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COMMISSIONER NANCY A. NORD

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

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Saving lives and reducing injuries wisely

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

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

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

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

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

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

Examples of over-regulation

The Testing Rule

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

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

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

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

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

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[4] *Id.* at 198

[5] *Id.* at 178.

[6] *Id.* at 134.

[7] *Id.*

[8] *Id.* at 187.

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

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

And then there are the additional costs to consider, including

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

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

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[10] *Id.* at 196.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id* at 153.

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

Changing random sampling to representative sampling

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

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

Definition of *children's product*

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

100 ppm limit for lead content

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

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

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

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

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

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

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

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id* at 30.

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

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

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

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

Here is a sample of concerns illustrating common themes.

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

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[21] *Id.*

[22] *Id.*

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

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

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

Conclusion

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

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

Attachment A

Commissioner Nancy A. Nord

Cost Reduction Proposals

Cost Driver: Excessive Testing

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

Cost Driver: Third Party Testing

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

Cost Driver: Variability of Testing Results

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

Cost Driver: Lead, Phthalates and Other Chemical Testing

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

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

Cost Driver: Differing Regulatory Requirements

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

Attachment B

Companies decreasing product lines due to 3rd party testing burdens

The Handmade Toy Alliance

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

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

As of January 9, 2012-

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

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

Attachment B

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

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

International Sleep Products Association

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

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

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

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

Fashion Jewelry and Accessories Trade Association

Attachment B

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

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

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

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