for its impact on the regulated community. I often heard from businesses who were frustrated that their voice was not being heard or considered in the regulatory process. My blog allows me to reassure consumers and the businesses subject to CPSC regulation that I understand the issues facing them and am working to find and promote the regulatory flexibility necessary to ensure product safety without unnecessarily stifling economic growth and consumer choice.

Question 21. Given your comments regarding the CPSIA, are you able to implement the law in a fair and impartial manner, even with respect to a provision of the law with which you disagree?

Answer. Agreement with a law is not a prerequisite to the recognition of a statutory duty to carry it out. Indeed, if every executive agency board and commission member was required as a condition of office to agree with every policy choice reflected in all of the statutes they administer, few, if any, would be left to serve. I swore an oath to uphold the law and that is what I have always done and will always do. I will also continue to help the Commission identify flexibility in the law that can alleviate its devastating impact on American business, and to focus on the CPSC’s core mission of assessing and reducing risks to consumer safety.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. KAY BAILEY HUTCHISON TO
HON. ANNE M. NORTHUP

Question. As you know, Section 103(a) of the CPSIA requires the placement of tracking labels on all children’s products and their packaging, to the extent practicable. In its July 2009 Statement of Policy regarding enforcement of this provision, CPSC staff indicated that products sold through bulk vending machines would not need to be individually marked, though the package or carton the products are shipped in would. The Statement of Policy further noted that “the Conference Report [accompanying the CPSIA] recognized that marking each individual product in such circumstances may not be practical. See H.R. Rep. No 787, 110th Cong., 2d Sess. 67 (2008).” *However, the Commission has not provided any explicit regulatory exclusion from Section 103(a) for bulk vended products. Will the CPSC pursue enforcement actions against bulk vendor suppliers, operators or retail establishments for the absence of tracking labels on bulk vended products? Further, can you please assure the Committee that the CPSC will maintain this position should any state attorney general or other entity seek to enforce Section 103(a) against bulk vended products?*

Answer. As you know, the Commission’s July 2009 Statement of Policy on Tracking Labels states the following:

"If a product is sold through a bulk vending machine, the item does not need to be individually marked but the package or carton in which such products are shipped to the retailer should be marked. The Conference Report recognized that marking each individual product in such circumstances may not be practical. See H.R. Rep. No. 787, 110th Cong., 2d Sess. 67 (2008)."

The Office of Compliance is following this policy as stated. Staff will consider enforcement action if the package or carton in which such products are shipped is not appropriately marked with the required information.

A State Attorney General technically may still pursue companies for violating any part of the CPSIA, in spite of enforcement guidance published by the Commission. Providing absolute certainty for bulk vendors or any other manufacturers in this regard would require an act of Congress amending the CPSIA.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO
HON. ANNE M. NORTHUP

Question 1. What can you tell us about the impact of the CPSIA on small businesses? Even though the CPSIA did not require the Commission to perform cost-benefit analyses of the rules it promulgates, many of the concerns raised from small businesses and from Members of Congress since the law passed have been based on the need for this very information—specifically, the law's economic impact and unintended consequences. Does the Commission have quantitative data to determine what the impact has been, and what the impact will be in the future as more requirements under the law come into effect?

Answer. The CPSIA has been devastating for many small businesses, and it has increased costs for large businesses. *Product Safety Letter* reported the following on a November 2009 public meeting with Mattel:

[a] lawyer for Mattel with the law firm Jones Day in Washington D.C., said his client is finding the CPSIA difficult to decipher. The law, he said, is unclear on what products the company needs to test, how often it needs to test them, and how many samples need to be tested. "It's a lot of work. I don't know how smaller companies do it," Biersteker told Commissioner Robert Adler.

Despite Mattel's large team of in-house lawyers, he said, the company needed to hire outside lawyers to help understand the CPSIA. He said Mattel holds weekly conference calls on the issue, discussing how to comply with the act while remaining "cost competitive."¹

Small businesses have by far borne the greatest impacts of the law. *Attached*, you will find some examples of businesses that have closed their doors, reduced product lines, or abandoned the children's product market due to the CPSIA. I submitted this information for the record during my opening statement.

This Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to product standards, and the potential reputational and litigation costs due to the upcoming public database. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and Labeling Rule. For example, our staff estimated that the cost to test a toy with a moderate number of colors and interesting accessories could range between \$3,712 and \$7,348. The cost to test a bike under our proposed testing rule could be between \$7,350 and \$18,600.² As a result of much of this anecdotal data and the pressure on the Commission from industry, the Chairman elected to create a full-time Small Business Ombudsman position at the agency—something that I do not believe will address industry's concerns, but nonetheless represents an acknowledgement of the pressures and concerns we have felt from the small business community.

However, you have asked whether we have *quantitative data* regarding the costs of this law, and unfortunately, we do not. So far, we have continued without fully studying or trying to reduce the impact of the regulations we are promulgating. With the anecdotal data we have from manufacturers and trade associations, and requests from Congress asking the Commission to try to mitigate the law's unintended consequences, both Commissioner Nord and myself have requested that we allocate funding to do a *full cost-benefit analysis* of the rules we are promulgating.

¹ "Mattel Finds CPSIA to be a Challenge," *Product Safety Letter*, November 9, 2009.

² Regulatory Flexibility Analysis of the Commission's proposed Testing rule, pg. 103–108. (Proposed Rule: Testing and Labeling Pertaining to Product Certification—Draft Federal Register Notice—April 1, 2010 (Part 1) <http://www.cpsc.gov/library/foia/foia10/brief/prodcert1.pdf>).

Given the disruption in the marketplace and the current state of our economy, it has been disappointing that the majority of the Commissioners have not agreed to focus more heavily on providing Congress with quantitative data on the economic effects. Even Representative Jo Ann Emerson, currently the Chairman of the House Financial Services Appropriations Subcommittee, has requested that the Commission initiate a cost-benefit analysis of the rules we promulgate and quantify the effects on small businesses. Unfortunately, this Commission has not produced any cost-benefit analyses to date.³

Furthermore, this anecdotal data does not reflect the full breadth of the law's requirements, because the most onerous requirements have yet to go into effect. The widest reaching mandate in the law—requiring third-party testing of all children's products for lead content—has been stayed since February of 2009. Currently, the Commission is considering whether to extend the stay further. We have not implemented the requirement to third-party test for lead, phthalates, or to the toy standard—which alone may require a considerable number of new tests and certifications for toymakers.⁴

The categories of children's products impacted by this law seem endless. But let me illustrate the cost versus benefit impact by considering two examples: furniture and toys.

A company making furniture for children's rooms would need to: (1) determine if its product is "primarily intended" for children 12 and under—which they may not know for sure, and for which the Commission has provided ambiguous guidance; (2) submit for testing to a third-party lab every part of every piece of furniture that may be used on a children's product, including nuts, bolts, and varnishes (one piece of furniture may have fourteen different coats of finish); (3) certify each component based on each of these tests; (4) add tracking labels to each piece of children's furniture with a lot number that can trace each component to its specific certification and test; (5) maintain records for all tests and certifications for all parts of each children's product; and (6) start this process all over again, if they decide to change a color or varnish, or some other part of the product—or if there is any other material change. One furniture company reported to us that they have already spent \$13 million on tests, new systems and tracking processes, despite the fact that every single component they were using on children's furniture already complied with the current lead standard. So in this case, the cost was \$13 million and the benefit (*i.e.*, improvement in safety) was zero.

All toys must be tested for lead and phthalates at third-party labs, and all are subject to the toy standard, ASTM F963, which the CPSIA made mandatory. As a result, a doll maker will be required to send to a third-party lab to be tested for lead, phthalates and any applicable rules under the toy standard, every component part, including each paint color used on the eyes, each button, the hair, and all of the accessories. Companies tell us that these requirements stifle innovation and product variety by erecting significant cost barriers to adding to dolls new accessories, new colors, or other variations. For example, a large toy manufacturer told us that his company has had to "de-spec" certain toys in order to afford the law's new costs, which means removing accessories, moveable pieces or other parts—or, in the manufacturer's words, "taking the fun out of toys."

Also, the scope of the toy standard is quite broad, as seen in the list of sections below. Not all toys must be tested to all parts of the toy standard, but any one toy may be subject to numerous requirements, and satisfying each requirement involves one or more separate tests:⁵

³The CPSIA does not direct that rulemakings (even "major rules") be promulgated under Section 9 of the CPSA, which requires a cost-benefit analysis and would normally preclude the Commission from promulgating rules whose benefits are not expected to bear a reasonable relationship to their costs. However, the Commission is not *prohibited* from doing such studies. So far, the only analysis that many rulemakings have received has been a perfunctory, small business regulatory flexibility analysis, as required by the Regulatory Flexibility Act. The reg-flex analysis to accompany the Testing rule (see footnote 2) provides hypothetical examples of testing costs, but no quantitative data.

⁴Jill Chuckas testified for the Handmade Toy Alliance on the second panel of the December 2, 2010 oversight hearing before the Senate Commerce Subcommittee on Consumer Protection regarding the high costs of testing to the toy standard (ASTM F963): http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=799a2c9d-f48a-4284-add2-1a9099961431&Statement_id=fb4d696e-c471-4bd1-be39-d9fb7f34f56a&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=12&YearDisplay=2010.

⁵<http://www.astm.org/Standards/F963.htm>.

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Your question focuses on cost-*benefit* analyses. The law imposes onerous requirements on small businesses that are hurting the economy, without any evidence of a safety benefit. The CPSIA's lead content standard, interim-ban of phthalates, and all third-party testing requirements are not based on risk. The CPSC has the authority to impose these types of requirements on any product or industry, if it determines that a risk exists and these costs are necessary to reduce or eliminate the risk.

This Commission never concluded that the components of children's products containing either 300 ppm lead content or the interim-banned phthalates pose a safety risk to children. And until directed to do so by Congress in the CPSIA, the Commission saw no reason to make ASTM F963 a federal standard, or to require all toy manufacturers to send their products to third-party labs to test to this standard. Regarding lead, 2007 data indicates that one percent of children tested nationally showed a dangerous blood lead level as established by the Centers for Disease Control (CDC). This number was down from nearly 8 percent in 1997,⁶ and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the Environmental Protection Agency have issued guidance for reducing children's exposure to lead, and its focus is not on children's products. It has never been suggested that this new law, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level. For further information on the risks associated with lead, I refer you to my answer under the "Lead Standard" questions below.

Finally, there is a cost to consumers—not only in the loss of jobs in a struggling economy, but the loss of choice. Many manufacturers can afford the costly mandates of the law only by reducing their product lines, leaving the children's product market, or "de-specing" their toys—with no offsetting improvement in safety. As a mother of six children, I remember Christmas shopping for new and different products at affordable prices, and I expected a creative and vibrant market all year-round. Parents expect the products they buy to be safe. But they also expect them to be creative, and they are entitled to a marketplace that encourages new ideas and the next "must have" toy of the season. Instead, the costs of complying with the CPSIA will discourage newcomers to the market and choice will be reduced, even as prices increase. Some international toy makers have even decided to leave the American market due to the costs imposed by the CPSIA, although they are still offering their products to European consumers.⁷

Given our economic situation and the mandate from the American people to shrink the size of government and reduce the numbers of unnecessary regulations, I believe some of the CPSIA's requirements could easily be scaled back. Job growth in the United States comes through the growth of small businesses—and the CPSIA's regulations directly hamper that growth.

Question 2. Does the Commission have any plans to assess the negative impacts of the law, and to take necessary actions to alleviate these burdens before they eliminate any more jobs?

Answer. To my knowledge, there are no plans to assess fully the impact of the CPSIA or even the regulations we are scheduled to promulgate.

Regarding action by the Commission to alleviate the law's unnecessary burdens, I no longer believe that this is likely. Before my Senate confirmation hearing, I was asked by both Democrat and Republican Senators to "find flexibility" in the law wherever possible, because the law had resulted in many unintended or unforeseen consequences. Once confirmed as a Commissioner, I took this request seriously.

However, the flexibility that I have found in the following rules was rejected by a majority of Commissioners:

a. *Absorption exclusion*—I argued that the absorption *exclusion* under Section 101 was actually intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term "any lead" in that section may be interpreted to mean a *de minimis*, harmless amount of lead in

⁶<http://www.cdc.gov/nceh/lead/data/national.htm>.

⁷One American importer of toys lists on its website the European brands that it no longer offers for sale in the United States due to the CPSIA: <http://www.eurotoyshop.com/getEndangeredToys.asp>.

a children's product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axles on toys would be legal—since lead in the substrate of these products is not harmful (See answers under “Lead Standard” below). Because the Commission rejected this interpretation, it voted to reject the petition of a manufacturer of toy cars, even though the car's brass fitting contained less absorbable lead than the Food and Drug Administration deems to be acceptable in a piece of candy.⁸

b. *Civil Penalties Factors*—In the Commission's interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that, while the overall civil penalty ceiling was raised, “technical” violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.⁹ Unfortunately, a majority of the commissioners did not want to provide that leeway.

c. *Definition of Children's Product*—The CPSIA applies to all “children's products”, statutorily defined as products “primarily intended for a child 12 years of age or younger.” The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended for the 10–12 or pre-teen age groups, or that straddle the age limit of the statute. The entire reason for defining the term was to provide guidance to these types of manufacturers, who need certainty to know how to determine if their products fall under the purview of the CPSIA. After receiving these comments, the Commission had a chance to put a much narrower “fence” around the scope of covered products—or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helps neither the CPSC staff,¹⁰ nor the regulated community.¹¹

d. *“Children's product safety rules”*—I offered a valid, alternative interpretation of the statute with regard to the requirement to impose third-party testing on all “children's product safety rules.” A clear distinction can be made between “children's product safety rules” and more general “consumer product safety rules” promulgated well before the passage of the CPSIA. Unfortunately, because the Majority chose to view all consumer product safety rules of the Commission as potential “children's product safety rules,” it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step—and there is no risk associated with these products that necessitates new third-party testing requirements.¹²

e. *Database*—As described below in the questions on the database, I proposed an alternative database rule that would have responded to a number of manufacturer concerns and made the database a more accurate source of information for consumers. Unfortunately, the Commission's Majority passed a rule that went well beyond the statute's requirements, allowing “anyone” to submit reports of harm—even advocacy groups, attorneys and random bystanders that may not have firsthand knowledge of the incident. In total, the Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers—particularly small businesses. Due to the inaccuracy of reports on the database, it will be a waste of taxpayer resources and will not be useful to the consumers it was intended to help.

Finally, regarding the upcoming rule on Testing and Labeling Pertaining to Product Certification (“15 month rule”), it is important to keep in mind that the statute does not permit the agency to exempt any manufacturer from the law's testing requirements. *Exemption from the testing requirement is the main change sought by small manufacturers.* Because we cannot exempt companies from the initial third-party test that every manufacturer must do to every component of their product—

⁸<http://www.cpsc.gov/pr/northup110409.pdf>.

⁹<http://www.cpsc.gov/pr/northup03102010.pdf>.

¹⁰Justin Pritchard, “Feds dismiss need to recall lead drinking glasses,” Associated Press, December 11, 2010. http://news.yahoo.com/s/ap/20101211/ap_on_he_me/us_cadmium_lead_glassware.

¹¹<http://www.cpsc.gov/pr/northup09292010.pdf>.

¹²<http://www.cpsc.gov/pr/northup07122010.pdf>.

even if the product poses no risk—I hope that the Commission will at least alleviate the burden through the “continued testing” requirements of the statute and the testing protocols, where we do have some flexibility. However, removing the costly requirements of third-party testing and certification will require an act of Congress amending the CPSIA.

Question 3. Chairman Tenenbaum mentioned the new Small Business Ombudsman. Do you believe that this Ombudsman will alleviate the expressed concerns of small businesses?

Answer. Although I appreciate the underlying objective of increasing Commission outreach to stakeholders such as small businesses, I do not believe that creating a brand new office for this purpose will address such stakeholders’ ongoing frustrations with Commission actions, add value to our core mission of product safety, or represent a wise use of taxpayer dollars.

In particular, I disagree with the implication that the new outreach to *small businesses* will help those who are struggling with the CPSIA. Small businesses are not clamoring simply for more information from the Commission about how to comply with this law—they are asking for relief from this law because it is killing them. Also, as the witnesses in the Second Panel of the December 2 hearing indicated, while the Commission has been open to listening to their concerns, this openness has not translated into more helpful rulemaking.

The solution for small businesses is not *more* government; it is repealing the portions of the CPSIA that impose tremendous costs without increasing safety. Furthermore, no matter how successful this new office may be, small businesses will still have to hire their own lawyers to fully grasp their particular obligations under the complex, far-reaching new regulations being promulgated by the Commission. In that respect, creating this office is like offering a Band-Aid™ for a problem that requires major surgery.

If we really wanted to help small businesses, this Commission would do everything in its power to mitigate the unintended consequences of the CPSIA through its rulemaking—something I have continued to argue for with limited success. It would add clarity and factor risk into our policies as much as the statute allows. Even better, we would unanimously approach Congress and ask that the law be reformed or repealed in a meaningful way so that *only risky products* are impacted—since the CPSIA has clearly taken us away from our core mission of product safety. Anything short of these steps will not help the small business community or a floundering economy.

Finally, I am concerned that creating a new office to govern the “education and outreach” responsibilities to industry stakeholders may complicate or even overtake the outreach we already perform under other offices such as our Office of Compliance. Right now, if a small company needs to know if its product falls under the purview of a particular regulation, it can call the Office of Compliance for advice. It is a key function of that office to assess products every day in the course of its enforcement responsibilities. By creating a new office in charge of “outreach” duties, we create unnecessary complications and risks in our communications with the public, including: (1) having two offices that could answer the same question differently; and/or (2) moving the agency away from its pure enforcement responsibilities and instead providing something akin to product pre-approval services. The latter course could potentially turn a relatively small CPSC into a behemoth more like the Food and Drug Administration. It is depressing to think it is even remotely possible we could have a government office dedicated to “pre-approving” all consumer products before they go to market.

Question 4. The Commission’s stay on third-party testing for lead content is scheduled to lift in February. Is the Commission prepared to move forward with lifting this stay of enforcement? Do you believe that businesses have been given the information necessary to comply with this requirement? Have they been given enough time to incorporate necessary changes to comply with the requirement by the February deadline?

Answer. On May 20, 2010, the Commission issued Notices of Proposed Rulemaking on (1) Testing and Labeling Pertaining to Product Certification (75 FR 28366), and (2) Conditions and Requirements for Testing Component Parts of Consumer Products (75 FR 28208). These proposed rules—referred to by the CPSC as the “15-month rule” and the “component testing rule”—address, inter alia, the protocols that will govern third-party testing of children’s products, including random sampling methods and the availability of component parts testing as a means to encourage compliance further up the supply chain and to provide manufacturers with more options to come into compliance. The Commission is just beginning consideration of the final versions of these rules.

The delay in finalizing these rules is of concern, because the Commission's previous stays on lead content testing were implemented principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time. If the stay is lifted prematurely, many small manufacturers, in particular, will be unable to afford to comply independently with the third-party testing requirement, and will stop making certain products or go out of business entirely.

This link between finalization of the 15-month and component testing rules and the lifting of the stay was recognized by Commissioners of both parties. As explained in the Commission's February 2009 Federal Register notice, the stay on third-party testing of children's products for lead content was first implemented in response to "confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom." 74 FR 6396 (February 9, 2009). The stay was thus intended to provide the Commission time to promulgate new rules addressing, *inter alia*, "production testing of children's products subject to third-party testing and certification . . . including random sampling protocols," so that "the right tests are run on the right products without unnecessary and expensive testing."

During the December 2009 public briefings to consider whether to lift the stay, CPSC career staff reported that the apparel component manufacturing sector was reluctant to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers were unable to obtain component parts testing because suppliers were reluctant to undertake the tests until the final rules for component testing and certification are in place. In the face of this evidence, Chairman Tenenbaum acknowledged that she "would never agree to lift the stay" until the 15-month and component parts rules are in place. She voted to extend the stay "in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements." Commissioner Moore also recognized the need to "give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials." During the December 16, 2009 public briefing on the stay, Commissioner Adler also conceded that the 15-month rule should be in effect before the stay is lifted. Although he retracted that view the following day in his written statement explaining his vote to extend the stay, Commissioner Adler predicated his changed position on his belief that "[n]ow that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner."

Consistent with the views of all five Commissioners, the Commission "determined that testing of children's products for lead content by a recognized third-party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011 to allow component testing to form the basis for certifications for lead content . . ." 74 FR 68588 (December 28, 2009).

A year has now passed, but in the absence of final 15-month and component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small manufacturers continue to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail outlets where many small manufacturers obtain component parts. Under these circumstances, a continuation of the stay would be consistent with the stated views of all five Commissioners. Commissioners Northup and Nord, and Chairman Tenenbaum all expressly linked the lifting of the stay to at least the finalization of the 15-month and component testing rules. Commissioner Moore supported extending the stay to give small manufacturers "sufficient time to find sources of lead compliant materials", and Commissioner Adler predicated his willingness to delink finalization of the 15-month rule from the stay on his expectation that small manufacturers would be able to "rely on component suppliers for compliance with the law." Given that component part suppliers remain unwilling or unable to provide component part certifications in the absence of final rules, there is no factual predicate for any of the Commissioners to support lifting the stay.

It is also important to emphasize that publication of the proposed rules has not provided the regulated community with the any certainty regarding the content of the final rules. Indeed, the CPSC's record of rulemaking over the past year demonstrates that a final rule can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that component

parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized.

I therefore intend once again to urge the Commission to vote to continue the stay of enforcement on third-party testing and certification of lead content in children's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between design and production, allowing one year after the two testing rules are finalized is necessary for manufacturers to benefit from the rule. Doing so would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay would not earlier be lifted.

Moreover, lifting the stay before the final 15-month and component testing rules are published would place manufacturers in the untenable position of trying to comply with the proposed rule, while anticipating a potentially much different final rule. This would provide manufacturers with insufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing, due to the rapidly changing requirements.

Finally, a reasonable time after publication of the final rules is necessary in order to afford the regulated community time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. In this regard, it is essential that the Commission retain in the final component parts rule the proposed provision, § 1109.5(g)(1), affording component parts certifications "currency" to allow them to be reasonably relied upon by downstream manufacturers without the need for duplicative testing.

Question 4a. Do you believe that the health of children has been at greater risk because of this stay of the third-party testing requirements?

Answer. No. Neither the lead standard(s) of the CPSIA nor the third-party testing requirements of the law are based on risk, so the absence of either of these requirements also does not create or denote a risk. I refer you to my answer under the "Lead Standard" questions for more information on the risks associated with lead.

Question 5. Is the Commission going to consider extending the stay in order to ensure that the affected businesses are adequately prepared and that there are enough resources to prevent a negative impact on the businesses affected? If so, when do you plan on doing so?

Answer. Because the Commission has yet to finalize the rules we intended to publish before passage of the original stay in February 2009, which provide the "instructions" regarding what manufacturers need to test, how often, and other details, I would vote to extend this stay to a future date, pending the finalization of these rules. However, the decision rests entirely with the Majority, since it would take three votes for the date of lifting of the stay to be changed and for such a change to be conditioned on the completion of the Commission's testing rules.

Question 6. The CPSIA draws a clear distinction between general product safety rules and children's product safety rules. Yet the Commission has chosen to apply the requirement of third-party testing to all children's products under the general product flammability rules. Can you tell us why this decision was made?

Answer. The Commission, by a 3-2 vote along party lines, decided to ignore the distinction between children's product safety rules and consumer product safety rules, and to require third-party testing of children's products to all the rules. Thus, general "consumer product safety rules," such as our flammability regulations for carpets and rugs, are now also "children's product safety rules" under the CPSIA. Manufacturers of carpets and rugs (as well as vinyl, wearing apparel and mattresses) already must adhere to a strict testing protocol for their products. This decision means that whenever they create a *children's version* of a product, they will have to do additional *third-party tests* to certify the agency's flammability standards. I opposed this decision, because these new third-party testing requirements were never part of the original standards promulgated by the Commission, and will not address a known risk. In fact, this was another area of the statute that allowed the Commission flexibility to prevent unnecessary new testing requirements and costs in a struggling economy. The Commission easily could have distinguished between "children's product safety rules" and more general consumer product rules of the Commission, and thereby avoided additional third-party testing requirements, where they are neither required by the statute nor risk-based.

Of all of the votes we have taken at the Commission, I had hoped that this would be an easy one. After all, it is unlikely that Members of Congress were anticipating adding third-party testing requirements to the 2007 mattress standard, the 1970 standard for carpets and rugs, and others when the CPSIA was passed. Unfortu-

nately, I believe it will now take an act of Congress to reverse these requirements and to prevent future “consumer product safety rules” from being caught up in the CPSIA’s third-party testing regime.

I would also note that due to the Commission’s vague “children’s product” definition, it is likely to be difficult for manufacturers to distinguish between a “children’s rug” or “children’s carpet” and a general-use carpet or rug. This difficult distinction also illustrates the absurdity of requiring carpets and rugs with children’s decorations to be sent to a third-party, CPSC-accredited lab for testing (beyond the normal testing requirements of the standard), when the carpet and rugs in the hallway or in the living room of a home, where children also play, are no less safe without these added third-party testing requirements.

Question 7. The flammability standards have been in place with testing protocols for adult and children’s products for some time. Yet the Commission has chosen to apply this additional third-party testing requirement to children’s products under those rules. Is there any evidence that the products affected by this ruling, such as carpets or vinyl plastic, were unsafe under the prior testing regime and needed to be subjected to third party tests to protect children?

Answer. No. And the Commission did not even consider whether these products presented a risk when it decided to require additional third-party testing to the flammability standards.

Question 7a. Is there any evidence that children’s versions of rugs or other affected products are in more danger than adult versions of those products to necessitate this additional testing standard?

Answer. No. The original flammability standard did not contemplate a difference between adult and child rugs, and the Commission does not even collect flammability data distinguishing between adult and child carpets and rugs.

Question 7b. Isn’t an adult version of an affected product more likely to be subjected to a cigarette or some other igniting source?

Answer. The Commission does not collect data on this question. However, I believe parents who smoke are more likely to do so in common areas of the house than in their child’s room. I would also presume that candles are more likely to be found in common rooms or adult rooms than in a child’s bedroom or playroom. Moreover, the kitchen is traditionally the room with the greatest risk of fire, and is an unlikely location for a children’s rug or other product. So it hardly makes sense to require more rigorous and costly testing for a child’s room.

As I said in my opening statement with regard to lead, children do not live cooped up inside of their rooms surrounded only by “children’s products.” Children live throughout the house, run around outside, and are exposed to lead in their everyday environment. In fact, they are surrounded by it: in the car (adult seat belts, window cranks) and in their homes (pots, pans, furniture knobs, door handles, appliances, lamps). These products do not threaten a child’s health because the lead in them is not absorbable. Hence, it makes little sense that the CPSIA bans materials with higher than 300 ppm lead content in such products as *children’s* furniture, *children’s* rugs, *children’s* lamps, etc.—while children are likely to spend more time outside their room handling the TV remote (an adult product), playing on their parents’ furniture, or playing with just about anything else. The same can be said for the flammability of “adult” vs. “children’s” carpets and rugs. The fact is, these additional testing requirements (or lead content requirements) have nothing to do with improving safety.

Question 8. At the end of November, the Commission passed the final implementing rule for the public database required under the CPSIA. While the law specified who can submit reports of harm, the Commission’s rule expands this list by defining consumers and public safety entities as essentially anyone who wants to submit a report—even if the submitter does not know who was harmed, the particular product involved, and did not see the incident occur. Therefore, as opposed to the list created by the statute, submitters are no longer limited to people who could have first-hand knowledge of the incident. What are your concerns with this expanded list of submitters?

Answer. The statute provides a list of submitters to the database, all of which are groups likely to have *first-hand knowledge* of the incident. Day care centers at which an incident of harm has occurred, for example, should be permitted to report to the database. Additionally, consumers of the product in question, health care professionals who treat the injured person, or emergency first responders at the scene should all be permitted to submit reports of harm to the database—and the statute requires all of these categories of submitters.

However, as I explained in my *November 24, 2010* and *April 22, 2010* statements, the Majority’s interpretation of the statute is flawed because it has greatly ex-

panded the list of allowable submitters to the database. This expansion goes against the statutory purpose that the database be “useful” for consumers, and does not comport with Congress’s discussion on the purpose of the law prior to its passage.¹³ Indeed, the Majority has expanded the list of submitters to such an extent that *anyone* can submit reports of harm—thereby rendering meaningless the statutory language listing permitted submitters.

It is important for individuals with first-hand knowledge of incidents of harm involving consumer products to be able to submit reports to the new database. However, groups or individuals with no direct knowledge of the incident, did not see it happen or do not even know the person that was harmed, should not be permitted or encouraged to submit incident reports to the database. There are several reasons why first-hand knowledge is essential, but the primary reason is *accuracy*. A database full of inaccurate reports from individuals who have second or third-hand information is not remotely helpful to consumers using the database to determine which consumer product they should purchase.

Advocacy groups, attorneys and other second and third person reporters added by the Majority’s database rule are not listed in the law as allowable submitters to the database, nor should they be. If they are not themselves consumers of the product that caused the incident of harm, or otherwise a first-hand witness (per the list of submitters in the statute), advocacy groups have no business inputting to a public database information that is intended to be a resource for *consumers*. Not only is adding advocacy groups as submitters contrary to the statute, but it invites dishonest, agenda-driven use of the database—diluting its usefulness for consumers. Advocacy groups, trial lawyers, other nongovernmental organizations and trade associations, all of which the Majority has added as allowable submitters, must serve their own agendas and lack an incentive to prioritize accuracy in their reports of harm. By inviting such groups to input reports of harm (none of which have to be verified for accuracy), this Commission has all but guaranteed that the database will be a tool for policy agendas, lawsuits and trade complaints rather than a place where parents can search for useful information about product safety. Why even have a taxpayer-funded database (at a price tag of \$29 million, so far) that will be no more useful than an “Amazon.com” or any of the other hundreds of websites where anyone can submit comments on a product?

There are many advocacy groups and associations that serve a role in public policy, but may not have the incentive or ability to provide specific and accurate product identification information to the Commission’s database. For example, the National Fire Protection Association (NFPA) supports government-mandated sprinklers in new homes, a controversial policy. One cause of house fires is the use of cigarette lighters, which are consumer products. Thus, the NFPA has a strong incentive to add all reports of house fires caused by lighters to the Commission’s public database. The more incidents in our database, the better case they can make that new fire prevention technology—which their members sell—should be mandated in homes.

But what incentive does NFPA have to ensure that it correctly identifies the brand of lighter in an incident report: A lighter may appear to be the branded product of a particular manufacturer, but instead be a cheap counterfeit. The NFPA is interested solely in reporting house fire incidents; the particular cause is not relevant to its goal of promoting sprinklers. Meanwhile, the company identified in the report as the manufacturer of the cigarette lighter must defend countless inaccurate (or at least unverifiable) claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

The problems caused by the overly expansive list of submitters in the Majority’s database rule could have been reduced if reports of harm had to be verified, or simply verifiable, before being published. Unfortunately, the Majority also rejected the proposals contained in my alternative database rule that would have made these reports more verifiable.

One of my unadopted proposals would have required reporters of harm to include the victim’s identity and contact information with a report (to be held confidential, as is current practice). Commission staff could then at least follow up with the victim in response to a manufacturer’s claim of a material inaccuracy, in order to verify the report.

¹³ On the Senate floor, during consideration of the CPSIA on March 5, 2008, Senator Pryor stated: “We have tried to find something that is balanced, that provides information, but also has some filtering so we make sure erroneous information is not disseminated. But the goal of this provision is that the public has the right to know when products are dangerous.”

In my alternative rule, I also included such additional required fields as the approximate date of purchase of the product and whether the product was purchased “new” or “used.” This information would have allowed consumers using the database to gauge the age of the products and know whether the product in question was the one currently in stores or is similar to the model they own. These proposals were not adopted by the Majority.

Finally, while submitters to the database must check a “self-verification” box to assert accuracy, this will do little to discourage or prevent inaccurate reports of harm. The final database rule merely asks the submitter of a report of harm to check a box stating that the report they are submitting is accurate “to the best of their knowledge.” The “best” knowledge of someone with no first-hand knowledge is of little value. An individual or group without first-hand knowledge will likely not have the full story of what happened—including the exact type of product, the recent history of the product, or even the precise cause of the incident.

Question 9. The intention of the database is to provide useful information to consumers. A substitute amendment included provisions to improve the accuracy of the data submitted by requiring the inclusion of additional information. These suggestions were rejected by a majority vote of the Commissioners. How would the substitute have improved the database for consumers?

Answer. In addition to limiting submitters to only those enumerated in the statute, and adding required fields to improve the reliability of reports, my alternative proposal also acknowledged the Commission’s discretion to withhold reports of harm from publication where a valid claim of *material inaccuracy* is pending.

In the latter regard, I supported a valid and more useful interpretation of the statutory 10-day time frame for evaluating claims of material inaccuracy. Under my interpretation, the brief 10-day window presents a strong incentive for manufacturers to submit any claims of material inaccuracy quickly, and for the information to go up on the database as soon as possible—that is, following the 10th day as long as there has been no claim of inaccuracy. However, if a manufacturer submits by the 10th day an adequately supported claim of inaccuracy, the Commission can and should withhold that incident until the claim is resolved. Under this interpretation, data is not *limited* in the database but better verified before it is posted. I refer you to my *November 24, 2010* statement for further details.

Notably, the Commission’s Notice of Proposed Rulemaking on the database originally included an interpretation similar to mine. For example, § 1102.26 of the NPR states: “If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the Database until it makes a determination.”¹⁴ 75 FR 29180. That language could not have been included in the NPR without a legal opinion supporting the permissibility of the policy choice. That the agency apparently believed at one time that this approach is legally permissible reflects, at a minimum, statutory ambiguity regarding the point.

Not surprisingly given the NPR, many if not most of the commenters assumed that incidents would not go into the Database pending the determination of a material inaccuracy claim. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even consumer groups—argued that the statute legally prohibits the agency from withholding reports from publication for the duration of its investigation. To the contrary, several commenters proposed a more detailed protocol for addressing claims of material inaccuracy, based on their understanding that reports would be withheld from publication while under review for accuracy. And yet the Majority’s final rule now forbids delaying publication in those circumstances, and fails to establish any specific protocol for handling requests for determinations.

Finally, it is helpful to remember that the Commission obtains information in addition to that which will be submitted to the public database, such as emergency room data, death certificates, etc. It is acceptable (and probably preferable) for the Commission to continue to absorb as much information on consumer products as it can—and this includes reports from advocacy groups, trial lawyers and trade associations. However, it is not necessary *nor is it statutorily required* that such information, particularly that which is neither accurate nor verifiable, also be posted on

¹⁴The preamble of the NPR contains analogous language: “If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the database until it makes a determination.” 75 FR 99, at 29161. And this: “We propose that in cases where a claim of materially inaccurate or confidential information is under review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made.” 75 FR 99, at 29170 (Response to summary 26)(emphasis added).

the public database. This is one area where my position on the database differs starkly from that of the Majority. I believe inaccurate information in a public database (with the official backing of “.gov”) is not *safety* information; on the contrary, it is simply misinformation—and a waste of taxpayer resources.

Question 10. What are your concerns about the accuracy and reliability of the information that will be provided?

Answer. As stated in the previous questions, I have many concerns with the accuracy and reliability of the new public database, and I proposed an alternative database rule to try and address these central concerns.

Because the Majority’s database rule all but guarantees that the database will be flooded with inaccurate reports of harm, it will be less useful for Commission staff in determining hazard patterns than are the current, internal databases we have today. Frankly, this is one of my greatest fears—that the Commission staff will be overwhelmed by inaccurate reports (or the reports that get picked up by the media) and unable to use their expertise to search objectively for genuine hazards. As the database is swamped with misleading or inaccurate reports, they will drown out the accurate ones.

There are a number of ways in which the new database could be unhelpful or misleading for consumers. Consider this scenario: Company A sells five million high chairs and Company B sells 5,000 high chairs. Company A has six incident reports on the database and the other has one incident report (all of which are unverifiable). Thus, a consumer could falsely conclude that Company A’s high chair is less safe, even though simply due to the number of units it sold, it is more likely that people own that high chair—and more likely that reports on that high chair would make it into our database. Or, it is also possible that some of the reports about Company A’s high chair actually pertained to older models of the high chair that are no longer for sale, which means the information may be entirely irrelevant for people using the database to look for safety information about current products on the market.

As a consumer and a grandmother, I do virtually all of my research on baby products (e.g., regarding safety, quality and price) at the point of sale—usually on the website from which I am ordering, such as an “Amazon.com.” The hundreds of comments on these websites cover a broad array of useful information. But for most products, I would not slow down my research to look onto a government website for additional, equally unverifiable, information—particularly when I can see safety information right alongside all of the other information I am looking for (wear and tear, usefulness, and warranty information) at the point of sale or the retailer’s website. All of these factors are useful to a purchaser.

Trial lawyers or other groups with self-serving motives will use the Commission’s database to look for potential trends and patterns of hazards. Under the Majority’s database rule, these same groups may also submit to the database false and unverifiable reports to fuel a lawsuit. It is no coincidence that these groups are strongly in favor of this public database and of the Majority’s interpretation of the statute, which expressly allows them to submit reports of harm.

Question 11. A central concern with the CPSIA remains that it takes away the Commission’s ability to assess the risk presented by a product. The law focuses on the content of lead in a product, not the risk of negative health effects from even limited exposure to that lead. Do you believe that there is a risk posed to the health of children from exposure to many of the products that are affected by the lead limits in the law, such as ATVs, books, pens, school desks, furniture, or furniture hardware (i.e., the nuts and bolts that hold the furniture together)?

Answer. No.

Regarding the risks associated with lead, I included much of this information in my opening statement. I believe it is important to clarify the risks associated with lead. Some advocates say that “there is no safe level of lead,” implying that none of us can ever spend enough time and money to reduce or eliminate lead everywhere. But there is, in fact, an *unsafe* level of lead that has been established by our leading scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. Only lead that is “absorbable” at greater than *minimal levels* is dangerous, especially to children ages five and under.

In order to determine risk, it is necessary to make a distinction between lead that is absorbable and lead that is not absorbable in meaningful amounts. In many other laws relating to absorbable lead levels, standards exist to allow for such minimal absorption. For example, the Food and Drug Administration allows for 0.1

microgram of lead in a one-gram piece of candy.¹⁵ The Safe Drinking Water Act declares “zero lead” to be the objective for the amount of lead in water, but pipes carrying the water are permitted to be 80,000 parts per million (8 percent) lead—allowing for negligible, trace amounts to exist in the water we drink.¹⁶ California Proposition 65¹⁷ as well as the European Union¹⁸ allow for a negligible amount of absorbable (or soluble) lead in children’s products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)¹⁹ is then taken into the body every day through the food we eat and the air we breathe.

So what lead is actually risky? Lead is risky when it is absorbable into the bloodstream at greater than minimal levels. The experts at the CDC and NIH have found that lead paint in old houses and lead in dirt²⁰ near old gas stations are the main source of environmental lead presenting a danger to small children (<http://www.cdc.gov/nceh/lead/>). In other words, the *risk of absorbability* from lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high.

In the same vein, a heavily lead-laden metal charm or piece of jewelry that can be swallowed presents a danger, because such an item could get caught in the stomach and absorbed. However, none of these agencies, including the CPSC, has ever found that a child touching a brass musical instrument or a vinyl lunchbox, or riding a bicycle, could ever rub off enough lead, day after day, year after year, to affect his or her health.

Consider the CPSIA’s lead requirements in comparison to these known lead hazards in the environment today. The CPSIA’s arbitrary lead content limits (currently 300 ppm, and moving this August to 100 ppm or the lowest achievable level between 100 ppm and 300 ppm) remove the ability of the Commission to assess risk, or the absorbability that exists for a particular product. Thus, the law’s lead content levels dictate that the metal handle bars of a bike that pose *no health risk* to a child be outlawed right alongside lead paint or a solid-lead charm on a piece of children’s jewelry that actually is dangerous.

The CPSIA has led to a ban on children’s books published before 1985, because the ink in them is likely to contain lead above the allowable level. Some at the Commission and many Members of Congress have expressed dismay that books have been affected, because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed at any discernable level (from hand to mouth touching where miniscule amounts of lead may rub off—not from actually eating the hood, handlebars or hubcaps). Other everyday products such as school lockers, the hinges on a child’s dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip.

Finally, as mentioned earlier, children do not live cooped up inside of their rooms surrounded only by “children’s products.” Children live throughout the house, run around outside, and play with adult products such as pots, pans, furniture knobs, door handles, appliances and TV remotes. For example, the new costs associated with this law will affect a young child’s lamp (usually turned off and on by the parent) but not the lamp in the den or the living room that a child is as likely to turn off and on. These products do not threaten a child’s health due to their lead content,

¹⁵ “Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children,” Food and Drug Administration, November 2006: <http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Lead/ucm172050.htm>.

¹⁶ Environmental Protection Agency, Safe Water Drinking Act, Fact Sheets: <http://www.epa.gov/safewater/sdwa/basicinformation.html>.

¹⁷ California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65—<http://www.oehha.org/prop65.html>, *Children’s Health at OEHHA*—<http://oehha.ca.gov/public-info/public/kids/schools041707.html>.

¹⁸ European Committee for Standardization (CEN), EN 71–3 Safety of Toys—Part 3: Migration of certain elements. CEN, Brussels, Belgium, 1994: <http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonised-standards-legislation/list-references/toys/>.

¹⁹ Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead: <http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22>.

²⁰ Although lead in dirt is a proven hazard for small children nearby to old gas stations that used leaded gasoline or certain pesticides, it is notable that the Environmental Protection Agency standard for lead in soil is 400 ppm. <http://www.epa.gov/lead/>. This standard for safety is less strict than the current lead content standard provided in the CPSIA for children’s products, which is 300 ppm and scheduled to fall to 100 ppm in August of 2011.

because the lead in them is not absorbable. This further illustrates the absurdity of the CPSIA's requiring the unnecessary reengineering of children's products with lead, while children are just as likely (if not, more likely) to play with everything else in the house.

Question 12. The idea of a "functional purpose exemption" was discussed at the hearing. Can you please explain in greater detail your objections to such an idea?

Answer. The primary proposal put forth by the Commission's Majority and by Ranking Member Henry Waxman to amend the CPSIA has been to create a new "exclusion" from the lead limits in the law for products that *need* lead in the substrate to serve a "functional purpose." This exemption is too complicated and costly, and would result in subjective exemptions and be of little use to the smaller manufacturers that need it the most. Under the proposed exemption, a manufacturer would need to petition for a product-by-product (or component by component) determination by the Commission prior to selling their product.

This exemption does not provide the broad exclusion flexibility that the CPSC unanimously sought in its January 2010 Report to Congress, and presents endless uncertainties and a number of unnecessary elements of proof. For example, one criterion for the exclusion was that the product "will have no measurable adverse effect on public health or safety." But if a product, component part, or material will have no measurable adverse effect on health or safety, then what reason does a government *safety* agency have to regulate it? Why must a company also then show that the item "requires the inclusion of lead"? Why show that it is "not practicable or technologically feasible to manufacture" with lower amounts of lead when the current level already poses no safety risk? Why demonstrate that "making the lead inaccessible" is not practicable or technologically feasible? Isn't the mere fact that an item will pose no lead risk to children sufficient to allow its use?

Requiring such costly and complicated petitions would result in the continued prohibition of many products that pose no risk to children. The goal of the exemption to reduce the burdens imposed by the CPSIA's non-risk based proscriptions, could not be met under these circumstances. Piling on such criteria makes it more difficult to apply for exclusions, and raises the question whether deterring petitions for safe products is precisely the point. The usefulness of the proposal is further reduced by the cost of petitioning a Federal agency, which is high even without these exacting requirements. And large businesses, with their in-house legal staffs, have an obvious advantage over small manufacturers, who would likely be unable even to afford to petition for relief under the exemption. Finally, even a manufacturer with the resources to pursue such a petition could not bring a product to market until CPSC staff analyzed the petition, the Commission took the time to consider it, and the majority granted it. Considering the substantial time it has historically taken the Commission to rule on pending petitions, this amendment was completely unhelpful.

Instead of creating an exemption from the law that requires pre-approval by the agency, the CPSIA should be amended so that products not posing a lead risk do not have to come before the agency at all. The Commission will still retain the right to recall and/or regulate any product that is unsafe, including those containing unsafe levels of absorbable lead. And manufacturers remain obligated to report to the agency any products that do not meet agency standards or which pose a risk.

Question 13. Can you elaborate on and further explain the following statement in your testimony: "... the central focus of the agency's time and resources in both 2009 and 2010 has been on implementing a law that has almost nothing to do with improving safety—the Consumer Product Safety Improvement Act of 2008, or CPSIA."

Answer. As Chairman Pryor pointed out during the hearing, some provisions of the CPSIA, such as the ATV Standard, may effectively address known risks. Also, making it unlawful to sell a voluntarily recalled product enhances the agency's enforcement powers and promotes consumer safety.

However, the bulk of the law's requirements and their attendant costs to the regulated community are not risk-based and will have a negligible impact on consumer product safety. Moreover, an overwhelming proportion of the Commission's time and energy since passage of the CPSIA has been spent implementing the new law. Numerous rules have been promulgated and many more are still to come. And with each rulemaking, the Commissioners must debate the same questions regarding the meaning of the new statutory language and the scope of the new requirements. Lost in all of these debates and rulemaking is the agency's mission to protect consumers, and especially children, from unsafe products. Instead, the agency's discretion to allocate resources and focus enforcement efforts to address risk has been replaced by a mandate to regulate to fixed and largely arbitrary standards that bear little relationship to risk.

A sample of CPSIA requirements and the CPSC's recent rulemaking illustrates these points.

- *Lead content limits:* The CPSIA sets limits for lead content in all consumer products, without regard for the absorbability of the lead in any particular product. But lead in a product's substrate that is not absorbable in meaningful amounts does not create a safety risk. For instance, lead in paint or in a solid lead charm is hazardous, because in each case the lead can be ingested and absorbed into the system. The lead in bicycle handlebars or the brass spokes of a toy wheel, in contrast, is part of the metal's substrate, is not absorbable, and therefore presents no safety risk. Moreover, lead is an important element that adds strength, machineability, weight and other traits that can be difficult to replace. As a result, companies have been required to spend millions re-engineering products to eliminate lead from components that contain little to no *absorbable lead*, and were therefore never harmful in the first place. The CPSIA third-party testing, certification and record keeping requirements similarly create a substantial financial burden with no commensurate improvement in safety.

The Commission is now beginning to consider lowering the permissible lead limit in children's products to 100 ppm, as the CPSIA requires. The limit must be so lowered "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product category." CPSIA § 101(a)(2)(C). In any event, the Commission must set the limit at the lowest level between 300 ppm and 100 ppm that the Commission determines to be "technologically feasible." CPSIA § 101(a)(2)(D). But the law does not require or even allow the Commission to first consider whether a lower lead limit better protects children's health. This is a radical departure from the CPSC's traditional role of using its expertise to *first assess* a safety risk *and then regulate* it to the extent required to protect the public. There is no scientific basis for reducing the lead limit in a product's substrate to 100 ppm as a means to promote safety. The Commission should be empowered to make that determination before American businesses are crippled by unnecessary costs.

- *Phthalates ban/interim ban:* The law properly bans certain phthalates that are known hazards. But it overreaches by banning additional phthalates for which the CPSC has already concluded there is insufficient scientific evidence of risk. The law called for a new Chronic Hazard Advisory Panel (CHAP) to re-study these additional phthalates, but bans them in the interim. This has required manufacturers to reengineer products and third-party test to the interim phthalates ban when the CHAP may determine once again that a risk does not exist.
- *Database:* This agency has already spent \$29 million through FY 2011 developing a new public database for consumers. The agency's recent database rule ensures that the database will be populated with unverifiable and likely inaccurate information. It will be no more helpful than a website with consumer reviews or complaints, such as *Amazon.com* or *yelp.com*, yet more misleading, because it is implicitly endorsed by the Federal Government. Inaccurate information in a database for consumers is not "safety information"—it is simply *misinformation*. See the questions above on the database for more information.

Drafting the rule for the database put enormous pressure on staff resources. Now, the costs will balloon as the agency fulfills its obligations to convey every single incident report to the manufacturer within 5 days, process responses from those manufacturers, and then post the incident after 10 days. Considering only the decision to allow "data dumps" into the database, the database could swamp the Commission's resources very quickly. 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.

- *Third party testing and certification requirements*—Section 102 of the law requires third-party testing to *all* children's product safety standards, including lead paint, lead content, phthalates and ASTM F963. The Commission majority has extended this requirement to previously passed "consumer product safety standards," including flammability standards for carpets and rugs, mattresses, and vinyl. However, none of these third-party testing requirements are necessary to address a risk. These requirements simply add burdensome costs to manufacturers, who will either pass the costs on to consumers, or reduce product lines or close, because they cannot afford them. The Commission maintains the authority to pose mandatory testing requirements on manufacturers where

necessary to address a risk, but the CPSIA's testing requirements by and large are unnecessary, wasteful and crippling to small manufacturers.

The Commission has already spent days discussing the rules that will govern the implementation of a certification system that will be effective and efficient. The hours dedicated by the staff over the past 18 months to draft these rules are incalculable.

- *Tracking labels:* All children's products, regardless of the risk they pose, must include a tracking label. After the current stay is lifted, these labels will become much more complicated because they will have to correctly reflect the finished product's unique lot number and that of each tested component of the product. If so little as one component part's certification is changed, the finished product label will also need to be changed. Similar to Section 102, this provision adds unnecessary costs to small and large manufacturers, without regard to whether their products pose a risk.
- *Increase in the maximum civil penalty levels:* The CPSIA increased the maximum civil penalty for a violation of a Commission standard from \$1.25 million to \$15 million, an unprecedented increase for any agency. While this provision was driven primarily by the toy recalls of 2007, which involved one of the largest toy companies, the bar has been raised for all manufacturers. This increased exposure to large fines accompanies the CPSIA's new, complex regulations that already significantly raise the cost to bring a new product to market. Again, this new burden has nothing to do with increased risk and threatens businesses and jobs by its very existence. The Commission could have reduced this burden by providing in its guidance that technical violations (such as a compliant product with a paper work violation) would be penalized at lower levels. But the majority of the Commissioners declined to write that reassurance into their guidance document.
- *Enforcement by state attorneys general:* Section 218 of the CPSIA authorizes state attorneys general to bring lawsuits against a manufacturers for violating the CPSIA—a law whose standards are, again, not based on risk. This provision invites lawsuits from state attorneys general and thereby exposes large and small manufacturers to a needless, increased risk of liability. It may also require manufacturers to incur additional costs to protect against the application of conflicting standards. For instance, a manufacturer can avoid any risk of a CPSC enforcement action for lead content by administering the lead content test recommended by the CPSC. But this would not insulate the manufacturer from a claim by a state attorney general based on the results obtained using a different test. A manufacturer could protect against this risk only by testing the same products repeatedly using different methodology, a large, unjustified expense. In other cases, the mere fact that a state attorney general could enforce a particular standard imposes a burden that the CPSC has judged to be unreasonable. Specifically, the Commission occasionally exercises its discretion to stay enforcement of standards that it deems cannot reasonably be met, based on the availability of laboratory resources or other factors. Yet a CPSC stay is not binding on a state attorney general, who could nonetheless bring an action based on the failure to adhere to the same standard. These sorts of inconsistent and conflicting burdens and risks are precisely why many Federal regulatory standards and enforcement mechanisms preempt state action. The same should have been done here.

Question 14. You stated that one example of cutting the Commission's budget would be to put the agency under one Administrator, rather than 5 Commissioners. Can you please elaborate on the benefits of this proposal?

Answer. I believe the CPSC could be run more efficiently by one Administrator, rather than a Commission of five or even three. 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, and any travel for all five Commissioners.

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 document.

Despite my efforts, I have been unable to meaningfully influence the rulemakings we have considered. In fact, divided along party lines, the Chair is often pushed to align her position with 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 have not 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 weekly briefings on rulemakings and other issues with professional staff. Unfortunately, it is not useful to combine most meetings with other Commissioners, who may have alternative 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 most of their weeks in repetitive meetings and away from other 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.

The CPSC still remains a relatively small agency, despite the new rules it has promulgated and its responsibility to enforce those rules. Other independent commissions, such as the FTC and FCC, might need five Commissioners, but those agencies’ budgets are *more than double* ours.

I am not aware of another independent commission that is under one Administrator. However, 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.

Question 15. Do you have any other budget-reduction recommendations that should be considered?

Answer. I have two recommendations on how to reduce the budget and at the same time, increase the Commission’s ability to fulfill its safety mission:

1. *Defund the public database:* The first budget-cutting measure I recommend is not to publicize the Commission’s new database. I understand that the agency’s internal IT improvements have been beneficial, particularly combining our separate internal databases of information. However, there is simply no safety need to make all of our incident reports public, particularly those that are likely to be inaccurate. If this Commission is to have a public database funded by taxpayers, it should be *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 will be no more useful than similar sites that are already available to the public today, and will, in fact, be more misleading to the public, given the likelihood of inaccurate reports and the lack of ability for anyone to verify them.

Further, the Commission has limited resources for enforcement, and the public database will divert resources from addressing genuine risks to monitoring and processing the likely increase in reports to the agency. Additionally, because inaccurate incident reports will be indistinguishable from accurate ones, the media’s attention may focus on inaccurate reports, pressuring the agency to prioritize its efforts based on publicity rather than risk level. The agency has yet to estimate the number of new FTEs we may need, year after year, to administer the public database. However, as stated above, 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.

As it is currently designed, and given the Commission’s database rule, taxpayer dollars will be supporting a public database with inaccurate and unverifiable in-

formation that unnecessarily harms manufacturers, and is not useful to consumers. Many believe the public database, if left unchanged, will be useful only to trial lawyers or advocacy groups that will be able to populate it with unverifiable, second-hand information for their own purposes.

2. *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, such as the lead content standard and third-party testing and labeling requirements. There are many ways the law could be reformed to provide the agency with flexibility not to impose all of the law’s requirements on products that do not pose any risk. 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. Many of these reforms have been discussed in my statement to accompany the agency’s Report to Congress in January of 2010.²¹ I would be happy to follow up with further detail, as necessary.

Question 16. The crib rule was mentioned briefly during the hearing. Can you please elaborate on the impact of the crib rule on child care centers due to the retroactive effects of the law?

Answer. I supported the Final Rule on Full-Sized and Non-Full-Sized Cribs, which was passed by a vote of 5–0 on December 15, 2010. I was also pleased that the Commission provided needed flexibility for child care centers and places of public accommodation to allow extra time, a full 2 years, to come into compliance with the regulation’s requirements.

However, when the rule takes effect, the law’s retroactivity provisions will still cause tremendous, needless waste for all child care centers nationwide—something that this agency does not have the ability to prevent. In fact, with the passage of this regulation, *every crib in this country has become obsolete overnight and unable to be sold*—regardless of whether that crib was ever subject to a recall or ever considered unsafe. Although most articles since the rule’s passage have focused on the fact that drop-side cribs can no longer be sold or used in child care centers, they fail to mention that the agency’s new standards also impact all other types of cribs.

The consequences of the retroactivity of the crib rule are immense. First, any young family who invested in a new crib over the past year or who will buy one in the next six months before the new ones are on the market, will not be able to sell it or donate it to a thrift store after it has been used, even if the crib has fixed sides and is safe. Also, retail stores and thrift stores can no longer sell safe, fixed-side cribs currently in their inventories. Families often invest in second-hand cribs or hand them down to another family member, due to the high cost of new cribs. While the Commission advises consumers not to use any crib that is over 10 years old, the fact remains that the safest place for a baby to sleep is in a crib. It is tragic that the unjustified destruction of the second-hand crib market may compel some families to opt for an alternative, unsafe sleeping arrangement for their infants.

Furthermore, the law goes far beyond prohibiting the sale of cribs. It expressly forbids cribs that met the previous standards but do not meet the new standards from being offered *for use* by places of public accommodation or child care centers. Day care centers and hotels across the country are required to throw out their current cribs and purchase new ones, even if they bought a crib earlier this year that met the previous ASTM standard (less than a year old) and is completely safe. This will be a tremendous waste of money for families, day care centers, and the public fisc, which funds many day care centers.

The law’s retroactivity provision also mandates that these standards become *retroactive every time they are updated in the future*. In other words, once the mandatory standards are modified in the future to respond to changes in the market, new innovations, or new hazards, all the new cribs that meet the Commission standard *this year* will become obsolete once again, cannot be resold, and day care centers once again will be forced to buy another set of new cribs. This situation will be disastrous for families and day care centers that depend on the availability of affordable cribs. I am not convinced that Congress intended such a drastic result.

Of course, crib companies are thrilled by the law’s retroactive effects. While companies certainly will lose current inventory that does not meet the new standard, they will also reap tremendous financial rewards, because every family and day care center will be forced in the near future to purchase a brand-new crib. They will not have access to any safe, used cribs in the resale market. Even if they have recently disposed of their drop-side cribs, as this Commission has advised for many months,

²¹ <http://www.cpsc.gov/pr/northup01152010.pdf>.

the new, fixed-side cribs they just bought will also be obsolete and unable to be resold. In fact, American families may not ever have access to much of a resale market if the mandatory standards for cribs continue to be modified periodically. Each time the standard is modified in the future, yesterday's crib will become outmoded, unable to be resold by families, and unable even to be used by such places as day care centers and hotels. (This alone provides quite an incentive for crib companies to continue proposing changes to the mandatory standard!)

The most economically vulnerable sectors of the market bear the brunt of over-regulation. In this case, young families, those of moderate resources and many day care centers will be negatively impacted by this crib rule. I supported this rule because it was required by the CPSIA and it provided at least some time for day care centers and families to prepare. I believe the Commissioners should share the consequences with Congress and give its Members time to change the law to avoid unnecessary costs. I am hopeful that Congress would be open to amending the law to address these unforeseen consequences.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHNNY ISAKSON TO
HON. ANNE M. NORTHUP

Question 1. In your written testimony you outlined many problems that businesses are having in complying with the third-party testing and certification requirements of CPSIA. Given the state of the economy, the lack of detailed CPSC regulations and the fact that the stay on the third-party testing and certification requirements expires on February 10, 2011, wouldn't it be best to extend this stay another year?

Answer. Given that the Commission has not finalized its testing rules so that manufacturers will know what is required of them, I believe it is premature to lift the stay of enforcement on lead content testing. The delay in finalizing these rules is of concern, because the Commission's previous stays on lead content testing were implemented *principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time.* If the stay is lifted prematurely, many small manufacturers, in particular, will be unable to afford to comply independently with the third-party testing requirement, and will stop making certain products or go out of business entirely.

As you may know, on May 20, 2010, the Commission issued Notices of Proposed Rulemaking on (1) Testing and Labeling Pertaining to Product Certification (75 FR 28366), and (2) Conditions and Requirements for Testing Component Parts of Consumer Products (75 FR 28208). These proposed rules—referred to by the CPSC as the “15-month rule” and the “component testing rule”—address, *inter alia*, the protocols that will govern third-party testing of children's products, including random sampling methods and the availability of component parts testing as a means to encourage compliance further up the supply chain and to provide manufacturers with more options to come into compliance. The Commission is just beginning to consider the final versions of these rules.

A year has now passed since the stay was first extended, but in the absence of final 15-month and component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small manufacturers continue to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail outlets where many small manufacturers obtain component parts. Under these circumstances, a continuation of the stay would be consistent with the stated views of all five Commissioners. Commissioners Northup and Nord, and Chairman Tenenbaum all expressly linked the lifting of the stay to at least the finalization of the 15-month and component testing rules. Commissioner Moore supported extending the stay to give small manufacturers “sufficient time to find sources of lead compliant materials,” and Commissioner Adler predicated his willingness to delink finalization of the 15-month rule from the stay on his expectation that small manufacturers would be able to “rely on component suppliers for compliance with the law.” Given that component part suppliers remain unwilling or unable to provide component part certifications in the absence of final rules, there is no factual predicate for the Commissioners to support lifting the stay.

It is also important to emphasize that publication of the proposed rules has not provided the regulated community with the any certainty regarding the content of the final rules. Indeed, the CPSC's record of rulemaking over the past year demonstrates that a final rule can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that component

parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized.

I therefore intend once again to urge the Commission to vote to continue the stay of enforcement on third-party testing and certification of lead content in children's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between design and production, allowing one year after the two testing rules are finalized is necessary for manufacturers to benefit from the rule. Doing so would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay would not earlier be lifted.

Moreover, lifting the stay before the final 15-month and component testing rules are published would place manufacturers in the untenable position of trying to comply with the proposed rule, while anticipating a potentially much different final rule. This would provide manufacturers with insufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing due to the rapidly changing requirements.

Finally, a reasonable time after publication of the final rules is necessary in order to afford the regulated community time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. In this regard, it is essential that the Commission retain in the final component parts rule the proposed provision, § 1109.5(g)(1), affording component parts certifications "currency" to allow them to be reasonably relied upon by downstream manufacturers without the need for duplicative testing.

Question 2. If another stay is granted, what could Congress, the Commission, and industry do together during that year to help the CPSIA fulfill its mission without driving responsible manufacturers out of business?

Answer.

Congressional Action

The best opportunity manufacturers and consumers will have to be rid of the non-risk-based, costly testing and certification requirements of the CPSIA and to allow the Commission to refocus its enforcement efforts on genuine risks, is for Congress to amend the law. There are many ways the law could be reformed to provide true flexibility to the agency so as not to impose unnecessary reengineering and testing requirements on products that do not pose any risk, including: (1) exempting products with *de minimis* absorbable lead from the law's requirements; (2) reducing the age range of the law to focus on children in the years when they are most likely to be exposed to harmful levels of lead; and (3) eliminating the costly third-party testing, certification and labeling requirements of the law, except where the Commission finds such requirements are necessary to address an actual risk. You may find more information on some of these proposals in my statement to accompany the Commission's Report to Congress in January of 2010: <http://www.cpsc.gov/pr/northup01152010.pdf> Such reforms would free up agency resources to focus on known hazards and to better prioritize our regulatory agenda—and bring us back to our core mission of safety.

It is also helpful to keep in mind that the statute does not permit the agency to exempt any manufacturer from the law's onerous testing and certification requirements. *Exemption from the testing requirement is the main change sought by small manufacturers.* Because we cannot exempt companies from the initial third-party test that every manufacturer must do to every component of their product—even if the product poses no risk—I hope that the Commission will at least alleviate the burden through the "continued testing" requirements of the statute and the testing protocols, where we do have some flexibility. However, removing the costly requirements of third-party testing and certification will require an act of Congress amending the CPSIA.

Commission Action

Regarding action by the Commission to alleviate the law's unnecessary burdens (absent reforms to the law by Congress), I no longer believe this to be likely. Before my Senate confirmation hearing, I was asked by both Democrat and Republican Senators to "find flexibility" wherever it is possible in the law, because the law had resulted in many unintended or unforeseen consequences. Once confirmed as a Commissioner, I took this request seriously.

However, the flexibility that I have found in the following rules or decisions was rejected by a majority of Commissioners:

a. *Absorption exclusion*—I argued that the absorption *exclusion* under Section 101 was actually intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term “any lead” in that section may be interpreted to mean a *de minimis*, harmless amount of lead in a children’s product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axles on toys would be legal—since lead in the substrate of these products is not harmful. Because the Commission rejected this interpretation, it voted to reject the petition of a manufacturer of toy cars, even though the car’s brass fitting contained less absorbable lead than the Food and Drug Administration deems to be acceptable in a piece of candy.¹

b. *Civil Penalties Factors*—In the Commission’s interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that while the overall civil penalty ceiling was raised, “technical” violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.² Unfortunately, a majority of the commissioners did not want to provide that leeway.

c. *Definition of Children’s Product*—The CPSIA applies to all “children’s products,” statutorily defined as products “primarily intended for a child 12 years of age or younger.” The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children’s products intended for the 10–12 or pre-teen age groups, or that straddle the age limit of the statute. The entire reason for defining the term was to provide guidance to these types of manufacturers, who need certainty to know how to determine if their products fall under the purview of the CPSIA. After receiving these comments, the Commission had a chance to put a much narrower “fence” around the scope of covered products—or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helps neither the CPSC staff,³ nor the regulated community.⁴

d. *“Children’s product safety rules”*—I offered a valid, alternative interpretation of the statute with regard to the requirement to impose third-party testing on all “children’s product safety rules.” A clear distinction can be made between “children’s product safety rules” and more general “consumer product safety rules” promulgated well before the passage of the CPSIA. Unfortunately, because the Majority chose to view all consumer product safety rules of the Commission as potential “children’s product safety rules,” it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step—and there is no risk associated with these products that necessitates new third-party testing requirements.⁵

e. *Database*—I proposed an alternative database rule that would have responded to a number of manufacturer concerns and made the database a more accurate source of information for consumers. Unfortunately, the Commission’s Majority passed a rule that went well beyond the statute’s requirements, allowing “anyone” to submit reports of harm—even advocacy groups, attorneys and random bystanders that may not have firsthand knowledge of the incident. In total, the Commission Majority’s database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers—particularly small businesses. Due to the inaccuracy of reports on the database, it will be a waste of taxpayer resources and will not be useful to the consumers it was intended to help.

Because the Commission’s majority has largely refused to find flexibility where it is possible under the statute, I am no longer optimistic that, without Congressional action, the situation will improve.

¹<http://www.cpsc.gov/pr/northup110409.pdf>.

²<http://www.cpsc.gov/pr/northup03102010.pdf>.

³Justin Pritchard, “Feds dismiss need to recall lead drinking glasses,” *Associated Press*, December 11, 2010. http://news.yahoo.com/s/ap/20101211/ap_on_he_me/us_cadmium_lead_glassware.

⁴<http://www.cpsc.gov/pr/northup09292010.pdf>.

⁵<http://www.cpsc.gov/pr/northup07122010.pdf>.

Economic Impact of the CPSIA—Examples 2009 and 2010

Costs Associated with the CPSIA

1. In a letter from the CPSC to Representative Dingell in March 2009, the Commission indicated that the overall economic impact of the CPSIA would be in the “billions of dollars range.” The Commission also acknowledged that the testing and certification costs will fall disproportionately on small-volume businesses. (*Letter from Acting Chairman Nancy Nord to Representative Dingell, March 20, 2009*)

2. “Major Rule”—CPSC acknowledges in its FY 2011 Regulatory Agenda that its main rule pertaining to the CPSIA’s testing requirements (*CPSC Docket No. CPSC–2010–0038*) is a “major rule” under the Congressional Review Act, resulting in, or likely to result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

3. In an article entitled “Makers Are Pushing Back on Toxic-Toy Law” (*Wall Street Journal*, March 5, 2009 <http://online.wsj.com/article/SB123621357629835121.html>), Joe Periera reported the following loss statistics:

- Goodwill Industries to destroy \$170 million in merchandise.
- Salvation Army expects to lose \$100 million in sales and disposal costs.
- The Toy Industry Association estimates inventory losses at \$600 million.
- Members of the Coalition for Safe and Affordable Childrenswear lost \$500 million.
- The California Fashion Association estimates troubled inventory at \$200 million.
- The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least \$125 million.

4. On March 11, 2009, *Playthings Magazine* reported updated data from the Toy Industry of America (see <http://www.playthings.com/article/CA6643505.html>), including:

- From a pool of nearly 400 manufacturers and 220 retailers, the TIA estimates losses of \$2 billion in retail value.
- More than \$1 billion in already shipped merchandise has been returned or is being withheld for return.
- More than \$800 million in compliant merchandise is at risk of return.
- 40 percent of all respondents plan to eliminate jobs to pay for the CPSIA, with more than 1200 jobs reported to be in jeopardy.

“TIA: Safety Act puts \$2B crimp in toy biz” 3/11/2009

5. Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members’ businesses could total \$1 billion. See: <http://www.1st5ive.com/harley-davidson/motorcycles/2009/02/2452/new-lead-rule-could-cost-motorcycle-industry-1-billion-annually>.

Examples of Businesses Closed Due to CPSIA

Most names provided by the Handmade Toy Alliance

1. Whimsical Walney, Inc.—Santa Clara, CA
2. Fish River Crafts—Fort Kent, ME
3. Kungfubambini.com—Portland, OR
4. Baby Sprout Naturals—Fair Oaks, CA <http://www.babysproutnaturals.com/about/>
5. Gem Valley Toys—Jenks, OK
6. Angel Dry Diapers—Michigan
7. Abracadabra Educational Craft Kits for Kids—Bend, OR
8. Hailina’s Closet—Ellensburg, WA (thrift store)
9. Eleven 11 Kids
10. Perfect Circle Consignment—Bremerton, WA

11. *JenLynnDesigns*—<http://waytobow.blogspot.com/>
12. A Kidd's Dream—Conway, AK
13. Storyblox—New Vienna, OH
14. Phebe Phillips, Inc.—Dallas, TX
<http://www.phebephillips.com/shopnow.htm>
15. Pops Toy Shop—mountains of Tennessee, Virginia, North & South Carolinas

Businesses That Have Stopped Production of Children's Lines Due to CPSIA

Most names provided by the Handmade Toy Alliance

1. Creative Artworks—Greenwood, AK
2. Craftsbury Kids—Montpelier, VT
3. "Pockets of Learning" *Special Needs Products Being Driven from Market By Testing Costs—Rhode Island*
4. Creative Learning Connection
5. Giverny, Inc/Mini Me Geology
6. HABA
7. *Challenge & Fun, Inc.*—<http://online.wsj.com/article/SB10001424052748703478704574612573263963560.html>
8. Hands and Hearts Far East History Discovery Kit—Greenwood, SC
9. Moon Fly Kids—Las Vegas, NV

Businesses That Closed and List the CPSIA as One of the Factors

Most names provided by the Handmade Toy Alliance

1. Due Maternity—San Francisco, CA
2. Frog Kiss Designs—Fairfield, CT
3. Waddle and Swaddle—Berkley, CA
4. Lora's Closet—Berkley, CA
5. Baby and Kids Company—Danville, CA
6. Baby and Beyond—Albany, CA
7. Obabybaby—Berkley, CA
8. Bellies N Babies—Oakland, CA
9. Oopsie Dazie—<http://www.oopsiedazie.com/>
10. Bears on Patrol—not a business, but program by police departments to hand out stuffed animals to scared children—<http://learningresourcesinc.blogspot.com/2009/10/cpsia-cpsia-casualty-of-week-for.html>
11. Simple Treasures

Other Companies Hurt by Retroactivity of the CPSIA's Lead Content Ban:

1. Gymboree—"change in safety requirements related to levels of phthalates rendered about 1.7 million of its inventory obsolete"
 - i. <http://www.reuters.com/article/idUSBNG44760220090305>
2. Constructive Playthings, Inc—"We have millions of dollars worth of merchandise sitting in 30 40-foot-long trailers waiting to be hauled out to a landfill somewhere," says Michael Klein, president of Constructive Playthings Inc. . . . The banned products include beach balls, inflatable toy guitars and blow-up palm trees."
 - i. <http://online.wsj.com/article/SB123621357629835121.html>

Businesses No Longer Exporting to the U.S. Due to the CPSIA

Most names provided by the Handmade Toy Alliance

1. Hess—Germany
2. Selecta—Germany <http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cpsia/>
3. Finkbeiner—Germany
4. Saling—Germany
5. Simba—Germany

6. Bartl GmbH dba Wooden Ideas—Germany
7. Woodland Magic Imports—France
8. Brio
9. Helga Kreft—Germany
10. Eichorn—Germany
11. Kapla
12. Kallisto Stuffed Animals

EuroToyShop—On this company’s homepage, you will find links at the bottom with a list of “endangered toys” or “extinct toys” that are still sold to children in Europe but which the company will no longer be able to sell in the U.S. due to the CPSIA.

Endangered Toys The CPSIA (Consumer Product Safety Improvement Act) has unintended consequences. Now, some European toys are no longer available in the USA. <http://www.eurotoyshop.com/>

Associations That Have Voiced Concerns to the Commission Regarding CPSIA’s Costs (list is not exhaustive):

Association of Home Appliance Manufacturers
 International Sleep Products Association
 Retail Industry Leaders Association
 Specialty Graphic Image Association
 American Coatings Association
 The Carpet and Rug Institute
 National Retail Federation
 Association of American Publishers
 Consumer Healthcare Products Association
 Toy Industry Association
 Glass Association of North America
 American Honda Motor Company, Inc.
 Society of the Plastics Industry, Inc.
 American Home Furnishings Alliance
 Sporting Goods Manufacturers Association
 Handmade Toy Alliance
 Consumer Specialty Products Association
 Footwear Distributors and Retailers
 Fashion Jewelry Association
 Craft and Hobby Association
 National Association of Manufacturers
 Halloween Industry Association
 American Apparel and Footwear Association
 Juvenile Products Manufacturers Association
 National School Supply and Equipment Association
 National Federation of Independent Business
 Promotional Products Association International
 Bicycle Product Suppliers Association

Killing Small Businesses: CPSIA in the News, Letters and Public Comments

Higher Costs for Schools:

January 11, 2010

“NSSEA members sell educational supplies, equipment and instructional materials to schools, parents, and teachers . . .

. . . the costs to schools, municipalities, libraries, and others of identifying and replacing such books would be extremely high and there is no reason to impose such costs given the lack of identifiable risk.

. . . While we applaud the efforts the CPSC has made to find solutions for small businesses . . . we believe the CPSC could do more if given more discretion by Congress. The alternative is the elimination of many valuable educational toys and products, some manufactured in low volume for niche markets (such as the deaf, blind, or otherwise differently-abled children) and typically not supplied by the huge multi-national toy manufacturers.”

Letter from the NSSEA (National School Supply and Equipment Association) to Commissioner Northup, January 11, 2010

Higher Costs for Products with No Lead Risk:

October 13, 2010

“The government wants to regulate Hannah Montana CDs and DVDs. The bureaucrats at the Consumer Product Safety Commission (CPSC) insist that the discs marketed to children be tested for lead, but when the same young starlet churns out raunchier material under her real name, Miley Cyrus, they will escape scrutiny. Never mind that the same 10-year-olds will likely end up buying both products.

“. . . Never mind that Hannah Montana’s fans aren’t likely to eat their DVDs, the latest red tape makes no distinction between products where lead is likely to be consumed and those where it isn’t.”

<http://www.washingtontimes.com/news/2010/oct/13/bureaucrats-way-out-of-tune/> “Bureaucrats way out of tune,” *Washington Times*, October 13, 2010.

Punishing Small Businesses, While Mattel and the Big Guys Squeeze out the Competition:

June 17, 2010

“Now Mattel is testing and making toys without any trouble at all, and those of us who were never the problem are in danger of losing our businesses,” says Hertzler, who runs EuroSource, based in Lancaster, Pa., with his wife and two sons . . .

“Nearly 2 years after the safety law was enacted, Congress and the Consumer Product Safety Commission are still struggling to reduce its burden on small businesses while eliminating the risk of lead and phthalates in children’s products.”

<http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17-ST-N.htm> “Lead testing can be costly for mom and pop toy shops,” *USA Today*, June 17, 2010

Bordering on Ridiculous:

June 17, 2010

. . . “What the law should be about is ensuring safe products,” says Edward Krenik, a spokesman for the children’s product alliance. “We’ve crossed over into ridiculousness.”

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17-st_n.htm “Lead testing can be costly for mom and pop toy shops,” *USA Today*, June 17, 2010

Regulation for Regulations’ Sake

November 8, 2010

“Regulation for regulations’ sake, where there is no inherent change to a bill of materials, a process or a product indicated after extensive, statistically significant testing across multiple points of input and verification, is simply wasteful.”

American Home Furnishings Alliance
November 8, 2010—Letter to Commissioners

Mattel Finds CPSIA a Challenge—How Much More for Small Businesses?

November 9, 2009

“Officials of the toy manufacturer, Mattel, met separately with two CPSC commissioners November 3 to talk about how challenging it was for Mattel to comply with the CPSIA . . .

Peter Biersteker, a lawyer for Mattel with the law firm Jones Day in Washington, D.C., said his client is finding the CPSIA difficult to decipher. The law, he said, is unclear on what products the company needs to test, how often it needs to test them, and how many samples need to be tested. “It’s a lot of work. I don’t know how smaller companies do it,” Biersteker told Commissioner Robert Adler.

Despite Mattel’s large team of in-house lawyers, he said, the company needed to hire outside lawyers to help understand the CPSIA. He said Mattel holds weekly conference calls on the issue, discussing how to comply with the act while remaining “cost competitive.”

“Mattel Finds CPSIA to be a Challenge,” *Product Safety Letter*, November 9, 2009.

Commission Action Adds to CPSIA’s Problems:

August 16, 2010

“The latest dictates from the *Consumer Product Safety Commission (CPSC)* will drive up the cost of manufacturing products intended for children. The agency adopted a pair of new rules in July and August implementing the Consumer Product Safety Improvement Act of 2008, but as drafted, these regulations will force companies to waste time and money on redundant testing programs solely for the entertainment of bureaucratic busybodies.

. . . The redundant examinations, mostly checking flammability, can be prohibitively expensive. For instance, the regulations could require a manufacturer to build a queen-sized-bed prototype of a baby’s crib just so it can be tested in an independent lab. Yet each of the component parts—the crib-sized mattresses, blankets and all other component parts—already are individually tested for the same hazards when manufactured.”

Editorial: “The Red Tape Stimulus,” *Washington Times*, August 16, 2010
<http://www.washingtontimes.com/news/2010/aug/16/the-red-tape-stimulus/>

Even the *New York Times* Spotlights the Unintended Consequences of the CPSIA:

September 28, 2010

“ . . . a new federal crackdown on dangerous toys has left some in the industry crying foul and not wanting to play.”

“ . . . Critics point to provisions in the law that they deem ludicrous. For instance, a paper clip that is included in a science kit for schoolchildren would have to be tested for lead. But a teacher can walk into any drug store and buy a box of paper clips that would not be subject to the same testing.

Similarly, a lamp that is festooned with cartoon characters would have to be tested, but a lamp without the characters would not.”

<http://www.nytimes.com/2010/09/29/business/29toys.html> “Toy Makers Fight for Exemption From Rules,” *New York Times*, September 28, 2010

Science Kits Are “Not Banned”—but the Tools Used Inside Them Are!

October 1, 2010

“The science kit makers had asked for a testing exemption for the paper clips and some other materials. On Wednesday, in a close 3–2 vote, the commission declined to give them the waiver they sought.”

“ . . . After the science kit vote, CPSC Chairman Inez Tenenbaum sought to reassure people that, “There is nothing in this rule that bans science kits.”

Right. But while the commission vote doesn’t ban the kits, manufacturers say it may crimp the supply of kits for elementary school children.”

<http://www.lvrj.com/opinion/goodbye-to-chemistry-sets-104139059.html>
 “Goodbye to chemistry sets,” *Las Vegas Review Journal*, October 1, 2010.
 Editorial.

Furniture Manufacturers Faced with Added Costs, Zero Safety Benefit to Children:

November 8, 2010

“ . . . there has not been a corresponding benefit in the improved safety of children’s furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children’s product lines since they began testing to CPSIA in 2008. . . . The testing is simply being done to attempt to prove a negative.”

American Home Furnishings Alliance
 November 8, 2010—Letter to Commissioners

Furniture Manufacturers Faced with Added Costs, Forced to Cut Jobs:

November 8, 2010

“The majority of the annual costs will be in the record keeping requirements because none of the companies have the requisite IT infrastructure to handle the tracking of test reports per batch . . . Hooker estimates that it will cost them from \$350,000 to \$400,000 per year. Furniture Brands International said this will cost them over \$4.5 million per year which is more than the profits from their best quarter in the last 2.5 years. In addition, this company must invest an additional \$2 million in startup costs for setting up the production testing, programming computer systems to work with existing systems, and hiring and training employees for the administration of the CPSIA.”

To offset these new costs, the company is forced to consider these choices: (1) shut down a small domestic plant which will mean the loss of 64 full time and 30 temporary U.S. jobs; (2) shut down a larger domestic plant which will mean the loss of 384 U.S. jobs; (3) significantly increase prices to offset the loss in revenue making them less competitive; (4) offer a lower quality product . . . or (5) shut down all domestic production which incorporates any finishing processes, which will mean the loss of approximately 460 U.S. jobs.”

American Home Furnishings Alliance
 November 8, 2010—Letter to Commissioners

No More Mom and Pop Toy Sales:

July 7, 2010

“The second program involves making wooden toys that are given to the church and other charitable organizations in the county for distribution to needy children throughout the year especially at Christmas. Last year we created over 700 toys. The idea that we now are required to have these handcrafted toys certified will bring the program to a halt.”

Dupage Woodworkers, Downers Grove, IL (July 7, 2010, Public Comment, Testing rule)

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO
 RACHEL WEINTRAUB

Question 1. The Food and Drug Administration (FDA) has three different product classifications for toothbrushes: (1) toothbrush, ionic, battery-powered; (2) toothbrush, manual; and (3) toothbrush, powered. The FDA classifies all toothbrushes as Class I medical (dental) devices. My understanding is that such Class I devices are regulated by the FDA. Under current law, does the Consumer Product Safety Commission (CPSC) have any authority to ensure the safety of toothbrushes, even those that are clearly marketed to children?

Answer. Under current law, the Consumer Product Safety Commission (CPSC) has jurisdiction over consumer products. In 15 U.S.C. § 2052(a)(5), a consumer product is defined as, “any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.” The term specifically

excludes a number of products including, (H) drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321 (g), (h), and (i)]).” Thus, medical devices are explicitly excluded from CPSC’s jurisdiction.

Further, the Food and Drug Administration (FDA) has jurisdiction over toothbrushes as medical devices. The FDA classifies toothbrushes as Class I devices in different product classifications, as you suggested. For example, FDA classifies manual toothbrushes under section 872.6855 and powered toothbrushes under section 872.6865.

Thus, since medical devices are explicitly carved out of CPSC’s authority over consumer products and FDA has authority over medical devices which include toothbrushes, under current law CPSC does not have authority over toothbrushes, while FDA does have authority over these products. This remains the case whether the toothbrushes are designed for children or adults.

Question 1a. Do you believe that all toothbrushes should be classified as medical devices or should some be classified as a consumer product?

Answer. I believe that toothbrushes should be considered a medical device and that FDA should retain jurisdiction over these products. I have not been made aware of information or claims from consumers indicating that toothbrushes should not be considered medical devices. If CPSC or any other government agency has knowledge or information that would be helpful to FDA in exercising jurisdiction over toothbrushes, we would urge FDA to work with that entity.

Question 2. There are a number of battery-powered toothbrushes in the market that have children’s cartoon or live-action characters painted on to the body of toothbrush or attached to the body of the toothbrush (*i.e.*, the on-off switch in the shape of the cartoon character), and are marketed to children. Does the CPSC consider such toothbrushes to be a “children’s product”? Should the CPSC classify these toothbrushes to be a children’s product as they are marketed to children 12 years of age and younger?

Answer. In an advisory opinion written by CPSC General Counsel, Cheryl A. Falvey on November 5, 2008,¹ the General Counsel states in a response to a manufacturer of preventative dental caries that, “Products that are medical devices do not fall within the definition of “consumer product” and, therefore, the definition of “children’s product” does not include medical devices.”² Based upon this advisory opinion, I conclude that CPSC does not consider these types of toothbrushes to be children’s products. I agree with this determination and do not believe that CPSC should have jurisdiction of these medical devices even when marketed and sold to children. FDA has expertise in regulating these and other medical devices and should retain this jurisdiction.

Question 2a. Does the FDA have any standards for the levels of heavy metals allowed in toothbrushes and other dental devices? If not, should the FDA develop such standards?

Answer. To the best of my knowledge, FDA does have standards for the levels of heavy metals allowed in toothbrushes and other dental devices but these standards are not in the form of a bright line total lead content limit. Rather, FDA requests complete material composition data from medical device manufacturers and if the presence of heavy metals is indicated, FDA requests further data about the heavy metal. In addition, FDA focuses on whether the heavy metal contained in the device can leach into the bloodstream.

Question 2b. Hypothetically, if it is reported that lead was found in the colored bristles of a toothbrush with a cartoon character painted on the body of the toothbrush, how would the CPSC respond? Would the FDA have absolute jurisdiction? If the FDA chooses not to investigate the report, does the CPSC have any authority to investigate such a claim independently?

Answer. If it is reported that lead was found in the colored bristles of a toothbrush with a cartoon character painted on the body of the toothbrush, CPSC would not respond. Rather, FDA would have jurisdiction. I would hope that FDA would consult with CPSC if CPSC’s knowledge and familiarity with lead exposure from consumer products would be helpful to FDA. If the FDA chooses not to investigate the report, we would hope that FDA based its review and determination upon an extensive review of the facts of the particular case and would urge FDA in any case

¹The advisory opinion can be found on CPSC’s web page at <http://www.cpsc.gov/library/foia/advisory/319.pdf>.

²Advisory Opinion of Cheryl A. Falvey, General Counsel, U.S. Consumer Product Safety Commission, November 5, 2008, available on the web at <http://www.cpsc.gov/library/foia/advisory/319.pdf>.

involving lead exposure to make determinations based upon the extensive body of research indicating that lead is a known neuro-toxin and that there are no safe levels of lead exposure. Since, CPSC does not have jurisdiction over medical devices; CPSC would not have authority to investigate such a claim independently.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
RACHEL WEINTRAUB

Question 1. Could you give us your thoughts on how this database can improve consumer awareness of product recalls?

Answer. This database will improve consumer awareness about product recalls because consumers will see information about recalls as they are looking up product information on the database. For a consumer who went to the database to look up a specific product, and was not even thinking about the potential of a product recall, recall information would be available and visible and enrich the person's knowledge about the product by including applicable recall information.

In addition to the database, the CPSIA is improving consumer awareness of product recalls by requiring that infant durable products be accompanied by a product registration card and a means to register the product on line. This is important because with this information, consumers will be directly notified by the manufacture if a product they own has been recalled. Direct consumer notification of product recalls is one of the most effective ways to increase consumer awareness of product recalls.

Question 2. I am concerned that consumers who have already purchased harmful, recalled products may still not know whether their consumer product has been recalled. How can the database and other computer or online tools help with that?

Answer. Consumers who have already purchased a potentially harmful product all too often do not find out that the product that they own has been recalled. It is problematic. The database will help consumers who own a previously recalled product if they go to the database and search for the product. Even if the consumer is not specifically looking for recall information, recall information will be accessible and visible to the consumer.

In addition, CPSC has a list serve announcing the most recent product safety recalls that it sends out to consumers and others who sign up. Consumers can sign up to receive information about specific types of products. We urge consumers to sign up for this list serve. To sign up, a consumer should go to: <https://www.cpsc.gov/cpsclist.aspx>.

Another tool that will help consumers find out about whether an infant durable product they own has been recalled is product registration. This is required for infant durable products. Critically, a consumer must fill out the card accompanying the product or fill out the information online.

Once the consumer communicates the information to the manufacturer, if there is a recall, the manufacturer will directly notify the consumer of the recall. This is a hugely positive step that will improve consumer knowledge about recalls of products they own.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO
STEPHEN LAMAR

Question 1. In your testimony, you stated that companies are required to comply with "silly" requirements. Please elaborate on what you mean by this and provide examples.

Answer. The CPSC has been very strict in interpreting the CPSIA's requirements and as a result, businesses have had to comply with various regulations that have been extremely burdensome but have amounted to zero improvements in consumer product safety. For example, the CPSC initially interpreted the General Conformity Certification (GCC) requirement to be a paper certification that would physically accompany each shipment of products. Not only would this have been a logistical nightmare for companies, but the certifications would be useless to regulators who would have had to search shipments to find them. Only on November 10, 2008 (two days before the GCC requirement went into effect) did the CPSC issue final GCC regulations clarifying that the certification could be in electronic format. In another example, the CPSC initially interpreted the third-party testing requirement to be product-based. This meant that if a company chose to use the same button on five different styles of pants, the company would have to send in each different fully assembled style of pant of to test the button five times.

While many (not all) of these issues have been addressed, companies are still dealing with duplicative testing, unnecessary paperwork, burdensome and confusing regulations, and conflicting interpretations on what the regulations mean. For example, retailers often still require third-party testing be done with specific testing labs resulting in duplicative testing for manufacturers. The most recent draft of the so-called “15 month rule” requires that GCCs, which are often created abroad by lab technicians be in English and stored in the United States. And the definition of “component” has been broken down to the sub-component level meaning components like zippers are now subject to seven tests.

Because the CPSIA is so rigidly written, the “solutions” we are able to develop sometimes end up creating more problems.

Question 2. The CPSC is currently working on third-party flammability testing for products such as fabrics and sleepwear. Please describe your industry’s experiences with this requirement.

Answer. On August 9, 2010, the CPSC issued a *Federal Register* notice entitled, “*Third Party Testing for Certain Children’s Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies, August 9, 2010.*” We have experienced several issues with this provision.

First, we disagreed with the CPSC’s assessment that this standard—a general product safety standard that applies to all products—is even covered by the third-party testing requirement. We submitted comments to the CPSC and have yet to receive a reply.

Second, we raised significant concerns—that are still unanswered—on the fact that this new third-party testing requirement was being imposed on a regulation that was working properly and which had been subject to full dress rulemaking. In fact, about a year ago, the CPSC published technical changes and updates to that rule following years of industry consultation and comment. We find it inappropriate that a rule that was developed in such a manner can be significantly altered outside the proper regulatory process that is laid out in the underlying Flammable Fabrics Act (FFA) with no stakeholder input. We are closely monitoring to identify any problems that emerge as the new CPSIA reasonable testing protocols intersect with the FFA testing protocols that have worked well during the 50 year life of this safety standard.

Third, the manner that the CPSC has used to lift the stay for products governed by the FFA has been confusing, non transparent, and subject to apparent *ad hoc* consideration. For example, the CPSC used the August 9 Federal Register notice to announce it was lifting the stay. However, the title of that notice (see above) made no mention of the stay being lifted and seemed to only address technical issues relating to third-party testing certification. Moreover, the actual phrase lifting the stay was buried deep within the notice itself. the CPSC stated, “*As the factor preventing the stay from being lifted in the December 28, 2009, notice with regard to testing and certifications of clothing textiles was the absence of a notice of requirements, publication of this notice has the effect of lifting the stay with regard to 16 CFR part 1610.*” As a result, many children’s apparel manufacturers did not realize that the stay of testing and certification had been lifted for children’s products subject to the flammability standard for textiles. We would note that the extension of the stay of testing and certification was announced with great fanfare. Many companies mistakenly thought the CPSC would announce the lifting of the stays with similar public statements.

Fourth, moreover, many were extremely confused as to whether the stay of certification lifted for adult’s products as well. In fact, the CPSC was similarly confused and were not able to clarify when asked. In response to our inquiries, the Commission only just announced the status of certification for adult’s products subject to the flammability standard on December 28.

Fifth, AAFA petitioned for an additional 60 days because we felt there was insufficient diversity to ensure no capacity problems. In fact, when the stay for children’s clothing was lifted, there were no third-party testing facilities certified for Vietnam, the second largest source of apparel (and a major source of kids clothing). As of the end of 2010, we have not yet received an answer to this request.

Sixth, with respect to sleepwear, AAFA and several stakeholders have been providing information to the CPSC on seemingly non compliant sleepwear that is being sold. Many of those complaints appear to go unanswered since the non compliant sleepwear continues to be sold year after year. Requiring additional testing, when the CPSC does not appear to be enforcing the existing rules, is not only frustrating to those companies who are in compliance with testing requirements and underlying standards, but also acts as a deterrent to ensure compliance by those companies who are ignoring the current law. The third-party testing regime doesn’t address the

main (and only) problem that exists with respect to this standard—the apparent lack of enforcement.

CPSC officials have explained that the move to third-party testing for FFA seemed logical since much of the industry is already using third-party facilities to test for compliance. We would note however that there is a significant difference between third-party accredited facilities and third-party facilities. Many companies naturally assume their labs are accredited with the CPSC without realizing that that accreditation may still be pending. Similarly, the flammability standards reflect detailed product safety regimes that are not easily amended. We remain very wary of unintended consequences yet to materialize as the CPSIA requirements are layered on top of existing programs. At a minimum, we are concerned that we will see duplicative testing and paperwork burdens.

Question 3. In your testimony you said the retroactive nature of many of the rules in CPSIA creates huge problems for industry, with no discernible benefit to improving product safety. Why do you believe there is no benefit to safety?

Answer. The retroactive nature of the CPSIA forced many companies to spend considerable resources to test inventory and to dispose inventory that was perfectly safe to children. Before February 10, 2009 (the date the lead standard went into effect), the apparel and footwear industry had to test all products on the shelves to determine and show compliance. These tests were done prior to the issuance of the CPSC's "Children's Products Containing Lead; Determinations Regarding Lead Content Limits on Certain Materials or Products" rulemaking that stated components like fabrics would not exceed the 100 ppm lead standard. As a result, companies had to spend money testing components that were of little to no risk of exceeding the lead standard just to prove product compliance. Moreover, as noted in my testimony, only about 5 percent of the hard components (like buttons, zippers and embellishments) were found to be not compliant with the lead standard. Most of these non compliant components were items such as the zipper stopper in the fly of children's pants that do not present any risk to children's health and safety.

As a result, we ended up with weird outcomes. Clothing that did not meet the lead standard, could be not be sold on February 10, 2009 since it was a banned hazardous substance. However that same clothing could be sold on February 9, 2009. Moreover, the CPSC did not force a recall of any clothing sold on February 9 or before. Clearly if it were dangerous it would be recalled. Furthermore, the CPSIA currently permits a company to make a product with a component that contains 250 ppm. However, on August 15, when the new retroactive lead limit takes effect, that exact same product becomes a banned hazardous substance. Once again, while it can't be sold after August 15, it is not subject to a recall. The safety of a product doesn't depend on the date when the product is sold.

Question 4. Could you please elaborate on what you think the impact will be on your members this February when the stay on third-party testing for lead content lifts? Have your members been provided with the information they will need to comply with these requirements?

Answer. When the Commission granted the stay a year ago, Chairman Tenenbaum wrote "*The extension of the stay was needed in order to give the agency more time to promulgate rules important to the continued implementation of the CPSIA and for the agency to educate our stakeholders on the requirements of those new rules.*" That continues to be the case. The "15 month rule" has yet to be finalized, and there remain serious questions with the draft rules that need to be resolved. Moreover, with a year's worth of reasonable testing under our belts, it is becoming increasingly clear that the third-party testing environment is an unnecessary burden on businesses. Continuing the stay gives all stakeholders more time to create a stable, logically consistent, well thought-out, and well understood regulatory system. It also avoids a damaging job killing cost that will be imposed on businesses with zero gain in public safety. One of our members recently reported this to me with respect to the lifting of the stay.

Currently we use an XRF machine that we bought to do our lead substrate testing for our products. We deliberately buy components from trusted suppliers that are lead free. They rely upon process controls and XRF testing as well. There is some third-party testing done but most is done in house under XRF. Once the stay is lifted all that testing moves outside—either by us or by our suppliers. We have about 1,000 styles that have components that need testing—an average of about 7 components in each style (since zippers can be as many as 3 components). Many of those components are unique to each style so we can be looking at 7,000 tests at \$50 a test for \$350,000 of third-party testing. When you add in third-party testing for lead coatings—screen print—and flammable fabrics you push us well over \$1 million. These extra lab costs are occurring as everything

else—including cotton which is at near record levels—are climbing. The XRF machine still has some use for screening but it mostly becomes a \$25,000 paper-weight.

Question 5. You identified the CPSIA mandated public database as one area where your industry has concerns. Please explain what your concerns are with this database.

Answer. Above all, we believe the database must be a reliable source of credible information that appropriately reflects its “dot gov” web address. As Chairman Tenenbaum stated in her February 17, 2010 ICPHSO address, “. . . Don’t believe everything you read on the Internet, except what you read on websites that end in dot gov.” By this statement, Chairman Tenenbaum is pointing out that government websites are held to the highest standards as public resources. People expect government websites to provide credible information and the database should be no different—even *with* a disclaimer. Materially inaccurate information serves no one, can be detrimental to businesses, will ultimately damage both the credibility and overall success of the database and damage the credibility of the agency itself. The final rulemaking does not go far enough to ensure the credibility of the information posted to the database and the CPSC must take steps to guarantee that the posts are both reliable and in the public interest.

Question 5a. Would you please tell us more about the resources that you believe your members will be forced to devote to following the database in order to address potential reports?

Answer. Members will have to devote time and resources to tracking information and allegations that are made on the website. Since the CPSC is under no requirement to actually remove materially inaccurate information, and yet is vested with the sole authority of determining what is materially inaccurate, companies are so far unsure if their efforts to correct the record (such as providing information that a particular product is a counterfeit) will even result in removal of offending entries. Especially with the advent of the CPSIA, product safety professionals have found even more demands on their time. Requiring them to also track a public database—especially one with the imprimatur of the Federal Government—to respond to ill informed and inaccurate allegations will result in even less time to devote toward actual product safety management.

Question 6. Where do you believe the CPSC can act to alleviate these concerns, and where do you think a legislative fix is necessary?

Answer. The CPSC has limited flexibility to alleviate our concerns with the database without a legislative fix. Most significantly, the CPSIA’s database provision does not do enough to ensure the material accuracy of the reports of harm. While timely dissemination of information is important, materially inaccurate information is extremely damaging to businesses and will *never* benefit consumers. The legislation puts into place a very strict timeline for the CPSC to transmit the report of harm to a manufacturer within 5 days and then post the information onto the website within 10 days of transmission—regardless of whether an investigation for material inaccuracy is pending. The database provision must be amended to require the Commission to not post information should the report of harm potentially contain materially inaccurate information.

However, the agency can take some regulatory actions as well since the CPSC’s database rulemaking created several additional concerns for businesses. For example, the CPSC expanded the list of those who can post to the database well beyond the scope of the CPSIA’s finite list. Including these additional categories of submitters will dilute the effectiveness of the database as more materially inaccurate information will likely be posted. Many of these categories of submitters will not have first hand knowledge of the incident, have access to the consumer product involved, and may have ulterior motives in posting information on the database.

Limiting the scope of the database as much as possible upon implementation will be fundamental in the database’s success. This approach will limit mistakes, minimize the impact of the mistakes, and give the CPSC more flexibility to make changes to the database as it develops.

Question 7. Chairman Tenenbaum and Commissioner Northup discussed budgetary issues related to the CPSC. What impact do you believe that the CPSIA has on the effective utilization of resources by the CPSC?

Answer. The CPSIA has directed many of the CPSC’s resources away from important safety regulatory activities and focused the agency’s limited resources on burdensome rulemaking activity. These rulemakings, while important to industry’s compliance efforts and understandings, have had little impact on improvement of consumer product safety. The predominant problem with the CPSIA is that the agency is not allowed to prioritize based on actual product safety regulatory need

and is forced to issue dozens of rulemakings on a very short, rigid timeline. Moreover, finding solutions for CPSIA compliance issues has been an extremely onerous process as the CPSIA leaves the agency little flexibility to provide necessary relief to businesses. For example, in order to determine a component or material compliant with the lead standard, the agency has had to spend months of time and significant resources analyzing products and materials that are of little to no risk to consumers and children. As noted in my oral comments, starting in 2008, AAFA worked closely with the CPSC to show there is no lead in textiles. AAFA and several retailers sent in thousands of test reports showing that lead would never appear in fabric. The textile determination was not finalized until August of 2009. While the determination has been very helpful for industry as now manufacturers do not have to test textiles for lead, we believe Congress should revisit the CPSIA to enable the CPSC to make these determinations more quickly. We further believe that Congress needs to give the agency more flexibility to consider risk so the CPSC can appropriate their funds to real product safety concerns.

Question 8. You expressed concerns with the CPSIA's lack of clear preemption with regard to state and local laws in your opening statement. Please clarify what your concerns are with regard to preemption. Do you have any specific examples?

Answer. A common-sense product safety regulatory approach is to have a strong Federal regime that preempts state regulations. Logic tells us that a product crossing state lines does not make it safe or unsafe. It follows that product safety regulations should be uniform throughout the United States. Complying with various labeling requirements and chemical content standards is confusing and burdensome for companies.

California Proposition 65, which is specifically exempted from preemption under the CPSIA, presents a whole range of challenges. Among other things, it relies on different compliance and enforcement mechanisms that often mean companies have to work toward separate CPSIA and Proposition 65 compliance targets.

Even the CPSC battles with these issues. Just recently, the news reported about a mother in Georgia finding a product with a California toxic substances warning label on it (see <http://www.wsbtv.com/news/26334677/detail.html>). CPSC spokesperson Scott Wolfson responded to the mother's concerns with, "We respect California law, but parents should know that the safety of their children is not necessarily at risk if they see that label."

Question 9. Chairman Tenenbaum discussed the idea of a "functional purpose" exemption to the lead standard. What are your thoughts on that proposal?

Answer. While we agree that the CPSIA exemption standard is too strict, a "functional purpose" test is not an appropriate solution. The CPSC's job is to assess the safety of products—not to determine whether lead is a necessary component of the product or material. Adding the additional "functional purpose" test would result in the CPSC wasting too much time and resources on an evaluation that does not help answer the real, relevant question: is the product safe? We should grant the CPSC the authority to make simple determinations based on their assessments of whether a product or a class of products presents a risk of lead absorption. We recommend Congress look at Commissioner Northup's statement accompanying the Commission Report to Congress Pursuant to P.L. 111-117, Conference Report 111-366 on Recommendations to Amend the CPSIA. She suggested Congress look at amending the lead exemption standard to allow for a "*de minimis*" amount of bioavailable lead in products. In her words:

The point of a *de minimis* bioavailability or absorption exception is to concentrate the enforcement resources on the real problems as well as to avoid obtaining negligible benefits at enormous cost . . . A particular virtue of the *de minimis* approach is that it would not require product-by-product approval by the agency, because manufacturers could determine for themselves whether their products meet the standard (subject to penalty and liability for errors) without having to petition the agency for an exclusion.

Question 10. In your testimony, you identified eight recommendations for changes to the CPSIA and CPSC. Your eighth point was that "there is more to the CPSC than CPSIA." Please explain what you meant by that statement.

Answer. Overall, it seems as though the CPSC has spent the majority of their resources in the past two and a half years on CPSIA-related activity. Be it writing interpretive rulemakings, explaining to businesses how the regulations will apply to them, hosting workshops or simply carrying out the mandates of the legislation—implementing the CPSIA has been the priority of the agency to a point where other equally important functions have languished. The agency has not been able to keep

up with the press of work from the CPSIA, and in so doing may have not spent adequate attention on other key enforcement and regulatory priorities.

Moreover, the legislation forces the CPSC to spend extraordinary amount of time rehashing old issues. In my oral statement we discussed our effort to show that there is no lead in textiles—a fact well known to all. In another example, the legislation requires the agency study the toxicity of phthalates—a study the CPSC conducted many years ago already. The CPSC determined that phthalates were not a risk to children and so to require the CPSC to conduct the same study is an inefficient use of resources. Giving the agency the flexibility to allocate their resources to address real safety and public health needs is crucial so the agency can deal with new chemical and product concerns as they arise.

