

**STATEMENT OF
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BEFORE THE SUBCOMMITTEE ON COMMERCE, MANUFACTURING AND
TRADE
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
PROTECTING CONSUMERS:
CURRENT ISSUES RELATED TO COMMON SENSE PRACTICAL PRODUCT
SAFETY REGULATIONS & CPSIA REFORM**

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Chairman Bono Mack, Vice Chairman Butterfield and members of the Subcommittee, thank you for the opportunity to provide comments about the important subject of practical common sense solutions to unintended consequences involved in the implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA) (Pub. L. No. 110-314). Our firm works as product safety counsel to the Craft & Hobby Association (CHA), Toy Industry Association (TIA), Juvenile Product Manufacturers Association (JPMA), Halloween Industry Association (HIA), Apparel makers, Publishers and Retailers of an array of children's products. I have been involved with developing product safety standards over many decades through relationships with the National Safety Council (NSC), National Bureau of Standards (NBS), American National Standards Institute (ANSI), ASTM International and International Organization for Standardization (ISO). We have also worked in collaboration with many foundations and consumer organizations and others to advocate the need for uniform product safety initiatives in the U.S. and internationally.

We keenly recognize that sometimes in the rush to regulate attention may be focused on relatively small risks associated with children's products while some very big risks remain underappreciated and unaddressed. In a world where perception is reality, where misinformation often drives perception, and where new, scary and uncertain hazards receive widespread attention, it is no wonder that policy makers can lack context for understanding and managing children's risks. Unfortunately, the net result is that we often collectively waste scarce financial resources at the expense of allocating them efficiently to make children's lives measurably safer. Further, this perpetuates a lack of coordination between groups that are all arguably committed

to helping children; focuses on individual issues and agendas instead of children themselves; and competition rather than cooperation for the resources to truly protect children. There is no more important theme than protecting our children. As much work as we all do, there is always room for improvement. We may not always agree with everyone appearing before you today on how to achieve our common goals, but we always stand willing and committed to work for the betterment of children's lives.

SUMMARY

In past appearances before this committee we have supported important legislative initiatives to expand the authority of the Consumer Product Safety Commission (CPSC) to effectively pursue its mission of consumer protection. Along these lines, we believe that there are ways to make the Commission more effective and at the same time more efficient. Allow me to share a few proposals on ways the Commission can increase its effectiveness in protecting consumers while minimizing burdens on the manufacturing sector of this country.

CPSC's mission is to protect children and families against an unreasonable risk of injury and death from more than 15,000 types of consumer products from a wide range of product hazards. Their work is vital in that it addresses consumer product hazards through a framework of mandatory product safety standards; engagement in the voluntary or consensus standard-setting process; compilation of consumer injury data; issuance of safety guidelines; implementation of information and education programs in an effort to proactively avoid injuries; and product recalls and corrective actions when necessary. The agency is operating with a vastly improved budget as a result of the CPSIA. However, in an era of restrained budgets and limited resources CPSC will need to allocate funds based upon better risk hazard analysis and sound

scientific principles. Allowing them the same discretion afforded other agencies to do so, based upon real world public health risks, would be a step in the right direction. Statutory changes that permit the agency greater discretion as regards regulation of lead and phthalate exposure would allow the Commission to address unintended consequences of mandates imposed under the CPSIA. Adoption of consensus standards and deferral to existing ASTM product safety standard setting processes can efficiently result in flexible regulatory requirements that can more readily be adjusted based upon hazard data than historically stagnant standalone mandatory federal regulations. Congress should clearly provide for only prospective application of new rules and regulations under CPSIA. To assure that American Brands have access to foreign markets there will continue to be a need to support of increased coordination with other countries regarding alignment of standards with better inspection and enforcement coordination. In a global economy we can ill afford disparate requirements without reasonable basis or foundation. Similarly Congress should assure uniform standards apply nationwide. U.S. manufacturers in the consumer product industry presently face increasing global competition that is more intense than ever before. In such an economic environment, U.S. manufacturers (small and large) should not be disadvantaged by an unnecessarily intrusive and inefficient domestic and international regulatory regime.¹

We supported many of the concepts reflected in the CPSIA to the extent effective good manufacturing standards and practices are recognized. However, to the extent that a myopic

¹ Congress intended this when it established a requirement that only identical standards uniformly apply to the same product risks regulated under the Sec. 18 of the Federal Hazardous Substances Act (“FHSA” 15 U.S.C. § 1261n) and Sec. 26 of the Consumer Product safety Act (“CPSA” 15 U.S.C. § 2075). Even the European Union proposed that trade between EU countries would be boosted by making it more difficult for member states to block imports of specific products on the basis that they do not meet a national product safety standard. *Procedures Relating to the Application of Certain National Technical Rules to Products Lawfully Marketed in Another Member State and Repealing Decision 3052/95/EC*.

implementation of provisions have resulted in regulations that depart from sensible risk-based decision-making Congress needs to act to restore a common sense regulatory framework. CPSC has strained under the burden of unrealistic timelines for implementation of imposed regulations.

Despite admonitions from Congress that the agency was empowered with discretion to implement practical regulations, the Commission in a bi-partisan fashion has determined that its discretion is limited without statutory changes². CPSIA adopted an unduly prescriptive scheme of absolute limits on total lead and phthalates resulting in standards inconsistent with risk-based measures commonly adopted by regulatory agencies. These wholesale limits were coupled with an exemption process that has proven to be impractical for lead and phthalates regulation. The stream of commerce suffered significantly as the imposition of such requirements was deemed to apply in a retroactive manner to any previously produced goods entered into commerce. Confusing, burdensome testing schemes (yet to be fully and clearly established as we sit here today) have resulted in additional marketplace confusion and cost. Notwithstanding a dedicated effort the Commission, continues to strain under the requirements imposed upon it. An efficient U.S. marketplace favors clear regulations and test methods and abhors chaos. Unfortunately, two and half years after passage legislation that bars the CPSC from making common sense decisions about protecting the public has had the unintended effect of banning safe products while imposing needless, costly burdens on small businesses. We appreciate that this Committee has elected to respond by drafting legislation that affords the agency the discretion that it requires to implement regulations that provide children protection from actual harm but that accords

² For example see STATEMENT OF COMMISSIONER NANCY NORDON THE PROPOSED AMENDMENT ENTITLED *CONSUMER PRODUCT SAFETY ENHANCEMENT ACT OF 2010* March 18, 2010; STATEMENT ON LEAD REGULATION UNDER THE CPSIA COMMISSIONER ROBERT ADLER January 22, 2010. Both statements make it clear that Congressional action is required to adjust the CPSIA.

responsible businesses the opportunity to distribute safe products without being unreasonably overburdened.

Prospective Requirements. We support clarifications to CPSIA to assure that limits apply only prospectively to products manufactured after the effective date of any regulation implemented. In the absence of a clear and unmistakable congressional intent to apply provisions of the CPSIA retroactively to products previously manufactured and placed in the stream of commerce, there is a strong presumption that “retroactivity is not favored in the law,” and that, as a result, “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”³ Unfortunately, due to imposition of requirements on *any* products in commerce, regardless of when produced or imported, the provisions have been applied in a retroactive fashion that forced the destruction of hundreds of millions of dollars of safe goods, as they were swept off shelves, notwithstanding the Commission’s issuance of repeated stays of enforcement. This approach could also provide badly needed relief for charitable organizations and thrift stores.

We respectfully request that new standards developed under CPSIA apply “*only to product manufactured and introduced into interstate commerce after their effective date*”. In recent testimony before this committee the CPSC Chairman noted that all five Commissioners support changes to ensure prospective application of rules and regulations promulgated under CPSIA. We hope Congress will heed their call.

³ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 237 (1995); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); and *Martin v. Hadix*, 527 U.S. 343 (1999). Compare: *National Resources Defense Council, Inc. v. CPSC.*, 597 F.Supp.2d 370 (S.D.N.Y. 2009), requiring Congressional clarification OF CPSIA to assure prospective application.

Lead Limits. We have always favored risk-based regulation of potential hazard posed by real world exposure to a substance. Congress recognized this approach under CPSIA Section 106 when it adopted as a regulatory requirement *ASTM F-963 Standard Consumer Safety Specification for Toy Safety*, which in turn regulates toxic heavy metals in toys from paints and similar surface coating based upon soluble extractable limits. This approach is currently embodied in the regulatory approaches under the Commissions administered FHSA and by other agencies, such as FDA and EPA. These are based upon risk-based approaches to managing potential hazardous lead exposure in an alternative fashion from CPSIA’s Section 101 banning approach and duly consider reasonably foreseeable handling, use, and routes of exposure from products. With imposition of total content limits on lead in substrate, Congress departed from well-established scientific based models related to actual risk of exposure. Exacerbating this approach, CPSIA language failed to provide the safety valve needed to assure the Commission with reasonable discretion to provide for exceptions to rigid requirements⁴. This resulted in positions that seem removed from common sense, when products which do not result in an appreciable risk of exposure are never-the-less banned. Although the CPSIA purported to allow for exemptions the contraining language used in CPSIA Section 101(b)(1)⁵ created a legal nullity as an exception based upon such requirement became impossible to obtain in practice when reasonably likely exposure with adverse health consequences was not a qualifier for exemption.

⁴ In relation to “safety valves” for example brass tire valves which are intended to be durable and corrosion resistant can’t be used on children’s products, even though there is no risk of hazardous lead exposure to a child.

⁵ The Commission may, by regulation, exclude a specific product or material from the [banned lead levels] 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 – (A) result in the absorption of *any* lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children’s activities, and the aging of the product; nor (B) have any other adverse impact on public health or safety.

Proposed legislation under consideration by this committee is a needed improvement, by providing time prior to further reduction limits and exemptions for certain metal materials certain metals (steel, copper and aluminum alloys) and materials that pose a *de minimis* risk, provided they are not small parts (as defined by widely used criteria under *16 CFR 1501, et seq*). Any product or material that does not result in anticipated adverse health effects based upon a reasonably likely exposure route should be exempt (as applicable under FHSA protocols already administered by the agency). The CPSC can establish a methodology to estimate the amount of lead a child would likely ingest, distinguishing between parts and substances that are reasonably likely to be placed in the mouth and those that cannot. A reasonable expansion in the amount of discretion granted to the Commission to provide exemptions from the lead bans in the CPSIA and allowance of time to *get it right* is justified.

We have long supported the limitations on lead in paint and note that the marketplace has met with great success in being able to achieve conformance to reduced limits to 90 ppm under 16 CFR 1303, et seq.

Phthalates. The Commission should be directed and permitted to exempt from the phthalates limits under Section 108 of the CPSIA products or materials that are not reasonably likely to result in hazardous exposure. The proposed bill includes a much-needed exception for inaccessible component parts that contain phthalates, similar to the inaccessible component parts exemption from the lead limits, and allows the Commission to grant an exclusion when it determines that compliance with the limits is not necessary to protect children's health. We believe they have this authority, but clarification is needed to assure that they exercise it in a manner that reduces unreasonable test burdens on manufacturers. In practice the failure to make such requirements clear has resulted in needless costly phthalate testing of materials and parts to

which there exists no reasonable likelihood of exposure. The ban should be limited to accessible, ingestible parts and CPSC should be provided explicit authority to exempt certain products and materials from burdensome testing when it determines that compliance with the limit is simply not necessary to protect children's health. The definition of toys under the Section should be aligned with Section 106 requirements and scope definitions. Finally after requiring CPSC to expend funds to convene another Chronic Hazards Advisory Panel to assess health risks from exposure to restricted phthalates, the Commission should be required to act upon recommendations in a finite time or the bans should be subject to rescission.

ASTM Standards. Adoption of consensus standards and deferral to existing ASTM product safety standard setting processes can efficiently result in flexible regulatory requirements that can more readily be adjusted based upon hazard data than historically stagnant standalone mandatory federal regulations. These standards are the bulwark of our national and even international safety system, and the Commission plays an important role in providing comments and proposals.⁶ We believe the Commission can better manage staff input to standards organizations to prevent proposals which lack technical merit or otherwise cannot be justified as federal standards from incorporation in ASTM standards. We support greater deferral and adoption of effective ASTM standards for durable infant products in a manner similar to Section 106 of the act⁷. We also support updates to CPSIA Section 104 durable nursery product

⁶ CPSC has worked with stakeholders to develop effective consensus standards completing approximately 10 times as many voluntary standards as mandatory standards.

⁷ An excellent example is their work with industry to revise the ASTM consensus baby walker safety standard to address injuries from stair falls. There has been a decrease in walker injuries of over 84 percent since 1995, likely due in large part to the effectiveness of such standard requirements. The commission projected societal costs decreased by about \$600 million annually from this one action. Similarly, there was an 89 percent reduction in crib-related deaths from an estimated 200 in 1973 and an 82 percent reduction in poisoning deaths of children younger than 5 from drugs and household chemicals from 216 in 1972. Recent collaborative efforts have also resulted in further enhanced crib safety regulations.

standards to provide relief for licensed daycare centers that meet appropriate rules related to inspection and operation of their facilities. In general we support the existing definitions that limit the definition of consumer products under the CPSA, so as not to require the Commission to expend scarce resources regulating products subject to the jurisdiction of other agencies such as the FDA and NHTSA.

Reduce burdensome testing requirements. In our experience manufacturer and importers take their obligation obligation to meet applicable standards seriously. The consequences of failure to do so have greatly increased since passage of the CPSIA. Most U.S. based businesses take extraordinary measures to assure compliance of they face recalls, reputational risk, harm to their brands and relationships with customers and possible penalties for non-compliance. We have often noted that testing plays an important and ongoing role in assuring compliance compliance. However, good manufacturing and procurement practices, adherence to quality assurance procedure in production and vigilance in qualification of material sourcing play an even greater role in assuring the safety and integrity of consumer products. Manufacturers producing products test them in production and then sample production lots continuously prior to shipping them. Major retailers duplicate this process on product orders. Most U.S based manufacturers and brand owners have a vested interest in developing and maintaining reputations as “safety conscious” companies.

We agree with other witnesses that micromanaging the test process by statute is not the best way to achieve the most cost-effective compliance, nor does it allow companies to rely on other compliance strategies to assure compliance. The draft bill offers important modifications to the reduce burdensome CPSIA testing scheme, recognizing that a system of compliance must

be predicated on the specifics of the product category and supply chain. CPSC should determine that accredited third party laboratory testing provides sufficient added safety benefits to justify the cost in lieu of materials that could be subject to certifications of compliance based upon independent testing. Additional criteria related to other test burdens when impracticable based upon laboratory capacity and logistics involving material availability within supply chains should be a consideration in establishing product or material specific test requirements or alternate test regimes. Alternate test rules as contemplated under CPSIA should be permitted as optional for products and must be flexible based upon product categories and should permit representative sample and composite testing when appropriate. Additional efforts should be required to recognize and “safe harbor” best practices already used in the supply chain.

We have filed extensive comments with CPSC in support of permissible reliance on supplier certifications as a mechanism to establish a reasonable basis of compliance with substance content limits for both sub-components and raw materials. Manufacturer certifications are a proven legal method to establish compliance under many laws, including but not limited to use of FDA complaint materials, the toxicological certification under the Labeling of Hazardous Art Materials Act (LHAMA), and continuing guarantees under the Flammable Fabrics Act (FFA) already administered by the agency.

Database Accuracy. Other witnesses may have provided more extensive comments on database issues. However in order to assure the integrity of its Database CPSC should continue to assure that only authorized reports are filed, duplicative reports eliminated and reports unrelated to actual or potential injury are duly eliminated, as required. Congress should assure that the CPSC maintain, and not disclaim, its responsibility to assure that potentially valid claims of

“materially inaccuracy” are investigated and resolved in a reasonable time prior to posting in the database. As was noted at this committee’s recent hearing improvements should be required as to the sufficiency of data (ie. make, model number, mandated tracking identifiers already required by law on children’s products), in order to provide more meaningful data. Finally, CPSC should act to clarify that brand licensors to the extent they are not manufacturers, importers or record or private labelers of products distributed by them are not misclassified as such in the database. .

CPSC Needs To Allocate Resources Based Upon Hazard Data In spite of remarkable progress that dramatically improved the length and quality of children’s lives in the U.S. over the past century, today’s children still face significant, real risks. For example, often-avoidable unintentional injuries take the lives of more than 1 out of every 10,000 children in the U.S. annually. That may not sound like much, but this includes over 150 infants that die before their first birthday in motor vehicle accidents and nearly 50 who drown in bathrooms⁸. This is why we would support dynamic new partnerships between stakeholders and the Commission to promote safety and safe consumer practices. Consumer information and education does not substitute for the essential responsibility of manufacturers to provide safe products, but it can help with a large percentage of accidents due to improper or irresponsible conduct or lack of supervision of minors. The Commission is fully authorized to embark on such programs, but encouragement from Congress should be provided

⁸ Kimberly Thompson, M.S. SCP, Assoc. Professor of Risk Analysis and Decision Science, Children’s Hospital Boston, Harvard Medical School Co-Founder/Director of Research Center on Media and Child Health; Director HSPH Kids Risk Project.

Thank you again for the opportunity to provide these comments. We appreciate the efforts of this committee to improve the CPSIA and expand the discretion afforded the Commission as it seeks to develop practical efficient and effective regulations to enhance children's product safety.