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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

[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

[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.

[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.