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A REVIEW OF CPSIA AND CPSC RESOURCES

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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A REVIEW OF CPSIA AND CPSC RESOURCES

THURSDAY, FEBRUARY 17, 2011

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

The subcommittee met, pursuant to call, at 11:30 a.m., in room 2322 of the Rayburn House Office Building, Hon. Mary Bono Mack (chairwoman of the subcommittee) presiding.

Members present: Representatives Bono Mack, Blackburn, Harper, Lance, Cassidy, Guthrie, Olson, Pompeo, Kinzinger, Barton, Upton, Butterfield, Dingell, Towns, Schakowsky, and Waxman (ex officio).

Staff present: Gary Andres, Staff Director; Jim Barnette, General Counsel; Mike Bloomquist, Deputy General Counsel; Paul Cancienne, Policy Coordinator, CMT; Andy Duberstein, Special Assistant to Chairman Upton; Robert Frisby, Detailee, CMT; Brian McCullough, Senior Professional Staff Member, CMT; Jeff Mortier, Professional Staff Member; Gib Mullan, Chief Counsel, CMT; Katie Novaria, Legislative Clerk; Michelle Ash, Chief Counsel; Felipe Mendoza, Counsel; and Will Wallace, Policy Analyst.

Mrs. BONO MACK. The subcommittee will come to order. I would ask members to take their seats.

As we begin to work this year, I would like to thank all of the members on the Subcommittee on Commerce, Manufacturing and Trade for your participation, especially the new ranking member, Mr. Butterfield. I would also like to congratulate Mr. Upton on his chairmanship of the full committee and to thank him for entrusting me with the chairmanship of this very important subcommittee.

As you know, the Energy and Commerce Committee is the oldest standing committee in the House of Representatives, dating back to 1795. Its original name was the Commerce and Manufactures Committee and our subcommittee continues to focus on the core of our original jurisdiction. The chair now recognizes herself for an opening statement.

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

Mrs. BONO MACK. This is the first hearing of our subcommittee for the 112th Congress. Over the months ahead I plan to look at a wide range of issues that deeply affect Americans in their daily lives. One of the most important as well as one of the most vexing

issues we face today is how do we get our economy back on track? How do we create new jobs? How do we bring jobs which have been lost to foreign countries back home and how do we make "Made in America" matter again? I believe it is part of our job to take a close look at what is working and what is not working and then see how we can work together to make a real difference in peoples lives.

Today's hearing is about the Consumer Product Safety Improvement Act, affectionately known as CPSIA. This legislation was truly a landmark in efforts to improve consumer product safety. It was the first reauthorization of the CPSC in 17 years and it modernized and strengthened the agency in many different and meaningful ways. While CPSIA has many virtues, there are some unintended consequences of the law as well. We have a responsibility to the American public to review those specific provisions of the law that have proven to be problematic and to fix them. Admittedly, it is a careful balancing act and we have to be certain as the old saying goes, "not to throw the baby out with the bathwater."

For thousands of businesses who strive to be responsible let us do what is best for consumers. CPSIA has consumed and inordinate amount of their time trying to understand how each new regulation and standard will affect them. Unfortunately, many have gone out of business, attributing their demise to some of the burdens of compliance with the many provisions of the new law. We need to strike a careful balance. As a Nation, we simply cannot afford to lose jobs or to stifle innovation because of unnecessary regulations. Frankly, many businesses never even heard about this law until well-after it was enacted. Most were shocked to learn of the onerous requirements it would impose on them if they manufactured or sold any children's product even though they had never done anything wrong and never had a single product recall.

It began with the best of intentions. In 2007, the widely publicized toy recalls for violations of existing lead paint standard gave way to new prohibition on lead content in children's products. As interpreted by the Commission, this category goes far beyond just toys to cover sporting goods, library books, ATVs, educational products, CDs, clothing and many other items. The goal was a noble one, making products safer for our kids but within just months of passage both the Commission and the Congress realized that problems with the new law would need to be addressed.

The Commission recently announced yet another stay of enforcement, at least five now by my count that it deems necessary to avert potentially disastrous results. What is more, during the last Congress numerous bills and legislative drafts were introduced including one by Mr. Barton to remedy some of the problems we already know about. I hope our new members can quickly get up to speed on these issues and working together we can come up with a commonsense solution that is a win-win for everyone.

Today the Commission has jurisdiction over literally thousands of different types of products. It is critically important that they should be able to prioritize their resources to address the products that pose the greatest risks to consumers. As a mother, I have very strong, passionate feelings about protecting all children but as a former small business owner I know all too well how unnecessary regulations, even well-intentioned ones can destroy lives too. This

is a rare opportunity to put aside the differences that often divide this great body and put our heads together to make a good law even better. It is up to us now and as we begin this important debate, I am going to encourage everyone to remember what we all tell our kids growing up, keep your eye on the ball.

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

PREPARED STATEMENT OF HON. MARY BONO MACK

This is the first hearing of our Subcommittee for the 112th Congress. Over the months ahead, I plan to look at a wide range of issues that deeply affect Americans in their daily lives. One of the most important—as well as one of the most vexing issues we face today—is how to get our economy back on track. How do we create new jobs? How do we bring jobs which have been lost to foreign countries back home? How do we make "Made in America" matter again? I believe it's part of "our job" to take a close look at what's working and what's not working, and then see how we can "work" together to make a real difference in peoples' lives.

Today's hearing is about the Consumer Product Safety Improvement Act or "CPSIA." This legislation was truly a landmark in efforts to improve consumer product safety. It was the first reauthorization of the CPSC in 17 years, and it modernized and strengthened the agency in many different and meaningful ways.

While CPSIA has many virtues, there are some unintended consequences of the law, as well. We have a responsibility to the American public to review those specific provisions of the law that have proven to be problematic and to fix them. Admittedly, it's a careful balancing act, and we have to be certain—as the old saying goes—not to throw the baby out with the bath water.

For thousands of businesses, who strive to be responsible, "let's do what's best for consumers"—CPSIA has consumed an inordinate amount of their time trying to understand how each new regulation and standard will affect them. Unfortunately, many have gone out of business, attributing their demise to some of the burdens of compliance with the many provisions of the new law. We need to strike a careful balance. As a nation, we simply cannot afford to lose jobs or stifle innovation because of unnecessary regulations.

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Today, the Commission has jurisdiction over literally thousands of different types of products. It's critically important that they should be able to prioritize their resources to address the products that pose the greatest risk to consumers.

As a mother, I have very strong, passionate feelings about protecting all children. But as a former small business owner, I know all too well how unnecessary regulations—even well intentioned ones—can destroy lives, too. This is a rare opportunity to put aside the differences that often divide this great body and put our heads together to make a good law even better.

It's up to us now. And, as we begin this important debate, I'm going to encourage everyone to remember what we all tell our own kids growing up: Keep your eye on the ball.

Mr. Butterfield, you are now up to bat.

Mrs. BONO MACK. Mr. Butterfield, you are now up to bat and the gentleman from North Carolina, the ranking member, Mr.

Butterfield is now recognized for 5 minutes for his opening statement.

OPENING STATEMENT OF HON. G.K. BUTTERFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. BUTTERFIELD. Let me thank the chairman for convening this very important hearing today and I certainly thank the witnesses for their anticipated testimony. We received a copy of your advanced testimony and I read most of it last evening but though I did not read all of it and so I look forward to your testimony today.

Today marks our first hearing and I want to thank the chairman of this subcommittee for calling this hearing and for her friendship and for her anticipated leadership on this very important committee. I reached out to the chairman and she has reached out to me and we have created a friendship and I look forward to working with her as we go forward. I can certainly say that the early signs are encouraging.

As today's hearing demonstrates, the issues before this subcommittee often have a real and direct impact on the daily lives of the American people. From the toaster they use at breakfast, to the dishwasher they load as they head out the door, to the dolls and the toy trucks their kids play with, people reasonably expect the consumer products they bring into their homes will be safe. Unlike many of the issues we deal with, consumer product safety is nonpartisan or at least it should be. In fact, a poll released just yesterday by the publisher of Consumer Reports found that 98 percent of American consumers agree that the Federal Government should play a prominent role in improving product safety. I am hopeful that we will be able to find common ground and move forward in a bipartisan manner on consumer product safety. It is clearly what the American people want and expect.

This is an obvious choice as our first hearing. We all understand the challenges that the Consumer Product Safety Commission has faced in implementing the CPSIA, the law that we all know so much about. I also understand that we are likely to see some legislation on this issue in the coming weeks. While no complete agency overhaul is likely to be perfect, the CPSIA has provided some crucial changes to strengthen and modernize the consumer product safety system, particularly with respect to children's products. The law established basic safety standards for limiting the amount of lead and phthalates in children's products. It also introduced a product testing system designed to ensure that all children's products and other products subject to mandatory safety rules are safe, and it gives the Commission new resources and authority, and reestablished a five-member commission, two of whom are sitting in front of us, allowing it to proceed in an unfettered way with its decision and rulemaking authority.

Consumers had long believed that if a product made it to the store shelf that it must be safe. Unfortunately, that was not the case and is not the case and the millions of toys recalled in the summer of 2007, illustrated this frightening trend and these weren't just recalls because of high lead levels. Many were due to

design-related safety defects that could have led to burns and choking and strangulation among other potentially fatal dangers.

Parents were concerned and outraged, as were the members of this committee. As a result, we resolved that our children would no longer be the frontline for measuring the risk to their health and safety from toys and other products they use. These manufacturers would have to prove their products were safe before they made their way into the hands of our children.

I understand that implementation has been a challenge for the Commission and for the small and large manufacturers working to comply with the new law. Today I hope to hear about how the law is working as well as the new challenges and as some say the unintended consequences that may have been created. I also hope to learn how the Commission allocates its resources between implementing this law and its many other important responsibilities. I also look forward to hearing why key provisions of the law still aren't being enforced. That is very important and why some congressionally mandated rules still have yet to be finalized.

I look forward to the hearing from all of the witnesses and as I said earlier, I thank you for coming today with your testimony.

Mr. BUTTERFIELD. I am going to yield my last minute that I have to any member who would like to consume. Ms. Schakowsky, you have my remaining time.

Ms. SCHAKOWSKY. I thank the gentleman very much.

I want to congratulate Chairman Tenenbaum for restoring the Consumer Product Safety Commission to its proper role of protecting consumers. And consumers do believe when they go and pick items off the shelf, they already think that somebody somewhere is protecting them, and thank goodness the CPSC is doing that just now. Before this landmark bill passed, there were 170 items of children's jewelry containing lead at high and dangerous levels. This legislation did something about that and finally, when we did our annual toy safety bill there were fewer items that we said were dangerous on the shelf.

The Commission has already shown its flexibility in dealing with some of the problems of implementation. But the bottom line issue of protecting consumers and particularly children, that is the proper role of government and that is our proper role that we will exert today. We are going to protect our consumers and our children.

Mrs. BONO MACK. Chairman Upton yielded his 5 minutes for his opening statement to me in accordance with committee rules. As his designee, I now recognize Mr. Barton, chairman emeritus of the committee and conferee on CPSIA for 1 minute.

Mr. BARTON. Thank you, Madam Chairwoman, and it is good to see you in the chair. I look forward to participating with you and the other members of this subcommittee as we have a very profitable next 2 years.

It is good to see our two witnesses, the honorable chairwoman and of course Commissioner Northup who I actually remember as congresswoman. Anne Northup, it is good to see you.

I was a conferee on the consumer product safety, whatever it was, information act 3 or 4 years ago. Mr. Dingell was the chairman of that conference. Ms. Schakowsky was on it and Mr. Waxman was on it, and I think Mr. Whitfield and Mr. Stearns on our

side. Senator Boxer I remember and Senator Inouye on the Senate side. We had a good conference. We reported a good bill. Unfortunately, we put some language in at the very end of the conference that has turned out to be very difficult because it doesn't really give the CPSC the flexibility that they need to show some discretion for some of our smaller manufacturers and in some cases, individual producers of some of these products. We introduced a reform bill in the last Congress. We were never able to get consensus on it and I hope that under the leadership of Chairwoman Bono Mack that we can get that consensus in this Congress.

And with that I would yield back and say I again look forward to working on this issue.

Mrs. BONO MACK. I thank the gentleman.

Now, I would like to yield a minute to Mr. Pompeo, one of our newest members, 1 minute.

Mr. POMPEO. Thank you, Madam Chairwoman. Thanks to the witnesses for coming out this morning. I look forward to the hearing.

A little later today on the floor or perhaps it will be early tomorrow morning I will offer an amendment of having to do with the public accessible database information. CPSC is set to roll this database out in early March as called for in CPSIA in 2008, but unfortunately the database's final role in my view has created and will create far more harm then good that it will do. The statute in my view has been interpreted to mandate the posting of materially inaccurate information and the agency has created a database that will both direct consumers away from safe products to relatively less safe ones and damage the reputation of very safety-conscious manufacturers.

I hope this amendment will pass this afternoon and we will get the time to reflect and review and give this committee the chance to do oversight so that we can get a better role, a better database that will more effectively accomplish the important objectives of the statute. Thank you.

Mrs. BONO MACK. And I have one more speaker but at this point she is not here. I would like to yield to Mr. Waxman for his opening statement for 5 minutes.

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

Mr. WAXMAN. Thank you very much. I want to thank Chairman Bono Mack for holding this hearing and congratulate her on her new chairmanship of this important subcommittee.

Until recently, our product safety system and especially our toy safety system was terribly broken. In 2007 and 2008, we saw record recalls and a total loss of consumer confidence in the safety of all products. Children were killed and horribly injured by defective and dangerous products. The Consumer Product Safety Commission had limited statutory authority. Only two of the three commissioner slots were filled and its staff numbers and resources had thoroughly atrophied. This situation alarmed families across the nation and Congress responded. In 2008, Congress enacted truly historic product safety legislation that vastly improved our chil-

dren's health and safety. Now that we are a few years away from the recalls and the most dramatic stories have left the front pages some suggest that we didn't really need to enact such a strong law but I believe that is wishful thinking. The fact remains that the system we had in place was a failure. This law was necessary to protect kids and families across the country.

Let me just mention a few of the law's successes. Today toy recalls have dropped from 172 in 2008, to 44 in 2010. Today we have strong mandatory standards for cribs and CPSC has finished creating a publicly accessible consumer incident database which as far as I know is a very useful database and we ought to get a chance to review it.

Today CPSC has increased its staff and resources. It increased surveillance at ports, five commissioners as well as a new IT system and laboratory. To retreat now from the proven consumer protections achieved under this law would be a huge mistake.

This morning an important new study was published. It shows that between 1990 and 2008, nearly 200,000 infants and young children went to emergency rooms for injuries related to cribs and playpens. And a new poll for the Consumers' Union documents Americans want a strong federal regulator to protect children from these dangers.

As legislators we know that legislation is not flawless. Although the Commission has made great strides in carrying out this law, we have heard from a number of stakeholders that certain provisions of the law may need adjustment and we need to take these concerns seriously. Over the past 2 years we have met repeatedly with stakeholders affected by the new law to understand their concerns and to craft an appropriate legislative response. I see that some of these stakeholders are represented on the second panel of this hearing and I welcome them. As I have stated to them in the past and I will repeat today, I am committed to working with them, the Commission and members of this committee to strike a delicate balance between the need for targeted changes to the law and the need to preserve the most important public health accomplishments of the law. Product safety should not and has not been a partisan issue and it is my sincere hope that this committee will work quickly to resolve these issues once and for all.

I look forward to hearing the testimony. I look forward to working with the new subcommittee and committee leadership as we continue our commitment to protect all consumers, especially children.

And I yield back the balance of my time.

Mrs. BONO MACK. I thank the gentleman.

Today we have two panels before us. Each of the witnesses has prepared an opening statement that will be placed in the record. Each of you will have 5 minutes to summarize that statement in your remarks.

On the first panel we have and we welcome the Honorable Inez Tenenbaum, Chairman of the Consumer Product Safety Commission. Joining her on the first panel is Commissioner Anne Northup and our former colleague. Thank you both for being here today.

Chairman Tenenbaum, you are recognized for 5 minutes.

STATEMENTS OF INEZ TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION; AND ANNE NORTHUP, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

STATEMENT OF INEZ TENENBAUM

Ms. TENENBAUM. Thank you and good morning, Madam Chairman, Ranking Member Butterfield and members of the Subcommittee on Commerce, Manufacturing and Trade.

Since assuming the chairmanship of the Commission in July, 2009, I have focused on three key objectives. First, I have worked diligently to implement the Consumer Product Safety Improvement Act and use that Act's new authorities in a manner that is both highly protective of consumers and fair to industry stakeholders. I recognize that some of these rules have caused concern in the regulated community and I have worked to provide appropriate relief whenever possible. However, it is also important to point out that the vast majority of the CPSIA rules and requirements had been adopted unanimously by the Commission and widely accepted by the industry consumer groups and families across the country.

I am pleased to report to the subcommittee, we are on time and on budget to launch the public database on the safety of consumers' products mandated by Section 212 of the CPSIA and this launch is on March the 11th. This database will empower consumers with information allowing them to quickly determine whether products they already own or are considering purchasing are associated with safety hazards or recalls. I want to assure this subcommittee that CPSC staff has worked to ensure that the database is fair to all stakeholders while also fulfilling the intentions of Congress. Overall, I strongly believe that we have reached the right balance of addressing the manufacturers' legitimate concerns while also ensuring that the public has access to critical consumer product safety information. This database will prevent injuries and it will save lives. Congress recognized this when it added Section 212 to the CPSIA and I look forward to seeing this important to fully implemented in just 3 weeks from now.

Second, I have focused on changing the CPSC's internal 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. In the last year the Commission has released a strategic plan that establishes a plan to make the CPSC the global leader in consumer product safety. We have established a new office of education global outreach and small business ombudsman that has already begun to provide outreach to small businesses and crafters. We have embarked on a substantial upgrade of our information technology system which has formed the backbone of the database and our new CPSC.gov homepage.

Third, I have focused on proactive prevention of consumer harms identifying emerging hazards and keeping those products out of the stream of commerce. We have taken a number of steps to increase the surveillance of potentially harmful consumer goods by signing several information sharing agreements with Customs and Border Protection and increasing our physical presence at the ports of entry. The Commission's safe sleep team has also made great

strides to rid the marketplace of dangerous cribs, usher in a new generation of safer cribs and to educate parents about the importance of maintaining a safe sleep environment for infants and toddlers. A key component of this was the mandatory crib safety standard. These standards were designed through many hours and staff working collaboration by the Commission resulting in a unanimous vote in favor of the new standards on December the 15th, 2010. And particularly, I am extremely proud of the Commission's staff and the work they have done to implement the bulk of the CPSIA and create a safer consumer product marketplace for all Americans.

The Commission has received increases in appropriations over the past 3 years. These resources are making a difference. They ensure that we can get the message out to families after a hurricane or an ice storm that the use of portable generators in homes can result in carbon monoxide poisoning and tragedy. They also allow us to do public outreach to new mothers so they will not place their newborns into an unsafe sleep environment that could result in a tragedy. Some will say that these resources are solely to promulgating rules under the CPSIA. This is untrue.

In 1980, the Commission had almost 1,000 employees and an inflation-adjusted budget of $150 million. By 2007, the Commission had fallen to 385 employees and was barely able to carry out its core functions. We simply cannot return to those dark days.

In the coming months I look forward to discussing possible target improvements to the CPSIA with this subcommittee. On January 15, 2010, I reported a unanimous report of the Commission requesting some additional flexibility on some key requirements. I recognize that some want to go further than this and reopen the entire act. This would be a mistake. Calls for a return to a completely risk-based lead paint and contents standard are one example of a proposal that is seriously ill-advised. Lead is a contaminant and a powerful neurotoxin. It is a particular threat to the developing brain of a fetus, infant and a young child and with documented negative effects on behavior and permanent loss of IQ.

During my tenure as chairman, my message to manufacturers has been simple. Get the lead out. If it absolutely has to be in your product, we have sought the authority to address it through a functional purpose exception. We have made substantial progress in this area since the passage of the CPSIA and parents should never have to wonder and worry about whether the model train or the toy they purchase for their child is leaded or unleaded.

Thank you again for inviting me to provide testimony before the subcommittee today.

[The prepared statement of Ms. Tenenbaum follows:]

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

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

Subcommittee on Commerce, Manufacturing and Trade

"A Review of CPSIA and CPSC Resources"

February 17, 2011

Good morning, Chairman Bono Mack, Ranking Member Butterfield, and Members of the Subcommittee on Commerce, Manufacturing and Trade. I am pleased to be here today to provide an update to the Subcommittee on 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.

Since assuming the Chairmanship of the Commission in July 2009, I have focused on three key objectives. First, I have worked diligently to implement the Consumer Product Safety Improvement Act of 2008 (CPSIA) and use that Act's new authorities in a manner that is both highly protective of consumers and fair to industry stakeholders. Second, I have focused on changing the CPSC's internal 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. Third, I have focused on proactive prevention of consumer harms: identifying emerging hazards and keeping those products out of the stream of commerce.

Fair and Effective Implementation of the CPSIA:

Children's Product Safety Provisions: In August 2008, Congress passed the CPSIA by overwhelming bipartisan majorities. Passage of the CPSIA sent a strong message to both the Commission and the consumer product manufacturing community: that the old, reactive regulatory approach was not working, and that the public will not accept another "Summer of Recalls."

In the last two years, Commission staff have worked diligently and successfully to implement almost all of the main provisions of the CPSIA. As part of this process, we have dealt with a few sections that have caused concerns in some segments of the regulated community. The Commission has been responsive to those concerns and provided appropriate relief where necessary. One example of this is the Commission's recent decision to extend the current stay of enforcement implementing third-party testing for lead substrate in children's products until December 31, 2011.

It is critical to note, however, that the vast majority of CPSIA rules and requirements have been adopted unanimously by the Commission – and widely accepted by industry, consumers groups, and families across the country. These rules include:

- New durable infant and toddler product standards, so that we never again have to hear of an infant that drowning in a defective bath seat or a toddler who is paralyzed by a poorly designed baby walker that tumbles down a flight of stairs;

- Product registration cards that now accompany many juvenile products, so parents who register can receive proactive notification of recalls; and

- The inclusion of tracking labels, to the extent practicable, on children's products so that parents can identify who made them – even long after the packaging is thrown away.

The Public Searchable Database: In March 2011, we will unveil our new publicly available database on the safety of consumer products, which was mandated by section 212 of the CPSIA. This database, which is an important element of the Commission's overall effort to upgrade its antiquated Information Technology systems, 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 also will allow consumers to play a critical role in safety by empowering them to submit information about potential product hazards for inclusion in 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 requires the Commission to remove or correct information in the database within seven business days that it has determined to be materially inaccurate. Manufacturers also have the right to comment on the reports and to have those comments posted 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 fully implemented this March.

A Reinvigorated Commission:

New CPSC Strategic Plan: During my confirmation hearings in the summer of 2009, I noted that one of my key goals for the Commission was to align its priorities with 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 businesses in the area of product safety. In particular, special attention will be given to developing "plain English" information tailored to small businesses and small batch manufacturers so that they can understand and comply with new standards.

New CPSC Website: As part of the Commission's overall Information Technology improvement project, the Commission also launched a new updated CPSC.gov home page last December, and currently is in the process of upgrading the entire website. These improvements will allow consumers to more easily search for recalls, report safety incidents and injuries, and view videos on keeping their families safe from product hazards. In addition, the new website will provide industry, and particularly small businesses, with increased access to resources on how to produce safe products that comply with applicable safety standards.

A New Focus on Prevention:

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 more "real time" importer information and target the most dangerous incoming shipments. The first of these MOUs, signed in April 2010, allows CPSC personnel to work at CBP's Commercial Targeting and Analysis Center (CTAC) in Washington, DC, 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 in August 2010, 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.

The Safe Sleep Team: 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 nine 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 report that the new mandatory crib safety rule was approved by the Commission is a unanimous vote on December 15, 2010.

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.

Rapid Response to New 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. This 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.

Moving Forward:

In the past eighteen months, the CPSC has implemented the bulk of CPSIA and moved towards a more responsive, proactive approach to consumer safety. In particular, I am extremely proud of the Commission's staff – and the work they have done to create a safer consumer product marketplace for all Americans.

The Commission has received increases in appropriations over the past three years. On Monday the President released the Administration's Fiscal Year (FY) 2012 Budget, which continues this commitment to rebuilding the Commission by requesting $122 million for expenses – a slight increase over the FY 2010 level. I deeply appreciate the continued investment in the Commission and have made every effort to ensure that these funds are spent wisely and judiciously – by putting more personnel in ports, expanding outreach, and responding to emerging hazards like drywall.

These resources are making a difference. They ensure that we can get the message out to families after a hurricane or an ice storm that use of a portable generator in home can result in carbon monoxide poisoning and tragedy. They give us the resources to put out remediation guidance for families with contaminated drywall. They also allow us to do public outreach to new mothers – so they do not place their newborns into an unsafe sleep environment that could result in tragedy.

Some will say that these resources are solely devoted to promulgating rules under CPSIA. That assertion is false. In 1980, the Commission had almost 1000 employees and an inflation-adjusted budget of over $150 million. By 2007, the Commission had fallen to 385 employees – and was barely able to carry out its core functions. This led to the "Summer of Recalls" and public outcry to reinvigorate and properly fund the CPSC. We simply cannot return to those dark days.

In the coming months I look forward to discussing possible targeted improvements to the CPSIA with the Subcommittee. On January 15, 2010, I supported a unanimous report of the Commission requesting some additional flexibility for certain requirements. Specifically, I supported a "functional purpose" exception to the section 101 lead substrate requirements where lead absolutely has to be in a children's product, prospective application of the 100 parts per million (ppm) lead limit "step down" set to occur on August 14, 2011, and targeted relief to address small manufacturer and crafter concerns with regard to the third-party testing and certification requirements in section 102.

I recognize some want to go further than this, and reopen the entire Act. That would be a mistake. Calls for a return to a completely "risk-based" lead paint and content standard are one example of a proposal that is seriously ill-advised. Lead is a contaminant, and a powerful neurotoxin. It is 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.

The scientific community is almost entirely in agreement that there is no "safe" level of lead. This is not a new finding. In May 1936, Consumer Reports published an article entitled "Lead Hazard in Toys," and noted that:

> *The hazard is especially great because lead is a poison which accumulates in the body, and can do great damage in amounts almost infinitesimally small. Some medical authorities believe that lead presents one of the gravest risks of childhood, being responsible for many obscure ailments which can be diagnosed only with the greatest difficulty.*

During my tenure as Chairman, my message to manufacturers has been simple: get the lead out. If it absolutely has to be in a product, we have sought the authority to address it through a "functional purpose" exception. We should not, in any way, slow or reverse the removal of this toxic contaminant from children's products wherever possible. We have made substantial progress in this area since passage of the CPSIA, and parents should never have to go back to wondering – and worrying – about whether the model train or toy they purchase for their child is "leaded" or "unleaded."

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Thank you again for inviting me to provide testimony before the Subcommittee today. I now look forward to answering any questions you may have.

Mrs. BONO MACK. I thank the chairman and recognize Commissioner Northup for 5 minutes.

STATEMENT OF ANNE NORTHUP

Ms. NORTHUP. Thank you, Madam Chair, and let me congratulate you. I know you are the first woman that is a subcommittee chairman of the Energy and Commerce Committee and as a former member I know that those achievements are so important to all the women that come behind us. It is very exciting to the women on Capitol Hill to see you as the chair so I congratulate you, and also, Ranking Member Butterfield, thank you for having me here today.

I appreciate the opportunity to come and talk a little bit about the CPSIA. I certainly want to acknowledge what the chair said and that is that most of our votes have been five to nothing. They are bipartisan. There is a wish across the Commission to make sure that our children are safer. I feel that if I had been still in Congress when the CPSIA had come before me that I would have voted for this bill. And understanding it as I read it as I was nominated by the President to this Commission and then went through the confirmation process, I had an opportunity to visit with most of the Senators who had been on the subcommittee and the committee, the Commerce Committee. And overwhelmingly I heard from them that there were unanticipated consequences of this bill and told me that they believed in the bill that there was a flexibility for us to both protect children and to avoid these unintended consequences and I promised them that I would do that.

And like I said as I read the bill, everything seemed so straightforward and so reasonable. It was only then when I was sworn in that I found out that the Commission had come to certain conclusions about portions of this bill, especially the absorb ability exclusion that have rendered whole sections of the bill meaningless. In other words, our Commission has found on a partisan majority that that section of the law is totally meaningless, that it does not apply to one product. So I am here today, not to be the naysayer because I think it is important entirely. I think it is important to recognize that our chair has instituted some things that have modernized this Commission and have made it possible for us to intercept things at the border and to advance our technologies that will make an enormous difference and help us protect children.

So I am here though to bring to your attention some of my concerns. It has been shocking to me the number of businesses that we have entirely caused to go out of business, the number of businesses that have left the children's product arena completely because of this bill, the number of choices that parents no longer have. Everyday I hear from businesses who tell me we use to make this many versions of this product. Today we make one because any additional components will cause us this many more thousands of dollars of testing, this many more thousands of dollars of paperwork and tracking and concerns that we have, and we heard it just at the toy fair this weekend. Almost universally, people estimated their cost and increase the price to parents 20 to 30 percent and the fact that they have reduced the bells and whistles of their toys. They have, as one major manufacturer told me, we have taken the fun out of toys because we don't want to put multiple colors. We

don't want to put the sound in it. We don't want to put the extra additions to it because we have to—it is just so complicated to abide by the law.

Specifically, the law requires that yes, everyone meet the lead standard and that means whether the lead is absorbable to not, even though in the law it said that items where the lead was not absorbable where exempted from the law. So we have applied it so that everything is affected by that even when it is not absorbable. So people that make ball bearings and connectors and things like that have no way to make those products and still comply by the law. Or they are using, as somebody told us in testimony, substitutes that are even less safe, like antimony, a known carcinogenic. So we need to address that exclusion.

I want to use the rest of my time to talk about the database. Right now you can go on Amazon.com, decide you are going to order a highchair for your child as I did for my grandchildren and the brand that I chose, I put in a brand, 147 different highchairs they make and some of them are $54 on the first page, one is $148. Today our database, somebody puts in an incident and all they have to do is give that brand name. They do not have to say whether it was the $54 chair or the $148 chair. They can be misidentifying it as we find people misidentify things in incidents everyday. That kind of information is not helpful to consumers. If accurate information is helpful, inaccurate information can drive people away from the safest product and it is not helpful to us who have to enforce the law. I know we will have a chance to talk about this further in the questions and answers but I did want to bring that to your attention.

Thank you very much.

[The prepared statement of Ms. Northup follows:]

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

Hearing: "A Review of CPSIA and CPSC Resources"

Before the

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

Subcommittee on Commerce,
Manufacturing, and Trade

February 17, 2011

Chairman Bono Mack and Ranking Member Butterfield, thank you for the opportunity to provide testimony to this Subcommittee to inform your review of the Consumer Product Safety Improvement Act of 2008 (CPSIA) and the resources 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.

My testimony today will focus on the devastating impact the CPSIA is having on American business growth and competitiveness, as well as the strain it imposes on the Commission's resources, all with little or no offsetting improvement in product safety. I will also propose four specific actions Congress can take to ameliorate these effects. Congress, through the appropriations process, could immediately (1) prohibit the Commission from expending any funds for the purpose of undertaking any further regulatory action without first performing a full cost-benefit analysis and making a finding that the cost of the action is justified by its expected benefits; and (2) prohibit the Commission from expending any funds for the purpose of launching the Public Database until the Commission's regulations ensure that the information contained in a report of harm submitted to the Database is verifiable, and the Commission has established an effective procedure for resolving a claim of material inaccuracy before a report of harm is put on the Database. Two longer term solutions that would require amending the CPSIA, include (1) changing the language at CPSIA § 101(b)(1) to exclude products or materials with a level of absorbable lead that the Commission determines not to be harmful to a child's health; and (2) eliminating third-party testing, certification and tracking labels of all children's products, allowing the Commission to retain its authority to impose such requirements only where necessary to address a risk with a specific product or material.

I. Background on the CPSIA

As you may know, the CPSIA was passed following a number of high-profile recalls involving lead in paint found on children's toys imported from China. While the law passed with broad support in 2008, its many unintended consequences have since led both Democrat and Republican Members of Congress to introduce bills reforming the law. Last year, this Subcommittee held a hearing on potential CPSIA amendments, and the Appropriations Committees of the House and Senate requested a Report from the five Commissioners in January of 2010 on ways to amend the CPSIA. (*See the following link for the Report to Congress and the Commissioners' five statements: www.cpsc.gov/about/cpsia/cpsiareport01152010.pdf*). Thus, the law no longer enjoys the broad support it received in 2008.

II. Economic Impact of the CPSIA

In March 2009, Commission staff reported that the economic costs associated with the CPSIA would be "in the billions of dollars range."[1] Industry associations representing manufacturers of furniture, mattresses, sports equipment, children's clothing and handmade toys, just to name a few, have all told us that they will be saddled with enormous costs, first to reengineer their products to satisfy the new standards imposed by the law, and then to third-party test every component of every product they make to demonstrate compliance with all of the applicable standards. Small businesses without the market clout to demand that suppliers provide compliant materials have been hit the hardest. Many report that the new compliance and testing costs have caused them to cut jobs, reduce product lines, leave the children's market completely, or close. Attached is a sample list of businesses impacted by the CPSIA, as well as other economic data.

This anecdotal data does not reflect the full breadth of the law's requirements, because the most onerous provisions of the law have yet to go into effect. The law's widest reaching mandate—third-party testing of all children's products for lead content – is stayed until December 31, 2011. In addition, the Commission has yet to implement the law's mandate to third-party test to the phthalates or toy standards. When the CPSC is fully implemented, the entire process companies must go through to produce a toy or children's product will have drastically changed. Under the law, all toys must be tested at third-party labs for lead and phthalates, as well as 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. After the components are fully assembled, the finished product will need to be sent back to a third party lab for additional testing and certifications related to the toy standard. Companies tell us that these requirements stifle innovation and product variety by erecting significant cost barriers to adding to toys new accessories, new colors, or other variations. For example, a large toy manufacturer told me 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."

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.[2] And these costs do not include the cost to certify to these third-party tests, to add a tracking label, or to maintain the data and paperwork so that every component and material can be traced back to its specific test and lot number.

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

[2] Regulatory 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

All of these steps are required by the CPSIA without any regard for whether the product presents a safety risk.

In fact, while the costs to companies of reengineering 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 and will continue to be much higher—all without any measurable benefit. A company making furniture for children's rooms would need to: 1) determine if its product is "primarily intended" for children 12 and under—an issue 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 accessible 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 to each piece of children's furniture a tracking label containing 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 make a material change to the product, including a change of color or manufacturing process.

One furniture manufacturing company reported that it spent approximately $13 million putting together a testing, tracking, and labeling system for its children's furniture, even though not one of its components exceeded the new lead limits or otherwise needed to be replaced. There was clearly no safety benefit, yet the company has faced enormous costs. Large and small companies alike must hire a lawyer or other outside expert simply to ensure they understand the extent to which their products are impacted by various provisions of the law.[3]

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 testing costs are cheaper. 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.

The CPSIA third-party testing requirements and lead content standards are far more stringent than the requirements governing products sold in the EU, Japan and other major markets. As a result, preexisting rules governing the export of domestically manufactured products that do not satisfy United States product safety standards erect a significant barrier to domestic manufacturing growth. A company wishing to sell a product in a foreign market can only manufacture it in the United States for export if the product has never been in commerce before, and if it undergoes a lengthy pre-approval process by both the CPSC and the receiving country. The CPSIA's new onerous requirements, combined with the difficult process for exporting products not meeting United States product safety standards, will encourage more businesses to move their manufacturing operations overseas. The CPSIA thereby undermines the economic

[3] "Mattel Finds CPSIA to be a Challenge," *Product Safety Letter*, November 9, 2009.

imperatives of increasing both employment and exports, and is inconsistent with President Obama's exhortation that American companies relocate their manufacturing to the United States.

III. Impact of the CPSIA on the Commission's Resources

In both 2009 and 2010, the agency focused its time and resources principally on implementing the 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 mandates of the CPSIA, including the lead-in-substrate and phthalates bans, the Public Database, and the third-party testing, certification and labeling requirements. Over the last two and half years, the Commission has issued an estimated 3,500 pages of regulations and guidance documents as a result of the CPSIA—a large portion of which must be read and understood by every affected company in order for them to grasp the law's complex requirements.

The diversion of the Commission's resources to CPSIA implementation reduces our focus 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.

Indeed, since 2008, there has been a significant delay in progress on actions to address many genuine safety hazards, such as promulgating standards to reduce the risk of death and injuries caused by cigarette lighters, table saw blades and portable generators. These issues would be front and center on the Commission's schedule if it were not for the CPSIA.

The new Public Database also will be a substantial drain on Commission resources. By the end of fiscal year 2011, the Commission will already have spent $29 million to develop the Database. And while we have not been able to estimate future costs, it is likely that the costs to maintain the Database will continue to strain Commission resources for years.

IV. Proposals to Immediately Ameliorate the CPSIA's Effects

A. Prohibit the Commission from expending any funds for the purpose of undertaking any further regulatory action without first performing a full cost-benefit analysis and making a finding that the cost of the action is justified by its expected benefits.

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 that will result from 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. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.

I believe such analyses would reveal that much of our CPSIA mandated regulation cannot be justified. To begin with, there is no scientific evidence suggesting there is any benefit from many of the law's requirements. For instance, no government health agency, including the CPSC, has ever concluded that the components of children's products containing either 300ppm 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-F 963 a federal standard, or to require all toy manufacturers to send their products to third-party labs to test to this standard. Regarding lead, the Environmental Protection Agency (EPA) and the Centers for Disease Control (CDC) report that in 1978, about 13.5 million children ages 1-5 had elevated blood lead levels. However, by 2007-2008, this number had declined to about 250,000 children.[4] Similarly, 2007 data indicates that one percent of children selected for testing across the country showed an elevated blood lead level as established by the CDC. This number was down from nearly eight percent in 1997,[5] and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the EPA have issued guidance for reducing children's exposure to lead, and neither has ever suggested that parents take away a child's bicycle because of the lead in the substrate of the metal comprising the spokes, pedals or handlebars. Nor has it ever been argued that the CPSIA, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level.

Because the CPSIA's new requirements are not risk-based, manufacturers are spending time and money satisfying arbitrary standards, rather than on improving the safety of 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:

> [T]here 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.[6]

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and

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[4] http://www.epa.gov/opeedweb/children/body_burdens/b1-graph.html
[5] http://www.cdc.gov/nceh/lead/data/national.htm
[6] Letter to Commissioners from the American Home Furnishings Alliance. November 8, 2010.

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, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% 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.[7]

The law imposes on small businesses onerous requirements 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.

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. 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.[8]

There is thus overwhelming anecdotal evidence suggesting that the costs, both economic and intangible, to the economy, businesses and consumers far outweigh any minimal improvement in safety that could be attributed to the CPSIA. Congress could prevent further harm by prohibiting the Commission from expending any funds for the purpose of undertaking any further regulatory action without first performing a full cost-benefit analysis and making a finding that the cost of the action is justified by its expected benefits.

B. Prohibit the Commission from expending any funds for the purpose of launching the Public Database until the Commission's regulations ensure that reports of harm submitted to the Database contain sufficient information to permit verification, and the Commission has

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[7] American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

[8] One 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

established an effective procedure for resolving a claim of material inaccuracy before a report of harm is published on the Database.

Section 212 of the CPSIA requires the Commission, subject to the availability of appropriations, to establish and maintain a public, web portal accessible Database on the safety of consumer products. The statute identifies five sources from which the Commission shall receive reports of harm. These are (1) consumers; (2) local, state, or Federal government agencies; (3) child care professionals; (4) child service providers; and (5) public safety entities. CPSIA § 212(b)(1)(A).

Each of these categories of submitters is likely to have first-hand knowledge of the harm reported. They can therefore be expected to provide accurate and reliable information that may be useful to consumers seeking product safety information.

Notwithstanding the statute's clear language, the Commission's Majority adopted a rule that greatly expanded the list of allowable submitters to the Database. For example, the Commission's regulation defines "consumers" to include "attorneys", and "public safety entities" to include "consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations." 16 C.F.R. § 1102.10(a). This expansion goes against the statutory purpose that the Database be "useful" for consumers and not disseminate erroneous information.[9] 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 that individuals with first-hand knowledge of incidents of harm involving consumer products be permitted to submit reports to the Public Database. However, groups or individuals with no direct knowledge of the incident, who 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.

Soliciting information from sources seeking to promote an agenda unrelated to simply sharing first hand information invites dishonest, agenda-driven use of the Database—diluting its usefulness for consumers. Trial lawyers, unscrupulous competitors, advocacy groups and other nongovernmental organizations and trade associations serve their own agendas and lack an incentive to prioritize accuracy in their reports of harm.

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 could also submit to the Database false and unverifiable reports to fuel a lawsuit. It is no

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[9] 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."

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.

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. 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 some of their members sell—should be mandated in homes.

But it is not important to the NFPA whether it correctly identifies a 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 brand of lighter 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 unverifiable and potentially inaccurate claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

By inviting trial lawyers, consumer advocacy organizations and trade groups to input reports of harm, the Commission has all but guaranteed that the Database will be a tool for lawsuits, policy agendas and anti-competitive activity. Under those circumstances, it cannot also serve its intended function of providing a reliable resource for parents seeking useful information about product safety. A Database populated with such information will be no more useful than "Amazon.com", "Yelp.com", or any of the other hundreds of websites where anyone can submit comments on a product, and does not warrant tax payer funding.

The problems caused by over expanding the list of submitters to the Database could have been reduced if reports of harm had to be verified, or at least verifiable, before being published. But the information solicited on the Database is inadequate to this purpose. With respect to the submitter, the Database requires that a "self-verification" box attesting to the report's accuracy be checked. But this will do little to discourage or prevent inaccurate reports of harm. Self-verification in the context of the Database rule means only that the report is accurate "to the best of the submitter's 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.

The scope of product information solicited on the Database under the Majority's rule is also inadequate. The only product information required is the identity of the manufacturer, the name of the product and the approximate date of the incident. This information is patently insufficient to permit reliable verification that the manufacturer and *specific* product are correctly identified. For example, a recent search of

Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would be of no value.

Carrying this example one step further, consider a 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 Company B 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 to people using the Database to look for safety information about current products on the market.

The Majority rejected proposals contained in an alternative Database rule I offered that would have minimized such confusion and would have aided in the verification of reports of harm that are challenged by manufacturers as materially inaccurate. I proposed requiring that (1) reporters of harm include the consumer and/or the victim's identity and contact information with a report (to be held confidential, as is current practice), so that the Commission could obtain additional information to evaluate a manufacturer's claim of material inaccuracy; and (2) the Database include fields for submitters to provide the approximate date of purchase of the product and whether the product was purchased "new" or "used", thereby allowing consumers to gauge the age and better identify the specific model.

The Majority also rejected my proposal that the Commission withhold reports of harm from publication pending the evaluation of a substantiated claim of material inaccuracy. Instead, reports about which there is an adequately supported claim of material inaccuracy are posted on the 10th day after they are submitted, unless the Commission can somehow resolve the claim in the brief intervening period. As of today, the Commission does not even have a procedure in place to evaluate claims of material inaccuracy, let alone one that could result in a determination in 10 days.

Notably, the Commission's Notice of Proposed Rulemaking on the Database originally included an interpretation similar to the one I recommended. 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."[10] 75 FR 29180.

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[10] The 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

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 be published to 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 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. Moreover, our agency's fiscal year 2011 appropriations request did not include even a single new FTE to resolve pending claims of material inaccuracy, and our fiscal year 2012 request does not provide sufficient resources to account for an anticipated increase in reports. These facts alone make clear to the business community how low the CPSC prioritizes its responsibility to resolve claims that reports of harm contain false or misleading information about products.

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.

The flood of potentially inaccurate reports that will be difficult, and often impossible, to verify also imposes a tremendous burden on manufacturers. Substantial private sector man hours will now be dedicated to understanding and responding to incident reports containing incomplete and often mistaken information. Manufacturers, who might otherwise view the Database as a means to stay ahead of the curve in their ongoing efforts to improve the safety of their products, will have nothing but vague reports and guesswork on which to rely. The resources spent by a company chasing down unverifiable information to avoid reputational damage, would be better dedicated to reviewing incidents known to relate to the company's products or otherwise promoting safety innovations.

Congress could prevent the irreversible damage that unverifiable and materially inaccurate information will cause American businesses, and ensure the creation of a Public Database that is a useful tool for consumers, by prohibiting the Commission from expending any funds for the purpose of launching the Database until the Commission's regulations ensure that reports of harm submitted to the Database contain sufficient

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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).

information to permit verification, and the Commission has established an effective procedure for resolving a claim of material inaccuracy before a report of harm is published on the Database.

V. Proposals to Amend the CPSIA

A. Amend CPSIA § 101(b)(A) to exclude products or materials with a level of absorbable lead that the CPSC determines not to be harmful to a child's health.

Prior to enactment of the CPSIA, the regulation of lead in consumer products was based upon the Commission's general authority and expertise, exercised for over 35 years, to assess and reduce risk by evaluating scientific and human factors data. The CPSIA, for the first time, imposed specific lead content limits for all consumer products intended primarily for use by children, without regard for the nature of the product or the way in which the product is used. CPSIA § 101(a).

Because such a sweeping one-size-fits-all requirement would have decimated whole industries and eliminated from the market numerous products presenting no safety risk to children, Congress recognized three exceptions to the lead limit requirement. These are (1) products containing lead that is inaccessible to a child through normal and reasonably foreseeable use and abuse; (2) electronic devices for which it is not technologically feasible to meet the lead standard; and (3) products containing lead that will not result in the absorption of "any" lead into the human body. CPSIA § 101(b).

The Commission has promulgated regulations creating meaningful exclusions from coverage by the lead limit for products meeting the first two exceptions. But it has interpreted the word "any" in the lead absorbability exclusion in a way that no product containing lead could ever satisfy. Because Congress clearly intended all three exclusions to have meaning, and in light of the Commission's decision to write the lead absorbability exclusion completely out of the law, it now falls to Congress to clarify its intent. The CPSIA should be amended to exclude products or materials with a level of absorbable lead that the CPSC determines not to be harmful to a child's health.

Drawing the line at the level of absorbable lead that is harmful to a child's health is consistent with the findings of 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. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt 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 in dirt that is eaten or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the Environmental Protection Agency standard for lead in soil is 400 ppm (http://www.epa.gov/lead/). This standard for safety is less strict even than the current 300ppm lead content standard provided in the CPSIA for children's

products, let alone the lowest technologically feasible level between 300ppm and 100ppm that the CPSIA will require in August of 2011.

In many other laws relating to absorbable lead levels, standards exist to allow for unharmful absorption. For example, the Food and Drug Administration allows for 0.1 microgram of lead in a one-gram piece of candy.[11] 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.[12] California Proposition 65[13] as well as the European Union[14] 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)[15] is then taken into the body every day through the food we eat and the air we breathe.

Unlike these rational rules, the CPSIA, as interpreted by the Majority, has led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, the CPSIA has led to a ban on children's books published before 1986, 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 in meaningful amounts. 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. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a bicycle handlebar, the CPSIA treats these items in exactly the same way it treats products that truly could hurt a child by increasing the blood lead level.

However, none of our health agencies, including the CPSC, has ever found that brass musical instruments, vinyl lunchboxes or bicycles, all of which contain lead in the product's substrate, should be avoided even when a child's blood level is at or near the

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[11] "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/Metals/Lead/ucm172050.htm

[12] Environmental Protection Agency, Safe Water Drinking Act, Fact Sheets: http://www.epa.gov/safewater/sdwa/basicinformation.html

[13] 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

[14] 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/

[15] 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

"tipping point" for lead poisoning. The Commission's interpretation of the CPSIA's absorbability exclusion requires the Commission to focus solely on lead limits and causes absurd consequences—such as banning products that pose no risk to children and forcing the agency to spend more time and attention on children's products with 350 ppm of lead than it does on riskier products or emergent issues like cadmium.

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 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 just as likely to turn off and on. These products do not threaten a child's health due to their lead content, 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.

The primary and best way to restore the agency's capacity to address "real risk" in the setting of its regulatory priorities and to align them with the existing standards of other federal agencies and around the world would be to amend the CPSIA to ensure that the agency can consider the absorbability (or bioavailability) of lead, and not just the total lead content of a given material. The CPSIA should therefore be amended to exclude products or materials with a level of absorbable lead that the CPSC determines not to be harmful to a child's health.

B. Eliminate third-party testing, certification and tracking labels of all children's products, allowing the Commission to retain its authority to impose such requirements only where necessary to address a risk with a specific product or material.

As discussed above, the CPSIA's requirement that all children's products be third-party tested to the lead, phthalates, ASTM-F963 toy standard and all other applicable standards has and will continue to have an enormous economic impact on American manufacturers with no commensurate improvement in product safety or compliance. Furthermore, the Commission has other new and more effective enforcement mechanisms that are more reliable than requiring manufacturers to certify to having performed third-party tests.

Today, the Commission intercepts non-compliant toys through its extensive border control efforts, application of x-ray technology to identify violative lead content, computer databases that flag previous offenders for greater scrutiny, the imposition of higher penalties of up to fifteen million dollars, and the threat of lawsuits and loss of reputation in the market. Notably, even prior to these improvements, the Chinese manufactured toys containing lead paint that were the impetus for the CPSIA were themselves identified and intercepted using the Commission's traditional methods. The company responsible faced a class action lawsuit and a massive fine.

More importantly, the imposition of a third-party testing and certification requirement does not reduce the likelihood of non-compliant products entering the country. Manufacturers were required to perform their own tests to be able to ensure compliance long before enactment of the CPSIA. Third-party testing will therefore not make violations by the honest companies who seek to comply with the law any less likely. Such companies already manufacture to all applicable standards, and will now merely incur greater costs to continue doing so. On the other hand, the truly bad actors who would knowingly violate the law are not likely to be reformed by the third-party testing and certification requirement. They will simply falsify certifications, and the CPSC will need to rely upon its other enforcement mechanisms to protect consumers from their products. The only difference will be that now some of the resources that could have been dedicated to more effective methods will be employed in the fruitless exercise of checking whether products entering the country are accompanied by the required certifications. And there will be more incentive to cheat, because the pricing advantage from not complying with the much more expensive third-party testing requirement will be that much greater.

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, which are the main CPSIA costs burdening small businesses.

I therefore recommend that Congress eliminate the third-party testing requirement entirely. Companies will still be required to test to ensure compliance, and the Commission will retain its new and longstanding enforcement mechanisms, as well as the authority to impose third-party testing and other requirements where necessary to address a risk with a specific product or material.

VI. The alternative of adding a "functional purpose" exemption should be rejected.

Ranking Member Henry Waxman of the House Energy and Commerce Committee last year proposed a very limited "fix" to the problems of the CPSIA, known as a "functional purpose" exemption. The proposal would authorize the Commission 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." This "fix" would do more harm than good.

Adding a "functional purpose" exemption to the Commission's authority would not provide the kind of broad exclusion flexibility that the Commission unanimously sought

in our January 2010 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 showing 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. Requiring separate exemptions for each product is also a very inefficient way to regulate safety. Even under the functional purpose exemption, the product cannot be a safety hazard. So if the amount of absorbable lead in a particular material is determined to be safe and necessary to a product's function, the material itself should be exempted. Otherwise, multiple companies will be required to incur the same costs to establish the material's safety, and the CPSC will repeatedly make the same safety determination for different products.

VII. Conclusion

There is bipartisan agreement that the CPSIA has caused and will continue to cause tremendous harm to the American economy in the form of lost jobs and failing businesses, with no offsetting improvement in product safety. The law has also diverted the bulk of the CPSC's resources toward regulating to the arbitrary mandates of the law and away from its more effective tools for protecting consumers from unsafe products. I urge this Committee to consider carefully my proposals to at least begin to ameliorate the harm caused by the law, before more business owners and their employees suffer needlessly. At a time of anemic job growth and the continued flight of manufacturing away from the United States, relieving the economy of the unnecessary burdens of the CPSIA would be an important step toward recovery.

Thank you, Madam Chairman and Members of the Committee for calling this hearing and for inviting me to testify today. I look forward to your questions.

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, Commission staff reported 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 **([PDF] 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%** 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 – Montepeliar, 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-cspia/
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

Mrs. BONO MACK. I thank the witnesses for their testimony and I am going to recognize myself for the first 5 minutes of questioning.

And my first question is to Chairman Tenenbaum, while well-intentioned, CPSIA is clearly flawed in many, many respects. What needs to be done to make it more workable?

Ms. TENENBAUM. Thank you, Madam Chairman. Last January all of the Commissioners submitted a report to this committee and to Congress and it was a unanimous report in which we asked for four things. First of all we asked for greater flexibility to granting exclusions from the Section 101(a) lead limits and that is now it is 300 in parts per million. In August it will be 100 parts per million. We asked for exclusions for ordinary children's books. We asked for a perspective application when we go to 100 parts per million so that compliant inventory now in the stores or are being shipped to the stores would not have to be recalled. We only want 100 parts per million applied prospectively. And we wanted some relief and some flexibility for small manufacturers and crafters and so that was what we asked the Committee for. Mr. Waxman proposed a bill and that was discussed on both sides of the aisle. Mr. Barton had a bill and a number of members submitted bills but Congress did not take any action last year. So we are hopeful that this year we can have.

Mrs. BONO MACK. Thank you for those suggestions. Let me move on to the next question because 5 minutes goes by so quickly.

Ms. TENENBAUM. I am sorry.

Mrs. BONO MACK. That is OK. If you could clarify something for me though, in terms of lead exemptions you favor the so-called functional purpose exemptions. What do you mean by that and doesn't this threaten to bog down the Commission in making case by case determinations?

Ms. TENENBAUM. Well, under the Federal Hazardous Substance Act which is the act which used to govern the way we dealt with lead before they passed CPSIA, there was a functional purpose exemption. For example, if you had a chemistry set, you had to label what the chemicals were but we did not recall chemistry sets because the chemicals were needed for the functional purpose of the chemistry set. It was our thoughts, several of us that we could say if you have an ATV and you need the ATV or the bicycle lead in it to make it stronger or have greater machine ability when you are making an ATV or bicycle, then that is your functional purpose, and if it doesn't harm children then we could exempt you. We never envisioned this being a very complicated exemption process but as it was talked about in Congress it became very complicated and then it really sunk under its own weight.

Mrs. BONO MACK. Thank you. It seems to me that the Commission's priorities get out of whack at times and you spend so much time focusing on trace amounts of lead but what about dangers that actually result in kids being hurt? According to one of my hometown newspapers, 20,000 children a year under the age of 5 are injured in shopping cart accidents. Under CPSIA, things like doll clothes must be approved by third-party testers. Are the locking wheel devices on shopping carts tested?

Ms. TENENBAUM. Well, thank you so much for that question. My staff has made me aware of the problems with shopping carts and we have been engaged with the ASTM which is the voluntary standards making organization to look at shopping carts so that we can expedite the issues with those carts. I would have to note though because we have increased resources we are able to look at emerging hazards faster and that is why any cuts to our budget will knock us off course in terms of our ability to respond to emerging hazards like shopping carts and lithium battery buttons and so forth.

Mrs. BONO MACK. Thank you, I can see.

Ms. NORTHUP. Madam Chair, first of all the functional purpose the way it was written would have been very difficult. It said that anybody applying for it would have to prove that there was no substitute and as we heard in testimony yesterday, there is always a substitute. The fact is you will end up with a $7,000 bicycle. So its not that there is not substitute. But if a ball bearing for example and it is made of brass is important in a bicycle, why is it not also important in a Tonka truck and the other items and so yes, bicycles might have the financial wherewithal to apply. They have to prove that there is no other practical substitute. They have to prove it doesn't hurt a child. I think that the minority of the Commission believes that if we exempt a material for one manufacturer, we ought to exempt that same material for all because if it meets the bar that it is not going to harm a child then why is there any other reason for us to address it. And as far as yes, this has completely absorbed the Commission's time. There are things that have gone unmet. Things like table saws. There is technology that addresses this. There are 10 fingers that are cut off a day in this country. Carbon monoxide poisoning, 500 people die a year from that because of generators. These are things that are way overdue in the rulemaking that we have not taken up because there simply is not the time to do that.

Mrs. BONO MACK. I thank the witnesses and now I would like to yield 5 minutes to Mr. Butterfield for his questioning.

Ms. BUTTERFIELD. Thank you, Madam Chairman.

Let me address my questions to the chairman of the Commission and the chairman is right, 5 minutes goes very quickly so I am going to try to get through this.

Ms. TENENBAUM. I am trying to be.

Mr. BUTTERFIELD. It is clear that the manufacturers have become critical of the Commission in implementing the database and we have just talked about that. Even your colleague, Ms. Northup, has been somewhat respectfully critical of the database. Just last week in written testimony to the House Oversight and Government Reform Committee, the National Association of Manufacturers' president, Mr. Timmons, stated that, "The final rule creates a default for immediate publication before any meritorious claims regarding trade secrets or material inaccuracies are resolved." In your testimony today, you point our several safeguards in the final rule to protect manufacturers and I know this is an issue that the drafters of the act gave a lot of thought. If you have ever read or even glanced at this section of the law, you can see it is rather lengthy. In fact, the statute provides more procedural safeguards

then any other public database at a federal agency including NHTSA and FDA, and so I appreciate that the critique of the database provided by a witness on today's second panel is a bit more careful then what came from the manufacturers last week. Nonetheless, it seems to me that there is some amount of misunderstanding and misinformation about the database. I would like you to help us clear up that with a few yes or no questions. Number one, is it correct that anyone who submits a report must provide to the Commission their name and contact information?

Ms. TENENBAUM. Yes.

Mr. BUTTERFIELD. Is it correct that anyone who submits a report must complete a verification that the information is true and accurate?

Ms. TENENBAUM. Yes.

Mr. BUTTERFIELD. Is it correct that within 5 business days of receiving a report the Commission will transmit the consumer report directly to the manufacturer?

Ms. TENENBAUM. Yes.

Mr. BUTTERFIELD. Madam Chairman, is it correct that the Commission will not publish that report until the tenth business day after transmission to the manufacturer?

Ms. TENENBAUM. Yes.

Mr. BUTTERFIELD. Is it correct that during the 10-day waiting period the manufacturer is given a chance to do three things? Number one, claim parts of the report are materially inaccurate. Number two, claim parts of the report contain confidential information and three, submit its own comments to be made public along with the consumers report. Is that true?

Ms. TENENBAUM. Yes, that is true.

Mr. BUTTERFIELD. Is it correct that the Commission as practicable will attempt to expedite that is expedite review of material inaccuracies where the manufacturer has limited the length of its submission?

Ms. TENENBAUM. That is true.

Mr. BUTTERFIELD. Is it correct that the Commission will review all inaccuracy claims and will correct or remove any inaccurate information published in the database?

Ms. TENENBAUM. Yes.

Mr. BUTTERFIELD. Is it correct that the database will contain only reports of harm from a product and not general complaints or reviews about a product?

Ms. TENENBAUM. Yes.

Mr. BUTTERFIELD. Is it correct that the Commission will seek criminal prosecution through the Department of Justice where it identifies repeated instances of false submissions?

Ms. TENENBAUM. Yes.

Mr. BUTTERFIELD. Finally, and we are within the 5 minutes, let me quote from the final rule on this one: "The Commission will as a matter of policy, redact the allegedly confidential information from a report of harm before publication in the database until it makes a determination regarding confidential treatment." Does that really mean what it says? Is it correct that no information claimed by a manufacturer to be confidential will be made public until this is resolved?

Ms. TENENBAUM. That is true.

Mr. BUTTERFIELD. All right, thank you, I don't know about you but those safeguards strike me as very adequate and I am very pleased with your responses. Thank you.

Ms. SCHAKOWSKY. Would the gentleman yield for a second?

Mr. BUTTERFIELD. Yes, I will yield to the gentlelady from Illinois.

Ms. SCHAKOWSKY. Thank you.

I wanted to raise just the issue that our chairwoman raised about—oh no, it was Ms. Northup raised about products not being clearly identified, that there may be what?

Ms. NORTHUP. One hundred forty-seven, that was it, yes.

Ms. SCHAKOWSKY. Yes so that is there something in the regulations that makes sure that we are clearly identifying the actual product line that the product itself precisely so there isn't that kind of confusion so it is not just a brand name but that it is which exactly of the items?

Ms. TENENBAUM. Well, you have to give the product name but you don't have to give the model name. But you have to give the product name. You have to give the manufacturer, the date you purchased it, your name and verification and several other things but we are not required to do the model. But we are hopeful that people will give the model name to be more clear and we certainly will investigate. If we investigate we will find out what the model name is.

Ms. SCHAKOWSKY. I think that is a reasonable thing to ask.

Mrs. BONO MACK. Ma'am, if we can move on before we get around to a second round of questioning hopefully.

Ms. SCHAKOWSKY. All right, OK, excuse me.

Mrs. BONO MACK. But members the time is involved by the votes on the floor so I would like to recognize Mr. Harper from Mississippi for 5 minutes.

Mr. HARPER. Thank you, Madam Chair.

I would like to ask, if I could, Commissioner Northup a couple of questions on some of this. What provisions of CPSIA do you think do not warrant the cost or regulation?

Ms. NORTHUP. Well, first of all there have been no cost benefit analyses so there is we don't even know what the cost of these regulations are. We estimated in 2009, billions of dollars. I have attached a list of companies that we know have gone out of business. Companies that we know have cut back. Companies that have left the market, the number of employees that have been cut off but there has been no broad study of that. But I would, the one that we have stayed right now, the testing and third-party certification, because we have advanced technology we are better at the border then we have ever been. Our ability to get logs of what is coming into this country we know who the people are that maybe have a bad record, who has a good record. We have the ability to scan an enormous amount of products instantaneously as they come in. Our level of penalties we if something comes in and it doesn't comply the entire shipment is destroyed and so those threats have created an enormous pressure on the manufacturers overseas to verify and re-verify and check. The third-party testing and then the certification on top of that is creating a nightmare of paperwork because you have to track every nut, bolt, screw. Bicycles, 141 different

components so every time it changes in the manufacturing process you have to change the lot number, you have to change the 141 certification numbers, you have to retest and they just, you know, they what it is old technology this sort of third-party testing. And if I may say, the people that are going to break those rules do you think they are not going to put in a new shipment of snaps and not change their certification or keep using the same lot numbers? We have such incredibly advanced ways of scanning materials coming into this country now that the cost of just that alone is going to be billions of dollars and it is on every single product even though the vast, vast, vast majority of them because of the fact, their products will be destroyed as they come in at the ports are fine. Let me just say that the database, we have spent $29 million on it. Yes, Representative Schakowsky is exactly right. It has the manufacturer's name. It may say a Graco high chair. It does not say which Graco high chair. It does not say the day it was purchased. You are supposed to say the approximate date of the accident but I will just use the example of Thanksgiving, three grandchildren. One is the new Graco high chair, one is the one I brought up from the basement that is 30 years old, one of them is the antique I have sitting by the fireplace. I could enter that as an accident if the leg fell off of one of those. The manufacturer has no idea. Is this a 1990s high chair or is this today's high chair? Do I need to conduct a recall today or do I have a product that years ago was produced? And by the same token, the parents who might go online and say OK I am going to buy a high chair. What data is in the database? They are not going to know. Is this a product that is on the market today? And finally, it allow anybody, not first person knowledge but it can be third-party. We are even inviting any organization to download all their data into our database. So the manufacturer gets a report, a red Schwinn bicycle that the wheel fell off. Schwinn says I don't make a red Schwinn bicycle but you have to give your name if you are the entrant and you can be a bystander. You can be a third-party organization. You can be the Consumers Union. So we have no way to go back to the consumer and say can you help us figure this out. They don't make a red bicycle and then we find out it wasn't. I had today a major company that sent me about eight examples of where there were two, one where a child died. It took 30 days for us and them to ascertain that it was a hoax. That is the kind of information. Those are things that come in everyday into our database. They are now going to be public within 15 days of when they are entered and nobody is going to be able to verify because they are not going to know who the consumer is.

Mr. HARPER. Thank you, Madam Chair.

Mrs. BONO MACK. I thank the gentleman. I would like to yield 5 minutes to the gentlelady from Illinois, Ms. Schakowsky.

Ms. SCHAKOWSKY. My certain, OK, sorry.

I wanted to ask the chairwoman, is $29 million the cost of the database?

Ms. TENENBAUM. No, that is not true and we have repeatedly said it is not true. We were charged when we were given new funds to upgrade our whole IT system. The database is around $3 million. The IT system was to get a data warehouse. We have five dif-

ferent silos of data that couldn't talk to each other. Our database couldn't talk to CBP so we had done extensive upgrading of our whole IT system and the database cost about $3 million of that. Now, we have had a soft launch of the database and of the 900 incidents we have had in February most of them had the serial number and the other thing we only out of that 900 we only had four material inaccurate claims and we had 723 businesses who signed up to have a business portal so they can get the information within 5 days of us receiving it.

Ms. SCHAKOWSKY. Thank you. So actually you did. How were those four discovered that were inaccurate, or whatever word you used?

Ms. TENENBAUM. Well, the business portal when you sign up, the 723 businesses sign up and we send them the report, they come back to say this information is materially inaccurate. Now, the law requires us to post the report of harm before we make the determination of whether or not it is true. We are going to try our very best to determine if it is materially inaccurate and the company is right and not put it on the database within 10 days. But if we haven't received the information or haven't had the time to research it and get to the bottom of it if it is a very complex laboratory issue and testing issue then we will have to post it and that is what the rub is.

Ms. SCHAKOWSKY. OK but I wanted to get to this issue of verified or firsthand. Here is my concern, one of the things that really inspired me to work on this law was the death of a child, Danny Kaiser, and his mom, Linda Ginzel who created Kids in Danger and became a great advocate over this tragedy. Well, she wasn't there when her son died in the crib. Would she be then ineligible to report on her son's death because she had not been at the daycare center or a parent who is not in the room when a child dies in a crib? How are you going to distinguish?

Ms. NORTHUP. Actually I wrote an alternative database and absolutely the daycare center can put this information in, the parent can put this information in. Nobody wants people that don't have firsthand information not to be able to put this information in. The issue is more a question of third parties that are sometimes fourth- and fifth-hand information. Let me just say one of the things I have seen at the Commission is that organizations that have particular safety agendas, marketing agendas want to use information of accidents to come to you and say there are 10 examples of this. You ought to pass a law. I will give you an example. The fire marshals, they want sprinklers in all buildings. We are not involved in that issue but they often put into fires in homes the fact that it was a BIC lighter. Well, it may not be a BIC lighter. In fact, BIC lighter has come to us and say please make them identify these better because what they really are is the cheap foreign knockoff. The problem for the company is if it says a BIC lighter. They are subject to a class-action lawsuit. They are subject to running around trying to prove that it is not a BIC lighter. And we don't even have the name of the person whose house burned down. All we have is the person that entered the incident, the Fire Marshals Association.

Ms. SCHAKOWSKY. I get what you are saying but I think that the organizations that represent they become a portal for people who have been hurt. Also have this, you can trace back this information.

Ms. NORTHUP. Many of them don't. We often have information where we cannot get back to who it was that was harmed and I would just say, as a parent that I knew what the product was that was at hand and, the question is would a bystander have that information? This is really important information to have. If you as the chair said I have never seen our agency be able to resolve a question of material inaccuracy in 10 days, ever. There are ones that are still dangling out there that are 9 months old that we still haven't ruled on.

Ms. SCHAKOWSKY. I yield back.

Mrs. BONO MACK. Good, the gentlelady's time has expired.

The chair recognizes the gentlelady from Tennessee, Ms. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Madam Chairman, and I want to welcome the two of you and thank you for being here and thank you for getting your prepared testimony to us.

I think that we have in front of us CPSIA is something that most people are just not real happy with. And I found it very interesting and, Commissioner Northup, I want to ask you what you think about the results of that Consumer Union poll that Mr. Waxman sent around yesterday and a dear colleague and also would like for you, if you will, to continue to talk about some of the unintended consequences. You have hit on the absorb ability problems and the miscues that are there, businesses closing. Of course we hear a lot from our charitable organizations about their displeasure with what we are seeing in the implementation of this law. Price increases we have talked about the database problems and then of course you were just beginning to touch on what I think is very dangerous for many of our American manufacturers and that is the fraud and infringement on their copyrights and the fraudulent merchandise, the pirated merchandise that makes it way and they found out about it later. This Schwinn bicycle is a perfect example of that. And so if you will talk about those unintended consequences that are coming into you and then touch on that Consumer Union poll because I don't think people are in favor of this.

Ms. NORTHUP. Well, I was amazed at the poll. It did say—first of all if you had polled me and said do you think the Federal Government should be involved in consumer safety, wouldn't every one of us in this room say yes? I was pretty shocked only eight or nine out of ten said yes. What I was even more surprised is that only half of those that said yes said they are very much supportive of that. The other half said just somewhat supportive of the Federal Government being involved. But mostly I would say that the poll was written in such a way all of us do polls politically and we know if we want really accurate information we have to make the poll so that it doesn't slant the question. You could also have written it that says do you think the Federal Government should require businesses to test every component of their children's product in an outside lab increasing the price 20 to 30 percent for materials that are not even dangerous to them. What sort of results do you think

you would have gotten? Here is another one. Do you think the Federal Government should have spent $29 million? Let me tell you, this whole database is we could have continued operating on the database we had. It was it only had to be changed because it was going up on a database where certain incidents that are not verifiable and can be entered trial lawyers, consumer advocates or competitors was false information could be posted about legitimate companies. You know, what sort of poll do you think you would have gotten? I don't think either those questions or the questions in the poll give you the real truth that we need to if you really if what you are trying to do is poll the American people you need to actually give them this is better.

Mrs. BLACKBURN. OK, and let me move on to the unintended consequences.

Ms. NORTHUP. Yes, the unintended consequences I would just tell you that it was a month after being at the Consumer Product Safety Commission. I was actually depressed because I thought that when I passed laws when I was in the General Assembly of Kentucky and in Congress and I sent them over to agencies and I thought they would make them rational and that they had more leeway. This law does not have a lot of leeway but we have heard from Members of Congress. Senator Klobuchar sent us a letter and said this law clearly was meant to exempt items that aren't where the lead is absorbable.

Mrs. BLACKBURN. OK let me stop you right there.

Madam Chairman, do you think the agency's overreach in trying to implement this law the way they have overreached on some of these rules has attributed to some of the jobs loss that we have seen in the manufacturing sector in this country?

Ms. TENENBAUM. I don't think we have overreached. I think we have implemented it based on the plain language of the statute and the issue here is the statute gives three exemptions.

Mrs. BLACKBURN. OK, let me stop you right there because I want to move on to the question on the database, $29 million is what you have spent total on this database?

Ms. TENENBAUM. No, we have spent $3 million on the database.

Mrs. BLACKBURN. OK.

Ms. TENENBAUM. We also received funds and that is the whole $29 million, $3 million of which were the database which we did IT modernization.

Mrs. BLACKBURN. Did you carry that out in-house or did you contract it out?

Ms. TENENBAUM. Well, we had some contractors and some insiders.

Mrs. BLACKBURN. OK and the timeframe that it has taken you to get the database?

Ms. TENENBAUM. We had when I came to the Commission July 29 we had not received the money from OMB because we had not qualified to bring the money down so we started in July of '09 and that is when the money came in.

Mrs. BLACKBURN. But you still have problems with it both from the entry and the information side?

Ms. TENENBAUM. No, we don't. We just did a soft launch.

Mrs. BLACKBURN. Yield back.

Mrs. BONO MACK. Yes, the lady's time has expired.

The chair recognizes the gentleman from New York, Mr. Towns for 5 minutes.

Mr. TOWNS. Thank you very much, Madam Chair.

And also let me say it is good to see you.

Ms. NORTHUP. Thank you. It is great to see you.

Mr. TOWNS. Happy to know there is life after Congress.

Ms. NORTHUP. I have missed you.

Mr. TOWNS. Let me just begin—first of all I want to clear up something. I keep hearing $3 million. I keep hearing $29 million on this database. I mean how much does this database really cost? Let me put it on the record here.

Ms. TENENBAUM. Three million.

Ms. NORTHUP. The IT modernization cost $29. This is the first time I have ever heard the figure $3 million ever but it was necessary in order to have this public database so that everything could talk to each other but let me just say going forward this year we do not have additional FTEs in the budget to handle the cases that come in but after this year we do. So the cost is going to grow because we are going to have to manage all the questions of verification when, you know, the verification that is part of the intake of an incident is only a self-verification where you say to the best of my knowledge this is true and we know as we take in cases right now that sometimes people have the wrong product. They have, you know, so the verification that the litigation that is involved all of that will take more FTEs.

Ms. TENENBAUM. Mr. Towns, we had five separate databases or silos. They could not talk to each other so if someone sent us an e-mail on CPSC.gov and said my stove caught on fire, it was this manufacturer and this model number we would then manually have to put into our incident report on computers but we had all five. We didn't have a data warehouse where one system could talk to the other system. We needed an upgrade in our hardware in our computers. We needed an upgrade in software. So we could not even share information with CBP because our systems wouldn't talk together so all of this is a larger effort to get our technology up-to-date and that we have people who have said they have repeatedly told Mrs. Northup that it is $3 million. It is not $29 million and so it is $3 million. The database is $3 million. It is not $29 million.

Mr. TOWNS. OK, thank you. In 2008, CPSIA passed with broad bipartisan support. In fact I voted for it and was signed into law by President George Bush. According to your testimony, Commissioner Northup, this legislation has had unintended consequences you were talking about earlier to small businesses because of new testing standards. Would implementation of a component part testing rule benefit small businesses?

Ms. NORTHUP. We hope so. What we would hope is that there would be there were developed on the market suppliers that would provide pre-tested, pre-certified components. The snap, the zipper, the component so that somebody that say makes a child's outfit could go to Michael's or whoever, the hobby shop and pick up these components pre-tested and pre-certified and then depend on those in their final certificate as, they would have currency. We would ac-

cept those pre-certifications and certificates in the final product. It will help. It does not take away the fact that many small suppliers also had very small lots. They make things to order. They make things—for example at the toy fair I met a woman who makes things for the blind. She has to have buttons for the eyes because just painting them on doesn't give you the tactile benefit. We have educational toys that are very small lives and so all these seeking out these certification numbers, these pre-certified products then doing a final certificate that picks up all of those. Every time you go back to the store and you pick up another lot you have to change your final certificate. You have to change what your tracking label is so that it reflects a new certificate. It is a lot of paperwork and the small businesses are telling us that is why we are going to make one thing or we are going to get out of the children's product business. It is very, you know, Ashley Furniture was probably the best example. They spent $13 million testing. They have 14 layers of primer and final product. They have every screw, nut and bolt. Not one product, not one component violated the lead limit but it was $13 for them to get the tracking and the component testing done so far.

Mr. TOWNS. Thank you, Madam Chair.

Mrs. BONO MACK. Thank you. The gentleman's time has expired.

I would like to recognize my new colleague from Kansas, Mr. Pompeo, for 5 minutes.

Mr. POMPEO. Thank you, Madam Chairman.

Chairman Tenenbaum, you said that there has been no cost benefit analysis performed at all, is that correct?

Ms. TENENBAUM. Under the CPSIA the Commission had mandatory deadlines and also the CPSIA did not require the Commission to do cost benefit analysis. Now, under the Federal Hazardous Substance Act and no under CPSA which is our general act we do cost benefit.

Mr. POMPEO. But there has been none on the database? So when we are talking about $3 million or $29 million that has been spent, I mean the real cost of this thing isn't what we are paying for the database. It is the hundreds of millions of dollars this is going to cost small business but we don't truly have any idea, is that correct, no analysis?

Ms. TENENBAUM. Well, the Commission has not done that because it is not our role to but we would certainly support any other agency that wanted to do one. We would provide them with the data.

Mr. POMPEO. Thank you. I appreciate that. You said, "The rub is that we have to post it." You have to post it.

Ms. TENENBAUM. We have to post within 10 days.

Mr. POMPEO. So would you support this committee recommending that we provide flexibility at your agency that you don't have to put it on that you can make a decision about whether it is accurate and the right thing to do? Today you say we have forced your hand. Would you prefer that we gave your agency more flexibility?

Ms. TENENBAUM. I think we need to stay to a limit where we can get information out as quickly as possible to consumers. I have heard of too many deaths, Danny Kaiser, other deaths of children

because parents did not have the information and we need a quick turnaround if a product is a problem. We will make the best faith effort once it is given to us that it is materially inaccurate to make a determination.

Mr. POMPEO. I appreciate that. I think this, I am an engineer. I love data but I also and I run for office and I know what people put online exactly.

Mrs. BONO MACK. Will the gentleman yield for briefly?

Mr. POMPEO. Yes, of course, yes, ma'am.

Mrs. BONO MACK. First day jitters, opening night jitters up here. We forgot to start the clock so we would like to point out that your time will expire at 2 minutes.

Mr. POMPEO. That is great. I assumed it was my first day jitters that you were referring to.

Mrs. BONO MACK. That is right. It was your first day jitters. You had it right.

Mr. POMPEO. That will happen as well. I just think this is a plaintiff's bar dream and I think the cost of litigation will be enormous.

Ms. Northup, do you think it would make sense to delay the implementation of the database to let this committee work out some of the challenges to make sure that we get good information to the public and we don't end up causing all the problems that have been alluded to this morning?

Ms. NORTHUP. Absolutely, as I walked around the toy fair in New York, one person after another raised this issue to me. Some already had issues that had come in on the soft launch and said there is nobody that knows what the facts are on this. They don't have to give enough facts that you can possibly know what the product is. They don't have to give enough specifics that you can possibly know what went wrong with it or even if it is they can't even make the claim it is materially inaccurate because they have no way to correspond with us and have us be able to go back to the source who might have firsthand information. I think that when you consider the jobs in this country and you consider the fact that we are going to have manufacturers running around terrified about how they are going to answer a database question when maybe it is not even their product. Maybe it is a product that is not even on the market anymore. It is 20 years old. And consumers if I might say the benefit to consumers I think of the ladders ad where you have two people playing tennis on the tennis court and all these people come running down to the point where it is crowding out the legitimate game of tennis. If you have all these data dumps from these organizations in here, the legitimate firsthand benefit that you can get from this database is lost and I might see that company X had a problem. It might not be there product. It might be a product from 20 years ago. I might think, OK I don't want to buy that product so I buy a different product and guess what? Really that was the safer product. So it is even misdirecting people to what is a hazard and what isn't a hazard, just some of the questions to stay within the timeframe.

Mr. POMPEO. Thank you, Commissioner Northup.

I yield back my time.

Mrs. BONO MACK. I would thank the gentleman.

I would and it is an honor to recognize the chairman emeritus and author of the original Consumer Product Safety Act as well as the conferee on CPSIA and the chair would recognize Congressman Dingell for 5 minutes.

Mr. DINGELL. Madam Chairman, I thank you and I appreciate your courtesy in recognizing me and I commend you for this hearing.

As my colleagues some of them will remember and the members will remember we passed with the support of the unanimous support of this committee a unanimous bill on this matter. It was an excellent piece of legislation. It got to the United States Senate and it got screwed up. And then we went to conference and the screw-up was worsened and it wasn't very long before I was being called by industry inquiring why a bill which had passed the House unanimously, come out of this committee unanimously had been turned into such a sad caricature.

So I have some questions for the Commissioner and I want to welcome the Commissioner and I want to welcome you particularly, Commissioner Northup.

Ms. NORTHUP. Thank you.

Mr. DINGELL. And I want you to understand this hearing is not critical of you but it is of the United States Senate and those people that screwed this up and we are going to try and figure out what it is we can make the matters right and help you to do your job. And I speak with particular outrage because years ago John Moss and I wrote the original legislation which created this your Commission in this room right here. It was a great success until the Senate got its hands on it and some members of the conference assisted actively in that screw-up.

Yes or no to both Commissioners, Section 101 of the CPSIA permits the Commission to exempt certain materials and products from the ax lead limit? I believe that is so narrowly written as to be useless. Do you believe that Section 101(b) needs to be amended in order to permit the Commission a more reasonable degree of discretion in granting exemptions, yes or no?

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

Mr. DINGELL. To both Commissioners, similarly given widespread concern about the feasibility of retroactively applying CPSIA's requirements to existing inventory, do you believe the applicability of such requirements should instead be limited to products manufactured after the act's effective date or the effective date of regulations promulgated by the Commission pursuant to the act except in instances where the Commission decides that exposure to a product causes a health and safety risk to children, yes or no?

Ms. TENENBAUM. Yes, for a hundred parts per million.

Ms. NORTHUP. Yes, for all parts. If they are not dangerous we should allow them to still be sold.

Mr. DINGELL. And you ought to have waiver authority, isn't that right?

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

Mr. DINGELL. That makes for intelligent regulation.

Now again to both Commissioners, likewise I am concerned that the age limit for children's products defined in CPSIA unnecessarily subjects certain products such as bicycles to more rigorous standards then otherwise necessary. Do you believe the age limit used in the definition of children's products should be lowered, yes or no?

Ms. TENENBAUM. No.

Ms. NORTHUP. Yes.

Mr. DINGELL. We have got a division. Do you believe that the Commission should have authority to deal with the question of waivers on that matter where it makes good sense, yes or no?

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes, except I worry about the big companies having the resources to ask for a waiver and for the exact same products small ones won't.

Mr. DINGELL. The little guys don't.

Do both Commissioners, I am also concerned that the blanket applicability of certification and tracking label requirements could be when required unduly cumbersome especially for small businesses. Would an exemption for small businesses like the one contained in the Food Safety Modernization Act be feasible in the case of consumer products, yes or no?

Ms. TENENBAUM. I would like to study that more. I don't know. I didn't read the food act.

Mr. DINGELL. That is a fair answer.

Ms. NORTHUP. I would support that but I would support doing away with third-party testing and certification and just let the advanced technology we have today. All the new tools that you gave us are plenty adequate to make sure that companies comply with our laws.

Mr. DINGELL. Now, to both commissioners I will expect that you will if you see fit make additional remarks for the purposes of the record and I sorry that I am so constraining you. Again to both commissioners, do you believe that the Commission's problems in implementing CPSIA can be remedied solely by administrative action by CPSC, yes or no?

Ms. TENENBAUM. No.

Mr. DINGELL. Commissioner?

Ms. NORTHUP. We could make some significant changes if we made the absorb ability exclusion mean something and I think there is we could have the majority of the commissioners didn't so it will take your action to change that.

Mr. DINGELL. I thoroughly agree. We have made a fine mess out of this. It has to be rectified legislatively.

Again to both Commissioners, if not do you support amending CPSIA to address these problems?

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

Mr. DINGELL. Would you assist the committee in our effort to do so?

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

Mr. DINGELL. I will be submitting additional questions to the record to allow the Commission to expand on these matters and I

will ask Madam Chairman unanimous consent that my letter of March 4, 2009, to Commissioners Nord and Moore as well as their respective replies be entered into the record.

Mrs. BONO MACK. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. DINGELL. And members of the Commission, I just want to ask this one additional question. Do you believe that implementation of CPSIA has overburdened the existing CPSC staff and resources?

Ms. TENENBAUM. No.

Ms. NORTHUP. Yes.

Mr. DINGELL. Does CPSC have adequate resources with which to implement CPSIA as well as to carry out its other duties?

Ms. TENENBAUM. Yes, if we are not cut.

Mr. DINGELL. Commissioner?

Ms. NORTHUP. No, I don't think we do but we could change the law and it would be sufficient and I am delighted to see you again, Representative Dingell.

Mr. DINGELL. Well, you are welcome back here, Commissioner. I am happy to see you and I am sorry we are seeing you under these circumstances and just maybe we can fix this mess. Thank you.

Mrs. BONO MACK. The gentleman's time has expired.

The chair would recognize the gentleman from Kentucky, Mr. Guthrie for 5 minutes.

Mr. GUTHRIE. Thank you, Madam Chairman. I appreciate the opportunity to be here and I have to follow up Chairman Emeritus Dingell. To the other committee and back so I might have missed this but I know the ranking member asked questions about the database and Congresswoman Northup, my fellow Kentuckian, or Commissioner Northup, you were going to answer. You may have since I was gone. They went through a series of questions on the database and did you agree with the security that it is a secure database and they did clear up all the problems or if you have mentioned that then we will move forward.

Ms. NORTHUP. Let me just state again I think it is so important because this database is going to be turned on that first of all the database rule that was written there was great division within the Commission. It is one of the few things that has divided us so seriously. I just I want to reiterate that there are a lot of things that we agree with and that the chair has really done a magnificent job in coordinating with Customs and implementing so much of this law. It is a shame that we are sort of here on the biggest debate issue but it is going to be turned on in 3 weeks. It is going to allow anyone to input, anyone, any organization, third-hand knowledge, hearsay information and the type of things that we see everyday. We see a Facebook where somebody talks about Pampers and about that they are causing a huge problem. Suddenly we got in 500 or we get in all these cases as I have to be careful I don't talk about what is confidential but I think we have made public statements that to date we have not been able to find that there is any problem with Pampers. But we haven't even finished providing a final statement on that.

Mr. GUTHRIE. OK, I want to get to another question. Go on for just a minute.

Ms. NORTHUP. For the companies that then would be running around because somebody collected some information on Facebook and at this point the person that owns the Facebook account could transfer every one of those incidents into our database. They do not have to know who it happened to. They put it in as their entry. That is legal. That is what they are supposed to do. It is the name and contact information of the person entering it, not the consumer.

Mr. GUTHRIE. Right, I just wanted to ask another question real quick.

Ms. NORTHUP. Yes.

And, Chairman Tenenbaum, and actually we met a long time ago when I was a State legislator and you hosted us for the Southern Regional Education Board in Charleston and you did a great job. Thanks but I am a manufacturer, my background, and like the Administration we are looking to create jobs and the ability to export, not just importing, increase our imports and my understanding is that CPSIA is that American manufacturers won't be allowed to sell their goods abroad unless they meet the lead standard that we just heard the Chairman Emeritus say we have got to fix. So and also they won't be able to sell abroad unless their goods have not been sold in the United States and never will be sold in the United States. So if they have never been sold in the United States or won't be they won't be able to sell abroad unless they compete with this law that we just heard other comment we think is unworkable. Do you think this puts American manufacturers at a disadvantage to or we couldn't make something here and send it somewhere else to go into a product and then come back here?

Ms. TENENBAUM. No, American manufacturers have to meet the standard which is 300 parts per million right now and 90 parts per million for lead.

Mr. GUTHRIE. Well our point is that it is difficult to do that and as the chairman emeritus has said the whole law we need to fix that.

Ms. TENENBAUM. No, yesterday we heard testimony. Excuse me, I just interrupted you.

Mr. GUTHRIE. No, go ahead. Go ahead. No that is fine. We are trying to get all of this in before we are out of time.

Ms. TENENBAUM. I am sorry but this came to mind but we heard testimony about one of the largest testing laboratories in the world and they said they tested over 90,000 data points and they found that 97 percent already comply with the hundred parts per million lead and so people are already going to that standard. And the other thing is that domestic manufacturers and importers have to comply with the 300 parts per million lead content and 90 parts per million.

Mr. GUTHRIE. Part of it is the labeling too.

Ms. TENENBAUM. Right and Canada has already dropped their standard for lead content to 90. The EU has 90 but it is the solubility standard but it is roughly comparable and but it is so worldwide people are dropping their lead standards. Because I have an article from May 1936, which talks about the harm lead can do to children and just this article says even infinitesimal amounts can bring down the IQ. It is a potent neurotoxin. It can cause brain

damage and there is no de minimis standard known. There is no safe level of lead known.

Mr. GUTHRIE. I am going to let you go.

Ms. NORTHUP. Let me just say that we have health agencies that tell us about what is an unsafe level of lead. The CDC, the NIH, the EPA all tell us a child's lead level needs to be under 10 parts per deciliter of blood. Right now only one percent of all children reach that and in every case even the consumers, I mean the American Association of Pediatrics tells us that if a child doesn't, they don't say it is their bicycle handlebars to take away those toys. They tell you it is because of lead in paint, lead in gasoline and what to do to offset those. No one has ever suggested in the health community that your bicycle handlebars and things like that have anything to do. In fact, we allow more then that amount of lead, the FDA in a child's piece of candy can have more lead.

Mr. GUTHRIE. As a manufacturer I can tell you if you agree with everything and it all works like it is supposed to, the traceability side of that because I have an automotive supplier and he said if he had to trace everything came in and went on, that is a real cumbersome thing for our American manufacturers, I think.

Ms. NORTHUP. Thank you.

Mrs. BONO MACK. The gentleman's time has expired.

The chair recognizes the gentleman from Texas, Mr. Olson, for 5 minutes.

Mr. OLSON. Thank you, Chairwoman, and thank you to our witnesses for coming in. I greatly appreciate your time and your expertise.

I want to follow up on a comment you made, Commissioner Northup, and I will quote here, "We are better at the border then we have ever been."

Ms. NORTHUP. I was talking about products coming in.

Mr. OLSON. Yes, products coming in. Exactly. No, no, yes, yes, not yes but we don't want to open that. No, ma'am.

I represent the Port of Houston which is the largest port in foreign products here in America and you all know that the Panama Canal is being widened and deepened and it is expected to be opened in 2015. When it is these very, very large cargo ships that right now are coming to the western coast of Mexico, the western United States are going to punch through the canal and come to the Gulf Coast. Any my question is are you working right now with DHS with the Customs people to make sure that we have the resources that when these ships get through if not were going to have some of these toys and all the things we are concerned about that you can verify and test these things and get ahead of this curve so they don't come to the pier, get off the pier and go into our economy?

Ms. NORTHUP. Really the person who has done so much on this is our chair and I feel like I ought to let you answer first because you have a lot you can say.

Ms. TENENBAUM. Well, first of all thank you. First of all, last year we were the first agency to sign a memorandum of agreement with Customs and Border Protection whereby we get to see the manifest data. We have two people located at CBP and the CTAC office and we look at data on ships as it comes to the United States

before it is even import before it is unloaded and we have also just finished a study on a risk management study so that we can target shipments and we are very, very accurate. Last year we, I had the numbers but we were able to have at least the targeted shipments that we stopped we found at least 50 percent had already violated. So we are working so that companies that don't have history of non-compliance can have a safe lane and those that we need to target and monitor closely we will have information well ahead of time before they get into the port. Because I visited the Port of Savannah and also the Port of Charleston and I understand that we need to get the shipments unloaded.

Mr. OLSON. Yes, ma'am.

Ms. Northup, any comments?

Ms. NORTHUP. Yes, only that it is so sophisticated it is so impressive. I think when you consider how advanced it is and the fact is one of the reasons we have so many fewer recalls is because we are intercepting things at the port and it does add to my claim what I believe is a reason why third-party testing and all the certification and tracking of every single component is going to be obsolete in compared to the new ways we have to survey what is coming into our ports.

Mr. OLSON. Yes, ma'am. Thank you very much for those answers. I would encourage you to keep working with the Customs and Border Patrol because this is will be big all along the Gulf Coast.

Ms. TENENBAUM. They are our strongest partners.

Mr. OLSON. I mean it is not just the Port of Houston. It is all the ports along the Gulf Coast are going to be impacted by this and obviously we need to stop these products from getting in as quickly as we possibly can.

The other question I have is about the impact of CPSIA on sort of the charities. Under the lead content test requirements right now is it a violation to donate clothes, toys or other items to children 12 and under if the items have not been tested and certified in compliance with law?

Ms. TENENBAUM. No, it is not a violation for you to give clothes to Goodwill or Salvation Army or any other charity. We have worked with all the charitable organizations and worked with States. We had a handbook. We have done an extensive education. We know that there are certain items that pose the largest risk. Children's jewelry could have cadmium or lead. Painted toys, items made out of vinyl because vinyl degrades quicker and lead can be exposed and there have been high amounts of lead in vinyl clothes, in vinyl clothing. So we have worked with them on things they need to check and not resell. Also it is illegal to sell a recalled product under CPSIA so if a crib has been recalled or playpen you shouldn't sell it. But we work really hard with the States and the organizations to try to educate them on what are the high-risk products.

Ms. NORTHUP. It is almost impossible to resell any children's product. As Goodwill told me in Kentucky they have lost a million dollars in sales in the first 4 months that this went into effect because the fact is they actually paid $35,000 to buy an XRF gun. They hired somebody and trained them. By the time they found a button that passed they had spent more money then they would get

on a blouse for example, a child's blouse and they found that so all of those things went out. All the new standards we have made for durable goods make every other durable good that is in the marketplace whether it is a car seat or a bath seat or you cannot sell them secondhand. So while it is not against the law for you to donate them, it is against the law for them to sell anything that doesn't comply.

Mr. OLSON. Thank you, ma'am.

Mrs. BONO MACK. The gentleman's time has expired.

The chair recognizes Congressman Lance for 5 minutes.

Mr. LANCE. Thank you very much, Madam Chair, and good afternoon to you both. I am new to the full committee, therefore new to the subcommittee and it is my honor to meet both of you and I look forward to working with both of you.

As I understand that you have stayed portions of the law for several years in a row. I also understand that some manufacturers might still be worried that state attorneys general might enforce the requirements even though those requirements have been stayed and I would request your comments as to perhaps whether or not your stay should be effective with the States as well.

Ms. TENENBAUM. Well, the stay will automatically lift December 31 of this year. Now what we have not and that is just for testing and certification for lead content, not lead paint. We didn't stay it but lead content.

Mr. LANCE. Yes.

Ms. TENENBAUM. And so but you still have to comply. So we didn't stay enforcement. Any manufacturer has to comply with lead paint limits, total lead content, limits on certain phthalates, small parts, magnets, and F963. Now, that means that attorneys general may enforce the law just as we might enforce the law and the large manufacturers as well as the large retail, if you go into any retail establishment you will find that their products have been tested because they require before the Wal-Marts, the Toys R Us, Target, if they require you to show a third-party test and that is why many people are already testing. So the attorneys general are not stayed from enforcement and neither are we.

Mr. LANCE. And has that occurred in any situation with which you are familiar?

Ms. TENENBAUM. Sure we have several attorneys general who are very active in consumer product safety and you can as well as some States who have lower lead limits then we do. Illinois has a 40 parts per million lead limit. Proposition, I mean California has had Proposition.

Mr. LANCE. But do you know what? I do not. Do you know what it is in New Jersey? I do not know.

Ms. TENENBAUM. No, but I can look it up.

Mr. LANCE. Commissioner Northup, your comments?

Ms. NORTHUP. Yes, well first of all the attorneys general one of the things that the law did say is that attorneys general can enforce the law even though it is a federal law can enforce it at the State level and it has caused a lot of angst among manufacturers and, you know, even though Illinois has a 40 parts per million, it doesn't say that you can't sell it. It just says you have to label it saying it might cause lead poisoning in your child.

Mr. LANCE. I see. Thank you, I did not realize that.

A philosophical question, sometimes perhaps in all cases laws we pass here and that are passed at State capitols with which I am familiar have unintended consequences and then it is our responsibility to try to address them. Do you believe and I would address this to both of our distinguished witnesses. Do you believe that unintended consequences might on occasion result in overreaching?

Ms. TENENBAUM. Well here is the law that was passed—allows to exempt products. If we cannot exempt a product if normal use and abuse of the product results in any lead being absorbed into the human body, any lead. So that is why when you had bicycles and ATVs and books the any lead standard kicked in and that is where we say we need flexibility.

Mr. LANCE. That would require modification of the statute in your opinion?

Ms. TENENBAUM. It would require us to have some flexibility and that if there is no harm to the child or to the person using it then we could have a waiver or an exemption. We can grant an exemption.

Mr. LANCE. Ms. Northup.

Ms. NORTHUP. I think by far the simpler thing and the thing to give certainty to the providers, the businesses is to have an exemption that makes the absorb ability exclusion mean something. There were three exclusions. There were electronics. There was the inaccessible. We have made both of those two exclusions mean something considerable but we have decided that not one thing qualifies for the absorb ability. If you changed it to say no amount of lead could be absorbable that would cause any material change in a child's lead level we would totally rationalize this bill.

Mr. LANCE. Would you suggest that this be done at your level or through by statute?

Ms. NORTHUP. Well, I do make the argument I have a legal brief that I think that it did give us that because I believe that Congress when they passed it meant for that section of the law to mean something and there is a lot of statutory past interpretation that shows that you can't just write off a whole section of the law. But the majority of the Commissioners decided that we couldn't and so it will take a change by you.

Ms. TENENBAUM. First of all that was.

Mrs. BONO MACK. The gentleman's time has expired and we need to move along but I would like to thank both witnesses for appearing today.

I also urge both of you moving forward to reexamine how the Commission prioritizes risk. Let us focus more on real dangers facing our children which may be going unaddressed at the present time and not perceived ones. Again thank you both very much. I look forward to working with you on fixing as Chairman Emeritus Dingell said all that is screwed up.

Ms. TENENBAUM. Thank you, Madam Chairman. Thank you all.

Ms. NORTHUP. Thank you.

Mrs. BONO MACK. We will just give a few moments for the second panel to get in place.

The subcommittee will come back to order.

On our second panel we have four witnesses. I would like to welcome them all.

Our first witness is Jolie Fay. Ms. Fay is the founder of children's product company called Skipping Hippos based out of Portland, Oregon. She is also secretary of the Handmade Toy Alliance which she also represents today.

Our second witness is Wayne Morris. Mr. Morris is the vice president of Division Services for the Association of Home Appliance Manufacturers representing manufacturers of all sizes and various consumer products.

Also today, we have Rick Woldenberg of Chicago, Illinois. Mr. Woldenberg is the chairman of Learning Resources, Incorporated, a children's product manufacturer and direct mail retailer that specializes in educational toys. The company is a small business but employs over 150 people.

And finally, we will hear from Nancy Cowles, Executive Director of Kids in Danger also based in Chicago. Ms. Cowles is testifying on behalf of Kids in Danger, Consumer Federation of America, and Consumers Union.

Again, welcome to all of you. You will each be given the 5 minutes and to help you keep track of time, I am going to make him remember to keep track of time and when the light turns yellow before you in the little box please try to sum up your remarks so that when the light turns red you are ready to stop. And with that we will welcome Ms. Fay for her first 5 minutes and just ask that you turn on the microphone and bring it close to your mouth and you are recognized for 5 minutes.

STATEMENTS OF JOLIE FAY, FOUNDER, SKIPPING HIPPOS AND SECRETARY, HANDMADE TOY ALLIANCE; WAYNE MORRIS, VICE PRESIDENT, DIVISION SERVICES, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; RICK WOLDENBERG, CHAIRMAN, LEARNING RESOURCES, INC.; AND NANCY A. COWLES, EXECUTIVE DIRECTOR, KIDS IN DANGER

STATEMENT OF JOLIE FAY

Ms. FAY. Chairman and members of the subcommittee, thank you for inviting us here.

I make children's ponchos in my home in Portland and I am testifying today on behalf of the Handmade Toy Alliance members. We are the people knitting hats on the train and we are the mothers in line with you at the store. We are the people from your hometowns who have grown up in families that craft and we are your neighbors and your families and we are constituents, and we need your help to bring commonsense changes to the CPSIA. Our businesses were born from the desire for safe children's products. We make them with care and attention and most often from materials purchased from our local craft stores. Our dreams are to build heritage products that will be cherished and remembered and saved for generations.

Our broad membership experience is the unintended consequences of the CPSIA in different ways. Micro-sized businesses that craft and retail toys and children's products make up half of our membership. Often these are one-person businesses who

produce and sell in very small batches. The CPSIA makes no provisions for these businesses to be able to operate. People crafting in their homes are expected to third-party test the same way as a mass-market manufacturer. The cost of third-party testing for lead and ASTM standards are prohibitive in very small batches. Tracking and labeling requirements are too burdensome and people find the law and its requirements too complex to understand and apply.

At the Hollywood Senior Center in Portland, Oregon there is a small retail shop that sells items made by the seniors. They live on an incredibly small fixed income and would never be able to afford a single ASTM third-party test. The workmanship that has developed over a lifetime helps contribute a small but very substantial supplement to their monthly income. These are artisans and this law makes them criminals.

Another segment of small-batch businesses producing multiple items and selling in boutiques and online are also not able to absorb the testing costs for their products and are treated equivalent to mass-market manufacturers. Companies who create only 20 or so products producing in batches in 10 and 20 units simply cannot afford these testing costs and expect to be able to charge the same price or even a reasonable price.

A third group hurt is in the specialty toy retailers. These are the mom and pop toy shops in towns across America. The CPSIA removes the ability for them to sell most safe and local products and many international products. Loss of specialty toys from Europe particularly tilts the children's marketplace in favor of mass produced items and removes the opportunity for special retailers to differentiate themselves. Without the ability to offer unique items to sell in their store, there is nothing that can set them apart from their competitors.

Finally, toy importers represent two percent of our membership. It is a small percentage but a big component of the culture of specialty toys in America. Within this melting pot culture that we live in they provide access to many safe products from our ancestors and countries of origin enriching the value of play and helping the culture survive. The CPSIA treats these small-scale importers as if they were mass-market manufacturers and they suffer alongside the U.S. small-batch manufacturers.

I grew up in Wyoming, where my great-grandparents were homesteaders. For generations my family has made toys and clothes and saddles for children. I cherish these items because they are from my family and they were made with care, just like what I make. Our members are people just like me from all across the country making safe products that we cannot afford to third-party test. I am here today because I want my children to continue this tradition and to understand and learn from our entrepreneurial spirits. Crafting gives them joy and selling it gives them reward.

While the HTA has worked closely with the CPSC, we feel strongly that the current legislation does not grant the CPSC the flexibility to address our members' needs. Our membership is in need of a legislative fix that only you in Congress can give. Solving the problems of the CPSIA is not only for our members' immediate financial relief but will save generations of future handmade products. For thousands of years cultures have been studied through

their handcrafted toys. In museums around the world there are artifacts of handmade toys connecting the cultures of the past to societies of today. What will the legacy be if the CPSIA destroys our generation's ability to share this piece of history?

Thank you for the opportunity to speak.

[The prepared statement of Ms. Fay follows:]

Good afternoon, my name is Jolie Fay. I am the owner of Skipping Hippos. I make children's ponchos in my home in Portland, Oregon. I am testifying on behalf of the 619 Handmade Toy Alliance members. We are the people knitting hats on the train, we are the mothers in line with you at the store, and we are the people from your church and home towns who have grown up in families that craft. We are your neighbors, your families and your constituents and we need your help to bring common sense changes to the CPSIA.

Our businesses were born from the desire for safe children's products. We make them with care and attention, most often from materials purchased from our local craft stores. Our dreams were to build heritage products that will be cherished and remembered, and saved for generations.

Our broad membership experiences the unintended consequences of the CPSIA in different ways.

Micro-sized businesses that craft and retail toys and children's products make up half of our membership. Often, these businesses are family or single owner businesses with no employees who produce and sell products in very small batches. The CPSIA makes no provision for these businesses to be able to operate. People crafting in their homes are expected to third party test the same way as mass market manufacturers. The costs of 3rd party testing for lead and ASTM standards are prohibitive in very small batches, tracking and labeling requirements are too burdensome and these micro-businesses find the law and its requirements too complex to interpret, understand and apply.

For example, at the Hollywood Senior Center in Portland, there is a small retail shop. The items in the shop are exclusively made by their members. Handmade trucks and planes are made by retired loggers in their 70's and 80's. They are on an incredibly small fixed income and would never be able to afford a single ASTM laboratory test. The workmanship that has developed over a lifetime helps contribute a small, but very substantial supplement to their monthly income. These projects keep them active and give them meaning to each day. These are artisans, but this law makes them criminals.

Another segment of HTA members are small batch businesses, producing multiple items and selling in boutiques and on line. They also are not able to absorb the testing costs for their products as the CPSIA makes no provision for these entities to continue to be economically viable after absorbing the costs of full CPSIA compliance. Again, they are

treated equivalent to mass market manufacturers. Companies, who create only 20 or so products, producing in batches of 10 and 20 units, simply can not absorb the testing costs and still expect to charge a reasonable price for the added expense.

Representing 19% of our membership, a third group hurt by the CPSIA is small specialty toy retailers. These are the "mom and pop" toy stores tucked into towns all across America. The CPSIA removes the ability for them to sell almost all of the safe local products and many international products. Loss of specialty products from Europe, particularly, tilts the children's products marketplace in favor of mass produced items and removes an opportunity for specialty retailers to differentiate themselves. Without the ability to offer products unique, which sets their store apart from the competition, there is little reason for the existence of the small specialty toy retailers. So the CPSIA limits consumer choice unnecessarily and creates a regulatory barrier to international small batch manufacturers.

The final group is specialty toy importers, representing 2% of our membership. It is a small percentage, but a big component in the culture of specialty toys in America. Within this "melting pot" culture that we live in, these importers provide access to many safe products from our ancestors' and countries of origin, enriching the value of play and helping the specialty market survive. The CPSIA treats these small scale importers as if they were mass market manufacturers and therefore they suffer alongside USA based small batch manufacturers.

I grew up in Wyoming, where my great grandparents were homesteaders. For generations, my family has made clothes, toys, saddles, and belts for their children. I cherish these items because they are from my family, and they were made with care, just like what I make. Our members are people like me, from all across the country, making safe products that we simply cannot afford to third party test. I am here today because I want my children to understand and learn from our entrepreneurial spirits. Crafting gives them joy, selling it gives them reward.

While the HTA has worked closely with the CPSC – submitting comments on pending rules, attending CPSC sponsored workshops, regular email 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. Our membership is in need of a legislative fix that only you, in Congress, can give.

Solving the problems of the CPSIA is not only for our members' immediate financial relief, but will save generations of future handmade products. For thousands of years, cultures have been studied through their handcrafted toys. In every museum around the world, there are artifacts of handmade toys –connecting the cultures of the past to societies of today. What will our legacy be if the CPSIA destroys our generations' ability to share in this piece of history?

Thank you for the opportunity to speak before you today. Please note that in my written testimony, I have shared some of our ideas to rectify the unintended consequences of the CPSIA.

About the Handmade Toy Alliance

The Handmade Toy Alliance represents small toymakers, children's product manufacturers, and independent retailers whose businesses cannot survive without repairing the Consumer Product Safety Improvement Act (CPSIA). We are lobbying for meaningful reform of the CPSIA to aid small businesses caught in a snarl of unintended consequences. We need meaningful, common sense reform to preserve the heart and soul of small batch specialty toys and children's products.

Handmade Toy Alliance Platform

The Handmade Toy Alliance (HTA) represents a broad spectrum of small businesses involved in production, retailing and importing of children's products. Our membership experiences the burden of the unintended consequences of the Consumer Product Safety Improvement Act (CPSIA) in different ways. Our platform outlines these issues for each business category along with the solutions and remedies desired by the HTA.

Business Type	% Members	Issues Caused by the CPSIA	Solutions Needed
Micro-business children's product crafter - retailer[1] *(single owner or small group, no employees, making toys or children's products in very small batches)*	48 %	The CPSIA makes no provision for micro-businesses to be able to operate – they are treated equivalently to mass market manufacturers • Cost of 3rd party testing for lead and ASTM F963 not economically feasible • Tracking, labeling and recordkeeping requirements burdensome • The law and its requirements are too complex to interpret, apply and attempt compliance	• Provide an exemption from all 3rd party testing, certification and from labeling requirements

[1] For example; small family business producing toys for retail at craft shows or online, sole proprietor producing unique children's products for retail locally, a retired senior who produces 20 wooden toys annually, a homemaker producing artistic children's products and retailing through etsy.com.

Business Type	% Members	Issues Caused by the CPSIA	Solutions Needed
Small-business children's product manufacturer *(less than 10 employees making toys or children's products in small batches or as one-of-a-kind)*	15 %	The CPSIA makes no provision for these entities to continue to be viable businesses after absorbing the costs of the CPSIA – they are treated equivalently to mass market manufacturers • 3rd party testing and certification for lead content is too costly in small batches • 3rd party testing and certification for ASTM F963 is too costly in small batches • Tracking, labeling and recordkeeping requirements burdensome	• Allow compliance with lead content standards with less expensive alternatives like XRF scanning and component part certification[2] • Make ASTM F963 testing voluntary • Tracking labels become voluntary except for durable nursery items. Manufacturers implementing tracking labels benefit from a lesser burden in the event of a recall.

[2] When and if certified component parts are readily available.

Business Type	% Members	Issues Caused by the CPSIA	Solutions Needed
Specialty toy retailers *(less than 10 employees retailing specialty children's products)*	19 %	The CPSIA makes no provision for specialty retailers to have access to a myriad of safe international products while simultaneously depressing the market for domestically produced specialty items • Loss of specialty products from Europe tilts the children's products market in favor of mass retailers selling mass produced items • Loss of specialty products from the USA removes opportunity for differentiation with mass retailers • Limits consumer choice unnecessarily • The CPSIA creates a regulatory trade barrier to international small batch manufacturers	• Recognize European Union safety standard EN-71 as an alternate for CPSIA • Direct CPSC to monitor international standards in children's products and recognize acceptable standards as alternates for CPSIA • See two previous categories for restoring access to domestically produced specialty products

Business Type	% Members	Issues Caused by the CPSIA	Solutions Needed
Specialty toy importers *(less than 10 employees importing specialty children's products)*	2 %	The CPSIA makes no provision for small scale importers / distributors of foreign children's products. They are treated equivalently to mass market manufacturers. • 3rd party testing and certification for lead content is costly in small batches • 3rd party testing and certification for ASTM F963 is costly in small batches • Tracking, labeling and recordkeeping requirements burdensome	• Allow compliance with lead content standards with less costly alternatives like XRF scanning • Make ASTM F963 testing voluntary • Tracking labels become voluntary except for durable nursery items. Manufacturers implementing tracking labels benefit from a lesser burden in the event of a recall. • Recognize European Union safety standard EN-71 as an alternate for CPSIA

For our membership and all Americans, the CPSIA regulations usher in a sea-change in the culture of children's products in the USA. Unless Congress acts, the accessibility of unique, small batch toys and children's products will significantly diminish. The children's products heritage of the next generation will be mass produced with little uniqueness. Save our members and save the culture.

Mrs. BONO MACK. I thank the gentlelady.

And now we will hear from Mr. Morris for 5 minutes.

STATEMENT OF WAYNE MORRIS

Mr. MORRIS. Thank you, Chair Bono Mack and members of the subcommittee. Thank you for inviting the Association of Home Appliance Manufacturers to testify on this important matter.

AHAM supports the creation of a public database to assist consumers with easy access to relevant and accurate safety information, and it is important that that situation be properly funded. Of course there are many private Internet sites that play the same role and so it makes little sense for the Commission to expend major resources to create a competing website unless it adds value. A critical part of that value proposition is that the information should be of high quality, accuracy and utility.

Unfortunately, the Commission's current database design hinders the publication of accurate information. It places unreasonable burden on manufacturers and it does not require timely resolution of good faith material inaccuracy claims. We need the database to be news we can use. With a few changes the accuracy of the information can be improved. Nothing we are proposing inhibits in any way the Commission from pursuing reports it receives from consumers or anyone else to see if a corrective action is necessary or a violation of the standards has occurred.

Our testimony here is limited to what is placed on a public, incident, Internet-based database. We have three points.

One, the Commission should resolve claims of material inaccuracy. According to the CPSC material inaccurate information is a report of harm in a report which contains "information that is false and misleading and which is so substantial and important as to affect a reasonable consumer's decision making about the product." This includes misidentification of the product, manufacturer or private labeler, or the harm or risk of harm.

The manufacturer has the burden of proof and must provide specific evidence and describe how the report is wrong and how it should be corrected. It is in every legitimate party's interest that the Commission post only accurate information to the database.

Under the current regulations, all harm reports except for the ones of outstanding confidentiality claims have to be posted to the database within 10 days of transmitting the report to the company no matter what. Accordingly, even if a company meets the Commission's burden of proof and responds within the short 10-day period, by submitting substantial evidence of material inaccuracy the Commission will post the complaint to the database before resolving the material inaccuracy claim. The Commission actually has no obligation to resolve the material inaccuracy claimed by any particular time. As we all know, once information has been published on the Internet even if it is revised or retracted later, it stays in cyberspace forever and may already have done damage.

We believe it is wrong for the Federal Government to allow companies and their brands to be unfairly characterized, even slandered without evaluating the company's claim. Because of the extremely limited timeframe to receive the information, analyze it and develop a response, we believe that it is unlikely that many

companies will comment on a high percentage of reports of harm and the chairman spoke earlier of the soft launch proving what we say. If a company does respond, basic fairness requires that the government decide before the data is publicly released.

Two, the eligible reporters to the database should be limited to those with direct information. The CPSIA lists those who may submit reports of harm to the inclusion of public incident database. The Congressional specificity of these groups was purposeful to encourage their involvement and to make clear that those who are the consumers, their representatives, first responders or care providers to consumers should not participate in the database for their own ends. This applies to trial lawyers, consumer groups and even trade association like mine. Remarkably, the Commission is now in the final database rule shoehorn certain non-governmental organizations into a definition of public safety entity. Congress should reinstate the original intent of the legislation.

The database ought to be limited to those people who purchase the product, use the product or cared for someone who has suffered an injury. Otherwise the database is simply a blog and there is no reason for the Federal Government to displace or compete with private blogs.

Three, the Commission should require a registration a model or other descriptive information. There are thousands of categories of consumer products, manufacturers and brands where there are numerous models of a product. Although the Commission encourages submitters to provide more detailed information which will allow the public and manufacturers to identify which particular product was subject to alleged incident, it does not require that information. This is a mistake which Congress should remedy.

The suggestions that we have made do not prevent a useful, accessible public database. Rather, we believe our proposals enhance the utility of this new mechanism.

Thank you for the opportunity to testify. I would be glad to answer questions. Thank you.

[The prepared statement of Mr. Morris follows:]

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Testimony
of
Wayne Morris
Vice President, Division Services
Association of Home Appliance Manufacturers

Before the
Energy and Commerce
Sub Committee on Commerce, Manufacturing and Trade
U.S. House of Representatives

Hearing on CPSC

February 17, 2011

Testimony of
Wayne Morris
Vice President, Division Services
Association of Home Appliance Manufacturers
House Energy and Commerce Subcommittee on
Manufacturing and Trade
Hearing on Review of CPSIA and CPSC Resources

February 17, 2011

Chair Bono Mack and members of the Subcommittee, thank you for inviting the Association of Home Appliance Manufacturers to testify on this important matter.

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's membership includes over 150 companies throughout the world. In the U.S., AHAM members employ tens of thousands of people and produce more than 95% of the household appliances shipped for sale. The factory shipment value of these products is more than $30 billion dollars annually. The home appliance industry, through its products and innovation, is essential to the US consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significant number of U.S. jobs and economic security.

For over 30 years, AHAM has been at the forefront of product safety through consumer education, support of safety standards and promoting good safety practices in the United States and throughout the world. We have worked with the Commission closely in a number of areas, including, for example, advocating improvement in safety design, manufacturing and practices in China. We supported passage of the CPSIA (albeit we advocated significant amendments) and

greater Commission funding. Recently, we supported the use of the Commission's new authority under CPSA section 15(j) with respect to hair dryers.

All throughout my career, I have been engaged in a variety of safety activities. I oversaw product safety for several appliance manufacturers, helped manage a leading safety testing laboratory, and since having been at AHAM, have led our efforts with the Commission and safety standards organizations in the United States and internationally. I serve on the board of the International Consumer Product Health and Safety Organization. I hope that my friends and colleagues at the CPSC and consumer groups understand that AHAM's and my motivation is to support product safety in the context of a reasonable and fair regulatory system. I also want to clarify that my comments are not a criticism of the hardworking and dedicated employees at the CSPC with whom I have worked for many years and who do their best even under difficult circumstances. The Commission and its staff have done an excellent job of making sure that viewpoints from industry have been heard. There have been several meetings, open hearings, and web meetings to allow for questions and comments. The process has been quite open.

In addition, I currently serve as the Chairman of the Industry Trade Advisory Committee Number 16 on Standards and Technical Trade Barriers to the U.S. Department of Commerce and the Office of the U.S. Trade Representative. In this work, our FACA Committee looks at the openness, transparency and national treatment of technical standards and testing work that is done around the world. In addition, our committee advises Congress on trade agreements.

AHAM supports the creation of a public database and we also support the funding necessary to execute this endeavor properly. Even before the enactment of CPSIA, the Commission had authority to create such a database, and we recognize that many consumers are

interested in easy access to relevant safety information. Of course, there are many private internet sites that play the same role so it makes little sense for the Commission to expend major resources to create a competing website unless it adds value. We believe that a critical part of that value proposition is that information should be of reasonably high quality, accuracy and utility. Otherwise, the application of significant CPSC resources is redundant and wasteful.

Unfortunately, in several respects, the Commission has made a policy choice or a legal interpretation to structure the design and operation of the website to decrease the quality and accuracy of information, to place unreasonable burdens on manufacturers, and not to require timely resolution of good faith material inaccuracy claims.

Fortunately, a few changes in the statute will make the operation of the database more fair, reasonable and accurate without undercutting the program. AHAM would like to make sure that the database contains "news you can use." The database will never be perfect but at least where there are motivated manufacturers who want to ensure more accurate entries, this participation ought to be supported.

I want to preface our specific recommendations by being clear that nothing we are proposing inhibits in any way the Commission from pursuing reports it receives from consumers or anyone else to see if a corrective action is necessary or a violation of standards has occurred. Reports of serious or potentially serious injury or harm, and even reports without a lot of detail, can still be reported to and pursued by Commission. Our testimony here is limited to what is placed on the public incident, internet-based database.

These comments are consistent with President Obama's new executive order on regulatory review which requires tailored, balanced rules. OMB has urged independent agencies to comply with the executive order and memoranda.

1. Information Should Not be Released to the Public Database While There is a Pending Claim of Material Inaccuracy

Commission's decision under CPSA Section 6A(c) (4) regarding material inaccuracy claims is dismaying.

According to CPSC, materially inaccurate information in a report of harm is a report which contains "information that is false and misleading, and which is so substantial and important as to affect a reasonable consumer's decision-making about the product." This includes misidentification of the product, manufacturer or private labeler or the harm or risk of harm. The manufacturer has the burden of proof and must provide specific information and evidence and describe how the report might be corrected.

To meet such a high standard of proof, companies need sufficient time to investigate the claim. In this regard, we think that the 10-day requirement is unreasonable and provides substantial challenges for the responding companies. Surely, since thousands of reports will be posted to the database every year (most unchallenged), if Congress increases the 10-day response, it would certainly not undermine the benefits to consumers and, as noted, would have no impact on the Commission investigating serious allegations.

A slight increase in time would also deal with the problem of CPSC not allowing brands to be registered. The extra time needs to be used by the brand owner to notify the manufacturer or importer. A retailer may have brands of the same product built by several manufacturers. Parties who raise frivolous allegations should be sanctioned (as should reporters of harm).

Moreover, it is in every legitimate party's interest that the Commission does not post materially inaccurate information to the database - there is no value in inaccurate or misleading information. Under the current regulation, all harm-reports (except for the ones with outstanding confidentiality claims) have to be posted to the database within ten days of transmitting the reports to the companies. Accordingly, even if the companies meet their burden of proof and respond within an incredibly short period (10 days) to a notice of a proposed posting and submit colorable and substantial evidence of material inaccuracy, the Commission will post the complaint to the database even if it is has not resolved the material inaccuracy claims. Indeed, there is no specific obligation under the regulation for the Commission to resolve the material inaccuracy claims by any particular time. Yet, as we all know, once information has been published in the public, internet database, even if it is revised or retracted later, it stays in cyberspace forever and may already have been used and disseminated to many other sites and for many purposes.

It is wrong for the federal government to allow companies and their brands to be unfairly characterized, even slandered, without the government evaluating a company's claim. Further, it is unwarranted that the Commission has as much as seven days to remove the complaint from the database, even after it determines that the report was materially inaccurate.

The law should be changed so that it is clear that no information may be published on the database if there is a pending claim of material inaccuracy. If the Congress wants a federal program that provides valuable information to consumers, while not unnecessarily burdening or harming US industry, then this simple due process should be required.

Because of the extremely limited timeframe to receive the information, raise it with the appropriate personnel within the company, analyze it, and develop a response, it is unlikely that

many companies will be able to respond in a timely manner to a significant percentage of reports of harm. If a company, however, does go through those lengths in such a short period of time, basic fairness requires that the government respond before the data is publicly released. Note, we are not advocating extra time for litigation or appeals, just a basic administrative decision.

2. **The Eligible Reporters to the Database Should be Limited, as Congress Intended, to those with First Hand Information about the Harm or with a Relationship to the Consumer.**

CPSIA Section 6A(b)(1)(A) lists those who may submit reports of harm for inclusion in the public incident database: (i) consumers; (ii) local, state or federal government agencies; (iii) healthcare professionals; (iv) child service providers; and (v) the public safety entities. The Congressional specificity of these groups was purposeful: to encourage their involvement and to make clear that those who are not the consumers, representative of the consumers, first responders or care providers to consumers should not participate in this database for their own ends. This applies to trial lawyers, consumer groups and even trade associations. Remarkably, originally the Commission proposed an "other" category, but then recognizing that that was clearly unauthorized, has now in the final Database rule shoehorned certain non-governmental organizations into the definition of "public safety entities." This action also is improper. Congress should reinstate the intent of the legislation.

Whatever value the database will have will not be because of rumor, speculation, misuse or "salting" of the database. Groups with a variety of motivations should not be allowed and do not need to place their often unwarranted opinions in a federal government database; there are countless internet sites for that purpose. The database ought to be limited to those who purchase

the product, use the product or cared or treated those who may have suffered from injury related to the product. Otherwise, the database is simply a blog, and there is no reason for federal government to displace or compete with private blogs.

3. **In the Interest of Accuracy, the Commission Should Require Registration of Model or Other Descriptor Information.**

There are thousands of categories of consumer products, manufacturers and brands where there are numerous models of a product within a general family of products. Although the Commission provides space and encourages submitters to provide more detailed information which will allow the public and manufacturers to identify which particular product was subject to the alleged incident or harm, it does not require that information as long as it is confident that it is a product covered by CPSC. This is a mistake which the Congress should remedy.

In most cases, more specific information is available to the consumer, which includes not only the manufacturer or brand but also the model number or other descriptor. Yes, there are consumer products (like rubber balls) where it is doubtful that the consumer will be able to provide much information beyond a name or brand, but where such information is available, the Commission should require it to be reported. The fact that such a requirement cannot always be adhered to is no reason not to apply it as much as possible. This action, which the Commission has resisted and in which our own thinking has evolved, will increase the usefulness of the report to reviewing consumers and will enable manufacturers a better chance to respond to the alleged report or to at least evaluate it for need to improve the product or take other actions.

We do not believe the totality of these suggestions prevents a useful, accessible public database. Rather, we believe that these proposals enhance the utility of this new mechanism. Improving the quality and fairness of the program will help prevent improper, unverified information from being publicized by the federal government.

Thank you for this opportunity to testify, and I will be glad to answer any questions.

Testimony of
Wayne Morris
Vice President, Division Services
Association of Home Appliance Manufacturers
House Energy and Commerce Subcommittee on
Manufacturing and Trade
Hearing on Review of CPSIA and CPSC Resources

February 17, 2011

Executive Summary

1. Information Should Not be Released to the Public Database while there is a Pending Claim of Material Inaccuracy

2. The Eligible Reporters to the Database Should be Limited, as Congress Intended, to those with First Hand Information about the Harm or with a Relationship to the Consumer.

3. In the Interest of Accuracy, the Commission Should Require Registration of Model or Other Descriptor Information.

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

And, Mr. Woldenberg, you are recognized for 5 minutes.

STATEMENT OF RICHARD WOLDENBERG

Mr. WOLDENBERG. Chairman, Ranking Member Butterfield and distinguished members of the subcommittee, thank you for the opportunity to testify this morning.

My name is Richard Woldenberg. I am chairman of Learning Resources, an Illinois-based 150-person manufacturer of educational materials and educational toys. I am accompanied today by my son, Ben, and my daughter, Alana. This is my second appearance before the subcommittee to testify about the CPSIA.

Three years after its passage, the high cost of the CPSIA, its overreaching and intrusive nature, its non-existent impact on injury rates and its depressing effect on the markets is beyond dispute. What remains a mystery is why we did this to ourselves in the first place.

The crisis, such as it is, seems like a media-fed hysteria. CPSC recall statistics reflect only three unverified injuries and one death attributed to lead from March, '99 to April, 2010, out of literally trillions of product interactions by tens of millions of children. Notably, there was only one recall of phthalates in U.S. history, 40 little inflatable baseball bats in 2009.

The possibility of injury is real but what is the probability of injury. Supporters of the CPSIA have never proven a causal link between the reported hazard in children's products and actual cases of injury. This is a very serious indictment of this law.

Children can take lead into their bodies in many ways including through the air, water and food everyday. The CPSIA places all of the blame on children's products without any substantive proof of cause. Lead or phthalates poisoning may seem so frightening that no price is too high to pay. In our panic, the absence of proof that children's products are causing injury hardly seems to matter. But in the wake of Toyota, is jumping to conclusions about causation still acceptable? Is it responsible government to simply argue that the CPSIA doesn't harm children and that businesses will just absorb the costs?

The harm inflicted by the CPSIA has been brought to the subcommittee's attention time and again over the last 3 years. First, absurdly high compliance costs. We have experienced a 10 times increase in costs from 2006 until 2011, all without any change in the safety of our products because they were safe to begin with. This cost jobs and curtailed business expansion opportunities.

Second, rules mania. Doubt over the interpretation of CPSC rules is widespread. No wonder the rules and law applicable to our business now balloon over 3,000 pages and counting. Several customers respond to this uncertainty by instituting their own safety rules. One even insisted that we test for lead in paint even if the item had no paint on it.

Third, absurd complexity. The explosion of safety rules makes it difficult or impossible to know how to comply. In the context of a real product line there is just too much to figure out. What is a children's product? What isn't? What is a toy? Which materials need to be tested or retested? In practical terms, it is a nightmare.

Other rules make us look stupid to customers. Consider for instance this warning on one of our rock sets. "Caution, federal law requires us to advise that the rocks in this educational product may contain lead and might be harmful if swallowed." This is a form of humiliation.

Fourth, liability risk deters cooperation. Under the CPSIA the CPSC has become a coercive enforcer of rules with little mercy or sense of proportion and no exercise of judgment. This environment certainly contributed to a lack of cooperation by component manufacturers who won't test for CPSIA compliance and subject themselves to CPSC persecution. Trust has been destroyed in so many ways.

Congress must restore to the CPSC the responsibility to assess risk. My top five recommendations are that first, the CPSC should be mandated to base its safety decisions, resource allocations and rules on risk assessment. Second, the definition of children's products should be limited to children six-years-old or younger and the definition of toy for phthalates purposes should be limited to children three-years-old or younger. Third, lead in substrate and phthalate-testing should be based on the reasonable business judgment of the manufacturer, not mandated outside testing. Resellers should be entitled by rule to rely on the representation of manufacturers. Fourth, mandatory tracking labels should be explicitly limited to long-life heirloom products with a known history of injuring the most vulnerable children. And fifth, the 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.

In conclusion, I urge your committee to address the fundamental flaws in the CPSIA to restore order to the children's product marketplace and to protect small businesses from further damage. I appreciate the opportunity to share my views here today and I am happy to answer your questions.

[The prepared statement of Mr. Woldenberg follows:]

House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing and Trade
February 17, 2011

Re: A Review of CPSIA and CPSC Resources

Statement of
Richard M. Woldenberg
Learning Resources, Inc.
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STATEMENT OF RICHARD M. WOLDENBERG
Chairman, Learning Resources, Inc.
Vernon Hills, Illinois

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 this oversight hearing, I want to highlight the economic damage wrought by the CPSIA lead and phthalate rules without achieving any material improvement in safety statistics. I also want to draw attention to pending rules or rules currently being implemented with the potential to put additional pressure on manufacturers and retailers, all without benefit to children. Finally, I offer my suggestions on how to fix the CPSIA.

Children are our business and the safety of children is our number one priority. The CPSIA, unfortunately, purportedly to protect children from vaguely-defined dangers, 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 more difficult to grow our business. Given these considerable sacrifices, I wish I could say 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 in a single recall since our founding in June 1984 (these products were 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 government's "help" has not raised our safety game but it has reduced our bottom line and cost some of our employees their jobs.

The precautionary principle 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 glacial implementation of this law by the CPSC has tested and disproved the case for mandatory testing. Mandatory testing for lead-in-substrate and phthalates (the bulk of the testing requirements under the CPSIA) has not been implemented by the CPSC yet recall rates for lead in children's products have collapsed. [Notably, there has only been one recall for phthalates in U.S. history – a tiny recall of 40

inflatable toy baseball bats in 2009.] Since August 2008, U.S. manufacturers and retailers have faced rigorous new lead content limits without the obligation to independently test their products prior to sale. There is no sign of a lack of consumer confidence as a consequence, despite dire predictions by consumer groups. The fall in recall rates suggests that clear standards and a lot of industry engagement produces good safety results. The last 30 months were a test of the theory behind the CPSIA – and the theory failed.

The CPSIA significantly broadened the reach of federal safety regulation well beyond what was needed to deal with the lead-in-paint toy recalls that made headlines in 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 popular assertion that the "common toy box" justifies this mighty list has no factual support but condemns these product categories to CPSIA's punishing jurisdiction. No one keeps their ATV, t-shirts, carpets, pens and toys in a big box. The absence of widespread actual childhood lead injuries caused by children's products suggests that the "common toy box" is matter of a parental supervision and no concern of the federal government.

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 2011, our company's testing costs jumped ten-fold. We estimate that our testing costs will rise further when the CPSC (as anticipated) lifts its testing stay at the end of 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 5.5 plus an outside lawyer on retainer. We fund these jobs by discontinuing profit-producing sales, marketing and product development jobs – the CPSIA is NOT a stimulus program. *Personnel, legal and other out-of-pocket safety expenses (besides testing) have more than quadrupled in the last three years – all without improving our already exemplary safety record.*

b. **Increased Administrative Expenses.** The CPSIA requires that all children's 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. In our case, we have estimated that we will spend $50,000 in CPSIA tracking label expenses for every dollar of hypothetical recall cost "saved". Ironically, with the strict new safety regime in place, we believe the already small chance of a product safety problem has been reduced further – making our investment in tracking labels virtually worthless by definition. The money to pay for all this administrative busy work comes from foregone business opportunities. *We are being forced to liquidate our company to apply tracking labels that no one will ever 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 possible return on investment other than to make the federal government happy. 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 byzantine recordkeeping nightmare. We will now be forced to manage each component separately, tracking test reports on a component-by-component basis. Our product line of 1500+ products may have tens of thousands of CPSIA components –

managing so many components separately is a mindboggling undertaking. It all sounds good on paper – but just try actually doing it. The system will collapse of its own weight or will be ignored. Will this make children safer?

c. **Reduced Incentive to Innovate.** The increased cost to bring a product to market under the CPSIA will make many valuable – and economically viable – 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, such as products serving blind or deaf children, are less likely to come to market and many new small business entrants may find themselves priced out of the market or unable to finance a start-up. It also means that mass market companies will gain yet another market advantage over their small business competitors. The experience of being regulated by the CPSIA depends very much on the scale of your business – the smaller you are, the worse it gets until it is utterly suffocating. Many small but important markets will be hurt, like educational products for disabled children.

d. **Crippled by Regulatory Complexity.** Our problems don't end with testing costs or increased staffing. We are being crippled by regulatory complexity. More than 30 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. Today, the applicable laws, rules and interpretative documents exceed 3,000 pages. As a practical matter, it is impossible to master all of these documents – and yet it's potentially a felony to break any individual rule. The rules and CPSC staff commentary keep changing, are still being written and are rarely if ever conformed to prior versions. 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 famous recalls of 2007 and 2008 were never a "rules"

problem – they were clearly a compliance problem. Imagine what will happen now with an unmanageable fifteen-fold increase in rules – and a seemingly infinite increase in CPSC penalties.

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 hyper-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. The double whammy of massive new regulatory obligations and the prospect of devastating liability are driving small businesses out of our market.

In its continuing effort to implement the CPSIA 30 months after passage, the CPSC is considering changes or new rules likely to make matters worse for our market. Consider the following:

1. **100 ppm Lead-in-Substrate Standard.** As required by the CPSIA, the CPSC is considering whether or how to reduce the current standard for lead-in-substrate from 300 ppm to 100 ppm. As the law is currently written, the new standard will be implemented on August 14, 2011 if the CPSC does not act to change it or without Congressional intervention. Many issues about this standard remain unresolved – and the corporate community has had to respond. Some retailers have implemented their own 100 ppm standard with immediate effect because the CPSC has yet to act decisively. The hearing on 100 ppm mandated by the CPSIA is scheduled for February 16, 2011, less than six months before the legislative deadline. The anticipated market disruption is being exacerbated by this slack regulatory response.

   In addition, the potential reduction in lead standards sends entirely the wrong message to the market. The purpose of the federal lead standard is to induce the "right" behavior by

manufacturers and retailers, NOT to specify a threshold for health or safety. In removing the margin of error for manufacturers, not only has the standard introduced new and uncontrollable economic risk into the manufacturing process, but public perceptions of safety have been significantly altered. While no one has demonstrated that a reduction from 300 ppm to 100 ppm in lead-in-substrate in children's products will have any measurable or detectible impact on health or safety, the new standard encourages the public to believe that their safety depends on never being exposed to products with lead in excess of 100 ppm in even a single component. The general public naturally takes the legislative process as a form of endorsement of 100 ppm as a health standard. This changing attitude toward lead is reflected by a November 2010 PIRG report which commented on a lab test showing 87 ppm lead in a piece of children's jewelry: "While this does NOT violate the CPSIA standard for lead in surface coatings, scientists have not identified a 'safe' level of lead exposure for children." In other words, the new standard for lead is now zero. We fully expect to be unable to sell merchandise with 101 ppm lead in it under the new rule – meaning that the marginal 1 ppm of lead over the standard makes our product "dangerous" in the eyes of the law and the market. Who will be able to withstand this kind of extraordinary regulatory excess?

2. 15 Month Rule. Since passage of the CPSIA, the CPSC has been working on the so-called "15 Month Rule" continuously without success. Last summer, the agency finally released a draft of the rules on "reasonable testing programs" and testing frequency which generated a firestorm of negative comments. Since then, the agency has been silent, leading to continuing doubt about which rules should be implemented in our supply chains to ensure compliance with CPSC requirements. The rules themselves represented an unprecedented intrusion in the daily affairs of manufacturers of innocuous items like t-shirts, books, magnets, shoes, ATVs, pens, musical instruments and so on. The expense implied by the over-arching requirements of these unrealistic rules can be best illustrated by my calculations (using CPSC testing figures in the draft rule) that our company will have to spend $15 million per year on testing - $10,000 per product per year –

to comply with CPSC requirements. This far exceeds our annual profit. The scale of the problems created by this rule exceeds the space available here. The 15 Month Tule hangs over the head of the market like the Sword of Damocles.

3. Public Database. The CPSC rule implementing the CPSIA's public injury/incident database creates a database likely to be filled with erroneous or malicious incident reports. The rules are written so that even erroneous information cannot be prevented by manufacturers from being posted to the database. The rule adopts a post-it-and-forget-it approach, but manufacturers and retailers are unlikely to be as sanguine about the contents of the database. The slanderous destruction of brands and cherished products can be anticipated.

Other problems relate to the flow of information under the rule. The agency's promise to widely promote use of the database suggests that consumers will be encouraged to communicate with manufacturers via the database, rather than directly. The restriction on provision of incident data to manufacturers (such as the contact information of the filer or photographs of the incident) means that manufacturers will have a sharply reduced ability to investigate incidents and make necessary changes. This will make kids less safe and expose manufacturers to far greater liability. In addition, the short timeline for circulating incident data prior to publication means that the database is likely to divert a great deal of attention from the day-to-day administration of our businesses. This is yet another government-induced "crisis of the hour". We cannot afford this kind of "help".

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 based on risk assessment analysis.

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". *The tenets of a reasonable testing program should be set by the reasonable business judgment of the manufacturer.* The mandatory third party testing requirement should be revoked. Resellers should be entitled **by rule** to rely on the representations of manufacturers. Phthalate testing policy should be clarified to exempt inaccessible components, metals, minerals, hard plastics, natural fibers and wood.

D. Definition of "Children's Product" should be limited to children six 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 three 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. Preempt state consumer "right to know" laws as they apply to lead or phthalates. Regulation of these substances should be the exclusive domain of federal law. In addition, myriad state regulation of these substances depresses interstate commerce.

J. 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.

Mrs. BONO MACK. Thank you.

Ms. Cowles, you are recognized for 5 minutes.

STATEMENT OF NANCY A. COWLES

Ms. COWLES. Thank you. Thank you chairman, ranking member, and other subcommittee members for allowing us to testify here today.

I am Nancy Cowles. I am the executive director of Kids in Danger. KID was founded in 1998, by the parents of Danny Kaiser who you have already heard about today, who died in a very poorly designed and inadequately tested portable crib. A portion of the Consumer Product Safety Improvement Act is in fact named after Danny. His parents and our organization are moved that lasting improvements to the safety of juvenile products will always be associated with his name.

Contrary to how it has been portrayed, CPSIA was not a slapdash attempt to address new reports of lead-painted products from China and bad press in the Chicago Tribune. Many sections of the law were previously introduced bills including mandatory standards and testing for juvenile products, a ban on using unsafe cribs in childcare, product registration, Internet labeling and lead limits.

KID has been reporting on the problems of lead in children's products and looking for a limit for those elemental lead since 2004. Even with delays and incomplete implementation, CPSIA has already shown success in making children safer. My written testimony does go into much greater detail but here are just a few areas.

Over the past 4 years we have seen 10 million cribs recalled in this country. That is a lot of cribs and we know from past history on recalls, many babies are still sleeping in those cribs that are dangerous. A report released just today by the American Academy of Pediatrics shows that 26 children are rushed everyday to hospital emergency rooms because of injuries caused or taking place in a crib.

CPSIA finally gave CPSC the authority to end a decade of inaction in the voluntary standard setting process on cribs and address real world hazards that have killed dozens of children. The CPSIA also requires that infant-toddler durable products such as cribs, strollers and highchairs include a product registration card to give manufacturers the ability to contact consumers in the event of a recall or product safety issue. Danny's mother has testified before this former body that she firmly believes her son, Danny, would be alive today if the product that killed him had come with one of those simple cards.

One of the most significant improvements in safety will be the database which goes live in March. It will both help individual consumer's research purchasing decisions as well as report when they have a safety problem with a product. In addition, it will help spot injury patterns and emerging hazards. The CPSC has put in place, as we have heard, many safeguards to keep the information accurate and useable.

We have also heard that before the CPSIA was passed, CPSC's ability to protect the public had been dramatically weakened. In

1972, when it was first started the agency was appropriated would be $176 million in today's dollars and had 786 full-time employees. Over the next 2 decades it dropped by almost 60 percent.

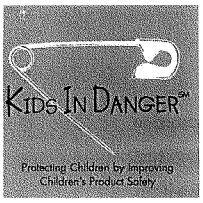
CPSIA infused CPSC with resources exactly where they had been lacking in the preceding years. Through the CPSIA and the appropriations process, CPSC has taken a number of important steps to protect consumers. They have a strong team in place to address safe sleep for infants. They have updated their internal data management in preparation for the new database and they have reinvigorated industry setting standard bodies. CPSC is a stronger more effective agency today because of the Consumer Product Safety Improvement Act. Consumers including children are safer. Implementation will have real safety results across all of CPSC's work and CPSC has in addition continued to address emerging hazards such as Chinese drywall, cadmium batteries, and more.

There have been delays and problems with implementation especially in the areas of testing for lead and other hazards. We fully support the Handmade Toy Alliances call for clear rules for reasonable testing for micro-manufacturers of children's products including the component testing procedures that are underway. But no matter where they make their purchases, parents deserve to know the products they buy for their children are safe, whether it was made in someone's garage, a small workshop, or a huge factory in China.

How do you know that the wheels on the baby's toy truck won't come off if you aren't testing it? How can we be sure products don't contain lead if they or their components aren't tested? Parents certainly can't ascertain the presence of lead. It is a known neurotoxin whose effects are permanent and irreversible. The damage is cumulative so every exposure simply adds to what the child has already been exposed to. And it has been suggested that we move to an accessible limit or use the risk analysis on every product but as we are talking here today about CPSC's resources, I do not believe that this product-by-product analysis of accessibility and risk would be useful and in fact would tie up most of CSPC's time and resources. We know lead is dangerous and we know it shouldn't be in children's products.

Thank you for your time.

[The prepared statement of Ms. Cowles follows:]



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Testimony of Nancy A. Cowles
To the House Sub-Committee on Commerce, Manufacturing and Trade, "A Review of CPSIA and CPSC Resources,"
February 17, 2011

Thank you, Chairman Bono Mack, Ranking Member Butterfield and Subcommittee members for this opportunity to testify before you today regarding the Consumer Product Safety Improvement Act and U.S. Consumer Product Safety Commission resources. I offer this testimony on behalf of Kids In Danger, Consumer Federation of America and Consumers Union.

KID is a nonprofit organization dedicated to protecting children by improving children's product safety. The organization was founded in 1998 by Linda Ginzel and Boaz Keysar, after the death of their son Danny Keysar in a poorly designed and inadequately tested portable crib. A portion of the Consumer Product Safety Improvement Act (CPSIA) is named after Danny. His parents and our entire organization are so moved that lasting improvements to safety of juvenile products will always be associated with his name. As Danny's mother, Linda Ginzel said when she testified before the House Subcommittee on Commerce, Trade and Consumer Protection in 2004, "improved children's product safety will be Danny's legacy."

Contrary to how it is often portrayed, CPSIA was not a slap-dash attempt to address new reports of lead-tainted products from China and bad press in the ***Chicago Tribune***. Many sections of the law were previously introduced bills, including the sections in the Danny Keysar Children's Product Safety Notification Act. These provisions include mandatory standards for durable infant and toddler goods, a ban on

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selling recalled products or using unsafe cribs in child care, and product registration as well as internet toy labeling and lead limits. KID reported on the problems of lead in children's products back in 2004.[1] At that time we asked CPSC to establish a limit for lead content in children's products.

CPSIA Successes

Even with delays and incomplete implementation, CPSIA has already shown tremendous success in making children safer. I'd like to highlight a few of these areas:

Safer Infant Sleep Environments

Pervasive design flaws have caused the recall of more than 10 million cribs over the past four years. Recalls and corrective actions for cribs have been issued for non-compliance with safety standards and because of serious risks posed to babies. The CPSIA requirement for a strong mandatory crib standard gave CPSC the authority to persuade the voluntary standard setting body, the ASTM International Crib Subcommittee, to end a decade of inaction and strengthen the standard to address real world hazards that have killed dozens of children. The final CPSC crib standard incorporates provisions that replicate the everyday use of cribs, such as durability tests, mattress support tests, and tests for the effectiveness of hardware. The resulting CPSC standard is a successful result of the CPSIA. And I'm sure we can all agree that the crib, the only product intended for us to leave our babies in unattended, must be as safe as possible.

Product Registration for Juvenile Products

The CPSIA also requires that infant and toddler durable products, such as cribs, strollers and high chairs, include a product registration card in their

[1] ***Playing with Poison: Lead Poisoning Hazards of Children's Product Recalls, 1990-2004.*** August 2004, Kids In Danger (Chicago).

packaging and provide an opportunity to register online. This gives manufacturers the information necessary to directly contact consumers in the event of a recall or other product safety issue. Too many consumers never hear about a recall of a product that they have in their home and as a result continue to use recalled products. This registration program will increase the number of consumers who hear about a recall. Today, most manufacturers have both online registration sites and include the cards. KID has evaluated 157 manufacturer web sites and found that almost all have online sites that consumers can use to register infant durable products. Children are safer because of this. Again, from her testimony in 2004, Linda Ginzel stated that she firmly believes that her beloved son Danny would be alive today if the Playskool Travel Lite had come with this simple registration card.

Mandatory Toy Standards

Despite the fact that conformity assessment bodies have not yet received accreditation to conduct full-scale testing to the mandatory toy standards, with the expectation of tighter enforcement down the road, some manufacturers are already adopting robust testing. With conformity assessment bodies receiving accreditation we anticipate more significant safety enhancements in the future.

Internet Toy Labeling

When consumers now purchase toys for children online, the same choking hazard warnings that appear on the toy packaging will appear online. With so much purchasing done online these days, this allows parents to see the warning before they buy a product. This new safety benefit is a result of the CPSIA.

Consumer Product Safety Incident Database

When the new publically available Consumer Product Safety Incident Database goes live in March, it will be a great new resource for the Commission, consumers, manufacturers and retailers. The database will help individual consumers research purchasing decisions as well as report when they have a safety problem with a product. For the Commission, Congress, consumer groups such as KID, CU, & CFA, manufacturers and retailers, it can help spot injury patterns and emerging hazards, allowing product design changes and recalls perhaps before an injury or death.

CPSC's Budget History

Before the CPSIA was passed, CPSC's ability to protect the public had been dramatically weakened. In 1972, when CPSC was created, the agency was appropriated $34.7 million (almost $176 million in today's dollars[2]) and 786 full time employees (FTEs). CPSC's staff 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%.

Any changes to CPSC appropriations during the period from 2000 to 2008 were marginal at best and some years were actually a decrease, given the increase in CPSC's mandatory expenses. This allocation forced CPSC to cut back on its staff and limit its programmatic goals. CPSC's 2008 Performance Budget document, for example, painted a very bleak picture of the agency's work for the future. The budget document contained 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. The 2008 Performance Budget document was replete with

[2] http://www.westegg.com/inflation

staffing cuts, limitations to programmatic goals and the absence of other goals and projects.

CPSC efforts to reduce product hazards to children and families were hindered by the forced reductions in FTEs. One of CPSC's hazard reduction strategic goals was to reduce the death rate from fires by 20 percent. However, CPSC was forced to cut 6 employees from its fire team. CPSC also had to cut 8 employees from its staff who work on children's and other hazards. Given the changing product safety market, this was incredibly limiting.

CPSIA's Direction of CPSC Resources

CPSIA prioritized issues at CPSC and infused CPSC with resources exactly where they had been lacking in the preceding years. The ***Chicago Tribune***[3] highlighted the flaws in the agency's operations – ignoring reports of injuries, a CPSC chairman who testified that he would take a dangerous toy away from his own children, but not have CPSC take any action to stop the sale of the known hazard, and an acting Chairman who denied any need for additional funding, even at the time her agency was unable to keep up with injury reports, data analysis and testing of hazardous products.

Through the CPSIA and the appropriations process, which provided for additional resources and staff, CPSC has taken a number of important steps to protect consumers: it has developed a strong team to address safe sleep for infants – perhaps our most vulnerable consumers; it has updated internal data management in preparation for the new Database launch; and it has lit a fire under sometimes lackluster industry standard-setting bodies that have resulted in stronger standards for many products. CPSC is a stronger, more effective agency today because of CPSIA. Most importantly, consumers, including children, are safer. While the deaths

[3] "Kids at Risk: Toys, Cribs, Car Seats, Lead - Chicagotribune.com." *Chicagotribune.com*. Chicago Tribune, Sept. 2007. Web. 14 Feb. 2011. <http://www.chicagotribune.com/news/chi-safety-child-hazards-main,0,7129923.special>.

and injuries averted may not make the front pages the same ways that the lives lost did, the CPSIA was a long-overdue overhaul of what the CPSC can do to protect our children from product hazards.

CPSC is intently focused on CPSIA implementation now, as it should be. As with the start of any new program or initiative, resources will be focused on that effort to get it off the ground. CPSIA implementation will have real safety results across all of CPSC's work. CPSC has at the same time also been addressing emerging hazards – Chinese drywall; unsafe sleep products such as sleep positioners that were not covered by CPSIA, cadmium, batteries and more. The agency is making up for lost time, and is restoring balance to its work on children's safety.

CPSIA Challenges

Much of the negative coverage of the CPSIA has come from implementation issues for testing for lead and other hazards. We support the Handmade Toy Alliance's call for clear rules for testing for micro-manufacturers of children's products, including component testing.

But no matter where they make their purchases, parents deserve to know the products they buy for their children are safe, whether it was made in someone's garage, a small workshop or a huge factory (or garage) in China. How do you know the wheels on your toy truck for a toddler don't come off unless you test it? How do you know that the bottle propping device that looks like a pillow tied around a baby's neck is safe unless it meets some standard for products for infants?

And perhaps most troubling – how can we be sure products don't contain lead if they or their components aren't tested for lead? Parents certainly can't ascertain the presence of lead. Over the years, the American Academy of Pediatrics has testified numerous times about the dangers of lead. It is a known neurotoxin whose effects are permanent and irreversible. The damage is cumulative, so even though the largest source is old housing stock and pollution, any other amount

added by a toy or school math mat adds to the damage. There are no parents who would choose a lead-laced toy over one without lead if they have that information.

The CPSIA uses a total lead measure for its requirements. There has been much talk about moving to an 'accessible' limit or using 'risk analysis' to lessen the testing requirements on business. But, as we are talking here today about the use of CPSC's limited resources, this type of product by product analysis of accessibility and risk would certainly tie up much of CPSC's time and resources. We know lead is dangerous, and we know it shouldn't be in children's products. The time spent on this further analysis serves no safety purpose.

Specifically for lead and in general for safety regulations, there has been talk about 'cost-benefit' analysis. KID urges Congress to carefully consider the 'benefit' side of that equation. For instance, AAP estimates that costs from lead-tainted jewelry recalled in 2007 and 2008 could top $209 million in lost income alone.

In conclusion, KID, CFA, and CU feel that the CPSIA is a strong safety measure for toys, nursery products, and other children's products. It allows parents to have confidence that the cribs and strollers they buy for their children won't strangle them or cut off the tips of their fingers. That the toys they buy are safe for their child – no parts will break off a rattle or split apart from a puzzle for a toddler, causing a choking hazard; a known neurotoxin such as lead will not taint toys or other products their children use regularly. And if they have safety concerns about a product in their home, they can report it to the CPSC online, or search for similar complaints from other consumers. CPSIA has effectively made all products safer, but especially the products we buy for our most vulnerable consumers.

Again, thank you for allowing us to testify here today. Our groups have been working to keep children safe for decades and we will continue that work into the future.

Kids In Danger is a nonprofit organization dedicated to protecting children by improving children's product safety. KID's mission is to promote the development of safer children's products, advocate for children and educate the general public about children's product safety. Learn more at www.KidsInDanger.org.

Consumer Federation of America (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. CFA's web site is www.consumerfed.org.

Consumers Union of United States, Inc., publisher of Consumer Reports®, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications and services have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports®, its other publications and services, fees, noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

Mrs. BONO MACK. I thank the witnesses for your courtesy in honoring the red light and would like to recognize myself 5 minutes for the first round of questions.

First, Ms. Fay, welcome again to the Committee. I appreciate it very much. I think as a member of Congress every time I get the opportunity to see how our laws matter at home in our districts it is very important and sometimes very eye opening for what we do here. Just a very quick question, you are a crafter and your inspiration for your crafts is your own children, correct?

Ms. FAY. Correct.

Mrs. BONO MACK. So the items you make, your children are the first to try them out to test them out?

Ms. FAY. Always.

Mrs. BONO MACK. Well, thank you and, Mr. Morris, you mentioned briefly the comparing the database to your fear of it becoming a blog and I think we all have concerns and we recognize the changing nature of the Internet and that everyday we find new information there or new ways to learn about information. I too have some concerns about the database but how can you even begin to investigate a complaint if your folks don't know who it came from how to contact the complainant?

Mr. MORRIS. Well, you are right, Chairman. The issue with the database is one that has been troublesome to our manufacturers since the very beginnings of it. I believe that when this particular body, this committee considered the database originally, in the House it was a study bill and it became a situation with the requirements when it was added in the Senate. The issue of having invalidated information is very concerning to manufacturers whose real primary I guess you could say their real value is their brand name. That tends to be in many cases these days the primary activity that they operate. So any time that we have the ability to investigate further to take a little bit of additional time and certainly to contact the consumer would be a help to everyone in gaining accuracy to this database. It is really not much of use to anyone if it contains just allegations that have not been proven.

Mrs. BONO MACK. Thank you.

Ms. Cowles, in terms of safety who would you regard as the best couple of children's product manufacturers?

Ms. COWLES. Well, you know, what we tell parents who call us with that same question of what crib should they buy, what stroller, is that any manufacturer, you know, needs to meet the standards that are out there and that you can't necessarily go by brand name. So I think that what we are looking at here is that there are parents need to know that go to the store that any of the products on the store shelves whether it be a big name store or your small local retailer or someone selling at a craft fair that the product is not going to hurt their child and so I mean we don't.

Mrs. BONO MACK. So you don't actually help them with the answer when they call you for a specific help on their question?

Ms. COWLES. No, we certainly don't recommend one brand over another. No, we don't. We don't do any marketing for the brands.

Mrs. BONO MACK. Is there any company that has no safety problems at all?

Ms. COWLES. No.

Mrs. BONO MACK. Would you favor a CPSIA amendment that allows the Commission to decide if the crib standard is revised again whether childcare centers have to buy new cribs or not?

Ms. COWLES. For the next revision you mean not this current one? Yes, we do favor. We do not believe that it needs to continue to be retroactive. We think at this point with the number of dangerous cribs out there it is good to get rid of them now at this point and they do have the 2 years but I think any further changes because this was such a dramatic overhaul, any future changes could be perspective from the date of manufacturer so we do support that.

Mrs. BONO MACK. Mr. Woldenberg, how do you keep track of all of the federal and State requirements that apply to your business?

Mr. WOLDENBERG. We work pretty hard. It is a lot. We have a staff of five-and-a-half people including myself, plus an outside lawyer on retainer and we have been working at it for 3 years.

Mrs. BONO MACK. And then, Ms. Fay, how big is your staff to try to comply with the same requirements?

Ms. FAY. It is just me.

Mrs. BONO MACK. And, Mr. Morris, in the case of and I have got to be brief, in the case of youth ATVs, CPSC has made the judgment that the risk of lead exposure to children is outweighed by the risk that children face if youth ATVs are not available and they ride adult-size ATVs instead. Can you briefly say does inaccurate information in the database pose the same problem? If the database sounds a false alarm about one product couldn't consumers be scared into buying a more dangerous product instead?

Mr. WOLDENBERG. Chair Bono Mack, I won't try to explain on all terrain vehicles because that is really not our product category but you address the issue of the materially inaccurate information in the database and I believe that is one of the things that we believe very strongly that there is time that needs to be added to this sequence within the CPSC to resolve these types of issues and to make sure that the information that has been put onto the comment by the consumer is in fact accurate. That the model number is there, it treats that particular model number. It gives that information to the consumer or to others so that they can deal with it directly. It is also a problem that if these reports are made the Commission itself is going to seek to try and do an investigation. If they don't know, they will be running around trying every type of product. I think that we need to try and narrow that down. Thank you.

Mrs. BONO MACK. Thank you. I just appreciate—I am new with a gavel but I hold it and you guys stop and that is a pretty powerful feeling without having to pound it.

But I would like to recognize Mr. Butterfield for his 5 minutes of questioning.

Mr. BUTTERFIELD. Thank you, Madam Chairman.

Ms. Cowles, let me start with you. Your group as well as other groups that you are representing today seems to be acquainted with the dangers of lead.

Ms. COWLES. That is correct.

Mr. BUTTERFIELD. I think you have spent a lot of time reading about and studying and getting familiar with. As you note in your

testimony, you tried to raise the profile of the problem with lead in children's products some years ago, a few years before the massive recalls in '07 and '08. I am told that you even asked the Commission to act using its authority to establish lead content limits for children's products and I assume that the Commission didn't respond favorably. Can you speak to that please?

Ms. COWLES. Yes, in fact I have the study here that we released in 2004 looking at lead in children's products. We call it Playing with Poison and we were surprised and I think that actually the CPSIA has reaffirmed our surprise at just how pervasive lead is and so we are very concerned not only with lead in paint but the lead content. It is an irreversible damage that it does to a child. Well under the hundred parts per million limit that we are looking at is enough for a child to be exposed to and lower their IQ one point.

Mr. BUTTERFIELD. Do you have advocate for a total lead content limit?

Ms. COWLES. We do and we support the total lead that is in the CPSIA. We think it is the most straightforward, the simplest way to test as well as we believe less expensive then the soluble test.

Mr. BUTTERFIELD. All right.

Mr. Woldenberg, let me just briefly address something to you as well. You pointed to a label a few moments ago on the toy that said something. Would you repeat that again because we didn't see that in your written testimony?

Mr. WOLDENBERG. OK, I apologize, it says, "Caution, federal law requires us to advise that the rocks in this educational product may contain lead which may be harmful if swallowed." It goes on to say, "We stand behind the safety of all of our products" and gives our phone number.

Mr. BUTTERFIELD. Did you manufacture that product?

Mr. WOLDENBERG. Yes, it is a box of rocks for schools.

Mr. BUTTERFIELD. Unless we are sadly mistaken we are not aware of any federal law that requires that label to posted on the toy.

Mr. WOLDENBERG. We are unable to determine whether those levels of rocks, this is an educational product. There is an exemption in CPSC rules that allows us to label products as possibly containing lead if they are for educational use in school and that is why we did this. We did this.

Mr. BUTTERFIELD. But you take the position that it is required by federal law?

Mr. WOLDENBERG. It is required by the CPSC. We didn't want to do it.

Mr. BUTTERFIELD. All right.

Let me go back to you, Ms. Cowles, if I can and talk about the database. There has been a lot of conversation about that. Some people say data and some say data. I am a southerner, I guess I say data.

Ms. COWLES. Well, I am from South Carolina so I go with you.

Mr. BUTTERFIELD. Yes, yes, Ms. Cowles, Mr. Morris in his testimony takes issue with the Commission including certain NGOs in the definition of public safety entities. I assume he means the inclusion of consumer advocacy groups in that definition. Do you be-

lieve that groups like your group should be able to submit reports of harm for the database and if so please explain why?

Ms. COWLES. I do believe that there are instances in which a group like mine would have information about a case about an injury and in order to make sure that it was included in the database, might want to enter that into the database. And I can give you—I have been working on this issue for 10 years now and while we talk about the database as a new thing, as we have said the CPSC has always had this way to provide information to them. They have always had an online forum. They have always had their own database. The difference is that now the consumers now will have access to that public information. I have only once reported an incident to CPSC and that was because it was from a family who had already lost one child to an unsafe product and did not want to deal with CPSC again. That was the only incident in which I did it so I do believe there are instances where it will be done. I do not believe there is going to be this flood from groups like ours. I can assure you the parents that I deal with who call me about a problem, they have already reported it to the manufacturer but they are calling me or the CPSC so that the manufacturers who say they don't have the information, I have never found that to be the case.

Mr. BUTTERFIELD. I believe Mr. Morris calls it salting the database. Have you ever salted a Federal Government database? Do you know any group that has?

Ms. COWLES. Do you mean put false information in it?

Mr. BUTTERFIELD. Yes, recklessly done so.

Ms. COWLES. No, I certainly do not. I think we look forward to access to information. Now when a parent calls me about a child who has been injured or killed it takes me months to get that information from CPSC to see if there were other incidents or if there is a standalone incident. I am looking forward to having access to information that can keep children safe so I do not think and I will not be spending my time putting false information about anybody's products in it.

Mr. BUTTERFIELD. Do you understand you could go to jail for doing that or anyone could?

Ms. COWLES. Well, I wouldn't do it either way.

Mr. BUTTERFIELD. Anyone could.

Ms. COWLES. Yes.

Mr. BUTTERFIELD. All right, thank you very much.

My time has expired.

Mrs. BONO MACK. I thank the gentleman.

The chair recognizes the vice-chair of the subcommittee for 5 minutes, Marsha Blackburn.

Mrs. BLACKBURN. Thank you, Madam Chairman.

Ms. Cowles, do you know how exposure to lead occurs in a child?

Ms. COWLES. I know there are many different ways that exposure occurs.

Mrs. BLACKBURN. Well, according to the CDC it is direct ingestion such as swallowing paint chips, house dust or soil contaminated by leaded paint or through hand-to-mouth activities such as placing fingers or other objects in their mouth putting them in con-

tact with lead paint or lead dust. Do you know what today's major source of lead exposure is today according to scientists?

Ms. COWLES. Yes, I do.

Mrs. BLACKBURN. And what is that

Ms. COWLES. That is old housing stock and the environmental lead.

Mrs. BLACKBURN. According to the CDC the major sources of lead exposure among U.S. children are lead contaminated dust, deteriorated lead-based paint and lead contaminated soil. Do you know what scientists attribute this 91 percent drop—well let me go up here first? Do you know what the average blood lead level of a child under 5 was in 1970?

Ms. COWLES. No, but I am sure it was much higher than it is today.

Mrs. BLACKBURN. The average and this is according to the EPA, the average BLL of a child under 5 was 15 micrograms per liter. Do you know what the current level of concern is according to the CDC?

Ms. COWLES. You better tell me. I have a guess but, right.

Mrs. BLACKBURN. In micrograms do you know the average blood lead level, the BLL of a child under 5, do you know what that is today?

Ms. COWLES. No.

Mrs. BLACKBURN. OK, it according to the EPA in '07 and '08, the average of a child under 5 was 1.4 micrograms per deciliter. So that I think gives you a pretty good idea of how we are doing with the lead. What do you think has attributed to this 91 percent drop in the blood lead level?

Ms. COWLES. The banning of lead in paint, the banning of lead in certain products, the very extensive abatement efforts on the part of cities, States.

Mrs. BLACKBURN. Well, the CDC says it is the result of the removal of lead from gasoline as well as from other sources such as household paint, food and drink cans, and plumbing systems, so just some items there for the record.

Mr. Woldenberg, can you tell us what your annual testing costs are under CPSIA?

Mr. WOLDENBERG. We are projecting for, I am sorry.

Mrs. BLACKBURN. OK and also I want you to tell me how this has affected your business plan following the adoption of the rules. Let me see where it is now and what kind of changes you had to make.

Mr. WOLDENBERG. Group-wide we are projecting costs far in excess of $1 million up to $2 million for this fiscal year and we expect that to increase if the 15-month rule is implemented as currently drafted by the agency. The impact on our business is that a tremendous amount of money has been removed from our business at an extremely inconvenient time. Our head count is down about approximately 30 percent from peak. It is, of course, not entirely due to this law. There was the recession but it greatly depleted our resources. We have deferred on opportunities to expand our business range into younger child ages educational products simply because we don't want to be exposed to the risk.

Mrs. BLACKBURN. How many jobs do you think that would have created had you been able to move ahead with that expansion?

Mr. WOLDENBERG. Well, $2 million goes a long way especially when it is moved from your profits so I am hoping a couple dozen and we have about five people in quality control to compensate for that.

Mrs. BLACKBURN. OK so you are lacking a couple of dozen jobs.

Mr. WOLDENBERG. I would say so.

Mrs. BLACKBURN. Ms. Fay, welcome. I am glad you are here. Talk about the unintended consequences of CPSIA affecting small business owners like yours and I want you to talk in terms of jobs, prices and consumer choice in the marketplace.

Ms. FAY. We can't afford the third-party testing. We can't. It is not just the lead. It is the ASTM testing and the phthalate testing. I don't know anyone especially now this has been going on for so long and we have been fighting this for so long that none of us can.

Mrs. BLACKBURN. So it will shut you down? It will shut your fleece fabrics and things, it will shut you down. So instead of creating the environment in which government creates the environment for jobs growth to take place, you see this as something that is completely restricting your ability to do business?

Ms. FAY. Yes, I am still the only inventory I have.

Mrs. BLACKBURN. Direct and indirect jobs, how many jobs would that be costing?

Ms. FAY. It is mine, and it is every other crafter out there. If we can't continue selling our stuff, we are dead in the water.

Mrs. BLACKBURN. Well and I think that is everyone wants to make certain that we are handling the problems that are in front of us but I think we are all concerned when we look at the unintended consequences.

I yield back.

Mrs. BONO MACK. I thank the gentle lady.

The gentlelady from Illinois, Ms. Schakowsky is recognized for 5 minutes.

Ms. SCHAKOWSKY. Mr. Woldenberg, you have written that there are no injuries as a result of products with high lead levels and my colleague was just talking about lead. I am really confused here. Is there some argument here that protecting our children from lead in toys is an unreasonable direction to go in, Mr. Woldenberg, that this is not a problem? Do you have scientific data that would back up that there are no injuries as a result of products with high lead levels?

Mr. WOLDENBERG. Well, the source of my information is the CPSC and I went through every recall they did from '99 to 2010, line by line and what I have said consistently is that there are three unverified injuries in their reports and one death attributed to lead in recalls of children's products since '99.

Ms. SCHAKOWSKY. And so you are concluding that lead in toys, that that is OK? That it is not a problem.

Mr. WOLDENBERG. Oh no, I would never say that. It is not in doubt that lead is dangerous but the real question isn't whether lead is dangerous but the real question is whether our products are dangerous and the consequence of.

Ms. SCHAKOWSKY. I am really not following that. If lead is in toys and sometimes at very high levels and in trinkets and things like that how then and you believe that it is dangerous then how can the product not be dangerous?

Mr. WOLDENBERG. Well, I believe that Representative Blackburn cited that it is soluble lead that the CDC and NIH and EPA cite as the cause of blood lead levels rising and what is at issue I think largely today is the regulation of insoluble lead that is lead bound into substrate and I believe that is, you know, not nearly the cause for concern because we can't identify people who have been injured by it. We are a conscientious.

Ms. SCHAKOWSKY. All right, thank you.

Ms. Cowles, let us talk about the different tests and your comments are what Mr. Woldenberg has said.

Ms. COWLES. Well, I think that that the statistics from CDC do not differentiate between soluble and insoluble. It is lead dust. It is lead. That lead could be the total lead in the product. A child can transfer it from its hand to their mouth, you know, if you watch a child at play. If you were to put purple ink on a child's hand and have them be unaware and come back an hour later and see all the purple ink around their mouth. Even children you think are too old to mouthing you would see that they are ingesting whatever gets on their hand a child is going to ingest even older children then the up to three that we have talked about in terms of mouthing. In terms of the product itself and the testing, the total lead test that CPSIA requires the under 300 parts per million going to 100 parts per million, is a very straightforward test that can be done. You can screen for it using an XRF gun so that you can see if it has some lead in it then you are going to need to do the test and so we believe that that is much more straightforward. You get more reliable results from that then a soluble test where you have to sort of figure out using different methods how much how your much of the lead will actually come out using different amounts of acids for different periods of time. Those tests often are very different. You get different results at different times and they aren't as straightforward I don't think as the total lead. I think the total lead actually simplifies it and makes it easier for people to comply.

Ms. SCHAKOWSKY. The other thing I have a real problem with is that somehow this notion of a cost benefit analysis in a tradition way. I mean what is the value then of a child's life or a child's IQ point. Ms. Cowles, if you would comment on the use of this the notion that we should have some sort of a cost benefit analysis.

Ms. COWLES. And I think if we are going to look at cost benefits let us look very closely at the benefit side. It is true as Mr. Woldenberg said there are not body bags of children who have been injured and killed by lead but there is testing that shows that a small exposure to lead is going to lead to a reduction in a child's IQ point. You are not going to be able to measure that. The parent isn't even necessarily going to know but we can show that that has an impact on future earnings. We have seen reports that, Representative Blackburn, you mentioned the changes in the '70s. There are reports that indicate that the drop in crime that we have seen could be because of the reduction in lead at that time. So to

say that simply because a child doesn't have an acute case of lead poisoning does not mean that there is not chronic lead poisoning that could be affecting both their future earning and our economy. So if we are going to look at cost benefit, we need to look closely at the benefits of children and how they are protected and what impact that has.

Ms. SCHAKOWSKY. And thank you.

Mrs. BONO MACK. The gentlelady's time has expired.

The chair recognizes the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Madam Chairman.

Ms. Fay, I would like to ask you just a couple of things. Of course, you know, we all want to make sure that the products that the kids use are safe. How do you ensure that your product is a safe product without testing?

Ms. FAY. Before the February 10, 2009, I rented an XRF scanner and I tested for 15 hours in my basement with this x-ray gun. I tested every fabric and every trim and I tested possible trims on sample cards that I might use in the future and in 15 hours every test result I had was no lead detected.

Mr. HARPER. What was the cost for you to rent that device, if you recall?

Ms. FAY. To rent it, it was for 5 days, $2,500 and I shared the cost with four other companies and I know that many of the handmade toy lines members across the country were having testing parties where they would get big groups of people to also use an XRF scanner so that everyone knew that all of their products were free of lead. And I also know in Oregon you are allowed to take your products to the Housing Development Department and they test them with an XRF scanner for free.

Mr. HARPER. I am just curious that you found no problems in what you spent the 15 hours with.

Ms. FAY. I found no problems with any of my products.

Mr. HARPER. And the four other companies that shared this with you or the 5-day rental cost with you, did they find any problems that you were aware of?

Ms. FAY. I am aware of some problems with shoes and mostly on the soles of the shoes, sometimes companies had like a colored dot that helped recognize their brand and that dot on the sole of the shoe sometimes had lead that I know of.

Mr. HARPER. And do you know what that particular company did in reaction to that, if you know?

Ms. FAY. They threw them all away.

Mr. HARPER. OK and is it your desire that you produce and manufacture goods that are safe?

Ms. FAY. Yes and it was for most of the handmade toy lines it if not every single one of us, we started our businesses because we wanted safe products for our kids and we felt that if we made them with our hands and we knew that the time and attention going into this product was there, the products would be safer.

Mr. HARPER. When you shared this cost for this and you said $2,500 for this device for the 5-day rental, have you been given a cost estimate of what the third-party testing would be for you?

Ms. FAY. At the time, I had just sold my house and I took almost all of our money, invested in my business so I had $30,000 worth of product and my testing costs were $27,000.

Mr. HARPER. OK, thank you, Ms. Fay.

Mr. Woldenberg, if I could just ask you on, you know, how do you without doing the testing what do you propose? What is a reasonable response to what we are seeing here?

Mr. WOLDENBERG. Well, we have always tested and there is no way to know if you comply with a standard without testing. We also can't use an in-house testing lab. We are not big enough and aren't prepared to manage one so, you know, what we want to do is manage to a standard. Set a reasonable standard and then the government shouldn't get involved in telling us how to meet it. We know well how to meet it and we have been doing it more then 2 decades successfully.

Mr. HARPER. So do you see a greater burden on small volume businesses with this possible requirement?

Mr. WOLDENBERG. What I just articulated or what exists?

Mr. HARPER. Yes.

Mr. WOLDENBERG. What I just articulated would be far easier. You know, Ms. Fay just described wasting thousands of dollars testing stuff that everyone knows is safe. That is just a terrible burden on any business whether it is a single business or a business with 150 people.

Mr. HARPER. OK, thank you.

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

Mrs. BONO MACK. The gentleman yields back.

The chair recognizes Dr. Cassidy for 5 minutes.

Dr. CASSIDY. Ms. Cowles, I am sorry, how do you pronounce your name? I am sorry.

Ms. COWLES. That is all right, Cowles.

Dr. CASSIDY. Cowles. I have to admit I started laughing when Mr. Woldenberg said he has to label rocks as a potential threat for lead poisoning if they are swallowed. Does that seem reasonable to you?

Ms. COWLES. I don't think that is part of CPSIA and I don't think he is saying it is either, the labeling of his rocks.

Dr. CASSIDY. OK, so OK, so that is however that is interpreted because I think you felt as if you had to correct?

Mr. WOLDENBERG. That is the only way we can sell products with lead is we had to find an exemption. There is an exemption for educational products and the cost to us is we have to put the word lead on our product. We don't believe anyone will buy things that say lead on them if they are for children. Who wants to buy a product that says it has lead in it? It is death. That is what is going on in Illinois right now with the lead labeling law which is essentially overriding your legislation.

Dr. CASSIDY. But I think there is a dispute as to whether or not you are actually required to put that on.

Mr. WOLDENBERG. We hired counsel and had a 1-hour conference call and whether or not this product was saleable under U.S. law without this label. I very much opposed putting a label on it. I was overruled by my outside counsel.

Dr. CASSIDY. OK, I can only imagine what that cost you.

Mr. WOLDENBERG. Exactly.

Dr. CASSIDY. Now, the next thing is I am new to this committee so I have kind of an open mind but Ms. Fay do you have a logger making a little wooden airplane?

Ms. FAY. I volunteer at a senior center.

Dr. CASSIDY. Hang on, hang on, decorating with a non-lead based paint?

Ms. FAY. No, there is no paint on it.

Dr. CASSIDY. OK, that has to be tested for lead content?

Ms. FAY. Yes and not the lead. It does not if it is not coated with anything other then natural materials but the ASTM testing.

Dr. CASSIDY. Which is what? I am sorry to be so ignorant?

Ms. FAY. They call it S963 and it is the required under the CPSIA that any toy has to go through a series of tests depending on what type of toy it is.

Dr. CASSIDY. OK.

Ms. FAY. So for example, you have to—we pay someone to hold an object from shoulder height and drop it to make sure. That is a laboratory test that they would have to pay. And the logger at the senior center, he is a retired logger.

Dr. CASSIDY. So this guy kind of doing a handicraft has to pay a third-party engineering group to hold it out by hand and drop it to see if it shatters?

Ms. FAY. If he wants to sell it.

Dr. CASSIDY. Because I mean I am just asking what would your comments be about that?

Ms. COWLES. I think I said in my testimony that we, you know, since the time this law passed we are very receptive to the problems of one-of-a-kind items, very small crafters such as Ms. Fay is talking about and are open to looking at reasonable testing programs. We are not—we would not say that those toys do not need to be tested in some way because again it doesn't matter to the child whether the nice gentleman at the senior center is making it or if it is brought in from China. If a wheel is going to fall off and cause a choking hazard for a very young child the parent should still know.

Dr. CASSIDY. Well, let me ask you I don't know, again I don't know this. I am learning in this committee. Obviously, I have young children. They always put things in their mouth, a little bit older now but you could swallow a ball and that could choke. Is a ball, let us say a ping-pong ball or is a rubber ball on a paddle, is that covered under this? I mean clearly they could die from dying swallow a small little rubber ball.

Ms. COWLES. Yes, they can and they do, yes.

Dr. CASSIDY. Is that covered under this legislation?

Ms. COWLES. Yes, balls would be covered because they are a toy so those products and again the choking hazard is for products for children under the age of 3. So those products usually small balls and the paddles you are talking about are not made for children under 3.

Dr. CASSIDY. Now, but as I have been reading the testimony and the stuff applied that is not applied, the common toy box concept does not apply to those sorts of toys?

Ms. COWLES. That is dealing with lead and things more than the choking hazard. There are additional labeling requirements for toys for children over 3 but under 6 to indicate once again that a child under 3 should not have them but the common toy box we are talking about is the lead issue.

Dr. CASSIDY. Now, I actually think if you are speaking of a common toy box, just thinking of my three children, that a ball would be more likely to be taken from one of them then an ATV and so if there is a common toy box, they will grab the older child's ball and try and put it in their mouth and hopefully nothing bad happens but it could. If we are going to accept the rationale, the common toy box means that you have to limit exposure to some of these toys I don't see the rationale for limiting it to what we limit it to.

Ms. COWLES. Well, I think that because even for the child over 3, lead is still a neurotoxin and it is still going to hurt that child if they do mouth it and so there is no reason for lead to be in children's toys.

Dr. CASSIDY. Mr. Woldenberg, you were shaking your head.

Mr. WOLDENBERG. Well, small parts are not illegal for children over 3 and there are many cherished childhood products such as Legos would be illegal if they were so if your observation is there are lots of small parts out there that children could be putting in their mouth, it is absolutely true, and it is a risk that is solved by parental supervision.

Dr. CASSIDY. OK, I yield back. Thank you.

Mrs. BONO MACK. The gentleman's time has expired.

The chair recognizes the gentleman from Texas, Mr. Olson.

Mr. OLSON. I thank the chair and I thank our witnesses for coming today. It is pretty obvious that this is a matter of great importance because of the emotions that are being felt here in this committee and because as a father of a beautiful 14-year-old daughter and a 10-year-old son, all I want for them is to be healthy and happy.

And, Mrs. Fay, I just want to tell you, you are not alone and I want to prove that to you because I am going to read a letter that I received from one of our Texans back home. And her name is Celice William Jackson and she is the owner of Mommy's Heartbeat and she just makes clothing for little babies in her home and here is what she wrote. "This bill, we are talking about CPSIA, requires manufacturers of any product intended for children 12 and younger to test their end product for lead and phthalates. The way the test is performed is by testing each component of the product in order to say whether it passes or not. For example, if I make a diaper and I have pink snaps, thread and fabric, when I send my diaper to be tested they will test the snaps, thread and fabric. But say I run out of pink thread and I use blue then I have to send in the diaper to be tested again which means that the fabric and snaps will be retested just because I used a different color of thread. By the way, it is nearly impossible for non-metallic thread to contain lead. I believe we can both agree that this testing is wasteful and redundant. I am a work-at-home mom to a beautiful 9-month-old daughter. If CPSIA stands as is, I will be forced to stop doing business. I cannot afford the hundreds of dollars re-

quired just to test one product. The economy is in bad enough shape as it is without having thousands of small businesses closing their doors and the cost of children's good skyrocketing."

My question for you, are you aware of more businesses that in your shape, Ms. Fay, out there in Oregon.

Ms. FAY. We get e-mails from companies all over the country talking about how this law is affecting them and we have compiled a list of businesses that have already closed due to the CPSIA. However, this list is small in comparison to what will happen if the CPSIA is fully implemented without changes. We know that if the stay of enforcement, if third-party testing is allowed to expire after December and no amendment has fixed our problems, 90 percent of our membership will have to close their businesses.

Mr. OLSON. Yes, ma'am, and again we need to fix that up here in the House of Representatives.

Ms. FAY. Please.

Mr. OLSON. That is something we can fix and something we should fix.

A question for you, Mr. Woldenberg, and just sort of the cost for your business here and how much of the cost of CPSIA impacted your business, your product lines. I mean your testimony states that your business costs of compliance have increased ten-fold, ten-fold.

Mr. WOLDENBERG. Well, I can illustrate that for you. You know, if we tested every one of our products once in destructive testing and all of our testing is destructive, we would have to test 1,500 products. Right now hanging over our head is the so-called 15-month rule which should be called the 30-month rule and this is a picture of what I would have to test. This is 81,000 units. This is what they look like. All of this would be destroyed and I have to pay for that. And it is a huge, huge distraction as well. There is just no end to the threats that come from this law.

Mr. OLSON. So you have to destroy 81,000 units?

Mr. WOLDENBERG. Yes, that is what it looks like.

Mr. OLSON. Just for testing and those are units that you could be selling, making money and growing your business?

Mr. WOLDENBERG. Right, this is a shipment of 81,000. I wouldn't get to do that.

Mr. OLSON. Well, yes, sir. I mean I know that back home in Texas there are a lot of old boys who would like to destroy 81,000 cartons there but that is not the way we are going to grow our economy. We need to get the regulatory burdens off your back.

Mr. WOLDENBERG. Thank you.

Mr. OLSON. And anything we can do to help you, we are going to do it.

Mr. WOLDENBERG. Thank you.

Mr. OLSON. Thank you very much for your time.

Yield back.

Mrs. BONO MACK. The gentleman yields back.

The chair recognizes Mr. Pompeo for 5 minutes.

Mr. POMPEO. Thank you, Madam Chairman.

I just have a couple questions for Ms. Cowles. The American Academy of Pediatrics testified at the Commission's one hundred parts per million technological feasibility yesterday that there is a

point where we go from the sublime to the ridiculous when it comes to treating all products as presenting the identical, the same risk. In your judgment, have we reached the ridiculous when we treat a bicycle or a geology kit or a jewelry charm precisely the same way?

Ms. COWLES. I don't know that I would call it ridiculous. I think that it is not really treated the same way. The charm is obviously going to be, you know, has definitely caused harm. I think we are looking at the way that lead is addressed in those different products but the effect of lead in each of those products if the child is able to ingest it is going to be the same.

Mr. POMPEO. Right and but we still have got the same hundred parts per million standard for each of those items and you think that is appropriate given the variance in the product and the product's usage and the product's contact with human beings?

Ms. COWLES. You know, I think that we should certainly look at inaccessible lead so that if there is lead in products that there is no way that the child is going to touch, that is one issue but I think that the way I look at it if you want to simplify it is as Rick said, parents do not want to buy products that have lead in them for their children. We had a lab testify yesterday at that same hearing that said most of the products that they are testing are already well below the hundred parts per million. I think we can do this and we can make these products without lead. It is what parents want and we can quibble about how bad the effect will be but I think that as Rick said if you tell the parent there is lead in it they really are not going to want to buy it so why don't we get the lead out of it.

Mr. POMPEO. In your judgment, Mr. Woldenberg showed us a picture of some product that will have to be destroyed. In your judgment, should the Federal Government make him destroy that product?

Ms. COWLES. I think he is talking about destructive testing. He is not talking about he is destroying it because it has lead in it.

Mr. POMPEO. But no he is talking about destructive testing. Do you think that he should?

Ms. COWLES. I am not familiar with his testing process as to why all of that would have to be destroyed.

Mr. POMPEO. Mr. Woldenberg, you were going back with my colleague, Congressman Butterfield, a few minutes ago about whether the label there was necessary or required and your counsel overruled you and told you it was. Has your counsel told you how many more hours he is going to get to bill once the database comes online?

Mr. WOLDENBERG. The database is going to be a full employment plan for our outside counsel.

Mr. POMPEO. And so, Ms. Fay, you don't have inside counsel?

Ms. FAY. Can't afford it.

Mr. POMPEO. And we have heard different testimony this morning about the risks and problems potentially with that database people have different judgment. Commissioner Tenenbaum was pretty clear in 10 days she feels like she is required to publish it regardless of its merits. Do any of the three of you involved in the manufacturing process think that makes sense?

Mr. WOLDENBERG. I do not. We can't evaluate the information that we are given because we are not given full access to the information and one of the biggest concerns that I have about the database is that by the government getting into the business of a safety blog they are training our customers not to call us. I want to talk to them directly about problems.

Mr. POMPEO. I really want and that is actually where I was headed. I appreciate that. Do any of you ever fear that your customers when they are not happy with your product won't call you?

Mr. WOLDENBERG. That is my biggest nightmare.

Mr. MORRIS. Certainly in our industry, Congressman, the manufacturers get lots of calls from their consumers and they find vital information very well and very thoroughly because the consumer when they call usually has the model number, they have the exact information in front of them and that is the best way to get the information.

Mr. POMPEO. Until 45 days ago I was involved in and I was running a manufacturing business and my customers when they weren't happy often were pretty successful at locating me. I also felt like we had an incentive to respond to that in a way that was meaningful to the customer and corrected any potential problems with product that we may have made. Do you all feel like you have adequate incentive already to address customer concerns about problems with your products?

Mr. WOLDENBERG. Absolutely and it is how a conscientious manufacturer has to behave. It is our responsibility.

Mr. MORRIS. That is why in many cases the claims that a manufacturer will make about materially inaccurate information is largely going to be that is not my product. It needs to be resolved and there is no reason that the Commission can't take an extra couple of hours to read a report and make sure that is accurate.

Mr. POMPEO. I appreciate it. Thank you all for coming today.

I yield back my time.

Mrs. BONO MACK. The gentleman yields back and no other members are present to ask questions.

Without objection, the chair is going to insert five additional statements for the record of our hearing that have been submitted. We have previously shared these with the minority and believe that they will improve the hearing record. So ordered.

[The information appears at the conclusion of the hearing.]

Mrs. BONO MACK. And so in conclusion of the hearing, I would again like to thank all of our witnesses today. We all appreciate your time and the stories that you shared with us. We all want safer products for our children. There is no question. But we also want to stimulate and encourage businesses rather than stifle them with unnecessary regulations that have little to no impact on safety. Our challenge is to figure out how to strike that balance and this is only the first of our discussions on that topic. I would like to most especially thank the Ranking Member Butterfield for his help today and his support and offer an open door to him as we work through all of these policies and to each and everyone of you I believe that we can do great things if we work together and that is my intention to do it that way.

So thank you to the audience for your kindness today and that concludes—oh wait, wait, oh just a little business. I remind members that they have 10 business days to submit questions for the record and to ask that the witnesses please respond promptly to any questions they may receive. The committee is now adjourned.

[Whereupon, at 2:08 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRED UPTON

Thank you, Chairman Bono-Mack, for holding this, your first hearing as Chair of the Commerce, Manufacturing and Trade Subcommittee, on the Consumer Product Safety Improvement Act (CPSIA). I think we all agree that there are significant problems with this law that need to be addressed urgently. I am also interested in hearing about the effect of this law on the resources of the Consumer Product Safety Commission.

The Energy & Commerce Committee worked on the CPSIA on a bipartisan basis under the leadership of then-Chairman Dingell and then-Ranking Member Barton. The bill passed the House on a nearly unanimous basis. The Senate did not proceed with the same bipartisan approach, but in conference we nevertheless went along with some of their provisions. Some of our conferees have expressed regret on that score. In any case, not long after the President signed CPSIA into law, serious problems emerged.

We all care deeply about our children and their safety - nearly every one of us on this dais has a child or grandchild. No one wants to put little children at risk. But this law may be doing exactly that. By dictating so much of the Commission's work, in too many cases we have shifted its attention to products that pose little or no risk and away from more significant issues. At the same time, we have deprived the Commission of the flexibility to develop common-sense solutions to the problems of implementation. The retroactive effect of the law has caused the Salvation Army, Goodwill Industries and thrift stores across the land to destroy used products, including even winter clothing that is sorely needed by millions of American children.

While we have seen little evidence of improvement in children's safety, there has already been an extreme impact on the children's product market - particularly for small- and micro-sized businesses. The Commission has pushed off the day of reckoning for some businesses by postponing, again and again, the expensive requirements for third-party independent laboratory testing of children's products. But the Commission has already told us that it believes its hands are tied-it can do nothing more to exempt products from this costly testing, even when the risk, if any, is minute and the burden to small business is gargantuan. In fact, the Commission is now working on regulations that would require even more testing-regulations that will pile on even greater costs in this terrible recession.

In short, it is up to us to fix the problem. We have no time to waste. This summer, the lead limits are set to drop again, to even lower levels. Again the effect will be retroactive, so our retailers and thrift stores will once again be destroying inventories of products that are already the safest in the world. I want to make clear that we do not intend to undo everything we did in the CPSIA, but we have every intention of fixing the law so that it works and the Commission can get back to its job of protecting our children.

PREPARED STATEMENT OF HON. EDOLPHUS TOWNS

Thank you Chairman Bono-Mack and Ranking Member Butterfield for holding this hearing today on the Consumer Product Safety Improvement Act and Consumer Product Safety Commission resources. The CPSIA was passed in the 110th congress to help protect consumers against dangerous products that may do them harm. This legislation affects a broad spectrum of our economy, from the manufactures of toys to the children that play with them. Our constituents want to know that we are doing everything in our power to make sure their children are kept safe.

I'm also interested in hearing from our witnesses today about how and more importantly when CPSIA's new rules will be finalized and implemented. As it currently stands the new rules have been in limbo due to concerns with-in the industry about unintended consequences. While I sympathize with the cost concerns of small businesses the safety of our nation's children should be our first priority.

I look forward to working with industry and consumer groups to make sure CPSIA's new rules and data base system are properly implemented and adhered to.

Thank you and I yield back the balance of my time.

JOHN D. DINGELL
15TH DISTRICT, MICHIGAN

CHAIRMAN
COMMITTEE ON
ENERGY AND COMMERCE

CO-CHAIR
HOUSE GREAT LAKES
TASK FORCE

MEMBER
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March 4, 2009

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

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

Dear Acting Chairman Nord and Commissioner Moore:

As an author of the original Consumer Product Safety Act in 1972 and a long-standing advocate for better protections for our Nation's consumers, I wholeheartedly support a stronger regulatory framework to ensure the safety of children's products. Nevertheless, I share the reasoned concerns of my colleagues, House Committee on Energy and Commerce Chairman Waxman, Subcommittee on Commerce, Trade, and Consumer Protection Chairman Rush, Senate Committee on Commerce, Science, and Transportation Chairman Rockefeller, and Subcommittee on Consumer Protection, Insurance, and Automotive Safety Chairman Pryor, about the implementation of the Consumer Product Safety Improvement Act (PL 110-314, "the Act"). In particular, I am troubled that the Act includes unrealistic deadlines for rulemakings and compliance, as well as too little implementation discretion for the Consumer Product Safety Commission (CPSC), both of which are exacerbated by CPSC's lack of adequate resources, both in terms of funding and staff.

In describing the implementation of the Act, Acting Chairman Nord's January 30, 2009, letter to the Congress maintains, "the timelines in the law are proving to be unrealistic, and [CPSC] will not be able to continue at this pace without a real risk of promulgating regulations that have not been thoroughly considered." Moreover, the letter states, "Although [CPSC] staff has been directed to move as quickly as possible to complete its work, short-circuiting the rulemaking process gives short shrift to the analytical discipline contemplated by the statute." In light of these statements, I would appreciate your candid responses to the following questions, which will assist me and my colleagues in our consideration of common-sense and workable solutions to some of the more pressing problems that have arisen during the Act's implementation:

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1. To what extent has robust implementation of the Act been hampered by CPSC's lack of resources? What levels of funding and staffing does CPSC believe necessary for proper implementation of the Act?

2. Given the paramount importance of ensuring children's safety and the overall mission of CPSC, to what extent are the deadlines in the Act practicable for CPSC and industry to meet acting with all deliberate speed? If these deadlines are not practicable, what revisions to them does CPSC suggest?

3. Does CPSC have quantitative data concerning any negative impact of the Act (*i.e.*, the lead and phthalate limits and testing requirements) on small manufacturers of children's products, and if so, would CPSC please provide them? What information does CPSC have on any such negative impact of a more anecdotal nature?

4. Does CPSC have any suggestion for how to mitigate any such economic impact of the Act on small manufacturers of children's products (*e.g.*, component testing for lead and phthalate content) that, in accordance with the intent of the Act and the CPSC's mission, will not compromise the health and safety of children using them?

5. What information has CPSC received about the impact of the Act on the availability of second-hand products for children, especially clothing? It is my understanding that many second-hand stores now refuse to sell children's products. Does CPSC have any suggestions for how to mitigate any negative effects of the Act on second-hand stores for children's products, especially in light of the recent economic downturn and the consequent increased need for low-cost sources of children's clothing?

6. Does CPSC believe that the age limit contained in the Act's definition of "children's products" (*i.e.*, 12 years and under) is appropriate? If not, what should the age limit be? Further, should CPSC have the discretion to lower the age limit for certain groups of children's products for which the risk of harm from lead or phthalate exposure is remote to non-existent (*e.g.*, snaps or zippers on children's clothing)?

7. Although some youth all-terrain vehicles (ATVs) and youth motorcycles are intended for use by children under 12 years of age, does CPSC believe it is necessary that these products be tested for lead and phthalate content? Similarly, does CPSC believe that these products present a risk to children for the absorption of phthalates or lead?

8. In light of recent court decisions that the lead and phthalate content restrictions are retroactively applicable, does CPSC have concerns about the effect on the environment of the disposal of inventories of non-compliant children's products?

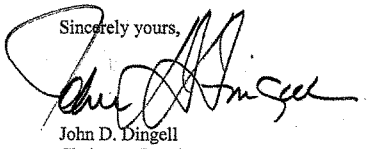
9. I understand that, since early December 2008, CPSC has had access to a large number of lead content test results for finished "ordinary books" (*i.e.*, books published in cardboard or paper by conventional methods and intended to be read by or to children age 12 or under) and their component materials (*i.e.*, paper, paperboard, ink, adhesives, laminates, and bindings). Have CPSC staff reviewed those test results? What do those test results indicate about such ordinary books and component materials in connection with the statutory lead limits prescribed in Section 101(a) of the Act? Does CPSC have any recommendations regarding how to mitigate the burdens that the testing and certification requirements of the Act, and especially the retroactive applicability of those requirements to inventory, could otherwise impose on publishers, printers, and retail sellers of such ordinary books, as well as on libraries, schools, charities and other second-hand distributors of such ordinary books, including those published before 1985?

10. In general, does CPSC believe that the Act was written with too little implementation discretion for the Commission? If this is the case, for which issues (*e.g.*, third party testing requirements) does CPSC require more discretion?

Please provide your responses to my office by **no later than the close of business on Friday, March 13, 2009**. I intend to work with my colleagues in the House and Senate to resolve these issues, as well as call on Chairman Waxman and Chairman Rush to hold hearings on problems arising from Act's implementation. Your responses to these questions will be invaluable in preparing Members of Congress for a frank discussion about several of the Act's apparent shortcomings. Should you have any questions, please feel free to contact me or Andrew Woelfling on my staff at 202-225-4071.

With every good wish,

Sincerely yours,



John D. Dingell
Chairman Emeritus
Committee on Energy and Commerce

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Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
Representative Bart Gordon

Representative Bobby L. Rush
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Senator Mel Martinez
Senator Mike Johanns

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

March 20, 2009

The Honorable John D. Dingell
Chairman Emeritus
House Energy and Commerce Committee
Room 2328
Rayburn House Office Building
Washington, D.C. 20515-2215

Dear Chairman Dingell:

Thank you for your letter of March 4, 2009, regarding the Commission's implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA).

Nearly two years ago I stated that the CPSC was at a crossroads. We would either get more funding and more staff or we would continue a decline that would eventually result in the agency ceasing to be an effective force in consumer safety. At that same time, wave after wave of press stories about hazardous products that the agency had purportedly not acted on in a timely manner were appearing and recall after recall involving lead were being announced. In response, Congress, and the citizens it represents, decided that not only should the agency survive but it should regain its lost stature. Through the CPSIA we were given new enforcement tools, manufacturers were required to prove that their products met national safety standards and the agency was given the resources (after a decade of seeking them) to build an IT system that will pull all of our disparate pieces of hazard data into one comprehensive, searchable database that will enable the agency to spot emerging hazards in a much timelier fashion.

The CPSIA presents both opportunities and challenges for our staff. Despite the fact that the agency did not get the immediate increase in funding that the Act envisioned, our staff has done a remarkable job of meeting the Act's deadlines (in some cases many months before the Act required them to be met). Staff has done this with an agency that only has two Commissioners who do not view the Act in the same light and who do not always agree on the Act's meaning. This has left the staff unsure in some instances about how to proceed and caused delays in providing guidance and in prioritizing the agency's work. That is also why there is no *Commission* response to your questions. The single most important step that needs to be taken in furtherance of the implementation of the CPSIA at the agency is to have the third Commissioner, who would also be the Chairman, appointed to lead the agency. Then the Commission would be able to give the staff direction and attend to various concerns that have gone unaddressed. This would also eliminate the threat of yet another loss of quorum, which has happened twice since July of 2006, and which would severely hamper the continued implementation of the CPSIA.

Congress has entrusted this agency with a large and important mission. The passage of the CPSIA was a huge vote of confidence for the agency and despite the hue and cry of some in the business community who will never be happy with the closer scrutiny and accountability required by the Act, it is a major accomplishment of the last Congress, and one that your leadership was instrumental in achieving.

I do agree with staff that additional time to implement certain of the Act's provisions (such as the one that made nearly all of the voluntary requirements in ASTM's F963 mandatory) would have been preferable. However, I think that when the agency gets the third Commissioner, we will be better able to address some of the concerns voiced by staff and by industry. Until then any legislative "fixes" are premature. Only the *Commission* should recommend what, if any, changes should be made to the CPSIA and no assumptions should be made that there are no other solutions than legislative ones until all three Commissioners have a voice in the matter.

Sincerely,

Thomas H. Moore
Commissioner

cc: Acting Chairman Nancy Nord

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

NANCY A. NORD
ACTING CHAIRMAN

TEL: (301) 504-7901
FAX: (301) 504-0057

March 20, 2009

The Honorable John D. Dingell
U.S. House of Representatives
2328 Rayburn House Office Building
Washington, DC 20515

Dear Representative Dingell:

Thank you for your letter of March 4, 2009, regarding the U.S. Consumer Product Safety Commission's (CPSC) implementation of the Consumer Product Safety Improvement Act of 2008. Recognizing and respecting the knowledge that the CPSC career staff has acquired in implementing this new law, I asked them to prepare answers to the important questions that you asked in your letter. Their responses are enclosed.

Since its passage last August, the CPSC staff has been working tirelessly to implement this comprehensive legislation in the most efficient and effective manner possible given the limits of our resources and the time constraints mandated in the law. As you will note in their responses, they have identified some proposed refinements to the law based on their front-line experience with it.

We share your commitment to better protection of our nation's consumers, and we very much appreciate your long-standing advocacy and support of the CPSC. After reviewing the staff's responses, please let me know if you have additional questions or comments.

Sincerely,

Nancy Nord

Nancy A. Nord
Acting Chairman

Enclosure

cc: Commissioner Thomas Moore

Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
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Senator Mel Martinez
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UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Date: March 20, 2009

TO : Acting Chairman Nancy Nord
Commissioner Thomas Moore

FROM : General Counsel CAF
Assistant Executive Director for Compliance
Assistant Executive Director for Hazard Identification and Reduction
Assistant Executive Director for Financial Management, Planning and Evaluation

SUBJECT : Responses to Letter from the Honorable John D. Dingell

Chairman Nord has asked us to respond to the questions recently received from Representative Dingell. The following responses have been prepared by career staff at the U.S. Consumer Product Safety Commission (CPSC).

1. To what extent has robust implementation of the Act been hampered by CPSC's lack of resources? What levels of funding and staffing does CPSC believe necessary for proper implementation of the Act?

The CPSC has made implementation of the Consumer Product Safety Improvement Act (CPSIA) our highest priority. Since August 2008, the agency has initiated and advanced over 20 rulemaking activities required by the CPSIA which is an unprecedented number for this agency or any other of this size, published enforcement guidance and policies to enhance compliance with the new law, conducted numerous meetings with stakeholders, developed a special website dedicated to the CPSIA, responded to questions from the public numbering in the thousands, and generally focused the agency's limited scientific, legal, technical, educational, training and administrative resources on CPSIA implementation requirements.

Because requested funding for implementation of the new law was not forthcoming during the critical first six months when many of the CPSIA requirements needed to be initiated or completed, implementation of the CPSIA has impacted our ongoing safety mission by delaying and deferring work in many other areas. While work has been deferred or delayed on these activities -- such as rulemaking activities on portable generators and voluntary standards work on electrical, fire, mechanical, chemical and children's hazards -- some of CPSC's ongoing safety work such as hazardous product investigations and recalls could not be deferred. This has limited our ability to advise you on how to fully reallocate existing staff resources to implementation of the CPSIA.

Moreover, issues related to the accreditations of laboratories and the increasing number of requests for exclusions from the Act's provisions have caused unanticipated additional demands on staff resources, at the same time that the staff has been implementing the Virginia Graeme

Baker Pool and Spa Safety Act (which became effective in December 2008), and the Children's Gasoline Burn Prevention Act (which became effective in January 2009). This has severely overstretched the agency staff and has begun resulting in delays in implementation that will continue until we are able to fully hire and otherwise maximize the resources that have just been provided to the agency for the second half of fiscal year 2009.

Three examples of the burden and complexity presented by the work on these issues are: (1) the continuing need to process and review applications for laboratory accreditation, including applications from government and proprietary firewalled laboratories, a process initiated by the CPSIA and one that the agency is handling for the first time in its history; (2) the need for further refinement of guidance on the scope of the phthalates ban and, in particular, defining a testing method and dealing with compliance questions regarding the chemistry and carbon chain branching that determines whether a product contains a banned phthalate; and (3) the engineering issues raised by the Pool and Spa Safety Act and the need to reconcile state regulations on health and safety issues such as water quality with the need to replace drain covers as required by that Act. The Commission staff cannot address these and similar matters all at once, yet delay has serious economic impacts on the affected parties which no one anticipated would happen at the same time as the current economic downturn.

As we implement each new requirement, we are seeing unanticipated issues arise, and we are learning more of the far-reaching effects of the CPSIA and there will undoubtedly be more to learn. In August 2008 following passage of the Act, staff estimated that it would require a full annual increase of $21.1 million and 59 FTEs to begin implementing the new legislation in Fiscal Year 2009. That same month, the Commission submitted an amendment in this amount to the then-pending President's Budget Request through the Office of Management and Budget, as well as directly to Congress. In November 2008 a revised amendment was provided to Congress to reflect CPSC's requirements for only the second half of the fiscal year. Through the first six months of implementing the CPSIA, none of this additional funding was received by the Commission.

The funding amount in the Commission's revised amendment has just been approved by Congress. While we will use these funds to immediately and aggressively hire and train new staff, the six-month delay in funding will cause continued deferrals until such time that the agency fully absorbs the new appropriation. For Fiscal Year 2010 the Commission has requested additional funding to continue implementation of the CPSIA.

2. Given the paramount importance of ensuring children's safety and the overall mission of the CPSC, to what extent are the deadlines in the Act practicable for CPSC and industry to meet acting with all deliberate speed? If these deadlines are not practicable, what revision does CPSC suggest?

Mandated Deadlines: Effect on Safety Priorities and Staff Workloads

In the CPSIA, Congress set an aggressive regulatory agenda for the CPSC over the course of the first two to three years after enactment. The work required by the CPSIA is in addition to the

Commission's ongoing regulatory activity in a variety of areas, including upholstered furniture, portable generators and other important standards development activities, as well as our ongoing compliance work in evaluating and recalling products that present hazards to consumers. As with any regulatory agency, CPSC's safety work must be prioritized to deal with the most significant risks; however, the deadlines mandated in the CPSIA have jeopardized our ability to meet Commission priorities and proven to be too much for a relatively small agency to handle all at once. Timely implementation is important, but the flexibility to prioritize our work to deal with the most serious risks is equally important to maximize effectiveness and do the greatest good with the resources that we have been given.

While the CPSIA mandates more than 40 separate action items for the Commission to undertake, that number understates the agency workload that results from each of those mandates. For example, there is no requirement to adopt an interpretative rule defining "child care article" and "toy" under section 108. Yet the Commission has been inundated with thousands of product specific inquiries about what types of products fall within those definitions, from shoes to sporting goods to electronic games. An interpretive rule is our recommended way to address this issue and adds to our rulemaking burden.

The action item count also does not include acting on requests for exemptions from the lead limits provision, nor does the list contemplate making "determinations" on classes of materials or products not covered by the ban on lead in children's products. Because the statute did not permit the agency to exempt products from the scope of the definition of children's product, the staff has been engaged in a process of narrowing the scope of materials likely to include lead in order to provide relief to small businesses and home crafters faced with crippling costs of testing and certification requirements. Many of those businesses are now asking the Commission to begin the same process of exemption of materials with regard to phthalates. As another example, consideration of component testing is not a part of the list of rulemaking activities in the CPSIA, yet it is a challenging issue to consider in implementing its requirements.

There are other activities required of the Commission in the CPSIA that require resources and time that are not evident in the list of required rulemakings. The resource needs have been enormous, ranging from projects so basic as educating headquarters and compliance field staff on the scope of the new regulatory requirements of the Act to the more complex work of updating the Commission's regulations to permit the use of its new authorities with regard to refusing admission of imports. Updating our regulations and coordinating with Customs and Border Protection to allow for a process for a hearing upon refusal of admission requires significant agency resources, as does developing a process for bonding shipments to cover the cost of destruction and related import activities.

Suffice it to say that each of the various initiatives in the Act -- whether it be the lead and phthalates limits, the testing and certification regime, the import provisions, or the new database and information technology upgrades -- will require significantly more time to implement than anyone originally anticipated. Having all of that done simultaneously would have taxed the agency even if we had been given additional funding from the start. Moreover, the agency has significant ongoing work that remains, as well as two other new statutes that it must implement

this year, the Virginia Graeme Baker Pool and Spa Safety Act and the Children's Gasoline Burn Prevention Act.

The deadlines have proven to be impracticable for our staff to meet and are presenting significant problems for the agency to solve. The Commission staff must have some relief from the deadlines imposed.

Practical Solutions: Prioritizing Workload Based on Risk or Extending Deadlines

The following suggestions, ideally in combination, would help ameliorate the issues discussed above.

- Use of Risk Assessment to Establish Priorities

Use of risk assessment methodology would allow the Commission to establish priorities, provide for common sense exemptions, and set CPSIA implementation deadlines. Congress took this approach, to some degree, when setting the initial testing and certification deadlines. Using recall frequency and, to a lesser degree, the severity of possible injuries, Congress determined that cribs, pacifiers, small parts, lead in paint, and lead in children's metal jewelry would lead the children's product testing and certification effort.

However, by this June the Commission must accredit laboratories for third-party testing to all other children's product safety rules, which includes any new or previously existing rule applicable to a product intended for children 12 years of age or younger. The agency will be pushed to meet that deadline as the staff will need to issue accreditation procedures, and all related testing procedures, for the many rules applicable to children's products at that time, including the enormously complex requirements of the ASTM F963-07 Toy Safety Standard. All of this will take place simultaneously with work we are doing to open CPSC's new laboratory facilities.

Examples of Inefficiencies: Furthermore, inefficiencies have been created given the tight timeframes of the Act. For example, under section 102 of the CPSIA, the Commission is required to publish accreditation procedures for laboratories testing baby walkers, bouncers and jumpers by March 12, 2009. However, the existing regulations for baby walkers and bouncers are outdated. The Commission through its enforcement actions has been requiring compliance to the voluntary standard rather than the outdated regulations, and for the most part industry is complying with the voluntary standard. It is inefficient for the staff to accredit laboratories to test to outdated regulations.

The baby walker standard will be one of the first two rules the Commission handles under the series of new consumer product standards required for durable infant products under CPSIA section 104, and therefore, the most efficient (and common sense) resource allocation would be to accredit laboratories for testing when we announce the new baby walker standard in February 2010. Because the statute was written without such flexibility, we must develop an approach to deal with the outdated baby bouncer, walker, and jumper standard, which may include withdrawing the outdated standard to avoid accrediting laboratories to standards no one follows

and to clarify that there is no need for industry to take a step backwards to test to standards that will be updated in a matter of months.

From our standpoint, an ideal solution to these challenges faced by our staff would be for Congress to let the Commission decide what level of testing is required for which products, allowing the Commission to prioritize based on risk and tackle any problems that need to be addressed in the most efficient manner. Alternatively, Congress could continue to require certification and third-party testing for all children's products but allow the Commission to prioritize as to when the testing to each children's product safety rule will begin, so that it can roll those out on a timetable that is based on its discretion and expertise. To do this right, we need to:

- provide our stakeholders with a list of all standards that are applicable to a children's product;
- identify which children's products need to comply with which standards;
- define the test methods for each standard and whether they make sense for all of the different products covered;
- accredit the laboratories for testing to each standard; and
- develop a process for inspecting certificates.

All of that takes time and the ten months the CPSIA gave us to accomplish this task has not proven to be workable.

The wholesale release of "all other" children's product standards in June 2009 may further stress manufacturers, importers, and retailers while providing marginal improvement in children's safety for many of the products. A methodical, pragmatic approach to the release, based on priorities determined by CPSC staff, would facilitate a smoother rollout while addressing first the products presenting the greater risk to children. This allows CPSC staff the flexibility to prioritize tasks, manage our workload, and assure greater safety without an unnecessarily burdensome impact on product sellers.

- Extend Deadlines

Another alternative is to move certain of the dates for implementation in the CPSIA to allow the Commission the time to provide additional implementation guidance. The most challenging deadlines for compliance were those that went into effect on February 10, 2009, requiring retroactive compliance to the new lead and phthalate content limits. The breadth of products covered by the definition of children's products covered by the lead limit, *i.e.*, any product designed or intended primarily for a child 12 years of age or younger, implicated numerous industries that had not understood that their products would be subject to the new lead provisions.

The question asks us to comment on the impact of the deadlines on industry. Whether it be makers of books, bikes, or baseball bats, every industry needed more time to determine which, if any, of its products were covered under the definition of children's product, test those products for compliance, and develop new methods of manufacture to eliminate the lead if it was present

in the product. The scope of products covered by the new regulation and the amount of inventory implicated went well beyond what many may have contemplated. Our information is incomplete but we are told that millions of products wait in storage warehouses for return and destruction. Retailers have indicated that most of these products do not contain accessible lead, and a real question exists in our staff's mind as to whether they contain accessible lead in a sufficient amount to be anything other than a *de minimis* risk but simply were unable to meet the standards that took effect in February. It will be even more difficult for these products to meet the stricter standards to come. These challenges faced by industry have a direct impact on CPSC staff resources and our ability to meet deadlines given the need to respond to their inquiries.

Another approach to the deadlines is to allow the Commission more discretion to move an effective date for a given product or class of products in certain circumstances. The CPSIA does not permit the Commission to delay the effective date of any of the new standards to deal with a problem such as the lead in bike tire valves where the risk to a child is exceedingly small but still measurable, and the economic impact is substantial. In cases such as these, some reasonable amount of time should be allowed to reengineer the product to develop an alternative that can meet the new lead limits.

3. Does CPSC have quantitative data concerning any negative impact of the Act (i.e., the lead and phthalate limits and testing requirements) on small manufacturers of children's products, and if so, would CPSC please provide them? What information does CPSC have on any such negative impact of a more anecdotal nature?

CPSC staff does not have data on the total value of impacted inventories, lost sales, disposal costs, and other costs likely to be incurred by small manufacturers because of the CPSIA; however, information of an anecdotal nature, that has not been verified by CPSC staff, puts the impact in the billions of dollars range.

Industry Estimates

For example, the Motorcycle Industry Council reported in a February 26, 2009, press release that the new lead rules would result in an annual impact of $1 billion on their industry. In a request for a moratorium on the retroactive application of the lead ban, the American Chamber of Commerce in Hong Kong estimated that the impact on their members producing children's wearing apparel would run in excess of $300 million. In a letter to the CPSC, counsel to a major mass retailer stated that a client estimated their cost to test inventory at $1.4 million and projected inventory losses of $30 million. Another client estimated the value of their unsalable inventory at $7 million. It was also reported in a March 5, 2009, article in the Wall Street Journal, that the Toy Industry Association estimated inventory losses valued in the range of $600 million.

CPSC Testing Estimates

CPSC staff has estimated that the cost for third-party testing of product for lead and phthalates would range from several hundred dollars to several thousand dollars per product tested,

depending on the number of product components requiring testing. Based on information obtained from testing laboratory price lists and quotes, the cost to test for the lead content of a substrate appears to range between about $50 and $100 per tested component. In a recent public meeting, industry representatives stated that testing of the 233 various components of a bicycle, valued at $50, cost one of their members approximately $14,000. Less information is available about the cost of testing products for phthalates, but the limited information obtained from price quotes and laboratory presentations to CPSC staff suggests the best estimate for the cost of phthalate testing at this time ranges from $300 to $500 per tested component. The cost to test for phthalates appears to vary widely from market to market. In a recent CPSC public meeting on phthalates, one participant told of receiving quotes for the testing of a product ranging from $7,000 in Asia to $22,000 in the United States. Because these tests tend to be destructive, manufacturers also bear the expense of lost material, labor, and overhead associated with production of the products tested.

Economies of scale provide an advantage to larger volume manufacturers, relative to their smaller volume counterparts, as they can absorb these testing costs over a larger production volume. Spread over this larger volume, the incremental increase to the cost of each product is much smaller for the large manufacturer versus the much smaller manufacturer. In short, the heavier burden falls to the smaller volume business. When the Commission establishes random sampling requirements (as part of the required rulemaking on periodic testing in Section 102(b)), testing costs will increase over current levels for manufacturers of all sizes.

The exclusion of most fabric from the third-party testing requirements will provide only limited relief for apparel manufacturers, including small manufacturers. In a public meeting with CPSC staff, several apparel retailers reported finding virtually no lead in fabric, but they did find lead in about 2% of the tests on hard items, such as buttons, zippers, snaps, and fasteners. Since most apparel items have some non-fabric items, there will still be testing requirements for most apparel items. Moreover, under the new restrictions the presence of lead in fasteners used on clothing has had a negative impact on the second-hand market for children's clothing in the United States.

Although testing children's products, as applicable, for lead and phthalates has received the most attention, many products will be subject to additional third-party testing requirements. For example, cribs must be tested for compliance to the crib safety standards at 16 CFR part 1508. Toys are also subject to testing for compliance to applicable provisions of the Toy Safety Standard, including testing for additional heavy metals, such as arsenic, cadmium and chromium. We have no quotes for these tests; however, it is probable that the major factor in the cost of the tests will be the labor time required to conduct the tests. Once again, given the destructive nature of the testing, the manufacturer will also bear the expense of lost material, labor, and overhead.

It is important to keep in mind the wide expanse of goods falling under the definition of "children's products" and subject therefore to third-party testing requirements. Beyond toys and durable infant and toddler products, items such as books, bicycles, clothing, youth-sized motorized off-road vehicles, school supplies, and Scout equipment and accessories are subject to lead and/or phthalates testing. Likewise, all products for children 12 years of age or younger that are made by crafts people, stay-at-home moms or dads, charitable church groups and the like,

must meet the new limits and be tested for compliance or their products are banned. This has completely upset the business model for many of those small businesses and charitable organizations. Because of the retroactive nature of the regulations, many retailers began turning back product with more than 600 ppm well in advance of February 10, 2009, in order to ensure their shelves were free of non-compliant product. As a result, many small manufacturers, who failed to recognize the true scope of the law or were unprepared for the retailers' reaction to the CPSIA, now find they have inventory they cannot sell.

Retailers Accelerating Deadlines

Retailers continue to move well ahead of the deadlines established in the CPSIA. For example, it is staff's understanding that Wal-Mart stopped receiving product with more than 300 ppm lead in January 2009. These actions have stranded inventory that may be compliant today but will be banned in August as the lead limit drops to 300 ppm. In addition to the risk that these products may become obsolete and will need to be reworked or destroyed, manufacturers of all sizes are incurring expenses to hold this inventory while they decide how to move their product. The cost to carry this inventory varies by business, but typically runs about 25% of the on-hand inventory value.

As retailers pull product from their shelves, many consumers have also been negatively impacted. For example, CPSC staff have received numerous emails from consumers stating they could no longer purchase parts for their child's youth model motorcycle because of retailer concerns over the lead content of the parts. More than one consumer has noted the possibility of consumers' purchasing vehicles sized for older children or adults if they could no longer service their current motorcycle or ATV. This reaction potentially places these children in a situation of increased risk of injury or death.

Solution: Risk-based Assessments That Consider Age and Exposure

It may be too late to mitigate the significant economic impact of the February 10, 2009, ban on children's products containing more than 600 ppm total lead content, by weight, for any part of the product. However, some relief could be provided to deal with the impact on thrift shops and second-hand sales, and Congress still has time to act to prevent the even greater impact that will occur when the lead limit drops to 300 ppm in August 2009. For example, toxic substances limits are better regulated based on the possibility of exposure in relation to age. Foreseeable use data, combined with mouthing and ingestion data at various ages, would define the group at risk for any given product.

This approach would exclude items such as bikes and ballpoint pens from the discussion and we could focus on items like metal jewelry and other objects likely to be mouthed or ingested. By granting the CPSC the flexibility to determine the relevant hazards, flexibility in determining exemptions based on assessment of risks, and the discretion to adjust the age limit for certain groups of products where the exposure is low, resources can be properly focused on areas of greater risk, yielding maximum reductions in consumer risk of death and injury.

4. Does the CPSC have any suggestions for how to mitigate any such economic impact of the Act on small manufacturers of children's products (e.g., component testing for lead and phthalate content) that, in accordance with the intent of the Act and the CPSC's mission, will not compromise the health and safety of children using them?

In light of the concerns expressed by small business owners and employees, CPSC staff has been considering what relief might be provided for them without compromising safety. The first challenge was to define what is meant by "small business" in the context of the manufacture of children's products.

For example, with regard to children's apparel, there are not good statistics differentiating those firms that make all apparel versus those firms that make apparel intended only for children 12 years of age or younger. With regard to toys, the analysis of those businesses that are focused on the manufacturing of products solely for children is more reliable. Bureau of the Census (2006) data shows that there are 776 firms that manufacture dolls, toys, and games (NAICS 33993); 403 of those firms (51.9%) have fewer than 5 employees, 632 (81.4%) have fewer than 20 employees, and 963 (98.3%) have fewer than 500 employees which is the standard definition of a small business. Only 13 of the firms (1.7%) that produce toys would not be considered small businesses by the Small Business Administration. All (or almost all) of these firms are likely to produce children's products and all are affected by the current economic downturn.

Another group significantly impacted by the CPSIA is small crafters of products for children, many of whom work out of their homes. Based on a 2000 survey conducted by the Craft Organization Directors Association, there were an estimated 106,000 to 126,000 craftspeople in the United States. Additionally:

- The average gross sales revenue was $76,000 per craftsperson.
- The median household income of craftspeople was $50,000 per year, with about half coming from craft activities.
- 64% of craftspeople worked alone, 18% work with a partner or family member, and only 16% had paid employees.

Component Certification

The cost of testing and certification is a huge burden on these small businesses and a robust component certification program would be extremely helpful. However, any component testing rule would have to apply across the board to all businesses, small and large, and to our global trading partners in compliance with international trade laws. Furthermore, we have to design a program we are confident will avoid the switch of components during manufacture which is the very problem that Congress was intending to fix by requiring testing of children's products in the CPSIA. Component testing presents real challenges since many of the components used in children's products are not children's products on their own and do not require third party testing. Snaps could be used on a hand knitted sweater that were not produced primarily for use in children's products, and we cannot be sure given the expense of testing, that a market will develop for certified compliant materials for use by crafters.

Potential Solutions

Recognizing that the Commission always has the ability to take action to address unsafe products in the marketplace, Congress could take many different approaches to mitigate the effects on small businesses. Congress could apply the new lead and phthalates limits prospectively to mitigate the impact on inventory existing prior to enactment. It could allow for a more flexible exception process based on balancing of risks against the burdens of the costs of testing and certification but that could overburden staff. Another option would be to allow the Commission the flexibility to decide what children's products require testing and certification.

5. What information has CPSC received about the impact of the Act on the availability of second-hand products for children, especially clothing? It is my understanding that many second-hand stores now refuse to sell children's products. Does CPSC have any suggestions for how to mitigate any negative effects of the Act on second-hand stores for children's products, especially in light of the economic downturn and the consequent increased need for low-cost sources of children's clothing?

CPSC staff has only limited, anecdotal information concerning the impacts of the Act on second-hand stores. Major resellers such as Goodwill Industries and the Salvation Army have estimated impacts, including both lost sales and disposal costs, totaling hundreds of millions of dollars. Many smaller resellers have indicated that under present circumstances, they cannot afford to continue selling children's toys or apparel, which account for much of their revenues. Even church bazaars and neighborhood yard sales are adversely affected.

The major problem for second-hand stores and other resellers is that the CPSIA prohibits the sale, distribution or export after February 10, 2009, of any children's products exceeding the applicable lead or phthalate limits regardless of when they were made. Second-hand stores are typically selling items that were manufactured years earlier. Thus, a large percentage of a reseller's current inventory of children's products may have been manufactured long before the stringent new limits took effect, and it may now be impossible to dispose of such items lawfully except by destruction (which itself may be costly, particularly for non-profit organizations). To make matters more difficult, there is often no cost-effective way to determine which products can lawfully be sold and which cannot.

Unlike other retailers, resellers generally have little or no control over the compliance of the goods that they obtain. Most are donated. Even where they have regular donors, resellers cannot practically establish specifications for children's products as major retailers can for their regular suppliers. Testing everything they receive is not a practical solution either. Like small, home-based manufacturers, resellers cannot spread testing costs across many units of the same type; at any given time, they would usually have on hand no more than a few items of the same type. The standard tests for lead and phthalate content are destructive, so if one tests a single item to determine whether it can be sold, one no longer can sell that item.

Screening devices, such as x-ray fluorescence (XRF) machines, can help in weeding out children's products that have excess lead, without destroying products that comply, but the new technology is still expensive. No such screening device yet exists for identifying phthalates. Even if such technology can be developed quickly, it remains a disproportionate burden to test every unique item in inventory. Some internet resellers and auctioneers do not even have access to the products that are offered for sale by third parties on their website and so could not feasibly test them by any method.

The second-hand store problem will get worse for several years before it may ultimately get better. The lead content limits will drop to 300 parts per million in August 2009 and to 100 ppm in August 2011 (unless the Commission determines that such limit is not technologically feasible for a class of products). Products manufactured after these dates will be in use for some years before they are donated to second-hand stores. So, it will probably take many years before children's products that comply with these stringent limits make up a sizable majority of the products for sale at second-hand stores.

Potential Solutions

Under the circumstances, merely postponing the effective date of the lead or phthalate limits for everyone, while this would help alleviate some problems we are seeing, would not be very helpful to resellers because it would allow products with excess lead and phthalates to continue being made, and thus add to the number of noncompliant products that may eventually find their way to resellers and so postpone the day of reckoning.

The most effective way to help resellers is to address the issue of retroactivity, requiring that manufacturers meet the statutory limits for products manufactured after the effective date but that retailers and resellers be allowed to continue sale. If this suggestion were adopted, it would be important to note that resellers could not sell recalled products and that the Commission retains its authority to stop sale of any product if it finds an exposure that presents an unreasonable health and safety risk to children.

A law like the CPSIA that outlaws sales of previously lawful products will, by its nature, hurt retailers more than manufacturers and hurt resellers even more than other retailers (given the fact that products are typically in consumers' hands for several years at least before they reach second-hand stores). While dealing with retroactivity across the board would be the most effective way to deal with the inequities presented by the current law, other suggestions include such things as establishing a separate rule for resellers. For example, the ban on selling children's products with excess lead or phthalate content could take effect at a later date for second-hand sellers than for retailers generally. Or, resellers (or some subset of them, such as individual consumers or non-profit resellers) could even be exempted entirely from the provision that makes it a prohibited act to sell products containing more than trace amounts of lead or phthalates. Children's products that would have been banned under prior law should not be exempted in any case, and there may be categories of products, for example, children's metal jewelry, that should be handled more strictly. While consumers are accustomed to the notion that used goods are sold "as is," it might be appropriate to require a label or other type of

warning at the point of sale if resellers are allowed to continue to sell older children's products that do not comply with the new limits.

Lest there be any question, CPSC staff does not favor exempting second-hand sellers from the prohibition against selling recalled products (including children's products that are recalled for excess lead paint, or excess lead or phthalate content). The staff believes that resellers can reasonably be expected to keep abreast of CPSC recalls by signing up to receive CPSC's recall press releases and to remove any recalled products from their shelves. Similarly, where Congress has unambiguously directed application of new regulatory requirements to a discrete class of used children's products, such as cribs, CPSC staff believes that resellers no less than others must take steps to comply, even if that means deciding not to sell the products in question.

The Commission has adopted an enforcement policy on lead limits and has issued other guidance to second-hand stores to address many of the recurring issues. In the staff's view, however, the core problem is caused by the retroactive nature of the law and is beyond the agency's authority to solve.

6. Does CPSC believe that the age limit contained in the Act's definition of "children's products" (i.e., 12 years and under) is appropriate? If not, what should the age limit be? Further, should CPSC have discretion to lower the age limit for certain groups of children's products for which the risk of harm from lead or phthalate exposure is remote (e.g., snaps or zippers on children's clothing)?

The term "children's product" has significance for several different provisions of the CPSIA. It specifies which products are subject to the lead content limits. Indirectly, it plays a role in defining which products are subject to the phthalate limits. It governs the scope of products that require certification based on third-party testing and those that will require tracking labels "to the extent practicable."

CPSC staff believes that for purposes of defining which products are subject to lead limits, the boundary age could reasonably be lower than 12, at least in most cases. The Senate bill (S. 2045) deemed age 7 a satisfactory upper limit. CPSC staff understands that the conferees ended up agreeing to age 12 primarily because of the so-called "common toy box problem" – *i.e.*, the concern that a product intended primarily for older children might nonetheless be available to younger ones in the same home. This choice had the effect, however, of applying the lead limits to a much larger population of products, including many that are not toys and even including outdoor products such as dirt bikes or ATVs that would rarely be accessible to younger children under any circumstances.

CPSC's Regulations Established Age Limits by Product Class

CPSC's own regulations have used a variety of different ages to define what group of children's products will be subject to a standard or ban, and these precedents may be useful to consider. For example, the small parts ban applies to products that are intended for children under 3. Toys that are intended for ages 3 through 5 are allowed to have small parts, provided that they have

cautionary labels to warn that they are not suitable for youngsters under 3. In general, toys that are intended for children 6 and older do not require cautionary labeling except in a few specific cases such as balloons and small balls. The lead paint ban (16 CFR part 1303) applies to children's products without a specific age definition. Despite this broad applicability, the scope of the lead paint ban has rarely if ever, generated controversy. This is probably so because it is limited to children's products that have paint or similar surface coatings, and such products are much fewer in number and more easily identified than children's products generally.

Both the likelihood of exposure and the route of exposure are factors to consider in deciding what products should be subject to lead limits. Lead presents an acute hazard when direct ingestion is possible. For this reason, CPSC staff has long treated children's metal jewelry as warranting special concern. In other applications, brass and many other metals often have some lead content, particularly to improve workability, corrosion resistance and other properties. Where such objects can be mouthed but not swallowed, they generally pose a lesser risk, and objects that can be licked but not mouthed pose still less risk. There are some products where mouthing or licking is unlikely but where some lead exposure may result from touching and inadvertent transfer of lead from hand to mouth. A child's exposure to lead from zippers and snaps will depend on the type of garment and the child's age, among many other factors.

Practical Solution: Commission Discretion

One way to address these issues would be to give the Commission more discretion to grant exclusions from the lead or phthalate limits. Under the law as currently written, a material having more than 600 parts per million lead cannot be excluded unless touching the product will not result in the absorption of *any* lead. Taken as a whole, the language of section 101 appears to rule out treating even very low levels of absorbable lead as negligible. Congress could modify this exclusion criterion to allow *de minimis* levels of absorption or to change the focus to preventing any significant increase in blood-lead levels of a child, particularly for children who are of the age of the intended user.

Giving the CPSC discretion to lower the age limit for certain classes of products might be more efficient than dealing with many requests for exclusion, which is a resource-intensive process. Another resource conserving approach would be for Congress to lower the age limit across the board and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

7. Although some youth all-terrain vehicles (ATVs) and youth motorcycles are intended for use by children under 12 years of age, does CPSC believe it is necessary that these products be tested for lead and phthalate content? Similarly, does CPSC believe that these products present a risk to children for the absorption of phthalates or lead?

CPSC staff is aware that many different parts of youth ATVs and youth motorcycles have lead content, some of which may exceed the 600 or 300 ppm level. Some of these parts are inaccessible, and some parts may qualify for the higher limits applicable to certain electronic components. Other parts, however, appear to be accessible and may not qualify for any

exclusion under section 101 of the CPSIA. These youth vehicles may also have some phthalate content, but they do not appear to be covered by the section 108 bans, which are limited to certain toys and child care articles.

The possibility that children will suffer significant lead exposures from these classes of vehicles appears to be remote at best. First, the vehicles are generally stored outside the home, where younger children would rarely be allowed unsupervised access. The vehicles are generally designed for children of at least 6 years of age and older. These children are far less likely to ingest or mouth components of a motorized vehicle – even those that are physically exposed – than something that fits readily in the mouth, such as a jewelry chain or charm. Children may still be exposed to some lead as a result of touching seats, handle bar grips or other places and then inadvertently transferring some of the lead to their mouths from their hands, either directly or indirectly, as for example while eating. For most children, however, this type of exposure is not likely to result in significant absorption of lead. This is particularly true where children are wearing appropriate protective riding gear, such as gloves and helmets.

Broadening the Exemptions for Metals

In section 101(b)(4), Congress recognized that it might not be technologically feasible for certain electronic devices to meet the lead limits applicable to children's products generally and gave the CPSC authority to adopt other requirements for such devices. The Commission has exercised this authority on an interim basis and established higher limits for certain electronic components where it concluded that such parts cannot be made inaccessible and it is not technologically feasible to substitute other materials at this time. These include metals such as steel, aluminum and copper alloys as used in electronic devices. In adopting these alternative limits, the Commission made reference to exemptions recognized elsewhere, such as the European Union directive 2002/95/EC known as RoHS. It is worth noting that in Europe, the RoHS exemptions are equally applicable to non-electronic uses of these metals, but the staff believes that section 101 gives us no flexibility to apply the same exemptions outside the realm of electronics. This means that children's products containing these metals and metal alloys manufactured for the U.S. market cannot employ recycled metal to the same extent as they can in Europe; rather, the manufacturers for the U.S. market must obtain supplies of primary metal, forcing vastly higher energy consumption and higher costs, or they must quickly switch to substitutes whose properties are poorly understood and may even pose more significant safety risks to children.

Under the current law, CPSC staff believes that an exclusion for youth ATVs would be very difficult to justify. Some have argued that if youth-sized ATVs cannot be sold for an extended period of time, owing to lead limits, then more children may end up riding adult-sized ATVs. A child using an adult ATV as a substitute would face a far graver and more immediate risk than that of the possible lead exposure from the youth ATVs.

Potential Solutions

The ATV situation is illustrative of a number of product classes that may not qualify for an exclusion. Congress could moderate this situation in several different ways. These include one or more of the following (not in priority order): (1) postponing the deadline for sales (not

manufacture) of children's products containing lead above the new limits; (2) lowering the age limit for children's products (as discussed in the response to question 6); (3) exempting some or all children's products that are usually not kept in the house, such as bicycles and ATVs; (4) giving the CPSC greater discretion to exclude from compliance with the lead limits any materials or products that pose a negligible risk to children (as discussed in the response to question 6); or (5) allowing materials that are eligible for special treatment when used in electronic devices to receive similar treatment in other children's products when the justification is equally compelling.

8. In light of recent court decisions that the lead and phthalate content restrictions are retroactively applicable, does CPSC have concerns about the effect on the environment of the disposal of inventories of non-compliant children's products?

This issue lies within the authority and expertise of the Environmental Protection Agency (EPA).

9. I understand that, since early December 2008, CPSC has had access to a large number of lead content results for finished "ordinary books" (i.e., books published in cardboard or paper by conventional methods and intended to be read by or to children age 12 and under) and their component materials (i.e., paper, paperboard, ink, adhesives, laminates, and bindings). Has CPSC staff reviewed those test results? What do those test results indicate about such ordinary books and component materials in connection with the statutory lead limits prescribed in section 101(a) of the Act? Does CPSC have any recommendations regarding how to mitigate the burdens that testing and certification requirements of the Act, and especially the retroactive applicability of those requirements to inventory, could otherwise impose on publishers, printers, and retail sellers of such ordinary books, as well as on libraries schools, charities and other secondhand distributors of such ordinary books, including those published before 1985?

Lead Testing and Printing Ink: The Publishing Industry's Challenge

Given the breadth of the definition of children's product in the CPSIA, the Commission received thousands of questions over the past six months regarding the scope of applicability of the retroactive lead limits and the required third–party testing of such products. At the same time, retailers began demanding certificates of compliance for products likely to be on their store shelves on February 10, 2009. The publishing industry claimed to have been unaware that the definition of children's product would encompass books until retailers started asking for certificates of compliance and we posted a response to one of the frequently asked questions regarding the application of the CPSIA to books intended or designed primarily for children. Because of the variety of colors of inks used in making children's books printed on paper and cardboard, the requirement of testing for compliance to the new lead limits proved costly and onerous. Some retailers were demanding separate certificates of compliance for each book title.

The issue of lead in printing ink and other products used to make a book is not new. Indeed, in 2007 the publishing industry issued a statement on lead in books to respond to any concerns

raised about books related to that year's toy recalls for excessive lead in paint. (See American Booksellers Association statement of November 29, 2007, Bookselling this Week: Getting the Lead Out: Consumers Question Books Made in China, found on March 15, 2009 at http://news.bookweb.org/news/5695.html.) The Commission has occasionally recalled such products for excess lead; for example, a recall was conducted in February 2008 for excess lead in paint on the colored spiral metal bindings of several sketchbooks. In July of 2004, the Commission issued a warning regarding the hazards of lead in candy wrappers that contain lead or bearing lead-containing ink.

The "Ordinary Book" Exemption

The Commission staff wanted to provide some relief to the book publishing industry given the extraordinary impact of third-party testing for lead and because the publishing industry maintained that the Commission had never considered ordinary children's books to be a health hazard. However, given the requirements of the CPSIA, the staff felt that they needed some representative data upon which to base a decision to exempt children's books from the requirements. The number of requests for relief from the retroactive effect of the CPSIA was so high that the staff felt that in fairness, any determination that the law did not apply to a material or class of products should be based on science and supported by test results.

It is not the case (noted in your question) that the Commission staff has had access to a "large number of tests on finished 'ordinary books'," but rather we have had access to a very limited data set on which the publishers have based their request for an industry-wide exemption from testing to the new lead content limits. The publishing industry association provided the staff with 152 separate entries representing testing done on approximately 157 books conducted anywhere from 2004 to 2009. The books tested range from the ordinary books to books with handles, stickers, kits or other accessories. The staff reviewed those test results, and initially concluded that many of the tests were done for European standards and/or did not test for total lead content as required by Section 101 of the CPSIA. The staff of the CPSC asked the industry to provide more data for total lead content and demonstrate that the data submitted was representative of all of the millions of ordinary books sold to children 12 years of age or younger.

The additional data submitted suggests that modern book publishing using offset lithography does not result in books with lead levels in excess of the 300 ppm limit that goes into effect in August of 2009. However, the Commission staff has not had the time or resources to look at the issue completely or comprehensively and has been hopeful that more data would be submitted by industry particularly with respect to books published in the 1960s and 70s. The Commission staff has been assured that the publishers now all use inks that result in children's books that fall below the statutory limits for lead. While the staff does not have a statistically valid basis for a wholesale exclusion of children's books at this time, its determination to exclude them from testing and certification does not mean that any children's book can exceed the lead limit. All children's books must meet the lead limit.

Making a determination that ordinary books cannot and will not exceed the lead limits appeared to be the only means of providing immediate relief. Such an exemption from testing also should

provide relief from the retroactive application of the standard to all books in schools and libraries that are provided to children for their use. In the meantime, the publishing industry was given a conditional enforcement waiver on the testing and certification requirements for lead, pending staff's review of the data and any additional data that may be submitted. That exemption was limited to books manufactured after 1985 because the publishing industry has not provided any test data on books published in the 60s and 70s. Instead, the industry has pointed to the fact that lead was removed from printing operations in this country due to federal statutory restrictions on worker exposure to lead in printing operations which went into effect in the late 70s. The very limited testing the Commission staff has done indicates that the lead content of these older books can occasionally exceed the 300 ppm limit that goes into effect in August 2009 but that data may not be representative. At this time the Commission staff has not had the time or resources to prove that books made more than twenty years ago do not exceed the lead limits as staff has needed to focus its resources on its investigations of deaths and injuries to children and other emerging risks and health hazards.

Library Books and Used Book Resellers

The retroactivity of the lead provision is particularly problematic in the area of books and other printed materials. We have done very limited testing of books from the 60s and 70s. It suggests that the lead content hovers around the 300 ppm mark. Anecdotal evidence received by the agency suggests that on occasion books from this earlier period may contain lead in excess of the lead limits in their binding materials. The only way to determine the total lead content in these books is to test them.

Under the CPSIA, however, sellers of used children's books, including used book stores and thrift shops, are not required to test or certify that children's books meet the new lead or phthalates limits. The CPSIA does not require resellers to test children's products in inventory for compliance with the lead limit before they are sold. However, resellers cannot sell children's books intended primarily for use by children that exceed the lead limit.

The Commission had hoped that an exemption for "ordinary books" plus its announced enforcement policy for lead would alleviate this situation. Based on information received from the trade associations with information regarding books in libraries and schools, the Commission staff understands that most textbooks in schools are less than ten years old. Likewise, the information received suggests that most library books lent to children are recycled approximately every 18 lending cycles or three years. Thus, it appears that few of the books being provided to children in their schools and from libraries would be more than 20 years old.

Potential Solutions

Staff has considered children's behaviors with books and concluded that after about 19 months of age, children may occasionally put part of a book in their mouths, but they typically are taught to care for their books so that they can continue to be used for reading and learning. This information suggests that any exposure to lead from contact with books diminishes as children age. We believe an exemption is the only way to provide relief under the CPSIA. Congress could limit the testing of books to only those picture books provided to children much younger

than 12 since this is the population of children that would be most likely to interact with their books in a way that could expose them to inks with higher lead content. Lowering the age limit would be extremely helpful to staff in dealing with books and many other products by narrowing the scope of products covered. Lowering the age limit would also provide relief to schools who face retroactive application of the lead provisions not just with regard to books but also the wide variety of other educational materials they provide to school-aged children.

The CPSIA establishes that any children's product no matter when it was made is a banned hazardous product if it exceeds the lead limits and the law does not have an exemption procedure other than one based on scientific proof that there will not be absorption of any lead. One solution would be for Congress to create a waiver process allowing the Commission to "grandfather" in products made prior to the date of enactment if the Commission concludes those products present only a *de minimis* exposure level and, therefore, a negligible risk. This could be used to solve the problem of used books as well as other products commonly sold second-hand such as used clothing or youth bicycles. It creates an administrative burden that the Commission may not be able to handle without some delay, but it would provide relief without having to undo the retroactive effect of the law altogether.

10. In general, does CPSC believe that the Act was written with too little implementation discretion for the Commission? If this is the case, for which issues (e.g., third party testing requirements) does CPSC require more discretion?

The CPSIA provides too little implementation discretion for the agency. One of the major problems with implementation has been the statute's reach across a variety of industry sectors quickly and simultaneously by virtue of its broad definition of "children's product." The lead limits reach literally every product intended or designed for a child 12 or younger. The breadth of the statute's reach has made it difficult for the Commission to address industry specific concerns in the few areas where the agency has discretion. The Commission needs room to address toy industry concerns separately from those of the apparel industry, from those of the publishing industry, and separately again from those of industries that make outdoor products for children such as motorized recreational products, playground equipment and bikes.

The lead limits and testing and certification provisions could be implemented much more smoothly if the Commission had the discretion to roll out those requirements on a product class basis. The same will soon be true for tracking labels where each industry has specific concerns about how additional labeling requirements will work given existing and multiple other labeling requirements. Congress can direct the agency as to how to determine priorities and work to a specific schedule as evidenced by section 104 which gave some flexibility to the Commission in pursuing the congressional mandates for new durable infant product standards. A similar approach to implementing all of the Act's new rules and requirements would ease the implementation burden. Indeed, the stay of enforcement of certification and testing was the agency's only means to get the breathing room it needed to deal with the various unanticipated issues that arose given the breadth of the industries affected.

Some have argued that the Commission should have a more relaxed approach to exclusions from the lead limits. However, the lead provision of the CPSIA restricts the agency's discretion at a variety of points in the statute. It allows for exemptions in three limited circumstances described in section 101(b). That section allows exclusions for inaccessible component parts of children's products and also allows the Commission to exempt electronic devices where lead is necessary for their functionality and cannot be made inaccessible. Beyond those exclusions, however, the statute leaves very little flexibility. Section 101(b)(1) of the CPSIA provides that the Commission may, by regulation, exclude a specific product or material that exceeds the lead limits established for children's products under § 101(a) of the CPSIA if the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will "neither result in the absorption of any lead into the human body," given reasonably foreseeable use and abuse of such product, including swallowing, mouthing, breaking or other children's activities or the aging of the product, "nor have any other adverse impact on public health or safety." (Emphasis added.)

The clear language of the statute is rigid; an assessment of whether there is absorption of "any lead" cannot be based on a risk based assessment because that language does not appear to allow any amount of lead, no matter how insignificant, to be absorbed in the human body. While the courts have occasionally upheld agencies applying a *de minimis* standard and exempting trivial risks from regulation, that has been permitted only when Congress has not unambiguously denied agencies that authority.[1] Here the act specifically limits the exclusion to an application supported by peer reviewed science supporting a demonstration that there cannot be absorption of *any* lead. Moreover, section 101(e) appears to restrict the agency's ability to use enforcement discretion while exclusion requests are pending, by stating that a pendency of a rulemaking to consider a request for exclusion "shall not delay the effect of any provision or limit . . . nor shall it stay general enforcement" of the lead limits.

Those who argue that common sense exclusions are permitted by the CPSIA would have to ignore sections 101(b)(1) and 101(e). Yet as the unanticipated consequences of the retroactive effect of the law have demonstrated, some ability to provide for *de minimis* exclusions would be helpful in implementing of the Act. The effort to deal with the *de minimis* risks given the speculative yet conceivable routes of exposure presented by certain products such as bike tire valve stems distracts attention from more serious health and safety problems that the agency must address. Recently proposed legislation banning BPA recognizes the need for such flexibility to provide relief when a manufacturer cannot comply because it is not technologically feasible to do so in the timeframes permitted. Yet such a waiver or exemption process could prove to be too resource intensive and divert agency resources to handling thousands of exemption requests when staff should instead be dealing with other risks that deserve attention such as identifying emerging hazards.

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[1] *Compare Les v. Reilly*, 968 F. 2d 985 (9th Cir.1992) and *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) with *Ohio v. EPA*, 992 F.2d 1520, 1534-35 (D.C. Cir. 1993). *See also* Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, U Chicago Law & Economics, Olin Working Paper No. 150. This paper can be downloaded without charge at: http://www.law.chicago.edu/lawecon/index.html.

The CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks and the actual consequences of the hazard. Congress should permit the agency to exempt certain products from the limits established by the CPSIA, to ease the burdens of testing and certification on products unlikely to present more than a negligible health risk, and to regulate on a timetable influenced by the seriousness of the actual risks not artificial deadlines. A more flexible exception process would avoid regulation of *de minimis* problems both prospectively and retroactively.

Moreover, this would allow the CPSC to consider the impacts of the regulatory requirements of the CPSIA, like the balance between the adverse effects on second-hand sales of children's clothing or bicycles and the potential risks from exposure in such products, which is especially important during the current economic crisis. It should also allow the Commission to balance risks such as balancing the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV. Given that exceptions would be made on a notice and comment basis, the underlying analysis and support for any exceptions will be public allowing for transparency and accountability. Finally, relaxing certain deadlines in the Act will allow for better priority setting which will allow Commission resources to be put towards the most serious health risks first.

* * *

CONCLUSION

The staff has set forth in its answers to specific questions above numerous approaches to dealing with the issues raised. In our view, we have been confronted with three major issues in implementing the CPSIA: (1) the retroactive application of requirements to inventory; (2) the broad reach of the legislative mandates given that "children's product" is defined as a product for children 12 years of age or younger; and (3) the impact of the new testing and certification requirements for all consumer products and the third-party testing requirements for children's products. You have asked us to consider possible solutions to the problems raised in the letter, and make our best recommendation as to productive solutions recognizing that these are ultimately policy decisions for others to make. We concluded that the following three changes would resolve many of the major difficulties identified above:

- Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children.

- Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

- Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities and a phase-in schedule.

As discussed above, there are many ways to address the challenges of implementation and meet the important goals of the statute. Regardless of the path chosen, some legislative changes would be helpful to allow the agency to set risk-based priorities given the finite resources available to the Commission.

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February 15, 2011

Chairman Mary Bono Mack
Subcommittee on Commerce,
Manufacturing & Trade
House Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Ranking Member G.K. Butterfield
Subcommittee on Commerce,
Manufacturing & Trade
House Committee on Energy & Commerce
U.S. House of Representatives
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack and Ranking Member Butterfield:

Thank you on behalf of the American Motorcyclist Association (AMA) and the All-Terrain Vehicle Association (ATVA) for holding the hearing entitled, "A Review of Consumer Product Safety Improvement Act (P.L. 110-314) and Consumer Product Safety Commission Resources," on February 17, 2011.

Please act to permanently exempt youth-model motorcycles and all-terrain vehicles (ATVs) from the negative and unintended consequences of the Consumer Product Safety Improvement Act (CPSIA) of 2008.

Founded in 1924, the AMA is the premier advocate of the motorcycling community. Along with our sister organization, the ATVA, we represent the interests of millions of on- and off-highway motorcyclists and all-terrain vehicle (ATV) riders nationwide. Our members are interested in any action that may affect their ongoing ability to responsibly enjoy motorcycle and ATV recreation. The AMA and ATVA remain concerned over the implementation of the CPSIA and the lead provisions in §101 as they apply to youth-model motorcycles and ATVs.

The Act, signed into law on August 14, 2008 and effective February 10, 2009, subjects any consumer product that is designed or intended primarily for a child age 12 years or under to the new limits on lead content (§101). While the Act was passed with laudable intent, it has created a well-documented safety hazard for children, a severe and unwarranted disruption to families who recreate together, and a deleterious effect on youth amateur racing. Additionally, the inclusion of youth-model off-highway vehicles (OHVs) in the Act has created an economic disaster for the youth model motorcycle and ATV industry.

Of greatest concern, however, are the unintended safety consequences for youth OHV riders. As you may know, the OHV community and the Consumer Product Safety Commission have worked extensively together to develop appropriate OHV size and operating guidelines for young riders. To suddenly eliminate the availability of all youth

OHVs is counterproductive to all the work that the OHV community and the CPSC have done to promote youth rider safety. The elimination of these vehicles because of an unsupported suspicion that they may pose a theoretical threat of a lead hazard effectively trades away a proven safety intervention for an unproven one.

As you continue your deliberations on this important matter, we urge you and the members of your committee to support H.R. 412, the Kids Just Want to Ride Act of 2011, introduced by Representative Denny Rehberg. This bill offers the most promising and viable legislative remedy available to permanently exclude youth-model motorcycles and ATVs from the perilous and unintended consequences of the CPSIA.

Thank you for the opportunity to provide comment on AMA and ATVA's ongoing concerns surrounding the CPSIA.

Sincerely,

Edward Moreland
Senior Vice President, Government Relations

CC: Chairman Fred Upton
Ranking Member Henry Waxman
Members of the U.S. House of Representatives Committee on Energy & Commerce

February 11, 2011

Chair Fred Upton
Subcommittee Chair Mary Bono Mack
U.S. House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Henry Waxman
Subcommittee Ranking Member G.K. Butterfield
U.S. House Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Representatives:

On behalf of the Motorcycle Industry Council (MIC), its nearly 300 vehicle manufacturer and aftermarket members, their thousands of dealers, and the millions of Americans who safely and responsibly ride their off-highway vehicles (OHVs) with their families, thank you for holding the hearing "A Review of CPSIA and CPSC Resources" on February 17, 2011. I am writing to urge you to amend the Consumer Product Safety Improvement Act to stop the ban on youth ATVs and motorcycles.

The CPSIA was intended to protect children from ingesting lead from toys. However, the lead content provision has had unintended consequences. The CPSIA has effectively banned the sale of age-appropriate youth ATVs and motorcycles because of the lead content of certain metal parts. 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 ban has resulted in unsafe situations for youth OHV riders.

It is estimated that over 13 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 products under the CPSIA because small amounts of lead – that pose no risk to youth – are imbedded in metal parts of the 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 lead content limits. Unfortunately, the stay of enforcement has proven unworkable. Due to the risks of selling under the stay, many manufacturers and dealers have stopped selling youth model OHVs, and there is now a limited availability of these products for consumers. In 2011, less than 25% of the major manufacturers are even producing the smallest youth ATVs.

The CPSC has explained that the ban on youth OHVs 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% of youth 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 notes 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.

For over two years, 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 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 unintentionally 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.

Finally, the CPSIA is unnecessarily hurting the economy and jobs when everyone is trying to grow the economy and create jobs. In 2009, MIC estimated that a complete ban on youth model vehicles would result in about $1 billion in lost economic value in the retail marketplace every year.

As Representative Rehberg stated when introducing H.R. 412 to stop the ban on ATVs and motorcycles, "a law meant to improve children's safety is actually being enforced in a way that puts kids in more danger than ever, while destroying jobs to boot."

We believe that Congress never intended to ban youth model motorized recreational vehicles when it passed the CPSIA. We urge this Committee to stop the unintended ban by either lowering the age range of "children's products" to age 6 and under or granting a categorical exemption for youth ATVs and motorcycles, as provided in H.R. 412. In either case, we urge the Committee to leave CPSC with no doubt about Congress' intent to ensure the continued availability of these youth model motorized recreational vehicles.

Respectfully submitted,

Paul C. Vitrano
General Counsel

Testimony Submitted for the Record
U.S. House of Representatives
House Subcommittee on Commerce,
Manufacturing, and Trade
April 17, 2011

Presented by
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Testimony Submitted for the Record
U.S. House of Representatives
House Subcommittee on Commerce, Trade, and Consumer Protection
April 29, 2010

Mr. Chairman, Ranking Member, and members of the Subcommittee, on behalf of Goodwill Industries International® (GII), thank you for this opportunity to provide testimony for the public record about the *Consumer Product Safety Enhancement Act of 2010*. Last spring, Goodwill worked with the Committee and its staff to develop draft language for inclusion in a discussion draft of the *Consumer Product Safety Enhancement Act*. Goodwill believes that the draft included effective provisions that would address Goodwill's concerns about retroactively applying the CPSIA's sales ban on children's products manufactured before the law's implementation. Goodwill believes that the provisions in Section 3, pertaining to the selling of used children's products, would have allowed Goodwill to continue supporting its mission through the sale of used children's apparel within the letter and spirit of the law.

Goodwill Industries International (GII) represents 158 local and independent Goodwill agencies in the United States that help people with barriers to employment to participate in the workforce. One of Goodwill Industries' greatest strengths continues to be its entrepreneurial approach to sustaining its mission. In 2009, the Goodwill network raised nearly $3.7 billion through its retail, contracts, and mission services operations. Nearly 83 percent of the funds Goodwill raised in 2009 were used to supplement government investments. Today more than ever people rely on Goodwill. In fact, in 2009, Goodwill collectively served almost 2 million people. This number represents a 26 percent increase compared to 2008. With the economy

continuing to be sluggish, we expect that we will continue to see the number of people who turn to Goodwill for assistance to increase dramatically.

The roots of today's Goodwill began as a simple idea in 1902 when Rev. Edgar Helms set out to help poor immigrants in Boston's South End by collecting clothes and household items from wealthier Bostonians to provide clothing and household items for the struggling immigrants. He discovered, to his surprise, that the immigrants were too proud to simply accept the items. So he took his idea a step further by enlisting volunteers to repair, clean, and sell the items at reasonable prices. He used the revenue to provide wages to the workers – and the first Goodwill store was born.

Especially during such difficult economic times, Goodwill is very proud of its long history of helping people to find jobs and advance in careers. As the nation struggles to recover from the worst recession since the Great Depression and unemployment stubbornly hovers near 10 percent, Goodwill remains committed to partnering with stakeholders at the federal, state, and local levels by contributing the resources and expertise of local Goodwill agencies in support of public efforts and investments.

Goodwill's first priority is and has always been the safety of its customers and the people it serves. Goodwill has a long history of working in good faith with the Consumer Product Safety Commission (CPSC) to prevent unsafe products from being sold in its stores. Local Goodwill retail professionals check the CPSC's product recall lists to identify any recalled and donated products. Those found to have been recalled are not placed on stores' shelves for sale and are taken out of circulation. In addition, agencies avoid selling known high-risk items, such as metal

jewelry and painted toys. We continue to work closely with the CPSC to pursue our common goal of preventing people from purchasing unsafe products. By continuing these efforts, we believe amending the CPSIA – by exempting the sale by charitable organizations of used children's clothes from the CPSIA's sales ban – would allow Goodwill stores to sell used children's apparel while protecting our customers' children.

I'd like to spend a moment of our time to discuss Goodwill's business model, since it is very different than that of a traditional retailer with a national footprint. First, it is very important to keep in mind that Goodwill's footprint in the U.S. is actually 158 local and independent community-based organizations' footprints that collectively make up the Goodwill network in the U.S. Each local Goodwill agency's autonomy allows it to be a true community stakeholder and partner. For example, in 2009, the Los Angeles Goodwill invested millions of its own earnings to subsidize one-stops that serve over 59,000 people. Over 4,000 went to work to support their families and improve the economic well being of their communities.

Second, the nature of the donated goods business means that most of Goodwill's products are each individually supplied through the generosity of people who donate unwanted clothes, household items, and furnishings. Inventory control systems that allow national retailers to purchase inventory; plan for its sale; and provide product specifics and information simply do not exist in the donated goods retail business. Before donated products can be placed for sale in a Goodwill store, they must be sorted and their price must be determined. In addition, our retail professionals check product recall lists to identify and dispose of any donated items that have

been recalled – therefore ensuring that these dangerous items are removed from the consumer marketplace.

We believe the nature of the donated goods charity model supports the need for legislation to exempt human service organizations that sell used children's apparel, among other products, from the CPSIA's retroactive sales ban. Goodwill absolutely agrees that children should not be exposed to products that have dangerous lead levels. This is a moral value Goodwill holds, yet it also makes good business sense. Doing anything less would have enormous potential to damage the Goodwill brand, thus hindering Goodwill's ability to provide the employment and training services to people with employment challenges.

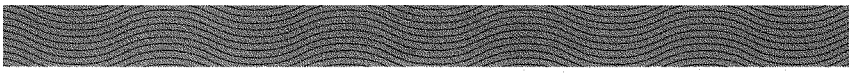
Goodwill has worked in collaboration with the CPSC to develop constructive solutions to this important issue, exploring potential courses of action that would allow local Goodwill agencies to demonstrate a good faith effort to comply with the new law, while selling used children's products at a reduced risk to our customers and our agencies. The result was an enhanced partnership with the CPSC to educate the public, and inform and train our retail professionals. Goodwill believes that these efforts demonstrate the gold standard of good faith on the part of both Goodwill and the CPSC toward accomplishing our mutual goal of protecting children. Goodwill also recognizes that the long-term solution requires Congress to take action.

Conclusion

Goodwill has deeply appreciated the opportunities that it has been given to develop draft legislation that would address the CPSIA's unintended consequences on charitable organizations, such as Goodwill, that resell donated items, including children's products, to support the delivery

of mission services. Goodwill looks forward to continuing its work with members of this Subcommittee and staff to develop provisions that would allow Goodwill stores to support Goodwill's mission through the sale of used children's apparel within the letter and spirit of the law.

Members of the Subcommittee, again I thank you for the opportunity to discuss these concerns with you, and for pausing briefly to hold this hearing with Goodwill and other stakeholders to ensure that the final bill protects children from harm while enabling local Goodwill agencies to support their efforts to annually serve nearly 2 million people in local communities nationwide.



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February 17, 2011

The Honorable Mary Bono Mack, Chairman
The Honorable G.K. Butterfield, Ranking Member
House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack and Ranking Member Butterfield:

The Retail Industry Leaders Association (RILA) welcomes the opportunity to submit written comments on the unintended consequences of the Consumer Product Safety Improvement Act (CPSIA) and on CPSC resources and its ability to protect consumers. RILA members place the highest priority on the safety and quality of the products they sell to their customers, and we supported the sweeping CPSIA when it was enacted in 2008. Nevertheless, while implementing the CPSIA, it has become apparent that there are some provisions in the law that do not coincide with best practices and have resulted in unintended consequences. RILA hopes the House Energy and 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.

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.

Prospective Application of 100ppm lead limit

RILA strongly supports the unanimous recommendation of the CPSC Commissioners to prospectively apply the August 2011 100ppm lead limit. As currently interpreted by the CPSC, the CPSIA will make it unlawful to sell products that exceed a 100ppm limit after August 2011, regardless of when the products were manufactured, unless the CPSC determines that the lower limit is not technologically feasible.

Moreover, RILA notes that "feasible" does not equal "practical" when considering the 100 ppm limit. When discussing lead limits at these very low levels, RILA believes the CPSC should also have discretion to use risk as a factor.

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 100ppm 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.

Inaccessible Component Parts for Phthalates

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. A 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.

Increased Authority for CPSC to Exclude Products from CPSIA limits

RILA also believes the CPSC should be granted expanded authority to except certain product classes or materials from the CPSIA's lead and phthalates limits based on functional purpose of the lead or phthalates in the product class, product, or component whenever the CPSC can also determine that the presence of lead or phthalates presents no significant risk of exposure or harm. Examples of product classes that may contain lead or phthalates which serve a functional purpose include pens, bicycles, all-terrain vehicles, and remote-controlled items.

Modifications to Reasonable Testing Program Requirements

The CPSC's proposed rule for reasonable testing programs (RTP) includes several burdensome and unnecessary provisions that RILA believes the Congress should consider. For example, under the CPSC's proposed rule, the burdens of record keeping for a RTP are enormous and costly. In particular, the requirement to have factory-based records in US and in English is burdensome and unnecessary because recordkeeping and the language and location of records do not meaningfully increase the safety of products.

In addition, Congress should clarify that the random sampling language in the statute does not necessarily mean statistical sampling but rather to show compliance and avoid the "golden sample."

Also, implementation of the RTP should be prospective to apply to products as they are developed. Companies should not be required to do retroactive testing, production test plans, specifications or record keeping for products already produced. The RTP requirements should apply only to products commencing production on the effective date.

Definition of Children's Products

The CPSC has interpreted the definition of children's products in an overly broad and confusing manner. RILA believes it would be helpful for Congress to provide clarity and common sense on this issue.

For example, there should be a greater weight on the manufacturer's intent whether a product is designed primarily for children.

The four (evenly) weighted factors do not lend themselves to determining the manufacturer's intent. It is currently unclear how retailers should apply the rules, especially for general use products that are used in a child's room. Instead, the rules should take into account risk and exposure. For example, a ceiling fan does not pose a risk to a child, even if it has "cartoonish" features.

The CPSC's rule effectively negates the words "designed or intended primarily". The same fan that hangs in a living room or DVD player in the den could be miraculously transformed into a children's product by the addition of Spiderman and a Hello Kitty decal.

One possible solution is to qualify the definition with something like "decorative embellishments that do not affect the functionality of the product shall not be given substantial consideration in the determination of a product as a children's product unless there is no reasonably likely general usage of the product in its unembellished form."

The CPSC should also have authority to adopt a risk evaluation in determining whether a product should be considered a children's product. For example, the definition could include, "In adopting rules interpreting the definition of a children's product, the Commission shall take into account the risk of substantial injury to children 12 years of age or younger."

Public Database

RILA believes that the veracity of information available on the CPSC's public database is critical. Thus, RILA believes that only those persons who have direct knowledge of an incident as either a victim, witness, or first responder should be eligible to provide information regarding the incident. This suggestion is to help to make sure there is sufficient information available to properly assess a report.

In addition, RILA believes that a 30 or 60 day period for manufacturers and retailers to object to complaints prior to publication on the database would be helpful.

Conclusion

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 as soon as possible 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 me at stephanie.lester@rila.org or 703.600.2046 or Jim Neill, Vice President, Product Safety at jim.neill@rila.org or 703.600.2022.

Sincerely,

Stephanie Lester
Vice President, International Trade

Rep. Denny Rehberg (MT-AL)
Statement for the Record
Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade
Hearing on a Review of CPSIA and CPSC Resources

Mr. Chairman, thank you for the opportunity to submit this Statement for the Record on the hearing entitled "a Review of CPSIA and CPSC Resources" and to share my specific concerns with an aspect of the law that was passed in 2008.

As you know, the Consumer Product Safety Improvement Act (CPSIA), while well-intentioned, created a situation in which off-road vehicles that are manufactured and marketed exclusively for children under the age of twelve; including all-terrain vehicles, off-highway motorcycles and snowmobiles, have been effectively banned due to the Consumer Product Safety Commission's (CPSC) interpretation of the lead content provision. Although the Commission has issued a stay of enforcement through December of this year, permanent action to exclude these products from the CPSC's interpretation is sorely needed.

Under the CPSC's interpretation, engines, brakes, wheels and suspension parts would not receive an exemption from the CPSIA's lead testing provisions and must conform to the strict provisions included in the legislation. As I have expressed to the Commission and to my fellow Members of Congress before, it would be extremely difficult for children to physically handle these parts, many of which aren't easily accessible to even the most experienced mechanics. Quite simply, these parts should not be included in the CPSC's interpretation of the bill.

I have again introduced legislation this Congress, H.R. 412, to exempt youth-model off-road vehicles from the CPSIA and I ask the Committee to include its language in any efforts to reform and improve the CPSIA. A full categorical exemption is the best way to clarify Congressional intent and ensure that children have access to the properly-sized vehicles that will keep them safe. This issue is of utmost importance to outdoor enthusiasts and small business owners across the country that base their livelihood on the sale of youth products.

I appreciate your attention to this issue and please do not hesitate to let me know if I can be of any assistance moving forward.

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

CHAIRMAN INEZ M. TENENBAUM

March 23, 2011

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

Dear Chairman Bono Mack:

Attached please find responses to the written questions for the record submitted by you and certain other Members of the Subcommittee in connection with the February 17, 2011, hearing entitled "A Review of CPSIA and CPSC Resources." An electronic version of these responses will also be provided to Katie Novaria, Legislative Clerk for the Subcommittee.

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

Very truly yours,

Inez M. Tenenbaum

Attachments

House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade
"A Review of CPSIA and CPSC Resources"
February 17, 2011

Responses of Chairman Inez M. Tenenbaum to Questions for the Record

Questions from the Honorable Mary Bono Mack

1. **On what date did the "soft launch" of CPSC's complaint database begin?**

   The soft launch began on January 24, 2011.

2. **Have all product safety complaints coming to the Commission since that day been processed as part of the "soft launch"? If not, how many have been processed as part of the soft launch?**

   All potentially eligible reports were processed as part of the soft launch. Reports originating through certain sources—news reports, death certificates, and incidents reported to CPSC under Section 15(b) of the CPSA, Section 102 of the CSPA, or reported through CPSC's voluntary retailer/manufacturer reporting program—are ineligible for the public database and were not considered for inclusion. From January 24, 2011, through March 8, 2011, 2,656 potentially eligible reports were received through soft launch.

3. **Of all the complaints received by the Commission since the start of the soft launch:**

   a. **How many provided enough information to qualify as a "report of harm" under the Commission's rule?**

      One thousand sixty-three of the reports received between January 24, 2011, and March 8, 2011, have qualified as "reports of harm." Most reports received by mail, phone, and fax have not included consent and verification and have had to be returned to the submitter so they may indicate his or her consent preferences and verify the accuracy of the information in the report. The number of qualifying reports from this time period will therefore likely increase over time as consent forms are returned.

   b. **How many were submitted by consumers who actually used the product that was the subject of the "report of harm"? Who else has submitted complaints?**

      We collect the category of the submitter (consumer, local, state, or federal government agency, health care professional, child service provider, or public safety entity) and, on some reports, the submitter has identified the relationship of the submitter to the victim. Relationship is not a required field, however, and is

only collected on reports where the category of submitter is "consumer" and the submitter indicates that there was an incident. We do not collect information on whether the submitter actually used the product. The two tables below show the distribution of category of submitter and of the relationship of the submitter to the victim. Each table includes a second dimension that shows whether or not the report qualifies as a report of harm. Reports for which we do not yet have verification and/or consent, preferences are designated in the tables below as "awaiting consent."

Qualified as Report of Harm by Category of Submitter
Received January 24, 2011, through March 8, 2011

	Child Service Provider	Consumer	Federal Government Agency	Health Care Professional	Local Government Agency	Medical Examiner and Coroner	Public Safety Entity	State Government Agency	Unspecified	Total
Yes	2	1042	2	0	6	3	8	0	0	1063
No	1	193	0	1	5	41	5	7	0	253
Awaiting Consent	1	435	5	0	10	838	34	12	5	1340
Total	4	1670	7	1	21	882	47	19	5	2656

Qualified as Report of Harm by Relationship of Submitter to Victim
where Category of Submitter is Consumer
Received January 24, 2011, through March 8, 2011

	Self	Family	Friend, Neighbor, Coworker	Professional Relationship	No Relationship	Unspecified	Total
Yes	306	191	5	4	1	535	1042
No	48	27	3	0	0	115	193
Awaiting Consent	86	50	1	1	5	292	435
Total	440	268	9	5	6	942	1670

c. How many of the complaints included model number(s)?

Nine hundred fifty-six of the reports that qualified as reports of harm contained an input in the model field. Among all potentially eligible reports, 1,430 reports contained an input in the model field.

4. Of the complaints that qualified as "reports of harm," how many were transmitted to the product manufacturer within five business days?

Of the 1,063 reports received between January 24, 2011 and March 8, 2011, that have qualified as reports of harm, 1,004 reports were forwarded to manufacturers and 59 reports were under review. Of the 1,004 reports forwarded, 759 reports were forwarded within five days after the report was determined to be a qualified report of harm and 245

reports were forwarded more than five days after the report was determined to be a qualified report of harm.

During soft launch the processing of some reports was somewhat slower than current processing speeds due to continued system testing and staff adjustment to the review process. Since then processing speeds have improved substantially, which was one of the purposes of the soft launch.

5. **Of the "reports of harm" that were transmitted to a product manufacturer:**

   a. **How many were sent to a manufacturer who had preregistered with the Commission?**

      Through March 8, 2011, CPSC notified businesses of 696 reports of harm that were eligible for the database. Of these, 529 were delivered to registered businesses through CPSC's business portal.

   b. **How many elicited comments to the Commission from the product manufacturer within ten business days?**

      Through March 8, 2011, 158 general comments were received through CPSC's business portal in response to the 1,004 reports of harm transmitted to businesses. Of these, 143 were received within 10 business days. Approximately 30 additional general comments were received by email, fax, or postal mail.

   c. **How many provided the product manufacturer with the contact information for the complainant?**

      Eight hundred thirty-seven of the 1,004 reports of harm were provided to businesses with the submitter's contact information.

6. **Of the "reports of harm" to which manufacturers responded:**

   a. **How many did the manufacturer claim were "materially inaccurate" in some way?**

      Through March 8, 2011, CPSC received 12 claims of materially inaccurate information.

   b. **How many did the manufacturer claim contained confidential business information?**

      Through March 8, 2011, CPSC had not received any claims of confidential information.

7. **Of the reports of harm as to which a manufacturer claimed some "material inaccuracy," how many were investigated by the Commission? Please provide the date the investigation was opened, the date it was completed and the resolution of the investigation.**

Investigations Related To Materially Inaccurate Information Claims

From January 24, 2011, through March 8, 2011, we received 12 claims of materially inaccurate information through the business portal on SaferProducts.gov. All of these claims have been reviewed and resolved. Nine of these claims alleged that the wrong manufacturer or private labeler was identified in the report of harm. After investigation, all nine of these claims were accepted by the CPSC staff and any erroneous information was corrected. We do not track a date when an investigation begins. We track the date a claim is filed and the date the claim is resolved, meaning the CPSC notified the manufacturer of its determination on the claim. For a claim involving a wrong manufacturer, the investigation generally consists of verifying the manufacturer's claim, primarily using an internet search. Once staff reviews the claim, it can typically be quickly resolved in approximately 15 minutes. Thus, for the nine wrong manufacturer claims received, all but one were resolved in two business days or less, as shown below.

Wrong Manufacturer Claims

Number of Wrong Manufacturer Claims	Number of Business Days to Resolve
2	0
4	1
2	2
1	4

Wrong Manufacturer Claims

	Date Manufacturer Submitted Claim	Date CPSC Resolved
1	2/2/2011	2/4/2011
2	2/8/2011	2/9/2011
3	2/11/2011	2/17/2011
4	2/22/2011	2/24/2011
5	2/24/2011	2/25/2011
6	2/25/2011	2/28/2011
7	2/28/2011	3/1/2011
8	3/3/2011	3/3/2011
9	3/3/2011	3/3/2011

Three claims alleged that information in a report was materially inaccurate, other than the identification of a manufacture or private labeler. Pursuant to the final rule, the burden of proof is on the firm alleging that a material inaccuracy exists. Claimants are expected to provide CPSC with sufficient information for us to make a determination on its claim.

After investigation, the CPSC determined that one claimant failed to meet its burden of proof to demonstrate that a report contained materially inaccurate information. Two reports were determined to contain at least one piece of information that met the definition of materially inaccurate information. With regard to the first report, a model number was corrected. In the second instance, the spelling of the name of the product was corrected. The length of an investigation depends on the amount of information provided. Where a firm has not met its burden of proof, or has offered little or no information for review or consideration, the CPSC's review does not take long to complete.

Materially Inaccurate Information Claims
(Excluding Wrong Manufacturer)

Number of Claims	Number of Business Days to Resolve
1	7
1	2
1	6

Materially Inaccurate Information Claims
(Excluding Wrong Manufacturer)

	Date Claim Submitted	Date CPSC Resolved
1	2/8/2011	2/17/2011
2	2/23/2011	2/25/2011
3	3/8/2011	3/16/2011

8. Of all the reports of harm submitted to CPSC during the soft launch, how many were investigated by the Commission?

Through March 8, 2011, 113 of the reports that qualify as reports of harm have been assigned for investigation by CPSC field staff and 198 of all potentially eligible reports have been assigned for investigation.

9. Is the Commission aware of any cases, either before or after the date of the soft launch, in which fraudulent complaints were filed with the Commission? Is the Commission aware of any cases in which a particular type of consumer product was the subject of two or more fraudulent complaints? Has the Commission pursued sanctions in any of these cases?

CPSC staff is aware of one instance of false data submitted in a report late last year. This submission, however, was not provided through the public database report process, which did not begin soft launch until January 24, 2011. Staff investigated the report in a timely manner, found evidence and information that the report was fabricated and forwarded it

to CPSC's legal team for review and possible action. As of this date, the case remains open and is under active investigation.

10. Approximately how many product safety complaints is the Commission staff able to investigate each year? For complaints that are investigated, what is the average time from when the complaint is filed with the Commission to when the investigation is complete?

Current staffing levels permit approximately 5,000 in-depth investigations per year. The elapsed time between complaint filing and completion of the investigation varies greatly depending on the urgency of the investigation, the complexity of the product, and any specific testing that may be required as part of the investigation. The average time elapsed between assignment of an investigation and completion in fiscal year (FY) 2010 was 43 days.

11. Does CPSC intend to allow information on the database to be downloaded without a disclaimer as to its accuracy? When CPSC determines that information previously included in the database is "materially inaccurate," how will it notify parties who have previously downloaded the inaccurate information?

No. To date, the CPSC has not provided a means for downloading data from SaferProducts.gov, because no reports have been posted yet. When the database has been populated with reports of harm, the CPSC intends to provide a means to download information. Information downloaded from the database will contain the statutorily required disclaimer as the first piece of information in every data file. However, CPSC cannot guarantee, nor does the statute require, that users and aggregators of this information retain this disclaimer.

Additionally, the database is a dynamic computer system. Information may change because a report is found to be materially inaccurate, or because the consumer revised his or her report to include additional information. Users that download this data must be mindful to update data on occasion, to ensure that corrected information is captured.

12. What obstacles (other than staff resources) does the Commission face in completing investigations more quickly?

Prior to the completion of Phase I of the Information Technology (IT) modernization, most of the CPSC's business processes used many small, disconnected information systems. Commission staff were unable to efficiently and effectively pull together required data because of these "stove piped" systems. Staff stored and manually maintained too much critical information outside of the legacy systems—a situation that places an unwarranted dependency on a small number of key program area staff with expert knowledge in a particular field and supporting data.

We needed to improve our business processes and the Commission's IT systems needed to support those improvements. These improvements are intended to eliminate manual

processes and tedious status reporting and expedite hazard identification and related management decision making. The IT modernization component of CPSIA Section 6A is designed to make these improvements.

13. Please provide an explanation of the $3 million figure cited by Chairman Tenenbaum as the cost of the public database. What is included in the cost? Was that estimate previously provided to Congress or to the other Commissioners?

Since the beginning of the statutorily mandated Consumer Product Safety Risk Management System (CPSRMS) project in FY 2009, the CPSRMS cost has been included in the CPSC's annual budget, which is presented to and voted on by the Commission. The budget is also presented to the Office of Management and Budget (OMB) and to the Congress. Starting in September 2009, Commission staff have published an OMB Exhibit 300 including a summary of historical, current, and planned expenses for the CPSRMS program. An example can be found at: http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/cpsrms.pdf.

However, in presenting its budget and in the OMB Exhibit 300, the Commission did not separate the cost of the public database from the overall CPSRMS information technology modernization costs.

Below is an estimate of the work done within the CPSRMS project to develop the public database. This estimate was established in hindsight according to the scope of the public database.

Portion of the Consumer Product Safety Risk Management System Costs Dedicated to the Public Database

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	**Total**
Development	$1.450	$1.000				**$2.450**
Operations and Maintenance		$0.400	$0.050	$0.050	$0.050	**$0.550**
Total	**$1.450**	**$1.400**	**$0.050**	**$0.050**	**$0.050**	**$3.000**

Please note that the costs (in millions) above include contracted goods and services by fiscal year. Costs in fiscal years 2009 and 2010 are based on actual obligations. Costs in fiscal years 2012 and 2013 are for planning purposes. Costs in fiscal year 2011, while currently under continuing resolution, are a combination of actual obligations and are for planning purposes.

Since December 2010, Commissioners Alder, Nord, and Northup have received briefings regarding CPSRMS costs, per their request.

14. Please provide an estimate of the cost to operate the database for one year. Please provide an estimate of the costs incurred by manufacturers in responding to reports of harm during the soft launch.

As noted in the chart above, the CPSC's operations and maintenance costs specific to the CPSIA Section 6A public database requirements are FY 2010: $400,000, FY 2011: $50,000, FY 2011: $50,000, FY 2012: $50,000, and FY 2013: $50,000.

With regard to the cost that may have been incurred by manufactures during soft launch this would have depended on the behavior of an individual manufacturer.

15. Lead limits—Books

a. You have indicated that you favor an exemption from the lead limits for ordinary children's books. In your view, what is the rationale for such an exemption?

Modern books are typically made of materials known to not contain lead at levels that exceed the limits required by law, such as paper products and four-color process (i.e., CMYK) inks. In the Statement of Managers Accompanying P.L. 111-117, the Conferees noted their belief that the CPSIA may not have been intended to subject ordinary children's books to the section 101(a) lead content limits. In response, the Commission unanimously stated in its Janaury 15, 2010, Report to Congress Pursuant to the Statement of Managers Accompanying P.L. 111-117 (hereinafter "Report to Congress") that "Congress may, with some limitations, choose to consider granting an exclusion for ordinary children's books and other children's paper-based printed materials."

b. In your conception, would an exemption for books also cover older books, such as those loaned by public libraries or sold by used book stores?

Ordinary children's books should include the same materials as described in part a. of this question and therefore Congress may, with some limitations, choose to consider granting an exclusion. In the past (i.e., prior to the early 1980s), inks containing lead were sometimes used for certain colors in children's books. However, many of these books (pre-1985) are generally considered "vintage" or "collectible" books, and as such would not be intended primarily for use by children.

c. Should the exemption cover other printed materials?

The Commission unanimously stated in its Report to Congress that Congress may, with some limitations, choose to consider granting an exclusion for other children's paper-based printed materials.

d. Would the rationale for books extend to other types of products?

Products that are exclusively made of the material determined to not contain lead pursuant to the Commission's August 26, 2009, lead determinations rule (74 Fed. Reg. 43,031), and are otherwise unaltered, could be exempted. Also, as stated in the Report to Congress, I believe we could more effectively implement section 101(a) if we were allowed some additional flexibility in granting exclusions from the section 101(a) lead limits.

16. Lead limits—Electronics Policy

a. CPSIA authorized you to set less stringent lead limits for certain electronics parts. You have exercised that authority to set such limits for various metals, adopting limits that are the same as, or similar to, those allowed in the European Union. In the EU, however, these more relaxed limits apply to metals whether used in electronics or in other types of consumer products. Would you favor a change to the law that gives the Commission the discretion to extend the exemptions granted for metals used in electronics to cover those same metals when used in other types of children's products? If not, what justification is there for giving electronics exceptional treatment?

If the Commission were to have some additional discretion to extend exemptions from the lead content limits, we would be able to exclude products such as ATVs and bicycles and other children's products where it is generally not practicable or technologically feasible to remove the lead, the products are not mouthed or swallowed, and granting such an exemption would present a very low likelihood of exposure.

A similar approach was taken by staff in the Janaury 20, 2010, final rule for the exemption of certain electronic devices from the section 101(a) lead limits in the CPSIA. (75 Fed. Reg. 3154) This rule, which was based on the specific criteria in section 104(b)(4) of the CPSIA provided for exemptions from the lead limits "for a limited number of components of electronic devices that must be manufactured using lead" and where "staff determined that it [was] not technologically feasible for certain components in electronic devices to meet the lead content limits under the CPSIA because the presence of the lead [was] necessary for proper functioning of certain component parts in electronic devices." In addition, staff's review showed that "lead containing components that [were] exempted are components that one would not expect children to mouth, swallow, or handle for significant periods under normal and reasonably foreseeable conditions."

b. Did the Commission, in establishing the more relaxed limits for certain metals used in electronics, perform any testing to determine how much lead a child might, be exposed to from these products?

We based our limits on the statutory criteria set forth in section 101(b)(4) of the CPSIA, EU directives, and review of the types of products or component parts which were accessible that might be subject to the alternate limits, such as headphone jacks and electrical plugs. We also assessed whether a child would have extensive contact with such parts based on staff's previous experience testing products made of varying materials, which showed that "the [exempted] lead containing components . . . are components that one would not expect children to mouth, swallow, or handle for significant periods under normal and reasonably foreseeable conditions."

c. **How variable is the lead content of metals, particularly metals that are commonly or repeatedly recycled, such as aluminum? Can manufacturers predict the highest lead level likely to be reached in a particular grade of metal, even if the usual level is much lower?**

According to CPSC staff, for some alloys, the maximum level of lead can be specified when placing the order for the alloy desired. As with any material or process, manufacturers must be mindful of the requirements and choose materials and suppliers carefully.

There are some steel alloys (e.g., free machining 12L14 steel and leaded hardenable alloy 41L40 steel), aluminum alloys (e.g., AA 2011), and brasses (e.g., C30000 wrought copper alloys) that have intentionally added amounts of lead for chip breaking and improved tool wear during machining and surface finishing of parts. Uses for the inclusion of lead are: machinability, surface finish, screw machines, and lubrication/bearings.

The American Iron and Steel Institute has provided CPSC with written comments that steel alloys with lead levels below 100 ppm are technologically feasible for both virgin and recycled steel because the high temperatures necessary during the melting of steel tends to vaporize any lead in the molten steel. Furthermore, customers can specify that a specific low lead level when ordering a steel alloy, and it will be met for that order.

Aluminum alloys do not normally contain lead. Lead content should be minimal from recycled sources. There is one wrought aluminum alloy 2011 that purposely contains lead for machinability and strength. Cast aluminum series 2xx.x Al-Cu, and 3xx.x Al-Si-Cu and/or Mg for gasoline engine cylinder heads and pistons generally do not contain lead.

Zinc alloys (Special High Grade) used for zinc die-castings should have a lead content below 30 ppm, while other zinc alloys permit a higher amount. For example, Prime Western Grade allows a maximum of 14000 ppm lead and High Grade allows a maximum of 300 ppm.

Copper alloys consist of brass, which is copper alloyed with zinc, and bronze, which is copper alloyed with tin, (although many copper-zinc alloys are referred to as bronzes). Brass alloys such as C68010 brass contain less than 100 ppm lead. There are many copper alloys where lead is intentionally added (up to 6 percent by weight) for machinability and surface finish. Lead can be an impurity in reported concentrations of 500 ppm to 700 ppm to 1500 ppm.

Tin and alloys with tin are also used in consumer products. There are only a few applications where unalloyed tin is used. Tin is used in tin-coated steel for tin cans, leaded and lead-free solders, modern pewter without lead, and copper-tin true bronzes.

17. Lead limits—Common Toy Box. CPSIA defines the term "children's product" to include products intended for children as old as 12. The justification for this age stems, in part, from the concern that younger children, who are more likely to put things in their mouth, may have access to toys and other products that belong to older children.

a. Has the Commission conducted or sponsored any research to determine how much mouthing of products children do at different ages? If so, please provide appropriate documents.

As part of its evaluation of phthalates in polyvinyl chloride, especially diisononyl phthalate (DINP), CPSC staff undertook an extensive observational study of several hundred children under age six years. A report of this study, "A mouthing observation study of children under 6 years," written by CPSC staff and dated November 2001 is available as Tab F in the staff briefing package for Petition HP 99-1 Requesting Ban of Use of PVC in Products - Intended for Children Five Years of Age, available at:
http://www.cpsc.gov/library/foia/foia02/brief/briefing.html.
http://www.cpsc.gov/LIBRARY/FOIA/FOIA02/brief/Fiveyearpt1.pdf
http://www.cpsc.gov/LIBRARY/FOIA/FOIA02/brief/Fiveyearpt2.pdf

Prior to the extensive observational study, staff also conducted a pilot study of 80 children between one and eight years of age in child care and school environments. A copy of that study is included separate from these responses.

b. What data were used to justify the age limits applicable to the Commission's "small parts" ban? Do those age limits remain appropriate in your view?

The small parts rule was developed using CPSC's National Electronic Injury Surveillance System (NEISS) estimates, death certificate review, and accident and injury data. The CPSC staff compiled data from its own files and from those of an independent death certificate and injury report on toys. There has not been a formal study to indicate that the age limits are not appropriate.

The method for identifying toys and other articles intended for use by children under three years of age that present choking, aspiration, or ingestion hazards because of small parts, was finalized June 15, 1979, and went into effect January 1, 1980.

c. **For some types of products, the "common toy box" justification might be inapplicable. For example, it may be that infants and toddlers would have no opportunity to mouth educational products that are used in school classrooms, particularly more expensive products like musical instruments, specialty products that are intended for children with special needs, or sophisticated scientific instruments such as telescopes or microscopes that are often kept under lock and key. Similarly, such young children would rarely have an opportunity to mouth products that are kept in garages or out of doors such as all-terrain vehicles, bicycles, snowmobiles, and the like. Would you favor granting the Commission flexibility to treat these products differently from toys for purposes of the lead limits?**

As the Commission noted in its January 15, 2010, Report to Congress, additional flexibility is appropriate for some products, such as youth all-terrian vehicles (ATVs) and bicycles, and similar outdoor products where it is generally not practicable or technologically feasible to remove the lead, the products are not mouthed or swallowed, and granting such an exemption would present a very low likelihood of exposure.

18. Retroactivity.

a. **The Commission unanimously recommended treating the 100 ppm limit as prospective only. This would be helpful to many retailers who otherwise might have to destroy inventory again this summer (as many did before when the lead limit dropped from 600 ppm to 300 ppm). It would be of little help, however, to sellers of second-hand children's products that were not subject to any lead limits when made. Would you favor legislative changes that provide greater flexibility to such resellers?**

With regard to some products, additional flexibility may be helpful. For other products, such as children's metal jewelry, painted children's toys, and vinyl plastic products, flexibility may pose a potential health risk. Additionally, the Commission should retain the ability to designate additional products where there may be a potential health risk and retroactive application of a specific standard may be appropriate.

b. **The new crib standard essentially bans traditional drop-side cribs, which have been the subject of many recalls over the last few years. Why should child-care facilities that have purchased cribs without drop sides have to throw them away at this point even if they have never been the subject of an**

investigation, let alone a recall? Would you favor legislative changes that grant the CPSC additional flexibility in this regard?

Upon taking over as Chairman of the Commission, I observed that there was an alarming pattern of failures of crib hardware and component parts, particularly related to drop-side cribs. The situation required meaningful short-term and long-term strategies to address this trend. According to our data, between November 2007 and April 2010, there were 36 deaths associated with crib structural problems. Thirty-five of those fatalities occurred when crib components detached, disengaged, or broke, ending in unspeakable tragedy.

Combined with our sustained and ongoing efforts to rid the marketplace of older, defective cribs, the development and passage of new mandatory crib standards is part of our responsible and holistic approach to giving consumers increased confidence in the safety of their cribs. This includes older cribs that may not have a drop-side, but may have other hardware issues and have not been tested to current standards.

I deeply appreciate the impact of this rule on smaller entities, particularly child care facilities and places of public accommodation. To address this concern and better ensure widespread availability of compliant cribs and an orderly and successful transition to the use of compliant cribs by child care providers and places of public accommodation, the Commission has adopted a two-step phase in of the rule. First, for all manufacturers, distributors, and retailers of full-size and non-full-size cribs, the final rule will become effective June 29, 2011. Second, child care centers, family child care homes, and places of public accommodation with then have an additional 18 months to comply (December 28, 2012).

This will ensure that all infants and toddlers in child-care facilities will have the safest possible sleep environment that is free of both drop sides and other potentially dangerous hardware and component parts not tested to new, protective standards.

19. Budget.

a. **Please provide a breakdown, by office and division, of CPSC staff at the time you were confirmed as Chairman and as of February 17, 2011.**

CPSC Staff Employment on June 26, 2009 and February 2, 2011

CPSC Office	Employment 6/27/2009	2/12/2011
Commissioners	10	21
Congressional Relations	0	3
General Counsel	27	39
Inspector General	5	6
Equal Employment Opportunity	2	2
Executive Director	4	3
International Programs and Intergovernmental Affairs	4	6
Human Resources	10	12
Information Technology Services	56	63
Financial Management	28	29
Information and Public Affairs	8	11
Compliance	156	183
Hazard Identification and Reduction	141	161
Total	**451**	**539**

Note: The new office of Education, Global Outreach, and Small Business Ombudsman is in the process of being established and is not included above.

b. What was the total cost of developing CPSC's new Strategic Plan? Is any additional outside work being contemplated in this area?

The total outside cost for the overall Strategic Plan and Operational Review contract with Booz Allen Hamilton, Inc. was $1,896,236.

Below is a breakdown of the costs contained within the contract.

Environmental Scan	$408,178
Strategic Plan	$773,067
Operational Review	$714,991

At this time we do not expect any additional outside work being performed in this area.

c. When do you estimate the Commission staff will be able to occupy the new laboratory?

We project to occupy the new laboratory in May 2011.

20. Cadmium. Some media, in reporting on cadmium levels in consumer products, have stated that cadmium is a human carcinogen. Is CPSC aware of any scientific evidence indicating that ingestion of cadmium (as opposed to inhalation) will cause cancer in humans?

At this time there is insufficient evidence to conclude whether cadmium is a human carcinogen through the oral route of exposure (ingestion).

21. CPSIA created new exceptions to section 6(b) of the Consumer Product Safety Act, including an exception that would permit public disclosure of consumer products that are stopped at the ports on the grounds that they violate a CPSC mandatory standard or ban. Do you believe this information would be useful to the public?

Yes. The disclosure of violative products stopped at ports may be beneficial to both consumers and industry.

22. Has the Commission made any determinations as to which State toy standards are exempt from preemption under CPSIA section 106(h)(2)?

Section 106(h)(2) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) allows states or political subdivisions of a state to continue in effect a safety requirement applicable to a toy or other children's product that is designed to deal with the same risk of injury as ASTM F963, "Consumer Safety Specifications for Toy Safety," if those state requirements were in effect on August 13, 2008, as long as the state or political subdivision has filed the applicable requirements with the Commission within 90 days after the CPSIA's enactment and in such form and in such manner as the Commission may require.

The Commission has prescribed the form and manner for submission of state laws on its website. Arizona, California, Illinois, and New York submitted laws that they asserted were designed to deal with the same risk of injury as ASTM F963. Section 106(h)(2) of the CPSIA does not require the Commission to take further action on the state or political subdivision submissions received (in contrast to section 106(h)(1) of the CPSIA, which requires the Commission, after notice and opportunity for oral presentation of views, to consider a rulemaking to exempt any proposed safety standard or regulation). Therefore, no further action by the Commission is pending on the state submissions.

23. What CPSC standards, bans or similar rules would potentially apply to a cloth poncho made for young children? What other statutory requirements might apply? What standards, bans, rules or statutory requirements would potentially apply to a poncho made for a child's doll?

Poncho: The applicable standard is 16 CFR 1610, Standard for the Flammability of Clothing Textiles. Depending on the cloth and any embellishments or color treatment, it may need to be tested for lead content or lead in surface coatings, require tracking information, and certification to the applicable standards based on testing by a third-party accredited laboratory.

Doll clothes poncho: The poncho would probably not have an age grade on it if it were sold separately from a doll. Any embellishments on the poncho would be subject to

assessment to the small parts requirement, 16 CFR 1501, for purposes of the choking warnings at 16 CFR 1500.19 (some dolls are for children under three and some are for children from three through six or older). The poncho would be subject to 16 CFR 1610 because of the requirement in the toy standard for toy textiles to meet the flammability requirement and would require tracking information. Depending on the product used to color the fabric, it may require third-party testing and certification as to lead content and lead in surface coating requirements.

Questions from the Honorable G.K. Butterfield

1. **The Consumer Product Safety Improvement Act (CPSIA) directs the Consumer Product Safety Commission (CPSC) to establish and maintain a publicly available database on the safety of consumer products that contains reports of harm from five different categories of reporters, including "consumers" and "public safety entities." The statute does not define those terms, nor does it impose any requirements regarding the relationship of the reporter to the harmful event.**

   CPSC in its final rule establishing the database defines "consumers" to include "users of consumer products, family members, relatives, parents, guardians, friends, attorneys, investigators, professional engineers, agents of a user of a consumer product, and observers of the consumer products being used. The final rule defines "public safety entities" to include "police, fire, ambulance, emergency medical services, federal, state, and local law enforcement entities, and other public safety officials and professionals, including consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations, so long as they have a public safety purpose."

   a. **Please explain why the CPSC believes it is important, and a faithful interpretation of the CPSIA, to allow a broad range of consumers and public safety entities to submit reports for the database, including those who may not have directly witnessed the harmful event.**

      The Commission determined that a broad interpretation best effectuates Congress' intention that the Commission receives reports regarding useful and reliable information about product safety incidents from a wide-range of submitters. The Commission requires all reports to contain eight data sets to ensure reports contain enough information to be helpful to other consumers. In addition, the required data sets require contact information for the submitter, as well as verification that information provided is true and accurate to the best of the submitter's "knowledge, information, and belief." If intentionally fraudulent reports are detected, the Commission has also indicated that it will take all appropriate action against a party filing such a report, including possible referral to the U.S. Department of Justice for legal action.

   b. **Is the CPSC aware of any attorney or consumer advocate knowingly submitting false or inaccurate information to the CPSC's existing incident reporting website or hotline?**

      No. If we were to discover an attorney, a consumer advocate, or anyone else who knowingly provided false information in a report or in a manufacturer comment, we would not only address any materially inaccurate information contained in the database, but also, where circumstances warranted, would seek legal remedies against those involved.

2. **The CPSIA lays out a specific timeframe for the publication of reports of harm and processes to prevent publication of or provide for removal of materially inaccurate information in the database. The statute requires the CPSC to transmit a report of harm to the relevant manufacturer no later than 5 business days after receiving it. The manufacturer is then given the opportunity to provide comments for publication with the report of harm and to contest information therein on the ground that it is materially inaccurate. The statute requires the CPSC to publish the report of harm no later than 10 business days after transmission of the report to the manufacturer.**

   a. **Do you believe requiring resolution of all material inaccuracy claims before publication of reports of harm would affect the usefulness of the database to consumers, including negatively impacting the availability of useful information in a timely manner? Please explain.**

      Yes. To do so would undermine Congress' overall intent behind the creation of the database, which was to provide a faster and freer flow of safety information to consumers than permitted by other provisions of the CPSA. Accordingly, the rules for the database were carefully crafted within the confines of the law to strike a fair balance for all parties in the interests of ensuring consumers have access to this information in a timely manner.

      The result is a balanced approach that will allow for the correction of faulty information and will not require the Commission to withhold reports from the public until vetted to perfection. Requiring resolution of all material inaccuracy claims before publication could result in substantial delays in the sharing of reports of harm—thereby potentially placing the public at serious risk of injury, illness, or death.

   b. **Do you believe requiring resolution of all material inaccuracy claims before publication of reports of harm would drain CPSC time and other resources? Please explain.**

      It might if there were an increase in materially inaccurate information claims, especially if made for the purpose of delaying publication of consumer incident reports.

   c. **Do you believe requiring resolution of all material inaccuracy claims before publication of reports of harm would create an incentive for manufacturers to contest a greater number of reports of harm than would otherwise be contested?**

      It is hard to predict the impact that such a change would have. It is my hope that responsible manufacturers would not file claims simply to delay publication of reports of harm but that certainly is a possibility.

3. **The CPSC has stayed enforcement of the third-party testing requirements for lead content, phthalates content, and ASTM F-963. However, some children's products are already required to undergo third-party testing due to other applicable safety standards of the CPSC. These include, among others: painted children's products manufactured after August 19, 2009 for the 90 ppm limit for lead in paint; pacifiers manufactured after January 20, 2009; metal components of children's metal jewelry manufactured after March 23, 2009; bicycle helmets, bunk beds, and rattles manufactured after February 10, 2010; and bicycles manufactured after August 14, 2010, with regard to certain design elements.**

   a. **Please explain any issues or challenges that manufacturers of children's products already subject to third-party testing requirements have encountered in complying with this requirement?**

      The major potential challenges faced by manufacturers of children's products subject to third-party testing requirements likely include conveniently locating and establishing business relationships with CPSC-recognized testing laboratories, increased testing-related expenses, and laboratory testing lead times.

   b. **Is the CPSC aware of any disruptions in the market for children's products already subject to third-party testing that are related to this requirement?**

      Although there is a stay of enforcement of the lead content and third-party testing requirements for youth ATVs, there have been claims of some disruption in the youth ATV market by certain trade associations due to manufacturer, importer, and dealer concern about these requirements.

      The Motorcycle Industry Council (MIC) and the Specialty Vehicle Industry Association (SVIA) have stated to Commission staff that youth ATVs have been and continue to be withheld from the market due to concerns about meeting the lead content requirements.

      Chinese manufacturers of ATVs have indicated to CPSC staff that imports of ATVs to the United States dropped sharply in 2009. CPSC, however, has not verified data indicating whether this drop was directly correlated with lead content requirements or larger macroeconomic concerns.

   c. **Is the CPSC aware of any negative impacts to manufacturers of children's products already subject to third-party testing requirements that are related to this requirement?**

      CPSC has no data on possible negative impacts to manufacturers of children's products subject to third-party testing requirements. However, it is likely that many have experienced an increase in testing-related expenses.

4. **Manufacturers of children's products already subject to third-party testing must also satisfy the requirement for continuing compliance and testing despite the so-called "15 Month Rule" not yet being finalized.**

   a. **Please explain how manufacturers of children's products already subject to third-party testing are able to meet the requirement for continuing compliance and testing without the final 15 Month Rule?**

      Until the Commission approves a final rule on testing and labeling, there is no requirement for manufacturers of children's products to conduct additional testing to ensure continued compliance with the applicable children's product safety standards, outside of any testing they may conduct in their normal course of business to ensure their products comply with all applicable U.S. laws and regulations.

   b. **Do you believe it is possible for manufacturers of children's products who would be subject to third-party testing for lead content to begin testing and satisfy the requirement for continuing compliance and testing without the final "l 5 Month Rule"'?**

      As mentioned, until the Commission approves a final rule on testing and labeling, there is no requirement for manufacturers of children's products to conduct additional testing. However, manufacturers are expected to ensure compliance with all applicable laws and regulations.

5. **The CPSIA phases in increasingly stringent lead content limits for children's products. The last congressionally-mandated lead content limit is set at 100 parts per million and takes effect this August. The statute, however, also provides that if the CPSC determines that it is not technologically feasible "for a product or product category" to meet that limit, it can set the lowest limit below 300 ppm that is feasible for that "product or product category."**

   CPSC last July requested comments and information related to this determination. The notice directed that the comments address a "product or *material*." The notice for the February 16, 2011, public hearing on this issue again specifically asked for information about the sourcing and extent to which lead is found in *materials*.

   In 2009, CPSC exercised its general authority to issue regulations as necessary to implement the CPSIA to exempt from the lead limits and third-party testing - requirement certain materials such as wood and cotton that have inherently low levels of lead.

   a. **Is the CPSC now considering, under its authority to make a technological feasibility determination for a product or product category, a blanket waiver from the 100 ppm lead content limit for all products with materials such as "metal, glass, or ceramics"? If so, can you explain how the CPSC is taking**

into consideration safe and unsafe uses of those materials in children's products?

CPSC is gathering as much information as possible to determine what type of determination is required to limit any undue stress to manufacturers while supporting the intent of the statute.

CPSC is considering the question of technological feasibility and commercial availability of products and materials with respect to the 100 ppm limit, as well as the health implications to children who might use products with lead content less than 300 ppm but more than 100 ppm.

b. **Do you believe that granting a blanket waiver from the 100 ppm lead content limit for all products with materials such as metal, glass, or ceramics would remove the incentive underlying the statutory lead content limits for manufacturers to move away from lead-containing materials and toward lower-lead or no-lead alternatives?**

Not necessarily, but we are carefully studying any potential impact. Manufacturers of children's products now are required to meet the 300 ppm lead content levels for products with materials such as metal, glass, or ceramics. The lead limit is already at a level where it is unlikely that lead is deliberately being added to any materials or to the manufacturing process. Accordingly, the incentive underlying the move away from lead-containing materials and toward lower-lead or no-lead alternatives does exist now.

The Commission held a hearing on February 16, 2011, to evaluate whether there is any product or product categories for which it is not technologically feasible to meet the 100 ppm lead content limit. At the hearing, several laboratories indicated that a high percentage of children's products tested are in compliance with the 100 ppm lead content limit. However, several manufacturers indicated that testing results are not always consistent due to material variability. We are still reviewing the hearing record.

6. **The drafters of the CPSIA intended that the feasibility determination allowing a product or product category to exceed the 100 ppm limit be made on a case-by-case basis at the request of the manufacturer. The burden was not supposed to be on CPSC to go out and find those products eligible for the exception.**

   a. **Has the CPSC put a petition process in place for manufacturers to seek a feasibility determination? If not, does it intend to put such a process in place? When?**

   While the Commission has set forth procedures and requirements for making determinations regarding lead content of materials or products under the Commission's regulations at 16 C.F.R. § 1500.89, those procedures are not

applicable to determinations on product or product categories that exceed the 100 ppm limit based on technological feasibility. The CPSC did not establish a petition process for individual manufacturers to seek product or product category-specific determination because there was insufficient time under the statute for the Commission to make such case-by-case determinations.

Unlike the procedures for lead content determinations, which are made on an ongoing basis, section 101(a)(2)(C) of the CPSIA provides that the 100 ppm limit will go into effect automatically on August 14, 2011, unless the Commission, after notice and hearing, finds that such a limit is not technologically feasible.

The petition process is a lengthy one. Even if procedures had been in place, manufacturers would have to gather all of the relevant information and supporting documentation necessary for CPSC staff to evaluate each product and make a determination regarding that product prior to August 14, 2011. The Commission is then required to provide notice and hearing for each product or product category. Once a determination was made as to the technological feasibility of meeting the 100 ppm lead content limit for the product or product category, the Commission would then be required to, by regulation, impose an alternative lead limit by August 14, 2011. Given the amount of time it would take to engage in notice and hearing for each petition, and the subsequent length of time it would take to issue a final rule, it was not feasible for the Commission to issue these rulings on a case-by-case basis prior to August 14, 2011.

Moreover, section 101(e) of the CPSIA provides that the Commission may not delay the effective date of the limit related to technological feasibility during the pendency of a rulemaking. Thus, even if the Commission began a rulemaking proceeding, the limit would go into effect regardless of whether the rulemaking process was completed prior to August 14, 2011.

Accordingly, to ensure that all of the interested parties had a meaningful opportunity to present evidence and testimony for the record, the Commission held a hearing on February 16, 2011, to evaluate whether there is any product or product categories for which it is not technologically feasible to meet the 100ppm lead content limit. We are still reviewing the hearing record.

7. **The CPSC on August 26, 2009, issued a final rule that determined that most textiles made of natural and manufactured fibers do not exceed any of the lead content limits in the CPSIA, and therefore do not need to be third-party tested for lead content. Specifically, the final rule stated the following textiles would not exceed the lead limits: "Textiles (excluding after-treatment applications, including screen prints, transfers, decals, or other prints) consisting of: (i) Natural fibers (dyed or undyed) including, but not limited to, cotton, kapok, flax, linen, jute, ramie, hemp, kenaf, bamboo, coir, sisal, silk, wool (sheep), alpaca, llama, goat (mohair, cashmere), rabbit (angora), camel, horse, yak, vicuna, qiviut, guanaco; (ii) Manufactured fibers**

(dyed or undyed) including, but not limited to, rayon, azlon, lyocell, acetate, triacetate, rubber, polyester, olefin, nylon, acrylic, modacrylic, aramid, spandex.

a. **If the fabric or thread used to make a cloth diaper consists of natural or manufactured fibers, does the fabric or thread need to be tested for lead?**

   No.

b. **If the fabric or thread used to make a poncho consists of natural or manufactured fibers, does the fabric or thread need to be tested for lead?**

   In general, no. As stated in the Commission's lead determinations order (74 Fed. Reg. 43,031), natural fibers and fabric made from those fibers that is dyed or undyed does not have to be tested for lead. Also, manufactured fibers and the fabrics made from those fibers are not required to be tested for lead. If the fabric is treated with an application, including a screen print, transfer, decal or other process it would no longer be excluded from testing as noted in the determination document. A poncho made from the above would fall under the same classifications. Therefore, unless the poncho was treated with an after treatment application that changes the condition of the fabric, it would not be subject to the lead testing and certification requirements.

c. **At least as early as 1993, plastic soda bottles have been recycled into material identified by clothing manufacturer as polar fleece. These plastic bottles are made almost exclusively from polyethylene terephthalate (PET); therefore polar fleece is made from PET. In addition, plastic bottles can be broken down by recyclers and re-fashioned into a wide range of goods, from playground equipment to toy telephones.**

   i. **Can you please tell me whether lead or lead compounds are used in the production of PET?**

      With respect to soda bottles or other product intended for use with foods, the use of lead and other chemicals is restricted by the U.S. Food and Drug Administration. For other types of products, lead compounds are sometimes used for color or other applications. Lead pigments, however, are not suitable for applications that require clarity or transparency, such as transparent bottles.

   ii. **Can you tell me if lead or lead compounds are introduced during the recycling of plastic bottles made from PET; either during the actual manufacturing process that turns the bottles into fibers or during the disposal process when the bottle is thrown into a recycling bin and combined with other items determined eligible to be recycled?**

To the best of our knowledge, no lead is used in recycling or processing of plastic bottles; the transfer from other possibly lead-containing comingled materials is expected to be minimal.

The most common polyester for fiber purposes is poly (ethylene terephthalate), or simply PET. Recycling PET bottles by remelting the PET and extruding it as PET fiber saves valuable petroleum raw materials, reduces energy consumption, and eliminates solid waste sent to landfills. Lead or lead compounds are not introduced during the process of converting bottle flakes to recycled polyester fiber. There could conceivably be trace amounts of lead, however, in the antimony catalyst used in the production of PET.

iii. Do you consider fibers made from recycled PET a manufactured fiber in the polyester family and therefore excluded from the third-party testing requirement for lead content?

Yes. The Federal Trade Commission defines polyester fiber as a manufactured fiber in which the fiber forming substance is any long-chain synthetic polymer composed of at least 85 percent by weight of an ester of a substituted aromatic carboxylic acid, including but not restricted to substituted terephthalic units, $p(\text{-R-O-CO-C}_6\text{H}_4\text{-CO-O-})_x$ and parasubstituted hydroxy-benzoate units, $p(\text{-R-O-CO-C}_6\text{H}_4\text{-O-})_x$. Polyester fiber made from recycled PET is polyester (PET) fiber.

iv. Does the fact that a manufactured fiber is made from recycled materials change CPSC's determination that the fiber will not exceed the lead limits and therefore be excluded from the third-party testing requirement for lead content? Did the CPSC consider the issue of recycling in its determination with respect manufactured fibers?

No. CPSC staff has not found information that indicates that fibers or fabrics made from recycled materials would contain lead above the lead limits. CPSC staff did not explicitly consider recycling, although it found no information that indicated that recycled materials should be considered separately from similar, non-recycled materials.

v. Is it correct that the CPSC is aware of children's products made from recycled plastic that exceed the lead content limits? Please provide examples and if so, can you identify whether those products contained PET?

The Commission's Division of Health Sciences is not aware of specific products that are made with recycled materials and that contain lead in excess of the lead content limits.

8. **CPSIA's authorization levels have been followed up with increased appropriations for the agency, which have allowed the CPSC to increase its staffing levels. In particular, the CPSC has been able to increase the number of staff dedicated to screening consumer products at ports of entry and intercepting dangerous products before they hit store shelves. In 2008, CPSC had only 3 employees stationed at ports of entry. Today the number stands at 19 employees at 15 ports of entry.**

   This intervention strategy has led to some good progress toward stopping dangerous products at the border. However, Commissioner Northup in her testimony described the CPSC's efforts at the border as "extensive." I understand there are 327 official ports of entry in the United States. The CPSC has staff at 15 of them.

   a. **Can you provide information about the percentage of consumer products coming into the U.S. that get screened for compliance with CPSC safety standards?**

      The current 19 port inspectors stationed at ports with occasional support from CPSC field investigators are able to inspect approximately 7,000 products per year. Of those inspections, about 1,750 products are sampled from shipments that are held. However, this colocated staff covers only 15 or 4.6 percent of the 327 U.S. ports where goods enter commerce.

   b. **Do you consider CPSC's current efforts to stop dangerous products at the border "extensive"?**

      No. That said, the CPSC has attempted to maximize its port coverage through strategic positioning of staff and by leveraging some existing Customs and Border Protection (CBP) resources through Memorandums of Understanding (MOUs) with that agency. Additional resources, however, would be helpful to further expand port coverage.

   c. **Do you agree that CPSC's ability to intercept dangerous products at the border does not, on its own, currently provide a sufficiently strong layer for protecting consumers from dangerous products, especially with respect to children's products?**

      Yes. As stated above, CPSC's Import Surveillance Division staff attempts to leverage all resources available to stop dangerous products before they enter the U.S. stream of commerce. However, limited budget and staff resources only allow us to inspect a fraction of the products entering the country. As your question implies, border detection alone is not sufficient to protect consumers.

   d. **Do you agree that the first layer for protecting consumers from dangerous products, especially with respect children's products, should be the manufacturer and that we should not first expose children to risk to**

determine whether that manufacturer is meeting its obligations?

Yes. The CPSA, CPSIA, and implementing rules and regulations put the burden of compliance on the manufacturer of a regulated product. Throughout my tenure as Chairman, I have continued to urge manufacturers to "build safety" into products, and not take shortcuts or use product substitutes (such as cadmium instead of lead) that could put consumers, especially children, at risk.

Question from the Honorable Leonard Lance

1. **At the hearing I pointed out that some manufacturers are concerned that State Attorneys General might enforce certain statutory requirements even though they have been stayed by the Commission. You indicated that the Commission did not stay enforcement of the lead content limits but only testing and certification requirements. As I read the Commission's announcements, however, it seems to me that the Commission has in fact stayed enforcement of the lead content limits for certain children's products, such as bicycles, youth all-terrain vehicles and other motorized products and recently extended those stays through December 31, 2011. In light of this additional information I wanted to follow up with my original question again: Can the State Attorneys General enforce the lead content limits in these cases even though the Commission has determined that it will not? Also, to the extent that testing and certification requirements have been stayed by the Commission, can the State Attorneys General continue to enforce the certification and testing requirements in the meantime or are they prohibited from doing so by the stay? Thank you very much for reviewing my question.**

   Yes, the state attorneys general could enforce either the lead content limits against bicycles and youth all-terrain vehicles or the testing and certification requirements for lead content limits even though the Commission has stayed enforcement. In addition, state attorneys general also have the power to enforce independent state content limits to the extent applicable.

   We have established a strong working relationship, however, with the state attorneys general offices and sponsor monthly telephone conferences to explain the rationales for our decisions and to work on coordinating our activities. To date and to the best of our knowledge, the state attorneys general have not enforced the lead limits as to bicycles or youth all-terrain vehicles nor have they enforced the testing and certification requirements for lead content.

Questions from the Honorable Mike Pompeo

1. **If Congress provides the agency more flexibility in implementing the CPSIA, do you trust the agency's experts to be able to devise rules that protect the health and safety of children?**

   The Commission has a very talented staff that works extremely hard to keep harmful products out of the U.S. stream of commerce and out of the hands of consumers. If Congress amends the CPSIA, Commission staff will continue to work diligently to implement regulations that are fair, effective, and protective of public health and safety. Statutory changes that require the Commission to make numerous case-by-case determinations, however, will likely have the effect of diverting resources from other Commission priorities, such as the investigation into problem drywall and efforts to prevent carbon monoxide poisoning deaths.

2. **Do you think that the agency's pre-existing rules governing vinyl plastic film and carpets and rugs were already doing a very effective job of ensuring the safety of consumer products in these categories? How many recalls has the agency conducted in the past 30 years based on violations of the vinyl plastic film and the two carpets and rugs product safety standards?**

   The Standards for the Flammability of Vinyl Plastic Film, 16 CFR 1611, and the Standards for the Flammability of Carpets and Rugs, 16 CFR 1630 and 1631, have done an adequate job at protecting consumers from the risk of injury and fire loss. We have had very few failures of the vinyl plastic film standard over the years. Considering the linear yards of carpeting that are in the U.S. market in almost every home in the United States the number of recalls associated with carpets, rugs, and wall-to-wall carpeting, compliance of this industry appears to be positive.

   CPSCs electronic records system began in August of 1995, limiting our ability to go back 30 years. Over the past 16 years, however, CPSC has completed a total of 1,158 regulated recalls. Of those regulated recalls, there are a total of 21 vinyl plastic film and carpet and rug related recalls as shown below:

Violation Description	**Total Violations**
Carpet Flammability Failure	14
Carpet Flammability Labeling	4
Other Carpet	1
Carpet Standards Certificate Violation	0
Carpet and Rug Related Recalls Subtotal	**19**
Vinyl Flammability Failure	0
Other Vinyl Film	2
Vinyl Plastic Film Related Recalls Subtotal	**2**
Total	**21**

3. **I understand that you thought the McDonald's Shrek glasses recalled last year contained amounts of cadmium that were too high. But when the agency's scientists came out with a cadmium standard later in the year, it turned out the cadmium in the glasses was lower than the agency's recommended limit. How much did that mistake cost McDonald's? Why did you let the headlines get ahead of the science there? Can you promise this Committee that you will wait for the science to come in before you act next time?**

   On June 4, 2010, McDonald's Corporation, in conjunction with the CPSC, announced a voluntary recall of approximately 12 million glasses based on certain preliminary cadmium wipe test data that was provided by the Commission. This matter was jointly and cooperatively discussed with McDonald's based on the best scientific data available. The CPSC has no information regarding McDonald's internal decision process regarding that recall or any costs incurred as a result.

4. **Do you think paper clips pose a significant threat to children? Do you think it makes sense for the Commission to require testing a paper clip in a science kit but not when attached to a child's Worksheets? Do you think it makes sense for the Commission to require testing brass in a child's bedside lamp but not in a child's musical instrument?**

   Section 101(a) of CPSIA requires children's products (those consumer products primarily intended for children twelve and under) to meet certain total lead limit requirements. Section 102 of the CPSIA requires testing and certification of children's requirements to ensure that they comply with CPSIA requirements and mandatory product safety rules.

   The CPSIA does not require testing and certification of every general use product that a child interacts with (such as a paper clip attached to a child's worksheet or a musical instrument). Instead, the law requires testing and certification of those products "designed or intended primarily for children 12 years of age or younger."

5. **Should new federal product safety requirements for cribs, portable cribs, and play yards mean that families who own products that complied with previous standards not be allowed to sell them on the secondary market even though the products were never found to be defective nor shown to be unsafe?**

   Upon taking over as Chairman of the Commission, I observed that there was an alarming pattern of failures of crib hardware and component parts, particularly related to drop-side cribs. The situation required meaningful short-term and long-term strategies to address this trend. According to our data, between November 2007 and April 2010, there were 36 deaths associated with crib structural problems. Thirty-five of those fatalities occurred when crib components detached, disengaged, or broke, ending in unspeakable tragedy.

   Combined with our sustained and ongoing efforts to rid the marketplace of older, defective cribs, the development and passage of new mandatory crib standards provides a

responsible and holistic approach to giving consumers increased confidence in the safety of their cribs. This includes older cribs that may not have a drop-side, but may have other hardware issues and have not been tested to current standards.

I deeply appreciate the impact of this rule on smaller entities, particularly child care facilities and places of public accommodation. To address this concern and better ensure widespread availability of compliant cribs and an orderly and successful transition to the use of compliant cribs by child care providers and places of public accommodation, the Commission has adopted a two-step phase in of the rule. First, for all manufacturers, distributors, and retailers of full-size and non-full-size cribs, the final rule will become effective June 29, 2011. Second, child care centers, family child care homes, and places of public accommodation with then have an additional 18 months to comply (December 28, 2012).

This will ensure that all infants and toddlers in child care facilities will have the safest possible sleep environment free of both drop-sides and other potentially dangerous hardware and component parts not tested to new, protective standards.

6. **When you say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission? Even if the person harmed is the one reporting, doesn't that person have the option of remaining anonymous to the manufacturer? Must the person who is reporting have first-hand knowledge?**

When you say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission?

No, contact information for a person who was harmed is not required for publication of a report by either the statute or the final rule. Section 6A(b)(2)(B)(iv) of the CPSA requires that in order for a report to be eligible for publication in the database, it must, at a minimum, include the "contact information for the person submitting the report." The Commission's final rule codified this requirement at 16 CFR 1102.10(d)(6). Moreover, pursuant to section 6A(g) of the CPSA, "harm" includes a risk of harm. Accordingly, many reports that are eligible for the database will not involve a person who was actually harmed.

During rulemaking the Commission decided not to require victim contact information on a report because such information may be lacking (where a report describes a risk of harm), considered private or confidential, or prohibited from disclosure. For example, parents completing reports involving their children may not mind including information about the age and gender of their child, while not wanting to include their child's first and last name. Also, medical professionals and others may have other statutory requirements not to disclose contact information for their patients. Section 6A(b)(1)(A) of the CPSA specifically provides that medical professionals and public safety entities may include reports in the database. Requiring victim contact information would eviscerate both the

ability to include in the database reports involving a risk of harm and reports from medical professionals where certain professionals are statutorily obligated not to disclose this information.

Even if the person harmed is the one reporting, doesn't that person have the option of remaining anonymous to the manufacturer?

Yes, this is a statutory requirement. Section 6A(b)(6) of the CPSA prohibits the CPSC from disclosing the name, address, or other contact information for submitters of reports. The only exception to this general prohibition is that the CPSC may provide contact information to the manufacturer or private labeler if the submitter has given express written consent. Accordingly, while submitters must provide their contact information to the CPSC in order include their report in the database, submitters are given a choice whether they want the CPSC to share their contact information with the identified manufacturer or private labeler.

Must the person who is reporting have first-hand knowledge?

No. "First-hand knowledge," as a concept is not required by the statute or the final rule. Instead, both the statute and the rule require that the submitter include certain minimum information about the product and the incident for a report to be included in the database. Section 6A(b)(2)(b) of the CPSA sets a floor for the type of information that a submitter must possess in order for a report to qualify for inclusion in the database. This statutory floor includes:

(i) a description of the consumer product;
(ii) identification of the manufacturer or private labeler of the product;
(iii) a description of the harm or risk of harm relating to the use of the consumer product;
(iv) contact information for the submitter of the report;
(v) verification that the contents of the report are true and accurate to the best of the submitter's knowledge; and
(vi) consent to include the report in the database.

The Commission's final rule includes two additional pieces of information, an incident date, or approximation, and the category of submitter (i.e., consumer, health care professional, public safety entity, etc.).

When you say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission? Even if the person harmed is the one reporting, doesn't that person have the option of remaining anonymous to the manufacturer?

Reports submitted anonymously will be accepted by the CPSC. By law, however, anonymously submitted reports cannot be published on SaferProducts.gov.

Although the contact information of a submitter of a report is required for publication, CPSC will *never* post this information in the database. When reports are submitted with contact information, other consumers can see and benefit from seeing the report, but will not be able to see who submitted the report. We discourage consumers from submitting reports anonymously so that reports can be included in the database, and so that the CPSC may contact submitters, if necessary, to follow up regarding their reports.

The submitter's name and contact information will never appear in the database. By law we can provide this information to the manufacturer only if the submitter has given us written permission to do so.

7. **Companies only get 10 business days after a report of harm is sent to them before it is posted to the database under the agency's rule. Is that enough time for them to investigate? Do they get enough information about the incident to be able to tell whether the report is true or not? Are they allowed to follow up with the victim to see what really happened? Are manufacturers able to identify reports that do not contain enough information to assess whether or not they are materially accurate? Can they require more information from a reporter of harm?**

Companies only get 10 business days after a report of harm is sent to them before it is posted to the database under the agency's rule. Is that enough time for them to investigate?

The CPSC is not in a position to opine on whether 10 business days is sufficient time for all businesses receiving a report to review it and respond. Over 15,000 different types of consumer products fall within our jurisdiction. Moreover, the size and ability of businesses to respond varies greatly, as do the length and complexity of reports. Providing 10 business days for a manufacturer or private labeler to respond to a report was a decision made by Congress and is, however, generally consistent with the current information disclosure requirements under section 6(b) of the CPSA, which requires a company to respond to a report within 15 calendar days.

Also, the statute does not provide that businesses will be given 10 full business days to respond to reports. Section 6A(c)(3)(A) of the CPSA provides that the CPSC shall publish eligible reports in the database "*not later than* the tenth business day after the date on which the Commission transmits the report ... [to the manufacturer or private labeler]." (emphasis added). Accordingly, CPSC could transmit reports to the manufacturer or private labeler and post them in the database on the same day. The CPSC, in its discretion, however, is providing businesses the full 10 business days to respond before publishing eligible reports in the database.

Do they get enough information about the incident to be able to tell whether the report is true or not? Are they allowed to follow up with the victim to see what really happened? Are manufacturers able to identify reports that do not contain enough information to assess whether or not they are materially accurate?

Every report will contain different types of information. Depending on the product and the incident, businesses may need to know more or less information, so this question cannot be answered for every report and for every business. It is likely that most reports will contain sufficient information for a business to understand the product and the incident based on the information submitted during soft launch.

For example, 90 percent of the reports that were submitted during soft launch through March 8, 2011, and would have been eligible for inclusion in the database, include information in the model number field.

Can they require more information from a reporter of harm?

No, the ability to follow up with submitters is not tantamount to legal process. Although a business may *ask* a submitter to provide more information about an incident described in a report, businesses cannot *require* a submitter to answer their questions or to provide more information for a report.

8. **Under the agency's rule, reports of harm go up after 10 days whether the inaccurate information in them has been corrected or not. There is no requirement for the agency to act on every report within a certain timeframe, is there? If a company believes that a report is not about their product, are they allowed to inspect the product? Or even necessarily follow up with the consumer? What does a company do to respond within 10 days if a ton of information is dumped into the database all at once?**

Under the agency's rule, reports of harm go up after 10 days whether the inaccurate information in them has been corrected or not. There is no requirement for the agency to act on every report within a certain timeframe, is there?

Neither the statute or the rule impose a deadline for the CPSC to make determinations on claims of materially inaccurate information, but the statute imposes a deadline for posting reports in the database. Both the statute and the rule require reports to be posted no later than the tenth business day after transmitting a report to the manufacturer or private labeler identified in the report. The only exception to this deadline is in section 6A(c)(4)(A) of the CPSA, which provides that the CPSC must correct materially inaccurate information before posting a report in the database if the agency has already determined that it contains a material inaccuracy.

If a company believes that a report is not about their product, are they allowed to inspect the product? Or even necessarily follow up with the consumer?

Yes, if a company believes that it has been misidentified in a report, and the submitter has consented to providing his or her contact information to the manufacturer or private labeler, that company may contact the submitter to verify the information in the report. If the submitter has the product, a company may inspect the product if the submitter consents.

What does a company do to respond within 10 days if a ton of information is dumped into the database all at once?

In the past, companies have often dealt with high volumes of product safety incident reports forwarded to them by the Commission. In addition, companies also generally respond to reports from calls and e-mails directly to the company, as well as other independent sources (such as the media, blogs, and state attorneys general). This is likely to be the case in the future, regardless of the existence of the database. Therefore, companies should be prepared to respond to numerous product complaints as they always have, regardless of the existence of the database.

If the same type of claim is being made by many different submitters, and the company would like to submit the same comment for every report, or is able to file a materially inaccurate information claim that applies to more than one report, they may contact the CPSC to determine whether we can assist them to do this in our system. At this point, the business portal handles comments and claims on a one-to-one ratio with a report.

9. **How would something like last year's Pampers investigation be affected by the database? You could have children's medical records and photographs in there forever couldn't you? Even once the agency has exonerated a product like Pampers DryMax diapers, the medical records and pictures would stay because the agency's rule does not require their removal, does it?**

Reports that are not determined to be fraudulent or materially inaccurate will be maintained in the database because we learn about emerging product hazards over time. To the extent the CPSC has conducted an investigation that relates to reports submitted to the database, the CPSC's press releases, public safety alerts, and/or recall information, will always appear in the search results before the reports are listed, so that consumers will see this information first.

10. **Will the agency adjudicate accuracy based on claims of causation? If not, why not? If a consumer claims that a particular brand of diapers caused autism, will that go up on the database?**

The CPSC has never, and will not now, adjudicate causation in reports submitted to our database. It is sufficient for inclusion in the database if a report describes an illness, injury, or death, or risk of illness, injury, or death related to the use of a consumer product. First, the CPSC does not have the resources to adjudicate causation in every report. It is unlikely that any federal agency would have the resources to adjudicate causation in the number of reports received on a yearly basis. Second, even if the CPSC did have such resources, it would unnecessarily impede the agency's primary mission to protect consumers from unreasonable risks of harm related to the use of consumer products. It is unnecessary to adjudicate causation in reports for them to be useful to the CPSC and to consumers. The CPSC relies on the collection of these incident reports to evaluate emerging product hazards, to conduct in-depth investigations, and to negotiate voluntary recalls. Consumers can search reports and review both the report and the

manufacturer's comments to make more informed choices about the products they purchase.

11. How does the database deal with the small numbers problem? For example, a widely-circulated product may have more complaints on the database than a product that is less widely-circulated. However, the less widely-circulated (and less complained about) product may actually be less safe. In such situations, will the database drive consumers to less safe products because it does not compare the number of products in circulation?

The database itself will not address this issue, although CPSC may issue recalls that address this type of information. Information from recall press releases will be displayed in the database before reports in a search. Additionally, all manufacturers are able to post information about the overall safety record of their product alongside complaints in the database.

12. Can a manufacturer bring a materially inaccurate report to the agency's attention without posting a comment on the database? How does a manufacturer do that?

Yes. A manufacturer or private labeler does not have to respond to a report at all. If it chooses to do so a business may respond in one or more of three ways: make a general comment, make a materially inaccurate information claim, and/or make a confidential information claim. Comments are the only type of response that can be made visible on SaferProducts.gov. A manufacturer or private labeler must affirmatively request that a comment be published. For example, a business can submit a comment that is visible to the public while at the same time file a materially inaccurate information claim that is not visible to the public. A business could file two comments, one that is visible on the database and one that is not. Or, if the CPSC determines that a report does not contain materially inaccurate information, the business can resubmit the claim with additional evidence. Neither claim would be visible on SaferProducts.gov. Businesses can submit comments and/or claims through the business portal, through e-mail, or postal mail.

13. Was the information in the soft launch made publicly available? If not, then how does it count as any kind of test of the problems with the database? Until the data is publicly available, there is no incentive for anyone to game' or 'salt' the database. You have stated that only 4 out of 1000 reports of harm in the soft launch were challenged as 'materially inaccurate.' Were manufacturers allowed to identify reports that lacked enough information for them to know whether they were materially inaccurate or not? How many such reports were so identified?

Was the information in the soft launch made publicly available? If not, then how does it count as any kind of test of the problems with the database?

Reports and comments submitted to the CPSC during soft launch will only be disclosed to the public pursuant to section 6(b) of the CPSA. Thus, someone would have to submit a Freedom of Information Act (FOIA) request to review this information.

Despite the fact that the information will only be disclosed pursuant to section 6(b) of the CPSA, soft launch provided an excellent opportunity for the CPSC to test the database software for:

- entering reports online using the new reporting form;
- registering businesses to use the new business portal application on SaferProducts.gov;
- allowing businesses to enter comments and claims regarding reports on the business portal; and
- working through internal CPSC processes for handling reports, including assessment of the minimum requirements for publication, notifying businesses about reports, and dealing with manufacturer comments and claims.

In addition, soft launch gave CPSC's staff the ability to identify certain areas where slight technical corrections would improve the overall operational stability of the database before the official March 11, 2011, launch date.

Until the data is publicly available, there is no incentive for anyone to game' or 'salt' the database.

CPSC did not conduct soft launch to determine whether someone would 'game' or 'salt' the database. But if someone had a nefarious intent to 'salt' the CPSC's database, he or she could have done so before now. Incident reports have been available to the public through a FOIA request since the inception of the agency. We do realize, however, that having more immediate access to information on the internet may increase someone's incentive to enter false data. If we determine that information in the database is fraudulent, we will remove the information and review our options to prosecute the offender.

You have stated that only 4 out of 1000 reports of harm in the soft launch were challenged as 'materially inaccurate.' Were manufacturers allowed to identify reports that lacked enough information for them to know whether they were materially inaccurate or not? How many such reports were so identified?

Manufacturers can choose to make a comment visible to the public and state that they do not have sufficient information about the incident to make a substantive response. We have not tracked this information to date.

14. Does the agency intend to allow information on the database to be downloaded without a disclaimer? If so, why is the agency ignoring the statutory requirement for a disclaimer on such data? How will the agency correct data that has been downloaded by third parties when it makes corrections to the database?

When the database has been populated with reports of harm, the CPSC intends to provide a means to download information. Information downloaded from the database will

contain the statutorily required disclaimer as the first piece of information in every data file.

Section 6A(b)(5) of the CPSA requires that the Commission provide "clear and conspicuous" notice to database users that the Commission does not guarantee the "accuracy, completeness, or adequacy of the contents of the database." Nothing in the statute requires that this disclaimer be included on printed or downloaded materials. Despite this fact, the Commission requires in section 1102.42 of the final rule that the disclaimer be displayed on the database and on all information printed from the database.

CPSC cannot guarantee, nor does the statute require, that users or aggregators of the data will retain this disclaimer, however.

Questions for the Record: Chairman Mary Bono-Mack
March 24, 2011

Commissioner Anne M. Northup
U.S. Consumer Product Safety Commission

1. **Why do you anticipate that adding a "functional purpose exemption" to the lead content limits would weigh down agency resources if adopted?**

The functional purpose exemption proposed by Chairman Tenenbaum and Ranking Member Henry Waxman would grant to the Commission the authority to exempt from the CPSIA's lead limits products in which the lead content serves a "functional purpose" so that it is "not practicable or not technologically feasible" to remove the lead in each product or component, and provided that such lead "will have no measurable adverse effect on public health or safety." Notably, this formulation was designed to exempt certain products from lead limits that were arbitrarily set by Congress without regard to risk in the first place.

First, this exemption would be complicated and costly. To implement the exemption, the Commission would need to promulgate regulations defining "functional purpose" and "measureable adverse effect," and to establish standards to govern its review of manufacturer petitions seeking the exemption. Once in place, the exemption would require the Commission to make product-by-product determinations in response to petitions filed by manufacturers. Petitioning a government agency requires substantial resources, including legal and technical assistance to make the necessary showing. Thus, this petition process likely will be available to only the largest manufacturers that could afford it. Small businesses, again, would be at a real disadvantage.

Commission staff has expressed the view that such an exemption could generate a large number of complex petitions. As a result, substantial Commission resources would be directed toward the pre-approval of a potentially unlimited number of products whose lead content does not have a measurable adverse effect on public health or safety. This pre-approval regulatory role is neither one previously assumed by the CPSC, nor one for which it is currently funded. The Food and Drug Administration is charged with pre-approving products before they are marketed, and it is responsible for a much smaller universe of products than is the CPSC. Yet the FDA's annual budget is in the billions of dollars, whereas the CPSC's FY 2012 budget request is $122 million. It is safe to assume that adding an FDA-like pre-approval function to the CPSC through a functional purpose exemption would turn the agency's safety mission on its head and require unnecessary, expansive resources to pre-approve products that do not even pose a lead risk to children.

I am also concerned that this exemption will be applied subjectively and with prejudice. This concern is reinforced by statements other Commissioners have made that seemingly prejudge the application of the functional purpose exemption to particular products, such as bicycles, without any supporting analysis. Ironically, this would result in arbitrary,

non-science based exemptions to a lead limit and a restrictively construed absorbability exclusion that are themselves without a scientific, risk-based foundation. For example, the lead in crystals on a child's jacket serves a "functional purpose" because it makes the crystals shine, but the crystals pose no risk because the lead is not soluble (that is, absorbable or bio-available). However, no matter how low the level of lead in such crystals, it is clear that the majority of Commissioners would not support a petition for a functional purpose exemption to permit crystals on children's jackets. Without even seeing a petition and/or having the benefit of a company's cost analysis, substitute materials evaluations, etc., those supporting the "functional purpose exemption" routinely assume that only specific industries would be helped.

There is something contradictory about the Majority Commissioners' casual attitude toward the need to award "functional purpose" exemptions while also interpreting the law's absorbability exclusion in the strictest manner possible, prohibiting any product with accessible lead from meeting this exclusion. It begs the question: "Are metals that contain small amounts of lead that are not bio-available dangerous to children?" If the answer is "yes," then clearly there should be no exemptions regardless of the functional purpose of the lead in the product—including no exemptions for ATVs or bicycles. If the answer is "no" because, in fact, such small amounts of lead do not pose a risk to children, then all metals where the lead is not soluble or bio-available should be permitted. This would allow manufacturers to continue to achieve the benefits that lead brings, such as strength, machinability, shine and other uses. This effort to construct a new exemption that does not take into account the science behind the risks of lead reinforces my concern that science will be less of a guide in granting a petition than a preconceived notion of who should or should not be granted such an exemption.

For example, one of the criteria in the Waxman proposal for granting a functional purpose exemption is that it would not expose a child to risk, that is, the inclusion of the item in the product would not raise a child's blood lead level. If a component does not pose a risk to a child on one product, then why would that same component not be acceptable on any other item? The very argument at the basis of the functional purpose exemption is that there are many materials where the lead does not pose a risk to a child that are currently banned Why not acknowledge this and fix the law so that we only ban materials that are actually risky?

That is why I have argued in my testimony that the Absorbability Exclusion in the law be amended so that it is meaningful. This exclusion can be amended so that products that do not contain lead that is absorbable, or bio-available, to a child in any amount that could be harmful would be exempt from the law's requirements—and such an exclusion could be drafted in a way that the agency would not need to review or approve such products before they are sold. Lamps, school desks, children's sizes of brass musical instruments, books, ATVs, bicycles, toys and all other products that do not contain lead that is absorbable in harmful amounts would be able to be produced and sold. The same industries envisioned to be assisted by the functional purpose exemption will achieve relief under this provision, as will any other industries that produce safe products. Of course, such a change would still not allow the sale of products containing dangerous

amounts of absorbable lead, such as those with lead based surface coatings and solid-lead children's jewelry.

2. **Before CPSIA was enacted, many pointed to the public database maintained by the National Highway Traffic Safety Administration (NHTSA) as a model for the CPSC's public database. Can you explain how these two databases are similar and how they are different? Is it true that CPSC's database contains more protections for manufacturers to ensure accuracy than NHTSA's database?**

The intention of both databases is to provide accurate and actionable safety information to the general public. Apart from the fact that both databases require some description of the consumer product/car/etc, and the approximate incident date, there is very little that is similar about the two. NHTSA requires a vehicle owner to provide specific detailed information about the vehicle to uniquely identify and distinguish it from all others. Such information includes the component name and the category, make, model and model year of the vehicle. In contrast, the CPSC database does not require submitters to provide information that is sufficient to distinguish the subject product from a myriad other products. The only required identifying information is the manufacturer, the "product type", including such broad category options as "toys, kids & baby", and an open ended field for the "product description" Unlike the NHTSA database, the CPSC database does not require the model, date of purchase, identification number, or any other uniquely descriptive information.

The NHTSA and CPSC databases also differ markedly in their solicitation of information necessary to ensure reports can be adequately verified and investigated. The NHTSA database requires "vehicle owners" to provide their first and last names, daytime phone number and address. Moreover, it is unlikely anyone other than a vehicle owner would possess all of the required information about the vehicle necessary to submit a report. Although the CPSC website also requires *submitters* to provide contact information, the contact information of the victim or product owner is not required. As a result, the submitter of the report does not need to have firsthand knowledge of the product or incident in question, and may not even know the contact information of the actual consumer and/or victim. Thus, when a manufacturer needs to clarify which product is the subject of an incident report, or when the veracity and accuracy of a report is subject to question, CPSC staff will be unable to follow up with a party that has knowledge of the incident and product. The absence of adequate information in the incident report will also preclude both the manufacturer and the CPSC from conducting an investigation to determine if a product has a fundamental problem and should be recalled.

As discussed in greater detail below, the other supposed "protections" exclusively available on the CPSC database are of little or no value. This includes the manufacturer's right to challenge a material inaccuracy, since a challenge does not preclude the CPSC from publishing the report after 10 days, and, given the absence of information necessary to adequately investigate the report, will often not result in the removal, redaction or correction of a materially inaccurate report. Similarly, a manufacturer's opportunity to

engage in an on-line dispute with a consumer over the safety of its product is more an invitation to a public relations disaster than an opportunity to ameliorate the harm from an inaccurate report that disparages a product.

Finally, NHTSA's database pertains to automobiles and components of automobiles—a finite universe of products and manufacturers. Car manufacturing is heavily regulated and car manufacturers almost always are large businesses. However, the CPSC regulates everything from household chemicals made by large companies to toasters, jewelry, and children's clothing made by small manufacturers or hand-made crafters. Simply given the scope of products covered, it is misleading to compare the impact of NHTSA's database with that of a new public database covering over 15,000 different types of consumer products—some of which may never have had a reason to be familiar with the Consumer Product Safety Commission.

3. **During the hearing, Ranking Member Butterfield asked Chairman Tenenbaum a series of questions regarding the CPSC database. Do you have any comments on those questions or the Chairman's answers?**

I have provided my own answers to the following questions:

1. *Is it correct that anyone who submits a report must provide to the Commission their name and contact information?*

All submitters must provide their contact information, but the contact information of the actual victim or consumer who experienced the risk of harm is not required. In other words, the submitter of the report need not have firsthand knowledge of the incident in question, nor does he or she have to submit the contact information of the person who does—which brings into question the accuracy and reliability of the report. It also may prevent our own staff from following up directly with the consumer or owner of the product, should the Commission need to verify the report's accuracy.

Under the Majority's database rule, groups or individuals with no direct knowledge of the incident, who did not see it happen or do not even know the person that was harmed, are permitted to submit incident reports to the Database. In fact, the Majority's rule specifically names consumer advocacy groups, trade associations and attorneys as allowable submitters to the database. None of these groups is likely to have firsthand knowledge of an incident. Moreover, for these groups, the accuracy of the incidents reported may be secondary to their own agendas, giving them no incentive to avoid the posting of false or misleading information.

Accuracy is essential to a public database of incidents on which consumers may base their purchasing decisions. While accurate information is helpful to consumers, inaccurate information in a public, ".gov" database is simply misinformation—and not helpful to anyone. To alleviate this concern, I proposed an alternative database rule that would have encouraged only those with firsthand information of an incident to submit reports to the database. Unfortunately, my proposal was not adopted.

2. *Is it correct that anyone who submits a report must complete a verification that the information is true and accurate?*

Submitters to the database must check a "self-verification" box affirming that the report they are submitting is accurate "to the best of their knowledge." But 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, recent history of the product, or even the precise cause of the incident. As a result, the "self-verification" requirement will neither discourage nor prevent inaccurate reports of harm.

3. *Is it correct that within 5 business days of receiving a report the Commission will transmit the consumer report directly to the manufacturer?*

Yes, provided the manufacturer has previously registered on the database system. A manufacturer that has not registered on the database is unlikely to receive notification of the report within five days. Moreover, unless a manufacturer makes a material inaccuracy claim and the Commission completes its investigation and determines that the report is materially inaccurate – all within the ten days following transmittal of the report to the manufacturer – the report will be published on the 11th day. Because the time period runs from the date of transmittal, not receipt, a manufacturer receiving the report by mail is unlikely to avoid publication of a materially inaccurate report.

Importantly, the promise that a report will be transmitted to the named manufacturer within five days of posting is no help to other entities who may also be harmed by a materially inaccurate report. The system is designed to provide automated notice to only a single party, the entity identified in the "manufacturer" data field. Moreover, the database does not currently permit an entity to register in its capacity as non-manufacturing licensor of a trademark used on another manufacturer's product. As a result, notice may not be provided to licensors and other parties who could be harmed by a report or may have valuable information concerning the material accuracy of the report. This includes, in addition to licensors, retailers and manufacturers identified in the narrative portion of the report but not the manufacturer field.

4. *Is it correct that the Commission will not publish that report until the tenth business day after transmission to the manufacturer?*

The Commission will not publish a report until the 10th day after sending notification to the named manufacturer. But the report will be published at that time even if the manufacturer has made an adequately supported claim that the report is materially inaccurate and the Commission has not completed its investigation of the claim. As a result, materially inaccurate information can remain on the site until the Commission completes its investigation and makes a determination. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely. Meanwhile, the Commission's efforts to

investigate claims of material inaccuracy are hamstrung by its failure to require the identification of victims of harm or firsthand witnesses of incidents raising a risk of harm. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims) , but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Recognizing this problem, I supported a valid and more useful interpretation of the statutory 10-day time frame for evaluating claims of material inaccuracy. Under my interpretation, reports submitted to the database would be published following the 10-day window, provided no claim of inaccuracy is made within that period. Reports that are the subject of an adequately supported claim of material inaccuracy made within 10-days of a manufacturer's notification would not be published until the Commission investigated and resolved the claim. No reports deemed not materially inaccurate would be withheld from the database; their publication would simply be delayed. Consumers would have the benefit of an effective tool for gauging the safety risk of products, rather than a database populated with unreliable and misleading information.

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."[1] 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

[1] The 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 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 29170 (Response to summary 26)(emphasis added).

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.

5. *Is it correct that during the 10-day waiting period the manufacturer is given a chance to do three things: 1) claim parts of the report are materially inaccurate; 2) claim parts of the report contain confidential information; and 3) submit its own comments to be made public along with the consumers report?*

This is correct, but these safeguards are meaningless in the absence of sufficient information to permit a manufacturer to gauge the accuracy of the report. Information essential to this purpose that is not required to be contained in the report, includes: the model number of the product; the date it was purchased; the UPC code; or, any other unique identifying information that would distinguish one product of a particular type from the potentially dozens of others that are of the same general type but are materially different. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would be of no value. And even in those cases where a victim or person with firsthand knowledge is identified in the report, unless a waiver is expressly given, the manufacturer will not have access to the information.

As previously discussed, even where reports contain sufficient information to identify a material inaccuracy, the value of notifying the Commission within 10-days is greatly diminished by the Commission's policy of publishing the information pending its determination.

With regard to manufacturers' having the opportunity to add comments to database reports, that supposed benefit is also of questionable value. As many manufacturers and their legal representatives have suggested, engaging in an open, on-line dispute with a customer over the contents of a report of alleged harm is not in a manufacturer's interest, and could cause a manufacturer to unwittingly increase its exposure to a products liability lawsuit. Nor is a forum for a "he-said, she-said" exchange of opinion about unverifiable allegations likely to assist viewers of the site in their search for useful product safety information.

6. *Is it correct that the Commission as practicable will attempt to expedite review of material inaccuracies where the manufacturer has limited the length of its submission?*

Yes, the Commission has committed to ***trying*** to expedite its review of material inaccuracies where a manufacturer can make a strong case through evidence and argument. However, as previously explained, this is small solace to a manufacturer provided with insufficient information even to assess the report's accuracy, let alone to support a claim of material inaccuracy.

7. *Is it correct that the Commission will review all inaccuracy claims and will correct or remove any inaccurate information published in the database?*

In those cases where a report contains sufficient information for a manufacturer to support a claim of material inaccuracy, and the Commission has sufficient information to conduct an adequate investigation of the claim, the Commission will correct or remove any information it determines to be inaccurate. Pending the Commission's investigation – for which there is not even an aspirational deadline – the potentially inaccurate report remains on the database. Once the change is made, consumers who have already relied upon the materially inaccurate information to select products to purchase will derive no benefit from the change.

8. *Is it correct that the database will contain only reports of harm from a product and not general complaints or reviews about a product?*

The goal of the database is to include only reports of harm, but it is difficult in practice to distinguish between reports of actual incidents or risks of harm and other categories of consumer complaint.

9. *Is it correct that the Commission will seek criminal prosecution through the Department of Justice where it identifies repeated instances of false submissions?*

The Commission has made that statement. However, between fiscal years 2004 and 2010, the Commission referred for criminal prosecution to the Department of Justice only one case that did not involve illegal fireworks. Moreover, the difficulty of proving that a report is not "true to the best of [the submitter's] knowledge" makes it unlikely any action would be taken. Even a consumer advocacy group in the habit of submitting reports based on third and fourth hand information heard "though the grapevine" is still submitting a report to the best of its knowledge. Finally, assuming the Commission even concluded that a report failed to meet this lax standard, the choice to prosecute would be made by the Department of Justice. I would be shocked if the Department of Justice, overwhelmed by significant cases effecting the national interest, would exercise its discretion to dedicate its resources to litigation over whether someone really didn't believe something they heard about a consumer product.

10. The final rule states: ``The Commission will as a matter of policy, redact the allegedly confidential information from a report of harm before publication in the database until it makes a determination regarding confidential treatment." Does that really mean what it says? Is it correct that no information claimed by a manufacturer to be confidential will be made public until this is resolved?

It is true that information claimed to be confidential by a manufacturer will not be published until the Commission makes its own determination as to the confidentiality of the information. However, once the Commission has done so, regardless of the manufacturer's position, the information will be published. It will then remain on the database unless and until the manufacturer prevails in court.

4. **You explained during your testimony that CPSC's rules for the public database do not require that submitters identify the exact product involved in the incident. In your example, you explained that one manufacturer of children's highchairs makes over 100 different models, and that reports to CPSC can be included in the public database without specifying which of the 100-plus models was involved in an incident. However, Chairman Tenenbaum also stated later that she is hopeful that people will give the model name and that the Commission staff certainly will investigate. Does that resolve your concern?**

No it does not resolve my concern. "Hope" that people will provide the minimum information necessary to ensure the accuracy of reports of harm is not a substitute for requiring such essential information. Moreover, the promise of an investigation is illusory when the Commission does not require the identification and contact information of a party with firsthand knowledge of the product and incident. Requiring precise product information *or* the identity of a party with firsthand knowledge would have given the Commission at least a chance of ensuring the veracity and accuracy of reports. Requiring neither has produced a system that is more harmful than helpful.

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. It will also harm consumers by driving their purchasing decisions with unreliable information – potentially steering them from safe products to unsafe ones based on the false and unverifiable information populating the database.

5. **You explained during your testimony that a Component Testing rule will help small businesses to be able to comply with the law's testing requirements. If the Component Testing rule will be helpful, why are small businesses still asking for relief from this law?**

If the rule on component testing (75 FR 28208) 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 costly, complicated 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.

To begin with, promulgation of the final component parts rule will not instantly create a market for component parts available to all small manufacturers. While the rule will make such a market possible, it will still be up to component parts manufacturers to determine whether they can profit from voluntarily incurring the expense of testing and certifying the component parts that they sell. It is questionable whether certified component parts will ever be available for sale at the craft and hobby retail outlets such as Michaels Stores or Joanne's, where many very small manufacturers purchase the materials they use to fabricate their products. Assuming such a market develops, it may not be available soon enough to benefit some small manufacturers, who will already have been driven out of business by the cost of third-party testing. And even with the benefit of pre-certified component parts, small businesses will still have to shoulder the enormous recordkeeping burden created by the Commission's rule.

In addition, even a robust market for component parts will not relieve small children's product manufacturers of the other costly requirements of the CPSIA. I urge the Committee to review the Commission's proposed rule governing testing and certification (75 FR 28366) to gain a better understanding of the tremendous burdens imposed by the CPSIA. Small manufacturers will still be required to do an initial third-party test of every component of their product and a third-party test following any material change to the product or component, regardless of whatever flexibility the Commission determines is possible within our testing rules. Some Commission safety standards require destructive testing of the finished product. The cost burden associated both with testing and the destruction of salable product will remain substantial for low volume producers. The extensive record keeping requirements and the disruption to production caused by the obligation to test products or components periodically after initial certification will also continue to burden small manufacturers. Moreover, some retailers have reported that there is unlikely to be sufficient third-party laboratory capacity to meet the increased demand that implementation of the third-party testing requirements will produce, particularly given that turnaround times at labs have already increased. As a result, small manufacturers can look forward to long delays waiting for labs to finish testing the products of the larger and more valued players who will likely be given priority, as well as increased testing prices as supply and demand market forces bid up the cost. Meanwhile, the sunk costs of product development and production capacity will remain economically unproductive while the small manufacturers await testing.

6. **Can you clarify your $29 million estimate for the cost of the database as compared to the $3 million estimate provided by the Chairman? Are you familiar with the basis for the $3 million estimate?**

I first heard the $3 million dollar estimate during the hearing. After checking with my staff, it was clear that no one in my office had ever seen or heard that number previously, and that there was no written, public or confidential paper available to me where that number appeared. Prior to then, I understood from the Commission's FY 2012 Budget Request that the Commission had estimated the cost of both the public database and IT modernization to be $29 million, and that it was impossible to distinguish the funding for the two initiatives because they are inseparable.[2]

Following the hearing, I learned that a variety of cost estimates for the database (or database plus IT modernization) have been provided by various sources, including:

- A statistic cited in Commissioner Bob Adler's January 14, 2011, Supplemental Statement on the Public Database: "In fact, according to CPSC staff, the cost of the database is only a small part of the $9 million spent on the first phase of the IT modernization."[3]

- An estimate communicated orally by CPSC staff that the database might cost between eight and ten million dollars.

- An estimate reported by the Associated Press on February 25, 2011: "The database was ordered by Congress as part of a 2008 product safety law aimed at removing lead and other dangers from toys, and last April the commission estimated it would cost about $20 million. That estimate included a major technology upgrade of antiquated computer systems that the agency said at the time was essential to providing a foundation for the searchable database."[4]

In order to resolve the confusion surrounding this issue, I recently requested from the CPSC Budgeting Office figures reflecting the exact cost of the database. In response, our budget office was unable to separate funds allocated to "IT modernization" from those associated with the creation of the database.

I was then referred to our IT staff, who provided me for the first time with written documentation supporting the $3 million figure. Notably, the document is a memorandum dated March 8, 2011, over two weeks *after* Chairman Tenenbaum

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[2] Commissioners began their review of the 2012 Budget Request in fall 2010. The document states at Page 5: "By the end of 2011, the Commission will have spent $29 million in contracted work for the public database and IT modernization." http://www.cpsc.gov/cpscpub/pubs/reports/2012plan.pdf

[3] http://www.cpsc.gov/pr/adler01142011.pdf

[4] Jennifer Kerr. "New Unsafe Products database Under Fire on Hill," *Associated Press* (February 25, 2011). http://hosted2.ap.org/APDEFAULT/89ae8247abe8493fae24405546e9a1aa/Article_2011-02-25-Dangerous%20Products/id-e20609a71a1d4f74af36b0430f1d233c

announced the $3 million figure at the Committee hearing. A copy is attached for your reference.[5]

The March 8 memorandum speaks for itself, but I find it to be an extremely confusing and loosely drafted post hoc justification for the $3 million figure. Its effort to separate the costs associated with creating the public database from expenses associated with other technology improvements is difficult to follow and unpersuasive. Indeed, before launching into its rationale for the precise delineation, the memorandum's author concedes that "[b]ecause modernizing the Commission's business processes and supporting IT systems is required in conjunction with deploying the public database, it is challenging to draw a bright line between these efforts." But the thrust of the argument appears to be that all of the funds used to create the database should not be included in its cost, because the accompanying IT modernization improvements and certain features of the database have uses beyond facilitating the public's submission and search of consumer product safety reports.

For example, the memorandum states at page 2 that "regardless of whether a report is a candidate for publication" the agency wants to: (1) drive the public from reporting incidents via the hot line or U.S. mail to an online form on the database; (2) change its standard communication method with businesses from paper forms to online forms via the business portal of the database; and (3) otherwise share with the public through the database valuable information in addition to the reports posted to the database by the public. Through this logic, the creation or upgrade of a public portal to facilitate consumer incident reporting and searching online is *not entirely* a cost of the public database, because the CPSC would have wanted *some* of this upgrade, regardless of the statute's requirements.

While nicely supporting the Chair's goal of minimizing the apparent cost of the database, I believe this carve out is unwarranted. It amounts to writing off a portion of the database's cost simply because certain of its features can also be used to accomplish other agency goals. To illustrate this point, imagine a vacuum purchased for $500 with the intent to clean a floor. The vacuum is then used for cleaning blinds, removing cob webs, and even blowing leaves from the driveway. Does this mean that the vacuum actually cost $300 because $200 was saved that could have been spent to perform the additional work? The same faulty logic – formulated in hindsight to reduce the apparent cost of the database – underlies the reduction of the database's cost from $29 million to $3 million. The features of the database that serve functions beyond facilitating public reporting and searching, including much of the IT modernization work that was an essential prerequisite to the creation and functioning of the database, have been deducted from its cost. But the fact remains that none of the database's features and their uses, nor much of the underlying IT modernization, could have been achieved had the Commission not received and spent funding to design and program the database.

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[5] CPSC Staff Memorandum, March 8, 2011, Subject line: "Estimated Costs of Public database Development."

Notably, the agency has always *promoted* its IT modernization and database plans as inseparable on the grounds that the former is essential to having a more efficient database. This argument was intended to reduce the risk that the Office of Management and Budget (OMB) or Congress would seek to cut the budget by eliminating funding for either IT modernization or the database. Since 2009, OMB has requested not only our Exhibits 300 and 53 on the database costs, but also a Spend Plan for the Consumer Product Safety Risk Management System ("Database Spend Plan") laying out in more detail the annual costs of the database. In none of these documents does the agency attempt to separate the funds allocated to IT modernization from those dedicated to the public database. On the contrary, a single combined figure has always been presented. The contracts the Commission has let to execute its IT modernization plan and to create the public database also do not distinguish between the two.

The fact that the agency's broader IT modernization efforts have only just begun also indicates that much of the money spent to date directly supported the database. The database became public on March 11, but the work necessary to achieve the IT modernization goals the Chairman discussed at the hearing will not be completed for several years. This includes integrating our different information silos, so that our staff can search across incident reports, field investigations and standards work, and perform more complex statistical searches. So far, we have standardized the way we intake data—a laudable accomplishment considering the agency's multiple internal databases. We have also begun a website redesign, and a plan to begin standardizing incoming data. However, the "IT modernization" piece, even if it could be broken out completely from the public database, is nowhere near complete---even after incurring over $29 million in contract and other costs.

While your question implicitly assumes that either the $3 million or $29 million figure is accurate, I believe that even the $29 million estimate understates the real cost of the database. The $29 million figure represents only the estimated contracting costs through FY 2011. It does not include the hours CPSC staff dedicated to developing the database and preparing for its launch, including managing contracts. Agency projections for the future cost of the database are also misleadingly low. The FTE cost estimates in the CPSC's Database Spend Plan only account for IT employees, ignoring the additional staff needed for data intake, investigations, and legal work associated with the new public database. It also appears to discount the expected increase in incident reports, material inaccuracy and confidentiality claims, and other work likely to be generated by the existence of a searchable public portal for the reporting of product safety incidents and issues.

The Commission's 2012 Performance Budget Request also discounts these expenses. According to that document, the "New and Reallocated Resources" dedicated to "Data Intake, Incident Review, and Investigation" is derived from an extrapolation of the growth trend line for reported incidents and investigations dating back to 2003. If, as is likely, this projection is proved to be too low, the assigned staff will be unable to timely manage all of the information reported through the database. As a result, Commission staff will be even less likely to resolve claims of material inaccuracy within the ten-day

period prior to the posting of unverified information. The Commission will then either request and be provided additional funding in subsequent years, or preside over an increasingly misleading database.

7. **On February 16, 2011 the Commission held a public hearing on the technological feasibility of lowering the lead content limit for children's products to 100 ppm this August. Unfortunately, we did not have time on February 17 to discuss the results of this hearing. Overall, did manufacturers and other witnesses provide evidence that they will be able to make the transition to 100 ppm this coming August?**

Evidence was presented at the hearing on two issues: the reliability of testing products for lead content as low as 100ppm, and the economic feasibility of actually manufacturing products to that level. With respect to testing, the reliability of lead content testing, as measured by the repeatability and reproducibility of test results, diminishes as the lead levels measured are decreased. However, representatives from several labs testified that they were able to measure lead levels down to 100ppm, albeit with an approximately 10% margin of variability. This means that the lead in a product might need to be 91ppm in order to be consistently measured no higher than 100ppm. In addition, a single portion of a material may have different lead levels at different locations. Thus, a 15 foot steel rod might produce five different lead level readings if measured at five different locations on the rod. This fact also reduces the reliability of testing for lower lead levels, because there is a greater likelihood that lead levels along a single object could rise above or fall below a low threshold.

Manufacturers testified that it was *possible* to obtain source materials with 100ppm of lead or less, but that such materials could *not* be obtained without increasing a product's cost to the point that it is priced completely out of the market for products of its type. For instance, most bicycles on the market today are manufactured from steel comprised at least in part from recycled materials. Such steel could not satisfy a 100ppm standard. But alternatives to recycled steel are available for the manufacturer of bicycles, including virgin steel and carbon based alloys. The problem with these alternatives is that they increase the cost of the product substantially. Virgin steel was estimated to increase the cost of a bicycle's manufacture by approximately 25%. Bicycles constructed of carbon sell for thousands of dollars.

Under the CPSIA, the 100ppm lead limit is technologically feasible if "a product that complies with the limit is commercially available in the product category." A common sense interpretation of the "product category" must take into account the market price of the product. Thus, the fact that a bicycle that costs $100 when made using recycled steel with 300ppm lead can also be manufactured and sold for $2000 if made from carbon containing 50ppm lead does not mean that the latter bicycle is a commercially available substitute for the former. They are different product catergories. Congress' mandate that the CPSC consider technological feasibility should therefore prevent the CPSC from destroying the market accessible to Americans of modest means for bicycles or any other

products, where reduction to 100ppm of lead would meaningfully increase the product's price.

Another relevant issue presented at the hearing is the absence of safer alternatives to lead for obtaining the essential characteristics lead contributes to a metal alloy. Lead increases the tensile strength of steel, permitting it to bend and bear greater pressure without breaking. Lead also adds to the machinability of metal alloy, allowing the punching of small holes while otherwise maintaining the integrity of the material. Lead is also an effective lubricant to reduce the friction of two metals rubbing together, and has therefore traditionally been used in the manufacture of ball bearings. Other substances can also contribute these characteristics to metal alloys, but they are either untested or known to be as dangerous as lead, including antimony.

Questions for the Record: The Honorable Mike Pompeo
March 24, 2011

Commissioner Anne M. Northup
U.S. Consumer Product Safety Commission

1. Do you think paper clips pose a significant threat to children? Do you think it makes sense for the Commission to require testing a paper clip in a science kit but not when attached to a child's worksheets? Do you think it makes sense for the Commission to require testing brass in a child's bedside lamp but not in a child's musical instrument? What can Congress do to return the agency to one that regulates based on risk?

While the CPSIA has forced the Commission to regulate children's products without regard to risk, I believe the Commission's rulemaking has unnecessarily compounded the problem.

As your question suggests, the Commission's final interpretive rule on the definition of children's product is a good example. It imposed the full scope of the burdensome CPSIA regime applicable to children's products – including the requirements that products be reengineered to remove levels of lead that pose no risk of harm, third party tested, certified and accompanied by tracking labels – on many more products than required by the statute, and many that pose no risk to children.

Under the Commission's final interpretive rule on the definition of a children's product, a paper clip contained in a child's science kit is a children's product and therefore must be third party tested to CPSIA lead limits. The same ubiquitous paper clip that secures the papers in every elementary school class room in America is deemed by the Commission to be a "general use product" because it is an office supply that is not primarily intended for use by children. It therefore need not be third party tested and is not required to meet the law's arbitrary lead limits. Obviously, the paper clip is no more likely to present a danger to a child in the one setting than the other. Indeed, younger children, who tend to mouth objects, are much less likely to encounter a paper clip in a science kit designed for older children.

But most importantly, the paper clip presents a danger in neither setting. This is because any lead contained in the item is locked in its substrate and does not present the absorbability potential that defines the real risk of lead to children.

The CPSC's differing treatment of lamps decorated for children and brass musical instruments further highlights this disconnect between actual risk and CPSIA regulation. The CPSIA as construed by the majority requires the reengineering and testing of children's lamps for lead content, while standard-size, brass musical instruments are considered general use products not subject to reengineering and third-party testing. But

standard-size brass musical instruments are often used by children, and brass typically contains lead well exceeding the statutory limits. And both are, in fact, equally harmless because any lead is locked in the product's metal substrate and cannot be absorbed in unsafe levels. Moreover, musical instruments are designed to be handled extensively, whereas a child might touch the brass in a bedside lamp only rarely if ever. There is therefore no logical reason for treating them differently, and both should be excluded from the law's requirements under the absorbability exclusion.

These two examples merely scrape the surface of the absurd distinctions the children's product definition has made. Children, especially after the age of six, do not live in an isolated world populated only by children's products. They turn on lamps all over the house, open drawers in the kitchen and elsewhere, handle keys for the door, and help plant flowers using garden tools. Each of these everyday objects is loaded with lead but pose no risk to a child because the lead is not absorbable. There is no logical reason to impose arbitrarily all of the burdensome CPSIA requirements on one of set of products and not the other, when none pose a risk of harm.

Congress can prevent these absurd outcomes and permit the CPSC to once again regulate based on risk, rather than arbitrary limits, by amending the law's absorbability exclusion so that it is meaningful. This exclusion can be amended so that products that do not contain lead that is absorbable, or bioavailable, to a child in any amount that could be harmful would be exempt from the law's requirements—and such an exclusion could be drafted in a way that the agency would not need to review or approve such products before they are sold. Lamps, school desks, children's sizes of brass musical instruments, books, ATVs, bicycles, toys and all other products that do not contain lead that is absorbable would be able to be produced and sold. Of course, such a change still would not allow lead in paint, solid-lead children's jewelry, or other harmful products to be sold that do contain dangerous amounts of absorbable lead.

Additionally, Congress could simply eliminate all third-party testing requirements from the law. The Commission has other new and more effective enforcement mechanisms that are more reliable than requiring manufacturers to certify to having performed third-party tests. Today, the Commission intercepts non-compliant toys through improved and expanded border control efforts, application of x-ray technology to identify violative lead content, computer databases that flag previous offenders for greater scrutiny, the imposition of higher penalties of up to fifteen million dollars, and the threat of lawsuits and loss of reputation in the market.

Notably, even prior to these improvements, the Chinese manufactured toys containing lead paint that were the impetus for the CPSIA were themselves identified and intercepted using the Commission's traditional methods. The company responsible faced a class action lawsuit and a massive fine.

Following the elimination of mandatory third-party testing, the CPSC will retain its new and longstanding enforcement tools, as well as the authority to impose third-party testing

and other requirements where necessary to address a risk with a specific product or material.

2. Do you think Congress should delay implementation of the Consumer Product Safety Database Rule in order to allow this subcommittee time to revisit the statute and clarify whatever language led the agency to adopt a rule that puts materially inaccurate data into the database?

3. If Congress allows the database rule to be implemented 'as is,' do you think the rule will increase costs for consumers? Drive some safe products from the market? Increase companies legal costs? Distract the agency from genuine long-term risks with the 'headline of the day'?

This answer responds to your questions number 2 and 3.

I believe the Commission should be prohibited from expending any funds for the purpose of launching the Public Database until Congress amends the law to ensure that (1) reports of harm submitted to the Database contain sufficient information to clearly identify the product in question and permit verification; and (2) there is an effective procedure for resolving claims of material inaccuracy before a report of harm is published on the Database.

Section 212 of the CPSIA requires the Commission, subject to the availability of appropriations, to establish and maintain a public, web portal accessible Database on the safety of consumer products. The statute identifies five sources from which the Commission shall receive reports of harm. These are (1) consumers; (2) local, state, or Federal government agencies; (3) child care professionals; (4) child service providers; and (5) public safety entities. CPSIA § 212(b)(1)(A).

Each of these categories of submitters is likely to have first-hand knowledge of the harm reported. They can therefore be expected to provide accurate and reliable information that may be useful to consumers seeking product safety information.

Notwithstanding the statute's clear language, the Commission's Majority adopted a rule that greatly expanded the list of allowable submitters to the Database. For example, the Commission's regulation defines "consumers" to include "attorneys", and "public safety entities" to include "consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations." 16 C.F.R. § 1102.10(a). This expansion goes against the statutory purpose that the Database be "useful" for consumers and not disseminate erroneous information.[1] 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.

[1] 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."

It is important that individuals with first-hand knowledge of incidents of harm involving consumer products be permitted to submit reports to the Public Database. However, groups or individuals with no direct knowledge of the incident, who 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.

Soliciting information from sources seeking to promote an agenda unrelated to simply sharing first hand information invites dishonest, agenda-driven use of the Database—diluting its usefulness for consumers. Trial lawyers, unscrupulous competitors, advocacy groups and other nongovernmental organizations and trade associations serve their own agendas and lack an incentive to prioritize accuracy in their reports of harm. 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 could 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.

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. 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 some of their members sell—should be mandated in homes.

But it is not important to the NFPA whether it correctly identifies a 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 brand of lighter 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 unverifiable and potentially inaccurate claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

By inviting trial lawyers, consumer advocacy organizations and trade groups to input reports of harm, the Commission has all but guaranteed that the Database will be a tool for lawsuits, policy agendas and anti-competitive activity. Under those circumstances, it cannot also serve its intended function of providing a reliable resource for parents

seeking useful information about product safety. A Database populated with such information will be no more useful than "Amazon.com", "Yelp.com", or any of the other hundreds of websites where anyone can submit comments on a product, and does not warrant tax payer funding.

The problems caused by over expanding the list of submitters to the Database could have been reduced if reports of harm had to be verified, or at least verifiable, before being published. But the information solicited on the Database is inadequate to this purpose. With respect to the submitter, the Database requires that a "self-verification" box attesting to the report's accuracy be checked. But this will do little to discourage or prevent inaccurate reports of harm. Self-verification in the context of the Database rule means only that the report is accurate "to the best of the submitter's 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.

The scope of product information solicited on the Database under the Majority's rule is also inadequate. The only product information required is the identity of the manufacturer, the name of the product (such as, "highchair") and the approximate date of the incident. This information is insufficient to permit reliable verification that the manufacturer and *specific* product are correctly identified. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would be of no value.

Carrying this example one step further, consider a 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 Company B 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 to people using the Database to look for safety information about current products on the market.

The Majority rejected proposals contained in an alternative Database rule I offered that would have minimized such confusion and would have aided in the verification of reports of harm that are challenged by manufacturers as materially inaccurate. I proposed requiring that (1) reporters of harm include the consumer and/or the victim's identity and contact information with a report (to be held confidential, as is current practice), so that the Commission could obtain additional information to evaluate a manufacturer's claim

of material inaccuracy; and (2) the Database include fields requiring submitters to provide exact product information, such as model number, the approximate date of purchase of the product, and whether the product was purchased "new" or "used", thereby allowing consumers to gauge the age and better identify the specific model.

The Majority also rejected my proposal that the Commission withhold reports of harm from publication pending the evaluation of a substantiated claim of material inaccuracy. Instead, reports about which there is an adequately supported claim of material inaccuracy are posted on the 10th day after they are submitted, unless the Commission can somehow resolve the claim in the brief intervening period. Notably, the Commission's Notice of Proposed Rulemaking on the Database originally included an interpretation similar to the one I recommended. 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."[2] 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, most of the commenters assumed that incidents would not be published to 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 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 forbids delaying publication in those circumstances. Moreover, our agency's fiscal year 2011 appropriations request did not include even a single new FTE to resolve pending claims of material inaccuracy, and our fiscal year 2012 request does not provide sufficient resources to account for an anticipated increase in reports. These facts alone make clear to the business community how low the CPSC prioritizes its responsibility to resolve claims that reports of harm contain false or misleading information about products.

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

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[2] The 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 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 29170 (Response to summary 26)(emphasis added).

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 reports that inadequately identify the product, and are misleading or inaccurate, such reports will drown out the accurate ones. The flood of reports with potentially inaccurate or incomplete product information, which will be difficult, and often impossible, to verify, will also impose a tremendous burden on manufacturers. Substantial private sector man hours will now be dedicated to understanding and responding to incident reports containing incomplete and often mistaken information. Manufacturers, who might otherwise view the Database as a means to stay ahead of the curve in their ongoing efforts to improve the safety of their products, will have nothing but vague reports and guesswork on which to rely. The resources spent by a company chasing down unverifiable information to avoid reputational damage, would be better dedicated to reviewing incidents known to relate to the company's products or otherwise promoting safety innovations.

Congress could prevent the irreversible damage that unverifiable and materially inaccurate information will cause American businesses, and ensure the creation of a Public Database that is a useful tool for consumers, by prohibiting the Commission from expending any funds for the purpose of launching the Database until (1) the Commission's regulations ensure that reports of harm submitted to the Database contain sufficient information to identify the specific product and to permit verification when there is a pending claim of material inaccuracy; and (2) the Commission has established an effective procedure for resolving a claim of material inaccuracy before a report of harm is published on the Database.

4. How could we salvage this database that the agency has already spent $29M in taxpayers' money on in order to make it useful?

The Database could be an effective tool for consumers if it were redesigned to ensure that reports are submitted only by identified individuals with direct knowledge of the reported incident, such submitters are required to provide contact information and clear, specific product identification, such as the model number, and, in the case of a claim of material inaccuracy, a report may not be published until after the completion of an investigation concluding that the report is not materially inaccurate.

5. Should new federal product safety requirements for cribs, portable cribs, and play yards mean that families who own products that compiled with previous standards not be allowed to sell them on the secondary market even though the products were never found to be defective nor shown to be unsafe?

Regardless of the steps that were taken to bring us to a place where traditional drop-side cribs will no longer be made (a place reached largely aside from the CPSIA's mandates), the CPSIA required the Commission to issue a mandatory retroactive standard for cribs—not just for new cribs, but for used cribs as well. Such a provision is unlike the mandatory standard requirements for other durable nursery goods, such as toddler beds, play yards, or cradles. For cribs alone, the Commission's mandatory standard that goes

into effect this summer ***will make every crib in this country obsolete overnight and unable to be sold***—regardless of whether that crib was ever subject to a recall or ever considered unsafe.

What are the consequences of this provision of the law? First, any young family who has bought a new crib over the past year (not a small investment) 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. Working families often depend on second-hand due to the high cost of new cribs. While the Commission advises consumers not to use any crib that is over ten years old, the fact remains that the safest place for a baby to sleep is in a crib, and the second-hand market for cribs remains a lifesaver for many families.

Unfortunately, once this provision of the law becomes effective, retail stores and thrift stores will no longer be able to sell fixed-side, safe cribs—a waste not only for those stores but for families in need of affordable cribs later this year or next.

Furthermore, the law goes beyond just a prohibition on the purchase of new cribs. It expressly forbids cribs that do not meet the new mandatory standard (and the CPSC has yet to confirm that a single crib on the market today meets that standard) from being offered ***for use*** by places of public accommodation. Once the new standard becomes effective two years after issuance of the Commission's final rule, day care centers and hotels across the country will have to begin using brand-new cribs that meet the Commission-approved mandatory standard—even if they bought a crib earlier this year that meets the previous ASTM standard (less than a year old), has fixed sides and is completely safe. This is not an insignificant number because of the large number of crib recalls in the past year. Many daycare centers have just recently replaced those cribs with new, safe cribs that will have to be discarded in the next two years. This represents a tremendous waste of money for families, day care centers, and taxpayer dollars that help fund many day care centers.

6. When database defenders say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission? Even if the person harmed is the one reporting, doesn't that person have the option of remaining anonymous to the manufacturer? Must the person who is reporting have first-hand knowledge?

The report submitter must include contact information. But the report submitter need not have any firsthand knowledge of the product, harm or risk of harm. As a result, requiring the contact information of only the submitter is not much different from permitting the submission of an anonymous report. In both cases, the Commission has no means to verify the accuracy of the report or to obtain supplemental information relevant to determining the existence and scope of an alleged product hazard. Without access to a direct witness to an alleged incident, the Commission may also be unable to determine whether a report contains a material inaccuracy. Where a lack of information and inability to contact the product owner or a witness prevents the Commission from determining the existence of a material inaccuracy, a dubious report will remain on the

database.

All reporters of harm, including those who report harm to themselves or their child, are permitted to remain anonymous to the manufacturer.

7. Companies only get 10 business days after a report of harm is sent to them before it is posted to the database under the agency's rule. Is that enough time for them to investigate? Do they get enough information about the incident to be able to tell whether the report is true or not? Are they allowed to follow up with the victim to see what really happened? Are manufacturers able to identify reports that do not contain enough information to assess whether or not they are materially inaccurate? Can they require more information from a reporter of harm?

In many cases, ten days is unlikely to be sufficient time for a manufacturer to determine whether a report identifying its product contains a material inaccuracy.

This is partly because many reports will not contain sufficient detail about the product and incident to guide a manufacturer's investigation. Information essential to this purpose that is not required to be contained in the report, includes: the model number of the product; the date it was purchased; the UPC code; or, any other unique identifying information that would distinguish one product of a particular type from the potentially dozens of others that are of the same general type but are materially different. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would not permit the manufacturer even to identify the specific product, let alone to gauge the accuracy of a report about the product.

Even a manufacturer provided sufficient information to identify a specific product may not receive enough detail about an incident to understand the role its product played in causing an alleged injury. Moreover, there may be no way to ascertain the truth in those cases where the manufacturer is certain that its product could not have caused an injury in the manner alleged. This is because a third-person reporter is not required to identify the victim or product owner, and access to a firsthand observer of the incident is necessary to resolve issues of fact.

A manufacturer forwarded a vague report has few options. Even where a firsthand observer is identified in the report, the manufacturer is not entitled to such individual's contact information. Without the ability to follow-up with a witness, the manufacturer must base its assertion of material inaccuracy upon the content of the report. In many cases, the report may not contain sufficient information for the manufacturer to ascertain whether it contains a material inaccuracy.

Even with adequate information, 10-days will often be too little time. Obvious cases of

manufacturer misidentification may be discernable within the available window of time. But many products of a more generic nature will be very difficult to distinguish without a much more extensive investigation. I have spoken with manufacturers who have needed over 30-days after receiving a consumer complaint to conclude that the subject product was not their own. And those were cases where the company had access to the product. 10-days will clearly be insufficient in many cases, and as a result, materially inaccurate information will remain on the public database well beyond that point.

8. Under the agency's rule, reports of harm go up after 10 business days whether the inaccurate information in them has been corrected or not. There is no requirement for the agency to act on every report within a certain time frame, is there? If a company believes that a report is not about their product, are they allowed to inspect the product? Or even necessarily follow up with the consumer? What does a company do to respond within 10 days if a ton of information is dumped into the database all at once?

The Commission will not publish a report until the 10th business day after sending notification to the named manufacturer. But the report will be published at that time even if the manufacturer has made an adequately supported claim that the report is materially inaccurate and the Commission has not completed its investigation of the claim. As a result, materially inaccurate information can remain on the site until the Commission completes its investigation and makes a determination. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely. Meanwhile, the Commission's efforts to investigate claims of material inaccuracy are hamstrung by its failure to require the identification of victims of harm or firsthand witnesses of incidents raising a risk of harm. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims) , but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

The manufacturer has no right to inspect the product. In those cases where contact information for the product owner is neither provided nor obtainable from the third-party submitter, it would be impossible even for the Commission to inspect the product. Similarly, there would be no opportunity for the Commission to follow up with the consumer under those circumstances. The manufacturer is not entitled to the contact information of a product owner who chooses to remain anonymous.

A company required to respond in a short period of time to a large number of reports about its products would presumably either divert resources to the task or risk the long term publication on the database of inaccurate information about its products.

9. How would something like last year's Pampers investigation be affected by the database? You could have children's medical records and photographs in there forever couldn't you? Even once the agency has exonerated a product like Pampers DryMax diapers, the medical records and pictures would stay because the agency's rule does not require their removal, does it?

It is my understanding that inflammatory or inappropriate photographs will not be included with published web postings. However, there is no mechanism for the redaction of photographs or medical information published on the database, except where the entire posting is removed following a determination of material inaccuracy. The Commission's evaluation of a report's accuracy does not entail consideration of whether the product actually *caused* the harm that a submitter has associated with the product. There is therefore no plan or procedure for removing postings linking particular products with harm, regardless of any conclusions the Commission may reach regarding causation.

Your Pampers example is therefore an apt one. Were the Database an available conduit for consumer complaints at the time of the DryMax scare, it would presumably have been inundated with reports of diaper rashes attributed to the product. Notwithstanding the Commission's failure to find any link between the diapers and the rashes experienced by some children, those reports would have remained on the Database. Notably, it took the Commission months after it initiated an investigation to state publically that it found no link between the new DryMax product and an increase in diaper rash cases, and that public statement also inconclusively reported that the CPSC was still studying the question. The Commission's DryMax experience is not anomalous. Indeed, if history is any indication of the future, it would be rare for the Commission to conduct any investigation and resolve it in ten or fewer days.

10. Will the agency adjudicate accuracy based on claims of causation? If not, won't there be lots of false causation information on the database to mislead consumers?

As noted in response to Question 9, the Commission will not consider implied or direct attribution of causation in its evaluation of claims of material inaccuracy. As a result, it is reasonable to expect that there will be a substantial number of reports that expressly or implicitly attribute an injury or illness to a product defect where no imputation of causation is warranted under the facts. This is one more reason that I believe the database being built by the majority will mislead consumers and mistakenly hurt the reputation of quality products and safety-conscious manufacturers.

11. Does the soft launch show that the database will be successful? If not, why not? Does the fact that only 4 reports of harm out of 1000 were claimed to be materially inaccurate necessarily mean that the other reports were accurate? Or did many of those reports fail to contain enough information for the companies to even assess whether the report was accurate or not?

12. Did the agency learn about any unsafe products during the soft launch that it would not have learned about anyway? Will it recall anything faster than it would have anyway?

It is premature to read much into the numbers, content and outcomes of the reports submitted during the soft launch. Generally, it is my understanding that the numbers of reports coming in have not exceeded the totals traditionally received during a similar time period through other available portals, such as the 1-800 hotline. There is therefore no reason to believe that the agency has learned through the Database of any unsafe products about which it would not otherwise have learned. Similarly, I can think of no obvious reason why the source of a report would impact the speed with which the Commission investigates and, where appropriate, recalls a product. In fact, when the database is launched, the Commission intends an aggressive public campaign to increase its use. If the campaign succeeds in soliciting a greater number of incident reports, the Commission will likely be unable to investigate them at the current rate.

I agree that it is reasonable to assume that there may be few claims of materially inaccurate information because many reports contain insufficient information to permit an assessment. However, no data has been reported to me that either proves or disproves the assertion.

Another potential explanation for the small number of claims of material inaccuracy is that the reports received on the database during the soft launch will never be made public. Some manufacturers may have chosen not to expend their resources challenging as materially inaccurate reports that will never be made public.

13. How much of the agency's recent budgets have been devoted to wasteful spending like designing a new logo or hiring an editor? How much of a cut in the agency's budget would be justified in these economic times?

The Commission has spent $5,329 on a contract for the design of a new agency logo. Once the logo is finalized, it is likely that the Commission will incur additional costs to replace business cards, stationary, signs and other on-going items which typically bear this logo.

The agency hired an editor as a GS-14 at a salary of $105,211. Given the large amount of regulations, guidance and other public documents we issue on a regular basis, I would not consider this to be a waste of agency funds.

More importantly, I am concerned with the ability of our agency to utilize all of the funds it has been given, and believe that the funding we are unable to spend should be cut in the next Continuing Resolution or returned to the U.S. Treasury. The Commission already faced such a dilemma in fiscal year 2010. In June 2010, our agency determined it had $7.1 million in extra funds for the year (including approximately $5.7 million unspent for salaries). This amounted to six percent of our entire annual budget.[3]

[3] http://www.cpsc.gov/pr/northup06042010.pdf

I opposed the majority's decision to reprogram this funding for other purposes and instead requested that it be returned to the Treasury to help pay down the deficit. Our agency was on a steady clip to fulfill its hiring goals, but I did not believe that the Commission's inability to spend its *entire* annual budget (all $118 million) as originally planned required it to invent other ways to spend the money mid-year. Given our massive national debt and a clear desire by the American people to reduce federal spending, returning $7.1 million to the Treasury seemed like a straightforward request.

I have the same concerns with regard to fiscal year 2011 and thereafter—not only for the CPSC but for all federal agencies who do not complete all of their new hiring at the beginning of each fiscal year. Agencies generally are provided funding for new FTEs (full-time equivalents) for the *entire fiscal year*, but may not bring those new employees on board until mid-year or later. The resulting unused salary funds could be recouped in the following ways:

1) In the next Continuing Resolution, Congress could provide only 5.5 months worth of salary funding for any *new* FTEs that have not begun their employment with the agency – and only the exact portion of salaries necessary to fund all other FTEs hired during the middle of the fiscal year.

2) In the next Continuing Resolution, Congress could simply prohibit the Commission and all agencies from reprogramming any money, such as unspent salaries, for other uses—and ensure that this money is returned to the Treasury.

In the midst of a recession and our on-going fiscal crisis, it would be prudent to ensure that all agencies spend only the money they need—and only for the purposes originally appropriated.

14. I understand you voted against the agency's rules treating vinyl plastic film, carpets and rugs, small carpets and rugs, wearing apparel, and mattresses as children's products. Is that because you believe, as I do, that Congress did not intend every consumer product safety rule to be treated as a children's product safety rule?

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 where the Commission ignored the flexibility in the CPSIA 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 new third-party testing requirements to the 2007 mattress standard, the 1970 standard for carpets and rugs, and others when the CPSIA was passed. Unfortunately, due to the makeup of the Commission, 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.

15. How do you answer the statement: "There is no safe level of lead"?

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 we can never 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.[4] 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

[4] "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/Metals/Lead/ucm172050.htm).

in the water we drink.[5] California Proposition 65[6] as well as the European Union[7] 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)[8] 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 dirt[9] 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 300ppm, and moving this August to 100ppm or the lowest achievable level between 100ppm and 300ppm) 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

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[5] Environmental Protection Agency, Safe Water Drinking Act, Fact Sheets: http://www.epa.gov/safewater/sdwa/basicinformation.html

[6] 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.

[7] 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/

[8] 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

[9] 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. See http://www.epa.gov/lead/. This safety standard is less strict than the current lead content standard provided in the CPSIA for children's products, which is 300ppm and scheduled to fall to 100ppm in August of 2011.

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, 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, 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.

16. If we amend the law to eliminate third party testing and certification, how will we be sure companies and other manufacturers comply with our laws?

Thanks in part to the CPSIA, the Commission today has enforcement tools vastly improved over those available even a few short years ago. Today, the Commission intercepts non-compliant toys through its extensive border control efforts, application of x-ray technology to identify violative lead content and computer databases that flag previous offenders for greater scrutiny. The CPSIA also increased the incentive for compliance through the threat of confiscated and destroyed violative products at the border, by authorizing the Commission to impose higher penalties of up to fifteen million dollars, and by streamlining its authority to seek criminal penalties. Notably, even prior to these improvements, the Chinese manufactured toys containing lead paint that were the impetus for the CPSIA were themselves identified and intercepted using the Commission's traditional methods. The company responsible faced a class action lawsuit and a massive fine. Today, retailers, private labelers, importers and manufacturers are collaborating to insure against violative products to protect themselves from lawsuits, damage to their reputations, the cost of recalls and loss of inventories.

It should also be noted that the requirement that all children's products be third party tested and certified irrespective of risk is an extremely wasteful way to promote compliance, and draws both industry and public resources away from more effective means. The CPSC 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."[10]

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% 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."[11]

17. Would you support the functional purpose exemption? If not, why not?

The functional purpose exemption proposed by Chairman Tenenbaum and Ranking Member Henry Waxman would grant to the Commission the authority to exempt from the CPSIA's lead limits products in which the lead content serves a "functional purpose" so that it is "not practicable or not technologically feasible" to remove the lead in each product or component, and provided that such lead "will have no measurable adverse effect on public health or safety." Notably, this formulation was designed to exempt certain products from lead limits that were arbitrarily set by Congress without regard to risk in the first place.

First, this exemption would be complicated and costly. To implement the exemption, the Commission would need to promulgate regulations defining "functional purpose" and "measureable adverse effect," and to establish standards to govern its review of

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[10] November 8, 2010, Letter to Commissioners from the American Home Furnishings Alliance.

[11] American Apparel and Footwear Association, Request for Comments, Docket No. CPSC-2010-0037 & CPSC-2010-0038 (August 3, 2010).

manufacturer petitions seeking the exemption. Once in place, the exemption would require the Commission to make product-by-product determinations in response to petitions filed by manufacturers. Petitioning a government agency requires substantial resources, including legal and technical assistance to make the necessary showing. Thus, this petition process likely will be available to only the largest manufacturers that could afford it. Small businesses, again, would be at a real disadvantage.

Commission staff has expressed the view that such an exemption could generate a large number of complex petitions. As a result, substantial Commission resources would be directed toward the pre-approval of a potentially unlimited number of products whose lead content does not have a measurable adverse effect on public health or safety. This pre-approval regulatory role is neither one previously assumed by the CPSC, nor one for which it is currently funded. The Food and Drug Administration is charged with pre-approving products before they are marketed, and it is responsible for a much smaller universe of products than is the CPSC. Yet the FDA's annual budget is in the billions of dollars, whereas the CPSC's FY 2012 budget request is $122 million. It is safe to assume that adding an FDA-like pre-approval function to the CPSC through a functional purpose exemption would turn the agency's safety mission on its head and require unnecessary, expansive resources to pre-approve products that do not even pose a lead risk to children.

I am also concerned that this exemption will be applied subjectively and with prejudice. This concern is reinforced by statements other Commissioners have made that seemingly prejudge the application of the functional purpose exemption to particular products, such as bicycles, without any supporting analysis. Ironically, this would result in arbitrary, non-science based exemptions to a lead limit and a restrictively construed absorbability exclusion that are themselves without a scientific, risk-based foundation. For example, the lead in crystals on a child's jacket serves a "functional purpose" because it makes the crystals shine, but the crystals pose no risk because the lead is not soluble (that is, absorbable or bio-available). However, no matter how low the level of lead in such crystals, it is clear that the majority of Commissioners would not support a petition for a functional purpose exemption to permit crystals on children's jackets. Without even seeing a petition and/or having the benefit of a company's cost analysis, substitute materials evaluations, etc., those supporting the "functional purpose exemption" routinely assume that only specific industries would be helped.

There is something contradictory about the Majority Commissioners' casual attitude toward the need to award "functional purpose" exemptions while also interpreting the law's absorbability exclusion in the strictest manner possible, prohibiting any product with accessible lead from meeting this exclusion. It begs the question: "Are metals that contain small amounts of lead that are not bio-available dangerous to children?" If the answer is "yes," then clearly there should be no exemptions regardless of the functional purpose of the lead in the product—including no exemptions for ATVs or bicycles. If the answer is "no" because, in fact, such small amounts of lead do not pose a risk to children, then all metals where the lead is not soluble or bio-available should be permitted. This would allow manufacturers to continue to achieve the benefits that lead brings, such as strength, machinability, shine and other uses. This effort to construct a new exemption

that does not take into account the science behind the risks of lead reinforces my concern that science will be less of a guide in granting a petition than a preconceived notion of who should or should not be granted such an exemption.

For example, one of the criteria in the Waxman proposal for granting a functional purpose exemption is that it would not expose a child to risk, that is, the inclusion of the item in the product would not raise a child's blood lead level. If a component does not pose a risk to a child on one product, then why would that same component not be acceptable on any other item? The very argument at the basis of the functional purpose exemption is that there are many materials where the lead does not pose a risk to a child that are currently banned Why not acknowledge this and fix the law so that we only ban materials that are actually risky?

That is why I have argued in my testimony that the Absorbability Exclusion in the law be amended so that it is meaningful. This exclusion can be amended so that products that do not contain lead that is absorbable, or bio-available, to a child in any amount that could be harmful would be exempt from the law's requirements—and such an exclusion could be drafted in a way that the agency would not need to review or approve such products before they are sold. Lamps, school desks, children's sizes of brass musical instruments, books, ATVs, bicycles, toys and all other products that do not contain lead that is absorbable in harmful amounts would be able to be produced and sold. The same industries envisioned to be assisted by the functional purpose exemption will achieve relief under this provision, as will any other industries that produce safe products. Of course, such a change would still not allow the sale of products containing dangerous amounts of absorbable lead, such as those with lead based surface coatings and solid-lead children's jewelry.

18. Do you think that the agency's pre-existing rules governing vinyl plastic film, carpets and rugs, wearing apparel and mattresses were already doing an effective job of ensuring the safety of consumer products in these categories? Will treating them as children's product safety rules disrupt the pre-existing (effective) testing requirements?

These rules have been in place for decades and have done an effective job without third-party testing. For example, there have been no recalls of youth carpets and rugs in the last 36 years of the agency's existence. There is absolutely no reason to change a system that has worked. Carpets already have to meet the flammability standard, they already get tested in house, and they can obtain general conformity certificates on that basis. Third-party testing will not improve children's safety. Nor does it make sense to treat so-called youth carpets differently. No child stays entirely in his own room and crawls or plays exclusively on his own rug. Children's rugs do not need different flammability protection than adult rugs. Indeed, every other rug in the house is more likely to have a cigarette dropped or candle tipped onto it than the carpet in a child's room. If this testing made sense, why would we not also require third-party testing for all carpets being laid in elementary schools, day care centers or in babies' rooms? If a wall-to-wall carpet installer arrives at a job to find a crib set up in the room and a mother far along in pregnancy, why

should third-party testing turn on whether the carpet has a juvenile design or not?

There is no doubt that CPSIA regulations treating clothing textiles and mattresses as children's products disrupts a preexisting effective testing regime. The clothing textile rule involves a long-standing and successful guarantee program that is unlike any of the rules promulgated under the CPSA. That regime effectively splits responsibility for determining the compliance of certain fabrics in a way that is not readily amenable to third-party testing.

In particular, the agency recently revised the mattress rule in a painstaking process that carefully weighed the benefits and costs entailed in that regulation. As part of that process, the agency determined that the rule would have an impact of greater than $100 million on the economy, making it the rule with the single greatest economic impact in the history of the agency up to that time. Requiring third-party testing based on an overly literal interpretation of a part of the CPSIA—for which there is absolutely no evidence to suggest it applies to the mattress rule—upsets the careful balance that the mattress rule's design struck. The oddity of overlaying third-party testing and certification on this rule can be seen from the fact that the rule will now require the burning of a queen-sized prototype mattress in an accredited third-party lab to prove the inflammability of a crib mattress several times smaller.[12]

19. Do you think the agency's overreach in treating rules as children's product safety rules has caused job losses and other harm to the economy? What about other rules the agency has promulgated under CPSIA? Which other rules that the agency is still working on pose the greatest threat to jobs?

In March 2009, Commission staff reported that the economic cost associated with the CPSIA is "in the billions of dollars range."[13] Industry associations representing manufacturers of furniture, mattresses, sports equipment, children's clothing and handmade toys, just to name a few, have all told us that they will be saddled with enormous costs, first to reengineer their products to satisfy the new standards imposed by the law, and then to third-party test every component of every product they make to demonstrate compliance with all of the applicable standards, certify based on those tests, attach tracking labels that correspond to all the cohort data regarding testing, and maintain complicated data for years.

Small businesses without the market clout to demand that suppliers provide compliant materials have been hit the hardest. Many report that the new compliance and testing costs have caused them to cut jobs, reduce product lines, leave the children's market completely, or close. A sample list of businesses impacted by the CPSIA, as well as other economic data was attached to my testimony.

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[12] Note that twin-sized mattresses would not require third-party testing, because they are not primarily designed or intended for children 12 years of age or younger. As clarified in the definition of a children's product, a twin-sized mattress is an example of a product typically purchased for a child under 12 but that would continue to be used all through the teenage years and even beyond.

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

This anecdotal data does not reflect the full breadth of the law's requirements, because the most onerous provisions of the law have yet to go into effect. The law's widest reaching mandate—third-party testing and certification of all children's products for lead content – is stayed until December 31, 2011. In addition, the Commission has yet to implement the law's mandate to third-party test to the phthalates or toy standards. When the CPSC is fully implemented, the entire process companies must go through to produce a toy or children's product will have drastically changed. Under the law, all toys must be tested at third-party labs for lead and phthalates, as well as 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. After the components are fully assembled, the finished product will need to be sent back to a third party lab for additional testing and certifications related to the toy standard. Companies tell us that these requirements stifle innovation and product variety by erecting significant cost barriers to adding to toys new accessories, new colors, or other variations. For example, a large toy manufacturer told me 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."

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.[14] And these costs do not include the cost to certify to these third-party tests, to add a tracking label, or to maintain the data and paperwork so that every component and material can be traced back to its specific test and lot number. All of these steps are required by the CPSIA without any regard for whether the product presents a safety risk.

In fact, while the costs to companies of reengineering 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 and will continue to be much higher—all without any measurable benefit. A company making furniture for children's rooms would need to: 1) determine if its product is "primarily intended" for children 12 and under—an issue 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 accessible 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 to each piece of children's furniture a tracking label containing 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 make a material change to the product, including a change of color or manufacturing process.

[14] Regulatory 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).

One furniture manufacturing company reported that it spent approximately $13 million putting together a testing, tracking, and labeling system for its children's furniture, even though not one of its components exceeded the new lead limits or otherwise needed to be replaced. There was clearly no safety benefit, yet the company has faced enormous costs. Large and small companies alike must hire a lawyer or other outside expert simply to ensure they understand the extent to which their products are impacted by various provisions of the law.[15]

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 testing costs are cheaper. 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.

The CPSIA third-party testing requirements and lead content standards are far more stringent than the requirements governing products sold in the EU, Japan and other major markets. As a result, preexisting rules governing the export of domestically manufactured products that do not satisfy United States product safety standards erect a significant barrier to domestic manufacturing growth. A company wishing to sell in a foreign market a product that is in compliance with foreign standards but not CPSIA standards, can only manufacture it in the United States for export if the product has never been in commerce before, and if it undergoes a lengthy pre-approval process by both the CPSC and the receiving country. The CPSIA's new onerous requirements, combined with the difficult process for exporting products not meeting United States product safety standards, will encourage more businesses to move their manufacturing operations overseas. The CPSIA thereby undermines the economic imperatives of increasing both employment and exports, and is inconsistent with President Obama's exhortation that American companies relocate their manufacturing to the United States.

20. Should rules promulgated under the CPSIA be evaluated under a cost-benefit analysis? Is it too late to do that?

The 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 that will result from 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. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA. Moreover, the CPSC may lack the expertise to do so for complex regulations like our Testing and Labeling Rule, and such analyses should therefore be performed by qualified contractors.

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[15] "Mattel Finds CPSIA to be a Challenge", *Product Safety Letter*, November 9, 2009.

I believe such analyses would reveal that much of our CPSIA mandated regulation cannot be justified. To begin with, there is no scientific evidence suggesting there is any benefit from many of the law's requirements. For instance, no government health agency, including the CPSC, has ever concluded that the components of children's products containing either 300ppm 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 did not make ASTM-F 963 a federal standard, nor require all toy manufacturers to third-party test to this standard, because the Commission did not believe such actions would reduce the risk to children. Regarding lead, the Environmental Protection Agency (EPA) and the Centers for Disease Control (CDC) report that in 1978, about 13.5 million children ages 1-5 had elevated blood lead levels. However, by 2007-2008, this number had declined to about 250,000 children.[16] Similarly, 2007 data indicates that nationwide, one percent of children selected for testing (and only high risk children were selected) showed an elevated blood lead level as established by the CDC. This number was down from nearly eight percent in 1997,[17] and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the EPA have issued guidance for reducing children's exposure to lead, and neither has ever suggested that parents take away a child's bicycle because of the lead in the substrate of the metal comprising the spokes, pedals or handlebars. Nor has it ever been argued that the CPSIA, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level.

Because the CPSIA's new requirements are not risk-based, manufacturers are spending enormous amounts of time and money satisfying arbitrary standards, rather than on improving the safety of 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:

> [T]here 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.[18]

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. 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

[16] http://www.epa.gov/opeedweb/children/body_burdens/b1-graph.html

[17] http://www.cdc.gov/nceh/lead/data/national.htm

[18] November 8, 2010, Letter to Commissioners from the American Home Furnishings Alliance.

> 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, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% 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.[19]

The law imposes on small businesses onerous requirements 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.

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. 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.[20]

There is thus overwhelming anecdotal evidence suggesting that the costs, both economic and intangible, to the economy, businesses and consumers far outweigh any minimal improvement in safety that could be attributed to the CPSIA. Congress could prevent further harm by prohibiting the Commission from expending any funds for the purpose of undertaking any further regulatory action without first performing a full cost-benefit analysis and making a finding that the cost of the action is justified by its expected benefits.

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[19] American Apparel and Footwear Association, Request for Comments, Docket No. CPSC-2010-0037 & CPSC-2010-0038 (August 3, 2010).

[20] One 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

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

Memorandum

Date: March 8, 2011

TO : [redacted]

FROM : [redacted]

COPY : [redacted]

SUBJECT : Estimated Costs of Public Database Development

The purpose of this memorandum is to describe the major cost components of the Consumer Product Safety Risk Management System program (CPSRMS) in both functionality and cost including our estimate of the costs for the public database.

Background:

Section 212, Section 6A of the Consumer Safety Improvement Act consists of two major requirements: 1) the implementation of the public facing database, and 2) the modernization of the Commission's information technology systems.

Prior to the completion of the modernization, most of the CPSC's business processes use many, small, disconnected information systems. Commission staff are unable to efficiently and effectively pull together required, available data because of these "stove piped" systems. Staff must store and manually maintain too much critical information outside of the legacy systems; A situation that places an unwarranted dependency on a small number of key program area staff with expert knowledge in a particular field and supporting data.

IT Modernization Scope:

The modernization will improve our ability to make effective use of all of our available information. It will enable Commission staff to receive data from and communicate with consumers, businesses, retailers, and professionals (e.g., fire marshals, medical examiners) with unprecedented speed and effectiveness. It will improve data quality, reduce or eliminate manual and redundant processing, and make better use of the collective knowledge of the staff in a way that helps the Commission learn about emerging hazards quickly.

During the initial CPSRMS phase we have improved how we collect reports from consumers and professionals. The quality of those reports has improved because of a better incident report process and forms on SaferProducts.gov. Since soft launch, online consumer reports, hot line calls, press clippings, and death certificates go in via the same "front end" and are coded

consistently regardless of their ability to be published in the database. We have eliminated many of the redundant and inefficient steps required to code and share this information with businesses. And, we have begun to improve the way that that the information is analyzed by providing better tools to make more data available.

We have also improved how we interact with businesses. Prior to this modernization, too much staff interaction with consumers and businesses was transacted by U.S. mail. For example, incident reports requiring 6C comment are batched and mailed to businesses for comment once a month. The businesses correspond by U.S. mail in a slow process not conducive to time-sensitive safety related work. With our recent soft launch, businesses and Commission staff are able to securely exchange information electronically regarding potentially publishable reports. Businesses may provide general comments and make claims of material inaccuracy or confidentiality. In future releases, we plan to expand the business portal to cover Section 15, 6C, and other common correspondence.

We are bringing the Commission's home page, CPSC.gov, in line with the times to improve public outreach and education. A critical component of this project is cleaning up the thousands of published documents to help the consumers and businesses find what they are looking for much faster.

Finally, business and information technology changes have significant risk of failure. We have implemented IT governance improvements including improvements in contract management, IT budget management, Capital Planning and Investment Control, Enterprise Architecture, Information Assurance, Project Management Office, and Independent Verification and Validation. Most of these efforts are focused to improve the CPSRMS program.

Public Database Scope:

The major IT functionality unique to Section 6A includes 1.) replacing our pre-CPSIA online incident reporting form with 6A compliant form (e.g., requires mandatory questions), 2.) providing businesses with a portal where they can register, view reports, and comment, and 3.) providing public search that includes reports that meet the 6A criteria for publication. Because modernizing the Commission's business processes and supporting IT systems is required in conjunction with deploying the public database, it is challenging to draw a bright line between these efforts. Three examples illustrate this.

First, regardless of whether a report is a candidate for publication, we want to drive the public from reporting incidents via the hot line or U.S. mail to an online form that will, as far as possible, pre-code information to make it more accurate. Second, regardless of whether a report is a candidate for publication, we want to change our standard communication method with businesses from paper forms sent in via U.S. mail to cheaper, faster, and more accurate online forms via the business portal. Third, the CPSC has a lot of good information to share with businesses, consumers, and professionals. Our website, search engine, and currently published information should be cleaned up and redesigned to improve this information sharing regardless of 6A's requirement to make certain reports of harm publically searchable.

Cost Breakout:

The Office of Management and Budget released funding for the CPSRMS program in September 2009. CPSRMS has been executing for three fiscal years and is on schedule to shift largely to operations and maintenance in fiscal year 2013. The table below is from our most recent OMB Exhibit 300 and summarizes CPSRMS spending by fiscal year.

CPSRMS Costs

(Includes IT Modernization and Public Database)

Table 1: SUMMARY OF SPENDING FOR PROJECT PHASES
(REPORTED IN MILLIONS)
(Estimates for BY+1 and beyond are for planning purposes only and do not represent budget decisions)

	PY-1 and Earlier	PY 2010	CY 2011	BY 2012	BY+1 2013	BY+2 2014	BY+3 2015	BY+4 and Beyond	Total
Planning:	1.473	0.603	0.840	0.300	-	-	-	-	3.216
Acquisition:	7.167	8.818	7.717	5.124	0.846	-	-	-	29.672
Planning & Acquisition Gov. FTE Costs:				5.424	0.846	-	-	-	32.887
Subtotal Planning & Acquisition (DME):	8.640	9.421	8.557	5.424	0.846	-	-	-	32.887
Operations & Maintenance:	-	1.244	2.064	2.913	3.594	2.748	2.748	2.748	18.060
Disposition Costs (Optional)	-	-	-	-	-	-	-	-	-
O&M, Disposition Government FTE Costs :									
Subtotal O&M and Disposition Costs (SS):	-	1.244	2.064	2.913	3.594	2.748	2.748	2.748	18.060
TOTAL FTE Costs:	0.314	0.811	1.360	1.980	3.000	3.096	3.097	3.097	16.695
TOTAL (not including FTE costs)	8.640	10.665	10.620	8.336	4.440	2.748	2.748	2.748	50.947
TOTAL (including FTE costs)	8.955	11.476	11.980	10.316	7.440	5.844	5.845	5.845	67.643
Number of FTE represented by Costs:	2	4	7	11	17	17	17	17	

The CPSRMS program described in the spending table above includes several components. Below are some common questions and answers.

Q: How much money have we spent on the CPSRMS program as of the public database launch in March 2011?

A: We have obligated approximately $23.2 million from the end of FY 2009 to now for the entire CPSRMS program.

Q: How much IT money has been spent on the public database and what are its future projected IT operations costs?

A: We do not breakout the costs of the public database from the other CPSRMS phase 1 project costs (much of which have to do with IT modernization). The estimate below of the work within CPSRMS to develop the public database has been done in hindsight according to the scope of the public database scope above.

CPSRMS Costs for Public Database

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	Total
Development	$1.450	$1.000				**$ 2.450**
Operations and Maintenance		$0.400	$0.050	$0.050	$0.050	**$ 0.550**
Total	**$ 1.450**	**$ 1.400**	**$ 0.050**	**$ 0.050**	**$ 0.050**	**$ 3.000**

Please note that the costs (in millions) above include contracted goods and services by fiscal year. Costs in fiscal years 2009 and 2010 are based on actual obligations. Costs in fiscal year 2012 are for planning purposes. Costs in fiscal year 2011, while currently under continuing resolution, are a mix of the two.

Q: When are you finished with CPSRMS development and what will this development cost?

A: CPSRMS development ends in fiscal year 2013 at an estimated cost of $32.887 million. The program completes shifting to operations and maintenance with continued costs of approximately $3 million per year.

Q: What are you working on in the CPSRMS program after the public database is launched in March 2011?

A: When we comply with 6A in March 2011, we shift the remainder of our work to improving the operational processes and supporting IT systems described under "IT Modernization Scope" above.

Questions for the Record

Wayne Morris, Vice President

Association of Home Appliance Manufacturers

Questions on the U.S. Consumer Product Safety Commission

Public Incident Database

March 21, 2011

Questions from the Honorable Mary Bono Mack:

Question 1: **How could the database provisions be revised to make them more workable without giving manufacturers the ability to game the system and block all complaints?**

We believe that the database could be revised in several ways that would ensure greater accuracy and would not allow manufacturers to "game the system."

a. Manufacturers should be allowed more time to respond to the initial incident. It is extremely difficult to gather and analyze the necessary information from a variety of sources relating to a consumer's complaint in 10 days.
b. The initial reports should be restricted to those individuals that have direct information on the incident or a care-giver for that individual. CPSC should not have created the opportunity for non-involved parties such as trade associations, consumer activist groups, or trial lawyers to add information to the database.
c. We have already seen, during the soft launch, instances of consumers stating mere opinions about whether a product is safe, unrelated to an alleged incident, and CPSC doing nothing to restrict from the database highly inflammatory comments without merit or even any evidence.. CPSC should be required to limit database postings to actual reports of harm or of near-harm situations and not someone's mere opinion on a product.
d. Information and reports should not be released to the public database until claims of material inaccuracy are settled. At present, CPSC has said it will "try" to resolve these claims but feels bound to publish a report 10 days after the manufacturer has received it. The CPSC Chairman said in her testimony that out of over 700 reports in the soft launch only 4 have resulted in claims of material inaccuracy. This indicates that, as AHAM testified, there likely will be relatively few reports about which manufacturers will claim material inaccuracy but those are critical to resolve fairly and expeditiously. CPSC

should be required to finalize those determinations before publishing the reports.

e. CPSC should require the reporting of model numbers or other distinct identifiers where applicable and available. In this manner, reports can be linked together, information can be made specific to the item in question, manufacturers who may not be allowed to have customer identification may have some opportunity to evaluate the allegation ,and consumers ultimately will be better served with itemized information on the products. As it stands now, consumers could register an incident about a Brand X dishwasher, when the issue probably resides, if at all, with only one model or model type. Without this critical information, the database will serve no useful purpose to the consumer or to the manufacturer trying to search for like incidents and to discover what a root cause may be.

Question 2. **You indicated at the hearing that retailers may sell brands of the same product made by different manufacturers. Does this pose a problem for manufacturers under the CPSC's rules for the database?**

Yes, we believe that consumers will likely report on a Brand of a product, without the necessary information on the model or model type. As we mentioned above, without that specific information manufacturers may often not be able to ascertain if the alleged incident even applies to a product they manufacture and ultimately the database loses its original purpose of assisting consumers and manufacturers in tracking down and evaluating safety issues. Likewise, Brand owners may choose not to make the effort to timely send the reports to the actual manufacturer. We believe that both Brand owners and the manufacturers associated with that Brand by model or platform of models should be able to register with CPSC which should transmit that information to both parties. If multiple manufacturers are building two or more models under a particular product type, it is important to identify the specific model and manufacturer where feasible. Time is of the essence in this reporting sequence. It is important that manufacturers have the information about potential problems as quickly as possible so that they may search and evaluate, other similar reports, for example. Without the specific model information, the database truly becomes just a "complaint" forum, which we are already seeing in the soft launch.

Rick Woldenberg's Responses for the Record
February 17, 2011 Commerce, Manufacturing, and Trade Subcommittee: "A Review of CPSIA and CPSC Resources"

Congressman Mike Pompeo

1. **Did your company have to buy a copy of the F-963 standard? Why? How much did that cost?**

   Our company has purchased several copies of ASTM F963 over the years. According to the ASTM International website (http://www.astm.org/Standards/F963.htm), the current cost of F963 is $62, or $74 (redline version). [This means that the ASTM literally charges companies EXTRA to figure out what changed in this legally-mandated standard.] To my knowledge, this standard is only available from the ASTM. Ironically, even the CPSC is unable to provide access to this document (as acknowledged in this CPSC Powerpoint presentation http://www.cpsc.gov/BUSINFO/intl/toyweb2_en.pdf) which casts doubt on its ability to guide companies attempting to comply with the law. The lack of access and cost of access to this standard certainly makes compliance burdensome for small businesses.

   The F963 standard has been updated regularly over the years, and we need to have access to the current version of the standard at all times. Until the CPSIA was enacted, the F963 standard was the tacit equivalent of a mandatory standard because the toy industry adopted it as a "voluntary" standard with the encouragement of the CPSC. At one time, voluntary standards were the preferred way the agency regulated many industries, including our industry. We have always used the F963 standard as a reference in product development and safety administration and frequently tested for compliance with the standard.

2. **You've been dealing with all of the agency's rules for the last few years. By my reckoning, an entrepreneur with, say, a good idea for a board game would have to pay to buy a copy of F-963 from ASTM (not a small price to pay for some small or start-up toymakers). Then, because the standard is literally dozens of pages long of densely spaced text, he'd have to hire a lawyer to tell which parts of the standard apply to his product. Then, he'd have to find a third-party test lab to test and certify a random sample of his actual production line for compliance with all of the F-963 requirements. And, if any product fails, you are basically back to the drawing board. And, of course, he'd have to do all this before ever selling a single toy. Do you think the next board game entrepreneur (e.g., Trivial Pursuit) might have a hard time getting off the ground under this regime? Has this agency effectively killed entrepreneurship in the toy market? Does a start-up company stand any chance of being able to navigate the CPSC's new rules and regulations on its own?**

The CPSIA has had the effective of creating new barriers of entry in the children's product market, once one of America's most entrepreneurial industries. The burdens are heavy in the toy industry but even worse in related industries like juvenile products. Large companies with steady cash flow enjoy considerable and valuable advantages over entrepreneurs who must put large sums of money at risk in their initial investment in compliance costs before receiving their first dollar of revenue. The effect of the CPSIA is one of picking winners and losers in affected markets. I question whether this is the appropriate role of the federal government in our markets.

We believe that these heavy costs will discourage investment in new products, by new entrants, by existing players and especially by small businesses. Recently, at the CPSC's hearing on the looming 100 ppm lead standard, representatives of the bicycle industry noted that in the wake of the 300 ppm lead standard, many small bicycle manufacturers have already left the market and large companies cut their product lines considerably. I have long predicted a reduction in product diversity as a necessary consequence of the CPSIA. Other evidence of market contraction exists, as well. At this year's ICPHSO, CPSC Acting Director of the Office of Compliance and Field Operations Robert ("Jay") Howell noted the CPSC's challenge in identifying a test lab that has or will agree to equip itself as a certified test lab for ATVs. Why? So many ATV manufacturers have stopped producing youth model ATVs under the effective ban by the CPSIA's lead standards that testing labs can't justify the capital investment to provide CPSIA compliance testing. Product diversity is declining all over the children's product market.

Toymakers will experience the same depressing effect and yes, that means that the next Trivial Pursuit inventor may be washed out. We may never know because the absence of a new toy or novel game will be hard to detect in the ad-driven, promotional toy market. It is clear, however, that entrepreneurs are free to deploy their capital wherever they want – they are seeking returns on their capital - so the combination of high CPSIA compliance costs, high regulatory risk, high legal costs and a generally hostile regulatory environment seems unlikely to attract new entrants to the toy market. War stories will also discourage new entrants – the well-known experience of toymakers who have suffered under this regulatory regime.

As a practical matter, the rules and regulations put out by the CPSC to implement the CPSIA for toys are incomprehensible, not to mention incomplete. We are now 31 months into the CPSIA era, yet the CPSC has yet to promulgate a final phthalate standard or certify even one phthalates testing lab. EACH and EVERY toy must be "phthalate-free" but the CPSC has yet to tell us how to know it has achieved this goal. This means we are subject to the risk that they will invalidate all the work we have done since 2008. While this regulatory delay is simply outrageous, it is more likely proof of the defects in the CPSIA than a sign of failure by the CPSC. Even the largest companies have complained to the CPSC about the blizzard of rules and interpretations. One of great frustrations in attempting to comply with the new rules is that many CPSC legal interpretations have been given in private letters, orally in speeches or even in the form of voicemails. Access to such information may be critical but is obviously inaccessible to anyone not obsessively watching every minute of every video, reading every letter,

attending every meeting or hearing and talking to every stakeholder in an attempt to master the breadth of this ever-morphing regulatory scheme.

3. **Does the existence of a small business ombudsman at the agency solve the compliance problem?**

The office of the Small Business Ombudsman serves a useful purpose as a friendly point of contact and possible advocate for small business within the agency. That said, there is no evidence that the office has power to make decisions, change policy or offer its own definitive interpretation of rules. For small businesses totally at a loss, the ombudsman is a good place to turn to for plain English answers to basic questions about rules. Notably, the office is not permitted to make decisions on behalf of the agency. The Ombudsman does not have the authority to make problems "go away". For this reason, the ombudsman function appears to be the regulatory equivalent of a shoulder to cry on. The current ombudsman, Neil Cohen, has been a good friend to the small business community, but unfortunately, he doesn't write the rules.

4. **What problems do you anticipate occurring as a result of the public database?**

We know that the public database will be administered on a post-it-and-forget-it basis. Based on our dealings with the agency, I believe that the agency will post all incidents unless a mistaken identity can be proven. As a consequence, we anticipate that the database will be allowed to be filled up with "incidents" that are conjectural, misleading or even proven WRONG. In the first and only filing against our company, an anonymous complaint accused one of our products of posing a small parts hazard. That accusation was based on an image viewed on a website – there is no indication that the filer had ever handled our product. Consequently, the filer had no reasonable basis for the small parts claim. As a matter of fact, we routinely test for small parts and have done so for years, and when we presented a valid CPSIA test report under F963 (and EN71, the European standard), we were told by the General Counsel of the CPSC that the claim would nevertheless be eligible to be published under current rules. Thus, we KNOW that the false and misleading filings will KNOWINGLY be published by the CPSC even if PROVEN false. *We believe this flagrantly violates our basic right to due process and creates the potential for damaging "feeding frenzies" that can consume our products and brands.*

Other claims may relate to "hazards" which affect a wide swath of products already well-known by regulators and industry. This presents many risks to industry and to brands. What will a consumer make of a "report of harm" relating to a general hazard and only one particular product? Is this a minor incident or a harbinger of a real risk? Should they stop using the product? Should they stop using the particular model or brand which is subject of the complaint? Given that many products may present the same hazard (for instance, that an electrical cord could pose a strangulation hazard), how does this information help consumers? Will consumers actually understand the issue and be able to put it into some sort of perspective? And when incidents accumulate, as they are likely to do, presumably the brands and models with the largest numbers in distribution will have more incidents even though, ironically, they may be better constructed and "safer"

than the alternatives. Will consumers falsely conclude that the models with more incidents are less safe and turn to something that really is?

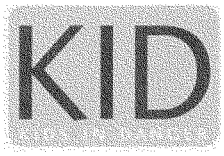
Responding to this type of complaint obviously creates a new and terrible dilemma for manufacturers. Should they expend resources to respond? Do they need to lay out "a brief" about the nature of the failure and why their product is named? Will people just view whatever they say as unreliable, self-serving information or will they really be able to internalize the data? As noted above, most people will not be able to put these incidents in any kind of perspective. The only thing we know for certain is that brands and companies will be the losers.

The public portrayal of the database belies the unverified nature of the filings. Notwithstanding the disclaimers made by the agency, even esteemed media outlets like *The New York Times* refer to the database as a "database of unsafe products". Unsafe? That label presumes some kind of judgment or filter prior to filing, which even *The New York Times* must assume is being provided by the CPSC. Ironically, the CPSC is doing everything possible to avoid providing that service. The result may be disastrous for American manufacturers, importers, private labelers and retailers of children's products. It will be yet another self-inflicted economic injury.

5. **What can Congress do to return the agency to one that regulates on the basis of risk?**

Congress should mandate that the CPSC use principles of risk assessment to make all decisions relating to regulation of children's products. The legislatively-mandated use of judgment and proportionality will likely lead to better rulemaking and more regulatory common sense. It is the legislative banishing of the exercise of judgment that led to the devastation of the bicycle industry, the elimination of youth model ATVs from the market (even though those products owe their very existence to a concerted effort by the CPSC to protect children from injury on adult-sized ATVs), the banning of all products made of brass, the senseless and almost neurotic banning of rhinestones as embellishments on children's clothing, shoes and jewelry, and so on. NONE of these changes in rules have been tied to even ONE avoided injury.

Congress should also mandate the use of principles of cost-benefit analysis by the agency in its rulemaking processes. Under the CPSIA, all considerations of economics have flown out the window with predictably disastrous results. We can operate our government better according to basic common sense notions of cost-benefit analysis.



Responses to questions from the Honorable G.K. Butterfield
Commerce, Manufacturing and Trade "A Review of CPSIA and CPSC Resources"
From Nancy A. Cowles, Kids In Danger
March 21, 2011

Can you please explain the mouthing behaviors of infants, toddlers, young children and not so young children and how lead in zippers, snaps, and other non-textile closures or embellishments can be ingested by infants, toddlers and other young children?

The main pathway for lead ingestion is getting lead on the hands and then putting hands into the mouth. Lead can be transferred from a surface to the hand and then to food or other objects put into the mouth or the hand directly put into the mouth. One particularly good quality study involved observation of children playing in a yard and video-observed their hand-to-mouth behavior and evaluated relationship of oral behaviors to children's blood lead levels. Children with higher hand-to-mouth occurrences had correspondingly higher blood lead levels. Investigators video-observed children ages 1-5 years putting a hand in their mouth 7 times hourly (maximum 67 times/hour) and an object or food in their mouth 17 time hourly (maximum 125 times/hour).[i] Embellishments on children's clothing are very likely to be handled by the child in dressing, playing, admiring the outfit's embellishments, etc.

Can you please discuss any science-based studies showing increases in children's blood lead levels from mouthing or hand to mouth contact?

A review of reports that describe children's mouthing was published by the U.S. Environmental Protection Agency in 2009.[ii] The EPA report has a significant quantity of similar data, with frequency of oral behaviors and minutes/day of mouthing. The amount of lead that would be transferred to a child may depend on mouthing behavior (times/hour and minutes/day) and the transfer rate of lead from the object to the hand (if the object is touched and not directly mouthed). Children as old as 10-12 years put their hand in their mouth an average of 4 times hourly. This rate is much higher among younger children, and exposures from mouthing behaviors can occur for several hours daily per child. Even for adult workers, hand lead is associated with blood lead level.[iii]

In addition, the Centers for Disease Control and Prevention's Mortality and Morbidity Weekly Report (CDC MMWR) has published cases of lead

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poisoning not related to ingestion of objects. Most recently, the MMWR published a case study of a toddler poisoned by a metal charm on a necklace he wore and mouthed regularly.[iv] The MMWR has also published cases of lead poisoning from eating off lead-tainted dishware;[v] lead dust contamination of family vehicles;[vi] and exposure to led at a firing range among adolescent members of a shooting team.[vii]

Can you provide any information regarding the extent to which lead has been found in zippers, snaps, and other non-textile closures or embellishments used on children's products?

From 2002 to present, KID indentified 19 examples of clothing products or accessories recalled by CPSC because of lead in the fasteners or embellishments[viii]. It should be noted that prior to passage of the CPSIA in 2008, testing for lead in products was not required – therefore it is likely that many products might have contained lead, but only these were discovered. In addition, the testing requirement in CPSIA has been stayed, so even current clothing may still have lead-tainted fasteners or embellishments that have gone undetected.

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[i] Ko S, Schaefer P, Vicario C, Binns H, Safer Yards Project. Relationships of video assessments of touching and mouthing behaviors during outdoor play in urban residential yards to parental perceptions of child behaviors and blood lead levels. *J Expo Sci Environ Epidemiol.* 2007 Jan; 17(1):47-57.
http://www.ncbi.nlm.nih.gov/pubmed/16941017

[ii] U.S. Environmental Protection Agency. Child-Specific Exposure Factors Handbook. August 2009, (EPA/600/R-08/135).

[iii] Rodrigues E, Virji M, McClean M, Weinberg J, Woskie S, Pepper L. Personal exposure, behavior, and work site conditions as determinants of blood lead among bridge painters. *J Occup Environ Hyg*, 2010 Feb;7(2):80-7.

[iv] Lead Poisoning of a Child Associated with the Use of a Cambodian Amulet – New York City, 2009. *MMWR*, January 28, 2011. 60(03);69-71.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6003a2.htm

[v] Childhood Lead Poisoning from Commercially Manufactured French Ceramic Dinnerware – New York City, 2003. *MMWR*, July 9, 2004. 53(26);584-586.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5326a4.htm

[vi] Childhood Lead Poisoning Associated with Lead Dust Contamination of Family Vehicles and Child Safety Seats – Maine, 2008. *MMWR*, August 21, 2009. 58(32);890-893.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5832a2.htm

[vii] Lead Exposure from Indoor Firing Ranges Among Students on Shooting Teams – Alaska, 2002-2004. MMWR, June 17, 2005. 54(23);577-579.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5423a1.htm

[viii] CPSC Recall Database at http://www.cpsc.gov/cpscpub/prerel/prerel.html?tab=recalls.

Date	Manufacturer	Product	Location of lead	Units
7/26/2010	Brine	VIP Lacrosse Gloves	Screen printing ink on triad logo	7,000
6/17/2010	Target	Children's belts	Belt buckles	190
12/16/2009	The Timberland Co	Classic Scuffproof Boots	Logo stamped into insoles	21,000
3/17/2009	Nordstrom	Girl's shoes	Surface paint on the outer sole	31,000
3/11/2009	Pronto Sports Inc	DBX Glide Boys Ice Skates	Surface paint on the ice skates	600
3/3/2009	Alpargatas USA Inc	Children's flip flops	Paint on the sole of flip flops	210,000
1/15/2009	Axiom International Inc	Children's Sunglasses	Surface paint on sunglasses	5,300
8/12/2008	Chelsea & Scott Ltd	Sun Smarties Children's Board Skirts	Paint on the skirt grommets	600
6/10/2008	The Children's Place Retail Stores	Camouflage Pajama Sets	Screen print on shirt	28,000
4/3/2008	StyleMark Inc	Children's Sunglasses	Orange lettering on the temples	144,000
12/7/2007	FGX International Inc	Children's Sunglasses	Surface paint	260,000
11/8/2007	Dollar General Stores imported by Dolgencorp Inc	Children's Fashion Sunglasses	Yellow surface paint	51,000
10/9/2007	Kahoot Products Inc	Cub Scouts Totem Badges	Surface paint	1,600,000
5/16/2007	Troy-Bilt imported by MTD Products	Budding Gardener Complete Gardening Set (Gloves)	Stamp-painted logo on gloves	80
2/13/2007	Samara Brothers	Heavyweight Jackets	Snap closures	8,000
1/5/2007	Samara Brothers LLC	Starting Out Shirt and Overalls	Coating on snaps	200
9/1/2005	Walt Disney Parks and Resorts LLC	Red Sunglasses/Toddler Cap Set	Paint	12,900
2/15/2005	HIS International	Denim Jumper Set	Paint on buttons	6,700
12/20/02 (Revised 2/4/04)	Wear Me Apparel Corp	Infant Girls' Garments	Paint on "smiley face" zipper-pull	3,000